

# **THE LEGACY OUTREACH**

**EDITION VIII**  
October 2022 - December 2022

# *Index*

## **Recent Legacy Triumphs**

A Birdview of the Data Protection Bill, 2022

Decoding the Jurisdiction Under Real Estate Regulation Authority (RERA) Act, 2016

## **Diversity and Identity - An Inclusive Way Ahead!**

Case Analysis: Gujarat State Civil Supplies Corporation vs. Mahakali Foods Pvt Ltd

Morbi Bridge Collapse: The Apparent Concession Disfunctionality

## **Speed Read with Legacy**

## **Season's Greetings & New Beginnings!**

**योग: कर्मसु कौशलम्:**

You Should Be Perfect

# Bidding Adieu to 2022

The year 2022 was the 16th year since Legacy Law Offices LLP came into existence. Within such time, team Legacy, by way of utmost diligence and enthusiasm, has been able to attain amplitudes of success in its legal practice. The past year, being credited as the actual recovery period after the unfortunate pandemic, has given us a positive outlook towards the future and has ensured that 2023 will bring new and distinctive growth in the legal field.

2022 has also been the year where our Law Firm and our Managing Partner have had the privilege of achieving new levels of success. While the Firm has been the bearer of the tags of a "Recognized Firm" by AsiaLaw; a "Recommended Firm" by IFLR 1000; and a "Leading Firm" by Legal 500, our Managing Partner, Mr Gagan Anand on the other hand, has had the pleasure of being included in the '2022 - 23 A-List of Lawyers' by the India Business Law Journal and has also been recognized by Chambers and Partners - Asia Pacific.

These achievements have been in addition to his recent recognition as a "Litigation Star" by Benchmark Litigation, a "Notable Practitioner" by AsiaLaw, and a "Highly Regarded Lawyer" by IFLR 1000.





# Recent Wins for Legacy

Team Legacy has, in the recent past, successfully rendered legal services for various assignments and matters including the following:

- Major Win for our client in relation to "Rehabilitation and upgradation of Goharganj to Bhopal section of NH-12 from existing Kilometer 255/300 to kilometers 301/200 including construction of Obedullaganj Bypass etc" before Jabalpur Bench of Madhya Pradesh High Court.
- Rendered legal services for establishing and incorporation of Himachal Pradesh Bulk Drug Park Infrastructure Limited which will be the implementing agency for setting up the Bulk Drug Park at Una in the State of Himachal Pradesh.
- Successfully advised and rendered contract management services to our client, 'Construction Technique' for an Asian Development Bank (ADB) funded Project concerning the conservation and rehabilitation of the 128 years old heritage property 'Bantony Castle Complex', also well-known as the summer palace of former Maharaja of Sirmaur in Shimla.

- Successfully represented our client before Uttarakhand High Court in a petition under section 11(5) of The Arbitration and Conciliation Act, 1996 concerning a dispute between a Central Public Sector Undertaking and Border Road Organisation arising during the construction pertaining to "Widening / Improvement of Dharasu-Gangotri Road.

EDITION VIII



**RENDERED CONTRACT MANAGEMENT SERVICES FOR REHABILITATION OF 'BANTONY CASTLE COMPLEX', SHIMLA.**



**128-year-old heritage Bantony Castle set to greet visitors**



Bantony Castle being set for management after the formation of the new government in the state. (12/12/2017)

Legacy Law Offices LLP rendered legal services for Drug Park in Himachal Pradesh.




**Shalini Munjal,**  
Co-managing Partner

# A Birdview of the Data Protection Bill, 2022

On 18th November 2022, the Ministry of Electronics and Information Technology (MeitY) released the Digital Personal Data Protection Bill, 2022 (DPDP Bill) to do away with the fallacies of the previously drafted Personal Data Protection Bill, 2019. The much-awaited Bill has been in the pipeline since the landmark judgment of Justice K.S. Puttuswamy (Retd.) v. Union of India<sup>[1]</sup>, wherein the Hon'ble Supreme Court had held the Right to Privacy to be an independent fundamental right protected by the Constitution of India.

Following the judgment, the Union deemed it necessary to craft a specific legislation covering the domain of a special law governing the protection and usage of the digital data of the citizens of India, with relation to which, a ten-member 'Committee of Experts on Data Protection' led by Justice Shri B.N. Srikrishna was established.

The reports submitted by the committee went through a lot of deliberations and were finally given the form of the DPDP Bill, 2022, which has the following features.

- Important definitions

Under this Act, Data Fiduciary and Data Principal are the fundamental contracting parties extracting benefits and obligations from the substance of its provisions.

- Consent and Deemed consent

The provisions defining 'Consent' and 'Deemed Consent' are the key ingredients of this Bill. These ingredients are defined exhaustively yet briefly to integrate all complexities concerning what will be considered consent and deemed consent of the Data Principal.

- Rights of Data Principal

Rights of the Data Principal are divided into four broad categories as set out below:

### *Right to information*

The above right is one of the most fundamental rights exercised by the Data Principal regarding one's own information, securing full-fledged control of how the data is shared and processed on the part of the Data Fiduciary.



The Data Principal can exercise this right to various personal data processing aspects, such as confirmation regarding the processing status of the personal data, statement of activities undertaken by the Data Fiduciary in the process, and specifications of Data Fiduciaries handling personal data of Data Principal at various stages.

#### *Right to correction and erasure*

Data Principal has a monopoly over the usage and erasure of his/her data. In the exercise of this right, a Data Principal can primarily govern the sharing, correction, completion and updating of his/her data through a request made to Data Fiduciary for such correction and erasure thereof.

#### *Right of Grievance Redressal*

The Data Principal shall have ready recourse to register a grievance with the Data Fiduciary with a subsequent right to approach the Board in case of delay or inaction on the part of the designated authority.

#### *Right to Nominate*

This right allows the Data Principal to nominate any person to exercise the above-mentioned rights on behalf of the Principal in the event of death or incapacity due to unsoundness of mind.

#### • Duties of Data Principal

The provisions guaranteeing rights are followed by a section entailing duties of data principle provided within four brief heads, including:

1. Duty upon the Data Principal to comply with the provisions of all applicable laws while exercising rights guaranteed within the provisions of this Act.
2. Duty upon the Data Principal to not register a false or frivolous grievance or complaint with the Board or Data Fiduciary
3. Duty upon the Data Principal to not furnish any false particular, suppress any material information or misrepresent any person while applying for a document, service, proof of address or identity, and so on.
4. Duty upon the Data Principal to provide bona fide information in the course of exercising the right to correction or erasure

#### • Simplified Cross-Border Data Transfer

After a thorough assessment of significant factors, the State is empowered to make regular notifications to Data Fiduciaries, validating the transfer of personal data in countries or territories outside India.

This provision was specially added to overcome the previously proposed stringent restrictions governing cross-border data transfers, which ultimately negatively impacted and soured trade ties with other countries.

- Data Protection Board of India

The compliance framework within this Act provides for establishing a Data Protection Board of India. Serving as the quasi-judicial authority, it will be subject to the notifications of the Central Government for further developments on its purpose.

- Enhanced financial penalty.

After conducting an inquiry and providing a reasonable opportunity to be heard, the Board can impose a financial penalty up to an enhanced limit of Rs. 500 Crores in each case.

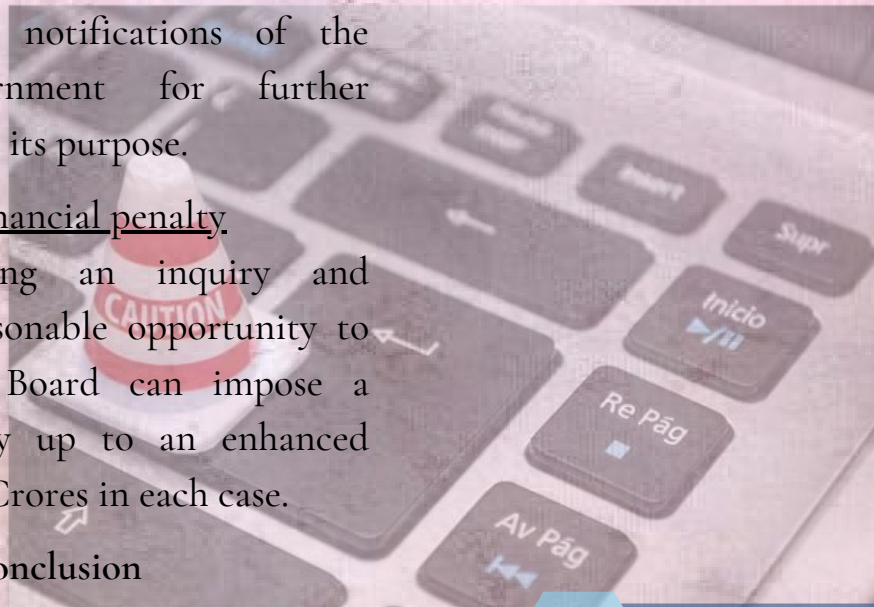
### Conclusion

By a mere perusal of the DPDP Bill, it can be inferred that the measures taken by the enactment may actually lead to the enforcement of its primary purpose, that is, to 'provide for the processing of digital personal data in a manner that recognizes both the right of individuals to protect their personal data and the need to process personal data for lawful purposes.

Even though the present bill may have a few shortcomings in relation to an increased ambit of powers lying with the Data Fiduciary and other such issues, it would be interesting to witness the implementation of the first-ever Indian data protection law.

### End-Note

I. Justice K.S. Puttuswamy (Retd.) v. Union of India, (2017) 10 SCC 1.





# Decoding the Jurisdiction Under Real Estate Regulation Authority (RERA) Act, 2016

The Real Estate (Regulation and Development) Act, 2016 came into force on 25.03.2016. The primary purpose of the act is to promote the development of real estate in the Country at par with international standards. At the same time, it protects the rights of real estate consumers/ buyers by providing them with a specialised option of grievance redressal against developers/ promoters/ real estate agents.

The Jurisdiction of the Real Estate Regulation Authorities established under the Act for dispute resolution is state-wise and clearly defined on the basis of relief sought by the buyers against their developers. The RERA has two forums to adjudicate and resolve the issues for both buyers and the seller which are as follows:



Section 79 of the Act bars the jurisdiction of civil courts in real estate-related disputes.

Section 89 of the Act provides an overriding effect of the RERA Act over other acts inconsistent with the RERA Act provisions

The Hon'ble Supreme Court has underlined the clear-cut jurisdiction of the Authority and Adjudicating Officer in the recently decided Judgment titled M/s Newtech Promoters and Developers Pvt Ltd. V. State of UP & Ors.[1] It is no more a matter of doubt which organ under RERA will have Jurisdiction to provide relief in the kind of malpractices recognised under the Act.

## Division of Roles

- **Authority:** The functions of Authority are defined in Section 34 and it exercises power under Sections 35, 36, 37 & 38. The Authority holds the power to call for information & conduct investigations, issue interim orders and directions and impose penalties or interest.
- **Adjudicating Officer (AO):** The AO has the power to grant compensation. The AO derives its appointment under section 71 and powers to grant the compensation under section 72 of the Act. It is interesting to note that the grant of compensation is in addition to reliefs of possession/ refund or interest.



## Malpractices recognised by RERA Act, 2016

The various Promoter-malpractices recognised by RERA Act are providing wrong information in the prospectus/ advertisement/ notice, non-adherence to the building plan, non-delivery of timely possession, providing poor quality service and other such violations.

The RERA Act 2016 clearly enunciates the various reliefs which can be claimed by aggrieved allottees in cases of malpractices as mentioned below:

Section	Protection	Relief	Jurisdiction
Section 11 & 12 r.w. S.19 (1) :	Protection to investors in cases of wrong information provided by developer in notice, advertisement, prospectus, model apartment/ plot or building related to project.	Refund, interest and compensation	Refund & Interest by Authority;  Compensation by AO.
Section 14 (1), (2), (3):	Protection to allottees in cases of structural defects, bad quality of workmanship, or other services as per Agreement provided the same are brought to the developer's notice within 5 years of possession.	Defect to be rectified by the Developer within 30 days of such notice without further charge.	AO to grant compensation in case of Developer's default.
Section 18 (1) r.w.19 (3), (4).	Protection to allottees who have not been given timely possession by Promoter.	<ul style="list-style-type: none"> <li>• In case the Allottee wishes to withdraw, Refund with interest including Compensation.</li> <li>• In case the Allottee wishes to take possession, interest for every month of delay till possession.</li> </ul>	Refund & Interest by Authority in case of delay in possession.

Section	Protection	Relief	Jurisdiction
Section 18 (2) :	Loss caused to Allottee due to defective title.	Compensation	Compensation by AO
Section 19 (2), (5), r.w. S.18 (3):	Other violations of Sale Agreement by Promoter	Compensation to Allottee	Compensation by AO.

### Conclusion

Under Sections 11, 12, 13, 14 and 19 (1-6) of the Act, multiple layers of protection have been provided in the form of:

1. buyer information and awareness by the Promoter
2. compliance with RERA rules and Regulations by Promoter and Real –estate agent
3. abiding by the terms of the Builder-Buyer Agreement by Promoter and Allottee both. It has been mandated for Promoters to maintain web pages on the website of RERA for providing Project related information in a clear and transparent manner to the public. Any breach of promised terms is attracting settlement through RERA or AO in the first instance and failing settlement penal provisions under the Act.

The RERA ensures that the rights of both the Allottees as well as the Promoters are equally protected.

Real estate development by Promoters and Real-Estate Agents is regulated by close monitoring.

#### End-Note

1. M/s Newtech Promoters and Developers Pvt Ltd. V. State of UP & Ors, 2021 SCC OnLine SC 1044

# Diversity and Identity

*An Inclusive Way Ahead*

Since its inception, Legacy Law Offices LLP has promoted Diversity in all its initiatives and management. We have a strong belief in an equal opportunity environment for every individual, irrespective of their gender, ideas, culture, lifestyle, orientation, etc.

In line with our initiatives to further an equally empowering environment, we wish to bring forth the names and identities of the outstanding Lawyers behind the recent triumphs at Legacy.



Ms Shalini Munjal, Co-Managing Partner

Ms Munjal joined Legacy in the year 2010 and has since been at the forefront of the Firm's General Corporate Practice. She heads a team of highly qualified lawyers and has been continuously guiding them on the path to success.

Recently, Ms Munjal, along with certain members of her team including Ms Eshjyot Walia (Principal Associate Advocate), Ms Shamita Kaushik (Senior Associate) and Mr Nandish Munjal, (Associate Advocate) provided quality professional legal services to the Himachal Pradesh Bulk Drug Park Infrastructure Limited which was the acting agency for the establishment of the prestigious Drug Park.



Ms Sadiqua Fatma, Senior Partner

Ms Fatma has been with Legacy since 2012 and is heading the Delhi Dispute Resolution Practice of the Firm which includes experienced Litigators and Lawyers.

In the recent past, Ms Fatma achieved a new pinnacle, where she was able to achieve favorable orders in 3 consecutive arbitrations filed by Highway Sector Concessionaires against the National Highways Authority of India.



# Diversity and Identity



Ms Roopali Chaturvedi, Partner and AOR



Ms Paromita Majumdar, Associate Partner and AOR

Ms Chaturvedi is the in-house AOR and Dispute Resolution Partner at Legacy Law Offices LLP. Presently, she handles the Supreme Court cases for the Firm and provides legal advice to our clients on matters and issues pertaining to POSH. In addition to her litigation skills, Ms Chaturvedi is also an avid reader and has authored various articles in different blogs and journals.

Her latest article, which sought to provide a gist of the new "Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022", received a lot of praise and accolades and was celebrated by a variety of clients.

Ms Majumdar joined Legacy in 2022 after acting as an In-House Counsel for Indiabulls and thereafter cleared her AOR examinations. Along with her detailed work portfolio, Ms Majumdar is also an active orator at various seminars, webinars and workshops organised by Institutes of Law, and other external organisations.

## Case Analysis: Gujarat State Civil Supplies vs. Mahakali Foods Pvt Ltd.

In the recent case of Gujarat State Civil Supplies Corporation Ltd. vs Mahakali Foods Pvt. Ltd. & Anr [1], the Hon'ble Supreme Court of India repeated its decision along the lines of the overriding effect of the Micro Small and Medium Enterprises Development Act, 2006 (MSMED Act) over the provisions of the Arbitration & Conciliation Act, 1996 (Arbitration Act). However, unlike the earlier judgments, this case involved a close introspection over the legislative history, intent and meaning of the provisions of the MSMED Act, in comparison to that of the Arbitration Act, which in turn, sought to clarify, once and for all, the position of law regarding the applicability of the two statutes in a given case.

Basing its decision on the two main principles of legal jurisprudence, vis-à-vis, 'Leges posteriores priores contrarias abrogant', meaning that "the later laws shall abrogate earlier contrary laws" and 'generalia specialibus non derogant', that is, "general laws do not prevail over special laws", the Hon'ble Supreme Court clarified the fact that MSMED Act has unquestionable precedence over the Arbitration Act.

### Factual Matrix of the Case

Before evaluating the substance of the judgment, it is imperative to contextualize the trajectory of the case, which included the clubbing of 7 different appeals arising out of the impugned judgments of the High Courts of Bombay, Delhi and Gujarat. The common questions of law in all of these appeals, including the questions raised in the case of Gujarat State Civil Supplies Corporation Ltd., were duly examined by the Hon'ble Court.

To resolve the conflict highlighted in the matters at hand, the Court carefully examined and studied the nature of the enactments and held that the provisions of the MSMED Act will override the Arbitration Act. It further emphasized the significance of the underlying purpose of a statute to help determine whether a specific provision promotes or frustrates its preamble. While making a reference to the case of Commissioner of Income Tax, Patiala vs Shahzada Nand & Sons,[2] the Hon'ble Supreme Court also observed the primary and time-honoured rule of statutory interpretation, which specified that the legislature's true intention must be construed from the plain and unambiguous expressions used in the provisions of a statute.



So far as the judicial reasoning in this case stretches, the Court examined the issue of whether a separately existing arbitration clause would be relevant in a case where the parties to a contract decided to follow the procedure under Sub-section (1) of Section 18 of the 2006 Act. It stated that a plain reading of the Section revealed the intention of the legislature and clarified the questions about its application. A reference was made to the case of *Silpi Industries etc. vs Kerala State Road Transport Corporation*,<sup>[3]</sup> wherein the Hon'ble Apex Court had observed the overriding effect of the MSMED Act legislation owing to its unique nature over the Arbitration Act.

The Hon'ble Court further noted that the objectives for creating the two Acts differed vastly. While the MSMED Act was intended to benefit a specific class of persons per se, the Arbitration Act, on the other hand, aimed to provide a general law for resolving disputes through domestic, international or commercial arbitration or conciliation. The overall scheme of the latter enactment provides for the law relating to Arbitration in India.

A separate note was made for the primary objective of the Arbitration Act which was to ensure fairness in the arbitral proceedings and minimize judicial interference, while that of the MSMED Act specifies the enactment to be welfare legislation for extending statutory support and facilitating promotion, development and enhancing the competitiveness of micro, small and medium sector enterprises in India.

### Analysis of the judgment

A mere perusal of the judgment gives an inference that the Hon'ble Chief Justice Bench of the Supreme Court made careful observations to answer that the Facilitation Council had the power to adjudicate upon a dispute in relation to amounts due under Chapter V and to act as an arbitrator, provided that, it had previously conducted the conciliation proceedings under sub-section (2) of Section 18 of the MSMED Act. This power was inherent because the bar imposed under Section 80 of the Arbitration Act was overthrown by Section 24 of the MSMED Act, wherein the latter was applicable to the specific situation.

The Hon'ble Supreme Court also held that a supplier who registers after entering into a contract cannot be entitled to the benefits provided under the Act retrospectively.



Given the ratio of the case of Silpi Industries[3], the Hon'ble Supreme Court opined that a party who was not a "Supplier" as per the definition given under Section 2 (n) of the 2006 Act on the date of entering into the contract, could not seek any benefit as a supplier under this Act. Ergo, such a party cannot refer disputes to the Facilitation Council under Sections 17 and 18 of the said legislation.

Even though the Arbitration Act and the MSMED Act have discrete spheres of operation, the Hon'ble Court held that the latter 'welfare legislation' would be read more liberally compared to the Arbitration Act. The contribution of this case to the development of MSME law and the Arbitration law is immense considering the multifarious ground-level implementation complexities of the two enactments in the political and cultural context in which these operate. The implications of the findings within this case are particularly relevant to clarify doubts regarding the literal and statutory interpretation and the factors that dictate the availability of different remedies subject to various enactments. Both statutes under question are relevant for distinct fields; hence, their legal interpretation shall vary accordingly.

End-Notes:

1. Gujarat State Civil Supplies Corporation Ltd., vs. Mahakali Foods Pvt. Ltd., 2019 SCC Online Guj 4302.
2. Commissioner of Income Tax, Patiala vs Shahzada Nand & Sons, AIR 1966 SC 1342.
3. Silpi Industries etc. vs Kerala State Road Transport Corporation, 2021 SCCOnline 439.
4. *Supra* at 2.





# Speed Read

EDITION VIII

In a case concerning the appointment of a substitute Arbitrator for adjudicating the dispute between the parties, the Jharkhand High Court has held that an application for appointment of substitute arbitrator made under Section 11(6) of the Arbitration Act (“Act”) is maintainable since the first arbitrator was appointed under the said section of the Act. Reasoning that the rules required to be followed for appointment of arbitrator under section 15(2) of the Arbitration Act have already been followed at the initial stage, the court noted that there is no requirement for instituting a fresh request under Section 21 of the Act for appointment of arbitrator, as the same will not be permissible, since, the power for appointment of arbitrator has been already seized the moment application under Section 11(6) was filed, and the same process cannot be revived.

*Case Name: M/s Central Coalfields Limited v. Eastern India Powertech Ltd., Arbitration Application No.14 of 2019, decided on 24-11-2022 (Jharkhand High Court)*

The challenge mechanism under The Insolvency and Bankruptcy Code (IBC) was recently highlighted when Reliance Industries Ltd. and Adani Power Limited opted not to participate in the much anticipated auction for insolvent Lanco Amarkantak Power Limited under IBC while raising objection to the proposed challenge mechanism on technical grounds. IBC allows the mechanism under Regulation 39-A(1-A) (b) which was recently added and crystallizes the challenge mechanism into the resolution process under the IBC.

The Securities and Exchange Board of India (SEBI) in November notified the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2022 (LODR) giving effect to an alternative method for the appointment and removal of independent directors from the boards of companies. Under this mechanism if the special resolution for appointment of an independent director does not get the requisite majority, then two alternate options that can be pursued are threshold for ordinary resolution and threshold for the majority of minority shareholders.

# Morbi Bridge Collapse: The Apparent Concession Dysfunctionalit

During the late evening of October 30, 2022, a 141-year-old bridge suspended with wires over the Machchu river of Gujarat, broke loose and submerged under water leading to a casualty of approximately 141 people. The bridge, known as the “jhulta pull” was originally constructed during the period of 1858 – 1922 by Waghji Thakur, the ruler of Morbi and had re-opened, only recently, for public visits, after being renovated by Ajanta Manufacturing Pvt. Ltd. / Oreva Group. Post the incident, it was brought to notice that the Contractor was working under an expired O&M concession agreement within the alleged supervision of the Morbi Municipality.

Following the incident and after much speculation and scrutiny, several reports emerged wherein certain substantial shortcomings in the Tender process, the Contract and its management were highlighted. These lacunae were furthered by corruption and a severe absence of due procedure, thus culminating in the unfortunate incident and casualties.

On the basis of the reports as well as the facts and circumstances, the Hon’ble Gujarat High Court took suo moto cognizance of the matter and initiated civil and criminal proceedings against several officials of the Morbi Municipal Corporation (‘Concessionaire’) as well as against Ajanta Manufacturing Pvt. Ltd. (‘Contractor’). An acknowledgement of these proceedings was also made by the Hon’ble Supreme Court of India in the case of Vishal Tiwari vs. Union of India<sup>[1]</sup>, wherein the Bench comprising of the Hon’ble Chief Justice of India held that,

*“Should it become necessary at any stage to move this Court at a later date, liberty is granted to the petitioners or to any other aggrieved to do so. We dispose of these proceedings, leaving it open to the petitioners to pursue their remedies before the High Court. Since the High Court is already seized of the suo moto proceedings, we request the High Court to take them up on a periodical basis so that the purpose of underlying the assumption of jurisdiction is duly fulfilled.”*



Thus, in lieu of an absence of due procedure which led to the collapsing of a bridge, a dire need arose, for a detailed examination of the procedure through which the alleged tender for the improvement and renovation of the bridge was awarded. This became necessary on account of the utter failure to comply with contractual obligations, the ultimate consequence of which was the ill-maintenance of a dilapidated ruin leading to the casualty and injury to a substantial number of people.

### **General O&M Concession Terms and their Apparent Lack Thereof**

The first and foremost step in any basic concessionaire agreement is the Expression of Interest (EOI) or Tender, which is followed by bids from qualified bidders, who are required to submit their experience and financial quotations. Thereafter, the authority makes a selection from amongst the bidders on the basis of such experience and an ideal financial quote and signs the agreement with the awarded agency. However, in case of the State of Gujarat, Section 110A of the Gujarat Infrastructure Development Act, 1999, allows the State Government or its agency (including any local authority operating under such agency), to enter into direct negotiations where the projects are covered within the ambit of Schedule III of the Act,

where the said schedule lays down a quad-criteria for classifying an eligible project. After completion of the aforementioned process, the agreement so signed consists of complex and detailed clauses, which seek to clearly define the rights of the Concessionaire as well as the Contractor, so as to reduce friction. Amongst the different types of concession agreements, an O&M concession agreement is the one adopted for contracts where the maintenance and operation of a structure is in question. Thus, for successful execution, it is necessary for the agreement to lay down an unambiguous listing of the duties or the Contractor for the purpose of adequately maintaining the structure. Thus under the legal system, the signing of a concession agreement is the consequence of a lengthy procedure filled with substantial steps and formalities, all of which have an intricate value within the system. After the collapse of Jhulta Pull, the fact of a complete absence of most of these steps and formalities surfaced, thus giving a prima facie inference to the moment when the ball started dropping.

The various clauses which are, in actuality, present in the Indian concessionaire agreements include the following:

- A clause which seeks to enumerate the various obligations of the Contractor through which it shall operate and maintain the property in question while to perform all such services as may be necessary under the applicable laws;
- An additional and important obligation put on the Contractor is to apply, gain and comply with all the necessary Governmental Permits, including all necessary modifications, amendments and renewals of such approvals. Amongst these approvals, the Contractor is also required to procure a “Fitness Certificate” in certain cases. Such certificate becomes necessary in cases where the structure in question is to be used by the public at large or when the concerns of safety become apparent;
- In certain cases, these clauses are accompanied by limited scope clause precluding the Contractor from sub-contracting the maintenance work to another company. However, this clause varies in different agreements and is dependent upon the region where the agreement is drawn. It is also subjective to the kind and nature of sub-delegation, *that is*, there may be cases where the contractor may be allowed by the Concessionaire to outsource a part of the maintenance, however, such delegation becomes a part of a consortium agreement;
- On note of sub-contracting, the Contractor may be allowed by the agreement to hire or engage the services of another company, after attaining due approval from the Concessionaire. However, such hiring or engagement is subject to the conditions imposed within the agreement and the types of obligations within;
- As a practice, all concession agreements contain a Force Majeure clause which precludes the responsibility of either party upon a failure caused due to an unforeseeable event. However, a ‘force majeure’ event only includes a case where the obligation under a Contract is prevented due to an act of the Government, act of war, act of god or any other such event which may not be in the control of the parties;
- For the Contractor, the most important clause in the agreement is the one that talks about the terms upon which the fee shall be levied for a speedy recovery and subsequent handover. While this clause may mention the actual amount or a percentage, such specifications are not always present; and



- Every concession agreement seeks to specify a minimum duration within which the maintenance work of the structure has to be completed. Indubitably, this clause may be considered as one of the fundamentals of such an agreement as it seeks to establish certain timelines, in the absence of which the maintenance will be indefinite, thus resulting in a significant loss to the Concessionaire.

As aforementioned, majority of such clauses were apparently missing from the agreement between the Morbi Municipality and the Ajanta Oreva Group. As per the interim revealed facts in the suo moto case (Suo Motu vs. State of Gujarat[2]), the Hon'ble Gujarat High Court observed that the agreement dated March 8, 2022 wherein the Concessionaire and the Contractor had been the alleged parties, was not actually approved by the Civic Body. It was further brought to the notice of the Hon'ble Court that there was also a preceding MoU between the parties which, although was drawn on 16.06.2008 for a period of 9 years, but was inconsequential owing to the absence of any action by the Contractor.

In fact, the entire communication between the Concessionaire and the Contractor, wherein the alleged maintenance of the bridge was supposed to be the subject matter, only seemed to concern the price at which the tickets were to be drawn, which further reflected the disregard to the actual objective of the O&M agreement.

It was further observed by the Hon'ble Court that post the expiration of the otiose 2008 MoU in 2017, which was merely one-and-a-half page long and was void of any definitions of the conditions or obligations of the Contractor, the latter continued to act as the Contractor and continued to operate and collect revenue from the dilapidated bridge, in spite of the fact that no new agreement or formal extension of the pre-existing agreement was drawn.

Another aspect that came to light was the fact that the Contractor had apprised the Concessionaire about the critical condition of the bridge and had claimed that the maintenance operations would not commence unless a new agreement was drawn, whereafter the impugned 2022 agreement was drawn. What was more peculiar was the fact that signing of the latter 2022 agreement did not take place after following the process of floating a tender or any EOI, that is, the first step for the concession seemed to be absent.



In its observations before an open Court, the Hon'ble Bench posed the following question to the accused:

*“From 15.06.2017, for a period of 2 years, without there being an MoU or agreement or entrustment, the bridge in question was continued to be maintained by Ajanta Company. After the said contract expired, what steps were taken by the official authorities to call for expression of interest or float a tender for a further period is not clear from the State's Affidavit?”[3]*

Furthermore, the Hon'ble Court also observed that there was a complete absence of a valid “Fitness Certificate” for the allegedly renovated bridge, which in fact, should have been a mandatory clause in any concessionaire agreement pertaining to the maintenance and operation of infrastructure.

A “Fitness Certificate”, as apparent from its name, is an essential element of any standing infrastructure. This certificate seeks to classify upon whether the maintenance of the structure, claimed to have been restored, is completed to the satisfaction of the appropriate authority and is fit to be used as per its primary objective. In the case of the jhulta pull, while the agreement lacked any such clause, the Hon'ble Court observed that even the Contractor did not take the necessary steps, in accordance with the contract, to get such certification.

Thus, the facts as noted by the Hon'ble Court revealed not only a blatant neglect of duty but also a complete lack of the fundamental provisions in the Concessionaire Agreement that may have prevented the tragedy.

### Conclusion

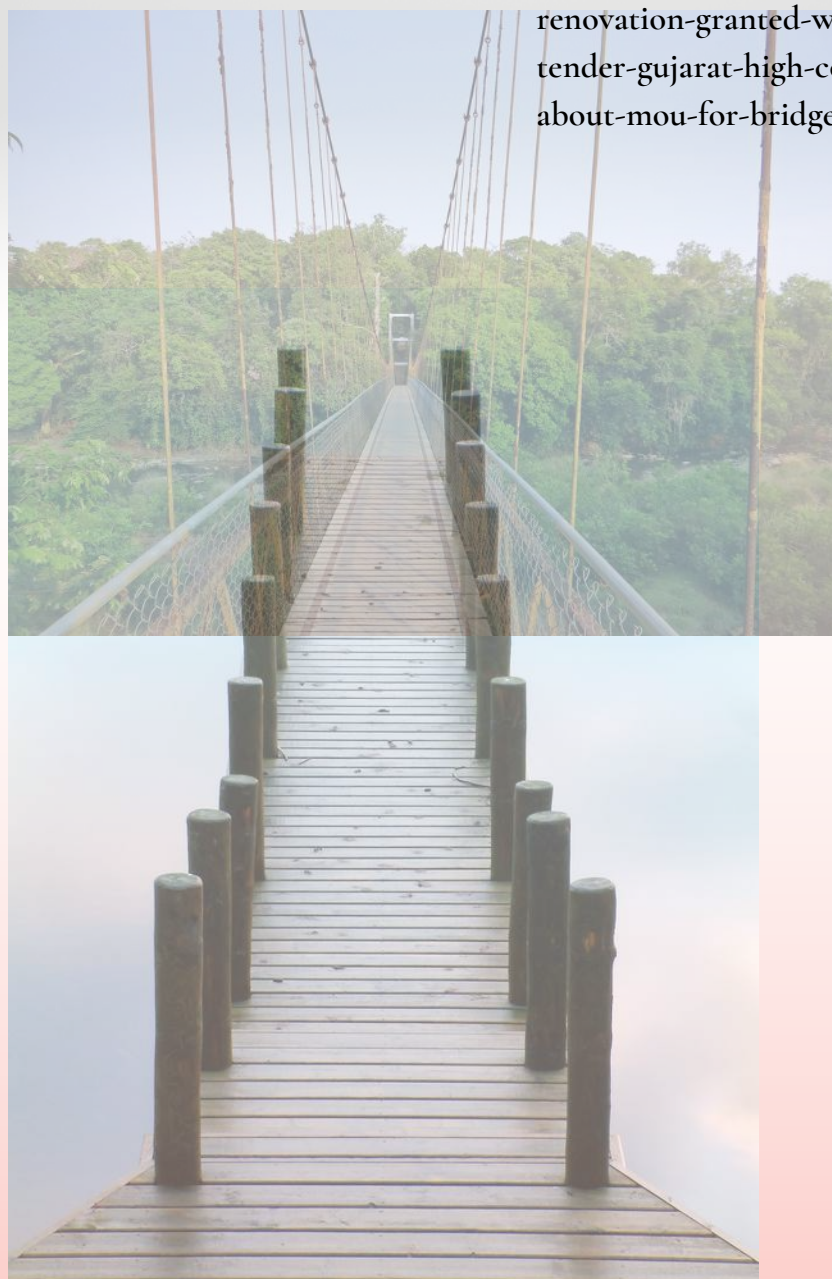
It is needless to mention that a detailed comparison of the particulars of a general concessionaire agreement with that allegedly signed between Morbi Municipality and M/s Ajanta Manufacturing Pvt. Ltd., make it evident that the unfortunate falling of the bridge was a result of a severe dysfunction in due procedure and an absence of observance of the due process of law. Even if the factum of the applicability of Section 110A of the GIDA is accepted, the entrusting of maintenance operations on the Contractor, in complete absence of any conditions may not be considered to be entirely ethical.

It is also pertinent to mention that all such facts have been duly revealed before the Hon'ble High Court of Gujarat, where the matter remains to be sub-judice, which keeps the discussion as to the defaulter and the severity of default, open and lingering.

In lieu of this, it only becomes more essential to note that the inception of the dropping ball started only after an impugned concession agreement and process came into existence, which further signifies the importance of such an agreement in PPP projects.

#### End-Note

1. Vishal Tiwari vs. Union of India, W.P. (C) 985/2022 in W.P. (Crl) 448/2022.
2. Suo Moto vs. State of Gujarat, 2022 SCC OnLine Guj 1860.
3. Sparsh Upadhyay, *Morbi Incident | How Contract of Renovation Granted Without Inviting Tender? Gujarat High Court Raises Questions About MoU For Bridge Maintenance*, LiveLaw (November 15, 2022), <https://www.livelaw.in/news-updates/morbi-incident-how-contract-of-renovation-granted-without-inviting-tender-gujarat-high-court-raises-questions-about-mou-for-bridge-maintenance-214137>.





## Season's Greetings and New Beginnings!

As 2022 comes nigh, we are filled with new hopes and ambitions. To welcome 2023, and to bid a perfect adieu to 2022, Legacy wishes to extend the perfect greetings to all its readers!



The end of 2022 has also brought about contemporary beginnings for Legacy, with brand new rankings and achievements:

Legacy is proud to announce that recently, our Managing Partner, Mr Gagan Anand was ranked in the Band 4 of Chambers and Partners, in the field of Projects, Infrastructure, and Energy.



In fact, his name was also added by the India Business Law Journal in the A - List of Lawyers for 2022 - 2023





## Contributors to This Edition

**Sadiqua Fatma**

Senior Partner

E: sadiqua.fatma@legacylawoffices.com

**Manijit Dewan**

Associate Director

E: manijit.dewan@legacylawoffices.com

**Shraddha Korekar**

Associate Advocate

E: shraddha.korekar@legacylawoffices.com

**Roopali Chaturvedi**

Partner and AOR

E: roopali.chaturvedi@legacylawoffices.com

**Akansha Srivastava**

Associate Advocate

E: akansha.srivastava@legacylawoffices.com

**Insiya Kothari**

Associate Advocate

E: insiya.kothari@legacylawoffices.com

## Disclaimer

This newsletter has been sent to you for informational purposes only and is intended merely to highlight certain issues. The information and/or observations contained in this or any other newsletter do not constitute legal advice and should not be acted upon in any specific situation without appropriate legal consultation.

The views expressed in this or any other newsletter do not necessarily constitute the final opinion of Legacy Law Offices LLP on the issues reported herein.

## Contact Us:

### DELHI

Legacy House, D-18,  
Nehru Enclave, Kalkaji,  
New Delhi- 110019, India  
T +91 114 1752507-08  
F +91 114 1752509

### CHANDIGARH

Legacy House, #333,  
Sector 4, MDC,  
Panchkula- 134114, India  
T +91 172 2559332 -33  
F +91 172 2559335

Also at

| Solan | Kurukshetra | Mumbai |  
Representative Office at Saudi Arabia

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

