

# Newsletter

**DMD**<sup>®</sup>  
ADVOCATES

Edition 2

November-December 2018

It gives us immense pleasure to circulate the second edition of DMD Advocates' Newsletter.

In this edition, we have covered recent and relevant judgements/orders of the Supreme Court of India, the National Company Law Appellate Tribunal (NCLAT), the National Company Law Tribunal (NCLT) and the Competition Commission of India (CCI).

We hope you enjoy reading this edition and find it useful in your area of work.

*All of us at DMD Advocates wish you a prosperous New Year 2019 !!*

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Feedback and suggestions from our readers would be appreciated. Please feel free to send your comments, feedback and suggestions to [dmdadvocates@dumeds.com](mailto:dmdadvocates@dumeds.com)

## Case Law Updates

### **A conditional gift only becomes complete on compliance of the conditions in the gift deed: Supreme Court ([S. Sarojini Amma vs. Velayudhan Pillai Sreekumar](#))**

A two judge bench of the Supreme Court comprising Justice Indra Banerjee and Justice Arun Mishra, set aside a judgement of the High Court of Kerala, holding that a conditional gift only becomes complete on compliance of the conditions in the gift deed. The court stated that a conditional gift with no recital of acceptance and no evidence in proof of acceptance, where possession remains with the donor as long as he is alive, does not become complete during lifetime of the donor. When a gift is incomplete and title remains with the donor the deed of gift might be cancelled.

The court relying on its own judgement in *Reninkuntla Rajamma vs. K. Sarwanamma* ((2014) 9 SCC 445), opined that the fact that the donor had reserved the right to enjoy the property during her lifetime did not affect the validity of the deed. The court held that a gift

made by registered instrument duly executed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the donee. Such acceptance must, however, be made during the lifetime of the donor and while the donee is still capable of making an acceptance.

The court agreeing with the decision in *Reninkuntla Rajamma vs. K. Sarwanamma* stated there is no provision in law that ownership in property cannot be gifted without transfer of possession of such property. However, the conditions precedent of a gift as defined in Section 122 of the Transfer of Property Act must be satisfied. A gift is transfer of property without consideration. Moreover, a conditional gift only becomes complete on compliance of the conditions in the deed.

### **An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 cannot be rejected on the ground of “usurious and extortionate penal interest”: National Company Law Appellate Tribunal ([Sh. Naveen Luthra vs. Bell Finvest \(India\) Ltd. & Anr.](#))**

A National Company Law Appellate Tribunal (NCLAT) bench comprising Justice S J Mukhopadhaya (Chairperson) and Justice Bansi Lal Bhat (Member (Judicial)) have ruled that an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) cannot be rejected on the ground of “usurious and extortionate penal interest” which is governed by Section 3 of Usurious Loans Act, 1918.

NCLAT was hearing an appeal challenging an order passed by the Mumbai Bench of the National Company Law Tribunal (NCLT), whereby an application under Sec-

tion 7 of the Code for initiation of corporate insolvency resolution process against M/s. Luthra Water Systems Private Limited (corporate debtor) was admitted.

Mr. Luthra, one of the shareholders of the corporate debtor, had challenged this order, on the ground that an application under Section 7 of the IBC is not maintainable in view of “usurious and extortionate penal interest”, which is governed by Section 3 of Usurious Loans Act, 1918.

The NCLAT opined that the corporate insolvency resolution process is not a litigation and

is not decided by a court of law. The NCLAT further asserted that the adjudicating authority cannot exercise powers under the Usurious Loans Act, 1918. The NCLAT stated that, “the ‘Adjudicating Authority’ deals with the matter of insolvency, which in its first stage is required to take steps for ‘resolution’ of the ‘Corporate Debtor’. Therefore, the Adjudicat-

ing Authority being not a Court of law and as the Adjudicating Authority do not decide a money claim or suit, it cannot exercise any of the power vested under Sections 3 or 4 of the ‘Usurious Loans Act, 1918’”. Accordingly, the appeal challenging the order was dismissed and insolvency application was admitted.

## **Pendency of case under section 138 & 141 of Negotiable Instruments Act, 1881 amounts to admission of debt and not existence of dispute: NCLAT ([Sudhi Sachdev vs. APPL Industries Ltd.](#))**

An NCLAT bench comprising Justice S J Mukhopadhaya (Chairperson) and Justice Bansi Lal Bhat (Member (Judicial)) have ruled that the pendency of case under Section 138/141 of Negotiable Instruments Act, 1881 amounts to admission of debt and not an existence of dispute.

NCLAT was hearing an appeal preferred by Sudhi Sachdev, Promoter of M/s Auto Décor Pvt. Ltd. (Corporate Debtor) against order dated 2 August 2018 passed by the NCLT, New Delhi Bench, whereby an application under Section 9 of the IBC initiated by Respondent – APPL Industries Ltd. (Operational Creditor) was admitted. The NCLAT relied on the decision of the Supreme Court in Inno-

ventive Industries Ltd. vs. ICICI Bank and Ors. (2018)1 SCC 407 and held that, “it is not in dispute that there is a debt payable to the Operational Creditor and default on the part of the Corporate Debtor. The pendency of the case under Section 138/141 of the Negotiable Instruments Act, 1881, even if accepted as recovery proceeding, it cannot be held to be a dispute pending before a court of law. Thereby we hold that the pendency of the case under Section 138/141 of Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute.” Accordingly, pendency of a case under sections 138/141 would not bar relevant creditor from initiating proceedings under IBC.

## **Supreme Court upholds NCLAT order approving UltraTech Cement’s revised resolution plan for Binani Cement ([Binani Industries Limited vs. Bank of Baroda & Anr.](#))**

The Supreme Court on 19 November 2018 upheld NCLAT’s judgement (dated 14 November 2018) approving UltraTech Cement’s revised resolution plan for Binani Cement. The petition was filed before the Supreme Court by Dalmia Bharat’s Rajputana Properties challenging the NCLAT judgement. A bench of justices Rohinton Nariman and Navin Sinha dismissed the plea and upheld the NCLAT judgement.

NCLAT had held that, “[P]urpose of Resolution is for maximisation of value of assets of the ‘Corporate Debtor’ and thereby for all creditors. It is not maximisation of value for a ‘stakeholder’ or ‘a set of stakeholders’ such as

Creditors and to promote entrepreneurship, availability of credit and balance the interests. The first order objective is “resolution”. The second order objective is “maximisation of value of assets of the ‘Corporate Debtor’ and the third order objective is “promoting entrepreneurship, availability of credit and balancing the interests”. This order of objective is sacrosanct.” The NCLAT judgement has reaffirmed that the insolvency process must seek to extract maximum value from resolution of stressed assets and ensure that interests of operational creditors (who are not part of Committee of Creditors) are also well served.

## **E-commerce market in India not dominated by any one player: Competition Commission of India ([All India Online Vendors Association vs. Flipkart India Private Limited](#))**

Competition Commission of India (CCI), in an order dated 6 November 2018 in relation to information filed by the All India Online Vendors Association against Flipkart, has held that Flipkart and Amazon are not in contravention of Section 4 of the Competition Act, 2002. Section 4 deals with abuse of dominance.

The CCI stated that, “looking at the present market construct and structure of online marketplace platforms market in India, it does not appear that any one player in the market is commanding any dominant position at this

stage of evolution of market.”

The CCI also observed that, “the marketplace based e-commerce model is still a relatively nascent and evolving model of retail distribution in India and the Commission is cognizant of the technology-driven nature of this model. Recognizing the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the Commission is of the considered opinion that any intervention in such markets needs to be carefully crafted lest it stifles innovation.”

## **Ola, Uber not in contravention of Section 3 of the Competition Act: CCI ([Samir Agrawal vs. ANI Technologies Pvt. Ltd. & others](#))**

CCI, in an order dated 6 November 2018 in relation to information filed by Mr. Samir Agrawal against Ola and Uber, has held that Ola and Uber are not in contravention of Section 3 of the Competition Act, 2002. Section 3 deals with anti-competitive agreements. The CCI held that accession by the drivers to algorithmically determined prices by the platform (Ola/Uber) does not amount to collusion between the drivers.

The CCI observed that “there does not seem to be any fixed floor price that is set and maintained by the aggregators for all drivers and the centralized pricing mechanism cannot be viewed as a vertical instrument employed to orchestrate price-fixing cartel amongst the drivers. The Commission is of the view that the Informant has come to an erroneous conclusion, without placing any evidence on record, that an algorithm determined price as explained above will eliminate price competition and that the price so determined will be necessarily higher than the prices that are negotiated by drivers and the riders on an individual trip basis. Thus, the allegation of the Informant that the opposite parties im-

pose a resale price maintenance on the drivers, in contravention of Section 3(4)(e) of the Act, is not tenable.”

The CCI further rejected allegations with regard to price discrimination. CCI also rejected the informant’s allegation that Ola/Uber has facilitated a cartel of drivers in a digital mode and should be accorded a treatment/liability in a manner similar to that meted out by the Commission in the Builders Association v. Cement Manufacturers Association & Ors, (Case No. 29 of 2010 decided on 31.08.2016). The CCI stated that “Ola and Uber are not an association of drivers, rather they act as separate entities from their respective drivers. In the present situation, a rider books his/her ride at any given time which is accepted by an anonymous driver available in the area, and there is no opportunity for such driver to coordinate its action with other drivers. This cannot be termed as a cartel activity/conduct through Ola/Uber’s platform. Thus, the present case is different from the Cement case, not only with regard to adoption of digital App but also with regard to other relevant aspects as elucidated hereinbefore.”

## Events

### DMD Advocates' taxation partner Sachit Jolly spoke at the 31<sup>st</sup> LawAsia Conference in Cambodia



Taxation Partner, Sachit Jolly shared his views on “Tax Incentives in Indochina region” at the 31<sup>st</sup> LawAsia (The Law Association for Asia and the Pacific) Conference held in Siem Reap, Cambodia from 2-5 November 2018.

The LawAsia Annual Conference is a platform for the convergence of bar leaders, jurists, professional organisations and individual lawyers from across the Asia Pacific, and is designed to facilitate discussion of regional developments in law, including issues such as judicial practice, legal education, cross border business and investment law and cross-border dispute resolution.

### DMD Advocates' partner Sumit Sinha at the 19<sup>th</sup> AVCJ Annual Conference

Corporate Partner, Sumit Sinha represented DMD Advocates at the 19<sup>th</sup> AVCJ Annual Conference held in Mumbai on 4 December 2018. The event witnessed presence of over 250 private equity professionals from over 145 organizations across 15 countries including Guthrie Stewart, Global Head of Private Investments at PSP Investments; Sanjay Nayyar, CEO of KKR India; Juan Delgado-Moreira, Vice Chairman of Hamilton Lane; Madhur Deep, Head of Strategy, Alibaba Group; and Mohandas Pai, Co-Founder and Chairman of Aarin Capital to name a few.

## Deal Disclosure

### DMD Advocates advised Subros in relation to issuance of equity shares

DMD advised Subros Limited, an Indian company listed on the NSE and BSE and one of the leading manufacturers of thermal products for automotive applications in India, in relation to issuance of equity shares by way of preferential allotment to one its existing shareholders. The scope of work involved advising on the preferential allotment process under the Companies Act and the SEBI regulations. The Firm also analyzed the application of the Takeover Code and its implications on the transaction.

The team was led by Senior Partner and Head of Corporate Practice, Rashi Dhir and Partner, Sumit Sinha.

## Rewards & Recognition

DMD's Taxation Partner, Sachit Jolly featured in the India Business Law Journal's A- List of the top 100 lawyers - Click [here](#) to view the A-list

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