



cyril amarchand mangaldas



CASE IN POINT

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Foreword

It gives me immense pleasure to present to you the Volume IX–Issue I of Case in Point, a quarterly update on the recent legal developments in the field of Dispute Resolution.

In this issue, we have examined the scope of interference in enforcement of foreign awards in India under Section 48 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”), especially in relation to the meaning of fundamental policy of Indian law. The position of the pre-2015 amendment vis-à-vis post 2015 amendment of the Arbitration Act has also been discussed in this issue.

We have examined the recent decision of the Supreme Court in *State of Jharkhand & Ors. vs. M/s HSS Integrated*, wherein the Supreme Court held that categorical findings of fact recorded by an arbitral tribunal cannot be interfered with if they have been arrived at after due appreciation and interpretation of relevant contractual provisions and the material on record.

We also analysed the decision of the Supreme Court in *Rashid Raza vs. Sadaf Akht*, where it was explained that simple allegations of fraud would not render the contract and arbitration agreement void and in the event such allegations of fraud do not have any implication on any matter in the public domain, the dispute could be referred to arbitration.

Further, two recent judgments of the Supreme Court in *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Ltd and Central Organisation for Railway Electrification vs. M/s Eci-Spic-Smo-Mcmlm*, where Section 12(5) of the Arbitration Act has been interpreted with regard to agreements having a sole arbitrator and on the concept of counter-balancing of powers of appointment of arbitrators under Section 11 of the Arbitration Act.

Lastly, the recent judgment in *Hindustan Constriction Limited and Another vs. Union of India*, wherein the Supreme Court struck down Section 87 which was introduced by the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Act**”) as unconstitutional

for being arbitrary, unreasonable and disproportionate. Consequently, Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (which was repealed by the 2019 Act) was revived.

Feedback and suggestions from our readers would be appreciated.

Please feel free to send in your comments to cam.publications@cyrilshroff.com

Regards,
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ENFORCEMENT OF FOREIGN AWARDS IN INDIA - SCOPE OF INTERFERENCE

In India, the enforcement of foreign awards is provided in Part – II of the Arbitration and Conciliation Act, 1996.

Background

The provision relating to enforcement of foreign arbitral awards initially found place in Article V of the New York Convention, 1958 (“NYC”), which provided for Recognition and Enforcement of Foreign Arbitral Awards, to which India became a signatory in 1958 and ratified the same in 1960. Clause 2(b) of the Article provides that a foreign award need not be enforced if the award is contrary to the public policy of the country where enforcement is sought; or if the subject matter of difference is not capable of settlement by arbitration under the law of such country.

According statutory recognition to the convention, the Indian Legislature enacted the Foreign Awards (Recommendation and Enforcement) Act, 1961, which provided conditions of enforcement of foreign awards - one of which was identical to Article V of the NYC - Section 7(1)(b), laying down that a foreign award is not enforceable if the enforcement of that award was “*contrary to the public policy*”. Subsequently, the UNCITRAL came out with the Model Law on International Commercial Arbitration – as a legislative template for countries to base their arbitral regimes on. Consolidating the existing arbitration law, India, in order to align with the Model Law, enacted the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”).

The Arbitration Act is divided into Part I, “*Arbitration*”; Part II, “*Enforcement of Certain Foreign Awards*”; Part III, “*Conciliation*”; and Part IV, “*Supplementary Provisions*”.

The Supreme Court has held that Part I and Part II of the Arbitration Act are mutually exclusive of each other, and that there shall be no overlapping between Part I and Part II¹.

Part II of the Arbitration Act provides for the “*enforcement of certain foreign awards*”. Chapter I of which deals with the enforcement of arbitral awards to which the Convention applies. In terms of Section 47 of the Arbitration Act, the foreign award holder seeking enforcement of the award in India is required to file a petition under Section 47 read with Section 49 of the Arbitration Act in the High Court within whose jurisdiction, the award debtor or its assets are located. It also mandates certain documents to be produced before the Court, while applying for enforcement.

On the other hand, the party resisting enforcement is required to prove that the foreign award should not be accorded recognition on account of the existence of one or more of the conditions under Section 48 – where under the Court *may* refuse enforcement if the grounds under Section 48 have been established.

The Supreme Court in a 2018 judgment eased the requirement in the initial stage of filing – it observed that a party applying for the enforcement of a foreign award need not necessarily produce the documents mentioned in Section 47 “*at the time of the application*”².

Legal position – pre and post the Amendment

For the purpose of this issue, the question of enforcement of a foreign award is being restricted to the aspect of the award being contrary to public policy.

The Supreme Court held that the phrase “*public policy*” as it appears in Section 7(i)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, had been used in a “*narrower sense*” - therefore, in order to attract the bar of public policy, the enforcement of a foreign award “*must invoke something more than the violation than the law of India*”. Enforcement thus could only be refused if the award was found to be contrary to (i) fundamental policy

¹ Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc, (2012) 9 SCC 522

² PEC Limited v. Austbulk Shipping SDN BHD (Civil Appeal No. 4834 of 2007) decided on 14 November 2018

of Indian law; or (ii) interests of India; or (iii) justice or morality.³ It also held that the Convention did not envisage refusal of recognition and enforcement of a foreign award on the grounds of it being contrary to the law of the country where enforcement was sought. Further interpreting “public policy” under the Foreign Awards (Recognition and Enforcement) Act, 1961, the Supreme Court held that it must be construed in the sense the doctrine of public policy is applied in the field of private international law.

However, peculiarly, the Supreme Court in 2011, while relying on *ONGC v. SAW Pipes (2003) 5 SCC 705* (“*Saw Pipes*”) (a decision where the award was challenged under Part I - Section 34), interpreted Section 48(2)(b) in the same vein as Section 34 of the Arbitration Act. It did so by holding that a foreign award could be set aside if “it is patently illegal”⁴.

While subsequently overruling *Phulchand*, the Supreme Court explicitly stated that the wide interpretation given in the case of *Saw Pipes* to the expression “public policy of India” was in the context of a domestic award facing challenge under Section 34 and the same was certainly not applicable if the award were a foreign award, challenged under Section 48. It clarified that although the same expression “*public policy of India*” is used in Part I (Section 34) and Part II (Section 48), it has to be applied differently. Its application for the purpose of a foreign award under Section 48, is more limited as opposed to when it is used in the context of a domestic award.⁵ This is due to the fact that a foreign award, *has already been challenged in the seat court*, or become final (when not challenged), in contrast to a domestic award, which is challenged under Section 34.

To this extent, the Supreme Court held that a foreign award comes into India stamped as a decree, while a domestic award becomes a decree only after the challenge under Section 34 has been rejected.

246th Law Commission Report

In August 2014, the 246th report of the Law Commission of India - “*Amendments to the Arbitration and Conciliation Act 1996*” (“**LC Report**”) suggested several significant amendments to the Arbitration Act. The principal object was to make the Arbitration Act more effective and in line with international standards. One of the primary objects of the LC Report was aimed at boosting the confidence of foreign investors by ensuring that arbitration matters are dealt with expeditiously; one of their main concerns being

the inordinate delay in Indian courts and arbitration tribunals in resolving the disputes. In order to minimize judicial interference, the Law Commission recommended that the definition of “*public policy*” must be restricted and be brought in line with what was held by the Supreme Court in *Renusagar*.

However, after the Law Commission's recommendation, the Supreme Court in *ONGC v. Western Geco (2014) 9 SCC 263*, (14 September 2014) (“*Western Geco*”) while examining as to what constitutes Fundamental Policy of Indian Law under Section 34 of the Arbitration Act, held that the phrase - fundamental policy of Indian Law includes (a) judicial approach (b) principles of natural justice and (c) rationality of reasonableness (Wednesbury principles).

Post the decision of *Western Geco*, due to the deleterious effect of the judgment, the Law Commission of India issued a *Supplementary Report to the 246th Report (February 2015)*.

The Law Commission reported that the Supreme Court's ruling in *Western Geco* undermines the recommendations made in the 246th Report and recommended that further clarifications are necessitated in Section 48 to ensure that the ground of “*fundamental policy*” of India law is narrowly construed.

Based on the recommendations, Section 48(2)(b) of the Arbitration Act was amended and the scope of the public policy defence was further narrowed by crystalizing the meaning of “*public policy of India*”. Further, “*interest of India*” as one of the grounds under public policy was removed, the same reasoned as being vague and susceptible to interpretational misuse, more so when it came to a challenge of a foreign award.

The amendment also inserted the provision which stated that it was not possible to review the foreign award on merits while examining whether the foreign award offended the fundamental policy of Indian law. In doing so, it gave statutory recognition to the judgment of the Supreme Court in the case of *Shri Lal Mahal*.

Narrow Scope of Judicial Review

After the amendment, various high courts, taking forward the legislative intent of the Arbitration Act and the amendments made, have limited the interfere in the enforcement of a foreign award. The Delhi High Court defined “*fundamental policy*” to connote the “*basic and*

³ *Renusagar Power Co. Ltd. vs. General Electric Co.*, (1994) Supp (1) SCC 644

⁴ *Phulchand Exports v. OOO Patriot* (2011) 10 SCC 300 (“*Phulchand*”)

⁵ *Shri Lal Mahal Ltd. vs. Progetto Grano SPA*, (2014) 2 SCC 433 (“*Shri Lal Mahal*”)

substratal rational values and principles which form the bedrock of laws in India. It was also held that merely contravening a provision of Indian law was insufficient to invoke the defence of public policy while resisting the enforcement of a foreign award – that would result in the defeat of the principal object of the Convention, the same being “*ensuring enforcement of awards notwithstanding that the award is not in conformity with the national laws*”⁶

Importantly, the Delhi High Court held that regard must be had to the fact that a foreign award may be based on foreign law and such law could be at variance with the corresponding Indian statute. To then interpret “*fundamental policy of Indian law*” as a reference to a provision of an Indian statute, would frustrate the aim of the Convention. The position thus is that in order to successfully resist enforcement of a foreign award on the ground of public policy, the objections must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise.

The Bombay High Court held that where a party had the right of challenging the foreign award under the law under which it was made, and it failed to exercise such right, such party lost its right to raise objections to the enforcement of the foreign award under Section 48.⁷

As to the extent of judicial review in relation to a foreign award, the Supreme Court in ***Shri Lal Mahal*** held that it was impermissible for a court to have a “*second look*” at the foreign award under Section 48 and that the scope of enquiry does not permit a “*review of the foreign award on merits*”.

The Supreme Court went on to add that while adjudicating upon the enforceability of a foreign award, the court “*does not exercise appellate jurisdiction over the foreign award*” nor does the court enquire as to whether, while rendering a foreign award “*some error has been committed*”.

A Division Bench of the Bombay High Court held that the legislative intent, as can be gathered from the limited grounds under Section 48, seems to be the honoring of private agreements and international adjudication through arbitration. Since the aim is to keep judicial interference to a minimum, the party seeking to avoid enforcement of a foreign award must mandatorily furnish proof of the grounds pleaded.⁸

Also, the Delhi High Court has interpreted the word “*may*” in Section 48(2)(b) as reflecting the legislative intent of ensuring that the judicial power to refuse enforcement is discretionary.⁹

A few other judgments where the enforcement of foreign award has been allowed:

· *Xstrata Coal Marketing AG v. Dalmia Bharat Cement Limited*, EX.P. 334/2014, delivered on 7 November 2016, Delhi High Court.

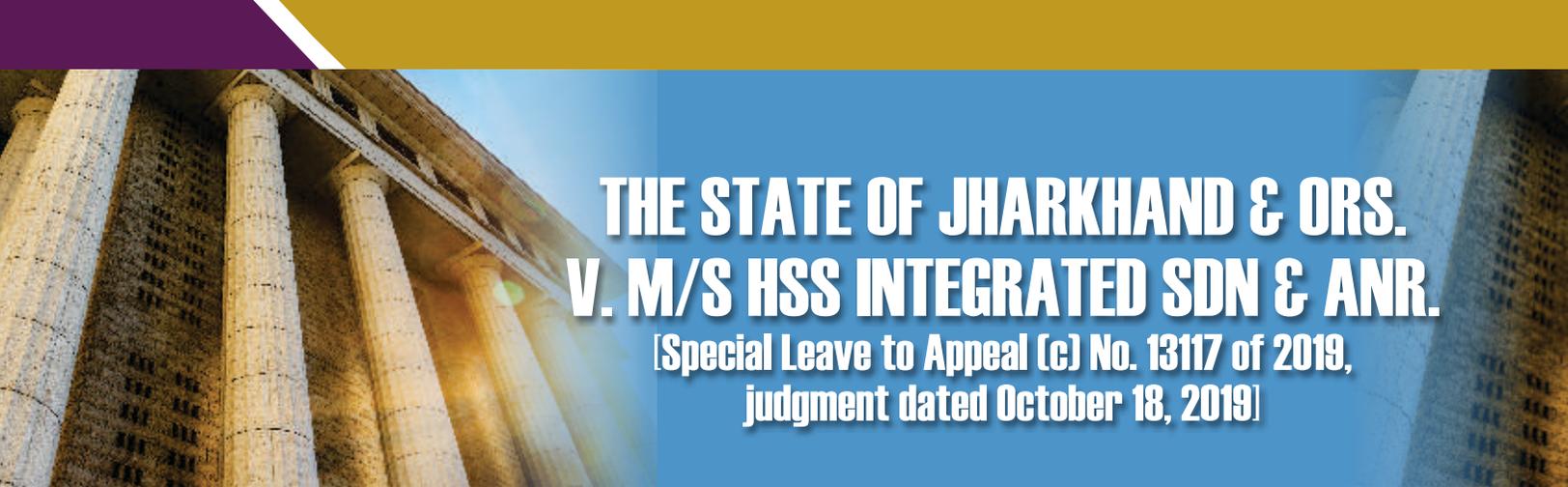
- *OHT Hawk v. Jagson International Ltd*, O.M.P.(EFA)(COMM.) 5/2016, delivered on 4 July 2018, Delhi High Court.
- *Swiss Singapore Overseas Enterprises v. SARA International*, O.M.P.(EFA)(COMM.) 2/2017, delivered on 7 March 2018, Delhi High Court.
- *Daiichi Sankyo v. Malvinder Mohan Singh & Others*, O.M.P. (EFA)(COMM.) 6/2016, delivered on 31 January 2018, Delhi High Court
- *Keytrade AG v. Nagarjuna Fertilizers and Chemicals Limited*, Ex EP No. 3 of 2017, delivered on 27 November 2018, High Court Of Judicature At Hyderabad For The State Of Telangana And The State Of Andhra Pradesh

⁶ Cruz City 1 Mauritius Holdings vs. Unitech Limited, 2017 SCC Online Del 7810

⁷ POL India v. Aurelia (2015) 7 Bom Cr. 757

⁸ Integrated Sales Service Ltd v. Arun Dev (2017) 1 Mah LJ 681

⁹ NNR Global vs Aargus; OMP 61 of 2012: Delhi High Court



THE STATE OF JHARKHAND & ORS. V. M/S HSS INTEGRATED SDN & ANR.

[Special Leave to Appeal (c) No. 13117 of 2019,
judgment dated October 18, 2019]

In *The State of Jharkhand & Ors. v. M/s HSS Integrated SDN & Anr.*, the Supreme Court held that categorical findings of fact recorded by an arbitral tribunal cannot be interfered with if they have been arrived at after due appreciation and interpretation of relevant contractual provisions and the material on record.

For background, an appeal was filed by the State of Jharkhand challenging the High Court's order dismissing their appeal under Section 37 of the Arbitration Act and confirming the award rendered by the arbitral tribunal and also the judgment of the first appellate court. The Petitioner State and the Respondent had entered into a consultancy agreement for construction of a carriageway wherein certain disputes arose between the parties resulting in termination of the contract by the Petitioner, consequent to which, the Respondents (original claimants) invoked arbitration alleging wrongful and illegal termination. The arbitral tribunal rendered specific findings recording that the termination was illegal and not as per the procedure required under the contract. The award allowed part of the claims of the Respondent, while disallowing the counter claims of the Petitioner in entirety.

The broad case of the Petitioner before the Supreme Court was that the High Court materially erred in not appreciating that the award was passed contrary to the materials on record. The Respondents opposed the said argument on ground that once findings of the arbitral tribunal are recorded upon appreciation of evidence and the materials on record, they were rightly not interfered with by the High Court under Sections 34 and 37 of the Arbitration Act.

The Supreme Court while reiterating the law on the narrow scope of interference with arbitral awards relied on its earlier decisions in *National Highway Authority of India vs Progressive-MVR (JV)*, (2018) 14 SCC 688; *Maharashtra State Electricity Distribution Company Limited vs Datar Switchgear Limited & Others* (2018) 3 SCC 133; and *Associate Builders vs Delhi Development Authority*, (2015) 3 SCC 49, to hold that once the arbitrator

has taken a plausible view, or a particular view (in cases where two views are possible), then such decision of the arbitrator, as long as it is reasonable, should not be interfered with in proceedings under Section 34 of the Arbitration Act. The Supreme Court reiterated that the arbitral tribunal is the master of evidence and the findings of fact arrived at on the basis of evidence on record cannot be scrutinised as if the court were sitting in appeal.

The Supreme Court held that not only did the arbitral tribunal give cogent reasons while allowing part of the claims, it even disallowed some of the claims, which gives rise to a strong indication of proper application of mind. Pertinently, the Supreme Court while declining to interfere with the findings of the arbitral tribunal noted that interference is particularly not warranted when the Petitioner has failed in the proceedings under Sections 34 and 37 of the Arbitration Act.



M/S CANARA NIDHI LIMITED V. M. SHASHIKALA AND ORS.

[Civil Appeal No. 7544-7545 of 2019, judgment dated
September 23rd, 2019, AIR 2019 SC 4544]

In *M/s Canara Nidhi Limited v. M. Shashikala and Others*, the Supreme Court considered the issue of whether parties seeking to set aside an arbitral award can adduce evidence to prove the grounds specified in Section 34 (2) of the Arbitration Act (which deals with grounds such as party incapacity, award not valid under law under which it was made, lack of notice, dispute beyond scope etc.).

This was an appeal against a judgment of the Karnataka High Court where the High Court had set aside the District Judge's order directing him to recast the issues and allow affidavits of witnesses and cross examination in a case where an arbitral award was challenged, for enabling the Respondents to prove the existence of the grounds under Section 34 (2) of the Arbitration Act.

Before the Supreme Court, the Appellants took a plea that that the validity of the award is to be decided on the basis of materials produced before the arbitrator and there is no scope for adducing fresh evidence before the court in proceedings under Section 34, unless exceptional grounds are made out. Contra, the Respondents' case was to introduce additional evidence in order to prove the specific grounds under Section 34 of the Arbitration Act. As per the Respondent, in view of Rule 4(b) of the Karnataka High Court Arbitration Rules, 2001, all the proceedings of the Code of Civil Procedure, 1908 applied to proceedings under Sections 14 or 34 of the Arbitration Act and therefore, the same were applicable.

The Supreme Court while rejecting the Respondent's contentions held that the Karnataka High Court Arbitration Rules, 2001 were merely procedural. The Apex Court relied on *Fiza Developers and Inter-Trade Private Limited vs AMCI (India) Private Limited and Anr., (2009) 17 SCC 796*, wherein it was made clear that there was no automatic import of all the provisions of the Code of Civil Procedure, 1908 into Section 34 proceedings, as doing so would defeat the purpose and object of the Arbitration Act.

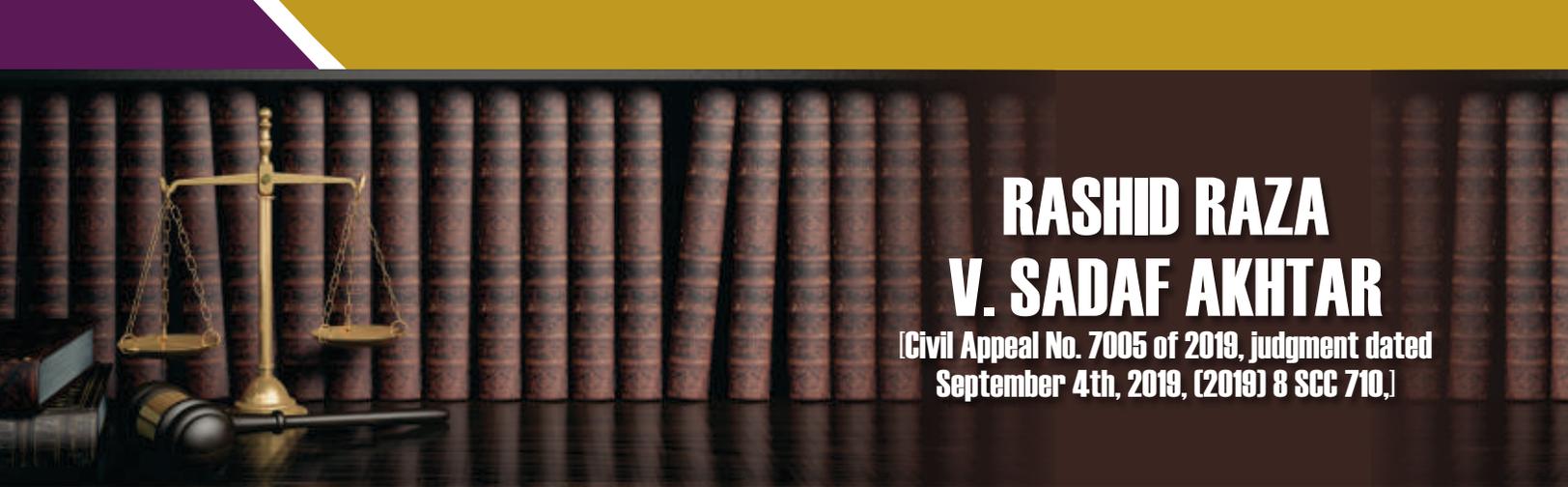
Although in *Fiza Developers*, it was further held that applications under Section 34 are summary proceedings with a provision for an opportunity to be afforded to the applicants to file witnesses' affidavits to prove the grounds under Section 34(2), the same was considered by the

Justice B.N. Srikrishna Committee which while taking cognizance of the inconsistencies in the decisions in relation to the opportunity to furnish proof in proceedings under Section 34 recommended amending Section 34(2) and substituting the phrase “*furnishes proof that*” with “*establishes on the basis of the Arbitral Tribunal's record that*”.

Following the recommendation and the subsequent amendment, the Supreme Court in *Emkay Global Financial Services Limited v. Girdhar Sondhi, 2018 SCC OnLine SC 1019* held that if issues were to be framed and oral evidence be taken in a summary proceeding under Section 34 of the Arbitration Act, the object of speedy resolution of arbitral disputes would be defeated. It was further held that the decision in *Fiza Developers* although a step in the right direction, must be read in light of the amendment made in Sections 34(5) and (6).

The Supreme Court reiterated the legal position clarified in *Emkay Global* and held that ordinarily an application for setting aside an award will not require anything beyond the record before the arbitrator, and only when absolutely necessary, will filing of affidavits be allowed. Cross examination of persons swearing in to the affidavits will be allowed only in exceptional cases.

Applying these principles in the facts of the *Canara Nidhi Limited* case, the Supreme Court held that the affidavit filed by the Respondents contained no specific averments as to the necessity and relevance of the additional evidence sought to be adduced, nor the nature of the evidence sought to be adduced. Therefore, upholding the order of the District Judge, the Supreme Court held that no exceptional case was made out to permit the Respondents to adduce evidence in the Section 34 proceedings and that the award and the evidence adduced in the arbitration proceedings, where the parties had sufficient opportunity to adduce oral and documentary evidence, were enough to consider whether the grounds urged in the Section 34 application were made out to set aside the award. Note that the 2019 Amendments to the Arbitration Act also introduce the language “*establishes on the basis of the record of the arbitral tribunal that*” in place of “*furnishes proof that*” in Section 34(2).



RASHID RAZA V. SADAF AKHTAR

[Civil Appeal No. 7005 of 2019, judgment dated
September 4th, 2019, (2019) 8 SCC 710.]

In *Rashid Raza v. Sadaf Akhtar*, the Supreme Court while relying on the tests laid down in *A. Ayyasamy vs. A. Paramasivam & Ors.*, (2016) 10 SCC 386 held that simple allegations of fraud would not render the contract and arbitration agreement void and in the event such allegations of fraud do not have any implication on any matter in the public domain, the dispute therein could be referred to arbitration. Consequently, the petition under Section 11 of the Arbitration Act would be maintainable.

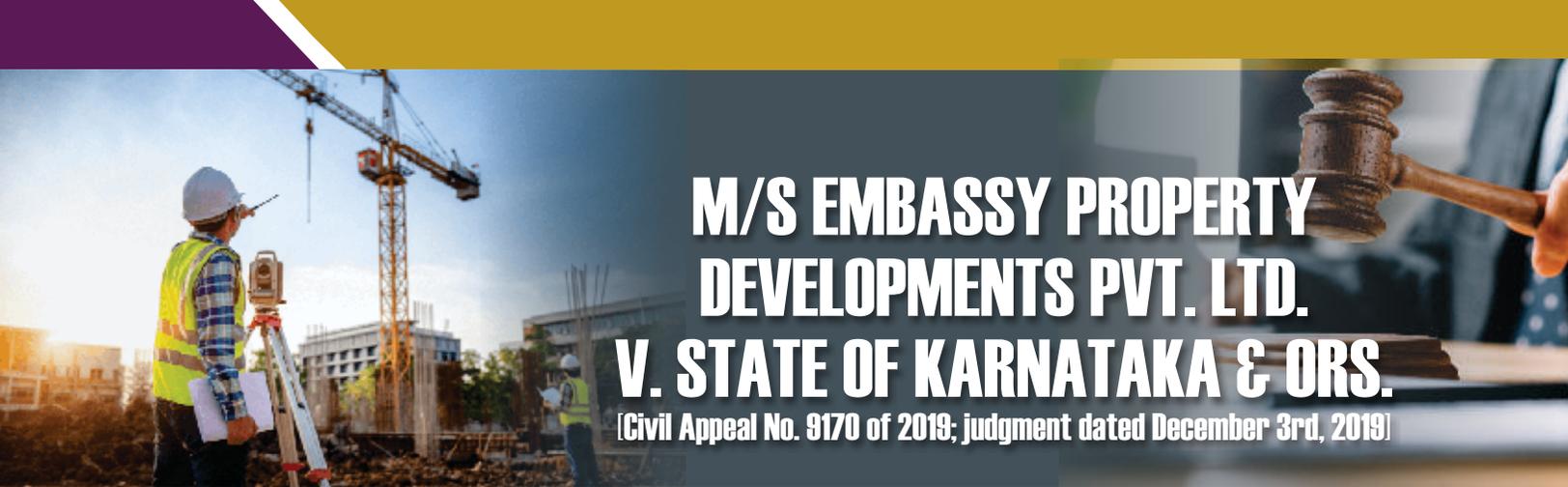
For background, this case arose out of a partnership dispute resulting in the passing of the order by the High Court in a petition under Section 11 of the Arbitration Act seeking appointment of an arbitrator. The High Court followed the Supreme Court's decision in *Ayyasamy* (paragraph 26) and disposed of the Section 11 petition, holding that considering the serious allegations of fraud, which were complicated in nature, the dispute was not fit to be referred to arbitration as it may require voluminous evidence to be adduced by both parties to come to a finding which could only be undertaken by a civil court of competent jurisdiction.

The Supreme Court while reiterating the law laid down in *Ayyasamy* held that mere allegations of simple fraud were not a sufficient ground to nullify the arbitration agreement between the parties. It is only where the court observes the existence of serious allegations of fraud should a court side-track the agreement by dismissing the application and proceed with the suit on merits.

In *Ayyasamy* it was held that only in instances of serious allegations of forgery/fabrication of documents in support of the allegations of fraud, or where the entire contract and agreement was rendered void on account of allegations of fraud against the arbitration clause itself, should the adjudication of the dispute be done by the court. It also held that in order for a party to avoid an arbitration agreement on the basis of an allegation of fraud, the application under Section 8 could only be rejected if upon a strict inquiry into the allegations of fraud by the court, the court was satisfied that the subject matter would be dealt more suitably by a

court rather than an arbitrator. Therefore, the tests thus laid down in *Ayyasamy* to ascertain the arbitrability of the dispute were: whether the plea of fraud permeated the entire contract and arbitration agreement, rendering it void; and whether the allegations of fraud merely touched upon the internal affairs of the parties or had an implication on a matter in the public domain.

Applying these tests to *Rashid Raza*, the Supreme Court held that the allegations of fraud were simple and did not vitiate the partnership deed or the arbitration agreement; and that the allegations made pertaining to the siphoning off of partnership funds did not relate to a matter in the public domain. Accordingly, the Supreme Court held that the disputes raised were arbitrable and that the petition seeking appointment of arbitrator under Section 11 was maintainable.



M/S EMBASSY PROPERTY DEVELOPMENTS PVT. LTD. V. STATE OF KARNATAKA & ORS.

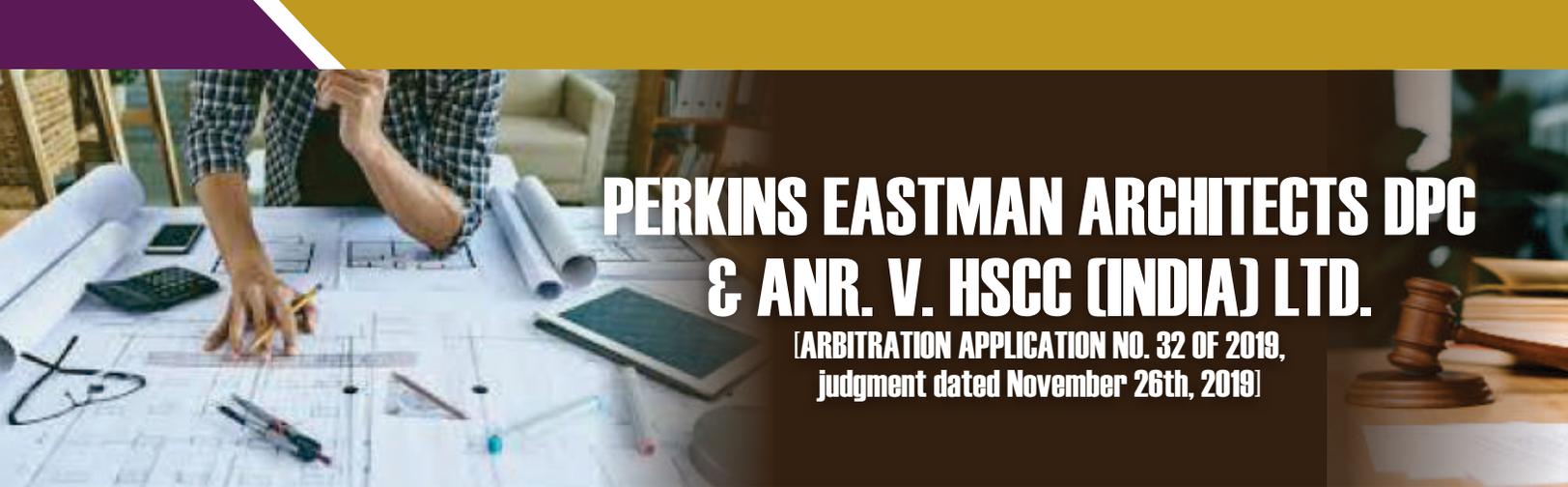
[Civil Appeal No. 9170 of 2019; judgment dated December 3rd, 2019]

In *M/s Embassy Property Developments Pvt. Ltd. vs. State of Karnataka & Others*, the two issues before the Supreme Court were . (i) whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the National Company Law Tribunal (NCLT) in a proceeding under the Insolvency and Bankruptcy Code, 2016, ignoring the availability of a statutory remedy of appeal to the National Company Law Appellate Tribunal (NCLAT) and if so, under what circumstances; and (ii) whether questions of fraud can be inquired into by the NCLT/NCLAT in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016.

In dealing with the first issue, the Supreme Court while reiterating its earlier decisions observed that the Insolvency and Bankruptcy Code, 2016 is a complete code in itself and covers the entire gamut of law relating to the insolvency resolution of corporate persons and that the NCLT is the relevant adjudicating authority to deal with all applications or proceedings arising out of or in relation to insolvency resolution. The Court however, distinguished the scope of this jurisdiction of the NCLT with that of the High Courts as expressed in the Constitution under Article 226. The Court observed that by the use of the expression '*any person*' in Article 226, the High Court ropes in even private individuals within its jurisdiction and the remedies available under Article 226 are public law remedies, which stand in contrast to the remedies available in private law. The Court observed that since the subject matter of the suit was a Government land, and since the relationship between the Corporate Debtor and the Government was statutorily governed under the Mines & Minerals (Development and Regulation) Act, 1957 (whose statement of objects and reasons clarified that the statute was enacted in the public interest), the decision of the Government to refuse the extension of lease period was in the public law domain and hence, the correctness of the decision can only be called in by a superior court vested with the power of judicial review over the administrative action. The Court noted that the NCLT being a creation of a special statute to discharge special functions, cannot be elevated to the status of a

superior Court. The Court further observed that the NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. The Court concluded on the first issue that the NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease, and since the NCLT chose to exercise a jurisdiction not vested in it in law, the Karnataka High Court was justified in entertaining the writ petition against such order, on the basis that NCLT was *coram non iudice*.

On the second issue, the Court observed that even fraudulent tradings carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under Section 66 of the IBC. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors, and that in view of the above, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. The Court answering the second question in the affirmative, concluded that that the NCLT has jurisdiction to enquire into allegations of fraud and as a corollary, the NCLAT will also have such jurisdiction.



PERKINS EASTMAN ARCHITECTS DPC & ANR. V. HSCC (INDIA) LTD.

[ARBITRATION APPLICATION NO. 32 OF 2019,
judgment dated November 26th, 2019]

The Supreme Court in *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Ltd.* held that a person who has an interest in the outcome or decision of the dispute, cannot have the power to appoint a sole arbitrator. This is so since independence and impartiality are the hallmarks of an arbitrator and the law cannot permit the appointment of a person as an arbitrator who himself is a party to the arbitration or is employed by a person, who is a party.

In the case at hand, the respondent invited bids for appointment of Design Consultants for planning and designing of various structures/ buildings for All India Institute of Medical Sciences at Gunther, Andhra Pradesh. The consortium of applicants submitted their proposals and entered into a contract with the respondent. The said contract consisted of an arbitration clause which provided for adjudication of all disputes through arbitration by a sole arbitrator appointed by the CMD of HSCC. The clause further provided that no person other than a person appointed by the CMD, HSCC shall act as an arbitrator. Subsequently, disputes arose and the appellants challenged the appointment of the arbitrator (by the respondent) in this appeal.

The Court first observed that since the lead member of the Consortium Agreement (the 1st Applicant) was having its registered office in New York, the requirements of Section 2(1)(f) were satisfied and the arbitration in the present case would therefore be an “International Commercial Arbitration”. The Supreme Court then relied on and reiterated the ratio in *TRF Limited vs Energo Engineering Projects Limited*; (2017) 8 SCC 377, wherein it was observed that by virtue of Section 12(5) of the Arbitration Act, if any person falls under any of the categories specified in the seventh schedule, that person shall be ineligible to be appointed as an arbitrator. It was also held that the seventh schedule makes it clear that the managing director of a corporation became ineligible to be appointed as an arbitrator. The Court further held that the said ineligibility of the managing director will extend to the nominee appointed by him. In coming to this conclusion, the Court relied on *Pratapchand Nopaji vs Kotrike*

Venkata Setty & Sons [(1975) 2 SCC 208], wherein the principle embodied in the maxim '*qui facit per alium facit per se*' was applied.

In this case, the Court also dealt with the issue as to whether an application under Section 11 of the Arbitration Act was maintainable where an arbitrator had already been appointed. In this regard, the Court held that if the appointment of the arbitrator is *ex facie* invalid, the aggrieved party would have the remedy of filing a petition under Section 11 for appointment of an arbitrator.

The Court annulled the effect of the appointment letter issued by the respondent in this case and the appointment of the arbitrator. In furtherance of Section 11(6), an arbitrator was freshly appointed by the Supreme Court as the sole arbitrator.



CENTRAL ORGANISATION FOR RAILWAY ELECTRIFICATION V. M/S ECI-SPIC-SMO-MCML (JV)

[CIVIL APPEAL NUMBERS 9486-9487 OF 2019;
judgment dated November 28th, 2019]

In this case, the Supreme Court set aside an order holding that the High Court was not justified in appointing an independent sole arbitrator, in view of the clauses of the General Conditions of Contract (“GCC”) which provided for the constitution of an arbitral tribunal consisting of three arbitrators.

The appellants had entered into a work contract with the respondents. The contract consisted of an arbitration clause which was subsequently modified post the 2015 amendment to the Arbitration Act. The clause waived the applicability of Section 12(5) of the Arbitration Act and provided for the appointment of a panel of three arbitrators (consisting of railway officers) for claims exceeding INR 1 crore in value. Further, the clause also provided that the said arbitrators shall be appointed by the General Manager of the Railways.

On disputes arising between the parties for a claim amount of INR 73.35 crores, the respondent sent a letter requesting the appellant to appoint an arbitral tribunal to resolve and settle the disputes between the parties. The appellant accordingly sent a list of four names from which the respondent was asked to select two names to form the arbitral tribunal. Subsequently, the appellant sent another letter consisting of four different names of retired railway officers from which the respondent was required to select two names and communicate the same to the appellant within 30 days as per the GCC. The respondent however did not reply to these letters and instead filed a petition before the High Court of Allahabad under Section 11(6) of the Arbitration Act seeking appointment of a sole arbitrator. The respondent alleged that the GCC did not make any provision for appointment of a neutral arbitrator and therefore the Respondent was constrained to file a petition under Section 11(6) of the Arbitration Act. The High Court held in favour of the respondent and stating that the power of a court to appoint an arbitrator is unfettered and operates independently of the contract between the parties.

The Supreme Court however held that the High Court was not justified in appointing a sole arbitrator in derogation of the provisions of the GCC. The court observed that the appointment of the arbitral tribunal by the appellant is “counter-balanced” by the respondent's power to select any two arbitrators out of the list of four names provided by the appellant. While making the above observation, the Supreme Court distinguished its decision in *TRF Limited vs Energo Engineering Projects Limited* [(2017) 8 SCC 377] and held that it is not applicable to the facts of the case. In *TRF*, the Supreme Court had held that if a person had become ineligible to be appointed as an arbitrator by operation of law, then any nominee appointed by such an ineligible person, shall also be ineligible.

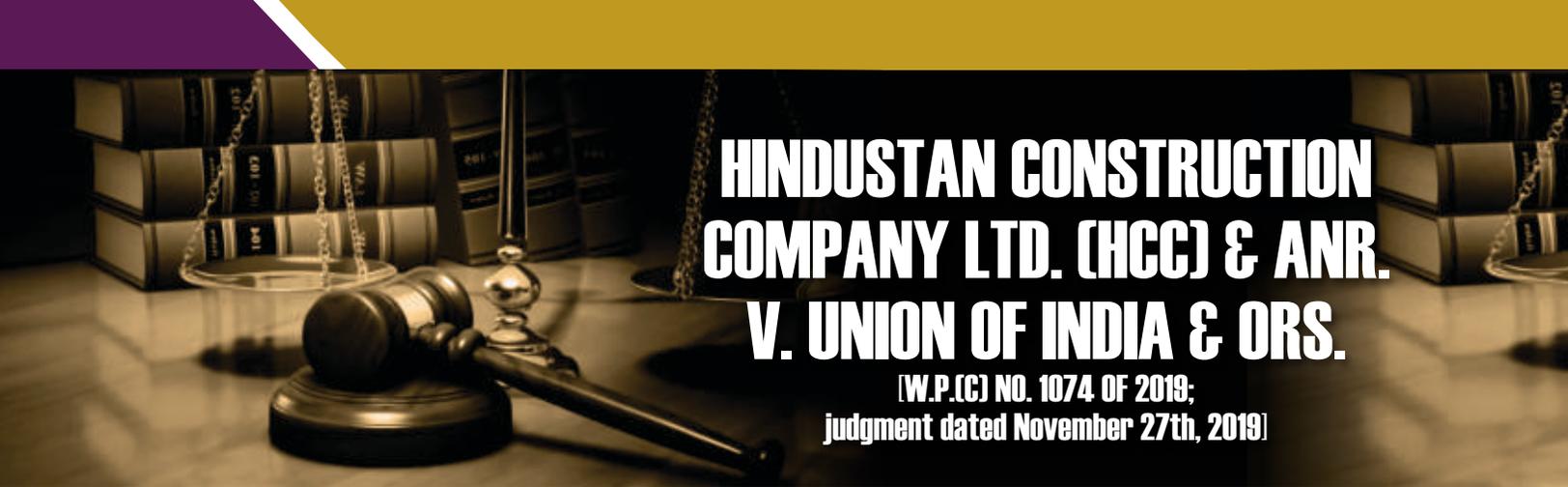
However, the Supreme Court held that the question of ineligibility does not arise where both parties nominate their respective arbitrators. As regards, the contention that the recent judgment *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Ltd.* further makes the arbitration clause bad in law, the Supreme Court held that though *Perkins* dealt with a different situation, it also acknowledged the situation that where both parties have the advantage of nominating an arbitrator of their choice, the advantage of one party in appointing an arbitrator would get counter-balanced by equal power with the other party. In this background, the Supreme Court held that since the arbitration clause in the GCC gave power to the contractor to appoint two of the three arbitrations from the panel of arbitrations, it counter-balances the right of the general manager of the respondent to appoint the third arbitrator.

The Supreme Court in this case primarily relied upon its decisions in *Voestalpine Schienen GmbH vs Delhi Metro Rail Corporation Limited* [(2017) 4 SCC 665] and *Punj Lloyd vs Petronet MHB Ltd.* [(2006) 2 SCC 638]. The Court in *Voestalpine* observed that bias cannot be attributable to the panel of arbitrators merely because they are Government employees or Ex-Government employees

and that this reason in itself, is not sufficient to make such persons ineligible to act as arbitrators. Further, the Supreme Court applying the ratio in *Punj* dismissed the contentions of the respondents that since the arbitral tribunal was not constituted by the appellant before the filing of an application under Section 11 of the Arbitration Act by the respondents, therefore, the appellant had automatically waived their right to constitute such a tribunal at a later stage.

The Supreme Court in *Punj* observed that the right of the party to appoint a tribunal does not get forfeited merely because the 30 day time limit has expired. The right gets extinguished only when the other party has filed a Section 11 application before such appointment. In the present case, the appellants sent a list of names of four retired railway officers to the respondents and requested the respondents to choose any two and communicate the selection within a period of thirty days. The respondents failed to reply to the appellant's request and directly requested the High Court to appoint an arbitrator. The failure to reply, as per the Supreme Court, disabled the respondent from justifying that the appointment of the arbitral tribunal had not been made before filing of the application under Section 11 and that the right of the appellant to constitute an arbitral tribunal was extinguished upon filing of the application under Section 11(6).

Therefore, the Supreme Court while setting aside the orders of the Allahabad High Court, directed the appellant to send a fresh panel of four retired officers in terms of the arbitration clause in the GCC within a period of thirty days under intimation to the respondent. It further directed that the respondent shall select two from the four suggested names. Upon receipt of the communication from the respondent, the appellant would constitute the arbitral tribunal in terms of the GCC within thirty days from the date of the receipt of the communication from the respondent.



HINDUSTAN CONSTRUCTION COMPANY LTD. (HCC) & ANR. V. UNION OF INDIA & ORS.

[W.P.(C) NO. 1074 OF 2019;
judgment dated November 27th, 2019]

By this judgment, the Supreme Court settled the law regarding the applicability of the Arbitration and Conciliation (Amendment) Act, 2015 (“**2015 Act**”). In this Writ Petition, the Petitioners had challenged the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “**1996 Act**”), the repeal of Section 26 of the 2015 Act by Section 15 of the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Act**”) and certain provisions of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”).

The Court struck down Section 87 introduced by the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Act**”) as unconstitutional for being arbitrary, unreasonable and disproportionate. Consequently, Section 26 of the 2015 Act (which was repealed by the 2019 Act) was revived.

The Court while adjudicating on the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (“**1996 Act**”) held that the reasoning in *National Aluminium Company Limited vs Pressteel and Fabrications Pvt. Ltd.* [(2004) 1 SCC 540] and *Fiza Developers and Inter-Trade Pvt. Limited vs AMCI India Pvt. Ltd.* [(2009) 17 SCC 796] was *per incuriam*.

In *NALCO* it was held that once an award was challenged under Section 34 of the 1996 Act, it became un-executable and further, the court is left with no discretion to pass any interlocutory orders with respect to the said award except to adjudicate on the correctness of the claim. Similar was the position in *Fiza Developers*, wherein it was held that the mere filing of an application under Section 34 of the 1996 Act, operates as a stay on the enforcement of the award.

The Supreme Court in *HCC* observed that the concept of 'Automatic Stay' of an arbitral award was obliterated by the amended Section 36 as introduced by the 2015 Act (which was based on the recommendations of the 246th Law Commission Report). The Court held that the amended

Section 36 cleared the air that the award shall become unenforceable only when a stay has been granted as result of a separate application filed.

The Court also criticized the Justice Srikrishna Committee Report which had recommended the proposal to introduce Section 87 and also repealing Section 26 of the 2015 Act. The said recommendation of the Srikrishna Committee Report was further criticized as being in the teeth of the Supreme Court's judgment in *BCCI v. Kochi Cricket Pvt. Ltd.* [(2018) 6 SCC 287] (“**BCCI**”). The Supreme Court observed that the controversial provision was brought into the picture through the 2019 Act even after the Supreme Court had specifically opined that the said provision would be contrary to the object of the 2015 Act. The Supreme Court in *BCCI* held that the 2015 Act applied prospectively with respect to arbitral proceedings and court proceedings commencing after 23 October 2015 and with respect to Section 36, the 2015 Act applied retrospectively even to court proceedings that had commenced prior to the 2015 Act.

The Court further observed that the retrospective resurrection of an automatic stay by the 2019 Act, not only turned the clock backwards, but also resulted in payments already made under the amended Section 36 (to award-holders) being reversed. Consequently, the Supreme Court held that the decision in *BCCI* shall continue to apply.



BILLS PASSED



1. The Transgender Persons (Protection of Rights) Bill, 2019

The Transgender Persons (Protection of Rights) Bill, received the President's assent on 5 December 2019, and has been enacted to provide for the protection of rights of transgender persons and their welfare. It defines transgender persons as “*one whose gender does not match the gender assigned at birth*”, and includes trans-men, trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities.

A person certified as a “*transgender*” under the Act shall have the right to determine their self-identified gender.

The Act provides for their protection against discrimination and unfair treatment with regard to (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is.

Further, the Act places upon the Courts, the responsibility to ensure that they are placed in a rehabilitation centre, in the event their family is unable to care for them, and mandates the Government to provide health facilities, including health insurance schemes, HIV surveillance centres, and sex reassignment surgeries. A certification, indicating the gender as “*transgender*” is envisaged to be provided by

the District Magistrate, upon making of an application by the person concerned. It further provides for the obtaining of a revised certificate in case of surgery to change the gender. The Act however does not lay down a provision for appeal or review in case the District Magistrate denies a person's application for a “*Certificate of Identity*”

The Act criminalizes certain acts committed against transgender persons – i) forced or bonded labour; (ii) prevention from use of public places; (iii) removal from household, and villages; (iv) physical, economical, sexual, verbal, or emotional abuse. Penalties range from imprisonment of 6 months to 2 years and a fine. It also provides for the setting up of a NCT (National Council for Transgender persons), to advise the Central Government and to monitor the impact of policies, legislation and projects concerning transgender persons, as well as redress the grievances of transgender persons.

2. The International Financial Services Centres Authority Bill, 2019

The International Financial Services Centres Authority Bill, 2019, having received the President's assent on 19 December, 2019, provides for the establishment of an Authority to develop and regulate the financial services market in the International Financial Services Centres in India. The Act is enacted to be applicable to all International Financial Services Centres, set up under the Special Economic Zones Act, 2005.

It lays down the composition of the authority and the functions to be performed by it,

including – development and regulation of financial products (securities, deposits or contracts of insurance), financial services, and financial institutions previously approved by any appropriate regulator (such as RBI or SEBI), in an IFSC.

The Authority is also required to constitute a Performance Review Committee to review its functioning – whether the Authority has adhered to the provisions of the laws applicable while performing its functions; whether it is promoting transparency. After consultation with the Government, the Authority has to specify the foreign currency in which IFSCs are to conduct transactions of financial services.

3. Taxation Laws (Amendment) Bill, 2019

The Taxation Laws (Amendment) Bill 2019, which received Presidential Assent on 11 December, 2019, aims at bringing more investment in the manufacturing sector by reducing the corporate tax rate to 15% for new manufacturing entities. Currently, domestic companies with annual turnover of up to Rs 400 crore, attract an income tax rate of 25%, whereas for other domestic companies, the tax rate is 30%.

The Act provides domestic companies an option to pay income tax at the rate of 22% and 15% (new manufacturing entities), provided they do not claim certain deductions under the Income Tax Act, 1961. The said reduction can only be claimed if these new entities are set up and registered after 30 September, 2019, and start manufacturing before 1 April, 2023. The Act further clarifies certain businesses that will not be considered as manufacturing businesses. These include businesses engaged in the (i) development of computer software, (ii) printing of books, (iii) production of cinematograph film, (iv) mining, and (v) any other business notified by the Central Government.

4. The Arms (Amendment) Bill, 2019

The Arms (Amendment) Bill, 2019 received the assent by the President of India on 16 December, 2019. The Act seeks to check the acts of terrorism and insurgency and use of illegal firearms.

The Act also seeks to decrease the number of licensed firearms allowed per person from 3 to 1. The Act also seeks to increase the maximum punishment for manufacturing and carrying illegal arms under the Act from a minimum of 7 years to life imprisonment, along with a fine. The Act also bans the manufacture, sale, use, transfer, conversion, testing or proofing of fire arms without license. The Act adds new offences like (i) forcefully taking a firearm from police or armed forces, (ii) using firearms in a celebratory gunfire which endangers human life or personal safety of others etc.

The Act has also defined offences committed by organized crime syndicates and illicit trafficking.

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The views expressed in this newsletter do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas and should you have any queries in relation to any of the issues set out herein or on other areas of law, please feel free to contact us on cam.publications@cyrilshroff.com or write to following coordinates:

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