

Highlights:**Corporate Brief**

- MCA general circular for clarification on Annual General Meeting for the financial year ended 31.03.2020.
- MCA notification for amendment of the Companies (CSR Policy) Rules, 2014 by the Central Government.
- SEBI circular for resources for Trustees of Mutual Funds.
- SEBI circular for execution of Power Of Attorney (PoA) by the Client in favour of the Stock Broker/Stock Broker and Depository Participant.
- RBI Notification for clarification on New Definition of Micro, Small and Medium Enterprises.
- RBI Notification for resolution framework for COVID-19 related Stress.

RERA Brief

- Circular issued by Karnataka Real Estate Regulatory Authority regarding payment of fee under Section 31 of the Real Estate (Regulation and Development) Act, 2016
- Public notice dated 03.08.2020 issued by Kerala Real Estate Regulatory Authority to the Promoters of Real Estate Projects.
- Whether the Promoters are entitled to exemption from compliance of Proviso of Section 43(5) of the Real Estate (Regulation and Development), Act, 2016?
- Whether the provisions of the Real Estate (Regulation and Development) Act, 2016 can be invoked without entering into an agreement between the developer and the homebuyer?

Litigation Brief

- Consumer Protection Act: Flat buyers are entitled to just reasonable compensation on gross delay.
- Scope of Challenge under Section 37 of the Arbitration and Conciliation Act, 1996

Corporate Brief

➤ **Vide General Circular (GC) No. 28/2020-F. No. 2/4 /2020-CL-V dated 17.08.2020, of Ministry of Corporate Affairs, ('MCA'):**

It has been decided that:

- **Clarification on Extension of Annual General Meeting (AGM) for the financial year ended as at 31.03.2020.**

The Registrar of Companies (ROC) would allow applications filed under Form No. GNL-1 by companies seeking extension of time to hold AGM for financial year ended on March 31, 2020 for a period of 3 (three) months from the date of filing of such application. The relief has been granted to the companies who despite availing relaxations offered under GC No. 20/2020 dated May 5, 2020 which allows to conduct AGM for the said financial year ending, through video conferencing and other audio visual means (OAVM) have been unable to conduct the said meeting.

➤ **Vide Notification No. G.S.R 526 (E) dated 24.08.2020, of Ministry of Corporate Affairs, ('MCA'):**

The following amendment has been introduced:

- **Amendment of the Companies [Corporate Social Responsibility Policy (CSR)] Amendment Rules, 2020**

In the Companies [Corporate Social Responsibility Policy (CSR)] Rules, 2014 ("Rules") the following proviso shall be in effect from August 24, 2020 under the definition of 'CSR Policy' provided in Rule 2(1)(e) of the said Rules by the virtue of the amendment:

- Any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23 subject to the following conditions:
 - (i) The research and development activities carried out in this regard with any institution or organization, should be covered under item (ix) of Schedule VII of Companies Act, 2013.
 - (ii) The details of activity in this regard should be disclosed by the company in the Annual Report on CSR included in the Board's Report.

➤ **Vide Circular No. SEBI/HO/IMD/DF4/CIR/P/2020/000000151 dated 10.08.2020, of Securities Exchange Board of India. ('SEBI'):**

- **Resources For Trustees Of Mutual Funds**

To provide ease in issue of providing administrative support including appointment of independent auditors for the Trustees in pursuance to requirement under SEBI (Mutual Funds) Regulations, 1996 regarding obtaining of internal audit reports at regular intervals by the Trustees from their independent auditors, it has been decided that:

- (i) Trustees shall appoint a dedicated officer having professional qualification and minimum 5 (five) years of experience in the field of finance and financial services.
- (ii) The dedicated officer shall be the employee of the Trustees and reports directly to the Trustees.
- (iii) Scope of work and duties of the officer to be formulated by the Trustees from time to time.
- (iv) The officer shall be treated as an 'access person' in terms of SEBI Circular No. MFD/CIR No/4/216/2001 dated May 8, 2001 pertaining to investment and trading securities by employees of Asset Management Companies and Mutual Fund Trustees.
- (v) The Trustees shall have an arrangement with independent firms for special purpose audit and/or seek legal advice in case of any requirement.
- (vi) The said circular shall be in effect from October 1, 2020.

⇒ **Vide Circular No. SEBI/HO/MIRSD/DOP/CIR/P/2020/158 dated 27.08.2020, of Securities Exchange Board of India. ('SEBI'):**

• **Execution of Power of Attorney (PoA) by the Client in favour of the Stock Broker/Stock Broker and Depository Participant**

Vide Circular dated April 23, 2010 issued guidelines for execution of PoA by the client favouring Stock Broker/Stock Broker and Depository Participant ("Agents"). The said guidelines stated that PoA executed by the client in favour of the Agents shall not permit activities such as transfer of securities for off market trades; transfer of funds from bank accounts of clients for trade executed by client through another stock broker; issuance of delivery instruction slips to beneficial owners etc.

However, in lieu of the observed misuse of PoA by Agents wherein they have been opening trading accounts for clients/investors and undertaking KYC compliance on their behalf. Following has been reiterated by SEBI:

- (i) PoA is optional and should not be insisted by Agents for opening of the investor/client account.
- (ii) PoA executed in favour of Agents by the client/investor should be utilized for the following purpose:
 - a) Transfer of securities held in the beneficial owner accounts of the client/investor towards Stock Exchange related deliveries/settlement obligations arising out of trades executed by clients on the Stock Exchange through the same stock broker.
 - b) For pledging / re-pledging of securities in favour of trading member (TM)/clearing member (CM) for the purpose of meeting margin requirements of the clients in connection with the trades executed by the clients on the Stock Exchange.
- (iii) All off market transfer of securities shall be permitted to Agents only by execution of Physical delivery Instruction Slip (DIS) duly signed by the client/investor himself or by way of electronic DIS. For all off market transfer of securities, One Time Password (OTP) system shall be enabled by the Agents for trading on behalf of their clients.

⇒ **Vide RBI Notification No. RBI/2020-2021/26 FIDD.MSME & NFS.BC.No.4/06.02.31/2020-21 dated 21.08.2020.**

• **New Definition of Micro, Small and Medium Enterprises (MSMEs)-clarifications**

In view of the new definition of MSMEs issued by the Ministry of MSME through Gazette Notification No. S.O 2119 (E) dated June 26, 2020, the RBI has provided the following clarification:

- (i) Classification/reclassification of MSMEs as per new definition shall be the statutory obligation of the Ministry

of MSME in accordance with the provisions of MSME Act, 2006.

- (ii) All enterprises are required to register online and obtain 'Udyam Registration Certificate'. Therefore, all lender banks will be required to obtain the said registration certificate from entrepreneurs of the enterprise.
- (iii) The Entrepreneur Memorandum (EM) Part II and Udyam Aadhar Memorandum (UAMs) of the MSMEs obtained till June 30, 2020 will remain valid till March 31, 2021. Enterprises registered till June 30, 2020 shall file new registration in the Udyam Registration Portal before March 31, 2021. Udyam Registration Certificate issued on self-declaration basis for enterprises exempted from filing GSTR and/or ITR returns will be valid up to March 31, 2021.
- (iv) Value of plant and machinery or equipment for all enterprise shall mean the Written Down Value (WDV) as at the end of financial year as defined in the Income Tax Act, relevant for the entry pertaining to depreciated cost as on 31st March each year of the relevant previous year captured in the online form for Udyam Registration.

⇒ **Vide RBI Notification No. RBI/2020-21/16 DOR. No.BP.BC/3/21.04.048/2020-21 dated 06.08.2020.**

• **Resolution Framework for COVID-19 related stress**

In lieu of the economic fallout due to COVID-19 pandemic, resulting in financial stress for borrowers across sectors, the RBI has formulated a resolution framework to mitigate the impact on the borrowers and has decided to provide a window under the Prudential Framework of Stressed Assets, 2019 which will enable lenders to implement resolution plan without any degradation of asset classification.

Following are the highlights of the framework:

(i) Ineligible Borrowers:

- a) MSME borrowers whose aggregate exposure to lending institution collectively is less than INR 25 Crore or less as on March 1, 2020.
- b) Agricultural lenders.
- c) Exposures of lending institutions to financial service providers.
- d) Exposures of lending institutions to Central and State Governments; Local Government Bodies and body corporates established by an act of Parliament or State Legislature.
- e) Exposures of housing finance companies.

(ii) Eligible Borrowers:

Eligible borrowers will include borrowers who otherwise have a good track record but are suffering from financial stress due to COVID-19 pandemic. The reference date for examining the performance

of a borrower is March 1, 2020. Only those loan accounts which were classified as standard and had not been in default for more than 30 (thirty) days as on March 1, 2020, are eligible for resolution under the framework.

(iii) **Conditions of Operation of Framework:**

The framework has been divided into 4 (four) parts specifying conditions related to requirement of (a) specific to resolution of personal loans; (b) resolution of other eligible borrowers; (c) prudential treatment of the exposures in respect of which resolution plans are implemented under this facility; and (d) disclosure requirements for lending institutions with respect to resolution plans. Lending institutions under this framework shall include all Commercial Banks, Primary/State/District Co-Operative Banks, All India Financial Institutions and Non-Banking Financial Companies (including Housing Finance Companies).

(iv) **Resolution Process:**

Lending Institutions herein are required to frame policies approved by their respective Boards detailing the manner in which the borrower's performance be evaluated and mechanism of implementing viable resolution plan for such borrowers. The framework provides lenders and their borrowers time till December 31, 2020 to invoke resolution process and reach an agreement to proceed with a resolution plan.

o **Key Features- Operation Of Framework**

a) **Personal Loans**

- Applicable to individual borrowers who have been sanctioned loan by lending institutions.
- Agreed resolution plan must be implemented within 90 (ninety) days from the date of resolution process.
- Resolution plan may provide steps pertaining to rescheduling of payments or granting of a moratorium subject to maximum of 2 (two) years.

b) **Other Loans**

- Consist of borrowers other than those mentioned in the personal loan category.
- Resolution plan agreed between borrower and lender to be implemented within 180 (One Hundred Eighty) days from the date of implementation of resolution plan. Loan

accounts to be treated as standard till the date of invocation of the resolution process.

- In case of multiple lenders, the resolution process will be treated as invoked if the lenders representing at least 75% by value and 60% by number agree to invoke the resolution process. Once the position is agreed between the lenders, an Intercreditor Agreement is required to be signed by all lenders within 30 (thirty) days from the date of invocation.

c) **Expert Committee**

- An expert committee shall be set up by RBI to recommend list of financial parameters to be covered in the resolution plan.
- The said committee will also be responsible for reviewing resolution plans under this framework in respect of accounts where aggregate exposure of Lenders is INR 1.5 billion and above.

d) **Asset Classification and Provisioning**

- The asset classification of loan accounts to be classified as standard and may be retained upon implementation of resolution plan.
- For accounts which may have turn into Non-Performing Asset (NPA) between the period of invocation of resolution plan and its implementation, such accounts to be upgraded as standard on the date of resolution plan and implementation.
- Post implementation of resolution plan under this framework, in case of Personal Loans and Other Loans, Lenders must from the date of implementation keep a minimum of 10% of their negotiated debt exposure.

e) **Credit Evaluation and Lender Disclosures**

- In case resolution plans where the aggregate exposure of Lenders at the time of invocation of the resolution process is INR 1 billion and above, an independent credit evaluation has to be conducted through any one credit rating agency authorized by RBI.
- Lenders are also required to make necessary disclosures in their quarterly/half-yearly/annual financial statements as per the prescribed formats in respect of accounts where a resolution plan is in effect.

Real Estate Brief

➤ Circular issued by Karnataka Real Estate Regulatory Authority regarding payment of fee under Section 31 of the Real Estate (Regulation and Development) Act, 2016

- The Karnataka Real Estate Regulatory Authority vide its circular dated 11.08.2020 cleared the issue regarding payment of fee under Section 31 of Real Estate (Regulation and Development) Act, 2016 read with Rule 29 of the Real Estate (Regulation and Development) Rules, 2017.
- The Karnataka Real Estate Regulatory Authority further provided that where a single individual has filed a complaint by paying fee of Rupees One Thousand, such complainant cannot be allowed to have other co-complainants, unless (i) each of the co-complainants have their respective fee of Rupees One Thousand; or (ii) all are the members of a single registered association.
- Therefore, only in cases of filing the complaint by a registered association of allottees or consumers, a single fee of Rupees One Thousand has to be collected.

➤ Public Notice issued by Kerala Real Estate Regulatory Authority (K-RERA) to the Promoters of Real Estate Projects.

- K-RERA vide its public notice dated 03.08.2020 announced that it has taken steps to develop its web based online system for submitting application and uploading documents and information for registration of projects as per the provisions of the Real Estate (Regulation and Development) Act, 2016. K-RERA further provided that the web based online system is expected to be ready by October, 2020.
- Thereafter, once the website is developed and functional, the promoter shall be required to upload the information and documents on the said website.
- K-RERA further provided that mere registration of a real estate project by the promoter shall not mean to construe that the information provided by the promoter is correct and genuine.
- K-RERA also specified that it is the responsibility of the promoter to ensure that all information submitted by the promoter and uploaded in the website of K-RERA, are correct and genuine. As also provided under Section 17(4) of the Kerala Real Estate (Regulation and Development) Rules, 2018, the authenticity of the details and documents uploaded on the website shall be the sole responsibility of the promoter concerned.
- Further, if it is discovered that the details and documents uploaded and furnished by the promoter are incorrect and

deficient, the same may attract action against the promoter under Section 60 of the Real Estate (Regulation and Development) Act, 2016.

➤ Whether the Promoters are entitled to exemption from compliance of Proviso of Section 43(5) of the Real Estate (Regulation and Development) Act, 2016?

IN THE MATTER OF: *M/s Mahanagar Realty & Ors. Vs. Dinesh Ramlal Oswal & Anr.*

(Decided by the Hon'ble Maharashtra Real Estate Appellate Tribunal, Mumbai)

Issue:

- Whether the Promoters are entitled for exemption to make compliance of Proviso of Section 43 (5) of the Real Estate (Regulation and Development), Act, 2016?

Facts:

- Promoters being the Applicant preferred an appeal against the impugned order dated 10.01.2019 wherein the promoter was directed to refund of the amount paid by the allottees along with the interest amounts.
- Thereafter, the Promoters filed an application for waiver of pre-deposit mandated under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 before the Hon'ble Appellate Tribunal.

Observations and Findings of the Hon'ble Tribunal:

- The Hon'ble Appellate Tribunal observed that, it is mandated under the Real Estate (Regulation and Development) Act, 2016 that the promoter who prefers an appeal has to deposit the amount(s) and comply with the Proviso of Section 43 (5) of the Real Estate (Regulation and Development) Act, 2016 for entertaining and hearing the appeal, and that deposit in respect of the same is a pre-requisite.
 - The Hon'ble Tribunal also observed that the right to appeal can be conditional and quantified.
 - The Hon'ble Tribunal further observed that the Hon'ble Supreme Court has previously settled this principle that any statute has to be interpreted in the context in which the words by are used in that particular statute.
 - Real Estate (Regulation and Development) Act, 2016 being a special legislation enacted to protect to the interests of the allottees cannot grant any exemption/ waiver to the promoter from pre-deposit of the amounts to be made under Section 43(5) of Real Estate (Regulation and Development) Act, 2016.
- **Whether the provisions of the Real Estate (Regulation and Development) Act, 2016 can be invoked without entering into an agreement between the developer and the homebuyer?**

IN THE MATTER OF: *M/s Casa Grande Civil Engineering Pvt. Ltd. Vs. Mr. P. Govindraj, Mrs. Deeparaj*
(Decided by Hon'ble Tamil Nadu Real Estate Appellate Tribunal- TNREAT)

Issues:

- Whether the provisions of the Real Estate (Regulation and Development) Act, 2016 can be invoked without entering into an agreement between the developer and the homebuyer?
- Whether the order of the Hon'ble Adjudicating Officer is an erroneous one?
- Whether the appeal deserves to be allowed or not?

Facts:

- Promoters being the appellant preferred an appeal against the impugned order dated 31.07.2019 passed by the Hon'ble Adjudicating Officer in CCP.No. 78/2019 for settling of an issue pertaining to whether without entering into a contract the homebuyers have the locus standi to invoke the provisions of the Real Estate (Regulation and Development) Act, 2016?
- The appellant/ promoter had advertised in newspaper sale of flats in the residential real estate project.
- The homebuyer and the developer mutually agreed for consideration payable in respect of the same. The homebuyer was asked to pay amounts towards consideration in respect of the proposed purchase of the residential flat in the real estate project. Thereafter, an acknowledgment letter was issued by the appellant/ promoter acknowledging the receipt of payment and providing for other terms and conditions.
- The terms and conditions of the said acknowledgment letter further provided for non-payment of goods and services tax that was subsequently asked to be paid by the homebuyer. Subsequently, the appellant/ promoter even reduced the area of residential flat proposed to be sold. Stemming from the abovementioned facts and events, the homebuyer decided not to sign any definitive agreement.
- The homebuyer further appeared before the Hon'ble Adjudicating Officer complaining about violation of Section 12 and 13 of Real Estate (Regulation and Development) Act, 2016.
- The Hon'ble Adjudicating Officer ruled that the appellant/ promoter had violated the provisions of Section 12 and 13 of Real Estate (Regulation and Development) Act, 2016. Hence, in lieu of the same, an appeal was preferred by the appellant/ promoter.

Observations and Findings of the Hon'ble Tribunal:

Findings on Issue 1-

- The Hon'ble Tribunal observed that if the letter was only an acknowledgment of payment, why were certain terms and

conditions mentioned in the same? The Hon'ble Tribunal even questioned the Appellant/ Promoter for incorporating terms and conditions before entering into any agreement.

- The Hon'ble Tribunal further observed that the letter was relied on for repayment so the developer cannot say that it is not binding.
- The Hon'ble Tribunal upheld the findings of the Hon'ble Adjudicating Officer that Section 12 and 13 of Real Estate (Regulation and Development) Act, 2016 were violated by the appellant/ promoter, as the project falls within the ambit of an ongoing project.
- Thus, the Hon'ble Tribunal observed that the provisions of Real Estate (Regulation and Development) Act, 2016 can be invoked even without entering into an agreement.

Findings on Issue 2-

- The Hon'ble Tribunal further modified the compensation to Rs.1,00,000/- awarded as opposed to 9% as awarded by the Hon'ble Adjudicating Officer.

Findings on Issue 3-

- As issue 1 was decided against the Appellant/ Promoter and issue 2 was modified by the Hon'ble Tribunal. Thus, the said appeal was allowed by the Hon'ble Tribunal, in part.

Litigation Brief

➤ **Consumer Protection Act: Flat buyers are entitled to just reasonable compensation on gross delay.**

IN THE MATTER OF: Wg. Cdr. Arifur Rahman Khan and Aleys Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd.) & Ors. (Decided by Hon'ble Supreme Court of India on 24.08.2020)

Issues:

1. Whether the flat buyers are entitled to compensation in excess of what was stipulated in the Apartment Buyers Agreement?
2. Whether the execution of the Deed of Conveyance by a flat purchaser precludes a consumer claim being raised for delayed possession?

Facts:

1. The Complaint before the National Consumer Disputes Redressal Commission (**NCDRC**) was initially instituted by nine flat buyers. These Complainants had booked residential flats in a project called Westend Heights at New Town, DLF, BTM Extension at Begu, Bengaluru. The brochure of the first respondent advertised the nature of the project and the amenities which would be provided to buyers. Responding to the representation held out by the developer, the complainants booked flats in the residential project. The flat buyers entered into agreements with the developer. Clause 11(a) of the

Apartment Buyer's Agreement (**ABA**) indicated that the developer would endeavor to complete construction within a period of thirty-six months from the date of the execution of the agreement save and except for force majeure conditions. The developers issued various communications indicating the progress of the work and kept on changing the timeline of delivery of possession. Further, there was an admission of the fact that until 2015, the occupation certificate had not been received. Thus, the obligation to handover possession within a period of thirty-six months was not fulfilled.

2. The first batch of nine flat purchasers moved a consumer complaint before the NCDRC complaining of a breach by the developer of the obligation, contractually assumed, under the terms of the ABA. Since the nine complainants purported to represent the entire group of flat purchasers, a notice of the complaint under Section 12(1)(c) of the Consumer Protection Act 1986 was published in the newspapers. An I.A. was filed before the NCDRC under Section 12(1)(c) which was subsequently disposed of by NCDRC, which led to an appeal before the Apex Court. Procedural directions issued upon several impleadment applications resulted in a further order of the Apex Court reiterating that the complaint would be treated as having been filed on behalf of 339 persons. By the aforesaid order, the Apex Court had laid down a peremptory time schedule of six months for the disposal of the complaint.
3. The NCDRC divided the group of 339 flat buyers into six groups based on whether or not they had taken possession, executed deeds of conveyance, settled the dispute or sold the flats before or during the pendency of the complaint or their applications for impleadment. While recording a finding of fact that there was an admitted delay on the part of the developer, the NCDRC held that the agreements provided compensation at the rate of Rs.5/- per square foot of the super area for every month of delay. The NCDRC held that the flat purchasers who agreed to this stipulation in the agreements were not entitled to seek any amount in addition. Further, the execution of the Deed of Conveyance by a flat purchaser would preclude a consumer claim being raised for delayed possession.
4. The NCDRC dismissed the consumer complaint filed by 339 flat buyers, accepting the defense of DLF Southern Homes Pvt. Ltd. and Annabel Builders and Developers Pvt. Ltd. that there was no deficiency of service on their part in complying with their contractual obligations and, that despite a delay in handing over the possession of

the residential flats, the purchasers were not entitled to compensation in excess of what was stipulated in the Apartment Buyers Agreement (**ABA**). Aggrieved by the order of the NCDRC, the Appellants have approached the Hon'ble Supreme Court.

Court's Observations:

- The Counsel for Appellants submitted that – i) There is a gross delay ranging between two and four years in handing over possession and the flat buyers ought not to be constrained by the terms of the agreement which are one-sided and unreasonable; (ii) The execution of conveyances or settlement deeds would not operate to preclude the flat buyers from claiming compensation; and (iii) The amenities which have been contracted for have not been provided by the developers. Pursuant to the aforesaid, the Counsel for Respondents submitted that – i) No evidence has been led by the complainants to discharge the onus placed upon them to establish coercion or duress while executing conveyances or settlements; (ii) Possession of the complex, comprising of 813 apartments in nineteen towers has been handed over between four to six years ago and the developer has transferred his right, title and interest to the Residents' Welfare Association ("RWA"); (iii) Out of 171 applicants, 145 have received compensation at the agreed rate while handing over possession; and (iv) Under clause 14 of the ABA, the flat buyers have been compensated at the rate of Rs 5 per square foot per month. No proof or measure of actual loss suffered has been adduced.
- The Court observed that the developer has accepted that there was a delay on his part which triggered of the liability to pay compensation. A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. Under Section 14(1)(e), the jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Further, in assessing the legal position, it is necessary to record that the ABA is clearly one-sided. Evidently, the terms of the agreement have been drafted by the Developer. They do not maintain a level platform as between the developer and purchaser. The stringency of the terms which bind the purchaser are not mirrored by the obligations for meeting times lines by the developer. The agreement does not reflect an even

bargain. Where, as in the present case, there has been a gross delay in the handing over of possession beyond the contractually stipulated debt, the Court is clear of the view that the jurisdiction of the consumer forum to award just and reasonable compensation as an incident of its power to direct the removal of a deficiency in service is not constrained by the terms of a rate which is prescribed in an unfair bargain.

- The Court further observed that the flat purchasers have invested their hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation. Thus, disapproving the view of NCDRC, the Apex Court held that flat purchasers who obtained possession or executed Deeds of Conveyance have not lost their right to make a claim for compensation for the delayed handing over of the flats.

After making the aforesaid observations, the Court has directed that - i) Except for eleven appellants who entered into specific settlements with the developer and three appellants who have sold their right, title and interest under the ABA, the respondents shall, as a measure of compensation, pay an amount calculated at the rate of 6 per cent simple interest per annum to each of the appellants. The amount shall be computed on the total amounts paid towards the purchase of the respective flats with effect from the date of expiry of thirty-six months from the execution of the respective ABAs until the date of the offer of possession after the receipt of the occupation certificate; ii) The above amount shall be in addition to the amounts which have been paid over or credited by the developer at the rate of Rs 5 per square foot per month at the time of the drawing of final accounts; and iii) The amounts due and payable in terms of directions (i) and (ii) above shall be paid over within a period of one month from the date of this judgment failing which they shall carry interest at the rate of 9% p.a. until payment.

⇒ **Scope of Challenge under Section 37 of the Arbitration and Conciliation Act, 1996**

The headline of Section 37 ("the Section") of the Arbitration and Conciliation Act, 1996 ("Act") reads "Appealable Orders". Section 37 provides an exhaustive list of orders that can be appealed against, and no second appeal can lie from an order passed under this

section except an appeal to the Supreme Court. The section is divided into 2 parts, the first subsection deals with appeals from orders of the court, i.e. orders passed under Section 9 and Section 34 of the Act, the second subsection provides for appeal against orders passed by arbitral tribunal, i.e. an order under section 16(2), 16(3) and Section 17 of the Act.

This Section comes into play most commonly as a second appeal against an order allowing or refusing to set aside an award under Section 34 of the Act. However, with an aim to reducing judicial scrutiny and interference in arbitration, the appeal mechanism under Section 37 is even narrower than under Section 34, which sets out grounds for challenging an arbitral award.

In 2013, Delhi High Court had laid down a standard for when an appellate court could intervene and reverse an order under Section 37 of the Act. In the case of *Morepen Laboratories Limited v. Phafag AG* (2013 (136) DRJ 668), the court held that the Division Bench as an appellate forum would intervene only if the Single Judge's determination about the award exceeding jurisdiction or being manifestly contrary to Indian law or substantive provisions is erroneous. Short of such threshold, this court, as an appellate court would not substitute its opinion for another plausible opinion adopted by the court of first instance. The Hon'ble Supreme Court also has often opined on the same line, recently in the case of *MMTC Ltd. vs. Vedanta Ltd.* (AIR 2019 SC 1168) where the court held that "As far as interference with an order made Under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference Under Section 37 cannot travel beyond the restrictions laid down Under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court Under Section 34 has not exceeded the scope of the provision." The Court in its rather boldly worded obiter dicta opined that Appellate Courts dealing with applications under Section 37 must be cautious and be "slow to disturb such concurrent findings".

The golden thread that flows through all judgments on the matter is that unless the decision of the first court under Section 34 is palpably erroneous on facts or in law, or manifestly perverse, it should not be disturbed: ***ADTV Communication v. Vibha Goel* (2018(3) ArbLR499(Delhi)); *MTNL v. Fujitsu India Pvt. Ltd.*, 2017(166)DRJ1; *M/S L.G. Electronics India (P) Ltd vs Dinesh Kalra*, 232(2016)DLT334.**

In *MTNL Ltd. v. Finolex Cables* (2017 (166) DRJ 1), the court has expanded and elucidated with examples on what grounds, an order under Section 34 can be disturbed under Section 37. If an award is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an

apparently untenable interpretation of the terms of the contract, it requires to be eviscerated. The Supreme Court has yet to lay down a standard on what is considered to be manifestly perverse and palpably erroneous in the terms of Section 37 of the Arbitration Act.

A strikingly different approach has been taken by the Hon'ble Delhi High Court, in **MMTC Limited vs. Anglo American Metallurgical Coal Pty. Ltd. (2020(2)ArbLR544(Delhi))**, wherein the court while recognizing that Section 37 is narrow in scope and shouldn't be interfered with lightly has held that if the conclusion of an arbitral tribunal, even if upheld by proceedings under Section 34, is not supported by clear-eyed reading of documents, the court should not flinch in correcting such a conclusion or inference. Hence, giving a window of opportunity to the courts to re-examine merits of a case while deciding a matter under Section 37 of the Act.

This judgement by the Delhi High Court has opened a small window of opportunity for judicial intervention. Judicial intervention in arbitration is a double-edged sword- on one hand it provides better checks and balances, on the other it can also open a Pandora's Box- which might lead to never ending challenges to arbitral awards.

Disclaimer:

For private circulation to the addressee only and not for re-circulation. Any form of reproduction, dissemination, copying, disclosure, modification, distribution and/ or publication of this Newsletter is strictly prohibited. This Newsletter is not intended to be an advertisement or solicitation. The contents of this Newsletter are solely meant to inform and is not a substitute for legal advice. Legal advice should be obtained based on the specific circumstances of each case, before relying on the contents of this Newsletter or prior to taking any decision based on the information contained in this Newsletter. ZEUS Law disclaims all responsibility and accepts no liability for the consequences of any person acting, or refraining from acting, on such information. If you have received this Newsletter in error, please notify us immediately by telephone.

Copyright © 2014 ZEUS Law. All rights reserved. Replication or redistribution