

# Between the lines...

April, 2018

## Key Highlights

- I. Supreme Court expands the scope of Arbitration Amendment Act, 2015 to pending court proceedings filed for setting aside of the arbitral award
- II. Supreme Court liberally interprets Section 13(3A) of the SARFAESI Act and limits the scope of agricultural land to the benefit of the secured creditors
- III. Arbitration agreement cannot circumscribe the jurisdiction of a Consumer Fora: Supreme Court upholds NCDRC Order

### I. Supreme Court expands the scope of Arbitration Amendment Act, 2015 to pending court proceedings filed for setting aside of the arbitral award

The Supreme Court in case of **Board of Control for Cricket in India v. Kochi Cricket Private Limited** (decided on March 15, 2018) held that the Arbitration and Conciliation (Amendment) Act, 2015 (“**Amendment Act**”) shall apply to arbitration proceedings and court proceedings related to such arbitration proceedings initiated after the Amendment Act came to force i.e. October 23, 2015. It also made the Amendment Act applicable retrospectively to pre-amendment court proceedings under Section 34 (*setting aside of arbitral award*) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”).

#### Facts

Under the pre-amended Arbitration Act, when an application for setting aside of an arbitral award was filed under Section 34, an automatic stay on the enforcement of the arbitral award would come into force under Section 36 of the Arbitration Act. The Amendment Act did away with such an automatic stay.

The brief facts of case are that certain applications were filed by the Board of Control for Cricket in India (“**Appellant**”) in the Bombay High Court against the arbitral award passed in favour of the Kochi Cricket Private Limited (“**Respondent**”) under Section 34 of the Arbitration Act before the commencement of the Amendment Act and certain applications were filed after commencement of the Amendment Act. There was no clarity with respect to the instances in which the Amendment Act shall apply. In the interim, Respondents filed execution applications in the Bombay High Court for payment of the amounts awarded under the arbitral awards, pending enforcement of such awards. These were resisted by the Appellants before the Supreme Court praying that there would be an automatic stay of the awards until the Section 34 proceedings had been decided. The question of law that came up before the Supreme Court in the present case was:

## Issue

Whether Section 36 of the Arbitration Act, which was substituted by the Amendment Act, would apply in its amended form or in its original form to Section 34 applications filed (a) prior to the coming into force of the Amendment Act; and (b) after coming into force of the Amendment Act?

## Relevant Provisions

The Court relied heavily on the interpretation of Section 26 of the Amendment Act to answer the aforesaid question of law. The provision has been reproduced hereunder for reference:

*“Section 26: Act not to apply to pending arbitral proceedings: Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”*

## Arguments

Appellants argued that Section 26 of the Amendment Act consists of two parts. The second part, which makes the Amendment Act applicable in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, is the principal part, whereas the first part of Section 26 of the Amendment Act, which makes the Amendment Act inapplicable if the parties do not agree for the same, is in the nature of a proviso or exception. If arbitral proceedings have commenced prior to coming into force of the Amendment Act, the said proceedings, together with all proceedings in court in relation thereto, would attract only the provisions of the un-amended Arbitration Act. Similarly, when arbitral proceedings have commenced after the coming into force of the Amendment Act, those proceedings, including all courts proceedings in relation thereto, would be governed by the Amendment Act. Hence, the Amendment Act will only apply to arbitral proceedings commenced on or after the commencement of the Amendment Act and to court proceedings that arise out of or in relation to such arbitral proceedings. It was emphasized that autonomy of the parties with respect to applicability of the Amendment Act to pre-amendment arbitral proceedings must be respected. Parties who have entered into agreements in the expectation that the old regime will apply cannot suddenly be foisted with a completely different regime under the Amendment Act.

The Respondent argued that in the first part of Section 26 of the Amendment Act, there is an absence of the mention of court proceedings. This shows that the Amendment Act would retrospectively apply to court proceedings, as distinguished from the arbitral proceedings. On a correct construction of Section 26 of the Amendment Act, proceedings under Section 34 of the Arbitration Act that have commenced before the Amendment Act came into force, would be governed by the Amendment Act, and arbitral proceedings which commenced after the Amendment Act, together with Section 34 applications made in relation thereto, would then be governed under the second part of Section 26 of the Amendment Act. It was stated that the original intent of the un-amended Arbitration Act was to minimise court intervention and to restrict the grounds of challenge of arbitral awards. Given

the fact that court proceedings in this country take an inordinately long time, the whole object of the amendment to Section 36 of the Arbitration Act would be stultified, if Section 36 of the Arbitration Act is only applied to court proceedings that result from arbitral proceedings, which have commenced on and after the commencement of the Amendment Act. Further, since the execution proceedings are procedural in nature, the amendment to Section 36 would be retrospective and, therefore, the substituted Section 36 would apply even in cases where the Section 34 application is made before the commencement of the Amendment Act.

### **Observations of the Supreme Court**

The Supreme Court held that while the first part of Section 26 of the Amendment Act refers only to arbitral proceedings before an arbitral tribunal, the second part refers to court proceedings “in relation to arbitral proceedings”, and it is the commencement of these court proceedings that is referred to in the second part of Section 26 of the Amendment Act. Section 26 of the Amendment Act, therefore, bifurcates proceedings, into two sets of proceedings (a) arbitral proceedings, and (b) court proceedings in relation thereto. The reason the first part of Section 26 of the Amendment Act is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties agree to such an arrangement. As “arbitral proceedings” having been subsumed in the first part, they cannot re-appear in the second part, and the expression “in relation to arbitral proceedings” would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The Supreme Court observed that the scheme of Section 26 of the Amendment Act is that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force.

The Supreme Court further observed that enforcement and execution of the award were one and the same and that proceedings under Section 36 of the Arbitration Act were procedural in nature. The judgment debtor did not have a substantive vested right to resist execution. Therefore, the new Section 36 of the Arbitration Act, would retrospectively apply even to pending Section 34 applications on the date of commencement of the Amendment Act. Supplementing this argument, the Supreme Court remarked on its judgement in ***National Aluminium Company Limited v. Pressteel & Fabrications Private Limited*** (decided on December 18, 2003) where it had recommended that Section 36 of the un-amended Arbitration Act should be changed, as it defeated the very objective of the alternative dispute resolution system. The Supreme Court observed that it is clear by looking at the practical aspect, the nature of rights involved and the sheer unfairness of the un-amended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years), that Section 36 of the Arbitration Act as amended would apply to Section 34 applications filed before the commencement of the Amendment Act.

### **Decision of the Supreme Court**

The Supreme Court dismissed the appeals filed by the Appellant and held that:

1. The Amendment Act shall apply to arbitration proceedings initiated on or after commencement of the Amendment Act as well as to court proceedings in relation to such arbitration proceedings.
2. The Amendment Act shall apply to court proceedings initiated by way of application for setting aside the arbitral award under Section 34 of the Arbitration Act if such court proceedings are pending when the Amendment Act came to force.

### **Situational analysis of the decision**

**Situation 1:** X and Y enter into an agreement before commencement of the Amendment Act. Y sends a notice to X to initiate arbitration on or after the coming into force of the Amendment Act. The Amendment Act applies.

**Situation 2:** X and Y enter into an agreement before commencement of the Amendment Act. Y sends a notice to X to initiate arbitration before the coming into force of the Amendment Act. X and Y mutually agree that the Amendment Act shall apply to their arbitration proceedings. The Amendment Act applies.

**Situation 3:** X and Y enter into an agreement before commencement of the Amendment Act. Y sends a notice to X to initiate arbitration before the coming into force of the Amendment Act. Court proceedings with respect to this matter are initiated on or after the coming into force of the Amendment Act. The Amendment Act applies.

**Situation 4:** X and Y enter into an agreement before commencement of the Amendment Act. Y sends a notice to X to initiate arbitration before the coming into force of the Amendment Act. Arbitral award is passed in favour of Y and X files an application for setting aside the award under Section 34 of the Arbitration Act. While such application is pending, Amendment Act comes to force. The Amendment Act applies.

### **VA View**

Section 26 of the Amendment Act has been at the centre of ample debate leading to contradictory views and multiple interpretations. The question at the crux of this disharmony is to which proceedings shall the Amendment Act apply? Before the Amendment Act came to force, after the arbitrator passed the arbitral award, the counter party could file an application to the court to set aside such award, which would result into an automatic stay on the enforcement of that award under the pre-amended Section 36 of the Arbitration Act. This was misused by the judgement debtor as a dilatory tactic to delay the enforcement of awards which resulted in awards not being enforced for years on end.

The Amendment Act by amending Section 36 of the Arbitration Act has done away with such an automatic stay and now it requires a separate court order to be made to cease the enforcement. This was an extremely welcome change. However, there was great uncertainty with respect to applicability of the new Section 36 of the Arbitration Act to pending arbitration and court proceedings. The cloud of confusion surrounding this matter has been lifted to a certain extent by this judgement. The Amendment Act shall apply in all four instances stated above in "Situational analysis of Decision". This judgement, despite its merits, fails to address the larger issue as to whether the Amendment Act applies to pending court proceedings other than those under Section 34 of the Arbitration Act. The judgement nevertheless shall have far reaching impact in so far as pending court proceedings under Section 34 of the Arbitration Act are concerned.

## II. Supreme Court liberally interprets Section 13(3A) of the SARFAESI Act and limits the scope of agricultural land to the benefit of the secured creditors

The Supreme Court in *ITC Limited v. Blue Coast Hotels Limited and Others* (decided on March 19, 2018) held that reply to representations of the debtor to a demand notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“SARFAESI Act”) is mandatory in nature, however, gave a liberal interpretation to the manner in which such representations can be considered. Further, the Supreme Court narrowed down the scope of agricultural land as construed under the SARFAESI Act.

### Facts

A petition was filed by ITC Limited (“Auction Purchaser”) to the Supreme Court as the sale of a five-star luxury hotel property (“Property”) purchased in a public auction by it was set aside by an order of the Bombay High Court. The sale of the Property was made by Industrial Financial Corporation of India (“Secured Creditor” or “IFCI”) after Blue Coast Hotels (“Debtor”) failed to pay back the Secured Creditor debt due to the extent of INR 150 crores. The Debtor had created a special mortgage on the Property, a part of which included agricultural lands, to obtain a loan from the Secured Creditor. After the Debtor failed to make payments, the Secured Creditor sent a notice to the Debtor under Section 13(2) of the SARFAESI Act calling upon the Debtor to pay the amount overdue within a period of 60 days. The Debtor replied to that notice asking for a time extension for payment, which was given to the Debtor. The Debtor failed to repay the amount. Subsequently the Secured Creditor issued a notice to the Debtor to take symbolic possession of the Property and thereafter sold off the Property to the Auction Purchaser in a public auction. The matter went to the Bombay High Court which ruled in favour of the Debtor and held that recovery proceedings were void. The matter was agitated in the Supreme Court and the issues that came up for determination were as follows:

### Issues

Issue 1: Whether Section 13(3A) of the SARFAESI Act which provides for replying to the representation of the Debtor and providing reasons for its rejection are mandatory in nature and whether its requirement was fulfilled by the Secured Creditor?

Issue 2: Whether the land over which the security interest was created by the Debtor was an agricultural land?

Issue 3: Whether the proceedings under Section 14 of the SARFAESI Act could not be initiated by IFCI which was no more a secured creditor after having sold the Property in auction to the Auction Purchaser?

### Relevant provisions

For a better understanding of the issues it is pertinent to reproduce the relevant provisions of the SARFAESI Act hereunder:

Section 13 (3A): “If, on receipt of the notice under Section 13 (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to

*the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.”*

*Section 14: “Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him (a) take possession of such asset and documents relating thereto; and (b) forward such asset and documents to the secured creditor.”*

### **Observations of the Bombay High Court**

**Issue 1:** The Bombay High Court observed that after the Secured Creditor issued the notice under Section 13(2) of the SARFAESI Act, the Debtor made a representation asking for a re-schedulement of the loan which the Secured Creditor neither considered (constituting a breach of Section 13(3A) of the SARFAESI Act which is mandatory), nor communicated the reasons for non-acceptance thereof. Thus, the subsequent action of the Secured Creditor in resorting to a measure under Section 13(4) of the SARFAESI Act by taking symbolic possession of the Property is liable to be annulled.

**Issue 2:** With regard to the second contention, the Bombay High Court observed that as per Section 31(i) of the SARFAESI Act, the provisions of the SARFAESI Act cannot be applied to security interest created on agricultural land. The inclusion of the agricultural land by the Secured Creditor in its notice under Section 13(2) of the SARFAESI Act and its inclusion in the recovery proceedings was therefore invalid.

**Issue 3:** According to the facts of the case, the Secured Creditor took over symbolic possession of the Property after which it transferred the Property to the Auction Purchaser. On the same day the Secured Creditor applied for taking physical possession of the secured assets under Section 14 of the SARFAESI Act. The Debtor argued and the Bombay High Court agreed that since Section 14 of the SARFAESI Act provides that an application for taking possession may be made by a secured creditor, and the Secured Creditor having transferred the secured assets to the Auction Purchaser, ceased to be a secured creditor, therefore, it could not apply for possession.

### **Observations of the Supreme Court**

**Issue 1:** The Supreme Court analysed the genesis of Section 13(3A) of the SARFAESI Act by making reference to the landmark judgement in the case of ***Mardia Chemicals Limited v. Union of India*** (decided on April 8, 2004) and observed that Section 13(3A) of the SARFAESI Act was mandatory in nature. The reasons for the same were two-fold. Firstly, the Supreme Court held that the language of the provision was clearly impulsive because of the use of the phrase “*secured creditor shall consider such representation or objection....and, if such representation or*

*objection is not acceptable or tenable, he shall communicate...the reasons for non-acceptance*". The Supreme Court saw no reason to marginalize or dilute the impact of the use of the imperative 'shall' by reading it as 'may'. Secondly, it was held that Section 13(3A) of the SARFAESI Act provides for communication of the reasons for not accepting the representation. A provision which requires reasons to be furnished must be considered as mandatory. After establishing the mandatory nature of Section 13(3A) of the SARFAESI Act, the Supreme Court looked at the facts of the case and held that the Secured Creditor was induced by the Debtor not to take action against them through assurances and promises. The Secured Creditor entered into negotiations for the settlement of the dues and even accepted cheques in repayment much after the notice under Section 13(2) of the SARFAESI Act. Many opportunities were granted by the Secured Creditor to the Debtor to repay the debt which were all met by proposals for extension of time. In these circumstances, failure to furnish a reply to the representation was not of much significance since the Secured Creditor undoubtedly considered the representations for repayment and granted sufficient opportunity to the Debtor to repay the debt.

**Issue 2:** Dealing with the issue of the agricultural land, the Supreme Court examined the intent behind Section 31(i) of the SARFAESI Act and held that the exemption was provided to protect the agriculturists from losing their source of livelihood and income. However, in the present case, the land was owned by the Debtor who was not an agriculturist and when the Debtor bought the land from certain agriculturalists, it applied to the revenue authorities for the conversion of these lands to non-agricultural lands, which was not completed as on the date of the judgement. Further, the Supreme Court analyzed various judgements and held that just because there was some kind of cultivation taking place on a land, it did not make it an agricultural land. The Supreme Court observed that at the time of creation of security interest, the parties themselves understood that the land in question was not agricultural and having regard to the use to which it was put and the purpose of such use, it was indeed not agricultural land regardless of how it stood in the revenue records.

**Issue 3:** The Supreme Court observed that only a secured creditor was permitted to make an application under Section 14 of the SARFAESI Act. However, when the Secured Creditor transferred the Property to the Auction Purchaser, it only had symbolic possession of the Property. When the transfer was made, the physical possession of the Property continued to be with the Debtor. The Debtor was using the same for business purposes and receiving rents from the rooms on the Property. As IFCI did not have physical possession of the Property, the transfer of the Property to the Auction Purchaser was not complete and IFCI continued to be the secured creditor. Hence, it could have made the application for taking physical possession of the Property under Section 14 of the SARFAESI Act.

### **Decision of the Supreme Court**

Setting aside the judgement of the Bombay High Court, the Supreme Court held that:

1. Section 13(3A) of the SARFAESI Act was mandatory in nature and its requirements were satisfied by the Secured Creditor by giving enough opportunities to the Debtor to pay off the debt even after making a notice of demand under the SARFAESI Act.
2. The Property did not qualify as agricultural land.

3. IFCI continued to be a secured creditor and could make an application under Section 14 of the SARFAESI Act to take physical possession of the Property.

In light of the above, the Supreme Court directed the Debtor to handover the possession of the Property to the Auction Purchaser.

#### VA View

The Supreme Court provides some leeway to the secured creditors in its interpretation of Section 13(3A) of the SARFAESI Act by way of this judgement. Even a lack of a formal reply to the representations of the debtor is acceptable if actions taken by the secured creditor (*such as giving further opportunities to the debtor to repay subsequent to the issue of notice under Section 13(2) of the SARFAESI Act*) indicate that due consideration was given to the representations of the debtor before taking any adverse action under the SARFAESI Act. However, it is still advisable to the secured creditors to err on the side of caution and give a formal reply to the debtor rejecting their representations and give reasons for the same pursuant to the demand notice under the SARFAESI Act. This case also provides that entry of certain property as agricultural land in the revenue records may not be the conclusive factor in determining whether the property actually qualifies as an agricultural land. The use of the property and the intention of the parties at the time of creation of security interest will have to be analyzed.

### III. Arbitration agreement cannot circumscribe the jurisdiction of a Consumer Fora: Supreme Court upholds NCDRC Order

In case of ***Emaar MGF Land Limited and Another v. Aftab Singh*** (decided on February 13, 2018), Supreme Court dismissed the appeal filed against order of National Consumer Disputes Redressal Commission, New Delhi (“NCDRC”) in case of ***Aftab Singh v. Emaar MGF Land Limited and Another*** (decided on July 13, 2017), which held that arbitration agreement cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments to Arbitration and Conciliation Act, 1996 (“Arbitration Act”).

#### Facts

Aftab Singh and others (“Complainants”) had booked residential flats/plots in projects of Emaar MGF Land Limited (“Builder”) to be developed in Gurgaon/Mohali and accordingly executed agreements. The Builder failed to deliver possession of flats/plots by the date committed in the agreement.

The Complainants filed complaint under Consumer Protection Act, 1986 (“Consumer Act”) to the Single Member, NCDRC seeking directions to the Builder for delivery and possession of the flats/plots and/or, in the alternative, refund of the amounts deposited by them, along with compensation. The Builder filed a set of captioned applications under Section 8 of the Arbitration Act and prayed that the parties be referred to arbitration as per the agreements. Learned Single Member referred the matter to Larger Bench and the following question came up for determination:



## Issue

Whether the amended Section 8(1) of the Arbitration Act mandates the Consumer Forums, constituted under the Consumer Act, to refer the parties to arbitration in terms of valid arbitration agreement, notwithstanding other provisions of the Arbitration Act and the provisions of the Consumer Act?

## Arguments

The Complainants relied on the judgment of Supreme Court in case of ***National Seeds Corporation Limited v. M. Madhusudhan Reddy and Another*** (decided on January 16, 2012) which held that the remedies provided under the Consumer Act are in addition to and not in derogation of other laws in force. Consequently, Consumer Fora would not be bound to refer parties to arbitration even if the contract between the parties contained an arbitration agreement. Complainants argued that the said pronouncement is primarily based on Section 3 of the Consumer Act, which provides that provisions of Consumer Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, which admittedly has not been amended or overridden by any provision in the amended Arbitration Act. On the contrary, the intention of the legislature to leave the ratio of the said decisions undisturbed is evident from the conspicuous absence of the words '*notwithstanding anything to the contrary in any other law for the time being in force*' in the amended Section 8 of the Arbitration Act. Complainants contended that a bare reading of the amended Section 8(1) of the Arbitration Act shows that the operative words of the provision "*shall ... refer the parties to arbitration*" have not been amended or altered, except for the addition of the words "*unless it finds that prima facie no valid arbitration agreement exists*". These added words make no material difference to the issue at hand as Section 3 of the Consumer Act remains completely un-amended and unaffected. Thus, in reading of the amendment, there is no intention to alter the interplay between the provisions of the Arbitration Act and the Consumer Act.

The Builder argued that the two enactments, namely, the Arbitration Act and the Consumer Act, are two distinct enactments. The moment a party agrees to Arbitration as a forum to adjudicate its disputes, the effect of Section 5 (*Extent of judicial intervention*) read with Section 8 (*Power to refer parties to arbitration where there is an arbitration agreement*) of the Arbitration Act comes into play and ousts the jurisdiction of any other forum under any statute, including the Consumer Act. Once a complaint is preferred invoking the Consumer Act, the opposite party has an option to either continue to defend the proceedings under the Consumer Act or to move an application under Section 8 of the Arbitration Act. Once such an application is filed, the effect thereof would be that the Consumer Forum, constituted under the Consumer Act, by virtue of the provisions in the Arbitration Act becomes the "judicial authority", exercising the jurisdiction as a "judicial authority" under Section 8 of the Arbitration Act. The amendment mandates the judicial authority to relegate the parties to the Arbitration, unless prima facie it finds the Arbitration Agreement to be invalid, *dehors* all judgments. The Builder submitted that there was no need for the legislature to again add "*notwithstanding anything contained in any other law*", in Section 8 of the Arbitration Act, because of the non-obstante clause is already present in Section 5 of the Arbitration Act.

### Observations of the NCDRC

The NCDRC observed that the scope of amendment to Arbitration Act cannot be to exclude all kinds of jurisdictions of Courts and Tribunals, be it criminal, testamentary, matrimonial, insolvency, tenancy and surrender them to private alternate dispute resolution mechanisms. In regard to pre-amendment era, the NCDRC referred to the judgments of Supreme Court in *National Seeds Corporation Limited v. M. Madhusudhan Reddy and Another* (decided on January 16, 2012) and *Rosedale Developers Private Limited v. Aghore Bhattacharya* (decided on September 6, 2013) and observed that it had been authoritatively opined that the existence of an arbitration clause will not be a bar to the entertainment of a complaint by a forum under the Consumer Act.

To determine the mandate of Consumer Fora to refer the parties to arbitration post-arbitration amendment, the NCDRC examined the Law Commission's Report and observed that the report did not even refer to the law evolved by the Hon'ble Supreme Court regarding the non-arbitrability of consumer disputes. To counter the arguments of the Builder surrounding Section 5 of the Arbitration Act, NCDRC relied on Section 2(3) of the Arbitration Act, which provides that the first part of the Arbitration Act shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. and observed that the Section specifically saves the application of the Arbitration Act to certain disputes, which may not be submitted to arbitration as the statutory regime concerning arbitration will not be applicable where public law regime operates. In other words, the Arbitration Act itself excludes from its purview the disputes with respect to which statutory remedy is put in place to sub-serve a public policy. A catena of such disputes, including the Consumer disputes, are protected by the umbrella of Section 2(3) of the Arbitration Act, that were not intended to be snatched vide the subject amendment to Section 8 of the Arbitration Act.

### Order of the NCDRC

In view of the afore-going discussion, the NCDRC concluded that an arbitration clause in agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act.

### Decision of the Supreme Court

Aggrieved by the order of NCDRC, the Builder filed an appeal to the Supreme Court. After hearing the counsels for the parties and perusing the record, the Supreme Court did not find any ground to interfere with the impugned order of NCDRC and accordingly dismissed the appeals.

### VA View

The settled position of law before commencement of the Arbitration and Conciliation (Amendment) Act, 2015 was that the Consumer Fora were not obligated to refer disputes within their jurisdiction to arbitration, even in terms of a valid arbitration agreement. However, after the amendment to Section 8(1) of the Arbitration Act, it was argued that the judicial authorities including Consumer Fora, before which, an action is brought, shall refer the

parties to the arbitration “*notwithstanding any judgment, decree or order of the Supreme Court...unless it finds that prima facie no valid arbitration agreement exists.*”

The Supreme Court dismissed the appeal against the order of NCDRC and again reinstated the pre-amendment position of law. Relying on Section 3 (*Act not in derogation of any other law*) of the Consumer Act and reiterating the well accepted legal principle that special law prevails over general law, NCDRC has observed that the disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable. The NCDRC judgement which has been upheld in its entirety by the Supreme Court had also stated that matters/disputes, which the authorities under the Real Estate (Regulation and Development) Act, 2016 are empowered to decide, are non-arbitrable, notwithstanding an arbitration agreement between the parties as to a large extent they are similar to the disputes falling for resolution under the Consumer Act. This comes as a win-win for the homebuyers who are roped into signing sale agreements with boiler plate arbitration clauses drafted heavily in the favour of the builders. This judgement not only provides two special alternatives to the homebuyers to either approach Consumer Forum or the Real Estate Regulatory Authority but also allows them to escape from arbitration proceedings which may prove to be a relatively more expensive and time consuming affair.



#### Disclaimer:

While every care has been taken in the preparation of this Between the Lines to ensure its accuracy at the time of publication, Vaish Associates, Advocates assumes no responsibility for any errors which despite all precautions, may be found therein. Neither this bulletin nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/substitute professional advice that may be required before acting on any matter. All logos and trade marks appearing in the newsletter are property of their respective owners.

© 2018, Vaish Associates Advocates  
All rights reserved.

Contact Details :

[www.vaishlaw.com](http://www.vaishlaw.com)

#### NEW DELHI

1st, 9th & 11th Floor  
Mohan Dev Bldg. 13 Tolstoy Marg  
New Delhi - 110001, India  
Phone: +91-11-4249 2525  
Fax: +91-11-23320484  
delhi@vaishlaw.com

#### MUMBAI

106, Peninsula Centre  
Dr. S. S. Rao Road, Parel  
Mumbai - 400012, India  
Phone: +91-22-4213 4101  
Fax: +91-22-4213 4102  
mumbai@vaishlaw.com

#### BENGALURU

565/B, 7th Main HAL  
2nd Stage, Indiranagar,  
Bengaluru - 560038, India  
Phone: +91-80-40903588 /89  
Fax: +91-80-40903584  
bangalore@vaishlaw.com