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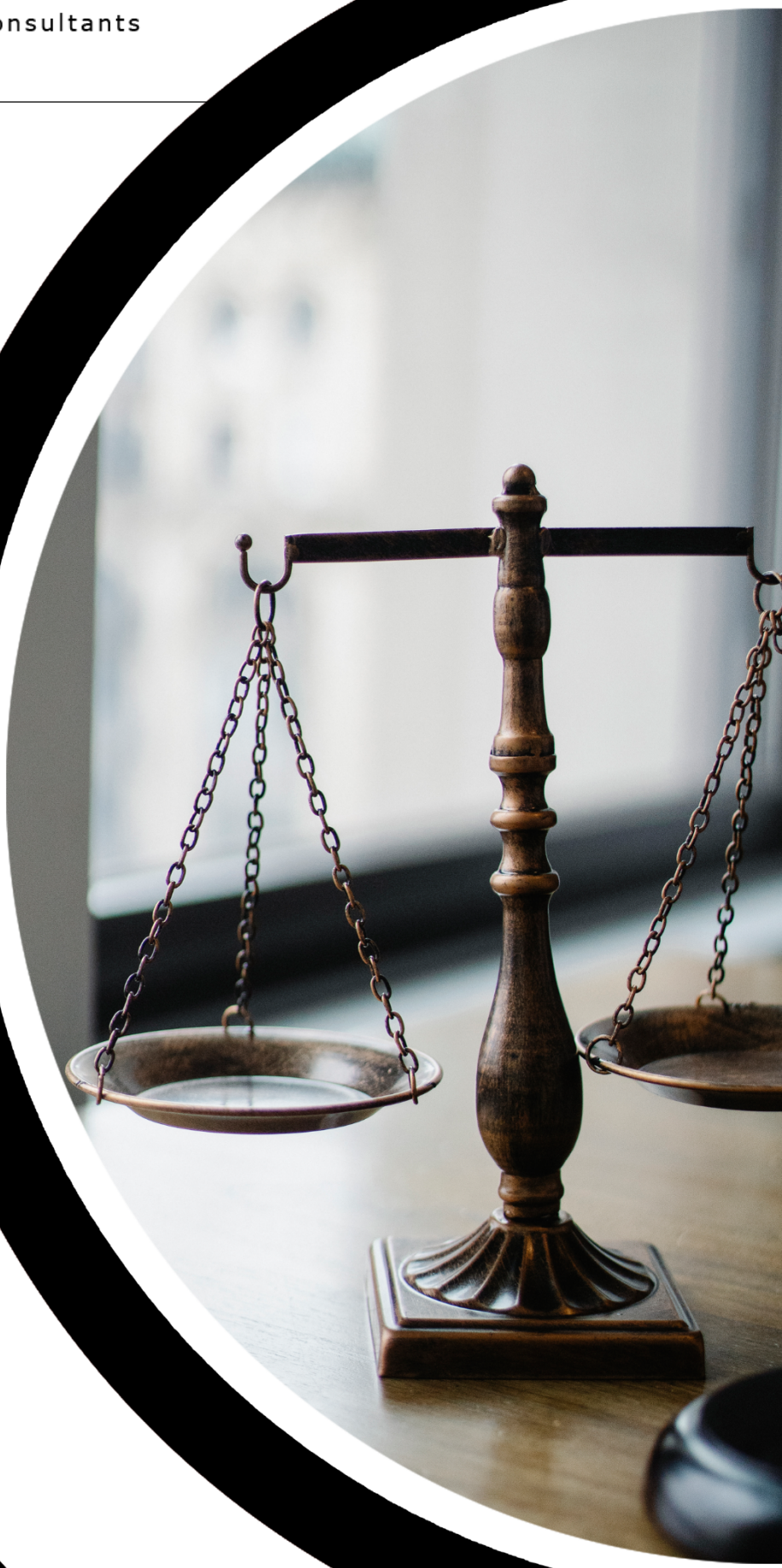

N K Gupta, Founder & Managing Partner

CONDITIONS FOR THE MAINTAINABILITY OF WRIT PETITION

The Constitution of India guarantees its citizens with Fundamental Rights enshrined in Part III of the Constitution of India. The Fundamental and legal rights are protected under the writ Jurisdiction of the Hon'ble Supreme Court and the High Court, as they are the most important pillars in sustaining the rule of law. The principles of writ jurisdiction are incorporated under Articles 32, 226 and 227.

A Writ is an immediate and effective remedy for injustice and an exceptional remedy that can be used only under exceptional circumstances. However, the Supreme court and the High Courts have the sole discretion to decide whether to exercise writ jurisdiction. The jurisdiction of The Supreme Court and The High Court under Articles 32, 226 and 227 are concurrent and independent of each other so far as fundamental rights are concerned. A person has a choice of remedies. He may move to the Supreme Court under Article 32 or an appropriate High Court under Articles 226 and 227. If his grievance is that a right other than a fundamental right is violated, he will have to move to the High Court which has the jurisdiction. He may appeal to the Supreme Court against the decision of the High Court.

The following listed are the circumstances in which an individual or an aggrieved person can file a writ petition-

I. To help or assist citizens in defending their fundamental or legal rights against any kind of violation. If there is a failure of justice or the aggrieved person has not been given a reasonable opportunity of being heard, then also the aggrieved person may approach the High Court or the Supreme Court directly.
II. To provide an alternative to the aggrieved person when an impugned order is not objected by the appeals filed to the higher authorities in the legal system. In such instances, where appeal is not allowed or appeal is not preferred by the aggrieved person within the stipulated time for reasons beyond the control of parties, the remedy of filing a writ petition is the natural recourse.
III. To ensure that justice is served and not denied. If there are any situation where fundamental or legal rights have been infringed or an injustice has occurred then the aggrieved person may approach the court.

Furthermore, the court analyses the substance of the injustice as well as a holistic perspective of the facts of each case when determining whether the writ should be maintained. A writ is an immediate remedy for injustice and a device for citizens' rights. It is an exceptional remedy that can only be used under exceptional circumstances.

When a remedy or method for enforcing a right or liability is prescribed by a statute, reference must be made to that specific statutory remedy before using the discretionary remedy under Articles 226 and 227 of the Constitution. This rule of the "exhaustion of legislative remedies" is one of convenience, policy, and judgement.

For instance, there is no tribunal formed for GST matters. Hence, an appeal for GST matters shall be filed as writ.

Grounds for the non- maintainability of writ petition

Some of the grounds for the non-maintainability of writ petition are as follows:

Disputed Factual Issues:

The High Court may decide to reject jurisdiction in a writ petition when there are disputed factual issues.

Doctrine of *Laches:*

The principle embodied in equity's maxim is "Delay defeats equity". It is a fundamental principle of the administration of justice, *Vigilantibus non dormientibus aequitas subvenit* that the court aids only those individuals who are vigilant about their rights and not the ones who are dormant. Claims which have been delayed unreasonably in being brought forward may be rejected. This, of course, requires judicial discretion.

Alternative remedy:

The High Court has the authority to refuse to hear a writ petition. One of the restrictions on the High Court's power is where an appropriate alternative remedy is offered to the aggrieved party. Although an alternate remedy does not deprive the High Court of its powers under Articles 226 and 227 of the Constitution, however a writ petition should not normally be entertained when an effective alternate remedy is given by law. However, there are certain exceptions to this as well. It has been highlighted in a catena of judgements, where the court is accepting writ despite the presence of an arbitration clause:

The Hon'ble Supreme Court cited in ***State of Uttar Pradesh v. Mohammad Nooh***[1], that the mere existence of alternative platforms where the aggrieved party may seek relief does not exclude the High Court from exercising its writ jurisdiction. The court also held that the mere presence of an alternative resolution mechanism would have no effect on the High Court's fundamentally discretionary writ jurisdiction, and therefore the same cannot be an absolute legal bar to the High Court's writ jurisdiction.

The Hon'ble apex court laid down the following principles in ***Radha Krishan Industries v. State of H.P***[2]**.** (2021) 6 SCC 771 :-

1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

3. Exceptions to the rule of alternate remedy arise where:

a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution.
b) there has been a violation of the principles of natural justice;
c) the order or proceedings are wholly without jurisdiction; or
d) the vires of a legislation is challenged.

4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the

[1] The State of Uttar Pradesh vs. Mohammad Nooh (30.09.1957 - SC) : MANU/SC/0125/1957
[2] Radha Krishan Industries v. State of H.P (2021) 6 SCC 771

view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.[3]

Conclusion:

The Court has stated unequivocally that parties are not required to seek other types of legislative assistance unless rendered helpless or there is proof of bad faith. Parties should remember that, while the Court's authority under Articles 32, 226 and 227 of the Constitution is extensive and all-encompassing, it is only available in exceptional circumstances.

Note: This article is not an extensive view of the subject, it is only a brief view.

[3]https://www.scconline.com/blog/post/2021/04/20/explained-rule-of-alternate-remedy-and-maintainability-of-writ-petitions-under-article-226-of-the-constitution/
Existence Of An Alternate Remedy Cannot Exclude Writ Jurisdiction Of High Court : Supreme Court (livelaw.in)

Executive Summary

1. **No stay on the proceedings under section 19(2),66 and 67 of IBC initiated against the personal guarantors in view of interim moratorium under section 96 provided under another insolvency petition.** *...Page no. 8*

The Hon'ble National Company Law Appellate Tribunal (NCLAT) (New Delhi), in the matter of ***Ashok Mahindru Anr. Vs. Vivek Parti***, has upheld the order of NCLT, New Delhi and declined to stay proceeding initiated against the Personal Guarantors in a petition considering interim moratorium imposed under section 96 of IBC.

2. **Mandatory Pre- Litigation Mediation vis-a-vis Draft Mediation Bill, 2021 and International Trends:** *...Page no. 8*

The Mediation Bill was introduced in the Rajya Sabha on December 10, 2021, and was then referred to a Parliamentary Standing Committee on Personnel, Public Grievances, Law, and Justice for examination, which issued a report on July 13, 2022, recommending significant amendments. In 2008, the European Union passed a directive with the broad goal of encouraging mediation in cross-border economic disputes. Italy, like Canada, Singapore, Australia, and parts of the United States, chose mandatory mediation. The overall conclusion is that there is a large percentage of settled disputes where parties are forced to mediate.

3. **DGFT has issued several notification regarding the exports and imports :** *... Page no. 10*

- Notification No. 46, Dated 30th November 2022 whereby annual SCOMET update is notified to extend the appendix 3 to schedule 2 of ITC classification which was supposed to come into the effect after 30 days.
- Notification No. 43, Dated 9th November 2022 whereby DGFT has made certain amendments to improve the services.
- Notification No. 40, Dated 28th October 2022 whereby restriction on sugar have been extended.
- DGFT vide circular No. 44, Dated 17th November 2022.certain relief have been announced in order to maintain average export obligations in EPCG cases.

Apart from this, DGFT has also issued certain notices:

1. Whereby validity of pre-shipment agency has been extended.

2. Where SION E 110 has been replaced by SION E 136 which will cover the export and import of wheat. Also, export of wheat flour is allowed under Advance Authorization Scheme.

3. Whereby DGFT has allowed all those applicants who have submitted online applications to submit physical copies by 31st December 2022 in TMA cases.

4. **Does LLP fall within the ambit of Body Corporate for the purpose of GST Reverse Charge or not??** *…Page no.11*

The Haryana Advance Ruling Authority has held that LLP is a body corporate for the purpose of GST RCM. It is pertinent to note that RCM can be casted only upon the body corporate. As per the RCM notification, LLP is also a partnership firm but only if it has been formed and registered. The same view has been supported by 20th GST Council Meeting.

5. **Doctrine of Lifting of Corporate Veil and Trusts**

By Tarun Rohatgi, Sr. Mentor (Income Tax)

The concept of corporate veil and it's lifting thereof is judicially well recognized however when it comes to applying the doctrine to Trusts , the concept of "*corporate veil* " has not been sufficiently judicially explored or expounded .

The recent decision by the Hon'ble Madras High Court ***CIT* v. *MAC Public Charitable Trust*[4] [2022] 144 taxmann.com 54** deals with the lifting of "*corporate veil in case of a trust* " . Though the judgement covers many issues but this article analyses it only from the point of view of lifting of *corporate veil* in case of Trusts.[5]

For full article, please refer to the following link:
https://www.taxmann.com/preview-document?categoryName=direct-tax-laws&fileId=105010000000022286&subCategory=experts-opinion&searchText=145%20taxmann.com%20132

[4] *CIT* v. *MAC Public Charitable Trust*[4] [2022] 144 taxmann.com 54

[5] https://www.taxmann.com/preview-document?categoryName=direct-tax-laws&fileId=105010000000022286&subCategory=experts-opinion&searchText=145%20taxmann.com%20132

- **Corporate Laws**

By: Jatin Sehgal, Advocate, Sr. Partner

No stay on the proceedings under section 19(2), 66 and 67 of IBC initiated against the personal guarantors in view of interim moratorium under section 96 provided another Insolvency Petition.

The Hon'ble National Company Law Appellate Tribunal (NCLAT) (New Delhi), vide its Order dated 29.11.2022 passed in Company Appeal (AT) (Insolvency) No.1324 of 2022 in the matter of ***Ashok Mahindru Anr. Vs. Vivek Parti***, has upheld the order of NCLT, New Delhi and declined to stay proceeding under Section 19(2) and Section 66 & 67 of IBC initiated against the Personal Guarantors in an insolvency petition considering interim moratorium imposed under section 96 in another petition filed u/s 9 of the IBC.
The Hon'ble NCLAT further clarified that **"what is contemplated to be stayed is the proceeding relating to debt, which means a liability or obligation in respect of a claim which is due from any person. Interim moratorium shall be for such proceedings which relate to a liability or obligation due i.e., due on date when interim moratorium has been declared. Section 96(1)(b) cannot be read to mean that any future liability or obligation is contemplated to be stayed."**

Thus, it was held that the stay of proceedings under Section 19(2) and Section 66-67 is not contemplated under Section 96(1)(b) and the scheme of Code in no matter provide for stay of such applications irrespective of moratorium as per Section 96 of the IB Code.

- **Mandatory Pre- Litigation Mediation vis-a-vis Draft Mediation Bill, 2021 and International Trends**

By: Akanksha Sheoran, Advocate, Sr. Partner

The Mediation Bill was tabled in the Rajya Sabha on December 10, 2021 and subsequently referred to a Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice for review, which recommended substantial changes via its report on July 13, 2022.

As per an Article by David Bilbe, *"The European Union in 2008 issued a directive with the general objective of promoting mediation in cross-border commercial disputes. Italy elected for compulsory mediation as have Canada, Singapore, Australia and parts of the US. The general finding is that there follows a high percentage of settled disputes where parties are compelled to mediate".*[6]

This piece attempts to examine the concept of mandatory pre-litigation mediation, its proposed introduction via the proposed bill and relevant international trends.

The Mediation Bill 2021 aims to *"promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost-effective process and for matters connected therewith or incidental thereto".*[7]

It proposes mandatory pre litigation mediation. Parties who fail to attend pre-litigation mediation without a reasonable reason may incur a cost which is a concern because as per Article 21 of the Constitution, access to justice is a constitutional right which cannot be fettered or restricted. To review it in an international context too it would not successfully align itself with Article 6 of the European Convention on Human Rights and the right to a fair trial.

Another concern which is also one of the objections of the standing committee is Clause 26 wherein court-annexed mediation, including pre-litigation mediation will be conducted as per the directions and rules of the Supreme Court or High Court which again is against the spirit of the constitution. On the other hand, it does lay down safeguards to protect the rights of litigants to approach competent courts for urgent relief. It provides for the process to be confidential and also provides immunity against disclosure in certain cases. Further, the mediation process will culminate into a Mediation settlement Agreement (MSA) which will be legally enforceable and can be registered with the relevant legal authorities within 90 days to authenticate the record of settlement. Finally, the Bill treats international mediation as domestic when conducted in India with the settlement agreement being recognized as a judgement or decree of a court. Hence, The

[6] https://www.lawyer-monthly.com/2022/08/what-are-the-pros-and-cons-of-compulsory-mediation/

[7] The Mediation Bill, 2021

Singapore Convention will not be applicable as it does not apply to settlements that already have the status of judgement or decree. It would be a huge setback to the idea of projecting India as a cross border mediation hub as it would fail the test of worldwide enforceability**.**

Civil litigation is by no means time and cost effective and usually is stressful for parties to a dispute. Mediation does offer an effective alternative dispute resolution option. Mandatory mediation can and will reduce the backlog burden on the Judicial System. As observed across all conflicts, mediation can be 80% effective in resolving matters at first attempt – and even more so at second or third attempt. However, to quote David Bilbe, *"an experienced mediator the distinction needs to be drawn between the obligation to attempt mediation and a genuine objective to settle in good faith. A system of mandatory mediation is unlikely to change the attitude of parties to a dispute unless they understand and can see the possible benefits".*[8]

Mandatory pre-litigation mediation would become a redundant continuum from dispute to judgement. Meeting of mind, full knowledge and good faith by both parties is preemptive for the process to be effective and meaningful, else it will be a barrier to justice and a stage to go through rather than a holistic alternative to costly litigation. If the process is misunderstood or abused in any way then it will be a barrier to justice. In our opinion, mediation should be retained as a flexible and effective parallel process and a highly successful alternative to litigation which does not deny access to justice.

- **Foreign Trade Policy**

By: JM Gupta, Sr. Mentor

Few notifications issued by DGFT regarding the exports and imports:

1. Directorate General of Foreign Trade has issued Notification No. 46/2015-2020 Dated 30th November 2022 whereby annual SCOMET update 2022 is notified to extend appendix 3 (SCOMETs ITEMS) to schedule 2 of ITC(HS) classification of export and import items 2018. In order to provide transition time to industry this notification shall come into effect after 30 days of the date of this notification.

[8] https://www.lawyer-monthly.com/2022/08/what-are-the-pros-and-cons-of-compulsory-mediation/

2. Directorate General of Foreign Trade has issued Notification No.43 /2015-2020 Dated 9th November 2022 whereby DGFT has made certain amendments in FTP to permit exports benefits/ fulfilment of export obligations, for invoicing, payment and settlement of exports and imports in INR as per RBI AP (DIR series) circular no 10 dated 11/7/2022.
3. Directorate General of Foreign Trade has issued Notification No. 40 /2015-2020 Dated 28th October 2022 whereby restrictions on exports of sugar (raw, refined and white sugar) are extended till 31/10/2023. Other conditions notified earlier shall remain unchanged.
4. Directorate General of Foreign Trade has issued Public Notice No.39/2015- Dated: 30th November 2022 whereby validity of reshipment inspection agency as listed in appendix 2G of A&ANF has been extended from 3/12/2022 to 31/12/2022.
5. Directorate General of Foreign Trade has issued Public Notice No.38/2015- Dated: 25th November 2022 whereby SION E110 stands deleted. The export of wheat flour (atta) is allowed under Advance Authorization Scheme. Accordingly, a new SION E 136 is notified for this purpose and import of wheat is placed under appendix 4J with pre import condition. Domestic procurement is not allowed in such cases.
6. DGFT vide circular no 44 dated 17/11/2022 certain relief is announced in maintaining average export obligations in EPCG cases for the year 2021-22. Such relief is provided in sectors where there is a decline in exports of more than 5%. In 2021-22 as compared to 2020.21.
7. Vide trade notice no 21/2022-23 dated 25th November 2022, DGFT has decided to allow all those applications of who have submitted online applications for exports made upto31/3/2021 to submit physical copies along with prescribed documents with Ras by 31/12/2022 in TMA cases.

- **IDT and Goods & Services Tax**

  By: Rakesh Garg, Sr. Mentor

  Meaning of "Body Corporate" for the purposes of GST Reverse Charge (RCM)

1. Recently, in the case of **AS & D Enterprises LLP** [No. HR/HAAR/05/2022-23 dated 22.09.2022], with regard to payment of GST on security services, the Haryana Advance Ruling Authority (AAR, in short) held that "Limited Liability Partnership" (LLP, in short) will be considered as "body Corporate" for the purposes of payment of GST [Reverse Charge Notification No. 13/2017-CT(R) dated 28.06.2017] since, for the purposes of the Companies Act, the term "body corporate" includes "LLP".

2. Besides security services, number of other services have been notified under section 9(3) of the GST Act, where reverse charge liability (RCM, in short) has been casted only upon the body corporates on services received from the persons other than body corporates.

3. With this advance ruling by the Haryana Authorities, a confusion arose, what is the meaning of "body corporate" for the purposes of GST RCM liability; and whether a "LLP" would be termed as "body corporate"? Another confusion crops up in the mind of Advocate LLPs is whether RCM is applicable in relation to legal services provided by the firm of advocates: i.e., *whether Firm includes LLP?*

4. Referring Explanation (e) to the RCM Notification No. 13/2017-CT(R): for the purposes of this notification, a "Limited Liability Partnership" (LLP, in short) formed and registered under the provisions of the Limited Liability Partnership Act, 2008 shall also be considered as a partnership firm or a firm.

5. No doubt, LLP is a body corporate for the purposes of the Companies Act, 2013; yet RCM Notification has considered LLP also as a partnership firm or a firm; and applying the principles of interpretation, the said Explanation (e) cannot be made redundant or otiose.

Notwithstanding the Companies Act, under the Income Tax Act also, LLP has been considered as a Partnership Firm. It is a famous saying that the Parliament has all the rights to deem everything as anything, except a man to a woman or vice-a-versa, subject to framework of the Constitution of India. And once the deeming fiction is applied, full effect must be given to it.

6. Therefore, in view of specific explanation in the RCM Notification itself, we may conclude that, even though LLP is also a body corporate, yet it shall be

considered a Partnership Firm or Firm for the purposes of the GST RCM notification.

7. So far as Advocate LLPs are concerned, in the 20th GST Council meeting held on 05 Aug 2017, it was clearly decided that partnership firm or a firm includes LLP for the purposes of levy (including exemption therefrom) of GST on legal services.

8. Whether Society and Trust are a body corporate: -

A body corporate, in general, means a body which has been or is incorporated under some statute and which has a perpetual succession, a common seal and is a legal entity apart from the members constituting it. A body which requires merely registration, is not a body corporate. One of the essence lies between the distinctions of the two terms: Incorporation and Registration.

As per Circular No. 8(26)/2(7)/63-PR, dated 13.03.1963 issued by the Department of Corporate affairs under the 1956 Act, it was stated that the term "body corporate" does not include a society registered under the Act, 1860 for the purpose of the Act, 1956. Moreover, a society does not fulfil the characteristics of a body corporate. In relation to Trust, in the case of Duli Chand vs. Mahabir Prasad Trilok Chand Charitable Trust - AIR 1984 Del 145 (Del. HC), the High Court observed, "It is well known that a trust is not a legal entity as such it is not like a corporation which has a legal existence of its own, and therefore, can appoint an agent. A trust is not in this sense a legal entity."

Therefore, Trust is also not a body corporate.

Reach us:

N.K. Gupta
Advocate
Founder & Managing Partner

delhi@legalworldgroup.com

+91-9911152709; 011-35730674

011-35730703

www.legalworldgroup.com

Registered Office:

105, Sagar Plaza, District Centre, Laxmi Nagar, New Delhi 110092

Head Office:

C-582, Defence Colony, New Delhi-110024

Offices:

Haryana; Uttar Pradesh; Uttarakhand; Jammu & Kashmir; Punjab; Chandigarh (UT); Rajasthan; Madhya Pradesh; Tamil Nadu; Kerala;