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-LAW IN ACTION



Legal Updates

Supreme Court rejects application seeking clarification of judgment dated 27.11.2020 in respect of retirement of the Technical Member, APTEL

The Supreme Court of India in *Madras Bar Association v. Union of India & Anr* has held that the Tribunal, Appellate Tribunal and Other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2020 (“**2020 Rules**”) with the modifications suggested in the final judgment dated 27.11.2020 passed in the main petition, shall become applicable for all appointments made after 12.02.2020. All appointments prior to 12.02.2020 were directed to be governed by the parent statutes and Rules.

The applications were filed seeking clarification of the judgement dated 27.11.2020, specifically in respect of the Technical Member, Appellate Tribunal for Electricity (“**APTEL**”) who was scheduled to retire on 08.11.2020 in accordance with the terms of his appointment. The Technical Member, APTEL continued to function on the basis of the interim order passed by this court on 09.10.2020, vide which the retirements of all Chairpersons, Vice-Chairpersons and members’ terms were extended till 31.12.2020. However, vide judgment dated 27.11.2020, the Supreme Court had disposed of the writ petition noting that any appointment made after the 2020 Rules have come into force shall be in accordance with the 2020 Rules subject to the modifications directed by the Supreme Court. In view of the judgment dated 27.11.2020, the Technical Member could not continue as he was scheduled to retire on 08.11.2020. Vide the present applications, direction was sought to permit the Technical Member, APTEL to continue till 31.12.2020 as directed by this Court on 09.10.2020, in order to enable APTEL to pronounce the judgments on matters which have been reserved for judgment.

Ministry of Power has promulgated the Electricity (Rights of Consumers) Rules, 2020 (“**Consumer Rules**”) on 21.12.2020. The Consumer Rules have been formulated under Section 176 of the Electricity Act, 2003, conferring the right to certain minimum standards of service for supply of electricity to consumers.

The key provisions of the Consumer Rules are as below:

**Ministry of Power
("MoP")
promulgates the
Electricity (Rights
of Consumers)
Rules, 2020**

- **Types of Consumers:** Consumers have been divided into two categories –consumer and prosumer. Consumer is a person who is supplied electricity for his own use by a distribution licensee or the government, etc., while a 'prosumer' is defined as a person who consumes electricity from the grid and can also inject electricity into the grid for the distribution licensee, using the same point of connect.
- **New connection and modification in existing connection:** Procedure for applying for a new connection and for modification in existing connection has been made simpler and transparent and time bound. The applicant also has the option of applying online.
- **Metering:** No connection would be given without a meter and such meter shall either be smart pre-payment meter or pre-payment meter. In case of smart pre-payment meters, the meters shall be read remotely at least once in every month and in case of other pre-payment meters, the meters shall be read by an authorised representative of the distribution licensee at least once in every three months. For post-payment meters, in case meter is inaccessible to the meter reader for two consecutive meter reading dates, consumer shall have the option to send the picture of meter indicating the meter reading and date of such reading through registered mobile or through e-mail. In such case, the distributor shall not send any notice / provisional bill to the consumer.
- **Billing and payment:** Tariff for each category of consumers to be displayed on the website of distribution licensee. Bills would be prepared by the distribution licensee based on actual meter reading, except where pre-payment meters are installed. Consumers have the option to pay bills online or offline. Bill amounting to more than Rs. 1000/- or an amount specified by the Commission shall be mandatorily paid online. Commission to specify a suitable incentive or rebate for payment through online system.
- **Reliability of Supply:** Distribution licensees to supply 24x7 power to all consumers, unless lower hours of supply are specifically mentioned by the Commission. To maintain reliability of supply, the following parameters are to be specified by the Commission, viz., (a) total duration and frequency of outages per consumer in a year – SAIDI or SAIFI; and (b) minimum outage time (in minutes) that the distribution licensee shall consider for the calculation of SAIDI or SAIFI, as the case may be.
- **Rights of Prosumer:** Apart from having the right of a general consumer, the prosumer would also have the right to set to set up renewable energy generation unit including roof top solar photovoltaic system, either by themselves or a service provider.
- **Compensation mechanism:** Automatic compensation shall be paid to consumers for which parameters on standards of performance can be monitored remotely. Compensation would be required to be paid for – non supply beyond a particular duration, number of interruptions in supply beyond limits, time taken for connection, disconnection, reconnection, shifting, time taken for change in consumer category, bill related complaints, etc. Payment of compensation shall be made by adjustment against current or future bills for supply of electricity.
- **Grievance Redressal:** Distributors shall create a Customer Grievance Redressal Forum at different levels. Each grievance shall be decided within thirty (30) days and in any case not exceeding forty-five (45) days from the date of its registration.

The Consumer Rules have been notified with an intent to empower consumers, safeguard their rights and interests, and for furthering the ease of doing business across the country.

The Uttar Pradesh Electricity Regulatory Commission ("**UPERC**") has, vide its order dated 11.12.2020, directed that provisional tariff for next six months, i.e. for the period from 01.11.2020 to 30.04.2021 shall remain as determined by the UPERC through various orders respective to the existing projects under the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014 ("**2014 Regulations**") subject to adjustment with applicable interest, if any.

The UPERC, vide its suo motu order dated 30.05.2019, had extended the applicability of 2014 Regulations with effect from 01.04.2019 and ordered that tariff during FY 2019-20 shall remain as determined by the UPERC under the 2014 Regulations on provisional basis, subject to adjustment with interest. Subsequently, the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2019 were notified on 11.09.2019 for the control period 2019-24. However, due to the outbreak of COVID-19 and consequent lockdown leading to restriction of inter- and intra-state movement, the UPERC vide its suo motu order dated 11.05.2020 ordered that provisional tariff for the next six months, i.e. during the period 01.04.2020 to 31.10.2020 shall remain as determined by the UPERC through various orders respective to the existing projects under the 2014 Regulations, subject to applicable interest, if any.

**UPERC extends
suo-motu order on
provisional tariff for
the period
from 01.11.2020 to
30.04.2021**

MoC issues revision in the Operational Guidelines for National Coal Index

The Ministry of Coal (“**MoC**”) vide OM dated 17.06.2020, had issued Operational Guidelines for National Coal Index (“**NCI**”). Considering the progress and research that has occurred since, in facilitating simpler solutions for producing NCI and representative prices, MoC ‘has made certain revisions in the Operational Guidelines. Some of the revisions are as under:

- Para 4.2 Auction Prices: To arrive at the unit value of all the grades of coal as well as the unit values of sub-sectors, one excel utility has been developed. By use of the utility, the unit values are automatically generated once the primary data is checked to take care that the following items are not there in the data set:
 - I. All entries pertaining to auction of washed coal;
 - II. All entries pertaining to auction of slurry, rejects, other coal products;
 - III. All entries pertaining to auction where no grad is mentioned.
- Para 4.5 Import Prices: On the 20th of each month, DGCIS provides the provisional import data of the previous month. From this, the unit values required would be compiled. For finalization purpose, the information in the web portal of DGCIS would be used.
- Para 5 Substitution of Prices: Detailed archive of historical unit values of auction channel has been prepared. In each month, the missing unit values from auction channel would be substituted by the available figures.
- Para 6 Compilation: Compilation work has been made automatic and as such there is no human intervention required. Once the price directory is updated, the NCI / RP would be compiled instantaneously.
- Para 8 Compliance with SOP: There is no requirement of preparing the detailed technical note as most of the procedures are automatic and supervised by Assistant Director.

PNGRB issues draft PNGRB (Integrity Management System for Petroleum and Petroleum Products Pipelines) Regulations, 2020 inviting stakeholder comments

The Petroleum and Natural Gas Regulatory Board (“**PNGRB**”) has, vide public notice dated 17.12.2020, issued the draft PNGRB (Integrity Management System for Petroleum and Petroleum Products Pipelines) Regulations, 2020 (“**Draft Regulations**”). Stakeholders have been invited to submit their views and comments on the Draft Regulations within 21 days from the date of issue of public notice. Some of the salient features of the Draft Regulations are as under:

- shall apply to all the entities engaged in laying, building, operating or expanding petroleum and petroleum products pipelines;
- cover all the existing and new petroleum and petroleum products pipelines including high vapour pressure (HVP) liquids, and including the associated facilities required for transportation of petroleum and petroleum products through pipelines such as storage facilities, delivery stations / terminals, intermediate pigging facilities, pumping stations, sectionalizing valves, etc. of pipeline installations.
- outline the basic features and requirements for developing and implementing an effective and efficient Integrity Management Plan (“**IMP**”) for petroleum and petroleum products pipeline system;
- intend to evaluate the risk associated with petroleum and petroleum product pipeline and minimize the probability of failure of petroleum and petroleum product pipeline for streamlined and effective operations;
- provide for a comprehensive integrity management system (“**IMS**”) which shall essentially comprise of the following elements: (i) IMP which encompasses collection and validation of data, assessment of spectrum of risks, risk ranking, assessment of integrity with respect to risks, risks mitigation, updating data and reassessment of risk; (ii) performance evaluation of IMP; (iii) communication plan; (iv) management of change; and (e) quality plan; and
- provide for review by entities of their existing IMS from time to time but not exceeding an interval of every 3 years, and audit of such system on a regular basis.

The Supreme Court, in its judgment passed in *Vidya Drolia v. Durga Trading Corporation* (Civil Appeal No. 2402 of 2019), has overruled the ratio laid down in *N. Radhakrishnan v. Maestro Engineers* and held that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. This is however, subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. The Supreme Court noted that in *N. Radhakrishnan (supra)*, the order rejecting the application under Section 8 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) was upheld on the ground that it would be in furtherance

Supreme Court holds that allegations of fraud can be made subject matter of arbitration when they relate to civil dispute; disputes which are to be adjudicated by DRT are not arbitrable; and landlord-tenant disputes are arbitrable

of justice that the allegations as to fraud and manipulation of finances in a partnership firm are tried in the court of law which is more competent and has means to decide a complicated matter. It was held therein that the dispute would be non-arbitrable on public policy consideration if it relates to serious allegations of fraud. Disagreeing with this ruling, the Supreme Court observed that question of non-arbitrability cannot be answered by examining whether the statute has a public policy objective which invariably every statute would have. There is a general presumption in favour of arbitrability, which is not excluded simply because the dispute is permeated by applicability of mandatory law. Violation of public policy by the arbitrator could well result in setting aside the award on the ground of failure to follow the fundamental policy of law in India, but not on the ground that the subject matter of the dispute was non-arbitrable.

The Supreme Court further propounded a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

- when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;
- when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
- when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and
- when the subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

The Supreme Court further set aside full bench judgment of the Delhi High Court in *HDFC Bank Ltd. v. Satpal Singh Bakshi* by holding that the disputes which are to be adjudicated by the Debt Recovery Tribunal (“DRT”) under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are not arbitrable, and overruled the ratio laid down in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia* by holding that landlord-tenant disputes are arbitrable as the Transfer of Property Act, 1882 does not forbid or foreclose arbitration. The Supreme Court further noted, however, that landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court / forum, and not through arbitration.

With respect to the question as to what extent does the Court decide the question of non-arbitrability under Section 11 of the Arbitration Act, the Supreme Court observed that: (a) Sections 8 and 11 of the Arbitration Act have the same ambit with respect to judicial interference; (b) Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Arbitration Act, unless it is a clear case of deadwood; (c) The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding; (d) The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above; (e) The scope of the Court to examine the prima facie validity of an arbitration agreement includes only: (i) Whether the arbitration agreement was in writing; (ii) whether the arbitration agreement was contained in exchange of letters, telecommunication, etc. (iii) whether the core contractual ingredients qua the arbitration agreement were fulfilled; (iv) on rare occasions, whether the subject matter of dispute is arbitrable.

MCA extends operation of Section 10A of the IBC

Section 10A was introduced in the Insolvency and Bankruptcy Code, 2016 (“IBC”) with effect from 05.06.2020 and provided for a suspension of operation of applications filed under Sections 7, 9 and 10 of the IBC for any default arising on or after 25.03.2020, for a period of six months or such further period, not exceeding one year from such date as may be notified in this behalf. The above-mentioned period of six months was scheduled to end on 25.09.2020. Accordingly, the Ministry of Corporate Affairs (“MCA”), vide notification dated 24.09.2020 extended the six-month long suspension of IBC provisions (i.e. Sections 7, 9 and 10) for another three months. Vide a notification dated 22.12.2020, the suspension of IBC provisions (i.e. Sections 7, 9 and 10) has been further extended for another three months from 25.12.2020.

The Ministry of Corporate Affairs (“MCA”) has, vide notification dated 17.12.2020, issued the Companies (Compromises, Arrangements and Amalgamations) Second Amendment Rules, 2020 (“Amendment Rules”) which amend the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. The Amendment Rules insert the definition of “corporate action” as any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares and right issue to the acquirer. The Amendment Rules further provide for procedure for purchase of minority shareholding held in dematerialised form as follows:

- The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under Section 236 of the Companies Act, 2013 verify the details of the minority shareholders holding shares in dematerialised form;
- The company shall thereafter send notice to such minority shareholders by registered post / speed post / courier / email about a cut-off date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date;
- A copy of the above notice shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.
- The company shall inform the depository immediately after publication of the notice regarding the cut-off date and submit the prescribed declarations;
- Upon receipt of above information, the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company;
- After receiving the intimation of successful transfer of shares from the depository, the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders;
- Upon successful payment to the minority shareholders the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer.
- Where there is a specific order of court or tribunal or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996, the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company.

**MCA notifies
Companies
(Compromises,
Arrangements and
Amalgamations)
Second Amendment
Rules, 2020**

**Kerala High Court
stays the order of
the NCLT Kochi
Bench in M/s
Tharakan Web
Innovations Pvt.
Ltd. v. Cyriac
Njavally**

The Kerala High Court in *M/s Tharakan Web Innovations Pvt. Ltd. v. National Company Law Tribunal & Anr.* has stayed the order of the National Company Law Tribunal, Kochi Bench in *M/s Tharakan Web Innovations Pvt. Ltd. v. Cyriac Njavally*, passed on 01.12.2020 which stated that the notification dated 24.03.2020 issued by the MCA enhancing the minimum amount of default as Rs. 1 crore with effect from 24.03.2020 does not protect the corporate debtor from initiation of insolvency especially in cases where defaults towards creditors have taken place before the pandemic and the resultant financial crisis, and that such an interpretation would be contrary to the intention of the executive in exercise of its power of delegated legislation.

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