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Articles

Diagnosing the issues of E-pharmacies

By **Ahalya Chalasanil**

With the increasing usage of internet, sale of most day to day things have gradually changed from traditional shops to online retail. Pharmacies are no exception to this. Though retail E-pharmacies began in Europe sixteen years ago, India is a recent entrant into this arena. Of late, there has been a lot of debate on the pros and cons of E-pharmacies and the risks involved. The latest judgments of Delhi and Madras High Courts, imposing a ban on E-pharmacies, are a result of the imminent risks posed by E-pharmacies in the absence of proper regulation.

This article analyses the various issues associated with E-pharmacies while giving an overview of Draft E-pharmacy Rules, 2018 and drawing a parallel between India, Europe and United States of America in relation to E-pharmacy regulations.

Regulations governing sale of drugs in India

At present, sale of drugs in India is regulated by Drugs and Cosmetics Act, 1940 ("Act") and Drugs and Cosmetics Rules, 1945 ("Rules"). The Act and Rules govern the offline sale of drugs and do not prescribe any specific regulations for online sale. The Pharmacy Act, 1948 and Pharmacy Practice Regulations, 2015 are also relevant for sale of drugs as they impose certain obligations and duties on pharmacists in connection with preparation and sale of drugs. To regulate the sale of drugs online, a Sub-Committee was constituted by the Drugs Consultative Committee, which is a statutory body under the Act. Based on the recommendations of this Sub-Committee submitted in its report in the year 2016, the Draft E-pharmacy Rules, 2018 ("Draft Rules") were notified by the Ministry of Health and Family Welfare on August 28, 2018.

While there are many advantages associated with E-pharmacies such as easy accessibility to drugs, competitive pricing etc., there are also a few challenges. It will be difficult to monitor the number of times drugs are ordered through a single prescription. This increases the risk of drug abuse, especially Schedule X drugs and other such drugs which are prohibited for sale without a prescription. Further, minors and children can also order drugs online due to easy internet access and it will be a challenge to monitor who is actually procuring the medicines through E-pharmacies. As is associated with any product purchased online, the risk of getting fake or unauthentic drugs is imminent in case of E-pharmacy as well.

Ban on E-pharmacies

A petition[1] was filed by one Dr. Zaheer Ahmed in Delhi High Court, seeking a ban on sale of drugs online. This petition was filed after he came across one of his patients who obtained certain Schedule X drugs through an E-pharmacy without any prescription. The Delhi High Court imposed an interim ban on sale of drugs online till January 8, 2019.

[1] *Zaheer Ahmed vs Union of India & Anr*, Writ Petition (C) No:11711/2018

Another petition[2] was filed in the Madras High Court seeking a ban on sale of drugs by the Tamil Nadu Chemists and Druggists Association. The Madras High Court also imposed an interim ban on sale of drugs online from December 20, 2018 until regulations are notified by the Government in this regard. However, after an appeal, the ban was suspended temporarily by the Madras High Court while reserving its orders on stay of the interim ban.

The position on sale of drugs online is somewhat unclear at the moment. However, more clarity is expected after the judgments in the aforementioned matters are pronounced and once the final regulations are notified.

Overview of the Draft Rules

The Draft Rules attempt to tackle the various risks posed by E-pharmacies. Some of the important measures proposed by Draft Rules include-

1. *Registration of E-pharmacies* – No person is allowed to sell drugs online without obtaining registration for the same.
2. *E-pharmacy portal* – All orders for E-pharmacies shall be placed only through E-pharmacy portal. Therefore, it is mandatory for every E-pharmacy to have an E-pharmacy portal.
3. *Protection of privacy* – E-pharmacies should keep all customer information confidential including prescription related information and adhere to applicable information technology laws in India. Further, E-pharmacy portal should be established in India and the data generated should be localised.
4. *Sale through cash/credit memo* – The supply of drugs by E-pharmacies shall be made only against a cash or credit memo and such memos should be maintained as record.
5. *Measures to tackle counterfeit drugs, unauthorised sale and expired products* -
   i) Details like name, address and license number of the licensee who is dispensing the drugs, should be mentioned on the memo.
   ii) Serial number and date of the memo should be mentioned on the memo.
   iii) Details of the drug including name, quantity, batch number, expiry date, manufacturer name should be mentioned on the memo.
   iv) Details of E-pharmacy including name, address and signature/ digital signature of registered pharmacist in-charge should be mentioned on the memo.
6. *Prohibition of certain Drugs* – E-pharmacies are prohibited from selling drugs covered under the categories of the narcotic and psychotropic substance as referred to in the Narcotic Drugs and Psychotropic Substances Act, 1985 , tranquilizers and the drugs as specified in Schedule X of the Rules.
7. *Periodic Inspection of E-pharmacy* - The premises from where the E-pharmacy business is conducted shall be inspected, every two years, by the concerned authorities.
8. *Details of Drugs and Patients on the E-pharmacy portal* - The details of the drugs dispensed including the patient details shall be maintained on the e-pharmacy portal.
9. *Verification by registered pharmacist* – Every prescription received on E-pharmacy portal should be verified by a registered pharmacist on behalf of the E-pharmacy and details of the patient, registered medical practitioner shall be checked.

[2] *Tamil Nadu Chemists and Druggists Association vs Union of India & Ors*, Writ Petition (C) No:28716/2018

10. *Prevention of unauthorised sale* – All E-pharmacies shall be required to maintain and update information regarding the drugs availability, types of drugs offered for sale, supply channels or vendor lists, details of registered pharmacists, registered medical practitioner etc.

Sub-Committee recommendations vis-à-vis Draft Rules

While the Draft Rules are definitely a step towards regulating E-pharmacies and tackling the imminent risks associated with them, there are a few lacunae in the Draft Rules which may hinder the effective implementation of a few recommendations of the Sub-Committee.

One of the recommendations of the Sub-Committee is to create a National Nodal Platform for transacting and monitoring online sale of drugs. However, the Draft Rules provide only for an E-pharmacy portal and not a nodal platform, which may restrain proper centralised tracking and monitoring of transactions that will take place through online platforms. Constituting a National Nodal Platform would help tackle the challenges posed by an E-pharmacy such as drug abuse, multiplicity of orders, tracking of nation-wide range of customers and the drugs sold to such customers.

European Union ("EU") law on E-pharmacies

Though there were regional laws and regulations on E-Pharmacies in Europe, the need for an international agreement or regulation on online sale of drugs became evident in the EU after the 2003 case[3] involving Germany and Netherlands.

This case concerned the sale of prescription and non-prescription drugs in Germany by one DocMorris company, a company established in Netherlands. DocMorris was accused of illegal practice by the German Association of Pharmacists. Drugs could be ordered from the company through several ways including phone, fax, online etc. However, few products offered by the company were 'prescription-only' in Germany or the Netherlands. The European Court of Justice held that Member States may not prohibit sale of non-prescription drugs online however, a Member State may prohibit distance selling of prescription drugs.

1. <u>EU logo for online sale of medicines</u>

   The European union introduced a common logo for regulating E-pharmacies through the Falsified Medicines Directive[4] and later the European Commission adopted it[5]. This logo on an E-pharmacy website ensures safety of the drugs and authenticity of the website. The European Commission adopted the common logo in June, 2014 and currently, all E-pharmacies in European Union are required to display this logo.

2. <u>Directive on falsified medicinal products</u>

   This Directive[6] is applicable since January 2013 and introduces measures to fight medicine falsifications and ensure that medicines are safe and trade in medicines is effectively regulated. Significant measures imposed by this Directive are as follows:

   i) *Tracking and tracing*: The measures provide for a unique identifier and an anti-tampering device on the outer packaging of medicines.

   ii) *Stricter Rules on import of certain ingredients*: Directive on falsified medicinal products mandates written

[3] *Deutscher Apothekerverband v 0800 DocMorris NV*, (2003) C-322/01

[4] Directive 2011/62/EU
[5] Implementing Regulation 699/2014
[6] Supra 4

confirmation from competent authorities to import certain active ingredients.

US Law on E-Pharmacies

In US, E-pharmacies are governed by both federal and state legislations. Amongst existing regulations governing E-pharmacies in US, a few notable measures include –

i) *Mandatory registration for sale of controlled substances*: Every pharmacy that dispenses controlled substances[7] must be registered with the Drug Enforcement Administration (DEA)

ii) *Electronic Prescription for Controlled Substances (EPCS)*: While maintaining control on controlled substances, under this rule, practitioners are enabled to issue electronic prescriptions for controlled substances.

iii) *In-person Medical Evaluation*: Under the Ryan Haight Online Pharmacy Consumer Protection Act, 2008, any practitioner issuing a prescription for controlled substance must conduct in-person medical evaluation at least once every 24 months.

Conclusion

Regulation on E-pharmacies is certainly ineluctable considering the significant impact they can have on people's health and safety. As directed by the Madras and Delhi High Courts, the Rules on E-Pharmacies should be introduced with extreme urgency. The Indian Laws on E-pharmacies should take into consideration the measures introduced by various other developed countries like US and EU such as tracking system, common logo, electronic prescription for certain drugs etc. to tackle problems associated with effective implementation and regulation of E-pharmacies.

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Liquidated damages in Share Purchase Agreements

By **Anurag Pareek**

Liquidated damages (LDs) are the pre-estimated sum to be paid by way of compensation in the event of breach of a stipulated term of the contract. Share purchase Agreements (SPAs) frequently provide for LDs in the event of certain breaches. Such provisions, where valid, are applied to fix the measure of damages, replacing the elements that would otherwise go into the court's determination of the amount of recovery.

Section 74 of the Indian Contract Act, 1872 stipulates that in cases of breach of contract, where a pre-agreed sum is stipulated, the party complaining of breach is entitled to the stipulated amount provided it is proven that loss has been caused to the complaining party. However, the complaining party need not prove the exact quantum of loss if the stipulated amount is reasonable and not unconscionable.

The rationale behind any damages clause is to enable restoration of the economic position in which the plaintiff would have been had the breach not taken place. It is thus, that the damages must be a bona fide and reasonable

[7] "controlled substance" is generally a drug or chemical whose manufacture, possession, or use is regulated by a government, such as illicitly used drugs or prescription medications that are designated by law. In US, it means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act, 1970.

estimate of the damages arising from the breach and not an amount intended to penalize the other party or coerce performance of the contract. The courts have wide discretion in determining reasonability of the compensation, however, the same may not exceed the amount stipulated in the contract.[1] If the stipulated sum agreed upon in a contract is a genuine pre-estimate of loss likely to flow from a breach, they qualify as LDs [2]. Any amount which is extravagantly and excessively high, greater than the possible amount of LDs that could be foreseen at the time of drafting of the contract, is taken to be a penalty clause[3].While there is no precise formula to distinguish penalty from LDs, the court upon taking into consideration the terms of the contract and the reasonability of the stipulated sum claimed as damages may make subjective awards.

Though the requirement of the section is that the pre-agreed quantum of damages have to be paid, the court stresses that certain legal injury or damage has to be shown before making such a claim.[4] When such computation or proof of the precise damage is impossible for the court, the amount stipulated in the contract, if it is not unreasonable or penal in nature can be awarded by the court.[5]

In India, there is no provision for a pecuniary liability to automatically arise in the event of complaint of breach of a contractual term where LDs are provided for, until determination of entitlement to the same by the court.[6] The position, therefore, would be that on the breach, only a right to sue for damages may accrue.[7] However, LD clauses, if carefully drawn, can be extremely useful to either or both of the parties to a SPA.

LD clauses provide for an assurance of compensation upon agreement of a reasonable amount, while, limiting the risks of the party causing the breach as the damages are already stipulated for. These serve the useful purpose of avoiding unnecessary litigation and promoting commercial certainty[8], especially where the quantum of damages are impossible or difficult to ascertain.[9] LD clauses enable the parties to provide for LDs for specific breaches, while allowing other types of breaches to be dealt with by unliquidated damages.[10] These provisions not only facilitate the calculation of risks, but also alleviates the difficulty and expense of proving the quantum of actual damages.[11]

For the aforementioned reasons, frequently provision for LDs is made in SPAs in connection with buyer's as well as seller's obligations such as non-compete or non-solicitation clauses, confidentiality clauses, anti-corruption clauses and any ancillary aspects or intangible losses such as damage to reputation, loss of business opportunity that cannot be stipulated using a straight jacket formula. In most cases where the calculation of the anticipated or actual damages suffered by the non-breaching party is difficult or time consuming, a calculation method to ascertain the LDs can be provided in the SPA. This pre-agreed arrangement between the parties on the amount or method of calculation cannot be undermined in case of actual default as it saves not only time but also substantial uncertainty.

[1] ONGC v. SAW Pipes (2003) 5 SCC 705
[2] Subir Ghosh v. Indian Iron & Steel Co (1976) 1 CALLT 346 (HC), Kailash Nath Associates v. DDA (2015) 4 SCC 136
[3] Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co Ltd, [1915] AC 79)
[4] State of Kerala v. United Shippers and Dredgers Ltd. (AIR 1982 Ker 281)
[5] ONGC v. SAW Pipes (2003) 5 SCC 705
[6] Iron & Hardware (India) Co. v. Firm Shyamal & Bros. AIR 1954 Bom 423
[7] Chellappan v. Executive Engineer 1979 Ker LT 53
[8] BSNL v. Reliance Communication Ltd. (2011) 1 SCC 394
[9] Diestal v. Stevenson (1906) 2 KB 345
[10] SAIL v. Gupta Brother Steel Tubes Ltd. 2009 AIR SCW 7191
[11] Clyde Bank Engineering and Shipbuilding Co. v. Castaneda (1905) AC 6

When the nature of transaction is such that assessment of damages is not possible, the court, if satisfied that the LDs are a fair and reasonable pre-estimate of damages agreed between the parties, is empowered to grant the full amount provided as LDs.[12]

In SPAs, it is common for LD provisions to apply in case of breach of contractual provisions by a party for failing to complete the transaction as agreed in the SPA or breach of the representation and warranties by a party after the completion of the transaction pursuant to which the other party has suffered actual damage. The amount of the buyer's deposit or on rare occasions, the seller's initial instalments of shares, is adopted as the amount of LDs in case of failure to complete a transaction. Such forfeiture of money held by an escrow company or assets delivered makes recovery convenient for the seller, or alternatively, the buyer as applicable. Typically, such forfeiture of a reasonable amount paid as earnest money or advance deposit as part payment does not amount to imposition of penalty, however, in cases where the forfeiture is penal in nature, Section 74 of the Indian Contract Act, 1872 applies.[13]

LD provisions, therefore, act as a sort of limited insurance for the parties to a SPA. If either party breaches the contract, the other knows the exact sum that can be anticipated to cover the damages from the said breach, effectively, mitigating the party's risk upon breach of terms of the said contract and also avoiding needless litigations or disputes.

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Notifications and Circulars

SEBI issues clarification on clubbing of investment limits of Foreign Portfolio Investors: The Securities and Exchange Board of India ("SEBI") has issued Circular No. SEBI/ HO/ IMD/ FPIC/ CIR/ P/ 2018/ 150 dated December 13, 2018 ("Circular") providing clarification on clubbing of investment limits of Foreign Portfolio Investors ("FPI"). By this Circular, SEBI has partially amended two of its pervious circulars, that is, circular no. CIR/IMD/FPIC/CIR/P/2018/64 dated April 10, 2018 on Know Your Client ("KYC") requirements for FPIs and circular no. SEBI/HO/IMD/FPIC/CIR/P/2018/66 also dated April 10, 2018 providing clarification on clubbing of investment limits of foreign government/foreign government related entities.

In the Circular, SEBI has clarified that the beneficial ownership criteria in Prevention of Money-laundering (Maintenance of Records) Rules, 2005 ("PMLA Rules") should be made applicable for the purpose of KYC only and not for clubbing of investments of FPIs. The Circular provides that clubbing of investment limits for FPIs will be on the basis of common ownership of more than 50% or based on common control. Exceptions to this are provided for FPIs which

[12] Herbicides (India) Ltd. v. Shashank Pesticides Pvt. Ltd. 180 (2011) DLT 243

[13] Maula Bux v. Union of India (1970) 1 SCR 928

are appropriately regulated public retail funds, etc. "Control" is defined to include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

The Circular also provides that in cases where two or more FPIs including foreign Governments/ their related entities are having direct or indirect common ownership of more than 50% or control, all such FPIs will be treated as forming part of an investor group and the investment limits of all such entities shall be clubbed at the investment limit as applicable to a single foreign portfolio investor. Investment by foreign Government agencies will also be clubbed with the investment by the foreign Government/ its related entities for the purpose of calculation of 10% limit for FPI investments in a single company, if they form part of an investor group.

Prior to this Circular, the beneficial ownership criteria under the PMLA Rules was applicable to clubbing of investment limits of FPIs. This beneficial ownership criteria under the PMLA Rules is a more stringent than the criteria in the Circular as it establishes a materiality threshold for identification of beneficial owners (which is 25% in case of companies). Further, the PMLA Rules also require analysis of how the beneficial owner exercises control. This 25% threshold under the PMLA Rules has now been changed to common ownership of more than 50% or based on common control for clubbing of investments of FPIs.

Disclosure of significant beneficial ownership in the shareholding pattern of listed entities:

The Securities and Exchange Board of India ("SEBI") in its Circular No. SEBI/ HO/ CFD/ CMD1/ CIR/ P/ 2018/ 0000000149 dated December 07, 2018 ("Circular") has provided that in the interest of transparency to the investors in the securities market, all listed entities are required to disclose details pertaining to significant beneficial owners in a prescribed format.

This is in furtherance to Section 89 and 90 of the Companies Act, 2013 ("Act") and the recently notified Companies (Significant Beneficial Owners) Rules, 2018 ("Rules"). As per the Act and the Rules, companies, partnerships, trusts etc. are required to disclose details of members who are classified as "significant beneficial owners".

For companies, "significant beneficial owner" is an individual or natural person, acting alone or together or through one or more persons including trust or person resident outside India, whose name is not entered in the register of members as the holder of such shares and the individual is holding ultimate beneficial interest of not less than 10% in share capital of a company or who exercises significant influence or control in the company through other means.

Details of such significant beneficial owners are required to be provided in the format provided by SEBI in its earlier circular dated November 30, 2015.

Though this is a step towards ensuring better corporate governance, it is pertinent to note that Circular will become applicable from March 31, 2019, which is when the first reporting is required to be undertaken. This may put additional compliance burden on listed entities. Further, as the Rules themselves have been recently enacted, there are certain provisions which are unclear in application, which may be of concern to the listed entities.

Insolvency Professionals to act as Interim Resolution Professionals, and Liquidators (Recommendation) (Second) Guidelines, 2018: On November 30, 2018, the Insolvency and Bankruptcy Board of India ("**IBBI**") replaced the Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) Guidelines, 2018 with the amended Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) (Second) Guidelines, 2018 ("Guidelines").

Under the Insolvency and Bankruptcy Code 2016 ("IBC"), in certain circumstances, the IBBI plays an important role in recommending an insolvency professional ("IP") who may act as an interim resolution professional ("IRP") and/or liquidator in the corporate insolvency resolution process ("CIRP"). This is provided under Section 16 of the IBC. Similarly, recommendation of the IBBI is required under Section 34 of the IBC where, for example, the resolution professional is required to be replaced.

When such a reference or direction is received under Section 16 or 34 of IBC for recommending/ proposing the name of an IP, the IBBI has no information about the volume, nature and complexity of the CIRP or liquidation process and the resources available at disposal of an IP. Further, it takes time for a reference or a direction from the National Company Law Tribunal ("NCLT") (under Section 16 or 34) to reach the IBBI. The process of appointment of an IRP or liquidator may entail 2-3 weeks, which could be saved if the NCLT has a ready panel of IPs recommended by the IBBI which it can use to pick up any name from the panel while issuing an order under CIRP for appointment of IP.

With this aim, the Guidelines prescribe establishment of a common panel of IPs for appointment as IRPs or liquidators and this will be shared with the NCLT. The panel will have NCLT bench wise list of IPs, which can be picked by the NCLT while issuing an order. The Guidelines also provide for an eligibility criteria basis which an IP can become part of the panel. IBBI will invite expression of interest from IPs to act as IRPs or liquidators, and this will be done NCLT bench wise. The eligible IPs will be included in the panel in order of the volume of their ongoing processes/cases/insolvency resolutions they have in hand (this will be assessed on a scoring methodology provided for in the Guidelines). The Guidelines also provide that despite having a panel, NCLT may still require IBBI to recommend an IP from outside the panel and in such cases, IBBI will accordingly recommend an IP.

Fund raising by issuance of debt securities by Large Entities: With a view to operationalising the Union Budget announcement for 2018-19, which, amongst other, stated that "*Securities and Exchange Board of India ("SEBI") will also consider mandating, beginning with large entities, to meet about one-fourth of their financing needs from the debt market*", SEBI has issued Circular no. SEBI/ HO/ DDHS/ CIR/ P/ 2018/ 144 dated November 26, 2018 ("Circular") whereby it provides detailed guidelines for operationalising the above budget announcement. This Circular is a step towards SEBI's and central government's attempts to strengthen the Indian bond market.

For listed entities following April-March as their financial year, the framework provided in the Circular will come into effect from April 01, 2019 and for the entities which follow calendar year as their financial year, the framework will become applicable from January 01, 2020. The framework will be applicable for all listed entities (except for scheduled commercial banks), which as on last day of the financial year (i.e. March 31 or December 31):

(i) have their specified securities or debt securities or non-convertible redeemable preference share, listed on a recognised stock exchange(s) in terms of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015; and

(ii) have an outstanding long term borrowing of Rs 100 crores or above, where outstanding long-term borrowings shall mean any outstanding borrowing with original maturity of more than 1 year and shall exclude external commercial borrowings and inter-corporate borrowings between a parent and subsidiary(ies); and

(iii) have a credit rating of "AA and above", where credit rating shall be of the unsupported bank borrowing or plain vanilla bonds of an entity.

If this criteria (points (i) – (iii) above) are fulfilled, the listed entity will be considered as a "Large Corporate" ("**LC**") and such LC will have to raise not less than 25% of its incremental borrowings, during the financial year (subsequent to the financial year in which it is identified as a LC), by way of issuance of debt securities. The expression "incremental borrowings" is defined to mean any borrowing done during a particular financial year, of original maturity of more than 1 year, irrespective of whether such borrowing is for refinancing/repayment of existing debt or otherwise and shall exclude external commercial borrowings and inter-corporate borrowings between a parent and subsidiary(ies).

In case of there is a shortfall in the requisite mandatory incremental borrowing, the Circular provides for a monetary penalty/fine of 0.2% of the shortfall in the borrowed amount to be levied and paid to the stock exchange(s). The Circular also provides reporting requirements for such LC, along with sample illustrations as to how the framework will be applicable to such LCs.

Ratio Decidendi

Before giving instructions to Director General to carry out investigation in any matter, the Competition Commission of India is not required to seek assistance from experts of eminence or the affected parties themselves

An appeal was made in the High Court of Delhi against the order of the Single Judge dismissing the writ petition filed by the Abbott Healthcare Private Limited ("Appellant") against the Competition Commission of India ("**CCI**"). The challenge in the writ petition was against the order of the CCI wherein the CCI had passed an order under Section 26(1) of the Competition Act, 2002 ("Act") directing the Director General ("DG") to cause an investigation into a matter and submit an investigation report within 60 days from the receipt of the said order.

The matter related to a letter received by CCI from the National Pharmaceutical Pricing Authority, Department of Pharmaceuticals ("NPPA") requesting CCI to analyse alleged anti-competitive agreement between four leading pharmaceutical companies. The allegation was that they were controlling the prices of oral diabetes drugs containing the Active Pharmaceutical Ingredient (API) Vildagliptin. The CCI also received an anonymous e-mail purportedly sent by one of the employees of the Appellant, which indicted that there was an understanding to maintain the price of drugs across the country.

The Appellant contended that (i) the CCI was required to take an informed view regarding both the veracity of the e-mail as well as also the data provided by NPPA so as to form a prima facie opinion; (ii) without considering the Appellant's contentions, the CCI could not have formed a prima facie view, which it was required to form in terms of Section 26 of the Act, and also in light of the fact that the CCI is conferred with powers of a Civil Court under the Code of Civil Procedure which includes summoning and enforcing the attendance of any person; and (iii) Regulation 17(2) of the Competition Commission of India (General) Regulations, 2009 in terms of which the CCI is empowered to invite the information provider and such other person as is necessary for a preliminary conference. In substance, the Appellant contended that it was incumbent upon the CCI to exercise such powers and form a prima facie view after conducting due enquiry.

Rejecting the contentions of the Appellant, the Court upheld the order of the Single Judge and placed reliance on the case of *Competition Commission of India v. Steel Authority of India Ltd. and Anr*., (2010) 10 SCC 744. The Court held that:

(i) Upon receiving information from any person or on its own knowledge, the CCI is expected to satisfy itself and express its opinion that a prima facie case exists and then pass a direction to the DG to cause an investigation into the matter in terms of Section 26(1);

(ii) The direction under Section 26(1) to the DG may be passed with or without seeking assistance from any other quarters including experts of eminence or the affected parties themselves;

(iii) The aggrieved/affected parties cannot claim a right to notice or hearing at such stage;

(iv) Issuance of direction by CCI under Section 26(1) of the Act is a direction simplicitor to cause an investigation and is administrative in nature to one of its own wings departmentally. It does not effectively determine any right or obligation of the parties to the case. Such direction is akin to departmental proceedings and does not entail civil consequences for any person;

(v) The CCI is not expected to give notice to the parties or to hear them at length. It is of a very preliminary nature; and

(vi) It is only after consideration of the report of the DG and passing of an order in terms of Section 26(2) of the Act that the aggrieved/ affected parties gain a specific right of notice and hearing.

[*Abbott Healthcare Private Limited* v. *Competition Commission of India* – LPA.658/2018, CM No. 49071-49075/2018]

News Nuggets

Arbitration – Rajasthan High Court clarifies on arbitrator's defacto inability to perform

The Rajasthan High Court has held that in the case events during proceedings before the arbitrator lead to a doubt in the party's mind regarding prejudice against it and *qua* impartial conduct, the situation would fall within *defacto* inability of the arbitrator to perform his functions as pre Section 14 of the Arbitration Act. Court in *Doshion (P) Ltd v. Hindustan Zinc Ltd* noted that proceedings before arbitrator had continued under shadow of conflict regarding fees payable, and that such

unpleasant situation is to be avoided in the best interest of the parties and the arbitrator.

Insolvency proceedings can be initiated against 'corporate guarantor'

The NCLAT has held that without initiating Corporate Insolvency Resolution Process (CIRP) against the principal borrower, financial creditor can initiate CIRP against the Corporate Guarantors. It noted that as per IBC Section 5(8)(h), counter-indemnity obligation in respect of a guarantee comes within the meaning of a 'financial debt'. The Tribunal in *Vishnu Kumar Agarwal v. Piramal Enterprises* also held that two applications under Section 7 cannot be admitted simultaneously, against two corporate guarantors, for the same set of claim and default, unless the corporate debtors are joint venture company.

Illegality of deed leading to default not to be challenged under I&B code

Assignment of a loan to another company by creditor cannot be challenged in petition under Section 7 of the IBC and that too by a party who had the knowledge of the Assignment Deed. The Corporate debtor had challenged the admission of application by NCLT by stating that there was illegal assignment of a loan since the account was not NPA at that time. NCLAT in *Lalan Kumar Singh v. Phoenix Arc* dismissed the appeal to stop the insolvency proceedings observing that corporate debtor was previously aware of assignment therefore it cannot raise the allegations of any mala fide.

Arbitration – 5th Schedule restricts only present employees for arbitrator

The Supreme Court has held that the 5th Schedule to the Arbitration Act governing appointment of arbitrator restricts only present employees, and that a person who was an employee 10 years ago cannot be restricted on apprehensions of bias unless proven. Court in *Govt. of Haryana v. G.F. Toll Road Pvt. Ltd.* rejected the allegations over appointment of ex-employee by the State of Haryana and terminated the three-member arbitral tribunal appointed by ICA. The Apex Court ruled that the proceedings be continued with the mutually agreed sole arbitrator.

Competition - Director can be proceeded against on violation of Sections 3 & 4

The Delhi High Court has held that officers or directors of a company can be proceeded against for violation of Sections 3 and 4 of the Competition Act, dismissing the plea that directors are punishable only where CCI order is not obeyed. It stated that it would be an anathema if officers/directors could not be punished. Court in *Mahyco Monsanto Biotech v. CCI* refused to refer the case to the Larger Bench and upheld the interpretation that Section 48 can be invoked against individual officers or directors to investigate their role and conduct of offences under Sections 3 and 4 and punishable by order under Section 27.

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