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THE FUTURE OF JUSTICE: EMERGENCE OF TECHNOLOGIES IN THE INDIAN JUDICIAL SYSTEM

N K Gupta
Founder & Managing Partner

We are in an age where we are seeing the transformative power of technology. Emerging technologies like artificial intelligence (AI), machine learning (ML), blockchain, and cloud computing are poised to revolutionize the judicial system, enhancing efficiency, accessibility, and transparency.

Digitalization of Court Proceedings

One of the most significant benefits of emerging technologies is the digitalization of court proceedings. The transition from paper-based to electronic systems can streamline case management, reduce administrative burdens, and facilitate collaboration among legal professionals. Electronic filing systems enable lawyers and litigants to submit documents remotely, saving time and costs associated with physical delivery and storage.

Furthermore, the digitization of court records enhances accessibility and transparency. Online repositories of court decisions and proceedings make legal information readily available to the public, empowering citizens to understand their rights and navigate the legal system more effectively.

As part of the eCourts project, seven platforms have been created to provide real-time case information, cause lists, judgments, and more to lawyers and litigants through various digital channels, including SMS Push and Pull (2,00,000 SMS sent daily) and email (2,50,000 sent daily), multilingual and tactile eCourts services Portal (35 lakh hits daily), JSC (Judicial Service centres) and Info Kiosks. In addition, Electronic Case Management Tools (ECMT) have been developed, with mobile apps for lawyers (total 1.88 cr. downloads till 30thJune 2023) and JustIS app for judges (19,164 downloads till 30th June 2023), facilitating access to case information and streamlining the judicial process.

Harnessing the Power of AI and ML

AI and ML are poised to play a pivotal role in transforming the judicial system. By analyzing vast amounts of legal data, AI algorithms can identify patterns, predict outcomes, and provide insights that can aid judges in making informed decisions.

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For instance, AI can assist in tasks such as:

Summarizing Complex Legal Issues and Documents
Identifying relevant case law
Assessing the likelihood of success in a particular case

The Ministry of Law and Justice places this digitization effort on its priority list for several compelling reasons. Historically, many people couldn't access the courts due to the high costs of travel, accommodation, and legal fees. However, digitization can significantly lower these barriers by enabling online case filing and remote participation in hearings. Moreover, digitization can reduce operational costs by curbing expenses related to paper usage and physical courthouse maintenance.
These capabilities can significantly reduce the time and effort required for legal research and analysis, allowing judges to focus on the substantive issues at hand.

E-filing

E-filing systems have revolutionized the way cases are initiated and managed, eliminating the need for physical submission of documents and streamlining the process for all parties involved. This has led to significant reductions in paperwork, improved data accuracy, and expedited case processing.

Blockchain for Secure Record-Keeping

Blockchain technology offers a secure and transparent solution for managing court records. By leveraging distributed ledger technology, blockchain can create an immutable record of court documents, preventing tampering and ensuring the integrity of the judicial process.
This technology can also streamline the exchange of information between courts and other legal entities, enhancing collaboration and reducing the risk of errors.

Challenges and Opportunities

Despite the transformative potential of emerging technologies, there are also challenges to consider. Data security remains a paramount concern, as the judicial system handles vast amounts of sensitive information. Robust cybersecurity measures and data privacy protocols are essential to protect this information from unauthorized access and breaches.
Additionally, the potential for bias and discrimination in AI algorithms is a critical issue. Careful design and implementation of AI systems are necessary to ensure fairness and impartiality in the judicial process.
Moreover, the judicial system must address the accessibility gap that may arise from the adoption of emerging technologies. Training and education programs are crucial to ensure that all legal professionals and litigants have the necessary skills and knowledge to navigate these new tools.

The Way Forward: A Future-Ready Judicial System

The future of the judicial system lies in embracing emerging technologies while addressing the ethical and practical considerations that accompany them. By carefully integrating these technologies into the legal landscape, we can create a more efficient, accessible, and transparent justice system for all.

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THE ROLE OF ARTIFICIAL GENERAL INTELLIGENCE IN CORPORATE AFFAIRS

Prem Chandra Vaish
Senior Mentor

The emergence of Artificial General Intelligence (AGI) has become a focal point of discussion, promising groundbreaking transformations across various sectors. AGI, characterized by comprehensive knowledge and cognitive computing capabilities, envisions a future where machines possess intellectual capacities indistinguishable from humans. Though currently confined to the realms of science fiction, the theoretical prowess of AGI lies in its ability to access and process colossal datasets at unprecedented speeds.

The Essence of AGI

Artificial General Intelligence, or AGI, represents the pinnacle of AI capabilities—a system designed to emulate the comprehensive cognitive abilities of humans. AGI's defining feature lies in its adaptability to tackle unfamiliar tasks, showcasing a level of intelligence that transcends specialized AI systems. The vision is for AGI to perform any task within the realm of human capability, a concept that aligns with diverse perspectives, including computer science's goal-oriented definition and psychology's emphasis on adaptability.

OpenAI's journey towards AGI took an unexpected turn with the revelation of a project called Q*. This breakthrough project, as reported by Reuters, triggered safety concerns among employees, leading some to express reservations about its potential threat to humanity.

Jensen Huang, CEO of Nvidia, a key player in the AI revolution, has even **predicted the potential arrival of AGI within the next five years.** The anticipation of AGI raises both excitement and concerns, especially considering its transformative impact on various industries.

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AGI, as conceptualized in computer science, represents the pinnacle of artificial intelligence—an intelligent system possessing not just specialized capabilities, but a holistic understanding comparable to human cognition. Unlike existing AI systems that excel in specific tasks, AGI aims for versatility, encompassing a broad range of intellectual functions. At present, genuine AGI systems remain speculative, awaiting the day when science fiction transitions into reality.

One of the defining aspects of AGI lies in its potential to outstrip human capacities. The theoretical framework suggests that AGI could perform tasks with an efficiency and sophistication akin to human intelligence, if not surpassing it. The key differentiator lies in the ability of AGI to navigate and analyze vast datasets at speeds unattainable by the human mind. This comprehensive knowledge-processing capability positions AGI as a transformative force in the corporate world.

Corporate Affairs and AGI

The use of AGI in corporate affairs promises to revolutionize the way businesses operate, strategize, and make decisions. The sheer speed and efficiency with which AGI can process information open avenues for enhanced data-driven decision-making. From analyzing market trends to optimizing supply chain operations, AGI holds the potential to become an invaluable asset in corporate boardrooms.

Strategic Decision-Making

AGI's cognitive computing capabilities provide a unique advantage in strategic decision-making processes. By swiftly synthesizing and interpreting vast datasets, AGI can offer executives unparalleled insights, enabling them to make informed and agile decisions. The adaptability of AGI to diverse business domains positions it as a strategic partner in navigating the complexities of the corporate landscape.

Challenges and Ethical Considerations

While the prospect of AGI in corporate affairs is exhilarating, it brings forth a set of challenges and ethical considerations. Issues related to job displacement, data privacy, and the potential concentration of power must be carefully addressed. Striking a balance between harnessing the benefits of AGI and mitigating its risks is crucial for responsible integration into corporate ecosystems.

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CONUNDRUM UNDER GST SURROUNDING REFUND OF TAX PAID UNDER MISTAKE: A REVIEW

Puneet Agrawal
Sr. Partner

In a tax regime, refund is an essential mechanism for the release of excess amount paid by an assessee under the relevant statute. Under the GST regime, the substantive provision pertaining to refund has been provided under section 54 of the Central Goods and Services Tax Act, 2017 (hereinafter "CGST Act"). A claim for refund may arise pertaining to tax or any other amount paid by an assessee. As per section 54, a refund application may be filed within 2 years from the relevant date.

Circumstances may arise, where excess payment of tax is on account of mistake of law or fact and only later the assessee comes to know about such mistake. There may be varying factual situation for example as assessee may continue paying tax under mistake while his supply may not be leviable to tax at all. In some cases, an assessee might have taken a demand of tax twice because of some clerical error. It may so happen that the assessee comes to know of its mistake after two years have already elapsed.

The issue becomes relevant as refund applications for refund of tax paid under mistake are rejected for being barred by limitation. The present article discusses the relevant provisions and the latest judicial pronouncements in this regard.

Relevant Provision

The relevant section 54 of the CGST Act, provides that any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date. Moreover, section 54(8) provides for scenarios where the refund is required to be directly credited in the account of the Applicant, wherein 54(8)(e) provides that:

> ***"54. Refund of tax***
> ***(1) Any person claiming refund ……***
> ***(2) ….***
> ***(8) Notwithstanding anything contained in subsection (5), the refund amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-***

(a)...

(e) the tax and interest, if any or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person."

Moreover, as per section 54(14)(2)(h), the relevant date in 'any other case' is the date of payment of tax.

Thus, from a bare reading of the above provisions it appears that in case of refund of excess tax paid, an assessee shall be entitled to the refund of the same within two years from the date of payment of tax. However, the question remains can the above limitation of two years be made applicable to the refund of tax paid under mistake of law.

In this regard, it is pertinent to note that as per Article 265 of the Constitution of India, no tax can be levied or collected without the authority of law. Tax deposited by an assessee under a mistake cannot be retained by the department, by circumscribing the constitutional mandate.

Relevant Judicial Pronouncement

This issue has obtained the attention of the Hon'ble Constitutional courts:

1. In M/s Comsol Energy Private Limited vs. State of Gujarat, 2021 (55) G.S.T.L 390 (Guj.), the Hon'ble Gujarat HC has held that Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. It has been held that since the amount of IGST collected by the Central Government is without authority of law, the Revenue is obliged to refund the amount erroneously collected. The Hon'ble High Court has underpinned that the amount so collected by the Revenue is not tax collected by them and, therefore, Section 54 is not applicable.
2. Likewise in Delhi Metro Rail Corporation vs. Additional Commissioner, CGST, W.P.(C) 6793/2023, the Hon'ble Delhi High Court held that the period of limitation for applying for a refund as prescribed under section 54 of the CGST Act, would not apply where GST is not chargeable and it is established an amount has been deposited under a mistake of law.

Way Forward

There may be various situations where assessee have wrongly paid tax not payable in first place. We have referred some illustrative situations in the earlier part of this article. If any such situation of tax payment arises, made under mistake, the assessee may take support of the of above cited decisions. Since the Hon'ble courts have clarified the law holding that amount paid under mistake is not a tax. It is therefore suggested that while filing refund claim, the said aspect is highlighted in the claim filed with the department.

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ENFORCING ARBITRAL AWARDS IN INDIA: A GUIDE TO DOMESTIC AND FOREIGN AWARDS

Vijay Sharma
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In the realm of commercial disputes, arbitration has emerged as a preferred mode of alternative dispute resolution (ADR) due to its efficiency, confidentiality, and finality. The Arbitration and Conciliation Act, 1996 (Arbitration Act), forms the legal framework governing arbitration in India. Under the Arbitration Act, arbitral awards are categorized as either domestic or foreign, with distinct enforcement procedures outlined for each.

There are two types of awards that are classified for the purpose of enforcement proceedings:
1. Domestic awards: These are awards that are made in arbitral proceedings where the place of arbitration is in India (as per section 2(7) of the Arbitration Act).
2. Foreign awards: These are awards that are governed by Chapter I and Chapter II of Part II of the Arbitration Act.

India is party to the New York Convention, Geneva Protocol, and Geneva Convention for enforcing arbitral awards.

Enforcement of Arbitral Awards

When it comes to enforcing domestic arbitration awards, section 36 of Part I of the Arbitration Act applies. This means that these awards are enforced in the same way as court decrees under the Code of Civil Procedure 1908 (CPC) and are generally enforceable unless the award debtor can demonstrate his right to challenge the award on any of the grounds listed in section 34 of the Arbitration Act.

On the other hand, foreign arbitration awards are enforced under Part II of the Arbitration Act. They are treated as if they were court judgments, provided that the court handling the case is convinced that they meet the requirements of Part II of the Arbitration Act (as set out in section 49). Generally, foreign arbitration awards can be enforced unless the party opposing enforcement can provide evidence for any of the reasons listed in Section 48 of the Arbitration Act. Additionally, the court may refuse enforcement if it finds that any of the requirements mentioned in Section 48(2) are fulfilled.

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In a recent case titled Cholamandalam Investment & Finance Company v. Amrapali Enterprises (2023 SCC OnLine Cal 605), the Calcutta High Court clarified that an arbitration award issued by a unilaterally appointed arbitrator will be considered non-existent ("non-est"). This provision cannot be enforced as per Section 36 of the Arbitration and Conciliation Act, even if it has not been set aside under Section 34. The Court emphasized that the executing court does not have the power to interfere with the award, but it can declare it legally invalid, treating it as null and void. The court can direct the parties to resolve their dispute before an unbiased and impartial arbitral tribunal, as an award from a tribunal lacking inherent jurisdiction is not valid.

In another case titled Hindustan Zinc Limited v. National Research Development Corporation (2023/DHC/000475), the Delhi High Court clarified that arbitration awards can only be challenged under Section 34 of the Act, with limited grounds for challenge as specified in Section 34(2). The Act does not permit dual challenges, which means that an award cannot be contested on its merits during enforcement proceedings.

Grounds for refusing enforcement

Domestic Awards

Section 34 of the Arbitration Act outlines the grounds for challenging a domestic award. An applicant, upon filing an application, must demonstrate that:

- the party was under some incapacity;
- the arbitration agreement lacked validity under its governing law;
- proper notice of the arbitrator's appointment or the arbitral proceedings was not given, or the party was otherwise unable to present their case;
- the award addressed a dispute not contemplated by or falling outside the terms of the arbitration submission; or the composition of the arbitral tribunal or procedure deviated from the parties' agreement or the applicable law.
- Additionally, the court, either on its own initiative or otherwise, can determine that the subject matter of the dispute is not suitable for arbitration, the award conflicts with India's public policy, or, for a domestic award not arising from international commercial arbitration, the award is tainted by a patent illegality apparent on its face.

It's noteworthy that, with the exception of patent illegality, these grounds mirror those in Article 34 of the UNCITRAL Model Arbitration Law.

Foreign Awards

Indian courts have the authority to decline the enforcement of foreign awards according to section 48 of the Arbitration Act, if certain conditions are met:

- An applicant establishes that they were under some incapacity.
- Proper notice was not given regarding the appointment of the arbitrator or the arbitral proceedings, and the party was consequently unable to present their case.
- The award addresses a matter not contemplated by or falling outside the terms of the arbitration submission, or it includes decisions on issues beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal did not adhere to the parties' agreement or the law of the country where the arbitration occurred.
- The award has not yet become binding on the parties or has been set aside or suspended by the relevant authority in the country where, or under the law by which, the award was made.

It is noteworthy that even if a ground under section 48 is established, the discretionary language in the provision ("may" be refused) allows the court the discretion to permit enforcement, unless the objection pertains to the lack of jurisdiction or a violation of Indian public policy, as established in the case of Government of India v. Vedanta Limited and Ors, AIR 2020 SC 4550.

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AGREEMENT TO SELL AND CONVEYANCE: UNDERSTANDING THE DIFFERENCE

Deepak Vijay
Sr. Partner

Introduction

In a recent order the Supreme Court reinforced a crucial principle in property transactions: an agreement to sell does not confer title or transfer ownership to the intended purchaser. The ruling came in response to a case where the execution of an agreement to sell a property in May 1990 was questioned.

Agreement To Sell: A Brief Introduction

An agreement to sell is a contractual arrangement wherein the transfer of ownership will occur at a future date or upon fulfilling specific conditions. It's crucial to realize that although though this agreement is a crucial part in the process of buying and selling of real estate, it doesn't truly make the ownership transfer or grant the buyer title.

Acting as a roadmap for the future sale, the Agreement to Sell essentially lays out the terms, circumstances, and timeframes. It often includes details on the purchase price, the terms of the payments, the date of possession, and any additional conditions that must be met for the deal to go through. Having said that, the seller retains ownership of the property until the completion of the remaining processes.

Background of the Case:

The crux of the dispute centers around an Agreement to Sell a property, executed on May 28, 1990, for Rs. 23,000. The appellant paid the entire consideration and took possession of the property. The agreement stipulated the transfer of all rights to the appellant, but the sale deed's registration was deferred due to restrictions under the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1996 (the "Fragmentation Act"). The Act prohibited registration of certain sale deeds. After the Fragmentation Act was repealed on February 5, 1991, the appellant continually demanded the sale deed. After a legal notice was delivered on September 3, 2001, a lawsuit for particular performance was filed on October 1, 2001, due to the respondents' refusal.

The Trial Court rejected the claim because the statute of limitations had expired and there were questions about whether the Agreement had been executed. The complaint was filed within the allowed period, according to the First Appellate Court, which nevertheless granted the appeal. On November 10, 2010, the High Court ruled in a Second Appeal that the Agreement to Sell was null and void due to its violation of the Fragmentation Act.

Verdict of the Supreme Court:

This ruling was reversed by the Supreme Court, which made it clear that the Agreement to Sell does not transfer ownership and cannot be in violation of the Fragmentation Act. Holding that the agreement to sell is not a conveyance; it does not transfer ownership rights or confers any title, the bench comprising Justices Vikram nath and Rajesh Bindal said:

"*The Agreement to Sell is not a conveyance; it does not transfer ownership rights or confers any title. What is prohibited or barred under the Fragmentation Act was the lease/sale/conveyance or transfer of rights. Therefore, the agreement to sell cannot be said to be barred under the Fragmentation Act.*"

The Supreme Court noted that the High Court erred in its interpretation. The Agreement to Sell, as a mere preparatory document, did not contravene the Fragmentation Act. The Act primarily barred only the lease/sale/conveyance or transfer of rights.

Analysis and Conclusion:

The judgment underscores the distinction between an Agreement to Sell and actual conveyance. It highlights the Agreement to Sell's nature as not transferring ownership but rather indicating intent to sell. This distinction is vital, emphasizing that ownership is not transferred until the sale is completed through a conveyance deed.

In the context of real estate transactions, the legal intricacies surrounding the transfer of ownership rights and title can be complex and nuanced. It's vital to remember that a "Agreement to Sell" does not instantly establish ownership or title—a point that is frequently misunderstood.

It is critical to realise that a property does not automatically acquire title or ownership rights just because an agreement to sell is in place. Even though this preliminary contract is an important part of the real estate transaction process, the ownership transfer cannot be completed without further legal procedures, most notably the execution and registration of a Sale Deed.

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DIGITAL EVIDENCE PROCEEDINGS: KEY INSIGHTS FROM RECENT JUDICIAL DECISIONS

Anil Kuamr Gupta
Sr Mentor

In the realm of digital evidence proceedings, a series of recent judicial decisions shed light on the nuances surrounding the admissibility of electronic records and the necessity of certification under Section 65B of the Evidence Act. These cases, including the notable State of Karnataka vs. T. Naseer @ NASIR@THANDIANTAVIDA NASEER @ UMARHAZI @ HAZI & others, offer crucial guidance on the use of electronic records as primary evidence and the implications of non-compliance with certification requirements.

1. Electronic Records as Primary Evidence: Anwar's Case

The judicial journey begins with the case of Anwar, where the court emphasized that a certificate under Section 65B is not mandatory if an electronic record serves as primary evidence. The distinction between primary and secondary evidence, particularly in the context of CDs and other recording instruments, is crucial. The court clarified that if an electronic record is used as primary evidence under Section 62 of the Evidence Act, it is admissible without strict compliance with Section 65-B conditions.

2. Arjun Panditrao Khotkar's Case: Original vs. Copies

Subsequently, in Arjun Panditrao Khotkar's case, the court highlighted the difference between the original information in a computer and the copies made from it. While the former constitutes primary evidence, the latter falls into the category of secondary evidence. The judgment emphasized the necessity of a Section 65-B certificate when relying on copies, underscoring the importance of understanding the nature of the evidence presented.

3. Non-Production of Section 65-B Certificate: A Curable Defect

In the case of State of Karnataka v. M.R. Hiremath, the court took a pragmatic approach by declaring the non-production of a Section 65-B certificate as a curable defect. The court cited earlier judgments to support this stance, emphasizing that the defect could be rectified during the document marking stage. This ruling provides flexibility in addressing procedural lapses concerning certification.

4. Timing of Section 65-B Certificate Production

Addressing the timing of Section 65-B certificate production, Arjun Panditrao Khotkar's case reiterated that the certificate can be introduced at any stage if the trial is not concluded. The court emphasized the need for a balanced approach, ensuring that the accused is not unfairly prejudiced. This flexibility in the presentation of certificates aligns with the overarching goal of upholding truth and ensuring a fair trial.

5. Fair Trial and Section 65-B Certificate: Striking a Balance

The court's decision underscores that a fair trial in a criminal case is not solely about fairness to one party; rather, it aims to prevent the guilty from going free and the innocent from being wrongly punished. Allowing the prosecution to produce a Section 65-B certificate at a later stage is seen as a measure to uphold truth, provided it does not cause irreversible prejudice to the accused. The accused retains the opportunity to challenge and rebut such evidence, ensuring a fair and just legal process.

In conclusion, the recent judicial decisions provide valuable insights into the evolving landscape of digital evidence proceedings. Understanding the nuances of using electronic records, distinguishing between primary and secondary evidence, and recognizing the flexibility in the timing of Section 65-B certificate production are crucial aspects that legal practitioners and stakeholders must consider in the digital age.

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NATIONAL HERALD CASE SAGA

Tarun Rohatgi
Sr. Mentor

The recent action of Enforcement Directorate in attaching properties worth Rs 751.9 crore in connection with its probe into the money laundering case against National Herald newspaper, owned by the Congress-linked Young Indian has brought the case to the front and in centre of the political slugfest between the two major parties in India.

The rivalry between Congress and BJP marks the political landscape in India. Both the parties have accused each other of committing several scams and crimes. Whether these allegations are real or fake, neither party can be absolved of the offence of corruption.

What is the National Herald Case?

The National Herald newspaper was established in 1938 by Jawahar Lal Nehru with the purpose of "reflecting the policy and principles of the Indian National Congress". The National Herald was owned by the Associated Journals Limited (AJL), which had suffered huge losses due to the declining revenue from the newspaper. In a bid to revive the National Herald, AJL took a Rs. 90 crore interest free loan from Congress. However, this was not sufficient to revive the newspaper, and AJL could not pay back the loan it took.

Subsequently, in 2010, a private not-for-profit company, Young Indian was established. Sonia Gandhi and Rahul Gandhi are on the board of directors, as well as owned 38% shares each. The effective control of the company rested with Sonia Gandhi and Rahul Gandhi. Therefore, Congress assigned their debt to Young Indian. Since AJL could not pay back its loan, it transferred most of its shareholding and real estate properties, estimated to be approximately Rs. 50 Billion to Young Indian.

In 2012, Subramanian Swamy filed a case against Sonia Gandhi and Rahul Gandhi.

Allegations by Subramanian Swamy

(a) Section 29A,B,C of Representation of People Act, 1951 & Section 13A of Income Tax Act, 1961: It was alleged that the interest free loan given by Congress to AJL is illegal. He argued that loans by political parties is illegal if it is given for commercial purposes.

(b) Misappropriation, Criminal Breach of Trust, Cheating & Criminal Conspiracy under the Indian Penal Code: It was alleged that Young Indian was established as a sham to convert public money for personal use. If AJL had been liquidated, its shareholders would have received a profit on the money they had originally invested. Further, the real estate properties were given to the National Herald on concessional rates only for publishing purposes. However, since 2008, these properties were not utilized for publishing purposes.

Since 2012, the case has been pending before the courts. In 2014, ED initiated an investigation under the Prevention of Money laundering Act based on an Income Tax assessment of Young Indian. In 2019, and more recently in 22023 2023 , ED attached properties of Young Indian in the National Herald case.

Defense of Congress

Congress has maintained the stance that Young Indian is a not-for-profit company. Therefore, any financial benefit that the company gains is not distributed to the shareholders. Further, they argue that all assets of AJL are owned by the company, and no transfer has taken place. In this circumstance, there can be no question of money laundering. Lastly, they have argued that loans by political parties cannot be deemed to be a criminal offence, which had already been clarified by the Election Commission.

ED's Role in the Case

Congress has claimed that this case is merely an attempt to defame the party, and garner votes for the upcoming election. Further, the use of PMLA has been weaponized by BJP to humiliate and target people.

Since 2012, the case has been pending before the courts. In 2014, ED initiated an investigation under the Prevention of Money laundering Act based on an Income Tax assessment of Young Indian. In 2019, and more recently in 22023 2023 , ED attached properties of Young Indian in
It has been reported that between 2014 and 2021, since BJP came into power, 121 politicians have been investigated by the ED where 95% of the politicians belong to rival political parties. This led to several parties filing a joint petition before the supreme court. They demanded an examination of the role of the ED. They argued that the ED has been weaponized to target politicians from rival parties. On the other hand, politicians from BJP are often let go or face extremely slow trial proceedings. However, Supreme Court rejected this plea, and refused to lay down blanket guidelines without any factual evidence.

Added to this, several recent amendments have increased the scope of PMLA and strengthened the powers of the ED. This comes after the Supreme Court upheld the provisions of PMLA in 2022. They argued that the ED's powers to search, seize and arrest were not arbitrary. They argued that the PMLA contained sufficient safeguards against arrest and confessions under the Act.

The ED has defended itself by maintaining that it has a 96% conviction rate. However, this statistic must be treated with a grain of salt. The conviction rate is only based on the completed trails. While there has been an increase in the number of cases registered by the ED, the slow pace of investigations and trials have led to several pending cases. There have been 24 convictions out of a total of 5906 cases registered.

Conclusion

BJP has often been criticized for curbing the voices of their opponents. The opposition have claimed that use of ED as an "extended arm" of the party to threaten politicians, activists and journalists is fundamentally against the rule of law.
The question of whether Congress is liable for the offence of money laundering or fraud is one to be decided by the courts. However, the National Herald case showcases the need to examine the powers of central agencies such as the Enforcement Directorate.

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SUPREME COURT VALIDATES IBC PROVISIONS ON PERSONAL GUARANTORS

Jatin Sehgal
Sr. Partner

In a radical decision by the Apex Court, in the matter of **Surendra B. Jiwrajika and Anr. vs. Omkara Assets Reconstruction Private Limited**, the constitutionality of key provisions under Part-III, Chapter-III of the Insolvency and Bankruptcy Code, 2016 (IBC) pertaining to the Insolvency Resolution of Personal Guarantors has been upheld by the Supreme Court.

Petitioner's Contentions:

The petitioners challenged the validity of Sections 95(1), 96(1), 97(5), 99(1), 99(2), 99(4), 99(5), 99(6), and 100 of the IBC, alleging a breach of natural justice and due process of law. The petitioners claimed that the personal guarantor was denied the opportunity to present their case or dispute the appointment of Resolution Professional, rendering the provisions arbitrary and violative of Article 14 of the Constitution of India.

Let's briefly overview the sections being challenged:

1. Section 95: This section empowers creditors to initiate insolvency proceedings against personal guarantors, with the Adjudicating Authority appointing the Resolution Professional, and the personal guarantor has no opportunity to contest this appointment.
2. Section 96: An interim moratorium is imposed upon filing an application for the resolution process, preventing coercive actions by creditors. However, it allows the personal guarantor to continue dealing with their assets.
3. Section 99: The Resolution Professional is mandated to review the application within 10 days of appointment and submit a report recommending approval or rejection.
4. Section 100: The Adjudicating Authority decides on the admission or rejection of the application after hearing both the applicant/creditor and the personal guarantor, considering the Resolution Professional's Report. Admission triggers a moratorium under Section 101, preventing the personal guarantor from transferring or disposing of assets.

Supreme Court's Decision:

In a judicious analysis, the Supreme Court affirmed the constitutionality of Sections 95 to 100 of the IBC and observed that the absence of an opportunity for a hearing during the pre-admission stage does not violate the natural justice and further held that the right to be heard is a flexible principle that adapts to the specifics of each case.

stice and further held that the right to be heard is a flexible principle that adapts to the specifics of each case.

The Court clarified that the interim moratorium under Section 96 is a protective measure, shielding the personal guarantor from legal actions arising from the debt until the insolvency application is heard under Section 100. The Court emphasized that the absence of manifest arbitrariness in the law precludes judicial interference to rewrite legislative mandates.

Importantly, the Supreme Court highlighted that the recommendatory report by the Resolution Professional is not binding. The Resolution Professional's role is one of facilitation, involving gathering information and recommending acceptance or rejection. Actual adjudication occurs under Section 100 by the Adjudicating Authority after the Resolution Professional submits their report.

This landmark judgment provides much-needed clarity to the evolving landscape of personal insolvency laws in India. It is noteworthy that the IBC Part-III, Chapter-III currently applies exclusively to personal guarantors to corporate debtors, underscoring the significance of this ruling in shaping the contours of insolvency proceedings involving individuals.

Analysing the potential impact of the Supreme Court's Judgment on the Insolvency and Bankruptcy Code (IBC):

Boosting Creditor Confidence: The affirmation of the IBC's provisions, especially those related to personal guarantors, is likely to instil greater confidence among creditors. This newfound assurance may empower the creditors to initiate insolvency proceedings against guarantors with increased confidence, fostering a more assertive approach in the pursuit of debt recovery.

Enhancing Clarity and Predictability: The clarity provided by the Supreme Court's ruling holds the potential to improve predictability within the insolvency framework. This newfound clarity could contribute to smoother and more efficient resolution processes. By addressing ambiguities that may have previously hindered creditor actions, the judgment may pave the way for a more streamlined and predictable insolvency regime.

Promoting Caution among Promoters: The judgment may induce a sense of caution among promoters and individuals providing personal guarantees for corporate debts. Even promoters of solvent companies might exercise greater circumspection when extending personal guarantees, considering the potential risks highlighted by this landmark judgment. This cautious approach could lead to more prudent decision-making regarding the assumption of personal liabilities.

In conclusion, the Supreme Court's judgment on the IBC has the potential to reshape dynamics within the insolvency landscape. By fostering creditor confidence, enhancing clarity, and promoting caution among promoters, the ruling may contribute to a more robust and predictable insolvency framework in the Indian legal landscape.

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SUPREME COURT: MAGISTRATE CANNOT REVIEW A PROTEST AGAINST THEIR OWN DECISION TO TAKE ACTION

In a recent legal ruling, the Supreme Court provided clarity on the jurisdiction of a Judicial Magistrate regarding the entertainment of a protest petition contesting their own order of taking cognizance based on a final report. The case under scrutiny involved a Chief Judicial Magistrate who, subsequent to receiving a final report from the Crime Investigation Department, took cognizance against a singular accused for the crime of murder.

Subsequently, the victim's father, feeling aggrieved, lodged a protest petition, contending that the Magistrate had neglected to take cognizance against other implicated individuals. In response, the Chief Judicial Magistrate issued an additional order on November 3rd, acknowledging the remaining accused. Dissatisfied with this, the latter group initiated a petition before the High Court under Section 482 of the Code of Criminal Procedure (CrPC). Despite the High Court's dismissal, the appellants sought a remedy from the Supreme Court.

The High Court, in rejecting the appellants' plea, grounded its decision on the precedent established by the Supreme Court in the case of Nupur Talwar vs. CBI and Anr (2012) 2 SCC 188. The appellants argued in the Supreme Court that Nupur Talwar was distinguishable as it related to a Magistrate's competence to entertain a protest petition against a closure report by the investigating agency. Concurring with the appellants, the Supreme Court expressed astonishment at the Magistrate's consideration of a protest petition challenging their own order of cognizance. The Court explicitly asserted that a Magistrate lacks the inherent authority to modify a prior order taking cognizance.

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The Court observed:

"Such a course was not permissible as it was not open for the learned Chief Judicial Magistrate to entertain a protest petition against his earlier order of taking cognizance. The order dated 3rd November, 2009, amounts to modification of the earlier order dated 9th April, 2009, which was not permissible as there is no power conferred on the learned Judicial Magistrate to modify earlier order of taking cognizance."

The court observed that the case of Nupur Talwar dealt with a completely different set of circumstances. Upon endorsing the appeal, the court invalidated the subsequent order issued by the Chief Judicial Magistrate, wherein cognizance was taken against the appellants.

Ramakant Singh & Ors. v The State Of Jharkhand & Anr (2023 INSC 1002)

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OVERSEAS DIRECT INVESTMENT IN REAL ESTATE: INTERPRETING DEFINITIONS AND PERMISSIBILITY

Navigating Overseas Direct Investment (ODI) in the real estate sector demands a thorough understanding of regulations, particularly concerning the definition of "Real Estate Activity" and the permissibility of various investment facets.

1. Definition of "Real Estate Activity":

Rule 19(1) of Foreign Exchange Management (Overseas Investment) Rules,2022, assumes significance in shaping our analysis, defining the permissible scope of ODI in relation to real estate. This rule prohibits Overseas Direct Investment in foreign entities engaged in Real Estate Activity. However, the definition itself warrants careful scrutiny due to its nuanced stipulations.

The definition encompasses "buying and selling of real estate" and "trading in TDRs" while explicitly excluding "the development of townships, construction of residential or commercial premises, roads, or bridges for selling or leasing." Notably, the exclusion of leasing creates an interpretative space regarding the permissibility of buying and leasing activities within ODI.

2. Permissibility of Buying Property for Leasing:

Interpreting the permissibility of buying property for leasing revolves around the exclusionary language within the definition. The absence of leasing from explicitly prohibited activities suggests its potential consideration outside the confines of "real estate activity." It's crucial, however, to align leasing activities with post-construction timelines, as implied within the definition.

3. Permissibility of Trading in Real Estate:

The language of the definition seemingly prohibits direct buying and selling within the realm of real estate trading. Various trading activities, including acquiring completed properties for resale in their current state, might require further clarification for their allowance under ODI regulations.

4. The Purpose behind ODI:

A critical aspect underpinning ODI regulations is the emphasis on investments geared towards genuine business activities rather than passive income accumulation. This principle guides our practical observations:

- Buying and selling real estate are explicitly prohibited.
- The permissibility of buying and leasing falls within a grey area.
- Construction followed by subsequent selling or leasing is permissible.

Conclusion:

In conclusion, the intricate landscape of Overseas Direct Investment (ODI) in the real estate sector demands a meticulous interpretation of regulatory nuances, with a particular focus on the definition of "Real Estate Activity." Rule 19(1) serves as the compass, delineating the permissible scope of ODI and setting boundaries for investment activities.

The definition's careful dissection reveals a dual nature, permitting certain real estate activities while expressly excluding others. The exclusion of leasing from the explicitly prohibited activities creates an intriguing interpretative space, fostering considerations of its potential permissibility outside the confines of "real estate activity." Nevertheless, a cautious approach underscores the necessity of aligning leasing endeavours with post-construction timelines, a vital nuance implied within the definition.

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The permissibility of buying property for leasing purposes, thus, hinges on a delicate balance of regulatory interpretation and practical application. This balance becomes even more critical when considering the exclusionary language that seemingly restricts direct buying and selling in the realm of real estate trading. Activities such as acquiring completed properties for resale necessitate further clarification of their alignment with ODI regulations.

The underlying purpose behind ODI regulations echoes a commitment to fostering genuine business activities rather than mere accumulation of passive income. The delineation of permissible and prohibited activities reflects this commitment:

- The explicit prohibition of buying and selling real estate.
- The acknowledgement of a grey area concerning the permissibility of buying and leasing.
- The endorsement of construction followed by subsequent selling or leasing as permissible.

In essence, ODI in real estate emerges as a complex yet dynamic endeavour, requiring a nuanced understanding of regulatory intricacies. As stakeholders navigate this multifaceted landscape, adherence to fair market rates, arm's length principles, and the overarching philosophy of ODI as a conduit for genuine business activities remain paramount.

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OVERVIEW OF BROADCASTING SERVICES (REGULATION) BILL, 2023

INTRODUCTION :

The recent call for public input by the Union Ministry of Information and Broadcasting on the Broadcasting Services (Regulation) Bill, 2023 reflects a proactive approach to the transformative shifts in the broadcasting landscape. Over the past three decades, the Cable Television Networks (Regulation) Act of 1995 has been the primary regulatory framework for content on linear broadcasting, primarily through cable networks. However, technological advancements have ushered in a new era, redefining how content is produced, distributed, and consumed.

The emergence of Direct-to-Home (DTH), Internet Protocol Television (IPTV), and Over-The-Top (OTT) services has not only expanded the reach of content but has also altered consumption patterns, providing viewers with greater flexibility in choosing when and how they engage with media. The digitisation of the broadcasting sector, particularly in cable TV, has prompted a critical reassessment of the regulatory framework governing this rapidly evolving industry. The draft Bill seeks to replace the outdated Cable Television Networks (Regulation) Act of 1995 and other existing policy guidelines, recognising the need for a more contemporary and consolidated framework.

About the Bill:

The Draft Broadcasting Services (Regulation) Bill, 2023, is a significant legislative proposal comprising six chapters, 48 sections, and three schedules. The bill expands its regulatory purview to cover Over-The-Top (OTT) content and digital news, areas currently governed by the IT Act, 2000, and its regulations.

Acknowledging the dynamic nature of the broadcasting industry, the bill introduces comprehensive definitions for modern broadcasting terms and incorporates provisions that anticipate and accommodate emerging technologies. The bill also places a strong emphasis on strengthening the self-regulation regime. Through the introduction of 'Content Evaluation Committees and the transformation of the existing 'Inter-Departmental Committee into a more participative 'Broadcast Advisory Council,' the legislation seeks to enhance industry self-regulation. This recognises the role of industry stakeholders in shaping and adhering to ethical broadcasting standards, fostering a more collaborative and inclusive regulatory environment.

Section 3 of the Bill elaborates on the Applicability of Chapter II:
a. Part A shall apply to
(i) broadcasters referred to in section 11,
(ii) cable broadcasting networks, and
(iii) satellite broadcasting networks,

b. Part B shall apply to radio broadcasting networks,
c. Part C shall apply to internet broadcasting networks and
d. Part D shall apply to terrestrial broadcasting networks.

A significant feature of the draft bill is its provision for differentiated Programmes and Advertisement Codes across various services. This allows for a nuanced approach, recognising the diverse nature of broadcasting content and the responsibilities of different service providers. Furthermore, the bill addresses the specific needs of persons with disabilities by incorporating enabling provisions for issuing comprehensive accessibility guidelines.

Introducing statutory penalties, including advisory, warning, censure, and monetary penalties, demonstrates a commitment to enforcing compliance. Notably, the bill ensures a balanced approach to regulation by reserving imprisonment and fines for severe offences. The bill also addresses infrastructure sharing among broadcasting network operators and the carriage of platform services and streamlines the Right of Way section for more efficient relocation and alterations. Establishing a structured dispute resolution mechanism further contributes to the overall effectiveness of the regulatory framework.

Conclusion:

The Broadcasting Services (Regulation) Bill of 2023, therefore, signifies a crucial step in aligning regulatory frameworks with the evolving nature of the industry. It is expected to address the challenges posed by traditional cable networks and the intricacies associated with the rapidly growing digital and online platforms. The solicitation of public comments underscores the government's commitment to inclusive policy-making, ensuring that diverse perspectives and stakeholder inputs are considered in shaping the future of broadcasting regulations in the country.

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