

## Case Snippets

### Volume 03, Number 21 (May 22, 2020)

#### **Hindustan Construction Company Limited & Anr. Vs. Union of India & Ors, Writ Petition (Civil) No. 1074 of 2019 dated (Supreme Court)**

##### **Section 87 of the Arbitration and Conciliation Act, 1996 read with Section 3(7) & 3(23) of the Insolvency and Bankruptcy Code, 2016 - Automatic stay on an Arbitral Award**

The present writ petition was filed by Hindustan Construction Company Limited (HCC). HCC was an infrastructure construction company involved in the business of construction of public-utilities and projects like roads, bridges, hydropower and nuclear plants, tunnels and rail facilities.

The Petitioner company, undertakes these building projects as a contractor for government bodies such as the NHAI, NHPC Ltd., NTPC Ltd, IRCON International Ltd and PWD. Such projects are allotted to the Petitioner through the public tendering system. As Government bodies are owners and beneficiaries of such projects, cost overrun is almost invariably disputed by these bodies, leading to huge delays in the recovery of the legitimate dues of the petitioners. Also, these dues can only be recovered through civil proceedings or through arbitrations.

Even if an arbitral award was passed in the favour of HCC, it was invariably challenged by the Respondents by filing an application under Section 34 of the 1996 Act. A Section 34 application resulted in imposition of an automatic stay on the operation of arbitral awards.

Consequently, on one hand, HCC's pending dues would be stuck until the application could be adjudicated upon and on the other hand, HCC's pending dues would become 'disputed debt' as per the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").





Therefore, any proceeding that could have been initiated by HCC under the IBC against the respondent government companies, would come to be dismissed. In any case, HCC could not initiate any proceeding against a statutory body like NHAI under the IBC.

There was a Bunch of Writ Petitions seek to challenge the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996, the repeal of section 26 of the 2015 Amendment along with few provisions of IBC.

### **Decision of SC:-**

The SC observed that section 87 was introduced merely on the basis of the recommendation in the Srikrishna Committee Report to remove uncertainty around the prospective applicability of the 2015 Amendment Act, when in fact such uncertainty was removed by the BCCI decision. The SC clarified that having held that there was no automatic stay under the unamended Act, the 2015 Amendment Act was only introduced to clarify such position. Therefore, section 87 was contrary to the object sought to be achieved by the 2015 Amendment Act as it sought to make the 2015 Amendment Act only applicable from 23 October 2015. Further, the legislature without referring to the BCCI decision which had pointed out the pitfalls of introducing such a provision, had brought into play a provision that was manifestly arbitrary, without adequately determining principle, and contrary to public interest. The SC agreed with the Petitioner that the introduction of section 87 resurrects the mischief sought to be corrected by the 2015 Amendment Act and was therefore unconstitutional.

Relying upon its judgment in ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others [(2019) 8 SCC 416]***, the SC held that the IBC is not meant to be a recovery mechanism, what it did in fact intend, was the resolution of stressed assets. Further, the argument that an Order VIII-A type mechanism as under the CPC was not barred under IBC, was totally rejected by the SC. It was observed that a dispute must be between the parties as provided under the IBC. The IBC was not a debt recovery legislation, wherein by some theory of indemnity or contribution debt owed to the Petitioners could be fastened on to public sector units

Hence, the Supreme Court strikes down provision granting automatic Stay on Arbitral Award under Section 87 of the Arbitration and Conciliation Act, 1996

