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-LAW IN ACTION



Legal Updates

Limitation of 3 years for filing a Section 11 petition for appointment of Arbitrator shall commence from the date on which the first cause arises and negotiations between the parties cannot postpone the cause of action for the purpose of limitation : Supreme Court

While deciding a Section 11 petition for appointment of Arbitrator in the case of *M/s B and T AG vs. Ministry of Defence, Arbitration Petition No.13 of 2023*, the Supreme Court vide judgement dated 18.05.2023, has in categorical terms observed that negotiations between parties cannot defer or postpone a statutory limitation.

In the said case, the Ministry of Defence had encashed the Bank Guarantees (“BG”) of the Petitioner Company in the year 2016, pursuant whereof, the parties continued to engage themselves in “bilateral discussions” with a view to explore the possibility of resolving the dispute regarding imposition of the Liquidated Damages and encashment of the BG. The petition for appointment of an arbitrator came to be filed in 2023.

The Bench observed that the date of encashment was the “breaking point” and will be treated as the date at which the cause of action arose for the purpose of limitation. While negotiations and discussions may continue even for a period of ten years or twenty years, it will not postpone the “cause of action” for the purpose of limitation. A statutory time period cannot be defeated on the ground that the parties were negotiating.

The High Court of Karnataka vide judgement dated 24.05.2023 in Writ Petition No. 15830 of 2022 titled *Town Essentials Pvt. Ltd. v. Daily Ninja Delivery Services Pvt. Ltd.*, held that the cause of action cannot be bifurcated to allow arbitration against few and civil suit against the others.

In the present case, there was a Supplier and Service Provider Agreement which also contained arbitration agreement and first defendant was later acquired by second defendant without notice to petitioner. After August 2020, the defendants started to siphon off their business

Cause of action cannot be bifurcated to allow arbitration against few and civil suit against the others : Karnataka High Court

violating the terms of the Agreement. Defendants No. 4 and 5 were the promoters and directors of defendant No. 1 and after acquisition by defendant No. 2, they became the employees of the latter.

The cause for loss in business was attributed to the inducement caused by Defendants No. 2 to 7 for breaching the Agreement which resulted in the petitioner instituting the Commercial Original Suit No.520/2021. The first defendant filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (“A&C Act”) to refer the parties to the suit to arbitration as the agreement provided for resolution of dispute through arbitration.

The court held that by the perusal of Order 1 Rule 3(3) of the Civil Procedure Code, 1908 (“CPC”), it became clear that a common question of law or fact would arise for adjudication, if an act or transaction or series of acts or transactions give rise to reliefs against several persons either jointly or severally or in the alternative, all such persons may be joined as defendants in a suit and another requirement for joining several persons as defendants in a suit is if separate suits are brought against them. The court held that there are more than one defendants where the cause of action is same against all the defendants and there is no arbitration agreement with some of them.

Defendants No. 4 and 5 might have signed the Agreement, but they did so in the capacity of directors of first defendant and not in their individual capacity; they are stated to be the employees of second defendant now. The non signatory defendants cannot be exposed to arbitral proceedings. Therefore, the court dismissed the application under section 8 of the A&C Act and restored the commercial suit.

While deciding a Section 11 petition for appointment of Arbitrator in the case of *M/S Vindhya Vasini Construction Co vs. M/S Bharat Heavy Electricals Ltd* bearing bearing Arbitration Petition No. 1298 of 2022, the High Court of Delhi vide judgement dated 10.05.2023 has observed that the arbitration clause shall not survive if it provides for a unilateral appointment of an arbitrator and there is no express waiver of the same by the other party.

In the said case, the arbitration agreement formed a part of clause 23 of the work order which stipulated that all disputes shall be referred to the sole arbitration of the Head of the Transmission Business Group (“TBG”), of Bharat Heavy Electricals Ltd (“BHEL”), Noida and if the Head TBG is unable or unwilling to act as the sole arbitrator then some other person appointed by the Head TBG willing to act as such arbitrator shall act as the sole arbitrator. It also said that that no person other than a person appointed by such Head TBG as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all.

It was the contention of the petitioner that both the stipulations of the arbitration clause were severable to each other and since the intent of the parties was to refer the disputes to arbitration, therefore the High Court ought to appoint an arbitrator for adjudication of the disputes.

The Bench observed that the dispute represented a case of non-survival of the arbitration clause itself, since the agreed upon procedure to appoint an arbitrator has failed. It concluded that the arbitration agreement expressly ceased to operate in case the nominee of the Head TBG cannot act as an arbitrator. The court further remarked that it cannot be said that the said condition stipulated in the subsequent part of the arbitration agreement is severable, in view of the express stipulation regarding the non-enforceability of the arbitration agreement once the said condition exists.

The Bench concluded that in absence of an express waiver by the petitioner and in view of the judgment of the Supreme Court in *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd., (2020) 20 SCC 760*, the Head TBG of the respondent or his nominee cannot be appointed as an arbitrator. Therefore, the arbitration agreement would cease to operate in terms of the agreement itself, and the parties would have to be relegated to their ordinary civil remedies in case of a dispute.

In the absence of express waiver of the party, the arbitration agreement would cease to exist, and the parties would have to be relegated to their ordinary civil remedies in case of a dispute : Delhi High Court



MoP issues directions regarding determination of green tariff under GEOA Rules

Ministry of Power (“**MoP**”) vide its letter dated 13.05.2023 issued the following directions to States regarding implementation of Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022 (“**GEOA Rules**”) and determination of green tariff thereunder:

1. For incentivizing use of renewable energy (“**RE**”), the tariff is strictly set in accordance with the GEOA Rules. Accordingly, it is clarified that in no case should the green tariff be higher than the Average Power Purchase Cost of RE + Surcharge @ 20% of Average Cost of Supply + a reasonable margin of 25 paise.
2. State Electricity Regulatory Commissions (“**SERCs**”) are further directed to notify Green Energy Open Access Regulations in alignment with the GEOA Rules notified by MoP.
3. Status of compliance may be sent to MoP by the SERCs within 15 days of issue of the MoP letter dated 13.05.2023.

MoP notifies amendment to GEOA Rules

MoP vide its notification dated 23.05.2023 notified Electricity (Promoting Renewable Energy Through Green Energy Open Access) (Second Amendment) Rules, 2023 vide which the following amendments have been issued:

1. The definition of “entity” stands amended. The earlier definition merely provided that an entity shall be any consumer, barring captive consumer, who has contracted demand or sanctioned load of 100 kW or more. The same has been substituted to mean any consumer, barring captive consumer, who has contracted demand or sanctioned load of Hundred kW or more either through single connection or through multiple connections aggregating Hundred kW or more located in same electricity division of a distribution licensee. There shall be no load limitation for captive consumers.
2. The first proviso to Rule 5(2) stands substituted in alignment with the amended definition of entity to provide that only consumers who have contracted demand or sanctioned load of Hundred kW or more, either through single connection or through multiple connections aggregating Hundred kW or more located in same electricity division of a distribution licensee, shall be eligible to take power through Green Energy Open Access and there shall be no limit of supply of power for the captive consumers taking power under Green Energy Open Access.
3. The fourth proviso to Rule 9(2) stands amended to provide exemption from payment of additional surcharge for electricity produced from offshore wind projects commissioned upto December 2032 and supplied to open access consumers.

The Supreme Court vide judgement dated 19.05.2023 in Civil Appeal No 2109-2110 of 2004 titled *K C Ninan vs. Kerala State Electricity Board & Ors.* held that the electricity due of the previous owners can be recovered from new owner. Supreme Court clubbed together various appeals and heard them together comprising of common issue of whether new owner of the premise is liable to pay the electricity dues of the previous owner. The court framed following issues, which were required to be settled in order to decide the principal issues involved in the matter:

1. Whether the Universal Service Obligation under Section 43 of the Electricity Act, 2003 (“**the 2003 Act**”) is linked to premises to which the connection is sought;
2. Whether a connection of electricity supply sought by an auction-purchaser comprises a reconnection or a fresh connection;
3. Whether the power to recover arrears of a previous owner or occupier from an auction-purchaser of the premises falls within the regulatory regime of the 2003 Act;

**New owner of the
premise is liable to pay
the electricity dues of
the previous owner :
Supreme Court**

4. Whether the power to enable the recovery of arrears of the previous owner or occupier from an auction-purchaser can be provided through subordinate legislation by the State Commissions;
5. Whether the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948, and the 2003 Act have express provisions enabling the creation of a charge or encumbrance over the premises;
6. Whether the statutory bar on recovery of electricity dues after the limitation of two years provided under section 56(2) of the 2003 Act, will have an implication on civil remedies of the electric utilities to recover such arrears; and
7. What is the implication of an auction-sale of premises on “as is where is” basis, with or without reference to electricity arrears of the premises?

The premises in the clubbed appeals were sold in auction on "as is where is basis" and the new owners who purchased the property in auction applied for electricity supply in the premises. The observation of the Supreme Court are as follows-

1. The Court held that the obligation to supply electricity under section 43 of the 2003 Act, is subject to charge and compliances as provided by the electricity utilities hence, obligation under section 43 is not absolute. The Court held that the electricity utilities can create a charge by framing subordinate legislation or statutory conditions of supply enabling recovery of electricity arrears from a subsequent transferee.
2. The Court further held that 2003 Act contemplates a synergy between the consumer and premises. For an application to be considered as a ‘reconnection’, the applicant has to seek supply of electricity with respect to the same premises for which electricity was already provided. Even if the consumer is the same, but the premises are different, it will be considered as a fresh connection and not a reconnection.
3. Once it is established that a statutory charge is created and required notice was given, the licensee is entitled to recover the unpaid electricity dues, which is in the form of charge on the property, by proceeding against the premises.
4. In the 2003 Act, Section 50 read with Section 181(2)(x) confers discretion upon the State Commission to frame the conditions governing electricity supply enabling recovery of electrical charges, including the electricity arrears of the previous owner from the new owner.
5. The Court held that the power to initiate recovery proceedings by filing a suit against the defaulting consumer is independent of the power to disconnect electricity supply as a means of the recovery.
6. The Court held that the application of the doctrine of “as is where is” was not limited to only physical features of the property but extends to the condition of the title of the property and the extent and state of whatever claims, rights and dues which affects the property, unless stated otherwise in the contract. The implication of the expression is that every intending bidder is put to notice that the seller does not undertake any responsibility of any liability for the payment of dues, like water/service charges, electricity dues for power connection and taxes of the local authorities, among others.
7. Thus, all prospective auction purchasers are put to notice of the liability to pay the pending dues when an appropriate “as is where is” clause is incorporated in the auction sale agreement.



**MPERC proposes
amendment to MPERC
(Distribution
Performance
Standards)
Regulations, 2012**

On the basis of the above observations, the Supreme Court held that the new owner of the premises is liable to pay electricity dues of the previous owner for the premises sold on 'as is where is' basis.

The Madhya Pradesh Electricity Regulatory Commission ("MPERC"), vide its public notice dated 26.05.2023, has sought views / comments on the second amendment to MPERC (Distribution Performance Standards) (Revision-II) Regulations, 2012 (RG-8(II) of 2012) ("Second Amendment"), from all stakeholders including the general public. The view and comments may be sent via email to secretary@mperc.nic.in or in writing addressed to Secretary, MPERC latest by 22.06.2023. The Commission shall hold public hearing on 27.06.2023 at 11:00 AM through video conferencing.

The Second Amendment substitutes Item No. (ix) of the Appendix A with the following:-

Service Area	Guaranteed Standards	Compensation payable to affected consumers
(ix) Time period within which bills are to be served;	At least 10 days prior to due date of payment	Rs 100 per day (or part thereof) of delay

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