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Articles

Contract labour – New dynamics under new Labour Code

By **Sudish Sharma and Apeksha Bansal**

Introduction

In the recent past, the engagement of contract labour has witnessed a spike across various sectors, both in the manufacturing as well as service sectors. Presently, the framework of the contract labour is regulated by Contract Labour (Regulation and Abolition) Act, 1970 ('**CLRA Act**'). This may continue for one more year, as implementation of new Labour Codes may get delayed due to the massive second wave of Covid-19 across the country.

CLRA Act will be subsumed within the Code of Occupational Safety, Health and Working Conditions, 2020 ('**OSHW Code**') which will come into force from the date to be notified by the Central Government. The draft rules of OSHW Code are meanwhile available in the public domain.

This article discusses the broad changes brought in by the OSHW Code with respect to the contract labour.

Major changes in the OSHW Code:

1) Applicability:

CLRA Act applies to:

(i) establishment which employs or employed 20 or more workmen as contract labour on any day of the preceding twelve months; [Section 1(4)(a) of CLRA Act]

(ii) contractors who employs or employed 20 or more workmen on any day of the preceding twelve months. [Section 1(4)(b) of CLRA Act].

The OSHW Code has increased the threshold applicability from 20 to 50 workers.

A question which arises is whether it can be contended that CLRA Act as well as OSHW Code neither use the word 'or' nor 'and' between the two clauses and therefore, the conditions should not be treated as an independent of each other, in order to determine the applicability of the contract labour provisions.

However, it appears that both the conditions are mutually exclusive and lay down independent criterion for applicability of CLRA Act on the principal employer[1].

2) Ambit of Contract Labour:

The OSHW Code has widened the ambit of contract labour. The definition has now included the following:

- *Inter-state Migrant Workers*: The Standing Committee on Labour in its Fourth Report presented in Lok Sabha on February 11, 2020 ('**Standing Committee Report**') mentions that the intention to include the inter-state migrant workers is to provide all the benefits as available with contract labour.

[1] *Contract Laghu Udyog Kamgar Union* v. *V.G. Mohite and Ors.* [2001 (3) ALLMR 597]

- *Workers employed in a supervisory capacity earning not more than INR 18,000*: Under CLRA Act, workers employed in a supervisory capacity earning not more than INR 500 per month are treated as a worker. Under OSHW Code, workers employed in a supervisory capacity earning more than INR 500 per month and up to INR 18,000 per month will be treated as a worker.
- The definition of a contract labour specifically excludes any person who is regularly employed by the contractor for any activity of his establishment and his employment is governed by mutually accepted standards of the conditions of employment (including engagement on permanent basis), and gets periodical increment in the pay, social security coverage and other welfare benefits in accordance with the law for the time being in force in such employment.
- The definition of a contractor under OSHW Code includes a person who supplies man power as a mere human resource. The same is absent under CLRA Act.

3) Registration by principal employer:

Under OSHW Code, every principal employer is liable to obtain registration if 10 or more workers are employed. The OSHW Code has done away with the requirement of separate registration by the principal employer with respect to the contract labour.

4) Registration by contractor:

Under OSHW Code, the contractor shall electronically apply (Form XIII) to obtain license (Form XIV) from the authority. The license will be valid for 5 years and specify the number of contract labour who can be supplied by the contractor along with security deposit.

The concept of single license has also been introduced under OSHW Code unlike CLRA Act. Accordingly, a contractor may obtain a single license for more than one state or for whole of India.

For the particular work order, the authority can issue 'work specific license' to the contractor to supply the contract labour.

5) Core activity:

Under CLRA Act, the employment of contract labour in an establishment is prohibited by the appropriate government by way of notification.

While OSHW Code, like the present Andhra Pradesh and Telangana specific CLRA provisions, has prohibited the employment of contract labour in core activities of any establishment. The 'core activity of an establishment' is defined as any activity for which the establishment is set up and includes any activity which is essential or necessary to such activity.

The Standing Committee Report recommended a clear-cut differentiation between the core and non-core activities in which contract labours can be engaged, as has been done by Andhra Pradesh.

The OSHW Code, sets out activities which are non-core activities and where contract labour can be deployed, unless an establishment has been set up for

such specific activities. The non-core activities include sanitation, watch and ward services, courier services, housekeeping and laundry, transport services, etc.

Further, OSHW has carved out the exceptions where contract labour in core activities can be employed. Such exceptions cover activities which do not require full time workers or sudden increase of volume of work in the core activity which needs to be completed within the specified time or where normal functioning is such that the activity is ordinarily done through contractor.

To ensure compliance, the need of the hour is to identify the core activities of the establishment as defined under the OSHW Code as then only the benefit of exceptions can be explored to deploy contract labour for core activities.

OSHW will allow the aggrieved party to make an application before the Government of India for determining the core activity, in the event of any issue.

6) Duties of Principal Employer:

Under CLRA Act, provision of welfare facilities (such as cleanliness, first-aid box, canteen, etc.) is the responsibility of the Contractor.

While under OSHW Code, the responsibility has been shifted to the Principal Employer. Accordingly, the Principal Employer will be required to make necessary arrangements for fulfilling its responsibility.

7) Duties of Contractor:

- *Payment of wages*: Under OSHW Code, like CLRA Act, the Contractor is responsible for payment of wages to the contract labour. In the event of failure of payment of wages by the contractor, principal employer is liable to make payment of wages to the contract labour. Further, OSHW Code additionally provides that the authority can recover the wages from the amount deposited by the contractor as a security deposit at the time of obtaining license.
- *Experience Certificate*: Under the OSHW Code, the Contractor is liable to provide, on demand, a certificate of experience in the prescribed format (FORM-XV) to the contract labour.
- *Intimation of work order*: Under the OSHW Code, the contractor will be required to intimate the authority about the work order received from the principal employer. In the event of failure, the license of the contractor can be suspended.

Conclusion

On a concluding note, we would like to highlight that the principal employer is liable to provide proper welfare facilities, health, safety and working conditions to the contract labour. Appropriate safeguards should be taken by the principal employer to ensure payment of wages on time by the contractors.

Further, the principal employer may be required to revisit their compliance requirements so as to effectively meet the obligations under OSHW Code including no deployment of contract labour in core activities of an establishment.

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Extension of limitation by Apex Court due to second wave of Covid-19

By **Dinesh Babu Eedi and Manasa Tantravahi**

The sudden onset of the pandemic Covid-19 in March 2020 had pushed litigants across the country into hardships with respect to the filing of petitions/ suits/ appeals/ applications etcetera and initiating and continuing legal proceedings before the various Courts and Tribunals.

Extension of period of limitation – An overview

Recognizing the distress, the Supreme Court, *vide* its Order dated 23 March 2020, in *In Re: Cognizance for Extension of Limitation*, Suo Moto Writ (Civil) No. 3 of 2020**,** had extended the period of limitation in all cases in proceedings in all Courts/Tribunals throughout the country with effect from 15 March 2020 till further orders ('**Limitation Extension Order**'). The Court had exercised its power under Article 142 read with Article 141 of the Constitution of India and declared that the said Order is a binding order within the meaning of Article 141 of the Constitution on all Courts, Tribunals and authorities.

That being so, owing to the necessity in the interpretation of such Order, *vide* a subsequent Order dated 6 May 2020, the Supreme Court had also extended all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996 ('**Arbitration Act'**) and under the Negotiable Instruments Act, 1881 ('**NI Act'**) with effect from 15 March 2020. Since the said Order came belatedly, the Apex Court had even clarified that in case the limitation had expired after 15 March 2020, for any of the said cases, the period from 15 March 2020 till the date on which the lockdown has been lifted in the jurisdictional area where the dispute lies/ where the cause of action arises, would be extended for a period of fifteen (15) days after the lifting of lockdown.

For further clarity on the issue, the Apex Court *vide* an Order dated 10 July 2020, had further held that:

a. In case of instances where a time period has been prescribed (under Section 29A of the Arbitration Act, for the passing of an arbitral award; and under Section 23(4) of the said Act for completion of the statement of claim and defence), the time shall accordingly be extended, in light of the Limitation Extension Order read with the Order dated 6 May 2020;

b. The time prescribed for completing the process of compulsory pre-litigation, mediation and settlement under Section 12A of the Commercial Courts Act, 2015 ('**Commercial Courts Act**') shall also be extended from the time when the lockdown is lifted plus 45 days thereafter; and

c. Service of notices, summons, and pleadings may be affected by e-mail, Fax, commonly used instant messaging services, such as WhatsApp, Telegram, Signal etc., as long as physical service is also initiated on the same date.

Interpretation of the Limitation Extension Order by various authorities

In spite of the intent behind the Limitation Extension Order being to provide relief to the litigants across India, the reception to the Limitation Extension Order has been varied across the different authorities and tribunals in India.

Due to some of the orders/ notices issued by some authorities, any relief given to litigants, on account of the said Order, has failed to be implemented everywhere. It is relevant to note

that the Limitation Extension Order only served to ***extend*** *the limitation period computed for initiation of proceedings, filing, etc. and did not serve as a* ***suspension*** *of proceedings.*

- *Accordingly, the Office* of the Controller General of Patents, Designs and Trademarks ('**CGPDTM**'), in response of the said Order, issued multiple notices dated 25 March 2020, 15 April 2020, etc., extending the limitation period for filings from time to time, under Section 10 of the General Clauses Act, 1897 ('**General Clauses Act'**), instead of excluding the period indefinitely for computing limitation. Even though the Supreme Court's Order was to be binding on '*all Courts/Tribunals and authorities'*, the notices issued by CGPDTM referred to Section 10 of the General Clauses Act and not the Limitation Extension Order. Further, the prescription of an end date in the CGPDTM's notices, instead of an indefinite extension, went beyond the Supreme Court's Order.
- As a result of this interpretation taken unilaterally by CGPDTM, there was extreme confusion and sudden overburdening of its offices with filings, especially since the electronic system of CGPDTM was not developed or equipped enough to handle such a sudden influx. Accordingly, a petition was filed before Apex Court, in *Intellectual Property Attorney Association and Anr.* v. *The Controller General of Patents, Designs and Trade Marks and Anr*., W.P.(C) No.3059/2020, challenging the notices issued by CGPDTM and seeking quashing of such notices. *Vide* an Order dated 21 May 2020, the Apex Court duly set aside the notices and held that the Order dated 23 March 2020, being the Limitation Extension Orders, stands operational for all matters including intellectual property matters.
- *Vide* a Press Release dated 24 March 2020, the Ministry of Finance had extended the time-limit for compliances under the Customs Act, 1962 and other allied laws until 30 June 2020, where such time-limit was expiring between 20 March 2020 to 29 June 2020, followed by the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020, dated 31 March 2020 solidifying such extension. The Customs, Excise and Service Tax Appellate Tribunal ('**CESTAT**'), *vide* its Notification dated 26 March 2020, following the Supreme Court's Order, had extended the period of limitation for filing appeals and applications with effect from 15 March 2020 till further orders by the Supreme Court. In light of the above, any issue of or reply to show cause notices/ applications/ proof of pre-deposit made, etc. could be filed by any entity after the lockdown period/ after further orders by the Apex Court.
- In accordance with the Ordinance, various notifications were indeed issued by the Central Board of Indirect Taxes and Customs ('**CBIC'**), in April 2020, extending the time limits for filing of appeal, furnishing of return, or any other compliance under the Central Goods and Services Tax Act, 2017 (**CGST Act**). However, CBIC also implemented the restriction on time limit for taking Transitional Credit under Section 140 of the CGST Act,

amended retrospectively by the Finance Act, 2020, with effect from 18 May 2020, to the utter dismay of taxable persons in the country. Further, *vide* its notification dated 19 January 2021, the CBIC demanded '*strict compliance to limitation while filing appeals/ petitions before courts/ tribunals'*.

- With context to consumer laws, the Supreme Court in the case of *S.S Group Pvt. Ltd.* v. *Aaditiya Garg & Another*, MANU/SC/0983/2020, while observing that the Consumer Court has no power to extend the time for filing the response to the complaint beyond 45 days, as per Section 38 of the Consumer Protection Act, 2019, held that, in reference to the Limitation Extension Order, the limitation for filing the written statement in the present proceedings before the National Commission would be deemed to have been extended, as it is clear from the said Order that the extended period of limitation was applicable to all petitions/ applications/suits/appeals and all other proceedings.
- It has been deemed by various litigants that an exclusion of the limitation period/ extension in the limitation period also automatically means an extension in the period of condonation of delay by the various courts/ tribunals. However, *vide* its judgment in *Sagufa Ahmed & Ors.* v. *Upper Assam Plywood Products Private Limited & Ors.*, 2020(5) ALT 167, the Apex Court clarified that the period for condonation of delay cannot be enlarged as a consequence of the Limitation Extension Order.

Present status of computation of limitation

All that said and done, since the situation in the country, had improved over time and lockdown was lifted, envisaging a return to normalcy, the Apex Court *vide* an Order dated 8 March 2021, settled the question of extension of limitation period once and for all.

The Apex Court, while disposing of the writ in **Suo Moto Writ (Civil) No. 3 of 2020**, held that:

i. *In computing the period of limitation for any suit, appeal, application, or proceeding, the period from 15 March 2020 till 14 March 2021 shall stand excluded. The balance period of limitation remaining as on 15 March 2020, if any, is to become available with effect from 15 March 2021.*

ii. *In cases where the limitation would have expired during the period between 15 March 2020 till 14 March 2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15 March 2021.*

iii. *In the event, the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply.*

iv. *The period from 15 March 2020 till 14 March 2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015, and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings,*

outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

However, due to a rapid deterioration of the situation in the country because of Covid-19's second wave, an application was filed by the Supreme Court Advocates on Record Association ('**SCAORA**') seeking restoration of the Suo Moto Writ (Civil) No. 3 of 2020 and thereby extending the limitation period for filing of cases in courts and tribunals for a further period beyond 15 March 2021.

Accordingly, *vide* an Order dated 27 April 2021 the three-judge bench of Justice N. V. Ramana, the Hon'ble Chief Justice of India, Justice Surya Kant and Justice A. S. Bopanna, recognizing the need for 'extraordinary measures' to minimize the hardship of litigant-public, has restored the Limitation Extension Order, and '*in continuation of the order dated 8 March 2021, the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders'.* It has also been clarified, in the same order, that the time periods prescribed under the Arbitration Act, NI Act and Commercial Courts Act, as abovementioned, shall also stand excluded from 14 March 2021.

Way forward

As abovementioned, the directions of the Supreme Court have been issued under Article 142 read with Article 141 of the Constitution of India and are consequently binding on all Courts, Tribunals, and authorities in India. Accordingly, the filings or proceedings throughout the country are required to adhere to the Court's directions on the computation of limitation issued vide the Order dated 27 April 2021.

This latest order also removes a lot of former ambiguities, due to its wide application from the phrase 'and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings', thus reducing any scope for the various authorities in the country to take a different interpretation to the said order.

It may be noted that the CGPDTM, while having issued a notice dated 24 March 2021, in line with the Order of the Apex Court dated 8 March 2021 hereinabove, is yet to issue a revised notice in line with the order dated 27 April 2021.

The CBIC, to the immense gratitude of taxpayers, *vide* various notifications issued since 27 April 2021, has (a) lowered interest rates for tax periods for the months of March and April 2021, (b) extended the time periods for completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission, tribunal, filing of any appeal, reply or application or furnishing of any report, document, return, statement by any other person etc., depending on the time period provided, up to 15 June 2021, and (c) extended the time for filing various forms, Form GSTR-4, Form GST ITC-4 etc. up to 31 May 2021, and Form GSTR-1 pertaining to outward supplies up to 26 May 2021.

W*hile the latest order may be considered as fresh relief to litigants everywhere, it remains to be seen whether the actions taken by authorities, especially governmental bodies, against aggrieved parties, are in the spirit of the order.*

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Notifications and Circulars

Covid-19 surge – Relaxations in corporate compliances and other developments: Considering the second wave of the Covid-19, various relaxations in corporate compliances and few other changes have been notified recently by the Ministry of Corporate Affairs (MCA). Refer L&S Update No. 16 of 2021 (available here) highlighting that,

- CSR funds can be utilized towards setting up of makeshift hospitals;
- relaxations in the levy of additional fee in filing forms, by companies/ LLPs, where due dates fall between 1 April 2021 to 31 May 2021;
- relaxations for filing two charge related forms; and
- the gap between two board meetings has been increased.

CSR funds utilisation for Covid-19 further clarified: The Ministry of Corporate Affairs has clarified that spending of CSR funds for,

- creating health infrastructure for COVID care,
- establishment of medical oxygen generation and storage plants,
- manufacturing and supply of Oxygen concentrators, ventilators, cylinders and other medical equipment for countering COVID-19,
- or similar such activities

are eligible CSR activities under Item Nos. (i) and (xii) of Schedule VII of the Companies Act, 2013. These Item Nos. of the Schedule relate to promotion of health care, including preventive health care, and, disaster management respectively. General Circular No. 9/2021, dated 5 May 2021 also draws attention to Item No. (ix) which permits contribution to specified research and development projects as well as contribution to public funded universities and certain Organisations engaged in conducting research in science, technology, engineering, and medicine as eligible CSR activities.

Ratio Decidendi

Promoter of MSME can submit a Resolution Plan in his individual capacity and as long as MSME status is established

The National Company Law Tribunal, Kochi Bench ('**NCLT**'), has held that the promoter of a Micro, Small and Medium Enterprise ('**MSME**') can submit a resolution plan in his/her individual capacity, under Sections 29A and 240A of the Insolvency and Bankruptcy Code, 2016 ('**IBC**' or '**Code**'), and that the resolution plan so submitted would be eligible to be considered along with the resolution plans submitted by other prospective Resolution Applicants on par.

Brief facts:

- The NCLT Kochi Bench, had admitted an application filed by one Prayag Polytech Private Limited ('**Operational Creditor**'), filed under Section 9 of the Code, and had directed initiation of Corporate Insolvency Resolution Process ('**CIRP**') against Propyl Packaging Limited ('**Corporate Debtor**'), *vide* its Order dated 14 February 2020. An invitation to submit Expression of Interest ('**EOI**') was called for by the appointed Resolution Professional ('**RP**'), which contained an eligibility criterion of minimum '*Tangible Net Worth of INR 10 crores*' for any entity to submit the EOI.
- One of the promoters of the Corporate Debtor ('**Applicant**') had also submitted EOI. However, the same was submitted in the name of Corporate Debtor. Further, he did not submit a certificate confirming his eligibility of having net worth of INR 10 crores or more individually. Therefore, the EOI was rejected by the RP on the basis of the same. Aggrieved by the rejection of EOI, the Applicant had filed an application before NCLT, challenging the action of RP.

Issue:

- Whether the Applicant, being the promoter of the Corporate Debtor, is eligible to submit the Resolution Plan in the name of the Corporate Debtor?
- Whether the Applicant is eligible to submit the Resolution Plan in view of the Notification dated 26 June 2020?

Decision:

- The NCLT Kochi Bench observed that the Corporate Debtor cannot submit a Resolution Plan, as per the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Therefore, the Applicant can only submit a Plan, if any, in his individual capacity and not in relation to the Corporate Debtor.
- However, with regard to the participation of the Applicant, in light of the networth criteria, the NCLT Kochi Bench relied upon the decisions of *Swiss Ribbons Private Limited* v. *Union of India and Others,* 2019 SCC Online SC 7 as well as *Saravana Global Holdings Ltd.* v. *Bafna Pharmaceuticals Limited and Ors.,* (CA(AT)(Insolvency) No.203 of 2019*,* in which the NCLAT has held that "*The intention of the legislature shows that the Promoters of 'MSME' should be encouraged to pay back the amount with the satisfaction of the 'Committee of Creditors' to regain the control of the 'Corporate Debtor' and entrepreneurship by filing 'Resolution Plan' which is viable, feasible and fulfils other criteria as laid down by the 'Insolvency and Bankruptcy Board of India",* to arrive at the decision that the Applicant shall be eligible and allowed to submit the EOI/resolution plan.
- The Applicant's EOI, in spite of not fulfilling the net worth criteria, was directed to be considered along with all other prospective Resolution Applicants. With respect to the retrospective applicability of the Notification, the NCLT Bench directed the Resolution Professional to register the Corporate as an MSME under the 'Udyam Registration' in terms of the Notification, and the Applicant shall still be considered as a promoter of an MSME.

[*K. Satheesh Babu Rajesh* v. *George Varkey, Resolution Professional of Propyl Packaging Limited* - Order dated 20 April 2021 in I.A.(IBC) No. 64/KOB/2021 in IBA No.52/KOB/2019, NCLT, Kochi]

Consolidation of CIRP of two Corporate Debtors permissible if 8 parameters satisfied

The NCLAT has set aside the Order passed by the NCLT Bengaluru Bench and allowed consolidation of Corporate Insolvency Resolution Process ('**CIRP**') of two Corporate Debtors, after noting that the parameters laid down by the NCLT Mumbai Bench, under *State Bank of India* v. *Videocon Industries Ltd.* [(2018) SCC Online NCLT 13182], stood satisfied.

Brief facts:

- NCLT Bengaluru Bench admitted an application filed by Radico Khaitan Ltd., the Appellant company, under Section 9 of the IBC for initiation of CIRP against Respondent No. 1, BT & FC Pvt Ltd. Subsequently, an Interim Resolution Professional was appointed, and moratorium was imposed. The Committee of Creditors (CoC) formed in the CIRP of Respondent No.1 comprised of Respondent No.3 and Respondent No.4, being financial creditors of Respondent No. 1 Company.
- Respondent No. 4 also filed a separate application under Section 7 of the Code seeking initiation of CIRP against Respondent No. 2, Bangalore Dehydration and Drying Equipment Company Pvt. Ltd., for default in payment of outstanding amounts. The said application was admitted by the NCLT Bengaluru Bench.
- The Appellant thereafter filed an application under Section 60(5) (a) of the Code, read with Rule 11 of NCLT Rules, 2016, seeking consolidation of CIRP of Respondent No.1 and Respondent No. 2, on the ground that Respondent No. 2 only operates as the land holding Company of Respondent No. 1 without carrying on any business activity and that the businesses of both the said Corporate Debtors (i.e., Respondent No.1 and Respondent No. 2) were interlinked and intertwined.
- NCLT Bengaluru Bench held that the Appellant, being an Operational Creditor of Respondent No. 1, had no *locus standi* to file the application for consolidation of CIRP of two Corporate Debtors.

Decision:

- The NCLAT Bench referred to *Videocon Industries Ltd. (Supra)* and held that the Respondent Nos.1 and 2 fully satisfied the criteria for consolidation of CIRP. The eight eligibility criteria noted by the NCLT Mumbai Bench in the given case were:
  a. Common Control,
  b. Common Directors,
  c. Common Assets,
  d. Common Liabilities,
  e. Inter-dependence,
  f. Pooling of Resources,
  g. Intricate links between the Companies, and
  h. Common Financial Creditors
- NCLAT also observed that the Financial Creditors (Respondent Nos. 3 and 4) of both the CIRPs have failed to resolve in their written submission how the consolidated CIRP shall prejudice their rights, considering that their interest will remain protected even during the combined CIRP of Corporate Debtors, being secured Financial Creditors.
- Accordingly, NCLAT allowed the appeal for consolidation of CIRP and directed the NCLT Bengaluru Bench to appoint a single common Resolution Professional/Liquidator who will carry on the duties and perform the

function of the Resolution Professional/Liquidator in accordance with the Code for the consolidated CIRP.

[*Radico Khaitan Ltd.* v. *BT & FC Pvt Ltd.* – Judgement dated 26 March 2021 in CA (AT)(Insolvency) No.919/2020, NCLAT]

A woman cannot be denied employment just because nature of employment would require her to work during night hours

The Kerala High Court held that a qualified woman cannot be denied of her right to be employed merely on the ground that she is a woman and the nature of the employment demands working during night hours. The Court was of the view that doing so is violative of her fundamental rights guaranteed under the Indian Constitution. The High Court set aside the provision in job Notification dated 24 October 2020 ('**Notification**'), issued by the Kerala Minerals and Metals Limited ('**Respondent No. 2**'), a public sector undertaking under the Government of Kerala, which prohibited women candidates for the post described thereunder.

Brief facts:

- The Petitioner is an engineering graduate and engaged as Graduate Engineer Trainee (Safety) by Respondent No. 2. The Petitioner had worked with Respondent No. 2 for the period from between November to May 2020. Thereafter, there was a job opening with Respondent No. 2 for a permanent post of Safety Officer, which was published vide the Notification, inviting applications for the said post and which also stated that only male candidates can apply for the said post.
- Being aggrieved by the Notification, the Petitioner had approached the High Court of Kerala, vide a writ petition under Article 226 of the Constitution of India, challenging the specific provision of the Notification which prohibited women to apply for the job post, on the ground that the same is discriminatory and violation of Article 14 and 21.

Issue:

Whether Section 66(1)(b) of the Factories Act, 1948 ('**Factories Act**') can be implemented in violation of the fundamental rights under the Constitution of India?

Decision:

- The High Court held that Section 66(1)(b) of the Factories Act can be operated and exercised only as a protection and cannot be an excuse for denying employment to a woman who does not require such protection anymore. Citing *Hindustan Latex Ltd.* v. *Maniamma* [1994 (2) KLT 111], the Court noted that 'a woman who is fully qualified cannot be denied of her right to be considered for employment only on the basis of her gender'.
- The Court referred to the decision of the Supreme Court in *Secretary, Ministry of Defence* v. *Babita Puniya and others,* [(2020) 7 SCC 469], where the Apex Court had declared that an absolute bar on women seeking command appointment violates the guarantee of equality under Article 14 of the Constitution of India.
- The Court noted that, *'In the present scenario, to say that a graduate engineer in safety engineering cannot be considered for appointment as Safety Officer in a public sector undertaking because of an offending provision under Section 66(1)(b) of the Factories Act, according to me, is completely untenable and unacceptable. This is evident from the*

fact that the State of Kerala has approved an amendment to the Rules which permits the engagement of women on condition that all safety precautions and facilities for such engagement are arranged by the employer.'

- The Court observed that the embargo provided in the Notification which stated that '*only male candidates can apply*' is violative of the provisions of Articles 14, 15 and 16 of the Constitution of India, and therefore, the said provision in the Notification set aside. Accordingly, the Court directed Respondent No. 2 to consider the application submitted by the Petitioner for appointment to the post of Safety Officer, notwithstanding the provisions of Section 66(1)(b) of the Factories Act.

[*Treasa Josfine* v. *State of Kerala & Ors.* - Judgment dated 9 April 2021 in WP(C). No.25092 of 2020(J), Kerala High Court]

News Nuggets

Breach of provisions of IBC – No power under CrPC Section 482 available to High Court to countenance breach

In a case where the Corporate Debtor had, after declaration of moratorium, transferred an amount to the account of another company without the authority of the Resolution Professional (RP), the Supreme Court has allowed the appeal of the RP against the High Court Order which had unfrozen the account of the other company, frozen earlier based on a FIR of the RP. The Supreme Court allowed the account of the other company to operate subject to it first remitting the amount back into the account of the Corporate Debtor. The Apex Court in the case *Sandeep Khaitan, RP* v. *JSVM Plywood Industries Ltd*. [Decision dated 22 April 2021] observed that the power under Section 482 of the Criminal Procedure Code may not be available to the High Court to countenance the breach of a statuary provision. It was of the view that the words 'to secure the ends of justice' in Section 482 cannot mean to overlook the undermining of a statutory dictate, which in this case was the provisions of Sections 14 and 17 of the Insolvency and Bankruptcy Code.

Operational debt not intended to include crown debt: Madras High Court

The Madras High Court has recently observed that the definition of 'Operational Debt' in Section 5(21) of the Insolvency and Bankruptcy Code, 2016 is not intended to include 'crown debt' such as taxes and duties payable to the Government. The Court was of the view that crown debt is distinct from the 'claim' and 'debt' as defined in Sections 3(6) and 3(11) of the IBC, 2016. The High Court, however, accepted the contention of the petitioner in so far as issue relating to extinguishment of the rights of the customs department to claim the customs duty were concerned. The Court in its Judgement dated

26 April 2021 observed that it is bound by the interpretation placed by the Supreme Court in *Ghanashym Mishra and Sons* v. *Edelweiss Asset Construction*, the reasons given therein and in the light of the amendment to the IBC, 2016 in 2019, including the clarification of the Finance Minister when the 2019 Bill was put to discussion in the Parliament. The Petitioner in the case *Ruchi Soya Industries Ltd.* v. *Union of India* was directed to obtain clarification from the National Company Law Board as to whether the Corporate Resolution Plan filed by the Corporate Applicant included the 'customs duty' to be paid by the Petitioner.

Mere forwarding of WhatsApp messages as received when not amounts to sharing 'unpublished price sensitive information'

The Securities Appellate Tribunal has held that mere 'forwarded as received' WhatsApp message circulated on a group regarding quarterly financial results of a Company, closely matching with the vital statistics, some time before the publication of the same, not amounts to an unpublished price sensitive information ('UPSI') under SEBI (Prohibition of Insider Trading) Regulations, 2015. The Tribunal noted that SEBI could not find out that the source of information was from the side of financial team, legal team or the audit team of the respective companies and that AO did not appreciate that the messages might have originated from the brokerage houses, or from the estimates found on the platform of Bloomberg which were floated and were in the public domain. It also noted that there were numerous other messages of similar nature received and forwarded by the appellant which did not at all match with the published financial results. Allowing the appeal, the SAT in *Shruti Vora* v. *SEBI* [Order dated 22 March 2021] observed that the SEBI failed to prove any preponderance of probabilities that the impugned messages were UPSI, that the appellants knew that it was UPSI and with the said knowledge they or any of them had passed the said information to other parties.

Distribution of assets in liquidation – No priority for first charge holders if security relinquished in common pool

The National Company Law Appellate Tribunal (NCLAT) has held that priorities amongst the secured creditors (first charge or second charge) will not prevail in distribution of assets in liquidation, in a case where the creditors had elected for relinquishment of security interest and for distribution of assets according to Section 53 of the Insolvency and Bankruptcy Code, 2016. The Appellate Tribunal was of the view that first charge holder will have priority in realising its security interest if it elects to realize its security interest (under Section 52) and does not relinquish the same. However, once a secured creditor opts to relinquish its security interest, the distribution of assets would be governed by the provision engrafted in Section 53(1)(b)(ii) whereunder all secured creditors having relinquished security interest rank equally. The NCLAT in *Technology Development Board* v. *Anil Goel* [Order dated 5 April 2021] also noted that Section 53 had a *non-obstante* clause and that the question as to whether the secured creditor holds first charge or second charge is material only if the secured creditor elects to realise its security interest.

Indian parties to arbitration agreement can opt for a foreign seated arbitration

The 3-Judge Bench of the Supreme Court has recently held that two Indian parties are allowed to designate a neutral seat of arbitration outside India. In an agreement executed by the parties, the Governing Law and Settlement of Dispute Clause stated that

'*In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by the Arbitration in Zurich in the English language, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause...*' The Apex Court held that a foreign seated arbitration between two Indian persons would qualify as 'International Commercial Arbitration' under Part II of the Arbitration and Conciliation Act, 1996 and the award in such arbitral proceedings shall be regarded as 'foreign award', enforceable in India without regard to the nationality of the involved parties. It held that the proceedings are subject to the provisions of Arbitration and Conciliation Act, 1996 as and where applicable. The decision was delivered on 20 April 2021 in *PASL Wind Solutions Private Limited* v. *GE Power Conversion India Private Limited*.

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