RRG & ASSOCIATES
LAW OFFICES

RRG & ASSOCIATES (FIRM UPDATE)

In the matter of M/S Aravali Power Co. Pvt Ltd v. Vedprakash and Anr. at the Supreme Court of India, Civil Appeal Nos 1692-1693 Of 2020; RRG & Associates represented the Appellants

These batch of connected appeals had arisen from the judgments of the National Green Tribunal pertaining to the utilization and disposal of fly ash by thermal power plants. In the instant case, the Hon'ble Apex court directed that it would be necessary for the MoEF&CC to revisit whether the parameters which have been prescribed by the notification dated 31 December 2021 (***By the notification, the Union Government has formulated parameters for ash utilization from coal or lignite thermal power plants***) must be modified taking into account the provisions of the Hazardous and Other Wastes attracted to the utilization, transportation and disposal of fly ash. Besides conducting this exercise, the Supreme Court also directed that MoEF&CC shall ensure that the enforcement, monitoring, audit and reporting mechanism which is envisaged in paragraphs E(3) and E(5) of the notification dated 31 December 2021 is duly put into place and enforced scrupulously. Further, the court directed that unless steps have already been taken to enforce the precautionary steps envisaged in the notification, MoEF&CC shall do so within a period of three months from the date of this judgment. In doing so the precautionary principle shall be followed. The MoEF&CC shall also determine upon due analysis whether any further modification of the notification is necessary to comply with the provisions of the Rules

of 2016 and with other cognate legislation, including subordinate legislation bearing on the utilization, transport and disposal of fly ash in an environmentally sustainable manner. The Apex Court set aside the impugned orders of the National Green Tribunal.

In the matter of Mr. Mahender Kumar Khandelwal, Insolvency Professional (Ip) under Section 220 of the Insolvency And Bankruptcy Code, 2016 (Code) read with Regulation 11 of the Insolvency And Bankruptcy Board Of India (Insolvency Professional) Regulations, 2016, before the Insolvency And Bankruptcy Board Of India (Disciplinary Committee), No. Ibbi/Dc/89/2022; RRG And Associates represented the Insolvency Professional and were successful in getting the Show Cause Notice (SCN) No. Ibbi/Ip/Mon /2020/161/404/2303 dated 6th September, 2021, issued to Mr. Mahender Kumar Khandelwal disposed off without any costs

In the instant case, it was alleged in the show cause notice that by seeking ratification of payment of pre-CIRP dues of Rs.109 crores (approx.) during the CIRP, the insolvency professional had contravened the moratorium ordered by Adjudicating Authority and section 14(1)(b), 25(1) and 208(2)(a) of the Insolvency and Bankruptcy Code. The Disciplinary Committee ***("DC")*** noted from the submissions made on behalf of the Insolvency professional that the insolvency resolution professional was faced with a difficult decision whether to make payment of pre-CIRP expenses to ensure continued supply of essential goods or services but risk violating provision of the Code or to tightly adhere to the Code and endanger the prospect of Corporate Debtor **("CD")** as a going concern. The DC noted the submission that the vendors and professionals engaged were specialized and dismissing them to explore other service providers would have resulted in loss that would have been more than the payments made by the IRP. That the supply of essential goods and services were critical and would have affected the going concern nature of CD, therefore, *IRP* could not terminate or interrupt the supply and employment even during the moratorium period. DC also noted from submissions of IRP that without pre-CIRP payment the supply of essential/critical goods and services by specialized vendors/ professional business operation of the CD could not have been managed and continued as a going concern, the DC observed that IRP made a decision that appears to be in the best interest of all the stakeholders and made the pre-CIRP payments to ensure the going concern status of the CD. The ensuing the survival of the CD allows for continued returns for the creditors, employment of the workers and steady revenue for the government as well. Hence, the DC held that in these

circumstances no contravention could be made out against IRP and upheld the exigent pre-CIRP payments made by IRP during the moratorium.

In the matter of Sharad Arora and another V. State of U.P., Criminal Misc. Writ Petition No. - 2672 Of 2022, RRG & Associates were successful in getting the quashing petition dismissed

In the instant case, it was observed by the Hon'ble High Court that merely because on similar facts an application under section 9 of the Act of 1996 was instituted or arbitration for resolution of contractual dispute can be availed of, in terms of the agreement between the parties, it would not mean that criminal action cannot be set in motion even though prima facie ingredients of offence are disclosed in the FIR. The fact that even after filing application under section 9 of the Act of 1996 the dispute has not yet been referred to the arbitrator, or the court approached under section 11 of the Act of 1996, also cannot be a ground to challenge the FIR if it otherwise discloses cognizable offence. Further, the Hon'ble Court observed that whether allegations made in the FIR are correct or not is not required to be examined by this Court, under Article 226 of the Constitution of India, at this stage, since the facts are to be ascertained by the concerned investigating agency at the first instance. The Court also observed that law is otherwise well settled that same set of acts or omissions may constitute offences under different enactments and where there are two distinct offences disclosed, made up of different ingredients, the punishment in both would be permissible even if the offences have some overlapping features. The Hon'ble Court also observed that admittedly, the facts in its entirety are not before the Court and the investigation is yet to conclude. At this stage, it would not be safe for the High Court to adjudicate facts so as to hold that necessary ingredients of offences alleged are not made out against the writ petitioners. The Hon'ble High Court relied upon word of caution sounded by the Supreme Court for exercise of power under Article 226 of the Constitution of India in Monika Kumar (Dr.) vs. State of U.P., (2008) 8 SCC 781 and reiterated in R. Kalyani vs. Janak C. Mehta, (2009) 1 SCC 516 and dismissed the quashing petitions.

In the matter of Gujarat Gas Limited V. Vedanta Limited and ors., before Delhi HighCourt,O.M.P I)(Comm)125/2022; RRG &Associates represented Vedanta Limited

The Hon'ble High Court of Delhi had observed that a party is not entitled to demand "Right of First refusal" after it has made a counter offer to the seller. It was held by the Single Bench of Justice Anup Jairam Bhambhani that seller becomes entitled to sell the subject goods to third parties when the party which had the right to first refusal makes a counter offer to the

other party. It was further observed by the Hon'ble Court that the Court while exercising powers under Section 9 of the Arbitration and Conciliation Act cannot grant the interim relief which is in the nature of specific performance when such claim would be a relief sought before the Arbitral Proceedings.

COMPANY LAW

Circulars and Notifications

A. Certain provisions of Companies Act, 2013 will now apply on Limited Liability Partnerships ("Llps")

Ministry of Corporate Affairs ("MCA") vide its notification dated 11.02.2022 [MCA Notification No. G.S.R. 110 (E)] has notified those certain provisions of Companies Act, 2013 will now be applicable to LLPs with certain modifications. In pursuance to the powers provided under Section 67 of the LLP Act, the below mentioned provisions of the Companies Act, 2013 have been made applicable on LLPs with the suitable modifications:

a) Section 90 (Registration of Beneficial Owners);
b) Section 164 (Disqualification for Appointment of Directors);
c) Section 165 (Number of Directorships) ;
d) Section 167 (Vacation of Office of Director);
e) Section 206(5) (Inspection of Books);
f) Section 207(3) (Conduct of Inspection and Inquiry);
g) Section 252 (Appeal to NCLT);
h) Section 439 (Offences to be non-Cognizable).

B. MCA notified NIDHI Amendment Rules, 2022

MCA vide its notification dated 19.04.2022 [MCA Notification No. G.S.R. 301(E)] has brought into force NIDHI Amendment Rules, 2022 which has made substantial changes to the NIDHI Rules, 2014. In terms of the amended rules, public company, which is desirous to be declared as a NIDHI, must apply in Form NDH-4 within 120 days of its incorporation for its declaration as NIDHI on fulfilling the following two conditions-

a) it must not have less than 200 members and
b) it must have Net Owned Funds of Rs. 20 Lakhs or more.

In addition to the above, the amended rules provide that any company which has failed to comply with the requirements of the aforementioned Rule, or fails to comply with the above condition on or after the commencement of the Amendment Rules, or if the application submitted by the company in Form NDH-4 gets rejected by the Government, then in such case that company shall not raise any deposit

from its members or provide any loans to them. Further, for timely disposal of applications, it has been provided that in case the Central Government fails to provide a decision within 45 days of the receipt of applications filed by the companies in form NDH-4, approval would be deemed as granted. This would be applicable on such companies which shall be incorporated after Nidhi (Amendment) Rules, 2022.

C. MCA notified Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022

The MCA vide its Notification dated 05.05.2022 [MCA Notification No. G.S.R. 251(E)] has amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 by notifying Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022. The amendment has inserted a proviso to Rule 14 (private placement) which deals with not giving an offer or invitation of any securities under Rule 14 to a body corporate that incorporated in, or a national of, a country which shares a land border/boundary with India/ However, the approval can be granted to such body corporate or the national, as the case may be, if it has obtained Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and has attached the same approval with Form PAS-4 and also insertion of check box in form PAS-4 (Private Placement Offer cum Application Letter) with regards to whether applicant is required to obtain Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to subscription of shares or not.

D. MCA notified Limited Liability Partnership (Second Amendment) Rules, 2022

The MCA vide its notification dated 04.03.2022, has amended the Limited Liability Partnership Rules, 2009 via the Limited Liability Partnership (Second Amendment) Rules, 2022. Key amendments to the said Rules include a) Increase in allotment of number of DPINs to 5 in the FiLLiP form, b) Allotment of PAN & TAN in addition to the Certificate of Incorporation, c) Introduction of web-based procedure in line with SPICE+, for LLP incorporation d) In Form 8, Inclusion of disclosures w.r.t. Contingent Liability e) Shifting of all e-forms into web-based form f) Inclusion of provision w.r.t. signing of statements of accounts and solvency and Annual Return of LLPs under insolvency.

E. MCA notified Companies (Management and Administration) Rules, 2014

The MCA vide its notification dated 06.04.2022 [MCA Notification No. G.S.R. 279 (E)] has amended the Companies (Management and Administration) Rules, 2014. The Rule 14 has been amended under the said rules for insertion after sub-rule (2) as under-: The following particulars of the register or index or return in respect of the members of a company shall not be made available for an inspection under sub-section (2) or for taking extracts or copies under sub-section (3) of Section 94: -

i. address or registered address (in case of a body corporate);
ii. e-mail ID;
iii. Unique Identification Number;
iv. PAN Number

F. De Minimis Exemption under the Competition Act,2002 extended for another 5 years

The MCA had exempted vide a Gazette Notification dated 27.03.2017 those combinations where the value of the assets being acquired, taken control off or merged did not exceed INR 350 Crores in assets in India or INR 1000 Crores in turnover in India ("De Minimis Exemption) from the requirement of notifying to the Competition Commission of India ("CCI"). This De- Minimis Exemption was earlier notified for a period of 5 years from the date of the said Notification. Now, the MCA vide its Notification dated 16.03.2022 has extended the De-Minimis Exemption for another 5 years, i.e., till 28.03.2027.

SECURITIES LAW UPDATES

A. Amendment to the SEBI (Credit Rating Agencies) Regulations, 1999

As per the provisions of the SEBI (CREDIT RATING AGENCIES) REGULATIONS, 1999, (Notification No. SEBI/LAD-NRO/GN/2022/69 dated 24.01.2022) a credit rating agency does not have the power to carry out any activity other than rating of those securities listed or proposed to be listed on the stock exchanges or financial instrument as goverened by the financial sector regulator or authorized by SEBI. After the Amnedment in the ICDR Regulations, now the credit rating agencies are authorised to act as monitoring agents for an initial public offering of securities. So, now an exception has been carved out by SEBI to the aforementioned condition of SEBI CRA Regulations, whereby a credit rating agency is now authorized to carry out any activity which may be permitted by SEBI along with rating of securities or financial instruments.

B. Amendment to the Sebi Listing Regulations

SEBI vide its notification dated 24.01.2022 amended the SEBI Listing Regulations and has introduced provisions relating to the appointment or re-appointment of persons who fail to get elected as directors, including whole time directors, managing directors or managers at the general meeting of a listed entity.

Some of the key takeaways on amendments are –

a) A lsited entity has to take shareholder's approval for appointment of a manager at the next GM or within 3 months from the date of their appointment, whichever is earlier. This requirement was earlier applicable only for appointment of a person on the Board of Directors.
b) The monitoring agency report is to be placed by the listing entity before the audit committee, quarterly instead of annually
c) Only if securities are held in dematerialized form with the depository, the requests for effecting transfer of securities will be processed.
d) The listed entity will ensure that transimission requests are processed for securities within 7 days after receipt of the specified documents.

C. Amendment to the SEBI (Depositories and Participants) Regulations, 2018

SEBI has vide its notification dated 23.02.2022 amended the SEBI (Depositories and Participants) Regulations, 2018 with a clarification that for a stock broker to act as a participant with SEBI's Certificate shall have a net worth of Rs. 3 Crores from the date of the said notification which shall be increased to 5 crores within 2 years from the date of this notification. Further in terms of the said notification, a self-clearing member who fulfils the net worth requirement can also register as depository participant as provided under the SEBI (Stock Brokers) Regulations, 1992.

D. Separation of role of Managing Director and Chairperson or CEO made non mandatory/optional

SEBI has vide its notification dated 22.03.2022 amended the SEBI Listing Regulations, making the requirement to separate the role of chairperson and Managing Director or CEO of a Company, non-mandatory. In terms of the same, the mandatory requirement for top 500 listed entities to ensure that a Chairperson or Board of Directors is a non-executive director and not related to the Managing Director or the CEO w.e.f. 01.04.2022 has been made discretionary.

LATEST JUDGMENTS

A. In the matter of UHL Power Company Ltd. v. State of Himachal Pradesh, 2022 SCC OnLine SC 19

In the instant case the Apex court has ruled that post award interest can be awarded by the Arbitral tribunal on the interest awarded in arbitral award under the Arbitration and Conciliation Act, 1996.

Facts of the Case- The sole arbitrator on 05.06.2005 had awarded a sum of INR 26,08,89,107 in favour of the appellant, UHL Power Company Limited (**UHL**), towards varied expenses claimed in addition to the pre-claim interest capitalized annually, on the expenses that were incurred. Not only this, compound interest was awarded in favour of the Appellant at a rate of 9% per annum till the date the claim was realized. Further, the arbitrator stated that in the event the awarded amount was not realized within a period of six months from the date of passing such award, future interest was awarded at the rate of 18% per year payable on the principal claim amount along with interest.

Against the said award, the State of Himachal Pradesh, the respondent, filed a petition under Section 34 of the Arbitration Act, wherein the Ld. Single Judge disallowed the entire claim of the Appellant. The said judgment passed by the Ld. Single Judge was challenged by UHL, and then an appeal before the Hon'ble Himachal Pradesh High Court was filed under Section 37 of the Arbitration and Conciliation Act, 1996. The Hon'ble High Court observed that where the contract lacks any provision for interest upon interest, then the arbitral tribunal is devoid of the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period. Against the said order an appeal was filed before the Supreme Court.

Issue: Whether post-award interest can be granted by an arbitrator on the amount of interest awarded?

Decision of the Apex court: The appellant, UHL, had referred to the ruling passed by the hon'ble Apex court in Hyder *Consulting (UK) Ltd. v. Governor, State of Orissa* (2015) 2 SCC 189, which overruled the judgement given in *State of Haryana v. S.L. Arora and Co*. (2010) 3 SCC 690. The popular opinion in Hyder Consulting was that an arbitrator can grant post-award interest on the interest amount awarded. The Apex Court held that the decision in S.L. Arora was incorrect and the court faltered in concluding that a sum directed to be paid by an arbitral tribunal

and the reference to the award on the substantive claim does not refer to pendente lite interest awarded on the "sum directed to be paid upon award," and that if the contract is devoid of any provision providing for interest upon interest, or compound interest, the arbitral tribunal does not have the power to award interest upon interest, or compound interest.

B. In the matter of *Mutha Construction v. Strategic Brand Solutions (I) Pvt. Ltd.*, SLP (Civil) No. 1105 of 2022 dated 4th February 2022

A matter can be remanded by a court acting under Section 34 of the Arbitration Act to the arbitrator for fresh decision only if both the parties' consent to the same.

Facts of the Case: An arbitration award was challenged by a party under Section 34 of the Arbitration Act before the Hon'ble High Court of Bombay (**High Court**). The Hon'ble High Court, after obtaining the consent of the parties set aside the award and sent back the matter to the Learned sole arbitrator to pass a fresh and reasoned award. Later on, the Petitioner filed an application to seek modification of the order before the Learned Single Judge, as it contended that the consent was not given for the matter being sent to the same arbitrator. However, the application was dismissed by the Hon'ble High Court.

The Petitioner then moved a review petition, but the same got rejected by the Hon'ble High Court after making an observation that the order was passed only after obtaining consent. The said decision was further upheld by the Division Bench of the Hon'ble High Court. After being aggrieved by the said decision, the Applicant preferred a SLP before the Hon'ble Supreme Court.

Issue: Whether the courts can remand matter to arbitrator for fresh decision under section 34 of the Arbitration Act?

Decision: The appellant relied on decisions such *as Kinnari Mullick and Anr. v. Ghanshyam Das Damani*, (2018) 11 SCC 328; *Dyna Technologies Private Limited v. Crompton Greaves Limited*, 2019 SCC OnLine SC 1656; and *IPay Clearing Services Private Limited v. ICICI Bank Limited*, 2022 SCC OnLine SC 4, to contend that in exercise of powers under Section 34 of the Act the appellate court cannot set aside the award on the ground that no reasons have been assigned and the matter cannot be remanded to the same arbitrator to give reasons.

The Apex Court took a note of the fact that the parties had passed a consent order and had agreed to get the award set aside and the case was remitted back for

a reasoned award to the Learned sole arbitrator. As a result, the Hon'ble Supreme Court opined that the appellant's rulings are not Applicable in the present scenario. While dismissing the appeal, the Hon'ble Apex Court concluded that previous rulings of the Apex Court would apply wherein the Supreme Court had held that the appellate court decides the Application that is filed under Section 34 of the Arbitration Act on merits. In the instant case, both the parties had agreed to get the award set aside and the matter was remitted to the Learned sole Arbitrator for a fresh and reasoned award. Therefore, it was held that once a consent order has been passed by the parties, the Petitioner cannot contend that the matter may not be be/ought to be remanded to the same Learned Arbitrator.

It is pertinent to note that in the matter, The Project Director V. M. Hakeem & Anr., the Apex Court observed that judicial powers are limited when it comes to an arbitral award, the 'limited remedy' under Section 34 is coterminus with the 'limited right', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

C. Shareholders' Rights and Corporate Democracy in India was favored by the Bombay High Court

Bombay High Court's division bench in the case of *Invesco Developing Markets Fund v Zee Entertainment Enterprises*, has overruled the judgment passed by the Ld. Single Judge in *Zee Entertainment v Invesco case*, wherein the Ld. Single Judge was of the view that Companies Act 2013 (hereinafter referred to as 'the Act') empowers the civil court to grant injunction on a requisition and that the requisition notice along with the proposed resolutions, cannot be implemented legally.

In terms of Section 100(2) of the Act, Zee in respect of resolutions proposed by Invesco, was required to hold an extraordinary general meeting (**EGM**) to pass a requisition notice. Zee has taken a stand that since the proposed resolution has various legal infirmities, the requisition notice was invalid and would have resulted in violation of various governing statues. The Ld. Single Judge was satisfied with the arguments put forward by Zee and subsequently, granted injunction, thereby restraining Invesco to take any action in furtherance of the requisition notice, including but not limited to the calling of EGM.

Pursuant to the order passed by the Ld. Single Judge, Invesco approached the Division Bench of the Hon'ble Bombay High Court by way of filing an appeal. Hon'ble Bombay High Court while deciding the appeal held that the explanation of 'valid requisition' under section 100(4) of the Act was confined to procedural and numerical compliances. In addition to the same, the Hon'ble Bombay High Court observed that the provisions of the Companies Act 2013 expressly bars a civil court from entertaining any suit or proceeding which falls under the jurisdiction of Hon'ble National Company Law Tribunal or the Hon'ble National Company Law Appellate Tribunal. The bench went ahead to observe that the allegation made by Zee regarding the presence of legal infirmities lacks merit. The captioned judgment passed by the Division Bench of the Hon'ble Bombay High Court has affirmed the jurisdiction of NCLT to decide the questions arising out of the provisions of the Companies Act 2013. Moreover, the order provides further clarification of section 100(4) of the Act and in order to emphasize on qualitative interpretation of law, the judgement ensures less intervention of judicial authorities, it provides greater freedom for corporate democracy.

D. NCLAT held that the Resolution Professional cannot decide the eligibility of a Resolution Plan under Section 29A of the IBC

In Sharavan Kumar Vishnoi v Upma Jaiswal and Ors., the Hon'ble NCLAT held that the ineligibility of a resolution applicant under section 29A of the IBC cannot be decided by the resolution professional. In the instant case, resolution plan submitted by the appellant was not placed by the resolution professional before the Committee of Creditors (CoC) as the resolution applicant, per the resolution professional, was not eligible under section 29A. The NCLAT observed that the resolution professional shall place all the resolution plans before the Committee of creditors which shall take a considered view.

E. The Apex court reiterated that restitution cannot be granted if the party claiming restitution is equally or more responsible for the illegality of the contract

In Loop Telecom and Trading Limited (Loop Telecom) v Union of India and Anr., the Apex Court reiterated that the principles of restitution provided under the Indian Contract Act, 1872 will not be applicable in the case where the party claiming restitution was equally or more responsible for the illegality of the contract. In the instant case, Loop

Telecom demanded a refund of the entry fee (restitution) for 2G licenses which were cancelled by the Supreme Court.

The Apex Court denied the payment of refund of the entry fee paid by Loop telecom as it was also partially responsible for the illegality behind the 2G licenses. In addition to the above, the Hon'ble Apex Court observed that even if the promoters of Loop Telecom are acquitted of their criminal charges, restitution cannot be granted as the contract was illegal and it would have benefited Loop Telecom.

Contact Us:

RRG & Associates [Research Desk]
C-14, Lower Ground Floor,
Chirag Enclave, Greater Kailash-1,
New Delhi-110048
Direct No. 011-40537591
Tel: No. 011-40563742
Email: rrg.rrgassociates@gmail.com
Website:- www.rrgassociates.com