

Newsletter

DMD[®]
ADVOCATES

Edition 1

November 2018

It gives us immense pleasure to circulate the first edition of DMD Advocates' Newsletter.

In this edition, we have covered the recent judgements of the Supreme Court of India in relation to the following:

- Validity of Aadhaar
- Constitutional validity of GST (Compensation To States) Act, 2017
- Applicability of Limitation Act to applications filed under Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016
- Obligations on plaintiff for obtaining a decree for specific performance
- Factors to be considered by Arbitrator while awarding interest
- Eligibility of resolution applicants at the time of submitting resolution plan and timeline of corporate insolvency resolution process
- Status of cheque bounce complaint filed by power of attorney

We hope you enjoy reading this edition and find it useful in your area of work.

Inside this Newsletter

- DMD at the International Bar Association (IBA) Annual Conference in Rome
- DMD at the Indian Lawyers Association (ILA) seminar in Jaipur
- DMD at the USISPF India Leadership Summit
- DMD at the India Economic and Law Summit, 2018 in Mumbai
- Deal Disclosure: DMD advises Vodafone in relation to merger with Idea Cellular
- Deal Disclosure: DMD advised Greaves Cotton in relation to acquisition of Ampere Vehicles
- DMD in News

Feedback and suggestions from our readers would be appreciated. Please feel free to send your comments, feedback and suggestions to dmdadvocates@dumeds.com

Case Law Updates

Supreme Court's verdict on validity of Aadhaar

Justice K.S. Puttaswamy (retd.) and another v Union of India and Others dated 26 September, 2018

The Supreme Court upheld validity of Aadhaar in a 4:1 majority verdict. A five-judge Constitution Bench headed by Chief Justice Dipak Misra and Justices A K Sikri, AM Khanwilkar, D Y Chandrachud and Ashok Bhushan passed the landmark verdict on a batch of petitions challenging the constitutional validity of Aadhaar and its enabling Act. Justice D Y Chandrachud delivered a dissenting opinion.

The key aspects of the judgement are as follows:

- The requirement under Aadhaar Act to give one's demographic and biometric information and collection of data, its storage and use does not violate fundamental right of privacy and is not unconstitutional.
- Aadhaar Act does not create an architecture for pervasive surveillance.
- Aadhaar Act and Regulations provides protection and safety of the data received from individuals.
- Section 7 of the Aadhaar is constitutional. The provision does not deserve to be struck down on account of denial in some cases of right to claim on account of failure of authentication. Section 7 mandates that individuals should either produce Aadhaar or Aadhaar enrolment number to access social services, subsidies, benefits, etc. whose funds are drawn from the Consolidated Fund of India. The government had issued 139 notifications, all under challenge, mandating Aadhaar for getting services.
- The State while enlivening right to food, right to shelter etc. envisaged under Article 21 cannot encroach upon the right of privacy of beneficiaries nor former can be given precedence over the latter.
- Provisions of Section 29 are constitutional. Section 29 (1) places onus on the Unique Identification Authority of India (UIDAI) to ensure that no core biometric information, collected or created under the Act, be shared with anyone for any reason whatsoever; used for any purpose other than generation of Aadhaar numbers and authentication under the Aadhaar Act.
- The court held Section 29 (3) constitutional, which requires that no identity information available with a requesting entity shall be used for any purpose, other than that specified to the individual.
- Section 33 was held constitutional as it provides for the use of Aadhaar database for police investigation and was not violative of protection granted under Article 20(3).
- Section 57, to the extent, which permits use of Aadhaar by the State or any body corporate or person, pursuant to any contract to this effect was held unconstitutional and void. The last phrase in main provision of Section 57, i.e. "or any contract to this effect" was struck down.
- Section 59 validated all actions related to constitution of UIDAI and appointment of its chairperson and members taken by the Central Government prior to enactment of the Aadhaar Act. Further, the court held that all such actions are deemed to have been taken under the Aadhaar Act.
- Aadhaar Act has been rightly passed as Money Bill.
- Section 139-AA of the Income-tax Act, 1961 (which mandates linking of Permanent Account Number (PAN) with Aadhaar) does not

breach fundamental Right of Privacy. The court further held that Section 139-AA has been enacted to achieve a legitimate state aim and seeks to remove bogus PAN cards by linking with Aadhaar, expose shell com-

panies and thereby curb the menace of black money, money laundering and tax evasion.

Supreme Court upholds constitutional validity of GST (Compensation To States) Act, 2017

Union of India & Another v Mohit Mineral Pvt. Ltd., dated 3 October, 2018

The Supreme Court upheld constitutional validity of the Goods and Services Tax (Compensation To States) Act, 2017.

The key aspects of the judgement are as follows:

- The Compensation to States Act, 2017 is not beyond the legislative competence of the Parliament.
- The Compensation to States Act, 2017 is not a colourable legislation. It does not violate and is not against the objective of Constitution (One Hundred and First Amendment) Act, 2016 that contains provisions necessary for the implementation of Goods and Services Tax (GST) Regime.
- Levying of Compensation to States Cess is an increment to GST which is permissible in law.
- The Clean Energy Cess and States Compens-

sation Cess were held to be entirely different from each other. In view of the facts of the present case, the court held that the payment of Clean Energy Cess, by the petitioner, was for a different purpose and has no bearing or connection with the States Compensation Cess. The court further promulgated that giving credit or set-off in the payment is legislative policy which had to be reflected in the legislative scheme. Compensation to States Act, 2017 or Rules framed thereunder did not indicate giving of any credit or set-off of the Clean Energy Cess already paid. The claim of the petitioner that he is entitled for set-off in payment of Compensation to States Cess to the extent he had already paid Clean Energy Cess was not accepted by the court.

Limitation Act is applicable to applications filed under Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016 from the inception of the Code

B.K. Educational Services Private Limited v Parag Gupta and Associates, dated 11 October, 2018

A two judge bench of Justices RF Nariman and Navin Sinha held that the Limitation Act, 1963 is applicable to applications filed under Sections 7 & 9 of the Insolvency and Bankruptcy Code, 2016 ('Code') from the inception of the Code.

The court held that "the right to sue" accrues when a default occurs. If the default has occurred over three years prior to the date of

filing of the application, the application would be barred under Article 137 of the Limitation Act, except in those cases where Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

Plaintiff to prove his readiness and willingness to perform his part of the contract throughout to obtain a decree for specific performance

Vijay Kumar & Others. v Om Parkash dated 3 October, 2018

A two judge bench of Justices R. Banumathi and Indira Banerjee restoring a trial court order have reiterated that in order to obtain a decree for specific performance, the plaintiff has to prove his readiness and willingness to perform his part of the contract. Further, the readiness and willingness has to be shown throughout and needs to be established by the plaintiff.

In context of the present case, the court stated that “though the respondent-plaintiff filed the suit for specific performance on 29th April, 2008, the respondent-plaintiff has not shown his capacity to pay the balance sale consideration of Rs.22,00,000 (Rupees Twenty Two Lakhs). In his evidence, the respondent-plaintiff has stated that he has borrowed the amount from his friends and kept the money to pay the balance sale consideration. As

rightly pointed out by the Trial Court, the respondent-plaintiff could not produce any document to show that he had the amount of Rs.22,00,000 (Rupees Twenty Two Lakhs) with him on the relevant date; nor was he able to name the friends from whom he raised money or was able to raise the money. Furthermore, as rightly pointed out by the Trial Court, the respondent-plaintiff could have placed on record his Accounts Book, Pass Book or the Statement of Accounts or any other negotiable instrument to establish that he had the money with him at the relevant point of time to perform his part of the contract. We are, therefore, in agreement with the view taken by the Trial Court that the respondent-plaintiff has not been able to prove his readiness and willingness on his part.”

Award-debtor cannot be subjected to a penal rate of interest

Vedanta Ltd. v Shenzhen Shandong Nuclear Power Construction Co. Ltd. dated 11 October, 2018

A two judge bench of the Supreme Court, comprising Justices RF Nariman and Indu Malhotra observed that the discretion of the arbitrator to award interest must be exercised reasonably. The court recorded factors that an arbitrator must take into consideration while awarding interest including: (i) the ‘loss of use’ of the principal sum; (ii) the types of sums to which the interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of

interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic stand-point; (vii) the rates of inflation, and (viii) proportionality of the amount awarded as interest to the principal sums awarded.

The bench concluded that the award-debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the award, before the court of law, or later.

Litigant cannot take contradictory stands in the same case

Suzuki Parasmurthy Suits Pvt. Ltd. v The Official Liquidator of Mahendra Petrochemicals Ltd. and Ors. dated 8 October, 2018

A three judge bench of Supreme Court comprising of CJI Ranjan Gogoi, Judge Navin Sinha and Judge K.M. Joseph, held that a litigant can take different stands at different times in a case but cannot take contradictory

stands in the same case. The bench also reiterated that the recitals in the order sheet with regard to what transpired before the High Court are sacrosanct.

Stage of ineligibility attaches at the time of submission of resolution plan by resolution applicant; 270 days time limit for completion of insolvency resolution process prescribed by the code is mandatory

ArcelorMittal India Private Limited v Satish Kumar Gupta and Ors., dated 4 October, 2018

A two judge bench of Supreme Court comprising Justices Rohinton Fali Nariman and Indu Malhotra has held that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant and not at any anterior stage. The bench also held that the time limit for completion of the insolvency resolution process as laid down in Section 12 is mandatory and cannot be extended beyond 270 days.

The court relied upon its own jurisprudence laid down in *Innoventive Industries Ltd. v. ICICI Bank & Anr.* (2018) 1 SCC 407 and accordingly observed that the consequence of not adhering to strict timelines as prescribed un-

der the Insolvency and Bankruptcy Code, 2016 ('Code') was liquidation of the corporate debtor. The court further explicitly laid out that the National Company Law Tribunal (NCLT) or any other adjudicating authority cannot intervene until the Resolution Professional (RP) finalizes its proposals and the Committee of Creditors (CoC) makes a final call on the bids. It is only after the CoC discovers that a resolution plan contravenes section 29A, that the resolution applicant can challenge the order before the NCLT and thereafter, the NCLAT.

Cheque bounce complaint filed by power of attorney maintainable in law

SK. Tamisuddin v Joy Joseph Creado and Ors., dated 25 September, 2018

A three judge bench of the Supreme Court comprising Judges Ranjan Gogoi, Navin Sinha and K.M. Joseph, reiterated that a cheque bounce complaint filed by power of attorney would be maintainable in law. The bench placing reliance on the judgement in *A.C. Nara-*

yanan v. State of Maharashtra and Another (2015) 12 SCC 203, wherein the Supreme Court had clearly held that a complaint filed by the power of attorney would be maintainable in law.

Events

DMD Advocates' partners Rashi Dhir and Sumit Sinha at the International Bar Association (IBA) Annual Conference 2018 in Rome



DMD Advocates' partners Rashi Dhir and Sumit Sinha attended the IBA Annual Conference 2018 held in Rome. The IBA is the world's largest and most prestigious international gathering of lawyers to meet, share knowledge, network and develop business. The IBA attracts more than 6,000 delegates representing over 2,700 law firms, corporations, governments and regulators. This year's conference featured over 200 sessions by distinguished speakers including: Kofi Annan, former UN Secretary-General; Christine Lagarde, Managing Director of the International Monetary Fund; Robert S Mueller III, former Director of the Federal Bureau of Investigation and General Colin L Powell, former US Secretary of State to name a few.

DMD Advocates' taxation partner Sachit Jolly spoke at the Indian Lawyers Association Seminar in Jaipur on 7 October, 2018

Taxation Partner, Sachit Jolly shared his views on "Intersection of Arbitral and Corporate Laws—Challenges and the way forward" at the Indian Lawyers Association (ILA) Seminar. ILA is a voluntary professional organization for the legal professionals of India comprising judges, lawyers, and academicians. The seminar witnessed a gathering of more than 300 delegates including Hon'ble Judges of Rajasthan High Court, legal counsels, prominent lawyers, chartered accountants, government officials and regulators.



DMD Advocates' senior partner Rashi Dhir spoke on US-India ties at the USISPF India Leadership Summit, along with other USISPF Board members

Senior Partner, Rashi Dhir attended the India Leadership Summit organized by the US-India Strategic Partnership Forum (USISPF) in New Delhi. Mr. Dhir is on the India Advisory Board and was part of the roundtable discussion and Q&A session on India-US ties. The Summit witnessed participation from notable personalities including Mr. Arun Jaitley, Minister of Finance and Corporate Affairs, Government of India.

DMD Advocates' corporate partner Sumit Sinha spoke at the India Economic & Law Summit, 2018

Corporate Partner, Sumit Sinha spoke on M&A in healthcare sector at the India Economic and Law Summit in Mumbai. The summit was attended by prominent individuals from the legal and corporate fraternity including, Justice Dipak Misra, Former Chief Justice of India; Dr. Lalit Bhasin, President, SILF and Bar Association of India; Mr. Atul Juvle, General Counsel, Schindler India; Mr. Joginder Yadav, General Counsel, Cisco India; Mr. Kaizad Hazari, Global General Counsel, Glenmark to name a few.



Deal Disclosure

DMD advised Vodafone in relation to its merger with Idea Cellular

DMD advised Vodafone on certain aspects in relation to its merger with Idea Cellular to create Vodafone Idea Limited. Particularly, DMD advised Vodafone for amalgamation of two of Vodafone's Indian entities with Idea Cellular Limited and represented Vodafone before the National Company Law Tribunal, Mumbai Bench to obtain sanction to the Scheme of Arrangement involving amalgamation of Vodafone and Idea. The Vodafone-Idea merger is the largest M&A deal in telecom sector in India. The resulting entity Vodafone Idea Limited is the largest telecom company in India by subscribers and revenue market share.

The team was lead by Founder and Managing Partner Ms. Fereshte D Sethna.

DMD advised Greaves Cotton in relation to its acquisition of Ampere Vehicle

DMD advised Greaves Cotton, a diversified engineering company, in acquiring a majority stake in Coimbatore-based electric vehicle company Ampere Vehicles for Rs. 155 crore. The first round of investment involved secondary purchase from the current investors and primary infusion valued at 77 crores, which resulted in Greaves Cotton acquiring about 67% in Ampere Vehicles. Greaves Cotton in the second phase has the option to acquire an additional 13% stake through secondary purchase from the promoters and/or further rounds of primary infusion.

The team was led by Senior Partner and Head of Corporate Practice Mr. Rashi Dhir and Partner Sumit Sinha.

DMD in News

- Article on Transfer Pricing Adjustment by Tax Partner Sachit Jolly, Tax Partner in *Mondaq* - ([Click here to read](#))
- Article on Significant Beneficial Ownership Rules by Corporate Partners Mr. Rashi Dhir and Mr. Sumit Sinha in *Business Standard* - ([Click here to read](#))
- DMD, Wallcliffs act on Greaves Cotton acquisition of Ampere Vehicles - [Bar&Bench](#) and [Legally India](#)
- DMD Advocates promotes 9 associates to PA, SA levels - [Legally India](#) and [Vantage Asia](#)

Newsletter

DMD[®]
ADVOCATES

Edition 1

November 2018



Ms. Anuradha Dutt

Founder & Managing Partner, New Delhi
Litigation, International Arbitration



Ms. Fereshte D Sethna

Founder & Managing Partner, Mumbai
International Litigation, Alternate Dispute Resolution



Ms. Vijaylakshmi Menon

Founder & Senior Partner, New Delhi
Litigation, Intellectual Property Rights



Mr. Rashi Dhir

Senior Partner, New Delhi
Corporate

Our Offices

MUMBAI

121, Maker Chambers – IV, Nariman Point
Mumbai – 400 021
Tel: + 91 22 4356 5555 | Fax: + 91 22 4356 5550 |
E-mail: mumbai@dumeds.com

NEW DELHI

30, Nizamuddin East
New Delhi – 110 013
Tel: + 91 11 4719 4400 | Fax: + 91 11 4050 6977 |
E-mail: delhi@dumeds.com

Please feel free to address any further questions or request for advice to: dmdadvocates@dumeds.com

DISCLAIMER: The information provided in this Newsletter does not constitute a legal opinion/advice by DMD Advocates. The information provided through this Newsletter is not intended to create any attorney-client relationship between DMD Advocates and the reader and, is not meant for advertising the services of or for soliciting work by DMD Advocates. DMD Advocates does not warrant the accuracy and completeness of this Newsletter and readers are requested to seek formal legal advice prior to acting upon any information provided in this Newsletter. Further, applicable laws and regulations are dynamic and subject to change, clarification and amendment by the relevant authorities, which may impact the contents of this Newsletter. This Newsletter is the exclusive copyright of DMD Advocates and may not be circulated, reproduced or otherwise used by the intended recipient without our prior permission.