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Now that is set to Change

On 4 February this year, Union Law Minister Ravi Shankar Prasad introduced a Bill in the LOK SABHA that was already in force by way of an Ordinance promulgated on 4 November last year. One of the critical features of this Bill is the automatic stay of arbitral awards. To date, when an application is filed before the Court to set aside an award under Section 34 of the Arbitration and Conciliation Act 1996, such mere filing did not result in an automatic stay on the operation of that award. This position is under the 2015 amendment to Section 36 of the said Act.

Now that is set to change.

The Bill provides that effective 23 October 2015, if it is prima facie established that the arbitration agreement was prompted by fraud or corruption, the Court may grant stay on the arbitral award even while the application to set aside that award was pending.

The Bill shows that specific provisions on awards resulting from fraudulent contracts are gaining ground in India.

However, it is recommended that just like an exception has been made in the enforcement of fraud-induced awards, a similar exception may be made in the stipulated 120-day limitation period for challenging such awards on the grounds of fraud or corruption under Section 34 itself. Such a separate limitation period is consistent with the UNCITRAL Model Law objectives, and Section 34 is based on it.

This recommendation intends to help the Bill fulfil its true intent i.e cut back corruption in securing contracts or arbitral awards and promote India as the hub of international arbitration.

On other topical issues, the opinion seems divided on the country's massive inoculation drive. Some reports suggest that the government has administered over 3.29 crore vaccine doses. Others lament that it may take more than 4 years to vaccinate the entire population at this rate. Meanwhile, Mumbai vaccination centres continue to witness a mad rush of senior citizens and people with co-morbidities as they struggle to prevent the flouting of social distancing norms.

On a positive note, while most of 2020 was about struggling to adapt to extraordinary circumstances, business sentiment looks upbeat as the first quarter of 2021 draws to a close. The March edition of Legal Era has an array of exciting reads in addition to the usual features that we are sure you will enjoy swiping it. Like always, we look forward to your raves and rants at the other end.

Aakriti Raizada

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-Aakriti Raizada
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Legal Era aims to provide "in the trenches" editorial that gives Common Man, Law Students, Lawyers, Business Leaders and Corporate Managements a detailed outlook of the current legal scenario.

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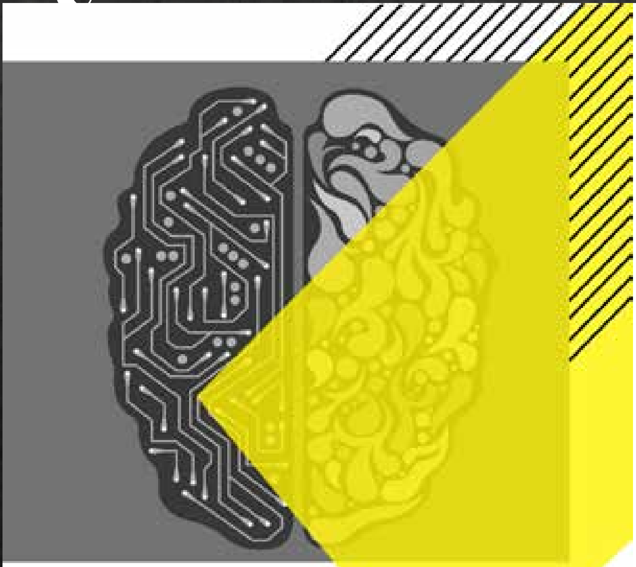

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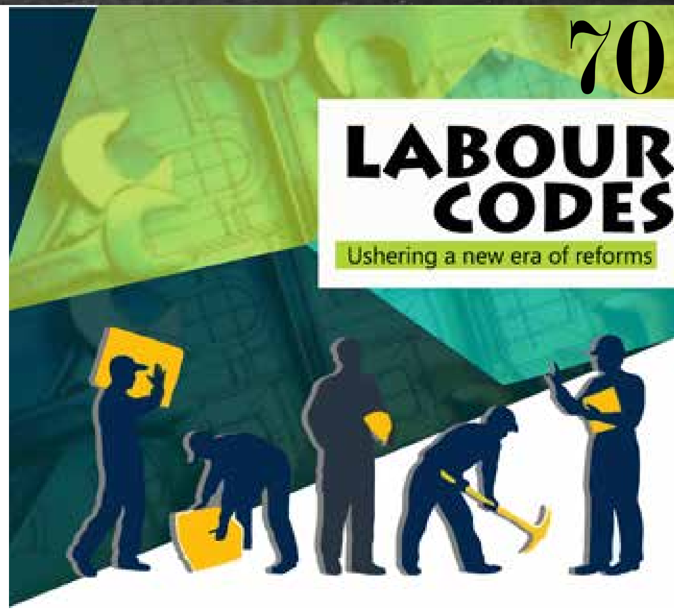

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READERS' NOTES BY THE PEOPLE FOR THE PEOPLE

Hearty congratulations to the Legal Era team for over a decade of success. Legal Era has always been a great platform for exchange of insightful and valuable information comprehensively covering the legal field. The January 2021 edition was finely curated with articles from eminent personalities in the field as well as contributions from young professionals.

Vinod Chauhan
Associate, Singh & Singh Law Firm LLP

I was delighted to go through the January 2021 edition link of Legal Era Magazine. All the topics covered apart from being topical provide the reader with accurate and relevant knowledge about each topic. I congratulate the Legal Era Magazine team for the hard work they have put in, by selecting the a Articles and providing the readers a variety of topics in one place.

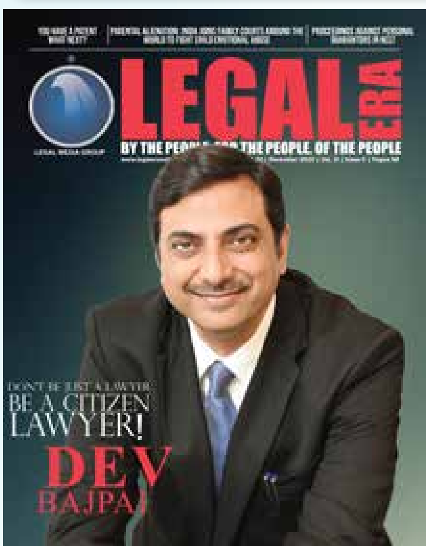
Rajiv Dutta
Senior Advocate - Supreme Court of India

Legal Era Magazine has established itself as one of the premier legal publications and is one of the top rated legal affairs magazines in India, both in print and digital media. Its rich & varied content, in-depth research, industry views, articles on the latest legal topics, judicial pronouncements' reporting and classic editorials make it wholesome and the most preferred legal magazine for any avid reader. I keenly look forward to new articles & editions to keep myself abreast with the latest happenings in the legal world.
I wish all the very best to Legal Era publication for their future endeavors.

Vineet Vij
Group General Counsel, Tech Mahindra

I had the best experience collaborating with Legal Era Magazine. It is undoubtedly one of the best legal resources we have in India today. The articles are engaging, crisp and up to date. Legal Era has gone from strength to strength and I wish them great success today and always.

Bindu Janardhanan
Registered Foreign Lawyer, Squire Patton Boggs



I found the contents of the magazine to be very informative and relevant. The articles and views of the authors were brilliantly put together. The standard of publications was exceptional and covered a broad area. As an author, I am grateful to the entire team for the support in editing and presentation of my views. The publication on both media, traditional as well as online, is an important feature I liked about Legal Era.

Aastik Dhingra
Advocate, Independent Advocate

I enjoy reading the articles in Legal Era magazine as they are thoroughly researched and provide in-depth analysis of the subject matter. They also reflect varied opinions of respected lawyers across a wide range of topics.

Mini Raman
Partner, LexOrbis

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MORATORIUM UNDER SECTION 14 OF IBC COVERS CRIMINAL PROCEEDINGS AGAINST CORPORATE DEBTOR UNDER SECTION 138 OF NI ACT: SUPREME COURT

Justices Rohinton Fali Nariman, KM Joseph and Navin Sinha

The Supreme Court has ruled that declaration of order of moratorium passed under the Insolvency and Bankruptcy Code (IBC) bars parallel proceedings under Section 138 of the Negotiable Instruments Act (NI Act) against the Corporate Debtor. The moratorium cannot be allowed to continue as the same will be covered by the bar under Section 14 of the IBC.

According to Section 14(1)(a) of the IBC, the institution of suits or the continuation of pending suits or proceedings against the corporate debtor (including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority) is prohibited.

According to the Court, moratorium was applicable only to the corporate debtor.

The petitioners appealed to the Supreme Court from the order of the National Company Law Appellate Tribunal (NCLAT) challenging the continuation of criminal trial under Section 138 NI Act during the pendency of liquidation proceedings in the National Company Law Tribunal (NCLT).

The NCLAT by its judgment had approved continuation of parallel proceedings under Section 138 of the Negotiable Instruments Act even as the resolution process under the IBC was under way against the company subjected to moratorium.

The bench of Supreme Court Justices Rohinton Nariman, Navin Sinha and KM Joseph held, "We have held that proceedings under Section 138/141 NI Act are covered by moratorium under Section 14 of IBC."

Last year, a division bench comprising Justices UU Lalit and Aniruddha Bose had issued notice to the Attorney General to determine the issue whether NCLT's moratorium during CIRP will bar the proceedings under Sec 138 of the NI Act.

As to the facts of the case, a moratorium was imposed after the NCLT Chennai bench had initiated Corporate Insolvency Resolution Process (CIRP) against Diamond Engineering Chennai Limited (Corporate Debtor) in June 2017 on a petition by Shah Brothers Ispat Private Limited.

Shah Brothers Ispat Private Limited had earlier filed a complaint under Section 138 before the Metropolitan Magistrate Court, Kurla Mumbai against the Appellants-Directors of the Corporate Debtor. It was filed prior to the initiation of CIRP against the Corporate Debtor. Another complaint under Section 138 of NI Act was also filed after June 6, 2017, i.e. after the order of moratorium.

The Appellant – Directors approached the NCLT contending that during the period of moratorium, petition under Section 138 of NI Act would not be maintainable. The tribunal directed Shah Brothers to withdraw the complaint under Section 138 of NI Act treating it as a proceeding filed after order of moratorium with observation that such action amounts to misuse of the process of law.

Shah Brothers appealed to the NCLAT against the NCLT order. The question before the NCLAT was whether the order of moratorium will cover a criminal proceeding under Section 138 of NI Act.

According to the NCLAT, Section 138 is a penal provision, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim.

Aggrieved, they appealed to the Apex Court.

AMAZON-FUTURE TUSSLE: SUPREME COURT BARS NCLT FROM FINALIZING SANCTION OF SCHEME

The Supreme Court has allowed National Company Law Tribunal (NCLT) to proceed in the Amazon-Future Retail case, but has directed it to refrain from passing any final order sanctioning the scheme the case sanctioning the scheme the case.

The Supreme Court has sought response from Future Retail Limited in a plea by Amazon that challenged the Delhi High Court order which had stayed the implementation of status quo direction passed by Single-Judge bench of Justice JR Midha of the Delhi High Court with respect to the Future-Reliance deal.

The Supreme Court Bench headed by Justice RF Nariman also ordered that while the proceedings before National Company Law Tribunal (NCLT) can go on, but it should not culminate in any final order of sanction of the scheme. The Court has stated that the matter will be heard after three weeks after the rejoinders are submitted in two weeks.

Amazon had approached the Top Court challenging the Delhi High Court order which had stayed the implementation of status quo direction passed by single-judge of the High Court with respect to the Future-Reliance deal.

When a plea was filed by Amazon Inc. against the ₹ 25,000 crores deal between Future Retail Ltd. (FRL) and Reliance Industries', a Delhi High Court Single-Judge Bench headed by Justice JR Midha had granted interim relief to Amazon directing all authorities and parties to maintain status quo on the deal until a detailed interim order on the case.

Later, Future Retail moved the Delhi High Court challenging the decision and a Division Bench comprising Chief Justice DN Patel and Justice Jyoti Singh stayed the status quo noting that there was no reason to seek a status quo before the learned Single Judge and that statutory authorities like SEBI, CCI should not be restrained from proceeding in accordance with the law.

This instant plea in the form of a Special Leave Petition (SLP) was filed with the Supreme Court by Amazon contending that the Division Bench order of the Delhi High Court is illegal, and arbitrary and without jurisdiction. The plea further contended that the Division Bench of the High Court could not have heard a letters

Justice Rohinton Fali Nariman

patent appeal from an order passed under Section 17(2) of the Arbitration and Conciliation Act.

It was further contended that FRL could not have preferred the Appeal before the Division Bench under Order XLIII Rule 1(r) of the CPC read with Section 13(1) of the Commercial Courts Act, 2015, thereby challenging an order issued under Section 17(2) of the Arbitration and Conciliation Act.

Amazon further contended that the Division Bench hastily passed the impugned order without waiting for the detailed order of the single-judge and without appreciating the "Group of Companies" doctrine.

According to Amazon, FRL disregarded the rule of law and that a collateral challenge to an Emergency Award cannot be permitted.

Justice RF Nariman said that the order under challenge seems to have decided the appeal finally at the interim stage. The Court therefore issued notice and stayed the NCLT proceedings. The Supreme Court, also clarified that the said matter is not before it and that it will not interfere with the same.

The Apex Court said that it will pass an order that proceedings before NCLT can continue, however, no final order can be passed by the NCLT on the scheme of amalgamation.

The Court also clarified that separate proceedings before a Division Bench arising from the observations made by another single-judge of Justice Mukta Gupta in the case filed by Future against Amazon will continue.

SUPREME COURT: CONSENT DECREE WILL NOT ACT AS ESTOPPEL IF COMPROMISED BY FRAUD, MISREPRESENTATION, OR MISTAKE

Justices Vineet Saran & Mohan M. Shantanagoudar

The Supreme Court of India (SC) in the case of Compack Enterprises India (P.) Ltd. (Petitioner) v. Beant Singh (Respondent), observed that a consent decree would not serve as estoppel, where the compromise was vitiated by fraud, misrepresentation, or mistake.

The SC bench comprising Justices Mohan M. Shantanagoudar and Vineet Saran, on 17 February 2021, stated that the High Court (HC) was correct in upholding the terms of the consent decree directing Petitioner to hand over possession of the entire suit property.

While referring to the case, Gupta Steel Industries v. Jolly Steel Industries Pvt. Ltd. & Anr., (1996) 11 SCC 678, the Apex Court observed that the consent decrees are intended to create estoppels by judgment against the parties, thereby putting an end to further litigation between the parties. It would be slow to unilaterally interfere in, modify, substitute or modulate the terms of a consent decree unless it is done with the revised consent of all the parties thereto.

Originally in this case, a suit for possession and mesne profits was filed by the owner of the property (respondent) against the company (petitioner) regarding the ground floor of the property owned by the former.

The HC passed a consent decree wherein it directed that Compack Company would pay to Singh through mesne profits, an enhanced sum of ₹ 1,00,000/- per month with a 10% increase "After every 12 months, i.e. from 1.10.2009, 1.10.2011, etc. w.e.f. 1.10.2008 (i.e., the date on which the 2006 Agreement expired) till the date the Petitioner (Singh) hands over actual possession of the suit property measuring 5,472 sq. ft. to the Respondent (Company)."

A review petition was filed by the 'petitioner' that was also dismissed by the HC.

The petitioner stated that the HC has erred in recording its judgment that the Petitioner has consented to handing over possession of the entire suit property area and that recording the terms of the consent decree, it recorded a 10% increase in mesne profit every 24 months, instead of 12 months.

The Top Court stated while observing the issue of the Mesne Profits that the recording of a 10% increase after every 12 months in the consent decree was an inadvertent error on the part of the HC.

It stated, "There is an inconsistency in so far there is a gap of every alternate year, i.e. from 2009 to 2011, in the example used by the learned Single Judge even though the decree notes an increase of 10% in mesne profits after every 12 months."

The Top Court added "The aforementioned inconsistency in the underlined extract of the consent decree is an error apparent on the face of the record. Hence, we find that this is a fit case to exercise inherent the jurisdiction to correct the terms of the consent decree, to bring it in conformity with the intended compromise."

The Apex Court disposed of the appeal and recorded its displeasure at the Petitioner's repeated and persistent efforts to re-agitate the question of delivery of possession to the Respondent.

The bench observed, "However, this formulation is far from absolute and does not apply as a blanket rule in all cases."

The Top Court referred to its judgment in the case of Byram Pestonji Gariwala v. Union Bank of India &

Ors., (1992) 1 SCC 31, and held that a consent decree would not serve as estoppel, where the compromise was vitiated by fraud, misrepresentation, or mistake.

The Bench added, "The Court in the exercise of its inherent powers may also unilaterally rectify a consent decree suffering from clerical or arithmetical errors, so as to make it conform with the terms of the compromise."

While disposing of the petition, the Court directed, "The Petitioner is additionally directed to pay costs of ₹ 1 lakh to the Respondent."

SUPREME COURT: ONE-TIME SETTLEMENT WITH BANKS NOT A GROUND TO QUASH LOAN FRAUD CASE

The Supreme Court of India (SC) refused a plea to quash a case registered by the Enforcement Directorate (ED) under the Prevention of Money Laundering Act (Act) over the loan fraud allegations in Telangana.

The SC Bench headed by CJI SA Bobde noted that the banks have agreed for One-Time Settlement (OTS) and added that it could not be a ground for quashing, or act as a defense in the trial, and hence, it refused to entertain the petition filed by Narang (Petitioner) for quashing of the ED's case against him.

The Court noted that the total outstanding amount was above ₹ 190 crore, which was settled in approx. ₹ 66 crores. The Court accepted the request made by the Senior Advocate Mukul Rohatgi on behalf of the petitioner to delete the description as 'fraud' and 'cheat' in HC's judgment in view of the OTS settlement with banks.

On 22 December 2020, Telangana High Court (HC), while dealing with a batch of criminal petitions filed by the petitioner and others seeking to quash the criminal charges against them. It had noted that the banks' acceptance of OTS would not absolve the Petitioners.

The Court further stated in its order that "Such economic frauds adversely affect the financial and economic well-being of the Nation and have implications which lie beyond the domain of a mere dispute between Petitioner No. 4 and the above said banks, including Central Bank of India and Bank of Maharashtra."

It added, "The mere fact that the banks which are already under stress to clear the NPAs from their books accepted the OTS, will not absolve the petitioners from criminal charges."

The complainants' banks had also specifically incorporated in the acceptance of the OTS proposals terms and conditions that the acceptance of the same would not absolve the criminal liability of the Petitioners and that OTS and criminal liability were different and distinct.

The HC had stated that the Top Court had categorically held in a case based on the economic offenses that it was not proper for the HC to exercise its inherent powers under Section 482 Code of Criminal Procedure for quashing the FIRs/ charge sheets.

SUPREME COURT: MANUFACTURER NOT LIABLE FOR DEALER'S DEFICIENCY

The Supreme Court has absolved Tata Motors Limited of any wrongdoing arising due to the fault of its dealer in Goa for selling an old vehicle to an unsuspecting customer for which it was held guilty along with the dealer by various forums.

The Court held that unless it is proved that the manufacturer was aware of the deficiency of the dealer, the manufacturer cannot be held guilty for any wrongdoing on the part of the dealer.

A three-judge bench of the Apex Court, comprising Justices UU Lalit, Hemant Gupta and Ravindra Bhat accepted an appeal filed by Tata Motors Limited and absolved it of the liability arising out of an unfair trade practice by one of its Goa-based dealers, Vistar Goa (P) Ltd.

One customer Antonio Paulo Vaz had filed a consumer complaint in the District Forum seeking a refund of the money or replacement of the car with a 2011 model vehicle.

Vistar Goa had sold a 2009 model car to Vaz under the pretext that it was a 2011 model car. Tata Motors was also made an opposite party, along with the dealer in the complaint.

The District Forum allowed the reliefs sought in the complaint, holding both the manufacturer and dealer liable for it. Tata Motors' appeal that it cannot be held liable for the dealer's fault was dismissed by the State Commission. The National Consumer Disputes Redressal Commission also failed to give relief to Tata Motors and affirmed the findings of the State Commission and the District Forum leading to Tata Motors approaching the Supreme Court.

"The record establishes the absolute dearth of pleadings by the complainant with regard to the appellant's role, or special knowledge about the two disputed issues, i.e. the dealer had represented that the car was new, and in fact sold an old, used one, or that the undercarriage appeared to be worn out. This, in the opinion of this court, was fatal to the complaint. No doubt, the absence of the dealer or any explanation on its part, resulted in a finding of deficiency on its part, because the car was in its possession, was a 2009 model and sold in 2011.

"The findings against the dealer were in that sense, justified on demurrer. However, the findings against the appellant, the manufacturer, which had not sold the car to Vaz and was not shown to have made the representations in question, were not justified," the bench ruled.

The Court examined the terms of the dealership agreement and noted that the relationship was on a "principle-to-principle" basis. It further noted that there were no pleadings by the complainant (Vaz) that Tata Motors had special knowledge of the deficiencies of the dealer.

Tata Motors' plea that it cannot be held guilty if the dealer sold an old car to a customer as new was allowed by the Apex Court.

In the judgment authored by Justice Ravindra Bhat, the Court observed, "Special knowledge of the allegations made by the dealer, and involvement, in an overt or tacit manner, by the appellant, had to be proved to lay the charge of deficiency of service at its door. In these circumstances, having regard to the nature of the dealer's relationship with the appellant, the latter's omissions and acts could not have resulted in the appellant's liability."

Allowing the appeal, the Supreme Court set aside the findings of the Consumer Fora as against Tata Motors.

SUPREME COURT: WHENEVER NEW SCHEME IS INTRODUCED FOR EXISTING EMPLOYEES, RETIRED EMPLOYEES CANNOT SEEK ITS BENEFIT

Justices Ashok Bhushan, Subhash Reddy, and MR Shah

The Supreme Court of India (SC) bench comprising Justices Ashok Bhushan, Subhash Reddy, and MR Shah, while setting aside the order of the HC in the case of Himachal Road Transport Corporation & Anr. (Appellants) v. Himachal Road Transport Corporation Retired Employees Union (Respondents), stated that the HC did not notice the difference of factual background, in the cases relied on by the respondent-writ petitioner and it did not consider the issue independently in question.

The bench stated, "It is clear that all the members of the respondent-Union, while in service, were governed by Contributory Provident Fund Scheme. All those employees who retired before 05.06.1995 were paid all retiral benefits, applicable to them."

It added that "As the Pension Scheme was not in existence during the relevant time, it was not the case of violation of any service conditions either. The Pension Scheme is introduced by way of notification dated 06.10.1995, by giving effect from 05.06.1995, on which date the Cabinet has approved the Scheme. The employees who were governed by the Contributory Provident Fund Scheme and retired prior to 05.06.1995 and the employees who were in service and continued after 05.06.1995, of the appellant-Corporation, cannot be treated as a homogeneous class."

The factual matrix of the case is that the appellant corporation is established under the Road Transport Corporations Act, 1950. The employees of the Corporation were governed by the Contributory Provident Fund Scheme (CPF).

In 1995, it introduced a Pension Scheme by issuing a Notification dated 6 October 1995 and adopted Central Civil Service (Pension) Rules, 1972. The said scheme was approved formulated by the Corporation.

The Pension Scheme was given effect from 5 June 1995 from the date on which Scheme was approved by the Cabinet/ Government. For the employees who retired from 5 June 1995 till 6 October 1995 and for the employees in service, an option was given either to opt for Pension Scheme or to continue under the CPF. Clause 5 of the Scheme, stipulates eligibility criteria to opt for Pension Scheme.

The respondent-Union, consisting of the employees who retired prior to 5 June 1995, approached the Himachal Pradesh Administrative Tribunal (Administrative Tribunal).

It was contested by the appellants and they contended that all the employees of the Corporation, who retired prior to 5 June 1995, were already paid all the retiral benefits including the benefit of CPF, as such the cut-off date fixed, implementing the Pension Scheme, was not discriminatory.

The Administrative Tribunal dismissed the Application filed by the respondent-Union and held that the appellants are entitled to fix the cut-off date for introducing the Pension Scheme for its employees and such fixation is not discriminatory.

An appeal was filed before the HC by the respondent-Union that has allowed the Writ Petition, by quashing the cut-off date, on the ground that no reasons were forthcoming from the appellant-corporation, for picking up the cut-off date 5 June 1995 for implementation of Pension Scheme.

The HC has declared that the Scheme which was notified on 6 October 1995, shall apply to the members of the respondent-Union and other similarly situated persons, with a condition that they will have to deposit the amount received by them under the CPF within a reasonable time.

An appeal was filed before the SC wherein the Top Court observed that it is always open for the employer to introduce new Schemes and benefits, having regard to the financial health of the employer.

It stated, "Whenever such new benefit is extended for the existing employees, retired employees cannot seek such benefit, merely on the ground that they too were the former employees of the Corporation."

It added that "When the members of the respondent-Union retired, there was no Pension Scheme at all. They were merely governed by the Contributory Provident Fund Scheme and, on retirement, they were already granted the benefit of such Scheme."

The Top Court referred to the judgment in the case titled State of Rajasthan and Another v. Amrit Lal Gandhi and others, (1997) 2 SCC 342. In this case, fixation of cut-off date from 1 January 1990 was found fault with, by the HC and it issued directions to give effect from 1 January 1986, while reversing the judgment of the HC. The SC has held that fixation of cut-off date from 1 January 1990 cannot be said to be arbitrary or discriminatory.

The SC bench put reliance on another case, Suchet Singh Yadav and others v. Union of India and others, (2019)11 SCC 520, wherein it was held by this Court that the pensioners, for purposes of pension, constitute one class and schemes which classify pensioners on basis of cut-off date are impermissible unless such classification is founded on some rational principle. It held that the Order which was issued by the Central Government on 21 November 1997, applies to existing officers and not retirees.

The SC referred to another case titled All Manipur Pensioners Association by its Secretary v. The State of Manipur and others, (2019)9 Scale, 282, wherein the Court held, "Pensioners form only one homogeneous class and held that such a fixation of date for extending the benefits of revised benefits to the pensioners, is arbitrary and violates Article 14 of the Constitution."

The SC set aside the judgment of the HC and allowed the appeal.

SUPREME COURT TO STOP USING WHATSAPP FOR SHARING VIDEO CONFERENCE LINKS WITH ADVOCATES

According to new Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (IT Rules), video conferencing links will be shared on registered email ids and registered mobile numbers of the concerned Advocates-on-Record (AOR)/ party-in-person (Parties).

The Top Court will not use WhatsApp groups to share video conference links for court hearings. According to the circular issued by the Court on 27 February 2021, this step has been taken in view of the newly notified rules.

Days after the Centre announced the tightening of rules governing social media and streaming companies, the Supreme Court decided to stop sharing video conference links for court hearings with WhatsApp groups.

The circular has come in effect from 1 March 2021. It reads "It is notified for the information of the Advocates-on-Record/Party-in-Persons that the creation of Groups in WhatsApp for sharing of VC links for hearing of their matters is restricted due to new guidelines or regulations issued by Government of India pertaining to Social media Apps and OTT Platforms."

On 4 July 2020, the Apex Court has partially modified its Standard Operating Procedure (SOP) for AORs and Parties for e-filing, mentioning, listing, and video conferencing hearing.

On 25 February 2021, the IT Rules were notified to regulate the functioning of online media portals, and publishers, OTT (Over the Top) platforms and social media intermediaries. The Rules are designed with the purpose to check the misuse of social media platforms, WhatsApp, Facebook, Twitter, and other social media firms, etc. It also requires all streaming services including Netflix, YouTube, and Amazon Prime Video, to appoint executives to coordinate with law enforcement.

It further directs to disclose the first originator of the mischievous information and remove, within 24 hours, content depicting nudity or morphed pictures of women.
According to the guidelines, social media intermediaries have to appoint a grievance officer, whose duty will be to register complaints within 24 hours, and file monthly compliance reports.

The Rules framed pursuant to the powers conferred by Section 79(2)(c) and Section 69A(2) of the Information Technology Act, 2000 (IT Act) provides for the classification of films and other entertainment programs, including web series, bring digital news platforms within the ambit of regulations covering print and electronic media and seeks to rein in social media intermediaries.

SUPREME COURT: ORDER XX OF CPC DEALING WITH TIME LIMIT FOR PRONOUNCING JUDGMENT IS NOT APPLICABLE TO HIGH COURTS

A Supreme Court (SC) Bench comprising Justices Rohinton Nariman and BR Gavai stated in the case of SJVNL (Appellants) v. M/s CCC HIM JV(Respondents) that Order XX of Code of Civil Procedure (CPC) which prescribes the time limit for Courts to pronounce judgments will not apply to High Courts (HC).

The SC stated that if there is a 6-month gap between reserving a judgment and delivering it, then in that case either party can move an application before the High Court (HC) Chief Justice, who may then decide that the matter be heard afresh.

The Bench added, "A reading of our judgment in Anil Rai v. State of Bihar [(2001) 7 SCC 318] and, para 9 in particular, makes it clear that Order 20 of the CPC does not apply to the High Court."

The Top Court passed the said order while hearing an appeal filed against a judgment of a Division Bench of the Himachal Pradesh HC that had on 29 December 2020 set aside a judgment of the single-judge on the ground that there was delay of nine months by the single-judge in delivering the judgment.

On 24 December 2019, the single-judge had concluded the hearing and reserved its verdict and on 30 September 2020, the judgment was delivered. The Division Bench had placed reliance on Order XX of CPC to set aside the verdict of the single-judge.

Order XX states that a Court after the case has been heard, shall pronounce judgment in an open court, either at once or as soon thereafter as may be practicable.


Justices BR Gavai and Rohinton Nariman

The Order of CPC further reads that in a case where the judgment is not pronounced at once, the Court shall make all endeavors to pronounce the judgment within 30 days from the date on which the hearing of the case was concluded.

The Order further provides that where it is not practicable to do so due to any exceptional and extraordinary circumstances of the case, the Court shall fix a future day for the pronouncement of the judgment. Such day shall not ordinarily be a day beyond 60 days from the date on which the hearing of the case was concluded.

The Apex Court relied in the case of Anil Rai (supra) to hold that Order XX of the CPC does not apply to the HC. The SC added that "In fact, para 10 then goes on to lay down a series of guidelines which ought to be imposed for the High Court in which, inter alia, it is mentioned that only after six months hiatus between reserving a judgment and delivering it, either party can move an application to the Chief Justice of the High Court, who may then decide that the matter be heard afresh."

The Court further added that no such application was moved in the present case. Hence, the Apex Court has set aside the judgment of the Division Bench of the HC and remanded the matter back to the Division Bench to be heard afresh and decided on merits.

SUPREME COURT: LITIGANT NOT ALLOWED TO SEEK RECUSAL OF JUDGE ON GROUND THAT AN UNSATISFACTORY ORDER MAY BE DELIVERED

Justices DY Chandrachud & MR Shah

On 5 February 2021, Justice MR Shah of the Supreme Court of India (SC) rejected a plea seeking recusal of Justice DY Chandrachud from a hearing. The SC observed that recusal would not be allowed as it is not based on reasonable grounds, and thus dismissed an application for recalling of the previous order.

Justice MR Shah observed in the case of Neelam Manmohan Attavar (Petitioner) v. Manmohan Attavar (Respondents), that a litigant cannot seek recusal of a Judge from hearing his/her case on the ground that he/she may not get a favorable order. It was stated that a litigant cannot be permitted to choose a Bench of his/her choice.

The factual background of the case is that a domestic violence complaint was dismissed by Metropolitan Magistrate, Bengaluru. Later, an appeal was initiated against the said order that was also dismissed by the Additional Sessions Judge. A revision petition was filed at the High Court (HC) that was also dismissed and later the petitioner filed a writ petition under Article 226 of the Constitution of India.

The writ petition was transferred to the SC where the division bench comprising Justices DY Chandrachud and KM Joseph, held that the petition was not maintainable, as an order passed by the HC in the exercise of its judicial powers, cannot be challenged.

The petitioner moved an application wherein she sought to recall the order and submitted that Justice DY Chandrachud should recuse himself from hearing the present application.

Justice MR Shah, who authored the order observed, "We see no valid and good ground for recusal by one of us. Merely because the order might not be in favor of the applicant earlier, cannot be a ground for recusal. A litigant cannot be permitted to browbeat the Court by seeking a Bench of its choice. Therefore, the prayer of the applicant - petitioner in person that one of us (Dr. Dhananjaya Y Chandrachud, J.) should recuse from hearing the present miscellaneous application is not accepted and the said prayer is rejected."

The Top Court observed that the petitioner filed an application earlier for recalling the order was lodged by the Registrar and the said application was dismissed.

The Court highlighted the earlier judgments passed on recusal in a judgment passed in August 2019, in the case of Seema Sapra v. Court On Its Own Motion, wherein the SC had observed that a Judge can recuse at his own volition, but need not at the mere asking of a litigating party.

The Court further pointed out that in October 2019, the Apex Court had rejected the prayer for recusal of Justice Arun Mishra from heading the Constitution Bench formed to settle the interpretation of Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Resettlement, and Rehabilitation Act.

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL

IBC PROHIBITS INCLUSION OF ASSETS OF INDIAN OR FOREIGN SUBSIDIARY OF THE CORPORATE DEBTOR IN THE LIQUIDATION ESTATE: NCLAT

The National Company Law Appellate Tribunal (NCLAT) has ruled that Section 36(4)(d) of the Insolvency and Bankruptcy Code, 2016 (IBC) prohibits inclusion of assets of Indian or Foreign subsidiary of the Corporate Debtor in the liquidation estate.

As to the facts of the case, the Respondents had extended corporate guarantee for the financial debt released to corporate debtor (IVRCL Limited) vide Deed of Guarantees Agreements. The Respondents had created equitable mortgage by depositing the title deeds over some assets exclusively charged to the Appellant (Union Bank of India). The asset mortgaged was an Exclusive Security and it belonged to the Respondents and was exclusively executed in favor of the Appellant Bank.

The State Bank of India filed an application before the National Company Law Tribunal (NCLT) – Hyderabad Bench, under section 7 of the IBC to initiate Corporate Insolvency Resolution Process (CIRP) against the corporate debtor (IVRCL Limited) when its account classified as Non-Performing Asset (NPA) and the Adjudicating Authority admitted the application in February 2018 and as no successful resolution plan was approved by the Committee of Creditors ('CoC'), the Adjudicating Authority passed an order of liquidation under section 33 of the IBC in July 2019.

The Adjudicating Authority directed the Appellant Bank to refrain from taking any coercive steps against the Respondents such as sale of the properties mortgaged to the bank by the Respondent Companies till the completion of the Liquidation proceedings of the corporate debtor.

The Appellant Bank submitted that it relinquished its interest only in common securities belonging to corporate debtor in liquidation estate and did not relinquish its rights of Exclusive Securities. The Appellant Bank also initiated proceedings under SARFAESI Act in respect of the securities created by Respondents.

The respondents had contended to the NCLT that Section 238 of the IBC supersedes the provisions of the SARFAESI Act and hence the proceedings initiated by the Appellant Bank under the SARFAESI Act were illegal and had no bearing on the IBC proceedings.

The Adjudicating Authority considered the sale of corporate debtor as a "going concern" in the process of liquidation and that one M/s. Gabs Megacorp Ltd has given a bid to take the corporate debtor as a going concern for a value of ₹ 1,654.77 crores. The Adjudicating Authority also considered its authority under Section 60(5)(c) of the IBC and maintained that the application is maintainable.

The NCLT further asserted that the Appellant Bank, if allowed to proceed with the possession notice, there is every chance that it would diminish the value of the liquidation estate and its shareholders. The Adjudicating Authority is of the view that there is no restraint on Financial creditor to proceed against the guarantor even after initiation of CIRP, approval of Resolution Plan or liquidation proceedings being commenced or closed.

Aggrieved by the order of the Adjudicating Authority, the Appellant Bank appealed to the NCLAT.

The NCLAT ruled that the assets of the subsidiaries are outside the purview of liquidation estate and as such cannot form part of the liquidation estate.

The Appellate Authority further held, "Since these exclusive securities were not forming part of liquidation estate, correctly done by Liquidator to comply with the provisions of Section 36 of the Code and precedence of this Appellate Tribunal already exists & the Code vide Section 36(4)(d) prohibits inclusion of assets of Indian or Foreign subsidiary of the Corporate Debtor in the liquidation estate, we have to set aside the impugned order of the Adjudicating Authority and allow the present appeal. The Appeal is accordingly allowed."

RECOVERY OF GOVERNMENT DUES: SECTION 53 (1) (E) OF IBC SHALL HAVE OVERRIDING EFFECT OVER SECTION 194 IA OF THE IT ACT

The National Company Law Appellate Tribunal (NCLAT) has held that in regard to recovery of the Government dues (including Income Tax) from the Company in Liquidation under the Code, there is inconsistency between Section 194 IA of the Income Tax Act, 1961 and Section 53(1) (e) of the Insolvency and Bankruptcy Code, 2016 (Code). Therefore, by virtue of Section 238 of the Code, Section 53 (1) (e) of the Code shall have overriding effect on the provisions of the Section 194 IA of the IT Act.

The NCLAT allowed the Appeal against Chief Commissioner of Income Tax (TDS) and UPL Limited. Herein, the appellant Liquidator had filed the Appeal against the order passed by the Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi. The NCLT declined to issue direction to successful bidder (Respondent No. 2) and the Income Tax Authority (Respondent No. 1) not to deduct 1% TDS from the sale consideration.

The Liquidator had filed an Application before the Adjudicating Authority for direction against the successful bidder (Respondent No.2) in auction held for sale of assets of the Corporate Debtor and, Income Tax Authority (Respondent No. 1) not to deduct 1% TDS from the sale consideration ₹ 43 Crores on the premise that Income Tax dues can be recovered by the department as per waterfall mechanism set out under Section 53 of Insolvency and Bankruptcy Code (Code).

The Adjudicating Authority had held that the deduction of Tax at source under Section 194-IA of the IT Act does not mean assessment and raising demand for collection of Tax by the Department. The deduction of TDS does not tantamount to payment of Government dues in priority to other creditors because it is not a Tax demand for realization of Tax dues. The NCLT dismissed the Application.

On appeal, the Hon'ble NCLAT observed that the TDS under Section 194 IA is nothing but advance capital gains tax recovered through transferee (Purchaser) on behalf of the transferor (seller).

The NCLAT further observed that Section 53 of the Code starts with a non-obstante clause, whereas Section 194 IA of the IT Act, does not start with a non-obstante clause, and it would necessarily be subject to overriding effect of the Code and therefore, there was no requirement to amend the Section 194 IA of the IT Act.

It was also affirmed that the Liquidator of a Company in liquidation under the Code is not required to file Income Tax Return, then there is no question of claiming refund of TDS deducted under Section 194 IA of the IT Act.

As per the Hon'ble NCLAT the Adjudicating Authority had erroneously held that the deduction of Tax at source does not mean raising demand for collection of tax by the Department.

Further, it was held that TDS under Section 194 IA, is an advance capital gains tax, recovered through transferee on priority with other creditors of the company. Hence, inconsistent with the provision of Section 53 (1) (e) of the Code and by virtue of Section 238 of the Code, the provision of Section 53(1) (e) shall have overriding effect. Thus, the impugned order was held to be not sustainable in law and was set aside.

NATIONAL GREEN TRIBUNAL

‘POLLUTER PAYS’ PRINCIPLE: NGT SLAPS PENALTY OF ₹ 58 LAKHS ON NTPC

The National Green Tribunal (NGT) has upheld an order passed by the Uttarakhand Pollution Control Board (PCB) penalizing NTPC for causing damage to the environment in Uttarakhand.

Uttarakhand PCB had imposed a penalty of ₹ 57.96 lakhs on NTPC for damaging the environment. The state-owned power major was found to have violated muck disposal site maintenance norms, resulting in damage to the environment.

Noting that the slope of the muck dumped at its Tapovan Vishnugad hydro power project in Chamoli was hazardously twice the standards with potential for erosion, a bench headed by NGT Chairperson Justice Adarsh Kumar Goel dismissed NTPC Ltd’s plea against the state PCB order.

According to the NGT order, “Erosion was already seen in terms of gully formation in down streams of the muck dumps. Thus, it is clear that the operative muck disposal sites were not being maintained as per the Ministry of Environment and Forests laid down norms. In view of the above, there is no merit in the appeal as ‘Polluter Pays’ principle has been rightly invoked for damage to the environment. Accordingly, the appeal is dismissed. The amount of compensation which may be recovered by the state pollution control board may be utilized for restoration of the environment.”

The NGT noted that NTPC is operating Tapovan Vishnugad hydro power project and has set up 5 muck disposal dumping sites out of which three were completed 3-5 years back while two are still active and operational and the state PCB found deficiencies in respect of the same.

Applying the principle of ‘Polluter Pays’, the state PCB had passed the order under Section 33 A of the Water (Prevention and Control of Pollution) Act, 1974 (Water Act) and directed NTPC to pay a compensation of ₹ 57,96,000 for the restoration of the environment.

PUNJAB & HARYANA HIGH COURT

FORUM SHOPPING: PUNJAB & HARYANA HIGH COURT IMPOSES COST FOR FILING WRIT INSTEAD OF APPROACHING NATIONAL COMMISSION

The Punjab and Haryana High Court (HC) imposed cost of ₹ 2 lakh for filing a writ petition before it and circumventing the alternate remedy available under the Consumer Protection Act (Act).

The Single Judge of the HC Justice Anil Kshetarpal observed, "One of the biggest evils faced by the Judiciary is 'forum shopping'."

The HC clarified that a State Commission has the power to proceed under Section 27 of the Consumer Act if the order passed in the complaint has not been complied with. It added that "In view of the statutory remedy of appeal (under the Consumer Protection Act, 1986), it will not be appropriate for the High Court to entertain a writ petition."

A writ petition was moved before the HC by the Managing Directors of C&C Towers Ltd., against execution proceedings instituted before the State Consumer Disputes Redressal Commission, under Section 27 of the Act. Section 27 comprises penalty if the person fails to comply with the order of the District Forum.

It was contended before the HC that the proceedings under Section 27 were not maintainable as the National Company Law Tribunal (NCLT) had already passed order of moratorium under Section 14 of the Insolvency Code.

It was stated that suspension has been declared regarding the institution of suits or continuation of pending suits or proceedings against the corporate debtor (C&C Towers Ltd.) that will include execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority.

Issues before the HC

- Whether the proceedings under Section 27 of the Act, 1986 can be allowed to proceed as per Section 14 of the Insolvency Code?

- Whether the HC can entertain writ petitions against orders passed by the State Commission under Section 27 of the Act, particularly when a statutory remedy of appeal under Section 27-A is available before the National Consumer Disputes Redressal Commission?

It was contended by the writ petitioner that no further proceedings can be done in the aforesaid Execution Application by the State Consumer Commission.

The Single Judge disagreed with the arguments and stated that "This Court does not find that the proceedings before the State Commission are without jurisdiction. Section 27 under the 1986 Act, lays down the penalties including imprisonment. Hence, the proceedings before the State Commission cannot be said to be 'wholly without jurisdiction'."

The Court held that the appropriate remedy against an order under Section 27 of the Act would be to approach the NCDRC under Section 27A. It noted, "There is no doubt that NCDRC is competent to examine and will decide holistically the plea (appeal) sought to be taken in these writ petitions."

The Bench referred to the judgment of a Coordinate Bench in the case titled Pranab Ansal v. State Consumer Dispute Redressal Commission, wherein it was held that in view of the statutory remedy of appeal, it will not be appropriate for the HC to entertain a writ petition against orders passed by the State Commission.

DISTRICT CONSUMER FORUM

SUPERMARKETS CHARGING FOR CARRY BAGS WITH COMPANY'S LOGO AMOUNTS TO 'UNFAIR TRADE PRACTICE'

The District Consumer Disputes Redressal Commission (District Forum) Hyderabad, on 19 February 2021, stated in the case titled Baglekar Akash Kumar (Complainant) v. More Megastore Retail Limited (Opposite Party), that the supermarkets selling carry bags to the customers with its logo for its advertising lead to unfair trade practice.

A Bench comprising Vakkanti Narasimha Rao (President), PVTR Jawahar Babu (Member), and RS Rajeshree (Member) of the District Forum said that "Retail outlet cannot use consumer as a tool for their advertisement by forcing them to pay for carry bags with the company logo."

The District Forum added that, using the Consumer as an advertisement agent at his cost tantamount to unfair trade practice under Section 2(1)(r) of the Consumer Protection Act (Consumer Act).

The factual background of the case is that the complainant purchased a product from the Super Market at ₹ 118/- which included the price of the plastic cover which was given to him. The carry bag supplied by the opposite party after collecting ₹ 3/- towards its cost contained a company's name and logo.

According to the District Forum, using the consumer as their advertisement agent at the costs of the consumer leads to unfair trade practice under Section 2(1)(r) of the Consumer Protection Act, 1986.

The complainant approached the Telangana State Information and Alternative Consumer Disputes Centre requesting the Commissioner to take necessary action against the opposite party.

Issues before the District Forum

- Whether any deficiency of service is there or any unfair trade practice is made out upon the part of the opposite parties?
- Whether the complainant is entitled to the relief sought?

The Forum observed that "The opposite party has been using its esteemed consumers as its Advertisement agents, by selling the carry bags to the customers with their Logo without prominent prior notice and information before the customer makes his choice of patronizing its retail outlets and before the customer makes his selection of goods for purchase and also without disclosing the silent specifications and price of the carry bags."

It added, "Disclosing the price of carry bags at the payment counter seems to be undoubtedly an "unfair trade practice". Under Section 2(1)(r) of the Consumer Protection Act, 1986 {Corresponding Section 2(47) of the Consumer Protection Act, 2019}."

The Forum stated, "As a matter of Consumer rights, the consumer has the right to know that there will be an additional cost for carry bags and also to know the silent specifications and price of the carry bags before he exercises his choice of patronizing a particular retail outlet before he makes his selection of goods for purchase from the said retail outlet."

Reliance was put on the judgment of the case titled Big Bazaar (Future Retail Ltd.) v. Ashok Kumar, whereby Big Bazaar was restrained from imposing an additional cost of carry bags bearing the company logo. The National Commission has held that disclosing the price of carry bags at the payment counter also amounts to unfair trade practices.

The District Forum after hearing both the parties at length issues certain directions to the supermarkets and the companies wherein it suggested that free carry bags should be provided to all customers if in case they printed their Company Logo on the carry bags. They may charge for the plain carry bags, with prior intimation and consent of Consumers and by displaying the information at conspicuous places in the Business premises.

The Forum directed the opposite party to "Pay back ₹3/- which was charged to the complainant with interest @ 12% p.a." It further directed to, "Pay ₹15,000/- (Rupees Fifteen Thousand only) towards compensation for collecting ₹3/- from the complainant for the cost of carry bag having the Company Logo as it amounts to adoption of unfair trade practice with deceptive nature apart from spurious Acts."

It further ordered a cost of ₹1,500/- (Rupees Fifteen Hundred only) towards the proceedings.

MADRAS HIGH COURT

MADRAS HIGH COURT: SPECIAL COURTS DESIGNATED TO HEAR MPs/ MLAs WILL HEAR CASES AGAINST THEM AND NOT THOSE FILED BY THEM

The Madras High Court has ordered that Special Benches, which are established in Courts to expeditiously hear criminal cases pertaining to Members of Parliament or Members of the Legislative Assembly (MPs or MLAs) will only hear cases filed against them and not cases filed by them.

The bench of Chief Justice Sanjib Banerjee and Justice Senthilkumar Ramamoorthy passed the order in a suo moto petition registered by the High Court for monitoring pending criminal cases against MPs and MLAs in the trial courts and the High Court to ensure that the directives given by the Supreme Court are fully complied with.

The Supreme Court had issued directions on the issue in a Public Interest Litigation (PIL) filed by Ashwini Kumar Upadhyay for the decriminalization of politics and the expeditious disposal of cases involving legislators.

The Madras High Court observed that it is necessary to constitute an appropriate Committee at the High Court level to look into complaints against legislators and resultant cases. The Court also expressed concern over the fact that legislators were akin to delay trials given their litigative resourcefulness.
The matter will be taken up next in June 2021.

MAHARERA

RERA: CONSENT OF 2/3RD BUYERS MUST FOR CHANGES IN BUILDING PLAN UNDER MAHARASHTRA RERA

Following the provisions laid down under Section 14 of the Real Estate (Regulation and Development) Act (RERA), the Maharashtra Real Estate Regulatory Authority (MahaRERA) has restrained a builder from making alterations to a sanctioned plan without prior consent of two-thirds of the buyers.

MahaRERA directed the builder to pay the complainant 9% simple interest on the amount of ₹ 1 crore that was paid in April 2014 till handing over the possession of seven shops in a redevelopment project at D N Nagar in Andheri (W).

The complainant had booked seven shops for a marine institute in the redevelopment project and had paid a little over ₹ 1 crore (almost 40% of the price) and was promised possession by March 31, 2014.

According to the complainant – S R Prasad, the builder was 'unilaterally' trying to modify the plan sanctioned by the BMC, in violation of Section 14 of RERA. Prasad approached the MahaRERA seeking orders to prevent any changes to plans, fixtures and fittings, and amenities. Prasad also sought interest on his investment, on the delayed possession which the RERA provides for at a rate which is 2% higher than that of State Bank of India.

However, the builder stated that the delay was for reasons beyond his control. According to the builder, in 2006, MHADA gave approval for reconstruction of the housing society with 320 members and the commencement certificate was received the next year. According to him, five buildings were demolished, one building was vacated, and two others weren't vacated.

The builder said that as the shops could not be constructed, in 2015, the society approached the Bombay high court to seek enforcement of their development agreement.

In October 2015, the High Court referred the society-builder dispute to an arbitrator. Both the parties agreed to get a new plan for 104 members after housing 216 others in the six buildings already constructed on the plot.

The builder said that he had to pay ₹ 80 crore as premium to amend the plans for the two buildings that were not vacated. "The project became commercially unviable due to the delay", but the builder said he was ready to construct, if funds were available. He even offered to refund the money received for the shops or give two additional shops instead.

According to the MahaRERA order, Section 14 of RERA casts a liability on the promoter to complete the project as per the sanctioned plans and not make any alterations to the plan of an apartment or shop without the buyer's consent. The builder cannot also modify the sanctioned plans for the building and common areas without written consent of two-third of allottees, other than the promoter.


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United Kingdom

IN A LANDMARK RULING, UK'S SUPREME COURT RULES THAT UBER DRIVERS ARE ENTITLED TO WORKER RIGHTS

The seven Judges of the United Kingdom (UK) Supreme Court have unanimously ruled that Uber drivers are classed as "workers" and entitled to rights like minimum wage, holiday pay and rest breaks and not self-employed.

The ruling has come as a blow to the gig economy and will have ramifications for millions of others. It will have a significant impact on the U.K.'s burgeoning economy and make it difficult for companies engaging people via digital platforms to assert that they are self-employed.

The dispute will be returned to a specialty tribunal, which will decide on the award to be given to the 25 drivers who filed the case in 2016. About 1,000 similar claims against the company, which had been stayed until after the ruling, may also proceed.

Till the Court ruling, Uber drivers were treated as self-employed. long-running legal tussle.

The Supreme Court unanimously dismissed Uber's appeal and observed, "The legislation is intended to give certain protections to vulnerable individuals who have little or no say over their pay and working conditions."

London is one of Uber's largest and most lucrative markets in Europe, with 45,000 drivers and 3.5 million people who use the app once every 90 days.

UK SUPREME COURT REVERSES DECISION ON NIGERIAN OIL SPILLS CASE

The UK High Court and Court of Appeal had earlier ruled that there is not any duty of care for Shell's British parent company.

A recent decision of the Supreme Court of the United Kingdom had given a ray of hope to 42,335 Nigerians by allowing them to proceed with their case against Shell's parent company and a Nigerian subsidiary in UK courts.

The claimants had first sued Shell and its Nigerian subsidiary in 2015 over allegedly leaking oil from pipelines in the Niger Delta. The unplugged oil pipeline leakage allegedly led to the destruction

of farmland, the death of fish stock, and poisoned drinking water.

They had argued that the oil spills had happened due to the negligence of the subsidiary company responsible for operating the pipelines and demanded from Shell's British parent company compensation saying it "owed them a common law duty of care" as it exercised significant control over the operations of its Nigerian subsidiary.

The UK High Court in 2017 ruled that although the court could try the matter against the parent company, "it was not reasonably arguable that there is any duty of care" for the parent company.

This decision was subsequently challenged in the Court of Appeal which in 2018 dismissed the claimants' case by ruling that there was "no arguable case" that the parent company owed the Nigerian claimants a common law duty of care.

The claimants subsequently challenged the Court of Appeal's ruling in the Supreme Court. Intervention by the International Commission of Jurists (ICJ) and the Corporate Responsibility (CORE) Coalition Ltd and their submission about the applicability of comparative law and standards in cases of environmental protection and human rights violations concerning companies' responsibilities in such situations helped convince the SC to allow the Nigerian claimants to proceed with their case in the UK court.

CORE and the ICJ had previously intervened and filed a similar legal brief in a case filed by the Zambian communities against the mining giant Vedanta (Lungowe v. Vedanta Resources PLC). The court in that case held that companies can be held to account for public commitments regarding their subsidiaries' operating standards.

The Supreme Court through its 12 February 2020 ruling reaffirmed the precedent established in the Vedanta judgment were applicable in this case too.

United States of America

NEW YORK APPELLATE REJECTS EROS' DEFAMATION LAWSUIT

The New York Appellate Division unanimously affirmed a lower court's dismissal of a defamation action against allegations that Eros might be engaging in fraud and misrepresentation.

The New York Appellate Division, First Department, affirmed the dismissal of a defamation lawsuit of the Indian firm Eros International against several short-sellers who had questioned Eros' reported financials and accused the media company of engaging in fraud and misrepresentation.

Eros International plc had opted to challenge a lower court decision to dismiss the lawsuit against hedge funds and other investors who had cast doubts through a series of research reports, tweets and presentations about Eros' financials.

Eros International is engaged in the production and distribution of movies and runs an OTT platform Eros Now. The firm is listed with the New York Stock Exchange.

In affirming the lower court's decision, the Appellate on 9 February 2021 agreed that the investors' statements were protected opinion based on each statement's disclosure of underlying facts and the use of speculative language.

The statements in question had questioned the accuracy and integrity of Eros' reported financials and other statements regarding its performance. Eros claimed that the investors had engaged in a "short and distort" market-manipulation scheme and defamed Eros in the process. The defendants, on the other hand, claimed that the lawsuit was an attempt to silence plaintiffs from expressing protected opinions based on legitimate investment research.

The lower court had held that Eros' defamation and conspiracy claims against all of the defendants were constitutionally protected opinion and thus were not actionable. The court had also noted that the reports disclosed the bases for the authors' conclusions in detail encouraged other investors to undertake their analysis of the company's financials.

The court had further observed that the reports, tweets and conference presentations contained "language of conjecture," such as "we believe," "in our opinion" and other disclaimers, which further underscored that the statements were non-actionable opinion.

In reaching its decision, the Court had observed that the challenged reports disclosed the bases for their opinions, disclosed the authors' short positions and contained phrases indicating that the reports were statements of opinion.

The First Department while dismissing the Eros International's petition felt that the mere use of the word "fraud" does not render a statement actionable. It also highlighted that the appellant did not challenge the accuracy of the statements' underlying facts.

US COURT RULES IN BITTER TRADEMARKS ARBITRATION BATTLE BETWEEN INDIAN BROTHERS

US courts were faced recently with a vexed case of two Indian diaspora brothers, who had fallen out and set up their separate firms, fighting a legal battle over trademark infringement.

The two brothers, namely Balkrishna and Nagraj Setty, were partners in a business. The case arose when their business relationship failed. The brothers had personally entered into a partnership agreement that required them to arbitrate disputes related to partnership rights.

They parted ways and formed their own business firms. Balakrishna Setty's company came to be known as SS Bangalore while Nagraj Setty's firm assumed the name SS Mumbai.

Balakrishna's firm SS Bangalore filed a suit against Nagraj's SS Mumbai for trademark infringement and sought to compel arbitration based on the arbitration provisions in their partnership agreement.

The legal battle started in the lower court, went to the Supreme Court before it was transferred to the Ninth Circuit Court of Appeals again which finally ruled in favor of SS Bangalore. The Ninth Circuit Court of Appeals denied the non-signatory's bid to compel arbitration of Trademark Infringement Claims due to lacuna in the partnership agreement.

The lower court denied SS Mumbai's motion to compel, noted that only the two brothers were signatories to the partnership agreement and their companies were not the signatories to it. Moreover, Nagraj Setty was not named as a defendant in the lawsuit which was filed against his firm SS Mumbai.

The Ninth Circuit Court of Appeals upheld the lower court's decision and held that SS Mumbai was not entitled to equitably estop SS Bangalore from avoiding arbitration, following which SS Mumbai filed an appeal with the Supreme Court.

On remand from the Supreme Court for further consideration, the question arose before the Ninth Circuit Court of Appeals if non-signatories to an agreement may use state law doctrines like the equitable estoppel to compel arbitration.

While the Appeals Court recognized that even a non-signatory may have the power to compel arbitration under certain circumstances, it found that the defendant in this particular case was not able to do so.

The Ninth Circuit Court of Appeals after it heard the case once again, reaffirmed its previous decision denying the motion to compel.

"It is essential that the subject matter of the dispute is intertwined with the contract providing for arbitration," the court stated.

The court further said that SS Bangalore's claims against SS Mumbai for trademark infringement were not clearly intertwined with the brothers' partnership agreement providing for arbitration, and thus SS Mumbai, a non-signatory defendant, lacked the power to compel arbitration in this matter, pulling the curtain on a prolonged and bitter legal battle fought between the two brothers.

ARKANSAS LAW PROHIBITING STATE CONTRACTS WITH COMPANIES THAT ABSTAIN FROM BOYCOTTS AGAINST ISRAEL DECLARED UNCONSTITUTIONAL

The United States (US) Court of Appeals for the Eighth Circuit has ruled that an Arkansas law passed in 2017 that prohibited state contracts with companies refusing to pledge against boycotts on Israel is an unconstitutional violation of the First and Fourteenth Amendments.

According to the 2017 law, contractors were prevented from signing deals with the state unless they agreed to refrain from boycotts against Israel. Contractors could avoid this obligation by offering services at a 20% discount.

The Arkansas Times printed advertisements for a local technical college incorporated into the University of Arkansas System for many years. At the time of renewal of the contract with the college, the Arkansas Times was asked to sign the Israel anti-boycott pledge in order to continue doing business. They refused, claiming the policy was a violation of their freedom of speech. The American Civil Liberties Union (ACLU) filed a lawsuit on their behalf.

The State of Arkansas argued that boycotts are not protected under the First Amendment because they are "all but invisible absent explanatory speech" and thus not considered expressive content. They also claimed that the law only prohibited an "economic boycott," which is not constitutionally protected.

The Court of Appeals for the Eighth Circuit declared that the law was very broad, focusing on a phrase in the law that prohibits companies contracting with the state from engaging in boycotts "or other actions."

According to the Court, evidence that a government contractor "has taken the boycott action" in association with others (i.e., "at the request, in compliance with, or in furtherance of calls for a boycott of Israel") can be considered to enforce the Act. At a minimum, therefore, a company's speech and association with others may be considered to determine whether the company is participating in a "boycott of Israel," and the State may refuse to enter into a contract with the company on that basis, thereby limiting what a company may say or do in support of such a boycott. In this way, the Act implicates the First Amendment rights of speech, assembly, association, and petition recognized to be constitutionally protected boycott activity.

The Court observed, "Supporting or promoting boycotts of Israel is constitutionally protected under Claiborne, yet the Act requires government contractors to abstain from such constitutionally protected activity. Without any explanation of how this condition seeks to "define the limits of [the State's] spending program," it can be viewed only as seeking to "leverage funding to regulate speech outside the contours of the program itself."

The Court agreed that, while the state could prohibit economic boycotts that do not constitute free speech, the restrictions on "other actions" violated the newspaper's First Amendment rights by preventing contractors "from engaging in boycott activity outside the scope of the contractual relationship "on its own time and dime."

The case was remanded to the district court, where it had previously been dismissed. Twenty-six other states have similar laws in place, several of which have also been challenged by the ACLU.

United States of America

BAKER MCKENZIE APPOINTS KURT HAEGEMANAS GLOBAL CHAIR OF CONSUMER GOODS & RETAIL GROUP

Kurt Haegeman is going to join the office of Baker Mckenzie as Global Chair of Consumer Goods & Retail Group from 1st July 2021. In 1996, Kurt joined Baker Mckenzie and became a partner in 2006. His sharp vision of the solution is believed to be much beneficial for the firm's clients, post-pandemic.

The Global Chair of Baker Mckenzie's Consumer Goods & Retail Industry Group is going to welcome Kurt Haegeman, on 1st July 20201, after Alyssa Auberger, vacates the office.

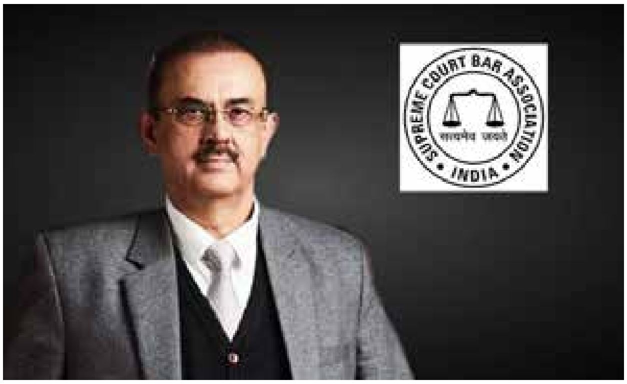
Kurt has been a member of Baker Mckenzie's CG&R Steering Committee as a competent partner in the office in Brussels, for the last four years. This office is at present on secondment to Tokyo. His association with the firm started in 1996 and by 2006 he was appointed as a partner.

Under Mr. Haegeman's representation, CG&R has served in complicated multi-jurisdictional antitrust matters, also he has been in the front line in support of the consumer and retail response during the pandemic, representing the firm, as a part of the Resilience, Recovery and Renewal framework.

In response to the new appointment, Kurt expressed his honour for the opportunity to lead the group which is already highly collaborated and strong. He also claimed the clients experienced a hard hit due to the pandemic and appreciated the sector for the quick adaption to a socially-distanced world and continued to grow. He forwarded his gratitude to Alyssa Auberger for her effort to the group since 2016.

Milton Cheng, the Global Chair of Baker Mckenzie, is delighted with the appointment of Kurt to the new role. He believes the experience and efficiency of Kurt Haegeman will be beneficial especially to the clients affected by the pandemic. He is hopeful towards the solution-oriented strong attitude of Kurt towards the sector to bring growth under his supervision.

SENIOR ADVOCATE VIKAS SINGH ELECTED PRESIDENT OF SUPREME COURT BAR ASSOCIATION



Senior Advocate Vikas Singh has been elected President of the Executive Committee 2020-2021 of the Supreme Court Bar Association (SCBA).

Senior Advocate Pradeep Kumar Rai was elected Vice President, and Advocate Ardhendumauli Kumar Prasad has been elected as the Secretary.

The elections for the Executive Committee of the SCBA were finally held today after having been postponed multiple times in the wake of COVID-19 pandemic and disagreements in terms of mode of conducting the elections. Finally, the voting was held online on National Securities Depository Limited (NSDL) platform.

However, after the commencement of the election process, the Executive Committee of SCBA passed a resolution stating that the election shall be carried out in a hybrid manner in the third week of February 2021. Consequently, the members of the Election Committee resigned including Dushyant Dave.

The Election Committee comprising Senior Advocates Jaideep Gupta, Harin P. Raval and NakulDewan had written to the Secretary of SCBA expressing their inability to discharge their duties as the Election Committee.

Subsequently, a new Election Committee comprising Senior Advocates PallavShishodia, Rana Mukherjee and Siddhartha Dave decided to hold elections in a hybrid manner subject to the advise of the health advisory team.

CYRIL AMARCHAND MANGALDAS OPENS ITS REPRESENTATIVE OFFICE IN SINGAPORE

On the auspicious occasion of Chinese New Year (Year of the Ox), India's leading law firm, Cyril Amarchand Mangaldas (CAM) announced the opening of its Representative Office (RO) in Singapore.

The Singapore RO will help in increasing accessibility and connectivity between CAM and its global clientele, and will enhance its network amongst Singapore and regional clients. The RO will be led by a senior full time CAM Alumni, based in Singapore.

On the Singapore RO opening, Mr. Cyril Shroff, Managing Partner, Cyril Amarchand Mangaldas said, "I am extremely excited to expand our footprint in a major international market. The Firm already has an extensive Singapore clientele and hopes to deepen these relationships further. Our local presence in Singapore will promote ease of access for our clients in and out of Singapore as also into India."

Mr. Rishabh Shroff, Partner and Head – International Business Development, Cyril Amarchand Mangaldas added "We would love to work with our Singapore RO and deepen our professional relationships with the leading law firms in Singapore. It brings us one step closer to our key relationship firms in Singapore. We are very excited with our maiden international foray."

CAM will also be applying to the Singapore Legal Services Regulatory Authority for a Foreign Legal Practice (FLP) license in due course.

BAIN CAPITAL AND CINVEN PARTNERS ACQUISITION OF LONZA SPECIALTY INGREDIENTS LED BY AZB & PARTNERS

Bain Capital and Cinven Partners have agreed to acquire Lonza Specialty Ingredients (LSI), from Lonza Group Limited, for an enterprise value of CHF 4.2 bn (approx. USD 4.7 billion).

The transaction forms part of the divestment strategy and will allow Lonza to focus on the healthcare business.

The transaction will help LSI to benefit from the resources and expertise of Bain and Cinven, invest further in research and development, innovation, and expansion.

Headquartered in Basel, Switzerland Lonza Specialty Ingredients is a provider of specialty chemicals for microbial control solutions, used to eliminate or control harmful and unwanted micro-organisms. The products are used in disinfectants, preservatives, sanitizers, personal care products, as well as coatings and other industrial uses. It operates through two businesses, Microbial Control Solutions and Specialty Chemical Services.

In a Press Release by Bain Capital, Pontus Pettersson, Partner at Cinven, was quoted as saying, "Cinven and Bain Capital are delighted to invest in LSI, as a global leader in a specialty chemicals category that serves a critical need for society, across a broad range of end-markets."

Also, in the Press Release, David Danon, Managing Director at Bain Capital stated, "LSI has multiple attractive growth opportunities as the leading global player in the growing market for microbial control. Our strategy is to reinforce the company's market position, to accelerate growth through further investment in R&D and innovation, and to use LSI as a platform for further industry consolidation, in line with Bain Capital's and Cinven's strategies in other sectors."

AZB & Partners advised Bain Capital and Cinven Partners in the transaction. The AZB & Partners team comprised of Partners – Anil Kasturi and Nandita Govind and Senior Associate – Shreya Basu.

SAM & CO. LEAD THE COMMITTEE OF CREDITORS IN THE CIRP OF UTTAM VALUE STEELS LIMITED (UVSL)

Shardul Amarchand Mangaldas & Co. (SAM & Co.) advised the Committee of Creditors of UVSL led by State Bank of India in the Corporate Insolvency Resolution Process (CIRP) of UVSL which had defaulted on loans of the Financial Creditors amounting approximately to ₹ 2500 Crores.

The resolution plan for UVSL submitted by a consortium of Carval Investors and Nithia Capital Resources Advisors LLP was approved by the National Company Law Tribunal, Principal bench, camped at Chennai on May 06, 2020. The deal is valued at USD 130 Million. The date of closing of the implementation of the resolution plan was 29 December 2020.

The transaction team was led by Soummo Biswas, Partner; Shivani Sinha, Principal Associate; Swati Lal, Senior Associate; Suktika Banerjee, Associate;

Apeksha, Associate. The Corporate advisory team on the deal comprised of YogeshChande, Partner; and Preeti Kapany, Associate. The Litigation team on the deal comprised of Misha, Partner, Ms. Meghna Rajadhyaksha, Partner, Mr. Vaijayant Paliwal, Principal Associate, Ms. Radhika Indapurkar, Senior Associate, Ms. MahimaSareen, Senior Associate and Ms. Kirti Kalyani, Associate.

AZB & Partner, Cyril Amarchand Mangaldas & Co. and Khaitan and Co. advised consortium of Carval Investors and Nithia Capital Resources Advisors LLP. – J. Sagar Associates advised Mr. Rajiv Chakraborty, the resolution professional. J. Sagar Associates also advised the Interim Monitoring Committee. Talwar Thakore & Associates and Rashmikant & Partners advised consortium of SSG Capital, Synergy Metals and Mining Fund LLP and Art Special Situation Finance (India) Limited. Thakordas & Madgavkar advised Operational Creditor Jatia group of companies.

JSA ADVISED AUSTRALIAN SECURITIES EXCHANGE-LISTED SOFTWARE GROUP ALTIUM ON THE INDIA LEG OF THE SALE OF ITS GLOBAL “TASKING” BUSINESS TO SCANDINAVIAN PE INVESTOR FSN CAPITAL

J. Sagar Associates advised Australian Securities Exchange listed software group Altium on the India leg of the sale of its global “TASKING” business to Scandinavian PE investor FSN Capital.

TASKING develops and operates software design technology processors in the field of security and assistance systems. The transaction involved a global carve-out of the TASKING business across jurisdictions, including India.

The JSA Team was led by Partner - ShafaqUraizeeSapre, Senior Associate - Adhiraj Guptaand Associate - PriyankaMurali.

Partner - Kumarmangalam Vijay assisted on tax aspects.

The JSA team collaborated with a host of global advisors - Altium was advised by Reed Smith offices in Germany, United States and Shanghai; Atsumi& Sakai in Japan; RBS in Russia; and Stek in the Netherlands.

FSN Capital was represented by Latham & Watkins.

ADVENT INTERNATIONAL’S SALE OF SHARES IN CROMPTON GREAVES CONSUMER ELECTRICALS BOOSTED BY JSA

J. Sagar Associates advised Advent International, a US-headquartered private equity firm in the sale of its shares worth approx. ₹ 1,492.20 crores (approx. USD 196.05 million) in publicly-listed Crompton Greaves Consumer Electricals Ltd. Advent-owned Amalfiaco sold 6.06% stake in Crompton Greaves Consumer Electricals and was executed through bulk deals on the Stock Exchanges. The JSA Team comprised Partners – VikramRaghani and BirBahadurSachar and Senior Associate – Abhilash Chandra.

SAM & CO. ADVISES TATA CONSUMER PRODUCTS LIMITED IN THE ACQUISITION OF KOTTARAM AGRO FOODS PRIVATE LIMITED

Shardul Amarchand Mangaldas

Shardul Amarchand Mangaldas & Co. advised Tata Consumer Products Limited (TCPL) in the acquisition of Kottaram Agro Foods Private Limited, owner of the brand 'Soulfull'. The company has signed definitive agreements to acquire 100% of the equity share capital of Kottaram Agro Foods from existing shareholders, including Aavishkaar Bharat Fund (ABF) and Bennett Coleman and Company Limited (BCCL). The deal is valued at ₹ 156,00,00,000.

KAF launched the brand 'Soulfull' in 2013. The brand operates in the Health and Wellness focused food segment with a portfolio of millet-based products for kids and adults. It is one of the fastest growing brands in India's 'better for you' packaged foods market. The brand currently has a strong presence in select urban markets in South, West, and North India.

A Press Release by Tata Consumer Products Limited read, "This acquisition will allow TCPL to expand its product portfolio into the fast growing 'on the table' and 'on the go' categories and to participate in newer consumption occasions. There are also significant synergies possible with the existing business of TCPL in areas spanning distribution, procurement, and logistics. Additionally, the TATA name would further enhance the brand's credentials with consumers."

The transaction team was led by Abhishek Guha, Partner; Tanya Uppal, Principal Associate; Shashank Prabhakar, Principal Associate; Keegan Pavrey, Senior Associate and Vyoma Mehta, Associate.

The due diligence team was led by Abhishek Guha, Partner; Mukul Baveja, Partner; Kirti Mahapatra, Partner; Tanya Uppal, Principal Associate; Shashank Prabhakar, Principal Associate; Ekta Chandan, Senior Associate; Keegan Pavrey, Senior Associate; Vyoma Mehta, Associate; Purva Phadke, Associate; and Amrita Ghosh, Associate.

Mukul Baveja, Partner, advised on IP related aspects.

PLANET HOLDING LTD. INVESTMENT IN LIFE REPUBLIC ADVISED BY DSK LEGAL

DSK Legal advised Planet Holding Ltd., UK, in relation to its investment (through different classes of shares) in Phase 2/second leg of development and monetization of land admeasuring approx. 19,963.53 square meters in the sector identified as R10 located in Pune within the Township Project, named Life Republic of Kolte-Patil Developers Limited. Planet Holding Ltd. is a UK-based real estate developer with global presence, specializing in development of smart housing projects. The deal closed earlier this year.

DSK Legal assisted Planet Holding Ltd. in structuring of Phase-2, drafting, reviewing and negotiating of all transaction documents (primarily share subscription agreement, shareholders' agreement and joint development agreement and certain other ancillary agreements) and closing.

DSK Legal
True Value, True Values

In April 2020, Planet Holding Ltd. had invested in Phase 1/first leg of development and monetization of land in R10 – where DSK Legal had assisted in the transaction.

DSK team: (i) Corporate - Aninda Pal, Partner and Sunayana Bose, Principal Associate, and (ii) Real Estate – Sagar Kadam. Anjan Dasgupta, Partner, acted as the relationship partner.

LATERAL MOVE

WEIL POACHES CORPORATE PARTNER OF A UK LAW FIRM

With the US law firm Weil Gotshal & Manges hiring Murray Cox, a corporate partner in one of the top UK legal firms Slaughter and May, the vulnerability of UK law firms to poaching on their home turf by their US rivals has got exposed yet again.

It is seen as a new and emerging phenomenon since such hiring in the past that too of a partner of a top legal firm was unheard of.

Cox joins the likes of Paul Dolman who quit Travers Smith to join Latham & Watkins in December 2020 while Skadden Arps Slate Meagher &Flom hired Fresh fields Bruckhaus Deringer's global M&A client group co-head, in September last year. Such corporate level lateral moves from the UK to the US firms are bound to push UK's legal firms to initiate new measures before such movements become a fad.

At the same time, firms like Slaughter and May could be forced to remodel their payment structure under which senior partners get paid more money compared to a junior who may have brought more revenue to the firm under the lockstep model.

Cox had joined Slaughter and May as a partner in 2016 and was a member of the firm's corporate, private equity, infrastructure and energy teams. He had led a team advising Kingsway Capital on the $1.4 billion take-private of Jordan-based Al Eqbal Investment Company in November 2020 and was also a part of the team that advised William Hill on its £2.9 billion takeover by Caesars Entertainment in September last year.

At Weil, he will join a market-leading team of corporate lawyers, including London managing partner Mike Francies, Marco Compagnoni, co-head of the firm's international private equity group, and David Avery-Gee, who joined the firm from Linklaters in 2019.

Mike Francies termed Cox as amongst the leading M&A partners in London of his generation while Michael Aiello, chairman of Weil's global corporate department, said: "Murray is a superb lawyer and will play a significant role in supporting our clients globally."

TOP BRITISH LAWYERS JOIN HOGAN LOVELLS AFTER A HIRING SPREE

Following an unusual hiring spree, five prominent UK lawyers have joined Hogan Lovells' London office. The purpose of such a large scale senior level hiring is to strengthen its corporate and litigation practices in the UK.

Hogan Lovells is a joint US-UK legal firm that came into existence following the 2010 merger of the American law firm of Hogan & Hartson and the British law firm Lovells.

White & Case's co-lead of London corporate practice Patrick Sarch, a prominent M&A lawyer is among those who have joined Hogan Lovells. Patrick Sarch will now co-head Hogan Lovells' London M&A practice alongside Ben Higson. Two commercial litigation partners and two counsel from Debevoise& Plimpton have also joined Hogan Lovells as partners which will enable it to bolster its London disputes practice.

They include the highly-rated former Herbert Smith board member Kevin Lloyd as well as fellow Debevoise partner Richard Lawton alongside international counsel Akima Paul Lambert and Ardil Salem.

They join a team of Hogan Lovells' around 2,400 lawyers working in the firm's more than 40 offices spread across the US, Europe, Latin America, the Middle East, Africa and Asia.

Patrick Sarch has 25 years of experience in advising clients on corporate finance, M&A transactions and restructurings. He had worked on high-profile deals such as Kraft's takeover of Cadbury's and Sainsbury's acquisition of the Home Retail Group. Sarch had served for four years at White & Case and had been a partner at Clifford Chance in the past.

Kevin Lloyd has solid leadership experience. Prior to joining Debevoise, Lloyd was head of contentious restructuring and insolvency at Herbert Smith, where he was also on the board of the law firm.

Richard Lawton and Ardil Salem moved out of Herbert Smith to join Debevoise along with Lloyd. Lawton and Salem had started their career at Herbert Smith.

Hogan Lovells' CEO Miguel Zaldivar said: "These appointments demonstrate our ambition and commitment to grow into an unrivaled global powerhouse that puts clients at the centre of everything we do, drives revenue and enhances profitability."

SIMPSON THACHER ADDS LEADING RESTRUCTURING LAWYERS TO ESTABLISH A FOOTHOLD IN EUROPE

Simpson Thacher & Bartlett LLP has announced that Adam Gallagher and James Watson would join the Firm as Partners in the London office to establish a European Restructuring Practice.

In a Press Release by the firm, Bill Dougherty, Chairman of Simpson Thacher's Executive Committee stated, "Simpson Thacher is a leader in providing innovative, strategic advise to clients facing financial distress, including as a result of recent market disruptions. Adam and James each bring an exceptional depth of experience in this area and are ideally positioned to expand our global restructuring capabilities. We are very pleased to welcome them to the Firm."

Adam and James have extensive experience representing companies, as well as creditors and other key stakeholders across the capital structure, in connection with complex distressed situations.

ADAM GALLAGHER & JAMES WATSON

Their work includes advising on domestic and cross-border restructuring and formal insolvency matters, as well as counseling clients on a broad array of stressed and distressed investments and liability management transactions.

According to Jason Glover, Managing Partner of the firm's London Office, "Establishing a restructuring practice in Europe is a logical expansion of our existing platform and will further enhance our ability to serve clients across the corporate, private equity and financial sectors as a single source of best-in-class advise."

Adam and James are widely recognized in the market as trusted advisors to clients dealing in complex restructuring matters.

Adam specializes in corporate restructuring and insolvency matters and was earlier working with Freshfields Bruckhaus Deringer LLP.

James joins the Firm from Kirkland & Ellis LLP, where he became partner in 2017. Adam and James have previously worked closely together at Freshfields for more than a decade.

HOGAN LOVELLS NAMES ITS NEW GLOBAL CHAIR

Global law firm Hogan Lovells has named its Paris partner and EMEA regional Managing Partner Marie-Aimée de Dampierre as its next chair. She will be replacing Hamburg-based IP partner Leopold von Gerlach who quits office at the end of April after completing his three-year tenure.

Marie-Aimée is an old hand at Hogan Lovells having been associated in various leadership roles for the past 22 years. Her previous roles include being at board level. She was elected to its 'at-large' seat in 2015 before joining its international management committee in 2018 while also taking up the position of chair of the firm's global diversity and inclusion committee. She became regional managing partner for EMEA in July 2020.

Marie-Aimée during her 22-year stint with Hogan Lovells has expertise in the field of IP litigation, particularly in the life sciences and healthcare besides in media and technology industries. She had also been head of the Paris IP, media and technology team, as well as Paris office managing partner between 2010 and 2018.

"Marie-Aimée has made a huge contribution to our firm, and taking on the role of chair is a natural next step for her and for Hogan Lovells. She is a great ambassador for diversity and inclusion at the highest ranks and is ideally placed to support firm management in delivering on our strategic priorities," Leopold von Gerlach, the outgoing chair, who decided to step down after just one term, said about this successor.

"Through the combination of my intellectual property practice and the leadership roles that I've held, I've experienced first-hand the true strength and diversity of our global firm. The impact of the global pandemic has brought unprecedented change to our people, our business and our clients, and highlighted the importance of innovating to stay connected," Marie-Aimée de Dampierre, said.

With Marie-Aimée taking over as Hogan Lovells' chair from 1 May 2021, Hogan Lovells becomes the latest and the third global firm to install new leadership with a strong focus on diversity.

Norton Rose Fulbright had appointed Shauna Clark, the US head of employment as its next US and global Chair in December 2020 to become the first woman of color to hold either role, while Freshfields Bruckhaus Deringer appointed Georgia Dawson as its next senior partner in September 2020, making her the first woman to lead a magic circle firm.

MoFo STRENGTHENS UP NATIONAL SECURITY TEAM BY HIRING TOP DOJ LAWYER

The US-based international law firm Morrison & Foerster (MoFo) has brought on board a big catch in the former US prosecutor Brandon Van Grack as co-chair of its national security and global risk, and crisis management groups.

Brandon Van Grack, a former Department of Justice (DoJ) prosecutor, was associated with several big-ticket cases.

Brandon Van Grack is the second DoJ lawyer to join MoFo in 2021 following the arrival of investigations and white-collar defense partner Brian Kidd.

Van Grack has joined the firm while two of MoFo's senior partners have moved to the DoJ after the arrival of Joe Biden administration in the US.

Van Grack will co-chair the firm's national security practice alongside John Smith and Nicholas Spiliotes, and the global risk and crisis management group alongside Robert Litt and Alex Iftimie.

Van Grack will also serve as a partner in the firm's investigations and white-collar defense group, leaving his role as chief of the DoJ's Foreign Agents Registration Act (FARA) unit.

MoFo with its headquarters in San Francisco is an international law firm with over 1,000 lawyers as its employees in its 17 offices spread across the US, Europe and Asia.

Interestingly, Van Grack and Brian Kidd have joined MoFo amidst reports that the legal firm is in the process of laying off 38 employees in the US and a handful in the UK due to the impact of the COVID-19 pandemic.

"Brandon is a well-known and well respected justice department lawyer whose prosecutorial experience at the DoJ brings unparalleled capabilities in investigations, compliance and enforcement, making MoFo the go-to firm on FARA," Bradley Wine, co-chair of MoFo's global litigation department, said.

MoFo is expecting that Van Grack's arrival will further bolster the insights the firm can provide to its clients on the inner workings of the DoJ across matters such as investigations and white-collar defense, as well as sanctions and export controls.

Van Grack said: "I was immediately drawn to MoFo's expertise and deep bench for handling all manner of investigations and litigation, including matters involving CFIUS, cyber-attacks, FCPA and export control."

Van Grack and Kidd are the latest addition to a long line of former senior government officials to join MoFo in recent years, including Litt and Iftimie, as well as Charles Duross, James Koukios and Lisa Phelan.

Van Grack had led the investigation and prosecution of former National Security Advisor Michael Flynn and served as a member of the trial team that prosecuted President Donald Trump's former campaign manager Paul Manafort.

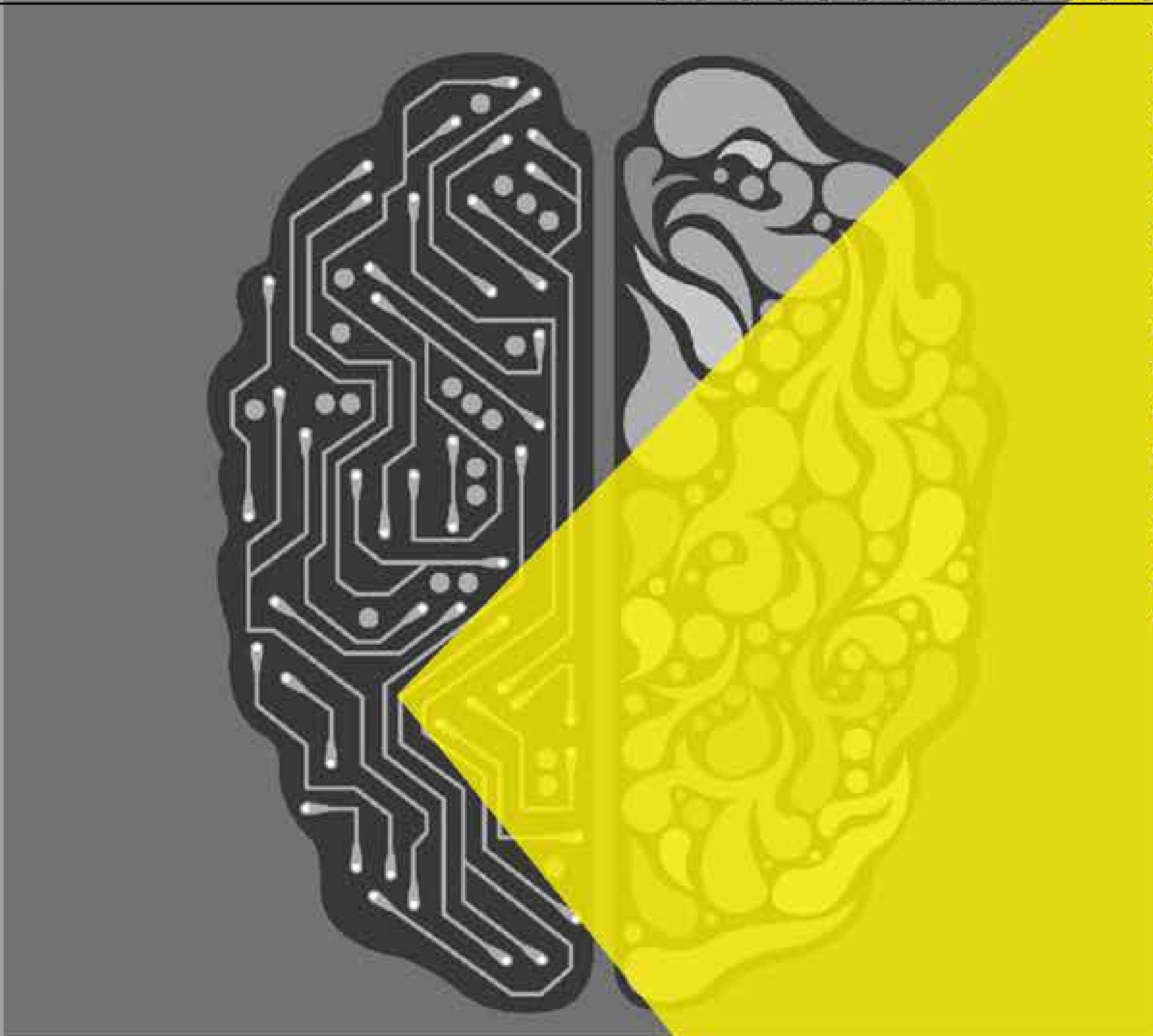
ACCESS BY IMPROVEMENT TO PATENTED Technologies

With the steadily or even exponentially increasing number of patent applications and patents in the age of IoT and AI, the question of how to access patented technologies is becoming more and more urgent. If one, like the author of this paper, believes in the importance of the present patent system for promoting inventive activities and innovations also with regard to technologies that quickly develop and lead to the creation of sometimes huge patent portfolios or even patent thickets, like in telecommunication, it becomes necessary to give newcomers a chance to further develop such technologies and, again, make use of the patent system for creating access to the already patented "primary inventions".

In this regard, as discussed e.g. in GRUR 2021, 196, by the author, the patent systems of many countries provide for a solution insofar already:

For example, in Germany, Art. 84 (2) of the German Patent Act (GPA) entitles an innovator that has created an important improvement of an already patented item and has patented it, by a "secondary" patent to request, as a matter of right and title, a compulsory license of a special kind from the owner of the "Primary Patent": That special license will come as a cross-license, and the grant of it does not require any determination of public interest like "normal" compulsory licenses in accordance with e.g. Art. 24 (1) (GPA).

Making use of such an "Opening Clause", as also discussed e.g. in Les Nouvelles in 2019 by Lakshmi Kumaran and the author of this paper, the respective article being related to "Patent Law Based Concepts For Promoting Creation And Sharing Of Innovations In the Age Of Artificial Intelligence And Internet of Everything", would help "newcomers" and "improvers" resp., to get access to the already patent-covered primary technology.



Possibly,

such "Opening Clauses" would not only be useful in heavily patented areas like telecommunication to get enforced access to SEP-surrounded innovations but also in pharma developments to achieve access and thereby licenses under first-medical-use patents by improvers

[1] *Guidelines on Regulations of Payment Aggregators and Payment Gateways issued vide Notification bearing reference No. RBI/DPSS/2019-20/174 DPSS.CO.PD.No.1810/02.14.008/2019-20 dated March 17, 2020. https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&Mode=0*

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Similar provisions do exist also in other countries, like India.

By such "opening clauses", together with a generous Experimental Use Clause (like in Art.11 (2)(GPA), not only make it possible for newcomers to improve already patented items, but also to get - by further patenting by "secondary patents", access thereto. By this procedure, both the "primary patentee" and the "secondary patentee", i.e. the improver, cannot only develop further technologies, but also use it commercially – all this for the benefit of consumers and, thereby, mankind.

Possibly, such "Opening Clauses" would not only be useful in heavily patented areas like telecommunication to get enforced access to SEP-surrounded innovations, i.e. entry into already existing standards like 5G, but also could help in pharma developments to achieve access and thereby licenses under first-medical-use patents by improvers, e.g. creators of second-medical-use patents, again by compulsory cross-licensing.

In the world of increasing patent portfolios and thickets, resp., compulsory cross-licenses might become more and more important, the more since in countries like Germany the respective licensing conditions could be determined by Patent Offices, if combined – in case of SEPs – with a duty of primary SEP holders to register License-of-Right (LOR) declaration in the respective patent registers.

By the way, provisions like Art. 24 (2) GPA do not mean that the "compulsory cross-licenses" granted by the primary patentee to the secondary patentee and by the secondary patentee to the primary patentee, resp., have to be - and are usually actually not! – "complimentary" free licenses: The respective authority, like in Germany the German Federal Patent Court (GFPC), can determine, together with granting the mutual licenses to the secondary patentee and the primary patentee, resp., impose royalty obligations from one side to the other, in order to balance the sometimes un-equal merits of the primary and secondary invention, resp.!

All this might become even more important when AI systems "as such" start to make inventions, namely as being used as tools by implementers of patented AI systems. This in future, might lead to reach-through-claims of enormous width to which easy access in the interest of newcomers, like software-developers etc., might be highly advisable. Again, compulsory cross-licensing together with LOR systems will help to overcome problems connected to this development.

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Foreign Investment In Australia:

The New National Security Regime

The Australian Government has introduced major changes to its foreign investment review framework, which imposes new mandatory notification requirements on foreign investors to protect Australia's national security

For over 40 years, Australia's foreign investment review framework (as set by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (**FATA**) and associated legislation and regulations) has screened individual investment proposals on a case-by-case basis to ensure that they are not contrary to Australia's 'national interest'.

Effective 1 January 2021, the Australian Government has introduced major changes to its foreign investment review framework. The most significant change is a new 'national security test' (which operates alongside the previous 'national interest' test). Under the new 'national security test', foreign investors must mandatorily notify the Foreign Investment Review Board (**FIRB**) and obtain the approval of the Australian Treasurer, before investing in a 'national security business' or 'national security land' in Australia.

These concepts are defined broadly, and now capture investments in Australian entities, businesses and land which were not previously notifiable actions under the FATA. Moreover, they now cover matters which would not intuitively be thought to pose national security concerns.

Foreign investors and their advisors therefore need to make careful inquiries to understand an Australian target's business and operations to determine whether their proposed transaction falls within the scope of the new national security regime, and accordingly, whether the investor needs to seek FIRB approval. Foreign investors should also be cognizant of the need to engage with FIRB early to ensure that transaction timelines and overall transaction objectives are met.

New National Security Regime

The key elements of the new national security regime include:

- a new category of 'notifiable national security actions' which are mandatorily notifiable to FIRB and must not be taken without approval from the Australian Treasurer;
- a new 'call in' power, which enables the Treasurer to initiate a review of actions that are not mandatorily notifiable and that have not been voluntarily notified, where the Treasurer considers that the action may pose national security concerns; and
- a new 'last resort' power, which, in exceptional circumstances, gives the Treasurer the ability to make divestment orders and unilaterally impose new conditions or vary existing conditions after FIRB approval has been given with respect to a particular action.

Mandatory Notification Requirements

Notifiable National Security Actions

A 'notifiable national security action' must be mandatorily notified to FIRB, regardless of the value of the proposed investment or the nature of the investor. Significant penalties apply for a failure to notify.

A 'notifiable national security action' is triggered where a foreign investor:

- starts a 'national security business';
- acquires a 'direct interest' (usually at least 10%) in a 'national security business' or in an entity that carries on a 'national security business'; or
- acquires an interest in Australian land (including an interest in an exploration tenement) that, at the time of acquisition, is 'national security land'.

What is a 'national security business'?

A 'national security business' is defined broadly to include:

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- responsible entities and direct interest holders of 'critical infrastructure assets' (as defined in the Security of Critical Infrastructure Act 2018 (Cth) and currently comprising critical electricity, gas, water assets and critical ports);
- carriers and nominated carriage service providers under the Telecommunications Act 1997 (Cth);
- businesses that develop, manufacture or supply critical goods or technology for (or intended for) a military or intelligence use by, or that provide or intend to provide critical services to, Australia's defense and intelligence personnel or a foreign defense force or intelligence agency; or
- businesses that store or have access to classified information, or store, maintain, collect or have access to personal information of Australia's defense and intelligence personnel which could compromise national security.

However, a business is only a 'national security business' if it is publicly known or could be known through reasonable inquiries that it falls within one of these categories.

In certain cases, it may be difficult to ascertain based on publicly available information whether a business is in fact a national security business. For example, the 'Register of Critical Infrastructure' is not made public. Similarly, it is unlikely to be public knowledge that a business has access to information with a security classification.

Accordingly, investors and their advisers must make reasonable inquiries (through a comprehensive due diligence and information exchange process) to determine whether a target is considered to be a 'national security business', and in turn whether FIRB approval is required in respect of the proposed transaction.

What is 'national security land'?

National security land is generally land which is a defense premises or where it is publicly known (or could be known through reasonable inquiries) that a national intelligence agency has an interest in the land.

'Call in' Powers

The Treasurer may 'call in' for review actions which are not otherwise notifiable (and which have not been voluntarily notified) if the Treasurer considers that the action may pose 'national security concerns'. This applies to both 'significant actions' (which are generally high-value transactions involving a change in control) and a new category of 'reviewable national security actions' (which apply regardless of value and generally involve a lower influence threshold).

'Reviewable national security actions' are broadly defined, and will capture a large proportion of foreign investment activities that do not fall within the other screening categories. These may include actions involving:

> The new national security regime gives the Australian Government greater oversight on foreign investment in areas which are thought to pose national security concerns

- acquisitions of interests of any percentage in an Australian entity;
- acquisitions of interests in, or interests in the assets of, an Australian business;
- acquisitions of interests in Australian land;
- issuing securities in an entity;
- entering agreements relating to the affairs of Australian entities;
- entering or terminating a significant agreement with an Australian business;
- altering the constituent document of an entity; and
- starting an Australian business.

Broadly, reviewable national security actions are actions which give foreign persons potential influence and rights, such as the ability to influence or participate in the central management or policy of an entity or business, or the right to occupy Australian land.

Once called in, the Treasurer may make orders (such as a prohibition or disposal order) in respect of the transaction where the Treasurer is satisfied that it would be contrary to national security. The 'call in' power may be exercised for up to 10 years after the action has been taken.

For greater certainty, foreign investors may choose to extinguish the Treasurer's ability to use the 'call in' power (but not the 'last resort power' discussed below) by voluntarily notifying a reviewable national security action. In this case, FIRB approval will likely be a condition precedent to transaction completion to remove the risk of the call-in power being exercised post-completion.

However, voluntary notification to FIRB must be balanced against the time and cost of making such application and the increased conditionality injected into the relevant transaction. This has flow-on impacts on the overall transaction timeline and competitive dynamics, particularly in an auction sale.

'Last resort' Powers

The Treasurer also has 'last resort' powers, whereby the Treasurer may:

- prohibit an action or order a disposal if satisfied that an action is or would be contrary to national security; and
- impose conditions or vary existing conditions if satisfied that it is reasonably necessary for reducing the national security risk.

The 'last resort' powers only apply in respect of actions notified and taken after 1 January 2021, although there are no time limits on when the Treasurer may exercise such powers post transaction.

The powers may only be exercised if the action gives rise to a national security risk and:

- the foreign person notifying the action made a material false or misleading statement or omission directly relating to that risk;
- the person's business, structure, organization or activities have materially changed, creating an unforeseeable national security risk; or
- the relevant circumstances or market have materially changed, altering the national security risk.

Certain checks and balances apply, including requiring that the Treasurer considers relevant advise from the national intelligence community, takes reasonable steps to negotiate in good faith with the foreign investor, and is satisfied that other available regulatory systems would not adequately reduce the national security risk.

That said, by giving the Treasurer the power to review previously approved transactions, the 'last resort' power goes further than other countries' foreign investment regimes. Investors should therefore ensure applications are carefully prepared and accurate, to mitigate the risk of FIRB exercising its 'last resort' powers.

Conclusion

The new national security regime gives the Australian Government greater oversight on foreign investment in areas which are thought to pose national security concerns. However, the actual impact of the new regime on foreign investment into Australia and the broader Australian economy is yet to be seen. The Australian Government is conducting an evaluation of the new foreign investment reforms to determine whether the right balance has been struck between welcoming foreign investment and protecting Australia's national interest.

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Payment

AGGREGATORS AND PAYMENT GATEWAYS

The Reserve Bank of India (RBI) in the exercise of its powers under Sections 18 and 10(2) of the Payment and Settlement Systems Act, 2007 decided to regulate the activities of Payment Aggregators and also issued technology-related recommendations for Payment Gateways...

After confronting the pandemic, the services provided by the e-commerce marketplaces have become even more indispensable. This has made the entire financial ecosystem of the country rely on electronic payment transactions more than ever. It is easy to ignore how complex and online payment systems are in India. Furthermore, many such payment systems are still evolving with the advances in technology. The probability of misuse of information and being duped by delinquent hackers remains high in the face of a system which is still developing. Before discussing the highlights and mandatory requirements provided under the guidelines, let us first understand the role of the Payment Aggregators (PAs) and Payment Gateways (PGs) followed by a clear distinction recognized by the RBI between them. Though, it is pertinent to note that PAs and PGs both are intermediaries playing an extremely crucial function in facilitating online payments.

Recognizing the gravity of these challenges as well as the cruciality of roles, (which includes the handling of sensitive customer data), the Reserve Bank of India ("**RBI**") in the exercise of its powers under Sections 18 and 10(2) of the Payment and Settlement Systems Act, 2007 ("PSSA") (an Act that primarily governs the expanse of payment systems in India) decided to regulate the activities of Payment Aggregators and also issued technology-related recommendations for Payment Gateways through the Guidelines on Regulations of Payment Aggregators and Payment Gateways, 2020 ("**Guidelines**"). The Guidelines came into effect on April 01, 2020, other than for activities for which specific timelines have been provided.

Before discussing the highlights and mandatory requirements provided under the Guidelines, let us first understand the role of the Payment Aggregators ("**PAs**") and Payment Gateways ("**PGs**") followed by a clear distinction recognized by the RBI between them. Though, it is pertinent to note that PAs and PGs both are intermediaries playing an extremely crucial function in facilitating online payments.

PAs are entities that assist merchants to accept various payment instruments from customers for completion of their payment obligations and in the process, these PAs receive payments from customers, pool and transfer them to the merchants after a period of time. PGs are entities that provide technological infrastructure to route and facilitate the processing of

[1] *Guidelines on Regulations of Payment Aggregators and Payment Gateways issued vide Notification bearing reference No. RBI/DPSS/2019-20/174 DPSS.CO.PD.No.1810/02.14.008/2019-20 dated March 17, 2020. https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&Mode=0*

an online payment without any involvement in handling the funds. For processing an electronic payment, apart from Payment Aggregators and Payment Gateways, there are different players in the online space. Payment System is the foremost and primary player while there are other System Participants such as Payment Service Providers and Third-Party App Providers. The present article covers the expanse of the regulatory framework with respect to Payment Aggregators and Payment Gateways.

1. PAYMENT AGGREGATORS

While recognizing the risks associated with inadequate governance, lack of proper redress mechanism and uniformity in practices as well as with the inability of PAs to meet their payment obligations, the RBI, with an intention to enhance consumer protection, chose to regulate in entirety the activities of the PAs. The regulations set out the following mandatory practices for the PAs:

A. Authorization of non-bank PAs

The services of PAs, apart from being provided by a private entity (i.e., non-bank PAs) are also provided by various banks as part of their normal banking services. For the non-bank PAs, the regulations provide the following mandatory requirements:

1. New 'non-bank PAs' are required to obtain mandatory authorization from the RBI under the Payment and Settlement Systems Act, 2007;
2. Existing 'non-bank PAs' are required to apply for authorization on or before June 30, 2021. They are also allowed to continue operations, till the decision of the RBI upon their application is granted.

It has also been clarified that any entity applying for authorization shall be a Company incorporated under the provisions of the Companies Act, 1956/2013 and shall ensure that the business activity as PA is covered under its Memorandum of Association.

B. E-commerce marketplaces providing services of PAs

E-commerce marketplaces providing PA services are allowed to continue services till June 30, 2021. To continue this activity any further, the entity is required to separate the PA activities from the marketplace business and to obtain an authorization on or before June 30, 2021.

C. Capital Requirements

The primary role of the PAs is to manage funds on behalf of the third parties i.e., merchants and customers, and to ensure that the customer has seamless and safe payment experience. To make sure that PAs are financially stable, the Guidelines provide strict mandatory net-worth requirements to be fulfilled:

1. New PAs are required to have a net-worth of INR 150 million at the time of applying for authorization and are obligated to achieve a net worth of INR 250 million by the end of the third financial year from the grant of authorization. The net worth of INR 250 million is required to be maintained at all times thereafter.
2. Existing PAs are required to achieve a net worth of INR 150 million by March 31, 2021, and a net-worth of INR 250 million by the end of third financial year i.e., on or before March 31, 2023. The net-worth of INR 250 million is required to be maintained at all times thereafter.
3. The Guidelines require that the net-worth consists only of paid-up equity capital, preference shares that are compulsorily convertible to equity, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of assets and exclude the reserves created by revaluation of assets adjusted for accumulated loss balance, the book value of intangible assets and deferred revenue expenditure if any. In this regard, the compulsory convertible preference shares can be either non-cumulative or cumulative and the shareholder agreements should specifically prohibit any withdrawal of this preference capital at any time.

D. Governance, Customer Grievance Redressal and Dispute Management Framework

The main function performed by a PA is to collect i.e., debit money from the account of a customer towards a payment obligation and pool it. The collected money is thereafter transferred to the account of the merchant after a period of time as per the terms and conditions as agreed between the merchant and the PA. The customers ordinarily have very limited access to the PAs for redressal of grievances and rely mainly on the merchants or banks while transacting an online payment. Hence, to create transparency in the functioning of PAs and to assuage any risks, the RBI while addressing the issue of lack of proper redress mechanism has made it compulsory for PAs to:

1. Clearly delineate by way of agreements the roles and responsibilities between the PAs, merchants, acquiring banks and all other stakeholders in sorting/handling complaints,

"

The non-bank PAs are obligated to maintain the amount collected by them in an escrow account with a single Scheduled Commercial Bank

refund/failed transactions, return policy, customer grievance redressal, dispute resolution mechanism, reconciliation, etc.

2. To disclose comprehensive information regarding merchant policies, customer grievances, privacy policy, etc., on website.
3. To put in place a formal, publicly disclosed customer grievance redressal and dispute management framework.
4. To have a board-approved policy for disposal of complaints/dispute resolution mechanism/ timelines for processing refunds in complete adherence with previous instructions of RBI on Turn Around Time for resolution of failed transactions.
5. To appoint and display details of a Nodal Officer on the website who shall be responsible for regulatory and customer grievance handling functions.

E. *Data Protection and Risk Management*

The PA being part of a payment process chain also handles sensitive customer data including customer's card credentials and other personally identifiable information which the customers are ordinarily required to part with while transacting online and discharging payment obligations. Keeping in view the security of the customer's data and to increase the customer's confidence in the financial ecosystem and to alleviate any fraud and compromise with cyber security, the RBI has mandated for PAs to:

1. Put in place adequate information and data security infrastructure and systems for the prevention and detection of frauds.
2. To establish a mechanism for monitoring, handling and follow-up of cyber security incidents and breaches. Such incidents are also required to be reported to RBI and CERT-In.
3. To not store the customer card credentials within their database or the server accessed by the merchant. PAs are also obligated to comply with data storage requirements as applicable to Payment System Operators [2].
4. To submit the System Audit Report, including cyber security audit conducted by CERT-In empaneled auditors, within two months of the closing of the financial year to the respective Regional Office of the Department of Payment and Settlement Systems, RBI.
5. To conduct a security audit of the Merchant to ensure that the merchant site has not saved customer card details and related data.
6. To have provision for security/privacy of customer data in the agreement with the merchant.
7. To undertake background and antecedent check of the merchants to ensure that merchants do not have mala fide intention of duping a customer and do not sell fake/counterfeit or prohibited products.

F. *Settlement and Escrow Account Management*

The non-bank PAs are obligated to maintain the amount collected by them in an escrow account with a single Scheduled Commercial Bank. For maintenance of the account, the operations of the PAs are deemed to be "Designated Payment Systems" under Section 23A of the Payment and Settlement System Act. The amounts deducted from customer accounts are required to be remitted to the escrow account on Tp+0 or Tp+1 basis, Tp being the date of debit to the customer's account against the purchase of goods and services. The final settlement with the merchant by PA is to be effected as follows:

1. Where PA is responsible for delivery of goods/ services, no later than Ts+1 basis, Ts being the date of intimation by merchant about the shipment of goods.
2. Where the merchant is responsible for the delivery of goods, the payment to the merchant shall be no later than Td+1 basis. Td being the date of confirmation by the merchant of delivery of goods to the customer.
3. Where the agreement with merchant provides for the PA holding the amount till the expiry of refund period, no later than Tr+1 basis, Tr being

[2] *Notification dated April 06, 2018 on Storage of Payment System Data https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11244*

the date of expiry of refund period, as fixed by the merchant.

4. The credits towards reversed and refund transactions are to be routed back through escrow account unless as per the contract, the refund is directly managed by the merchant and the customer is aware of this arrangement.
5. The Guidelines also list out the permissible credit and debit from the escrow account with an obligation upon the relevant bank to ensure that the payments from escrow account are made only to eligible merchants/purposes. No interest shall be payable by the banks on balances maintained in the escrow account, except under the certain circumstances outlined in the Guidelines[3].

The intention of the RBI to designate the PAs, for the purposes of maintaining escrow account, as Designated Payment Systems under the provisions of Section 23A of the PSSA, is to explicitly secure and provide safe payment experience to the customers and merchants. Under the non-obstante provision of Section 23A(3) PSSA, the persons entitled to receive payments from the escrow account shall have a first and paramount charge on the balance held in that account notwithstanding any other law including Insolvency and Bankruptcy Code, 2016. Therefore, if a PA or concerned scheduled commercial bank undergoes the liquidation, then the liquidator is duty-bound to not utilize the balance in the account for any other purposes until all such entitled persons (merchants etc.) are paid in full or an adequate provision is made therefor.

2. *PAYMENT GATEWAYS*

PGs have been mandated to adopt the baseline technology-related recommendation provided in the Guidelines to ensure that there is a uniform adoption of IT amongst PGs. Apart from the technology recommendation provided under the Guidelines, the bank PGs are also further subject to RBI guidelines on 'Managing Risks and Code of Conduct in Outsourcing of Financial Services by Banks'[4].

In an important step towards enhancing the security of the customer and his/her private and sensitive data, the RBI has advised the PGs to take preventive measures to ensure storing of data in an infrastructure that does not belong to an external jurisdiction and PGs are also made subject to instructions on storage of payment data, as applicable to Payment Systems Operators. Therefore, the data localization norms as applicable to Payment System are also applicable upon the Payment Gateways and make it obligatory to store all data related to payment transaction in a system located in India. This data includes end-to-end transaction details/information collected/carried/processed as part of the message/payment instructions.

[3] *Para 8.15 of the Guidelines on regulations of Payment Aggregators and Payment Gateways*
[4] *https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=3148&Mode=0*

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Kerfuffle OF APPS TERMS OF USE: *Can They Change Anytime?*

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Given that some Apps are more exposed to the public eye than others, it is recommended that consumers be able to assess a few simple elements before using "unsanctioned" Apps

Online Apps (such as WhatsApp, Twitter, Facebook, Instagram etc.) generally follow a similar two-tiered contracting pattern: a clickwrap agreement (which ends with "I Agree…") and / or a browse wrap agreement, whereby a user agrees to and continues to be bound even if the App reserves the right to unilaterally change its terms of use.

In the last three or four years, little happened in the regulatory spectrum regarding the online Apps, despite their usage in wider and wider domains of life. At a technical level, we have seen less cases of Apps that unilaterally change their terms of use, without having the consumers informed; however, the corundum remains as to what happens if the Apps do change their terms of use unilaterally and give notice to the consumers to that respect.

The recent case of WhatsApp informing on their change of terms and conditions in February 2021 came as a relevant example. WhatsApp stated their acquisition by Facebook triggered several changes in the terms of use and simply conditioned the continuation of use of the app to the consumers' consent on having certain parts of their data shared with Facebook. In a simple explanation, Whatsapp confirmed in January 2021 that only certain data from chats exchanged with business accounts or certain shopping data (whilst allegedly the consumer does such transaction) were to be shared with merchants and Facebook for marketing purposes (personalizing adds, sending promotions etc.).

Nevertheless, WhatsApp confirmed and assured consumers on the continuation of end-to-end encryption of the regular chats sent via the App. Lastly, the changes brought along severe privacy concerns for consumers and their change of preference to other similar Apps, such as Signal or Telegram. The trade in was easily motivated by better privacy assurances on the part of these less commercialized Apps.

But is there a trite law regarding these Apps? The answer varies according to multiple contingencies. All Apps receive, collect, and use data. Such usage regimes are pre agreed by the consumers via the clickwrap agreements. Voluntary disclosure of data keeps the Apps aside of otherwise heavy litigation.

Regulationwise, we might of course investigate what different jurisdictions do. In the EU, the GDPR provides a comprehensive circulation regime for data. Other jurisdictions, such as DIFC to refer to a local example, have enacted similar norms for personal data. However, such regulation sets compliance standards for the Apps and do not interfere with the changes in the terms of use, for as long as these changes remain within the said compliance regime. In the interim, it is understood that an App may change its terms of use, on the condition the changes they remain lawful.

The drawback is that many jurisdictions have little normative or procedural history in dealing with similar issues. We have found the most prominent examples in the practice of the US Courts.

As the Ninth Circuit held in Nguyen vs. USA, "[T]he onus must be on website owners to put users on notice of the terms to which they wish to bind consumers".[1] In Michael Rodman vs. Safeway Inc., the Court held: "The safeway.com agreement did not give Safeway the power to bind its customers to unknown future contract terms, because consumers cannot assent to terms that do not yet exist. A user confronting a contract in which she purports to agree to terms in whatever form they may appear in the future cannot know to what she is agreeing."[2]

The approach of such judiciary practice tends to uniformly imply that online environments need to be reasonable, understandable and easily accessible to all consumers, not only to the ones who are familiar with the data and tech ecosystems.

In 2019, the data protection authority in Hamburg, Germany, notified Facebook of their intention make use of the GDPR Art. 66, which allows a national agency to order data processing to stop if there is "an urgent need to act in order to protect the rights and freedoms of data subjects". The action came in response of Facebook manually reviewing certain Google Assistant consumers' audio snippets.

Whereas Facebook has been in collision with regulators in recent years, the change in WhatsApp terms of use additionally raised severe concerns with a number of regulators, in various jurisdictions: the European Commission, local governments of Ireland, India, Italy, USA etc. The changes in terms have been regarded either as data breaches or even as

[1] *No. 07-30197, Plaintiff-Appellee,D.C. No.v.CR-05-00270-05-RSL, https://law.justia.com/cases/federal/appellate-courts/ca9/07-30197/07-30197-2011-02-25.html, [last accessed on January 31 2021]*

[2] *ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; SETTING CASE MANAGEMENT CONFERENCE, Re: ECF Nos. 171 & 173., JON S. TIGAR, District Judge, https://scholar.google.com/scholar_case?case=5925834191658507423&hl=en&as_sdt=6&as_vis=1&oi=scholarr [last accessed on January 31 2021]*

> **All Apps receive, collect, and use data. Such usage regimes are pre agreed by the consumers via the clickwrap agreements. Voluntary disclosure of data keeps the Apps aside of otherwise heavy litigation.**

unfair contract terms, for the jurisdictions that have statutory provisions in this respect, such as the EU.

But all in all, are the changes in the Apps terms of use legal? Generally yes, they are legal if in line with the law. Despite this, an App has a corporate support in most of the cases, which is represented by a company or by a number of companies. Each of these need to align to a specific compliance regime, depending on the place of operation. For instance, the EU regulator of WhatsApp is the European Commission and the GDPR fully applies to WhatsApp within the EU or in relation to EU citizens.

Conclusively, an applicable normative system or the judiciary practice associated with it cannot impose a business (an App) to change or not to change its terms of use. What the normative system does is to set limits to such changes, in order to make them reasonable, known to the consumers and transparent.

In the case of WhatsApp, however, what changed the App's position towards its intended change of terms was less the regulation; such shift was commercially driven by the hypothesis of losing consumers (users). Ideally, it should be the regulatory environment to buffer any unreasonable changes in terms, not the loss of profit associated with the terms.

Finally, given that not all Apps are notorious and exposed to the public eye (such as Whatsapp), it is our recommendation that consumers should be able to assess few simple elements before using such "unsanctioned" Apps. This would safeguard, at least until such time that uniform regulation is enacted, their interests; by this, they may investigate how an app uses data, if it transfers it in different jurisdictions, if it uses secure encryption and related technology, if the App is run by a legitimate company or corporate set up, if it profiles consumers etc. Overall, few simple steps that would help mitigate the detritus of the online ecosystems.

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Insolvency and Bankruptcy Code

SUPREME COURT OF INDIA ENDORSES THE FRESH START ON A CLEAN SLATE PRINCIPLE

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The Supreme Court holds that a successful resolution applicant should be given an opportunity to take over and run the business of the corporate debtor on a clean slate

Section 31 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) provides that once the Adjudicating Authority (as defined in the IBC) approves a resolution plan, it shall be binding on the corporate debtor, its employees, members, creditors including Central/ State Government and any local authority to whom a debt arising under any law in force is owed, guarantors and other stakeholders involved in the resolution plan.

THE ESSAR STEEL CASE

The Supreme Court of India (**"Supreme Court"**) in Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others[1] (Essar Steel case) held that allowing claims apart from those covered in a resolution plan to survive after the approval of a resolution plan militates against the rationale of Section 31 of the IBC. The Supreme Court held that the successful resolution applicant should be given an opportunity to take over and run the business of the corporate debtor on a clean slate. Accordingly, a resolution applicant should not be suddenly faced with 'undecided' claims which would throw into uncertainty the amounts payable by a resolution applicant to take over the business of the corporate debtor. Accordingly, the Supreme Court upheld the principle of extinguishment of past liability by interpreting Section 31 to mean that once the resolution plan had been approved by the Adjudicating Authority, it would be binding on all stakeholders as it is and no past liabilities or claims could pop up subsequently.

While it was certain after the verdict of the Supreme Court that all claims against a corporate debtor would stand extinguished after the approval of a resolution plan, there was still some uncertainty about the status of criminal and civil proceedings that may be initiated by statutory authorities for alleged offenses or violations under applicable law by the corporate debtor prior to the commencement of insolvency.

EXTINGUISHMENT OF LIABILITY

As background, it will be useful to analyze certain orders issued by regulatory authorities under the Securities and Exchange Board of India Act, 1992 (**"SEBI Act"**) and the Prevention of Money Laundering Act, 2002 (**"PMLA Act"**).

The Securities and Exchange Board of India (**"SEBI"**) had issued show cause notices dated October 18, 2019 to Monnet Ispat & Energy Limited and Alok Industries Limited respectively for alleged non-compliances with certain disclosure obligations under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 stated to have occurred prior to implementation of the respective resolution plans. The SEBI, adjudicating officer in both these matters imposed a monetary penalty[2] on the corporate debtor for such non-compliances. On appeal, however, the Securities Appellate Tribunal[3] (**"SAT"**) recognizing the need for the successful resolution applicants to be given a fresh start pursuant to the IBC process and relying on the Supreme Court's decision in the Essar Steel case noted that the SEBI ought not to have issued the show cause notice or adjudicate or pass an order of the penalty in relation to violations which occurred prior to implementation of the resolution plans. Further, the SAT noted that once the Adjudicating

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[1] *GCommittee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others, (2020) 8 SCC 531*

[2] *See Adjudication Order No. Order/SR/SM/2020-21/8025/30 dated June 26, 2020 in respect of Monnet Ispat & Energy Limited and Adjudication Order No. Order/SR/SM/2020-21/8433/47 dated July 30, 2020 in respect of Alok Industries Limited.*

[3] *Monnet Ispat & Energy Limited v. SEBI (Order dated October 29, 2020 in Appeal No. 238 of 2020); Alok Industries Limited v. SEBI (Order dated December 1, 2020 in Appeal No. 300 of 2020)*

Authority had approved a resolution plan, it would be binding on all government authorities, including the SEBI. At the time of writing this article, appeals filed by the SEBI against the aforementioned orders of the SAT are pending before the Supreme Court.

The question of the liability of a corporate debtor for alleged offenses committed before it successfully underwent the corporate insolvency resolution process under the IBC also arose in the case of acquisition of corporate debtor - Bhushan Power & Steel Limited (**"Bhushan Power"**) by JSW Steel Limited (**"JSW Steel"**). On October 10, 2019, the Directorate of Enforcement of Central Government (**"ED"**) attached the assets of Bhushan Power under Section 5 of the Prevention of Money Laundering Act, 2002 (**"PMLA Act"**). Such action by the ED preceded the Supreme Court's judgment in Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others by about a month.

JSW Steel urged before the National Company Law Appellate Tribunal, New Delhi (**"NCLAT"**) that the ED could not attach assets of a corporate debtor after its resolution plan had been approved on the grounds of money laundering by the erstwhile promoters. While the matter was still pending before the NCLAT, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was promulgated and published in the Gazette of India on December 28, 2019 (the **"2019 IBC Ordinance"**). Pursuant to Section 10 of the 2019 IBC Ordinance, Section 32A was introduced in the IBC effectively providing immunity to successful resolution applicants against the offenses committed by erstwhile management of the corporate debtor, subject to certain conditions.

It is also relevant to note that Section 238 of the IBC provides for an overriding clause which states that the provisions of the IBC shall have full effect notwithstanding anything inconsistent therewith contained in any other law in force. It is a well-recognized principle in law that when two non-obstante clauses in two special statutes clash, the statute which is later in time will prevail. Therefore, IBC being the later statute will prevail over the SEBI Act and the PMLA Act.

SECTION 32A OF THE IBC

Section 32A of the IBC expressly provides that a corporate debtor shall not be prosecuted for an offense committed prior to the corporate insolvency resolution process, from the date on which a resolution plan is approved by the Adjudicating Authority, subject to certain conditions. Section 32A further clarifies that

if a prosecution is instituted during the corporate insolvency resolution process against a corporate debtor, it shall stand discharged from the date of approval of the resolution plan. The exemptions from liability as mentioned earlier are subject to the following conditions:

1. The resolution plan approved should result in change of management or control of the corporate debtor to a person who was not a promoter or in management or control of the corporate debtor prior to the implementation of the resolution plan, or a related party of such a person; or
2. The relevant investigating authority should not have reason to believe, on the basis of any material in its possession, that the new persons in the management or control of the corporate debtor had abetted or conspired in the commission of the alleged offense with the erstwhile promoters or persons in management or control of the corporate debtor.

   The relevant investigating authority is required to file a report or complaint to the relevant statutory authority or court in relation to such abetment or conspiracy to continue with the prosecution against the corporate debtor.
3. The designated partner or officer in default who was in charge of, or responsible to the corporate debtor for conduct of its business or associated with the corporate debtor in any manner, or directly or indirectly involved in the commission of the offense according to the report/compliant filed by the investigating authority, would not be granted such immunity.

Section 32A(2) of the IBC also bars action against property of a corporate debtor in relation to an offense allegedly committed prior to commencement of the corporate insolvency resolution process, subject to similar conditions (as listed above). Section 32A(3) obligates the corporate debtor to extend all co-operation to investigating authorities for investigations relating to the period prior to the commencement of the insolvency.

Taking note of the 2019 IBC Ordinance, the NCLAT in *JSW Steel Limited v. Mahender K. Khandelwal and others*[4] (JSW Steel case) issued notice to the ED and the Central Government seeking a response on whether JSW Steel would be covered by the exemption under Section 32A. The NCLAT while holding that the PMLA proceedings ought to be quashed, noted two important observations – (i) that Section 32A being merely clarificatory, would apply retrospectively; and (ii) Section 32A requires the investigating agency to have reasons to believe that the new management of the corporate debtor had abetted or conspired in the commission of the offense on the basis of material in its possession as on the date on which such investigation authority is called to provide its confirmation with respect to Section 32A. The investigation authority may not keep such confirmation in abeyance until the investigation is complete in all other aspects. At the time of writing of this article, an appeal against the judgment of the NCLAT in this JSW Steel case is pending before the Supreme Court.

Separately, on the basis of a plain application of Section 32A of the IBC, the Delhi High Court in *Tata Steel BSL Limited and another v. Union of India and another*[5] discharged the accused in proceedings filed against them before the trial court for alleged offenses under the Companies Act, 2013, Companies Act, 1956 and the Indian Penal Code, 1860 consequent to approval of Tata Steel Limited's resolution plan for revival of the petitioner (then known as Bhushan Steel Limited) under the IBC process.

SECTION 32A OF THE IBC GETS RECOGNITION FROM THE SUPREME COURT

More recently, in *Manish Kumar v. Union of India*[6] the Supreme Court dismissed a writ petition challenging the constitutional validity of Section 32A of the IBC on the ground that Section 32A is arbitrary and violates Articles 300A, 14, 19 and 21 of the Constitution of India. The Union of India urged before the Supreme Court that the Essar Steel case required the successful resolution applicant to be provided an opportunity to start on a fresh slate and that Section 32A was introduced to give such objective statutory basis. The Supreme Court while observing that the legislature ought be given freedom to experiment with economic laws and recognizing the imperative need for the IBC in the Indian context, held that the "extinguishment of criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate". The Supreme Court issued an unequivocal declaration of the need to give the successful resolution applicant a fresh start. Naturally, the decision of the Supreme Court is binding on all subordinate courts and tribunals and we expect that such decision will be implemented by such courts and tribunals in letter and spirit.

It will be interesting to examine whether regulatory authorities will stop issuing notices to successful resolution applicants and/or the revived corporate debtor for offenses alleged to have occurred prior to the implementation of a successful resolution plan. It will also be interesting to see how the Supreme Court rules in the aforesaid pending appeals in the matter of Alok Industries Limited, Monnet Ispat & Energy Limited and JSW Steel.

While the legislative prerogative may presently require extinguishment of past liability, going-forward the law may be reconsidered with a change in the economic

[4] *2020 SCC OnLine NCLAT 55*
[5] *Tata Steel BSL Limited and another v. Union of India and another (Order dated March 16, 2020 in W.P. (CRL) 3037/2019 and CRL.M.A. 39126/2019)*
[6] *Manish Kumar v. Union of India (Judgment dated January 19, 2021 in W.P. (C) No. 26 of 2020)*

conditions. The concept of corporate criminal liability is not unknown in India. Further, given that resolution applicants are given extensive due diligence rights, in the future, the legislature itself may treat acquisition under the IBC process at par with any other acquisition. In fact, even in the JSW Steel case, the NCLAT had taken an initial prima facie view that if the ED finds that the assets of the corporate debtor were purchased out of the 'proceeds of crime' then the amount generated out of the assets will come within the meaning of 'operational debt' payable to the ED for which it may file a claim under the IBC. Accordingly, in the future, it is possible that special regulatory authorities such as the ED and the SEBI may participate in the corporate insolvency resolution process by submitting claims against corporate debtors. However, for this, further amendments will be required to the IBC.

TRACES OF RECOGNITION OF THE CLEAN SLATE PRINCIPLE UNDER THE COMPANIES ACT

Interestingly, the Company Law Board in its order[7] approving the induction of strategic investor – "Tech Mahindra Limited" in "Satyam Computers Services Limited" after the Satyam scam broke out, had granted protection to the strategic investor similar to that contemplated by Section 32A of the IBC. The directors nominated by Tech Mahindra Limited were granted exemption from any civil/criminal liability pursuant to proceedings by the state or central government agencies, for any acts or omissions by the company which occurred prior to the suspension of the erstwhile board of directors of the company. The reason for this was to ensure that the directors nominated would be able to carry out their functions without any apprehension of being subject to civil/criminal liability for the past offenses. Therefore, this concept of allowing the new management to operate on a clean slate is not completely alien to the Indian jurisprudence.

Further, in the view of the authors, courts and tribunals must consider applying the clean slate principle on a case to case basis, where the Central Government applies for relief under Sections 241 and 242 of the Companies Act, 2013 when it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest. The clean slate principal serves public interest by ensuring that the company survives and regulatory actions do not linger to haunt the company and the new management.

CONCLUSION

The Supreme Court in Manish Kumar v. Union of India has clearly paved the way forward for courts and tribunals to deal with the recurring question of the continuity of liability of a corporate debtor for past offenses. Given that the suspension on filing of insolvency petitions on account of COVID-19 is due to expire shortly, i.e. on March 31, 2021[8], the authors believe that it would be beneficial if the aforesaid appeals pending before the Supreme Court are disposed of quickly. This would ensure that potential resolution applicants have better certainty and clarity before offering their resolution plans.

[7] *Union of India v. Satyam Computer Services Limited and Ors., (2009) 2 CompLJ 293 (CLB)*
[8] *Notification (Ministry of Corporate Affairs) dated December 22, 2020, Available at: https://ibbi.gov.in//uploads/legalframwork/df55d4f612f270d6c637ee4b3c8131c8.pdf*

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Overall, the Codes are a welcome move and can be a game changer

India was on a socialistic path initially before embarking upon liberalization. Quite naturally, there was a difference between the timing of those legislations and requirements of the day. Currently, India has legislations as old as those passed from the year 1923[1]. Coupled with this are the challenges of having different enactments dealing with similar subject matter with different definitions and also matters relating to labour welfare, trade disputes, social security falling under the 'concurrent list' of the Constitution of India[2], enabling both Central/federal and State governments to legislate on the labour laws. Accordingly, there are legislations and rules passed by the central government and rules framed by the state governments.

While so, wherever there is any ambiguity, Courts by and large interpreted the provisions in favor of employees/workers, by adopting liberal interpretation of the welfare legislations.

Therefore, there was a pressing requirement to consolidate all these laws and simplify their implementation.

To overcome these difficulties, the Government had constituted a Second National Commission on Labour (***"Commission"***) with a two-point agenda:

i) Suggesting rationalization of existing laws relating to labour in the organized sector; and
ii) Suggesting an 'umbrella' legislation for ensuring a minimum level of protection to workers in the unorganized sector.

The Commission had recommended consolidation and rationalization of labour laws by eliminating obsolete provisions. After a prolonged delay, finally in 2019-2020, four labour codes were enacted consolidating 29 of the existing labour laws (***'Codes'***) as follows:

i) Code on Wages, 2019 (***"Wage Code"***), consolidating the law in relation to payment of wages and bonus;
ii) Code on Social Security, 2020 (***"SS Code"***), consolidating the law in relation to social security benefits;
iii) Code on Occupational Safety, Health and Working Conditions, 2020 (***"OSH Code"***), consolidating the law on safety, health and working conditions of workers at factory/ establishment; and
iv) Code on Industrial Relations, 2020 (***"IR Code"***), consolidating the laws relating to trade unions, retrenchment, lay-offs and settlement of industrial disputes.

Even though the introduction of the above Codes is predominantly a consolidation exercise, the changes brought in by the Codes can be broadly classified into five different groups viz., (A) Structural changes; (B) Changes that are aimed to better 'Ease of Doing Business India' rankings; (C) Changes influenced by judicial pronouncements; (D) Contemporary changes; and (E) Changes that are beneficial to the employees.

The changes under the above groups are discussed hereunder:

STRUCTURAL CHANGES

The following structural changes are made to the existing legislations when subsumed in the new codes:

i) ***Prohibition of contract labour in core activity:*** The OSH Code prohibits deployment of contract labour in the core activity of an establishment. 'Core activity' is defined as any activity for which the establishment has been primarily set up and includes activity which is essential or necessary to such activity. Certain activities are clarified to be not essential or necessary such as watch and ward services, canteen and catering services, loading and unloading operations, etc., unless the entity itself is engaged in such activity.

ii) ***Concept of Negotiating Council:*** The IR Code now introduces the concept of a 'negotiating union' for negotiating with the employers. A negotiating union is a trade union having 51% or more of the total workers on the muster roll of the establishment as its members. Where more than one trade union is present with none having 51% worker membership, a negotiating council will be constituted consisting of the representatives of such registered trade unions, having the support of not less than twenty per cent of the total workers on the muster roll of that industrial establishment.[3]

iii) ***Concept of Floor Wages:*** The Wage Code empowers the Central Government to fix the minimum floor wage for each region and there is a statutory obligation on the State Governments to fix minimum wages above the floor wage.[4]

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[1] *Employee's Compensation Act, 1923*
[2] *Entries at sl. nos. 22, 23 and 24 of the Concurrent List in Schedule VII*
[3] *See Section 14 of the IR Code*
[4] *See Section 9 of Wage Code*

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CHANGES AIMED AT 'EASE OF DOING BUSINESS'

The following changes are made to improve ease of doing business rankings:

i) ***Prior permission for retrenchment and lay-offs:*** The requirement of obtaining prior permission from the appropriate government for closing down, lay-offs and retrenchment of workmen has now been increased to establishments employing 300 or more workmen from the current 100 or more, thereby making it easier for the employer of smaller size to terminate employees as per business needs.[5]

ii) ***Facilitator Regime:*** The labour inspectors under the erstwhile regime are rechristened into inspector-cum-facilitators. Their role is not merely to act as an enforcement agency but also to act as facilitators of compliance. All employers will be given an opportunity to rectify non-compliance in the first instance and it is only in a second or subsequent offense that the penalty and penal provisions would be applicable.[6]

iii) ***Recognizing the concept of fixed term employment:*** The concept of fixed term employment has now been extended to all sectors. In order to be classified as a fixed term employee, he/she must be appointed for a specific period. The Code places fixed term employees on an equal footing with permanent workers on working hours, statutory benefits including gratuity. Gratuity shall be paid upon completion of at least 1 year of service.

iv) ***e-Way:*** In line with the government's emphasis on the Digital India mission, the records, registers, returns, etc., can be maintained electronically.

v) I***ncreased Thresholds:*** The applicability threshold for contract labour deployment has been increased from 20 to 50 workmen.[7] For factories, the applicability is increased to: i) 20 or more workers (currently it is 10), where a manufacturing process is being carried on with the aid of power; or (ii) 40 or more workers (currently it is 20), where a manufacturing process is being carried on without the aid of power.[8]

CHANGES INFLUENCED BY JUDICIAL PRONOUNCEMENTS

There are certain provisions that are influenced by judicial pronouncements which include:

i) **Recognizing all genders:** An employer cannot discriminate employees belonging to any gender and

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[5] *Section 77 of the IR Code*
[6] *See Chapter VII of Wage Code; See Chapter IX of the OSH Code*
[7] *See Section 45 of the OSH Code*
[8] *See Section 2(w) of the OSH Code*
[9] *See Section 3 of the Wage Code*
[10] *Refer to: Navtej Singh Johar v. Union of India, (2018) 10 SCC 1*

> The concept of inter-state migrant labour was limited to persons hired through a contractor for work in an establishment situated in another State.

not limited to male and female.[9] This is a welcome move in recognizing the plurality of the society.[10]

ii) ***Uniform Wage definition:*** The term 'wages' has been a matter of debate and contest as it is defined variedly under the extant laws resulting in different practices. In the matter of *Regional Provident Fund Commissioner*[11] the Supreme Court upheld that the allowances paid across the board uniformly to all employees in a category will qualify as basic wages on which provident fund contributions shall be made.

Now, the definition of 'wages' has been standardized across all the four Codes. It includes all remuneration paid to the employees such as basic, dearness allowance, retaining allowance but excludes: a) overtime and house rent allowance, conveyance allowance, remuneration payable under any award or settlement gratuity; b) gratuity, retrenchment compensation, or similar ex-gratia. It is clarified that if the exclusions exceed 50% of the remuneration, then the amount in excess of such 50% will be treated as wages.

The definition brings in much-needed harmonization, but misses in detail, as some components can be taken in both the inclusion list and exclusions. This may also have additional cost implications for employers.

CONTEMPORARY CHANGES

Provisions that are contemporary in nature include:

i) ***Concept of Gig Workers and Platform Workers:*** The SS Code recognizes the growing concept of gig and platform workers and offers them social security benefits. 'Aggregators' which is a digital intermediary that brings buyer and seller on to a single platform, that engages these gig and platform workers, may now be asked to contribute to these social security schemes, which shall not be less than 1% of the turnover of the aggregator or 5% of the amount paid or payable to these workers, whichever is less.[12]

ii) ***Broadening the scope of inter-state migrants:*** The concept of inter-state migrant labour was limited to persons hired through a contractor for work in an establishment situated in another State. Now, this concept has been broadened under the OSH Code to include any person who has come from one State and obtained employment in another State and earning wages below INR 18,000 per month. This provision is applicable to both worker and employee. The employer is required to maintain records of inter-state migrants and pay them journey allowance every year.[13]

EMPLOYEE BENEFICIAL PROVISIONS

There are certain provisions that are beneficial to the employees, such as:

a) ***Establishment of Re-skilling Fund:*** The IR Code proposes to establish a "Worker Re-skilling Fund" having contribution from the employer of an industrial establishment, totaling to an amount equal to fifteen days of wages as last drawn by the worker immediately before retrenchment. The contributed amounts are to be credited to the retrenched worker's account, within forty-five days of such retrenchment, in such manner as may be prescribed.[14]

b) ***Settlement on exit:*** In case of removal, dismissal, retrenchment and resignation of an employee, the wages must be paid within two working days.[15] Monthly wages are to be paid within the 7th day of the succeeding month, as against the 10th day of the succeeding month.[16]

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[11] *Regional Provident Fund Commissioner (II) West Bengal v. Vivekananda Vidyamandir and Others (2019) SCC Online SC 291*
[12] *See Section 114 of the SS Code*
[13] *See Chapter 61 of the OSH Code*
[14] *See Section 83 of the IR Code*
[15] *See Section 17(2) of the Wage Code*
[16] *See Section 17(1) of the Wage Code*

c) ***Maternity Benefit:*** In case the work assigned to a woman is of such nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period and on such conditions as the employer and the woman may mutually agree.[17] The crèche facility shall be located within the establishment or at an appropriate distance from the establishment such that it is easily accessible to the women employees including a woman employee working from home.[18]

d) **Accident in course of employment:** An accident occurring to an employee while commuting from his residence to the place of employment for duty or from the place of employment to his residence after performing duty, shall be deemed to have arisen out of and in the course of employment if the nexus between the circumstances, time and place when and where the accident occurred and the employment is established.[19] Accordingly, he shall be eligible for compensation.

CONCLUSION:

Overall, the Codes are a welcome move and can be a game changer. At least a few parts of the Codes are likely to be implemented from 1st April 2021. The Codes are slated to be a win-win situation offering much-needed flexibility to organizations in hiring employees, reducing the intervention of external forces in their operations and at the same time without compromising on the rights of the employees. Considering this, it remains to be seen how the Codes shall be implemented, as both Central and State Governments have the rule making power. To achieve the avowed object for which the Codes are promulgated, the rules should be in parity with each other and not conflicting.

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[17] *See Section 60(5) of the SS Code*
[18] *See Rule 39 of the draft Code on Social Security (Central) Rules, 2020*
[19] *See Section 34(3) of the SS Code*

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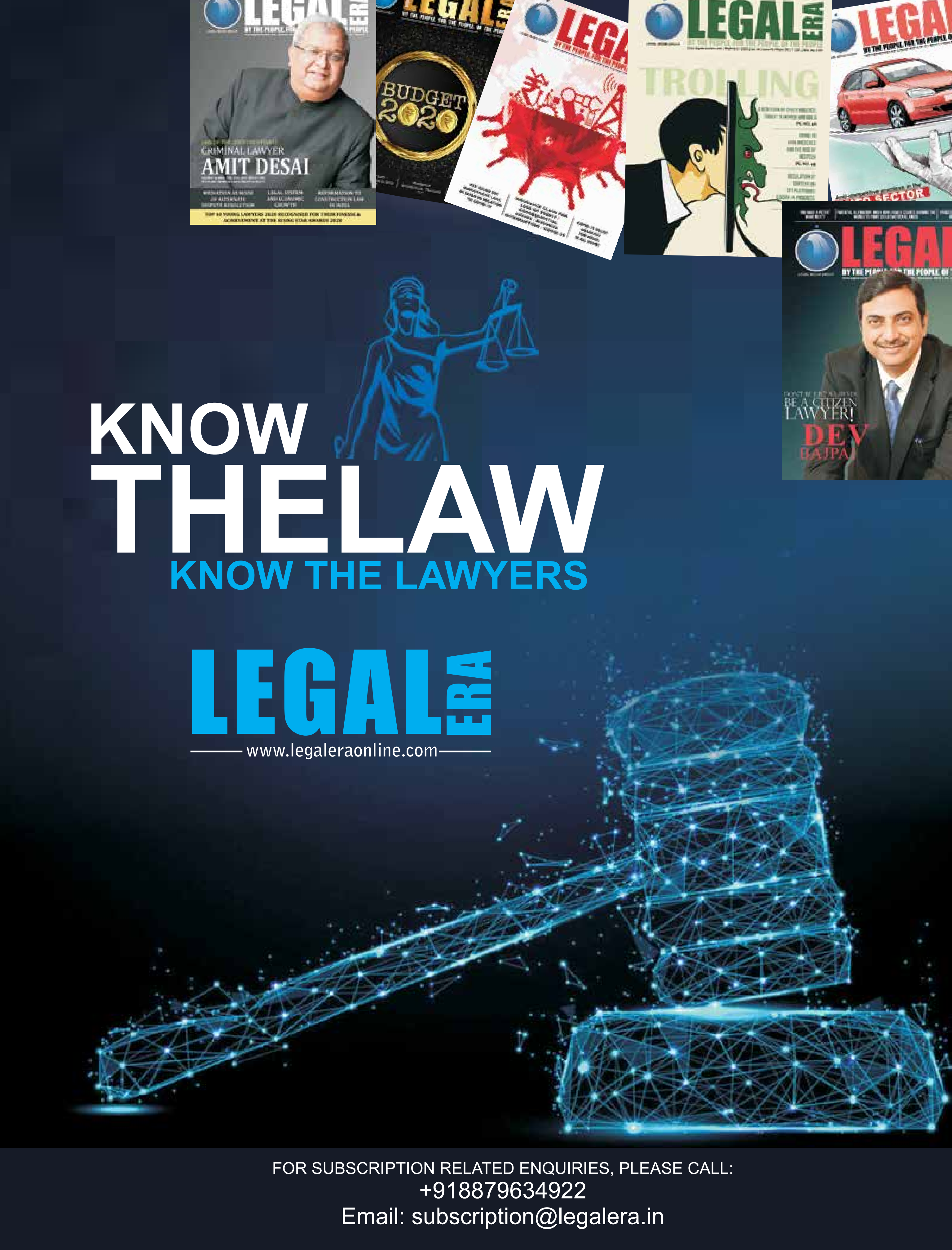
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CONCESSIONS & WAIVERS

Is There Light At The End Of The Tunnel For The Real Estate Sector?

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To what extent these efforts of the government help in bringing down skyrocketing Real Estate prices or bringing about an upward trend in the ailing Real Estate sector remains to be seen

The deadly COVID-19 pandemic has taken a large bite out of the Real Estate business. This has inevitably contributed to the downward spiralling of investor / end-user sentiment to invest in new/on-going Real Estate projects. In order to inject some much-needed life in the Real Estate sector, the Maharashtra Government ("GoM") has announced / implemented various incentive and concession schemes and has taken pro-active steps to revive the ailing Real Estate sector in the state of Maharashtra.

OVERHEAD EXPENSES

Every transaction of transfer of immovable property entails overhead expenses under various heads. In Maharashtra, stamp duty and surcharge / infrastructure cess payable on transfer instruments make up a large share.

A. Stamp Duty

Legally, all instruments effecting a transfer of property valued at more than ₹100/- (Rupees One Hundred only) are required to be compulsorily stamped and registered. Sale and Gift are the two major heads under which end users acquire immovable property. Stamp Duty laws in Maharashtra require instruments of Sale and Gift to be stamped as under:

Instrument of sale	Within municipal limits	5 (five) per cent of the consideration payable to the seller or the ready reckoner value, whichever is higher.
	Within the limits of any municipal council / cantonment of any area within MMRDA	4 (four) per cent of the consideration payable to the seller or the ready reckoner value, whichever is higher.

	Within the limits of a gram panchayat	3 (three) per cent of the consideration payable to the seller or the ready reckoner value, whichever is higher.
Instrument of gift	if residential and agricultural property is gifted to husband, wife, son, daughter, grand-son, grand-daughter, wife of deceased son.	₹ 200/-
	if property is gifted to family members being husband, wife, brother or sister of the donor or any lineal ascendant or descendant of the donor.	3% of the ready reckoner value of the property
	any other case.	Same duty as can be levied on instrument of sale on the ready reckoner value of the property

B. Surcharge / Infrastructure Cess

To support / fund the various ongoing infrastructure projects viz; Metro Rail, Mono Rail, Freeways, Sea-links etc. the GoM in February 2019 increased the stamp duty, payable on instruments relating to inter-alia Sale and Gift of immovable property, in Mumbai, Pune, Pimpri-Chinchwad and Nagpur by adding a surcharge at the rate of 1 (one) per cent of the ready reckoner value of the property ("Surcharge").

Illustration:

Stamp duty on a Sale Deed prior to February 2019 (assuming property is situated in Mumbai City and consideration and ready reckoner value are the same)

Ready reckoner value	₹ 1000/-
Stamp duty payable	5% of ₹ 1000 = ₹ 50/-

Stamp duty on a Sale Deed post February 2019 (assuming consideration and ready reckoner value are the same)

Ready reckoner value	₹ 1000/-
Stamp duty payable	5% of 1000 = ₹ 50/- Plus 1% of 1000 = ₹ 10/- ------------------------- Total = ₹ 60/-

Local Body Tax at the rate of 1 (one) per cent of the ready reckoner value is payable on transactions pertaining to properties situated within the limits of Zilla Parishads and Municipal Corporation other than the Municipal Corporation of Greater Mumbai, over and above the stamp duty and Surcharge.

WAIVER OF SURCHARGE AND CONCESSIONS IN STAMP DUTY

To make investment in Real Estate attractive for investors and reduce over-head expenses for the end-user, the GoM initially announced a waiver in payment of Surcharge for a period of 2 (two) years with effect from 1st April, 2020.

The waiver of Surcharge was followed-up by a concession in Stamp Duty payable on instruments relating to the sale of immovable property between 1st September, 2020 and 31st March, 2021 as under:

Region	Concession	
For properties situated within Mumbai Area and within MCGM limits	Between 1st September, 2020 and 31st, December 2020	2% from the earlier 5%
	Between 1st January, 2021 and 31st March, 2021	3% from the earlier 5%
For properties situated with the limits of municipal corporation other than Municipal Corporation of Greater Mumbai	Between 1st September, 2020 and 31st, December 2020	3% from the earlier 5%
	Between 1st January, 2021 and 31st March, 2021	3.5% from the earlier 5%

Local Body Tax was also reduced to 0% for transactions between 1st September, 2020 and 31st December 2020 and 0.5% for transactions between 1st January, 2021 and 31st March, 2021.

CONCESSIONS IN VARIOUS CONSTRUCTION PREMIUMS

In addition to providing benefits directly to the investors / end-users through waivers and concessions as above, GoM also took steps towards providing indirect benefits:

(i) by inter alia reducing premiums on Additional Premium FSI and Fungible FSI for residential projects to 35% of market value from the earlier 50% and for commercial projects to 40% from the earlier 60% and waiving off development cess till 19th August 2021; and

(ii) rationalizing premiums payable to municipal corporations and granting concession of 50% on various premiums levied by all planning authorities / local administrations in the State on Additional Premium FSI and Fungible FSI for on-going and new projects up to 31st December, 2021 (“Scheme”) to facilitate the construction and completion of many stalled projects in the State.

APPLICABILITY AND IMPLEMENTATION

Key provisions of the Scheme that both developers and end-users / investors should consider before opting to avail the benefits of the Scheme are summarized below:

(i) The Scheme is optional in nature and discretion to avail or not avail the benefits of the Scheme lies solely with the developer.

(ii) The Scheme is only applicable to premiums which are paid between 14th January, 2021 and 31st December, 2021.

(iii) The Scheme is not applicable to Development Charges and other government charges.

(iv) The premium amount will be calculated on the basis of the annual statement of rates / ready reckoner rates as on 1st April, 2020 or on the date of payment of premium, whichever is higher.

(v) The entire stamp duty on the instruments pertaining to sale of units (residential, commercial, industrial etc.) constructed by availing the Scheme will have to be borne by the developer. The

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> With the waivers and concessions now offered to developers, developers can explore the possibility of launching new projects at attractive prices by passing on the benefits of the subsidized approval costs to the end-users / investors

developer will have to submit an undertaking to the municipal authority to this effect.

(vi) The list of beneficiaries of the Scheme will have to be disclosed by the developer on its website, to RERA and MCGM. A clause to such effect that the stamp duty has been borne by the developer will have to be incorporated in their respective sale agreements too.

(vii)The Scheme is also applicable on projects which may not have end users, for example schools, shopping malls, premises given on lease, cinemas, hotels etc. However, the developer shall submit an undertaking stating that stamp duty on any instrument pertaining to sale of any such unit constructed availing benefits of the Scheme, shall be borne and paid by the developer.

EFFECT

The effects of the concessions, waivers and other schemes announced by GoM will be two-fold:

(i) reduction of project expenditure and overall project cost to help developers kickstart projects without heavy investments and complete stalled projects;

(ii) direct benefits to the end-user / investor by way of concession in Stamp Duty.

We have already seen the positive effect that the Stamp Duty concessions have had, in driving the sales of unsold inventory of developers. With the waivers and concessions now offered to developers, developers can explore the possibility of launching new projects at attractive prices by passing on the benefits of the subsidized approval costs to the end-users / investors. To what extent these efforts of the government help in bringing down the skyrocketing Real Estate prices in the State or bringing about an upward trend in the iling Real Estate sector remains to be seen.

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SCAM- NO- SCAM

2G JUDGMENTS OF THE SUPREME COURT AND SPECIAL COURT

While the Supreme Court found a big scam in allocation of 2G spectrum, the Special Court did not find any manipulation of FCFS Policy and criminality in the allocation of spectrum

"I may also add that for the last about seven years, on all working days, summer vacation included, **I religiously sat in the open Court from 10 AM to 5 PM, awaiting for someone with some legally admissible evidence in his possession**, but all in vain. Not a single soul turned up. **This indicates that everybody was going by public perception created by rumor, gossip and speculation.** However, public perception has no place in judicial proceedings."

"There **is no evidence on the record produced before the Court indicating any criminality in the acts allegedly committed by the accused persons relating to fixation of cutoff date, manipulation of first-come first-served policy, allocation of spectrum to dual technology applicants…"**
(Emphasis supplied)

The above are the extracts of the Judgment dated 21.12.2017[1], of the Special Judge O.P. Saini, Central Bureau of Investigation Court dealing in 2G Spectrum Cases ("**Special Court's Judgment**"). The Special Court, thus, brought the curtain down on what was termed as the biggest telecom scam (2G Scam), saga relating to grant of licenses and allocation of 2G spectrum. The Special Judge did not find any criminality and acquitted all dramatis personae of this saga.

But the Supreme Court earlier on the same matter, when the trial had not even commenced, by its Judgment dated 02.02.2012[2] canceled 122 licenses and allocation of 2G spectrum ("**SC 2G Judgment**"). These 122 licenses[3] were granted to 10 applicants pursuant to two controversial Press Releases dated 10.01.2008[4] ("**Press Releases dated 10.01.2008**"), which tweaked the 'First Cum First Serve' Policy dated 14.12.2005[5] ("**FCFS Policy**"). The allegation before the Supreme Court was that the FCFS Policy was tweaked vide the Press Releases dated 10.01.2008 only to favor a select few, who had advance information and were ready to meet the conditions of the tweaked FCFS Policy. Under the original First Cum First Serve Policy, an application received was first processed, Letter of Intent ("**LOI**") was issued and upon compliance of LOI conditions the license was granted. Since spectrum was bundled with the license, whoever got the license first would be allocated spectrum first. The tweaked FCFS Policy provided that the 'time and date' of meeting the LOI conditions would be treated as the criteria for grant of license. Whoever met the LOI conditions first would be granted the license and be the first for the allocation of spectrum. The Supreme Court found this tweaked FCFS Policy flawed and arbitrary. The Supreme Court canceled the licenses, directed that all future allocation of natural resources shall be through auction only and imposed costs on certain operators, who according to the Supreme Court had benefited from the tweaked FCFS Policy and had offloaded their stakes in the name of infusion of equity. The Special Court did not find any irregularity. Could the Supreme Court have canceled 122 licenses without looking into individual cases? It did so but principles of natural justice demanded that after the Supreme Court found the FCFS Policy flawed, each operator should have been called to explain its conduct.

The Supreme Court presumed that infusion of equity in telecom companies was only because of the grant of the licenses pursuant to the tweaked FCFS Policy. The Supreme Court noted the examples of four companies. Out of these, one was not a party to the proceedings and had neither applied for nor was granted any license after 2008. The other company was an established telecom operator, having been in the business since 1997 with millions of subscribers, and had been granted 19 licenses much before the FCFS Policy of the Department of Telecommunications. This company had applied for only 3 licenses in 3 smaller circles and there too, it had opted for CDMA spectrum. There were no takers for CDMA spectrum and only two operators had applied (one for 3 licenses and other for 21 licenses) for grant of licenses with CDMA spectrum. The other two operators referred to in the SC 2G Judgment were new operators, who had applied for GSM spectrum. All other operators, whose licenses were canceled, were also applicants for license using GSM spectrum. Interestingly, neither any statute nor a government policy nor a court order prohibited infusion of equity immediately after the grant of licenses. Can it be said that the infusion of equity in a company, which was already holding 19 licenses, was only because three licenses were granted to it on or after 10.01.2008, the date of controversial Press Releases? Was there a similarity for raising the funds between an established operator with the new licenses, who did not have operations or assets?

The petitions, which culminated in the blanket cancellation of 122 licenses, were mainly based on

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1 *Case RC No. 45 (A) 2009, CBI, ACB, New Delhi. This Judgement is under challenge before the High Court of Delhi in CRL.L.P. 257 of 2018.*
2 *Centre for Public Interest Litigation vs. UOI & Others, (2012) 3 SCC 1.*
3 *3 licenses were applied for on 21.06.2006, 9 licenses were applied for on 26.06.2006, 4 licenses were applied for on 31.08.2006, 13 licenses were applied for on 02.03.2007, 6 licenses were applied for on 07.07.2007, 21 licenses were applied for on 28.08.2007, 23 licenses were applied for on 06.09.2007, 22 licenses were applied for on 24.09.2007, and 21 licenses were applied for on 25.09.2007.*
4 *First Press Release dated 10.01.2008 available at: https://dot.gov.in/sites/default/files/46.Press%20Release%20dated%2010-01-2008.pdf?download=1 (last accessed on 26.02.2021), Second Press Release dated 10.01.2008 available at: https://dot.gov.in/sites/default/files/45.Press%20Release%20dated%2010-01-2008%20regarding%20issue%20of%20letters%20to%20the%20applicant%20companies.pdf?download=1 (last access on 26.02.2021).*
5 *DoT Guidelines for Unified Access Services Licence vide No.10-21/2005-BS.I(Vol.II)/49 dated 14.12.2005, available at: https://dot.gov.in/accessservices/guidelines-and-application-form-dated-14122005 (last accessed on 26.02.2021).*

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Comptroller and Auditor General Report dated 16.11.2010[6] (“**CAG Report**”), which had observed that the public exchequer has potentially suffered a loss of ₹ 1.76 lakh crores because of the allocation of 2G spectrum. This estimation and calculation of ₹ 1.76 lakh crores’ loss is still being questioned and debated. The entire CAG Report was considering GSM spectrum and not CDMA spectrum, which was in abundance and had no takers. Could the licensees with CDMA spectrum be equated with licensees with GSM spectrum?

These aspects did not weigh with the Supreme Court when it passed the judgment canceling the licenses. The review and curative petitions filed by various operators also did not find any favor.

The SC 2G Judgment has had a far-reaching impact on the telecom sector, which has changed the entire landscape. Prior to the said judgment, 2G spectrum allocation had paved the way for entry of many new telecom companies. Foreign investors were investing and taking stakes in the Indian telecom companies. This changed by one stroke of a pen i.e., blanket cancellation of 122 licenses. Since then, foreign investors/companies such as Russia’s Sistema, Norwegian Telenor and Abu Dhabi headquartered Etisalat have moved out of the Indian market. Loop Telecom, Videocon, S-Tel, Swan/Etisalat have closed their operations. The number of direct and indirect job losses has been astronomical.

The Government’s response to the SC 2G Judgment was that the reserve price for auction of spectrum must be kept very high. In fact, it also called upon operators to pay market price for already held spectrum, beyond a particular quantity. To compete in the auction and/or to survive in the market, operators had to borrow which has buried the telecom industry in heavy debt[7]. Some of the telecom operators such as Reliance Communications and Aircel are already in insolvency proceedings. The number of main telecom service providers has gone down to three. The smaller number of telecom players in the market may have an impact on competition, and ultimately on the quality of the service and rates at which such services are being provided to the customers.

While the Supreme Court found a big scam in allocation of 2G spectrum, the Special Court did not find any manipulation of FCFS Policy and criminality in the allocation of spectrum. Whether there is a scam or not, the jury is still out. The Special Court’s Judgment is in appeal and will ultimately be decided by the Supreme Court. We will have to wait and see. Scam-no-scam saga continues.

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[6] *CAG Report No. 19 of 2010 - Performance Audit of Issue of Licences and Allocation of 2G Spectrum of Union Government, Ministry of Communications and Information Technology, available at: https://cag.gov.in/en/audit-report/details/2314 (last access on 26.02.2021).*

[7] *Some estimate it at 5.70,000 crores while others estimate it much higher. There is also around 1,50,00 crores unrecoverable debt amounts due to bankruptcy of various telecom operators.*

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DOCTORS, PATIENTS & THEIR INTERFACE

While discussing the duties of a doctor and rights of the patient, we must acknowledge and hold accountable the state for inadequate infrastructure

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The last year has been tumultuous. The reason is not even up for any guesses, the COVID-19 Virus. The effects are not over, may even be visible over the next few years. Many people say that life would not be the same and it would be marked as post COVID-19. The situation was unprecedented, with the world at a standstill. Along with the medical emergency, it brought economic, cultural and other problems as well. It showed how underdeveloped our infrastructure is, especially medical infrastructure. The medical situation around the globe was/is out of control. Even the developed countries were trumped, pun intended. The threat even bigger in developing and underdeveloped countries. The spread of the virus created confusion among the masses, governments and I would say even God and a monstrous challenge. As a result, a lockdown was imposed in many countries including India. The medical infrastructure was not ready for such a pandemic, over 2.5 million people lost their lives. The virus spared no one, directly or indirectly, especially with the lockdown in place.

With there being minimum knowledge of the virus, the treatment of the same was not available either. Many doctors shut down their clinics, hospitals were also not functional to a large extent. The problem was not just restricted to COVID-19, in certain cities there was a medical emergency where there were no medical treatments available as no doctors were accepting patients. Private medical facilities which one usually relies on were operating at a bare minimum, the only option left for the population at large was government hospitals. Besides a few hospitals which have state-of-the-art facilities, the situation in these hospitals is worrisome to say the least, their best is usually not enough.

A NOBLE PROFESSION

"Wherever the art of Medicine is loved, there is also a love of Humanity." - ***Hippocrates***

The noblest of professions has its limitations too. There is no doubt that medical professionals are considered next to God, they are our best bet to survive. But they cannot be held accountable as gods and God gets away with much worse, right? A number of reasons can come between one's treatment such as hospital policy, money, social stigmas, consent to operate etc. What must be understood is, can a doctor deny treatment to a patient? Or can he say that I will admit you once I know you can pay my fees? Or I will wait till I complete the formalities of the hospital? The answer may not be as simple. Because in an emergency situation he may not say no, otherwise he has a right to choose the patient. No professional is expected to work for free. Why should a doctor be judged differently? Nonetheless, a doctor must treat a patient when one is fighting for her/his life. The Medical Code of Conduct under clause 2.4 states that *"A patient must not be neglected: A physician is free to choose whom he will serve. He should, however, respond to any request for his assistance in an emergency."* Having mentioned the doctor's duty as aforementioned, it does not attach any strict liability if a doctor refuses to attend a patient. Thus, making it very subjective. Justice Markandey Katju opined that the medical profession is a noble profession and it should not be brought down to the level of a simple business or commerce.[1] Constitutions, religious texts, judicial texts across the world have accepted the fact that life is of paramount importance. Preservation of life is the most important and noblest of things. But once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. Therefore, every doctor, be it a statefunded hospital or a private practitioner, has the professional obligation to extend his services with due expertise towards protecting life.[2] India being a welfare state, it is the duty of the state to ensure that laws do not become an impediment in the preservation of life. What is important here is that, the background/social standing of the patient does not hamper the process of her/his treatment. The patient, whether he be a criminal or an innocent person, the medical professionals must preserve her/his life. Primarily, it is the responsibility of the state to ensure adequate medical assistance for people from all walks of life. Unfortunately, we do not live in an ideal world, especially in India statues trump infrastructure, two minutes silence for Ayushman Bharat.

There have been a couple of occasions wherein certain states rolled out policies that people from other states may not be eligible for treatments.[3] But, if a state rolls out a law that a particular sect, community or a person from outside the state cannot be treated in a hospital or in any hospital in a state, that law would be unconstitutional. It is the bounden duty of a doctor to preserve life. The Delhi High Court quashed the order of the Medical Director, Guru Teg Bahadur Hospital, Government of NCT of Delhi whereby patients who do

[1] *Martin F. D' Souza vs Mohd. Ishfaq (2009) 3 SCC 1*
[2] *Pt. Parmanand Katara Versus Union of India, 1989 SCR (3) 997- AIR 1989 SC 2039*
[3] *https://www.deccanherald.com/national/no-covid-19-treatment-for-outsiders-in-delhi-for-some-months-kejriwal-846667.html*
[4] *Social Jurist, A Civil Rights ... vs Government Of Nct Of Delhi And Anr, W.P.(C) 10585/2018 & CM APPL. 41279/2018*

> **Capitalists thrive in our economy, the government needs to thrive too.**
> ***– Personal Opinion***

not hold a valid Voter ID Card of Delhi were categorized as non-Delhi patients, and thereby denied certain facilities for treatment in a Government hospital being violative of Article 21 of the Constitution of India.[4] If a patient is brought to a hospital, the duty of the doctors is to preserve life first, impediments like financial resources, govt. circulars, hospital policies should not cause delay in providing first aid in emergency conditions. The law requires the doctor to stabilize the patient before transferring or referring her/him to another doctor/hospital.[5] What happens when an indigent person approaches in emergency situations. The obligation would be on the medical practitioner to undertake emergency procedure and stabilize the patient.

Needless to say, it is the responsibility of the state to provide medical facilities. Nobody should have to rely on the private hospitals. The Supreme Court observed that the government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. The state cannot shy away from the responsibility and non-observation of the same could entitle the sufferer to adequate compensation.[6]

INFORMED CONSENT

Now, that we have established that medicine is a noble profession. It is also not a secret that every profession is governed by a code of conduct, the medical profession is no exception. The first and basic code of medical ethics is almost 2,500 years old. This is the universally known Hippocratic Oath, laid down by Hippocrates and his school in ancient Greece.[7] The oath does not create any liability on a medical professional, makes sense to call oneself Hippocrates. Though the oath is vague, it touches upon various aspects of medical professional conduct. The one that stands out for discussion is *"… Into whatsoever houses I enter, I will enter to help the sick, and I will abstain from all intentional wrong-doing and harm, especially from abusing the bodies of man or woman, bond or free"*. The philosophy of seeking consent culminates from the fact that every human being of adult years and sound mind has a right to determine what shall be done with his own body. A surgeon who performs an operation without the patient's consent commits an assault for which he is liable in damages[8]. In the 1920s, German physicists and surgeons adopted unorthodox procedures which were highly criticized. As a result, the German government introduced a code for medical practitioners which also emphasized on seeking consent before performing any procedure/treatment. Well, I am sure Hitler strictly adhered to human rights. It is often suggested that the Reich government blatantly disregarded these rules themselves in pursuit of a pure race. However, these rules were highlighted once again during the *Nuremberg Trials.* These rules are a refined version of the Hippocratic Oath and adopted in the Declaration of Geneva, 1948. These regulations are universally appreciated and incorporated in the medical code of ethics. The medical professionals in India are bound by the Indian Medical Council (Professional conduct, Etiquette and Ethics/Regulations, 2002), which ensures that all students submit a declaration that they will abide by the aforementioned code[9].

The term 'informed consent' was first used by Justice Bray in Salgo vs. Lenand Stanford, Jr., University Board of Trustees wherein it was held that *"A physician violates his duty to the patient and subjects himself to liability if he withholds any fact that is necessary to form the basis of an intelligent consent by the patient to the proposed treatment."* It is a settled law that once diagnosis has been done, the doctors are required to make full disclosure to the patient or his family and advise on the proposed treatment with specific details. It is only after such disclosure and receiving consent to perform the mentioned procedure that a medical professional

[5] *Paschim Banga Khet Mazdoor Samity and Ors v State of West Bengal and Another. 1996 4 SCC 37*
[6] *Consumer Education and Research Centre v. Union of India, 1995 (3) SCC 42*
[7] *Textbook of Forensic Medicine and Toxicology, Page 347*
[8] *Schloendorff v. Society of New York Hospital, 1914*
[9] *Chapter 1, Indian Medical Council (Professional conduct, Etiquette and Ethics/Regulations, 2002)*
[10] *Samira Kohli vs. Dr. Prabha Manchanda & Another 1(2008)CPJ 56 (SC)*

can go ahead with the procedure. Informed consent is not a formality but an ongoing process, an informative conversation extending over time, which must:

A. disclose the nature, purpose and procedure of treatment with its benefits and effects;

B. suggest alternatives (if any);

C. disclose the outline of the substantial risks;

D. highlight the adverse consequences of refusing treatment,[10] and

E. outline the side effects of the procedure.

The doctors do not have to explain the theoretical aspects of the procedure. The consent obtained has to be specific. The doctor cannot deviate from the procedure. The only exception to this rule is, if during the procedure, an unforeseen and sudden development makes it necessary to save/preserve the life of the patient and any delay would be unreasonable and/or fatal.

WHO TAKES AND GIVES CONSENT?

The treating doctor is responsible to take consent as any other attendant may not be able to explain the procedure, risks, benefits, alternatives available etc. In a normal situation it is the patient who has to give the consent but wherever that is not possible due to unconsciousness or incapacity, tender age etc., a family member may provide the same as the patient's surrogate. In case of minors, a surrogate is eligible to provide consent because the law presumes that minors are incompetent unless they understand the nature and effects of treatment and the consequences of refusal.[11] However, the surrogate should be of sound mind and an adult who should be in the capacity to understand and consent to the same. More often than not, people provide their consent for the procedures as prescribed by the medical professional. But there are certain cases wherein the patient may not provide consent. It could be due to religious beliefs, undue influence of a family member, social stigmas etc. There could many a times be a dilemma among different family members regarding consent, the best way to resolve that is to seek consent from the legal guardian. If there is confusion with regard to a legal guardian, one can always get a judicial order, if the time permits. An interesting case where neither the minor nor his father consented to the procedure. Hoping for alternative remedies to serve as a cure for his cancer. The court disregarded their dissent and vested the consent power with itself on the minor's behalf[12] against the popular view considering the best interests of the child. It is safe to assume that Indian courts will follow the similar path. An important aspect to be considered by courts is whether the decision is really of the patient? Does the patient really mean what she/he says or is merely saying it for a quiet life under someone else's pressure,[13] and proceed in a manner which serves the best interests of the patient.

While admitting a patient, the hospitals get a consent form. The significance is to inform the patient/relatives of the seriousness of the condition and the attached treatment and complications. While hospitals/doctors obtain consent forms, the responsibility of the person signing such forms is to enquire and completely understand about the procedure and then make an informed decision. Under contract law, any consent obtained under undue influence can be invalidated by a court of law. However, the cases on undue influence in the law of property and contract are not applicable to the consent to medical or surgical treatment. The wife who guarantees her husband's debts, or the widower who leaves all his property to his housekeeper, are not in the same situation as a patient faced with the need for medical treatment.[14] Therefore, if at the time of seeking consent, the doctor takes care of all the parameters, the consent cannot be later invalidated.

REMEDIES FOR NEGLIGENCE OF A DOCTOR

"Isn't it a bit unnerving that doctors call what they do "practice"?" ***George Carlin***

While we may hold doctors next to God, they are really humans who are doing their best. Their goodness/nobility may not always be rewarding. It is by abundant precaution that hospitals document written consent from the patients. A few hospitals even include a no liability clause in the consent forms to ensure that no legal actions could be brought in by unhappy patients/relatives. Is such consent legally valid? As far as the consent with regard to perform the procedure is concerned, that is valid. But the no fault liability clause is invalid and illegal. The doctor/hospital cannot outrun legal ramifications for medical negligence. If found negligent, they are liable for punishment. For unethical practices they may be reported to the disciplinary committee constituted under the Indian Medical Council

[11] *Paschim Banga Khet Mazdoor Samity and Ors v State of West Bengal and Another. 1996 4 SCC 37*
[12] *Consumer Education and Research Centre v. Union of India, 1995 (3) SCC 42*
[13] *Textbook of Forensic Medicine and Toxicology, Page 347*
[14] *Schloendorff v. Society of New York Hospital, 1914*
[15] *Chapter 1, Indian Medical Council (Professional conduct, Etiquette and Ethics/Regulations, 2002)*

Act. Furthermore, negligence causing death can also be reported under section 304A of the Indian Penal Code. But what constitutes negligence will depend upon the circumstances of each case. The Supreme Court held that where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages. However, if the degree of negligence is so gross, his act being reckless as to endanger the life of the patient, he would also be made criminally liable for offense under Section 304A of IPC.[15]

The Hon'ble Supreme Court has held that a patient is a consumer under the Consumer Protection Act. Therefore, a doctor/hospital where one has charged for her/his services is a service provider and is liable to pay damages and compensation in cases of negligence under the act. Since, proceedings before consumer forums are summary in nature it is better suited than a civil suit. Negligence in the medical profession is subjective, therefore, the law recognizes and protects the rights of medical professionals. Understanding that many patients may hold a grudge and file complaints out of spite, the apex court has held that a doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been leveled against him).[16] A medical procedure has an inherent risk attached, the doctor is expected to keep these risks at minimum. If every mishap is termed as negligence, that would be disastrous to the community as doctors will not be able to perform their duties without fear. The court elaborated on this principle and stated that before issuing notice in medical negligence cases, a court must satisfy itself by referring the matter to a specialized committee to establish a prima facie case, to avoid unnecessary harassment of the medical professionals.[17]

THE FAULT DOES NOT LIE WITH THE DOCTOR

From the time of Sushruta till today, medical professionals have proved to be a boon to the society. Medical professionals and the frontline warriors have showed impeccable character during the pandemic. A report published by IMA in October 2020 suggested that over 500 doctors have succumbed to COVID-19 who were infected during their services. The count would be much more now. If we add the number of all the frontline warriors of COVID-19, the count would be exponentially larger. The medical professionals once again proved that they are not here just to mint money, with some exceptions of course. In the end, even doctors are humans and as they say 'to err is human'. Our country has seen vicious attacks on doctors and hospitals on a number of occasions. They operate in an area which leads to survival and death, because of which they often bare the brunt of extreme emotions, sometimes exceptionally extreme. Even when doctors do their best, many a times disgruntled patients may feel otherwise and be motivated to file complaints. Therefore, doctors need protection from such frivolous complaints and harassment. It is appropriate that arrest should not be made in every instance of a complaint against a doctor, while balancing the rights of the patients. While discussing the duties of a doctor and rights of the patient we must acknowledge and hold accountable the state for the inadequate infrastructure. Fundamentally, we are a capitalist yet a welfare state. Therefore, the duty is cast upon the government, wealth creators cannot act as social workers. Capitalists thrive in our economy, the government needs to thrive too. A doctor may or may not be wrong but it is the state which is definitely the culprit and negligent for inadequate medical services. At the end I am reminded of Paul Farmer who said *"It is very expensive to give bad medical care to poor people in a rich country."* Mic Drop!

[16] *Jacob Mathew vs. State of Punjab and Anr. (2005) 6 SCC 1*
[17] *Supra '1'*

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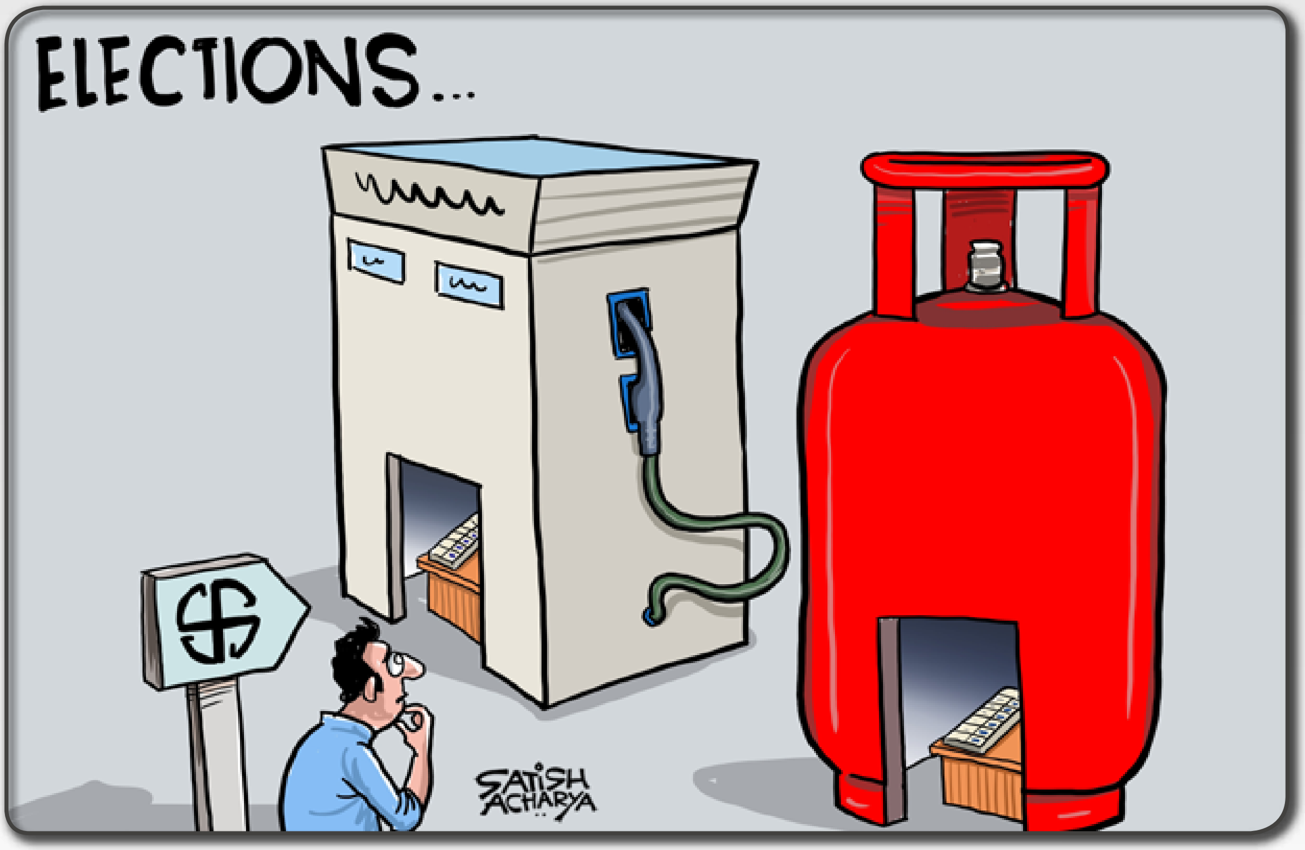
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LOOK, FREE ENOUGH TO SAY SO!
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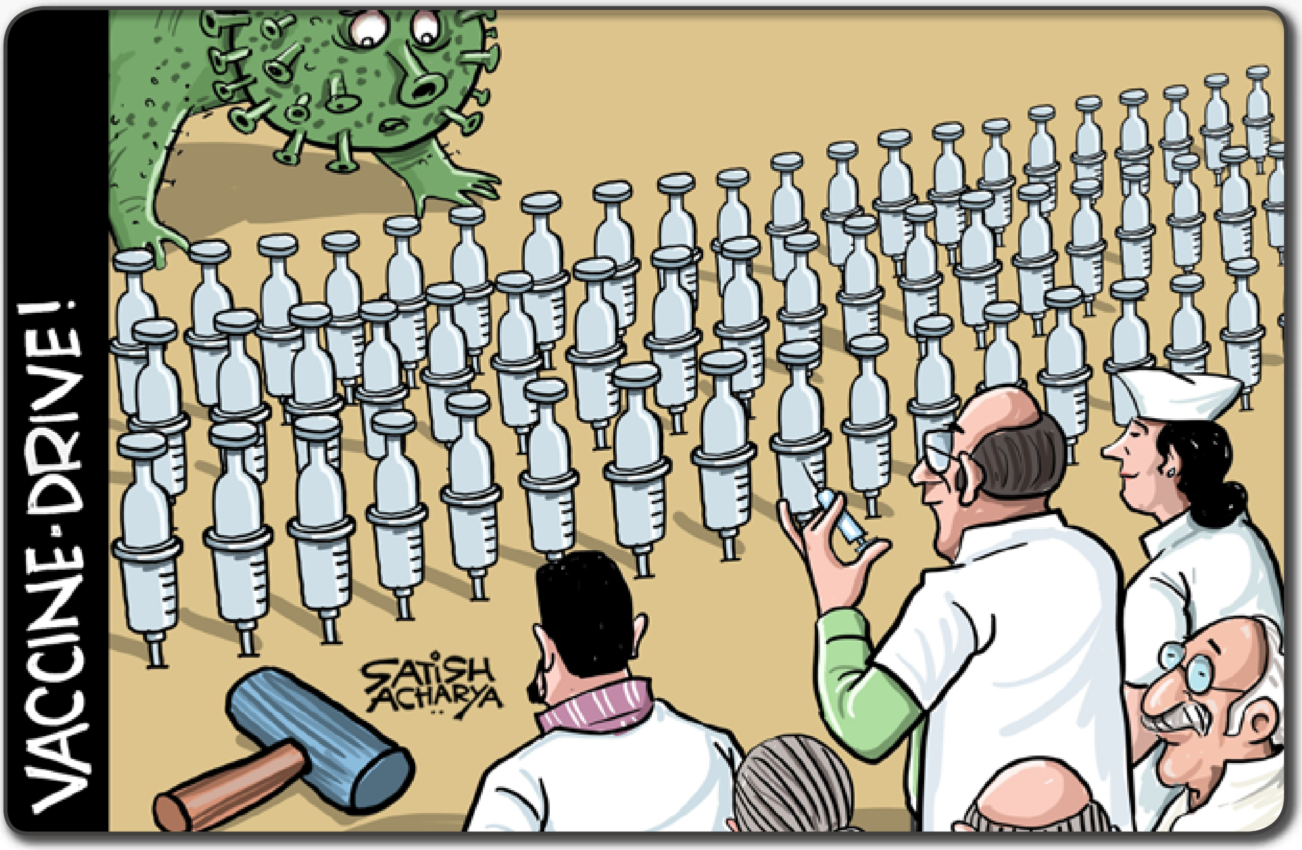
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