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JUSIP LISTICLE

INTELLECTUAL PROPERTY RIGHTS

SIMPLIFY

What is artistic work?

Section 2 of the Copyright Act, 1957 gives a comprehensive and descriptive definition of artistic work. Any work of an author that is reduced in a tangible form such as photograph, sculpture, painting, drawing or any architectural work like building, would be an artistic work. However, merely being tangible and artistic work does not guarantee copyright in the work. The element of creativity and originality prevails when deciding copyright such artistic work.

Delhi High Court orders suspension of domain name and blocking of website in trademark infringement suit by Voltas

The Delhi High Court in *Voltas Limited v. Ashok Kumar & Ors.*, granted an injunction in favour of Plaintiff Voltas against Defendant for infringing Plaintiff's registered trademark 'VOLTAS' and its logo. The Plaintiff claimed that its trademark "**VOLTAS**" is a well-known and established trademark which they have adopted and used since the year 1954. The said trade mark was alleged to have been infringed by the Defendant through the operation of a website: www.myvoltascare.com that is identically copying the entire look and feel, colour schematics, even photographs from Plaintiff's original website. The Plaintiff submitted that, *inter alia*, the Defendant's unauthorized usage of their trademark and logo is intentional and is dishonestly defrauding customers thus, violating Plaintiff's registered trademark VOLTAS and its logo and is causing damage to the goodwill and reputation of the Plaintiff.

The Court noted that there is a *prima facie* case in favour of the Plaintiff and that the activities of the Defendant are causing irreparable harm to Plaintiff's reputation. Therefore, holding in favour of the Plaintiff, the Court granted an *ex parte* ad interim injunction and suspended and blocked the impugned website in addition, also issued order to freeze the bank account, mobile number and UPI ID of the Defendant which was being used to use, contact and conduct various unauthorized activities.

Delhi High Court: Use of meta tag to promote business using competitor's trademark amounts to infringement.

The Delhi High Court in *Head Digital Works Pvt Ltd v. Tictoc Skill Games Pvt Ltd*, granted an injunction in favour of the Plaintiff and ruled that use of a competitor's registered trademark as an ad-word, keyword or meta tags to promote one's own business is a violation of trademark owner's rights. The Plaintiff filed a suit for a permanent injunction against the Respondent on the use of meta tags which is its registered trademarks. The Plaintiff argued that they are an online gaming software developing company and is the registered proprietor of the trade marks '**A23**' and '**Ace2three**'. The Petitioner contended that when a user searches for 'A23' or 'Ace2three' on the search bar of the application store, the application '**WinZo Games**', which is the online gaming application of the Respondent, is shown as the first result.

Although the Respondent denied the usage of Petitioner's trademark, the issue before the Court was whether the invisible usage of Petitioner's trademark as an ad-word, keyword or meta tags amounted to infringement. The Court relied on the 2022 judgment of the Delhi High Court in *Makemytrip India Pvt Ltd v. Bookings.com B. V. & Ors.*, wherein the Court observed that the invisible usage of registered trademark as an adword or keyword on any online platform would amount to infringement of the plaintiff's rights on the trademark. It can be argued that although the usage was invisible, the use of registered trademark of the Petitioner was allowing an economical advantage to the Respondent by showing the Respondent's application as the first search result.

Supreme Court : Offence under Section 63 of the Copyright Act is a cognizable and non-bailable offence.

The Supreme Court in the recent case of *M/s Knit Pro International v. State of NCT of Delhi*, *Criminal Appeal No. 807/2022* has examined and explained in detail that offence committed under section 63 of the Copyright Act, 1957 is cognizable and non-bailable offence. The case in question was that the Appellant filed an appeal before the Supreme Court challenging the High Court's order of quashing the criminal proceeding against the accused Respondent on the sole ground that the offence under section 63 is not a cognizable and non-bailable offence.

The point of contention arose because under Section 63, punishment for offence is imprisonment for at least six months to three years, whereas as per the guidance provided in Part II of the First Schedule of the Code of Criminal Proceeding, 1973, it is stated that where the punishment for offence is imprisonment with less than three years is a non-cognizable and bailable offence, whereas, offence where punishment is imprisonment for three years but less than seven years is cognizable and non-bailable. The contention here was what categorisation would offences under section 63 of the Copyright Act, 1957 would lie in.

The Court based their observation to hold that the maximum term of imprisonment prescribed for offence under section 63 should not be excluded from classification of the offence. Thereby, the Court held that as the maximum term of offence is three years, the classification as per Part II of First Schedule would be cognizable and non-bailable offence.

Delhi High Court allows interim injunction in favour of Amazon Seller Services, observing the logos are original artistic works

The Delhi High Court in *Case No. CS(Comm) 364/2022, Amazon Seller Services Pvt Ltd v. Amazonbuys.in & Ors.*, has granted an interim injunction in favour of the Plaintiff and observed that Defendant was passing off their services as those of the Plaintiff and is guilty of copyright infringement by reproducing identical representation of the Plaintiff's logo and website.

The factual matrix is that the Plaintiff alleged that the Defendants are using their trademark "AMAZON" and are offering fake registration services by charging fees for one of Plaintiff's program. In addition, the Defendants are blatantly reproducing an identical representation of the Plaintiff's logo and website design and user interface, that is causing financial damages to the Plaintiff and damaging their goodwill and reputation

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The issue for consideration was whether the Respondent is guilty of trademark infringement and whether an identical representation of logo and website design amounted to copyright infringement. Relying on the provisions of Section 2(1)(zg), 11(6) and (7) of the Trade Mark Act, 1999, the Court noted that the Plaintiff enjoys a statutory and common law right arising from the goodwill of the mark in India as well as globally. The primary contention raised by the Plaintiff is that the logo, website's design and user interface as well as the content published is literary and artistic work as per section 2(o) and (c) of the Copyright Act, 1957.

The Court based their opinion on the existing legal principles and observed that the Plaintiff has a *prima facie* case and that the balance of convenience lay in their favour. The Court observed and noted that the Plaintiff has a copyright on the logo and website design and that the conduct of Defendants was infringing their copyright and trademark. Holding in favour of the Plaintiff, the Court allowed the injunction and issued directions to block the Defendant's website, cellular and other communication services as well as freeze their bank accounts and directed the Defendants to refrain from using the Plaintiff trademark and copyright protected artistic work.

MEITY proposes draft amendment to IT Rules, 2021

The Ministry of Electronics and Information Technology (**MEITY**) has released the proposed draft amendment to *Information Technology (Intermediary Guidelines and Digital Media Ethics Code), 2021* (**IT Rules**), for public scrutiny and comments on 6th June, 2022. The draft amendment proposes the following:

- Setting up a Grievance Appellate Committee by the central government for appeals against the decisions of the Grievance Officer that will be disposed within 30 days.

- Amended Rule 3(1)(a) and (b) to ensure that intermediaries duly inform a user of the intermediary or government framed guidelines and assure adherence of the same.

- Rule 3(1)(m) to include obligation on the intermediary to take all reasonable measure to ensure '***accessibility***' of their services to all users, along with reasonable expectation of due diligence, privacy and transparency.

- strict timeline for disposal and removal of prohibited content, as per which the new timeline requires intermediaries to acknowledge complaints within 24 hours and dispose the complaint within 15 days.

- complaints regarding removal of a prohibited content must be addressed within 72 hours.

Although the proposed amendment are bringing necessary obligations and a new redressal mechanism, the amendment suffers lack of procedural certainty. Such as, there is a lack of clarity and transparency in Rule 3(3) regarding the jurisdiction and tenure of the Grievance Appellate Committee.

SIMPLIFY
What is abuse of dominant position?

Dominance refers to an enterprise's ability to operate independently of the competitive forces, or its effect on market competition. An enterprise would be abusing their dominant position impedes competition. Abuse of dominant position by an enterprise may include:

1. Imposing unfair conditions or price, including predatory prices
2. Limiting production, market, technical or scientific development
3. Denying market access
4. Concluding contracts with conditions, which has no connection with the actual contract
5. Using dominant position to gain advantage in another relevant market

CCI: Presence of several NBFCs in relevant market sector does not mean abuse of dominant position by an Opposite Party

The Competition Commission of India in *Case No. 12/2022, Tallada Dilip Kumar v. Shriram City Union Finance Ltd*, while adjudicating a complaint for abuse of dominant position by the Opposite Party, under section 4 of the Competition Act, 2002, held that the Opposite Party is a Non-Banking Finance Company (NBFC) in a competitive space with presence of multiple other NBFCs and does not hold any market power in respect to its activities.

Herein, the Informant, also a customer of the Opposite Party, contended that the Opposite Party is charging exorbitant interest rates for EMI using illegal methods and refused to supply the Informant with loan account statements and agreement when sought thereby, failing to adhere to the Fair Practice Code specified by the Reserve Bank of India.

The Commission observed that the Informant had neither specified the provisions violated by the Opposite Party for examination of allegation under section 4 of the Competition Act, 2002 nor delineated the relevant market in which the Opposite Party is operating. The information had also not established dominance of enterprise in the relevant market to support the contention of dominance.

The Commission made the observation of the presence of multiple NBFCs and rural/urban/co-operative banks available for the consumers for availing loan facilities. Therefore, the Commission dismissed the Informant's application and held that the Opposite Party cannot be held to be in a dominant position due to the presence of several NBFCs engaged in similar activities.

INSOLVENCY AND BANKRUPTCY

SIMPLIFY

When is a claim included in the resolution plan?

Both financial and operational creditors are required to submit their claims to a resolution professional ['RP']. As per the provisions of the Code, when a moratorium under section 14 is declared, the RP shall immediately make public announcement of CIRP under section 15. Regulation 12 of CIRP Regulation states that creditors have a ninety (90) days period to submit their claims with proof, after announcement to the RP. Once the claim is verified, it becomes part of information memorandum and a Resolution Applicant then prepares resolution plan as per information from information memorandum.

Supreme Court: SC rejects NOIDA's claim of being a Financial Creditor under the Insolvency and Bankruptcy Code, 2016

In the case of *New Okhla Industrial Development Authority (NOIDA) v. Anand Sonbhadra*, the Supreme Court held that NOIDA is an Operational Creditor under the Insolvency and Bankruptcy Code, 2016 and rejected its claim for declaring it as a Financial Creditors under the provisions of the Insolvency and Bankruptcy Code, 2016.

The Appellant NOIDA filed an appeal against the order of the NCLAT and contended that the lease deed executed between the Appellant and the Corporate Debtor is a financial lease as per the Indian Accounting Standard (IAS) and thus, would qualify as a financial debt under section 5(8)(d) of the Insolvency and Bankruptcy Code, 2016. The Supreme Court examines the rules of the IAS vis-a-vis clarifies on financial lease apropos to the 'economic life' of the asset in question i.e. land.

The Supreme Court observed that Rule 63 of the IAS states that a lease would be a financial lease if the term of the lease is for the majority of the '*economic life*' of the underlying asset. The Supreme Court observed that the underlying asset here is land and that the economic life of land cannot be limited to the period of lease nor it can be said that the land will lose its economical viability or commercial usage after the expiry of the lease. With no loss to the economic life of the land, the contention that a lease is a financial lease as provided under section 5(8)(d) is negated.

In addition, the Supreme Court also examined the position of NOIDA under section 5(8)(f) but held that it cannot be said that the obligation of the lessee to pay rental and premium cannot be treated as amount raised by lessee from the appellant, therefore, NOIDA cannot be treated as a financial creditor. Hence, the Supreme Court dismissed the appeal and affirmed the concurrent finding of the NLCT and NLCAT that NOIDA is an Operational

Creditor.

NCLT Kolkata: Preferential, Fraudulent or Avoidable Transaction cannot be alleged without stating specific material facts

In the case of ***Star India Pvt Ltd v. Advance Multisystem Broadband Communications Ltd***, the NCLT Kolkata Bench vide order dated 30.05.2022 held that a transaction cannot be alleged as a preferential, fraudulent or avoidable transaction under sections 45, 46, 47 and 66 of the Insolvency and Bankruptcy Code, 2016, unless an enquiry has been conducted by relevant experts and specific material facts have been stated.

Herein, the contention of Applicant/Resolution Professional is that IndusInd Media Communications Limited (IMCL), the Promoter and holding company of the Corporate Debtor, has sold its shareholding in the Corporate Debtor. IMLC was alleged to have violated the terms of the sanction letter obtained for credit facilities from the Financial Creditor. However, IMCL contended that there is no violation of terms as the shares are not the property of the Corporate Debtor as they are separate and distinct and that IMCL is not the Promoter of the Corporate Debtor.

The NCLT Bench placed reliance on the 2020 decision of the Supreme Court in A*nuj Jain v. Axis Bank Limited*, wherein it was held that "*specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or section 66*" of the Insolvency and Bankruptcy Code, 2016. Unless the requirements set out, in this case, are met an application for avoidance transaction would not be maintainable.

With this rationale and considering the facts of the case, the NCLT Bench held that the Resolution Professional had vaguely and unmindfully asserted the allegations against IMCL and others hence, dismissed the application.

NCLT Mumbai - Claims that were not part of the Resolution Plan, cannot be claimed after the Resolution Plan is approved.

In the case of ***State Bank of India v. Rohit Ferro Tech Limited***, the NCLT Mumbai Bench vide order dated 14.06.2022 rejected the claim of the Applicant raised post-approval of Resolution Plan and held that claims or relief that were not part of the Resolution Plan cannot be claimed after its approval by the Adjudicating Authority.

The Applicant had filed an application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 for compensation of the losses suffered due to the cancelled order placed upon the Corporate Debtor and requested the same to be paid out by of the Corporate Insolvency Resolution Process (CIRP) cost. The Applicant here filed the application after the Adjudicating Authority approved the Resolution Plan under section 31(1) of the Insolvency and Bankruptcy Code, 2016.

The NCLT Bench observed that Applicant did not approach the Adjudicating Authority when the Resolution Plan was pending consideration and has approached post-approval of the Resolution Plan. The NCLT Bench then relied on the 2021 decision of the Supreme Court in ***Ghanshyam Mishra & Sons Pvt Ltd v. Edleweiss Asset Reconstruction Company Ltd***, wherein the Supreme Court held that when the Resolution Plan is approved under section 31(1), the claims as provided under the Resolution Plan stands frozen and binding upon the Corporate

Debtor and others and that on the date of its approval, any claim that was not part of the Resolution Plan shall stand extinguished and no person will be entitled to initiate CIRP apropos to such claims.

The NCLT Mumbai Bench reiterated the legal position that after passing of Resolution Plan, new claims which were not raised or part of it, cannot be joined later. Hence, the Bench dismissed the Applicant's application.

ALTERNATIVE DISPUTE RESOLUTION

SIMPLIFY
How is arbitrator appointed?

Appointment of an arbitrator is governed under section 11 of the Arbitration & Conciliation Act, 1996. Accordingly, only High Court has the power to appoint an arbitrator, only when the following conditions are fulfilled:

1. There is a valid arbitration agreement.
2. Agreement contains for appointment of one or more arbitrator.
3. Appointment is to be made by mutual consent of the parties.
4. Dispute has arisen between the parties of the arbitration agreement, or between appointed arbitrator.
5. Dispute is on the appointment.

Delhi High Court: Pendency of insolvency application not an embargo to appointment of arbitrator

In the case of *Millenium Education Foundation v. Educomp Infrastructure and School Management Limited*, the Delhi High Court passed an order vide order dated 13.05.2022, in favour of the Petitioner and allowed the appointment of arbitrator despite insolvency resolution petition under section 9 of the Insolvency and Bankruptcy Act, 2016 pending before Adjudicating Authority.

In the present case, the parties entered into a collaboration agreement in 2014 after which a dispute arose between them. Subsequently, demand notice and counter notices were exchanged and Petitioner sought to refer the dispute to arbitration, but the Respondent refused. Then the Petitioner applied for the appointment of an arbitrator, in the meantime, the Respondent had filed an insolvency resolution petition under section 9 of the Insolvency and Bankruptcy Act, 2016 before the Adjudicating Authority.

The issue for deliberation in the present case whether an arbitrator can be appointed while insolvency resolution petition is pending consideration before the Adjudicating Authority. The Respondent contended and relied on the 2021 judgment of the Supreme Court in *Indus Biotech v. Kotak India*, wherein the Supreme Court gave precedence to insolvency proceeding over arbitration proceeding and held that arbitration petition would not be maintainable after insolvency resolution petition is admitted.

The Court analysed the arguments and the judgment relied upon by the Respondent and observed that the pendency of insolvency resolution application does not bar the appointment of arbitrator. The Court noted that the legal position established in *Indus Biotech* is that when an insolvency resolution petition is admitted and a moratorium is declared then only arbitration proceedings would be non-maintainable. The pendency of insolvency resolution application is for the Adjudicating Authority to satisfy whether or not a default has happened.

Bombay High Court: Court shall refer the parties to arbitration when there is a duality of opinion as to the genuineness of the agreement

In the case of *M/s Atul & Arkade Realty v. IA & IC Pvt Ltd*, the parties had entered into a joint venture agreement for development rights in a property. But later, a dispute arose between the parties and the Applicant moved for interim relief but the same was not provided. Then the Applicant made an application for the appointment of arbitrator under section 11 of the Arbitration and Conciliation Act, 1996. However, the Respondent objected and contended that the arbitration agreement between the parties is a false, forged and fabricated document and that sufficient stamp duty is not paid on the agreement thereby, a pre-arbitration trial was held to determine the authenticity of the agreement.

The issue before the High Court here was that there were differing expert opinions on the authenticity of the signature and rubber stamp on the agreement. The authenticity of the agreement vis-a-vis the allegation of fraud and forgery of the agreement needs to be deliberated for the existence of arbitration. To this, the Court laid down certain considerations to decide on the issue of fraud while appointing an arbitrator. The considerations are: (1) specificity, spontaneity and gravity of allegation; (2) whether the allegation relates to undermine the validity of underlying contract or they pertain to the transaction pursuant to the contract; (3) whether the allegation involves a public law element; (4) material to support the allegation; and (5) whether the determination by the arbitrator would be inefficacious or prejudicial to the public interest.

The Court noted that the allegation of fraud and forgery attacks the execution of agreement, however, considering the duality in expert opinions regarding the genuineness and authenticity, the

Court found it fit to refer the matter to be decided as a preliminary issue by the arbitrator appointed. Accordingly, the Court appointed the arbitrator and issued directions to decide the issue of validity of the agreement as a preliminary issue.

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