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Coronavirus: Employer and employee relationship

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Coronavirus, which originated from the Wuhan district of China, has been declared as a health emergency of international concern by the World Health Organization on January 30, 2020. The outbreak of the novel Coronavirus Disease ("**COVID-19**") has transcended geographical barriers and already sickened approximately 15,00,00 people, with more than 85,000 deaths across the globe. Governments around the world have shut borders and imposed quarantines. Some companies have imposed travel bans on their employees, while others have completely shut down their operations due to the pandemic.

To ensure protection of individuals, the Government of India has been taking several proactive, preventive and mitigating measures ranging from progressive tightening of international travel, issuance of advisories for members of the public, contact tracing of persons infected by the virus, setting up of quarantine facilities to taking measures for ensuring social distancing including a three week lockdown period.

India, which is one of the most populous countries in the world, was largely unaffected by COVID-19 up until March, 2020, but now India has also recorded approximately 5500 cases with approximately 170 people dead and the number of cases is increasing at a rapid rate. The lack of infrastructure and sanitation along with high population density, can make India the worst affected region in the world. The impact of the epidemic on businesses and employment has been unprecedented.

Where there is a gathering of people in large numbers, the extent of COVID-19 spreading amplifies and numerous lives are put at risk. Therefore, considering the situation, on March 24, 2020, the Hon'ble Prime Minister of India announced a complete lockdown throughout the country for 21 (twenty-one) days, as a preventive measure for containing the virus. The Central and State Governments have issued various guidelines and orders during this time to help contain outbreak. This in turn has raised several questions on the business and employment front across sectors which now need to carefully review their existing employee protection and safety policies, strategies and procedures.

Responsibilities of employers

A clarion call was issued to enterprises for undertaking initiatives for mitigating the risk associated with the spread of COVID-19 and making provisions for its employees including:

a) Providing a safe work place and appropriate resources for working from home ("**WFH**") that are planned, organised and maintained;

b) Reimbursing the employees for the expenses incurred while working from home including internet access;

c) Managing and conducting all work-related activities to ensure the safety, health and welfare of employees;

d) Providing information, instructions, trainings and supervision regarding safety and health to employees;

e) Having plans in place for emergencies;

f) Promoting video conferencing for meetings over face-to-face meetings; and

g) Formulating an emergency response team which acts as an intermediary between the top-level management and the employees and also ensuring coordination within the company.

Responsibilities of employees

The ongoing pandemic casts a duty not only on the employer, but also on the employees such as:

a) To cooperate with their employer and follow instructions;

b) To protect themselves and others from harm during the course of their work as well as the official equipment, for instance, taking care of any laptop provided by the employer and reporting any defects in the same to the employer immediately; and

c) To report any injury arising from work activity to their employer immediately.

Work from home

For businesses which have effectuated the policy of WFH for its employees should consider confidentiality and privacy policy related access. The employer should bear the following in mind while implementing WFH:

a) Confidentiality and data security

This is one of the major aspects that employers should consider while allowing WFH to its employees. Therefore, employers should take additional data security measures to ensure that their IT infrastructure and allied resources are up to date and protected and should also conduct training sessions on a regular basis regarding the monitoring and usage of the company's data.

b) Tracking of productivity and performance levels

In the traditional working atmosphere, employers build a mechanism to test the levels of productivity and performance of each employee by closely monitoring their day-to-day activities, handling of clients, processing of information and timely delivery of work deliverables. Considering the prevalent atmosphere, the employer will have to adapt to the concept of WFH and can make use of several online applications for assessing and monitoring performance of their employees who are working remotely.

c) Working hours

There is no specific legislation which regulates or governs the concept of WFH. Accordingly, the prevalent employment laws that would otherwise be applicable to the employee while they are working from home would continue to apply. In this regard, it be noted that employment laws are subject to specific amendments prescribed by the Central or State Governments from time to time.

Health laws in India

Article 42 of the Constitution of India states that humane conditions at work should be ensured. In order to ensure a healthy environment at the workplace, various laws have been formulated including:

a) The Factories Act, 1948 ("Factories Act")

The Factories Act is the principal legislation which governs the health, safety, and welfare of workers in factories. A factory under the Factories

Act is defined as a place using power, employs 10 or more workers or 20 or more workers without power or was working any day of the preceding 12 months. However, under Section 85 of the Factories Act, the State Governments are empowered to extend the provisions of the Factories Act to factories employing fewer workers.

According to Section 7A of Factories Act, it is the responsibility of the occupier to ensure the health, safety and welfare of all workers while they are at work in the factory. Further, Section 11 to 20 of the Factories Act deals with provision of environmental sanitation that protect the workers from hazardous environment.

During this pandemic, State Governments are according paramount importance to the health, safety and welfare of the workers and employers must also ensure the same.

b) The Disaster Management Act, 2005 ("Disaster Management Act")

The Disaster Management Act provides for effective management of disasters. The Disaster Management Act marks a paradigm shift in the nature of disaster management in India with focus shifting towards disaster mitigation, prevention and preparedness. The Disaster Management Act deals with disasters, both natural and man-made and establishes the National Disaster Management Authority at the central level.

A '*Disaster*' under Disaster Management Act is defined as, *'a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or manmade causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.'*

The Supreme Court in *N.D. Jayal and Anr. v. Union of India (UOI) and Ors.* (2004) 9 SCC 362 observed that, disaster management means all aspects of planning, coordinating and implementing all measures which are necessary or desirable to prevent, minimize, overcome or to stop the spread of a disaster upon the people or any property and includes all stages of rescue and immediate relief. It is a proven fact that a lot of human suffering and misery from large number of disasters can be mitigated by taking timely action, preventive measures and prior planning and this is possible only through a well-functioning disaster management framework.

In light of the aforesaid definition, COVID-19 has been considered as a disaster, demanding strict management for preventing it from spreading further and providing relief to people who are currently affected by it.

c) The Epidemic Disease Act, 1897 ("Epidemic Disease Act")

The Epidemic Disease Act provides for the better prevention of the spread of dangerous epidemic diseases. Further, the Government is also empowered under the Epidemic Disease Act to exercise control and to prevent any epidemic or spread of epidemic in the States or country.

If the public at large is threatened with an outbreak of any dangerous epidemic, the States may authorise an agency or office to determine the process and take responsibility of all expenses incurred in relation to compensation, travel, temporary accommodation, segregation of infected person, etc.

The Government of India, in partnership with the World Bank and in accordance with the Epidemic Disease Act formed the Integrated Disease Surveillance Programme ("**IDSP**") in 2004. The IDSP, through its call centres had previously proved efficient in spreading awareness amongst people during the swine flu outbreak.

Further, it be noted that the Ministry of Labour & Employment has issued a department order letter dated March 20, 2020 vide D.O No. M-11011/08/2020-Media and the Ministry of Home Affairs has issued an order dated March 29, 2020 vide Order No. 40-3/2020-DM-I(A), which prescribe that an employer has been (a) advised to deter from deducting the salaries of employees and (b) directed not to deduct wages of workmen during the period of outbreak of COVID-19. Since the lockdown orders have been issued under the Epidemic Diseases Act and the Disaster Management Act, violating the same would have penal consequences in certain cases wherein the State Governments have specifically mentioned that "*All the Government as well as private establishments shall make payments of wages/salaries fully to the workers/employees including those working under contract and outsourcing basis during the lockdown period. Any violation will be viewed seriously and will invite penal action under The Epidemics Disease Act 1897.*" Similarly, several other orders, notifications and guidelines have been passed by the Government of India and its ministries relating to the implications of labour and employment laws.

Conclusion

Diligent planning for global health emergencies can help protect the interest of all stakeholders such as employers, employees and its customers. However, success of plan depends upon the good execution of the same. Companies should use the current situation of lockdown to optimize and test the efficiencies of their plans.

Even at the end of the lockdown, companies should, as a prudent measure, put in place various safeguards to protect themselves as well as their employees till the effect of COVID-19 is wiped off. Additionally, it be noted that in case the lockdown has been lifted by one State where the employee works but has not been lifted in the State where such employee is residing, then the employee should not be forced to be physically present where the employee has its employment. The policies developed by companies and organisations will prove valuable during these trying times and as well as in the future.

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Notifications and Circulars

Companies Fresh Start Scheme, 2020: Upon representations by various stakeholders and in the interest of all companies, the Ministry of Corporate Affairs has introduced the Companies Fresh Start Scheme, 2020. The purpose of the said scheme is to condone the delay in filing of documents and provide a one-time waiver to companies from prosecution and imposition of additional fee, in order to enable such companies to file all their documents. Detailed analysis of the Scheme notified by General Circular 12/2020, dated 30 March 2020 can be accessed here.

LLP Settlement Scheme, 2020: The central government in exercise of its powers under Section 460 of the Companies Act, 2013 introduced the LLP Settlement Scheme, 2020 to grant a defaulting LLP a one-time window to condone the delay in filing of statutory returns and other forms as required with the Registrar of Companies. The MCA *vide* General Circular No. 6/2020, dated March 4, 2020 issued the scheme after receiving representations from various business houses for waiver of fee, including additional fee, or condonation of delay taking the plea of excessive financial burden. Further, *vide* General Circular No. 13/2020, dated March 30, 2020, the MCA modified the contours of the LLP scheme. This was done *inter alia* in order to support and enable LLPs registered in India to "focus on taking necessary measures to address the COVID-19 threat". The Circular, read with the Modified Circular, thus imputes two sets of LLP schemes – one that was applicable from March 16, 2020 till March 31, 2020 ("LLP Scheme 1") and the other that is applicable from April 1, 2020 till September 30, 2020 ("LLP Scheme 2"). Detailed analysis of the Scheme can be accessed here.

Banking companies exempt from specific provisions of Competition Act, 2002: In terms of Notification (S.O 1034(E)) dated 11 March 2020, the Central Government has exempted any company classified as a 'Banking Company' in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from the application of the provisions of Sections 5 and 6 of the Competition Act, 2002, for a period of five years. Section 45 of the Banking Regulation Act, 1949 deals with the power of the Reserve Bank to apply to Central Government for suspension of business by a 'Banking Company' and to prepare the scheme of reconstitution of amalgamation. Sections 5 and 6 of the Competition Act deal with combinations and regulation of combinations respectively.

RBI guidelines on regulation of Payment Aggregators and Payment Gateways: The Reserve Bank of India, *vide* Circular dated 17 March 2020 has notified the guidelines on regulation of Payment Aggregators (**PAs**) and Payment Gateways (**PGs**). These guidelines were issued under Section 18 read with Section 10(2) of the Payment and Settlement Systems Act, 2007 (**PSS Act**) and has come into effect from 1 April 2020. PAs are entities that facilitate e-commerce sites and merchants to accept various payment instruments from the customers. They receive payments from customers, pool and transfer them on to the merchants after a time period. PGs are entities that provide technology infrastructure to route and facilitate processing of an online payment transaction without any involvement in handling of funds. The guidelines *inter alia* provide for the following:

i. The guidelines and the technology related recommendations are mandatory for PAs, while PGs are recommended to adhere to the technology related recommendations.

ii. Non-bank PAs have to be a company under the Companies Act, 2013 with the PA activity forming part of its objects.

iii. While Banks carrying on the activity of a PA do not need a separate authorisation, existing non-bank PAs need to apply for an authorisation under the PSS Act, prior to 30 June 2021 and shall be allowed to operate until they are granted/ refused an authorisation.

iv. E-commerce marketplace entities providing PA services shall segregate their PA business from the marketplace business and apply for an authorisation on or before June 30, 2021.

v. Existing PAs must ensure a net worth of INR 15 crores by 31 March 2021 and INR 25 crores by 31 March 2023. As for the new PAs, a net worth of INR 15 crores is required for making an application for grant of authorisation and they must achieve a net worth of INR 25 crores by the expiry of the third financial year occurring after the application is made/ authorisation is granted (including the year in which application is made/ authorisation granted). A net worth of INR 25 crores is to be maintained at all times thereafter.

MCA Advisory for "Work from Home": On 19 March 2020 Ministry of Corporate Affairs issued an 'Advisory' by way of which it strongly advised all the Companies and LLPs to put in place an immediate plan to implement 'Work from Home' policy as a temporary measure till 31 March 2020 to the maximum extent possible, both at their head-quarters and field offices. Further, even with the essential staff on duty, staggered timings are to be followed so as to minimize physical interaction. Apart from that, the preventive measures, including *Do's and Don'ts* advised by the public health authorities are to be strictly followed. For this purpose, MCA deployed a new web-based Form CAR (Company Affirmation of Readiness towards COVID 19) on 23 March 2020 – to confirm the readiness to deal with COVID 19 threat. All companies were requested to report compliance of the same in a staggered manner from 23rd March 2020.

Securities Contracts (Regulation) (Amendment) Rules, 2020: The Ministry of Finance has issued a Notification G.S.R. 189(E) dated 19 March 2020 notifying the Securities Contracts (Regulation) (Amendment) Rules, 2020 and thereby amending Securities Contracts (Regulation) Rules, 1957. Henceforth, a company which has issued equity shares having superior voting rights to its promoters or founders ("**SVR Shares**") and is seeking listing of its ordinary shares for offering to the public must mandatorily also list its SVR Shares at the same recognized stock exchange along with the ordinary shares being offered to the public. The minimum offer and allotment requirements as prescribed under clause (b) of sub-rule (2) of Rule 19 of the Rules shall not be applicable to the listing of SVR Shares issued to the promoters or founders as the case may be, in cases where the applicant company is seeking listing of its ordinary shares for offering to the public in accordance with the provisions of this rule and the regulations made by SEBI.

Covid-19 relief activities - Clarifications on spending CSR funds: The Ministry of Corporate Affairs *vide* General Circular 10/2020, dated 23 March 2020 has clarified that funds spent on activities related to Covid19 would qualify as eligible CSR activity. The said expenditure would fall under activities related to promotion of health care including preventive health care and

sanitation; and disaster management as specified under Schedule VII of the Companies Act, 2013. Further, *vide* another Circular dated 28 March 2020, MCA has clarified that contribution to PM CARES Fund would qualify as an eligible CSR activity.

Special Measures under Companies Act 2013 and Limited Liability Act, 2008 in the view of Covid-19 outbreak: MCA *vide* General Circular 11/2020, dated 24 March 2020 has announced following relief measures on the account of Covid-19 outbreak:

a) No additional fees shall be charged for late filing during a moratorium period from 01 April to 30 September 2020, in respect of any document, return, statement etc., required to be filed in the MCA-21 Registry, irrespective of its due date.

b) The mandatory requirement of holding meetings of the Board of the companies within the intervals provided in Section 173 of the CA, 2013 (i.e., 120 days) stands extended by a period of 60 days till next two quarters i.e., till 30th September. Accordingly, as a one-time relaxation the gap between two consecutive meetings of the Board may extend to 180 days till the next two quarters, instead of 120 days as required in the CA, 2013.

c) The Companies (Auditor's Report) Order,2020 shall be made applicable from the financial year 2020-21 instead of being applicable from the financial year 2019-2020 as notified earlier.

d) As per Para VII (1) of Schedule IV to the Act 2013, the Independent Directors ("**IDs**") are required to hold at least one meeting without the attendance of Non-independent directors and members of management. For the financial year 2019-20, if the IDs of a company have not been able to hold such a meeting, the same shall not be viewed as a violation. The IDs, however, may share their views amongst themselves through telephone or e-mail or any other mode of communication, if they deem it to be necessary.

e) Requirement under Section 73(2)(c) of CA 13 to create the deposit repayment reserve of 20% of deposits maturing during the financial year 2020-21 before 30 April 2020 shall be allowed to be complied with till 30 June 2020.

f) Requirement under Rule 18 of the Companies (Share Capital & Debentures) Rules, 2014 to invest or deposit at least 15% of amount of debentures maturing in specified methods of investments or deposits before 30th April 2020, may be complied with till 30 June 2020.

g) Newly incorporated companies are required to file a declaration for Commencement of Business within '180 days of incorporation under Section 10A of the CA 2013. An additional period of 180 more days is allowed for this compliance.

h) Non-compliance of minimum residency in India for a period of at least 182 days by at least one director of every company, under Section 149 of the CA 2013 shall not be treated as a non-compliance for the financial year 2019-20.

Covid-19 – Regulatory package by Reserve Bank of India: The RBI vide Statement of Development and Regulatory Policies released on 27 March 2020 *inter alia* announced certain regulatory measures to mitigate the burden of debt servicing brought about by disruptions because of COVID-19 pandemic and to ensure the continuity of viable businesses. In this regard, the detailed instructions were issued on the same day. The key highlights of the instructions are as follows:

a) **Rescheduling of payments**: In respect of all term loans (including agricultural term loans, retail and crop loans), all commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all-India Financial Institutions, and NBFCs (including housing finance companies) are permitted to grant a moratorium of 3 (three) months on payment of all instalments falling due between March 1, 2020 and May 31, 2020. The repayment schedule for such loans as well as the residual tenor, will be shifted across the board by 3 (three) months after the aforesaid moratorium period. However, interest will continue to accrue on the outstanding portion of the term loans during the moratorium period.

b) **Cash credit/overdraft facilities**: Lenders are permitted to defer the recovery of interest applied in respect of such facilities during the period from March 1, 2020 up to May 31, 2020. The accumulated accrued interest will be recovered immediately after the completion of the aforesaid period.

c) **Easing of working capital financing**: In respect of cash credit/ overdraft facilities sanctioned to borrowers facing stress on account of the economic fallout of the pandemic, Lenders may recalculate the 'drawing power' by reducing the margins and/ or by reassessing the working capital cycle. The aforesaid relief will be available in respect of all such changes effected up to May 31, 2020 and the accounts which are provided such relief will be subject to subsequent supervisory review with regard to their justifiability on account of the economic fallout from COVID-19.

d) **Asset classification**: The moratorium/ deferment/ recalculation of the 'drawing power' as mentioned hereinabove will not be treated as a concession or a change in terms and conditions of loan agreements due to financial difficulty of the borrower for the purposes of the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019. Accordingly, such measures, by itself, will not result in downgrade of asset classification. The asset classification of term loans which are granted mortarium as mentioned above will be determined on the basis of the revised due dates and the revised repayment schedule. Similarly, working capital facilities where relief is provided as mentioned in (c) hereinabove, the small mention account and the out of order status will be evaluated considering the application of accumulated interest immediately after the completion of the permitted deferment period as well as the revised terms. The rescheduling of payments, as aforesaid, will not qualify as a default for the purposes of supervisory reporting and reporting to credit information companies ("**CICs**") by the Lenders. CICs are required to ensure that the actions taken by the Lenders pursuant to the Regulatory Package do not adversely impact the credit history of the beneficiaries.

e) **Other Compliances**: Lenders are required to frame Board approved polices for providing the reliefs pursuant to the Regulatory Package to all eligible borrowers. If the exposure of a Lender to a borrower is Rupees five crore or above as on March 1, 2020, the Lender shall develop an MIS on the reliefs provided to its borrowers which shall include borrower-wise and credit-facility wise information regarding the nature and amount of relief granted.

MCA allows for Board meetings to be held via video-conferencing: The MCA on March 19, 2020 *vide* notification (G.S.R 186(E)) amended the Companies (Meetings of Board and its Powers) Rules, 2014. Now Rule 4 of the extant rules will be read as Rule 4(1) and a new sub-rule (2) has been inserted which provides that from the period beginning from commencement of the amendment till June 30, 2020, meetings on the matters referred to in Rule 4(1) can be held via video conferencing and other audio-visual means in accordance with Rule 3 which provides for the same. Rule 4 provided that matters such as the approval of annual financial statements; approval of Board's report; approval of prospectus; the Audit Committee meetings and approval of matters relating to amalgamation, merger, demerger, acquisition or takeover were not to be dealt with in any meeting held through video conferencing or any other means. Further, it may be noted that on 8th of April, 2020, the MCA has laid down procedure for conduct of EGM by any company in case holding such meeting is considered inevitable, and is to be conducted on or before June 30, 2020. According to the General Circular No. 14/2020, EGM may be held through video conferencing or through other audio visual means.

Ratio Decidendi

Supreme Court quashes RBI circular imposing ban on trading in cryptocurrency

Facts:

In light of numerous activities undertaken by different stakeholders regarding virtual currency, the Reserve bank of India laid down norms for ring-fencing regulated entities from VCs in its Statement on Developmental and Regulatory Policies issued on 5th April 2018. Pursuant to the same, RBI issued a Circular on 6th April 2018, directing the entities regulated by RBI to not to deal in VCs or to provide services for facilitating any person or entity in dealing with or settling VCs and to exit the relationship with such persons or entities, if they were already providing such services to them. A writ petition was filed before the Supreme Court by Internet and Mobile Association of India representing the interests of online and digital services industry, whereas another writ was filed by few companies which run online crypto assets exchange platforms along with a few individual crypto assets traders.

Submissions by the Petitioners:

i. The immediate effect of the Impugned Circular was to completely severe the ties between the virtual currency market and the formal Indian economy, without actually a legislative ban on the trading of VCs, thereby promoting cash and black-market transactions.

ii. The Impugned Circular failed to take note of the difference between various VC schemes such as closed VC schemes, unidirectional flow VC schemes and bidirectional flow VC

schemes and unreasonably differentiates between unidirectional flow schemes and bidirectional flow schemes, by targeting only bidirectional flow schemes.

iii. VCs do not qualify as money, as they do not fulfil the four characteristics of money namely medium of exchange, unit of account, store of value and constituting a final discharge of debt and since RBI accepted this position, they had no power to regulate it. Considering the fact that historically, money as understood in the social sense and money as understood in the legal sense, are different, the courts in different jurisdictions such as USA and Singapore have understood VCs to be akin to money or funds at times or as commodities/intangible properties at other times.

iv. The Impugned Circular was manifestly arbitrary, based on non-reasonable classification and it imposed disproportionate restrictions.

v. A decision to prohibit an article as *res extra commercium* is a matter of legislative policy and must arise out of an Act of legislature and not by a notification issued by an executive authority.

vi. The RBI had no power to prohibit the activity of trading in VCs through VC exchanges since VCs are not legal tender but tradable commodities/digital goods, and thus do not fall within the regulatory framework of the RBI Act, 1934 or the Banking Regulation Act, 1949. The Petitioners also contended that the power conferred upon RBI under the Payment and Settlement Systems Act, 2007 to issue guidelines for proper and efficient management of payment systems, to lay down policies relating to regulation of payment systems and to give directions pertaining to conduct of business relating to payments systems, exercisable in public interest, was also not applicable to VC exchanges, as the services rendered by them do not fall within the definition of the expression "payment system" u/s 2(1)(i) of the Act.

Submissions by the RBI:

i. Virtual currencies do not satisfy the criteria such as store of value, medium of payment and unit of account, required for being acknowledged as currency.

ii. Virtual currency exchanges do not have any formal or structured mechanism for handling consumer disputes/ grievances.

iii. Virtual currencies are capable of being used for illegal activities due to their anonymity/pseudo-anonymity.

iv. Increased use of virtual currencies would eventually erode the monetary stability of the Indian currency and the credit system.

v. The impugned decision is within the range of wide powers conferred upon RBI under the Banking Regulation Act, 1949, the Reserve Bank of India Act, 1934 and the Payment and Settlement Systems Act, 2007.

vi. The impugned decision of RBI is legislative in character and is in the realm of an economic policy decision taken by an expert body warranting a hands-off approach from the Court.

vii. The impugned decisions are not excessive, confiscatory or disproportionate in as much as RBI has given three months' time to the affected parties to sever their relationships with the banks. This is apart from the

repeated cautions issued to the stakeholders by RBI through Press Releases from the year 2013.

viii. The impugned decisions were necessitated because in the opinion of RBI, VC transactions cannot be termed as a payment system, but only peer-to-peer transactions which do not involve a system provider under the Payments and Settlement Systems Act. Despite this, VC transactions have the potential to develop as a parallel system of payment.

ix. Cross-border nature of the trade in VCs, coupled with the lack of accountability, has the potential to impact the regulated payments system managed by RBI. A large constituent of the VC universe does not hold membership of the Petitioner association or is not even accountable for their acts but is material and instrumental in driving the VC trade.

Decision:

The Supreme Court held in favour of the Petitioners and set aside the impugned RBI Circular. The key points deliberated upon in the judgement are as follows:

- The Supreme Court considered the definitions of virtual currencies given by different regulators elucidated that *even though virtual currencies have not acquired the status of a legal tender, they nevertheless constitute digital representations of value and that they are capable of functioning as a medium of exchange and/or a unit of account and/or a store of value.*
- Referring to the definitions of the terms "currency", "currency notes", and "Indian currency" stipulated under FEMA the Supreme Court observed that while t*raditionally 'money' has always been defined in terms of the three functions or services that it provides as a medium of exchange; a unit of account and a store of value but in course of time, a fourth function namely that of being a* **final discharge of debt or standard of deferred payment** *was also added.* The Supreme Court also referred to definition of money in Clause (33) of Section 65B of the Finance Act, 1994 and observed that the definition *identified instruments other than legal tender which could come within the definition of money.*
- The Supreme Court dismissed RBI's contention that so long as VCs do not qualify as money either in the legal sense and are not widely accepted by a huge population as a medium of exchange they cannot be treated as currencies within the meaning of any of the statutory enactments from which RBI draws its energy and power.
- The Supreme Court further observed that once it is accepted that some institutions accept VCs as valid payments for the purchase of goods and services it can be safely said that the users and traders of virtual currencies carry on an activity that falls squarely within the purview of the RBI, and held that, *"If an intangible property can act under certain circumstances as money (even without faking a currency) then RBI can definitely take note of it and deal with it."* and dismissed the Petitioner's contention that they were carrying on an activity over which RBI has no statutory powers.
- For the Petitioner's challenge that the impugned Circular is violative of Article

19(1)(g) of the Constitution of India, the Supreme Court stated that when *a person is deprived of the facility of operating a bank account, resulting in the trade or business getting automatically shut down then the burden of showing that larger public interest warranted such a serious restriction bordering on prohibition, is on the RBI. The Supreme Court* outrightly rejected RBI's contention that there is no fundamental right to purchase, sell, transact and/or invest in VCs and that therefore, the petitioners cannot invoke Article 19(1)(g), on the grounds that *some of the petitioners did not claim a right to purchase, sell or transact in VCs, but claimed a right to provide a platform for trading in VCs.*

- *The Supreme Court also observed that the Impugned Circular was issued even though the RBI did not find anything wrong about the way in which the exchanges function and despite the fact that VCs are not banned. The Supreme Court also observed that the consistent stand of RBI is that they have not banned VCs and the Government of India is unable to take a call despite several committees coming up with several proposals including two draft bills, both of which advocated exactly opposite position.*
- *The Supreme Court extensively discussed the doctrine of proportionality,* held that the measure taken by the RBI is not proportionate and set aside the Impugned Circular on the ground of proportionality.

[*Internet and Mobile Association of India* v. *Reserve Bank of India* – Judgement dated 4-3-2020 in Writ Petition (Civil) No.528 of 2018, Supreme Court of India]

Period of limitation under Insolvency and Bankruptcy Code starts ticking from date of default

Facts:

The Respondent is assignee of UCO Bank. UCO Bank had extended financial assistance to the Appellant by way of loan of INR 75 Crores, for developing Shopping Mall and Office Complex at Raipur and there was default in repayment of the Loan. An application was filed before Debt Recovery Tribunal (**DRT**) which allowed the claim of the Financial Creditor and held that the Corporate Debtor was liable to pay the loan amount along with interest from the date of filing of application dated 28 September 2013 till the debt was paid off. The application under Section 7 was filed on the basis of the final order dated 22 October 2016 passed by the DRT which issued Recovery Certificate in the nature of decree under Section 19(22) of Recovery of Debts Due to Banks and Financial Institutions Act 1993.

Thereafter, before the Adjudicating Authority, the Appellant raised dispute of limitation claiming that the loan was made in 2013 and the application filed based on the order dated 22 October 2016 was time barred when the application was filed i.e. on 7th January 2019. The Adjudicating Authority however recorded that the application was based on the order dated 22 October 2016 and thus was within limitation and was recorded. The appeal before the NCLAT claimed that the account of Appellant was declared as NPA on 30 June 2013 vide notice dated 07 August 2013 which was issued by UCO Bank and action was initiated under Section 13 (2) of the SARFAESI Act. The notice stated that the account had become NPA on 30 June 2013.

The Appellant claimed that the application was filed before DRT on 30 September 2013. The Corporate Debtor had contested the notice under Section 13(2) of the SARFAESI Act and still the Bank went ahead to file Original Application No. 225 of 2013 and the order passed by DRT is ex parte. The application filed under Section 7 of Insolvency &Bankruptcy Code dated 17 January 2019 is time barred keeping in view, the date of NPA dated 30 June 2013.

Arguments:

i. The appellant referred to the case of *G Eswara Rao v. Stressed Assets Stabilisation Fund* decided by the NCLAT and submitted that the Application under Section 7 of Insolvency & Bankruptcy Code, 2016 is required to be filed within 3 years of account becoming NPA. Thus an application filed on the basis of the DRT order cannot save limitation with regard to Account which had become NPA on June 30, 2013.

ii. The Respondent however that in the judgment of *G Eswara Rao v. Stressed Assets Stabilisation Fund* the tribunal referred to the judgment of the Supreme Court in the case of *Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Limited and Another*. In the aforementioned Supreme Court judgment the Court observed that the limitation starts ticking from the date of recovery certificate. It was argued that even in that matter the Corporate Debtor was declared NPA on a certain date and recovery certificate was issued on a certain date and only when recovery certificate was issued, the same injured effectively and completely the Appellant's rights as a result of which the limitation had begun ticking. The Respondent suggested that the judgment held that limitation will start running from the date of recovery certificate for application under Section 7 of Insolvent and Bankruptcy Code, 2016.

Decision:

The NCLAT referred to a number of Supreme Court judgements and stressed on the judgements of *B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates*[1] and *Vashdevo R. Bhojwani v. Abhyudaya Co-operative Bank Limited and Another*[2] referred to in the judgment of *Sh G Eswara Rao v. Stressed Assets Stabilisation Fund* delivered by the NCLAT and stated that it was clear that the applicable provision is Article 137 of the Limitation Act 1963 and the relevant date is date of default for the purpose of Application under Section 7 or Application under Section 9 of Insolvency and Bankruptcy Code, 2016. Once, the time starts running, subsequent filing of the Application to DRT and judgment passed by DRT does not make a difference, for the purposes of provisions of Insolvency and Bankruptcy Code, 2016. The Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 in the present matter was held to be time barred and impugned order admitting the Application was set aside. [*Digamber Bhondwe* v. *JM Financial Asset Reconstruction Company Ltd*. - Company Appeal (AT) (Insolvency) No. 1379 of 2019, NCLAT Delhi]

[1] (2019) 11 SCC 633
[2] (2019) 9 SCC 158

News Nuggets

Limitation for execution of foreign decree – Supreme Court clarifies

The Supreme Court of India has on 17th of March, 2020 held that limitation period for executing a decree passed by a foreign court (from reciprocating country) in India will be the limitation prescribed in the reciprocating foreign country. The Court further was also of the view that the period of limitation would start running from the date the decree is passed in the foreign court of a reciprocating country. It however held that if the decree holder first takes steps-in-aid to execute the decree in the cause country (country in which decree is issued), and the decree is not fully satisfied, then he can file a petition for execution in India within a period of 3 years from the finalisation of the execution proceedings in the cause country. The Court in the case *Bank of Baroda v. Kotak Mahindra Bank Ltd.* was also of the view that Section 44A of the CPC does not lay down or indicate the period of limitation for filing such an execution petition

Pre-deposit of amount of debt due mandatory to entertain appeal under Section 18 of SARFAESI Act

The Supreme Court *vide* judgement dated 2nd March, 2020 has held that the pre-deposit as required under Section 18 of the SARFAESI Act, 2002, is mandatory for entertaining an appeal before the DRAT. The Court held that DRAT, at best could, after recording the reasons, have reduced the amount to 25% but could not have totally waived the deposit. In deciding so, the Court relied on the judgement of *Narayan Chandra Ghosh v. UCO Bank & Ors*. [(2011) 4 SCC 548], wherein it was held that keeping in view the language of the Section 18 even if the amount or debt due had not been determined by the DRT, the appeal could not be entertained by the DRAT without insisting on pre-deposit.

Electronics manufacturing – Ministry of Electronics notifies two incentive schemes

Ministry of Electronics and Information Technology has on 1st of April, 2020 notified the Production Linked Incentive Scheme (PLI) for large scale electronics manufacturing, and the Scheme for Promotion of manufacturing of Electronic Components and Semiconductors (SPECS). While the PLI scheme shall extend an incentive of 4% to 6% on incremental sales (over base year) of goods manufactured in India and covered under target segments, to eligible companies, for a period of five (5) years subsequent to the base year, SPECS proposes to offer financial incentive of 25% of capital expenditure for the manufacturing of goods as per the list that constitute the supply chain of an electronic product under the Scheme.

COVID-19 - Extension of limitation for filing in all courts/tribunals

In the background of pandemic COVID-19, the Supreme Court *vide* Order dated 23 March 2020, in a Suo Motu Writ Petition on the issue of limitation with respect to filing petitions/applications/suits/appeals/all other proceedings in respective Courts/Tribunals across India has directed that a period of limitation in all such proceedings, irrespective

of the limitation prescribed under the general law or Special Laws, whether condonable or not shall stand extended with effect from 15 March 2020 till further order/s to be passed by this Court in the present proceedings. The order was issued by the Apex Court by exercising its power under Article 142 read with Article 141 of the Constitution of India.

Competition Commission - Measures in view of COVID-19 pandemic

The Competition Commission vide notifications dated 23 March 2020 and 30 March 2020 has stated that all the matters listed for hearings up to 14th April, 2020 shall stand adjourned and fresh date(s) of hearing will be notified in due course; all filings or compliances due on or before 14 April, 2020 in respect of pending cases (under sections 3 and 4 of Competition Act, 2002) shall remain suspended and fresh dates will be notified in due course; and all other filings, submissions and proceedings under the Act and regulations made thereunder, including those before the Director General shall remain suspended till 14 April 2020.

Department of Telecom – Relaxation in terms and conditions of Other Service Providers (OSPs)

In the context of Covid19, DOT has offered following relaxations till 30 April 2020 ("**Exempted Period**") to call centres, BPOs, support service providers operating under an OSP license:

a) The requirement for security deposit and "Work from Home" agreement is exempted.

ii) The requirement of authorised service providers provisioned secured VPN is exempted. During the Exempted Period, the licensees are permitted to use secured VPN configured using static IP address by themselves. Agents at home shall be treated as extended agent position of the licensees.

iii) The requirement for seeking prior permission for Work from Home (WFH) facility is exempted. However, the concerned entities are now required to inform respective LSA field units of DOT before starting WFH facility.

DOT further clarified that on violation of these terms and conditions by an agent/employee of a licensee or by the licensee itself during the Exempted Period, the licensee shall be subjected to a penalty of up to Rs. 5,00,000 per WFH location which is in violation.

NCLAT – Excluding lockdown period for counting time of resolution process u/s 12 of IBC

NCLAT vide order dated 30 March 2020 has excluded the period of lockdown for counting of the period for 'Resolution Process' under Section 12 of the IBC in all cases where 'Corporate Insolvency Resolution Process' has been initiated and pending before any bench of the National Company Law Tribunal or in Appeal before this Appellate Tribunal. It was further ordered that any interim order/stay order passed by this NCLAT in anyone or the other appeal under IBC shall continue till next date of hearing, which may be notified later.

Withdrawal of non-refundable advance – Employees' Provident Funds Scheme amended

The Ministry of Labour and Employment has notified the Employees' Provident Funds (Amendment) Scheme, 2020 *vide* Notification

dated March 27, 2020. The Amendment Scheme introduces a new paragraph in paragraph 68L of the Employees' Provident Fund Scheme, 1952, permitting the Commissioner or any officer subordinate to him authorised by the Commissioner, to allow a member to withdraw a non-refundable advance from the provident fund account maintained under the EPF Scheme. However, such an advance should not exceed the basic wages and dearness allowances of that member for three months or up to 75% of the amount standing to his credit in the EPF Scheme, whichever is less.

Constitution of NCLAT – Chennai Bench

The Central Government *vide* notification dated 14 March 2020 under the powers conferred under Section 410 of Companies Act, 2013 has constituted another Bench of the National Company Law Appellate Tribunal (NCLAT) at Chennai with effect from 18 March 2020 to hear the appeals against the orders of the Benches of the National Company Law Tribunal (NCLT) having jurisdiction of Karnataka, Tamil Nadu, Kerala, Andhra Pradesh, Telangana, Lakshadweep and Puducherry. Henceforth, the Bench of the NCLAT at New Delhi shall be known as the Principal Bench of the NCLAT which shall continue to hear appeals other than those in the jurisdiction of Chennai Bench of the NCLAT. NCLAT in a subsequent press release stated that although the effective date of the functioning of bench is 18 March 2020, the NCLAT - Chennai Bench is expected to become functional from Chennai from the month of June 2020.

Mineral Laws (Amendment) Act, 2020 notified

The Union Government on 13 March 2020 has notified the Mineral Laws (Amendment) Act, 2020 to amend the Mines and Minerals (Development and Regulation) Act, 1957 and to amend the Coal Mines (Special Provisions) Act, 2015. The Amendment permits mining companies to carry on coal mining operation for own consumption, sale or for any other purposes, as may be specified by the central government. Henceforth, companies need not mandatorily possess any prior coal mining experience in India to participate in the auction of coal and lignite blocks. The Amendment permits state governments to take advance action for auction of a mining lease before its expiry. The Amendment replaces Mineral Laws (Amendment) Ordinance, 2020 and is effective from 10 January 2020.

Insolvency and Bankruptcy Code (Amendment) Act, 2020 notified

The Union Government on 13 March 2020 has notified the Insolvency and Bankruptcy (Amendment) Act, 2020 with effect from 28 of December 2019 amending the Insolvency and Bankruptcy Code, 2016. The said amendment replaces the IBC (Amendment) Ordinance, 2019, which was promulgated on 28 December 2019. The amendment *inter alia* introduces section 32A to state that a corporate debtor will not be liable for any offence committed prior to the commencement of the CIRP and the corporate debtor will not be prosecuted for such an offence from the date the resolution plan is approved by the NCLT, if the resolution plan results in the change in the management or control of the corporate debtor. Further, the amendment provides immunity to the corporate debtor from attachment, seizure, retention, or confiscation of its property forming part of a resolution plan, in relation to such offences

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