Corporate

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

November 2024 / Issue–158

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exceeding expectations

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By **Jivesh Chandrayan, Pooja Vijayvargiya and Bhagwati Tiwari**

The article in this issue of Corporate Amicus discusses a recent Karnataka High Court decision on the question of whether there exists an employer-employee relationship between the cab-hailing service provider (cab aggregator) and its driver-partners. Considering the commercial terms of the Agreement, which revealed the aggregator's extensive involvement in business management, supervision, and control, and the fulfilment of the POSH Act's objectives, the Court held that driver-subscribers qualify as employees for the Act's purposes. Elaborately analysing the decision, the authors raise a pertinent question - if the driver-partners can be considered employees for the purposes of PoSH Act, basis the level of control and supervision wielded by the cab aggregator, why not for the purposes of employee compensation, state insurance, provident fund, gratuity, leaves, protection as a workman, etc.

Extending 'employee' status to Gig Workers – Implications of employee misclassification

By Jivesh Chandrayan, Pooja Vijayvargiya and Bhagwati Tiwari

A Contract, whose prologue screams an agreement between two principals (a cab-hailing service provider and its drivers), ends up whispering a story of master-servant relationship by its epilogue.

Like the washing-off of the proverbial paint, the true colour of this relationship is revealed with each passing clause. By the agreement's final word, it becomes clear as day that one principal has ascended to a 'master' status through thousand acquisitions (*of rights*), while another has descended into a 'servant' status through allowing thousand concessions (*to obligations*).

The existence (or lack thereof) of an employer-employee relationship between the cab-aggregator and its drivers, a question simple to ask but difficult to probe, stood as the core issue in front of the Karnataka High Court through a writ petition [*MS X* v. *ICC ANI Technologies & Ors*.— decided by the Karnataka High Court on 30 September 2024].

The case of the petitioner was simple, facts undisputed, and the prayer straightforward.

The Petitioner, a victim of sexual harassment by a cab/taxi driver, was aggrieved by the inaction of the Internal Complaints Committee ('**ICC**') of the cab aggregator ('**Respondent**'). The said committee, constituted under the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('**PoSH Act**'), rejected her complaint on the grounds that the said driver was an independent contractor and not an employee. The petitioner then approached the High Court through a writ petition.

The ICC responded to the petition by arguing before the Court that it is beyond its statutory jurisdiction to enquire into non-employee complaints. Section 11 of the PoSH Act expressly states that, 'the Internal Committee…shall, *where the respondent is an employee*, proceed to make inquiry into the complaint…'.

The Respondent, taking forward the ICC's contentions, presented before the Court the Subscription Agreement it uses to onboard drivers. This Agreement explicitly recognises the relationship between the respondent and its drivers as that of two principals. Thereby negating any employer-employee relationship between respondent and its driver-partners.

Beyond the contractual arrangement, the cab aggregator argued that the practical aspects of their arrangement with drivers also failed to satisfy the classical factors required to be fulfilled for the purpose of establishing an employer-employee relationship. Mainly, that the respondent does not have an exclusive arrangement with its drivers. This was evident from the fact that most of the taxi drivers in the aggregator economy drive for multiple platform aggregators [arguing that anyone who serves multiple masters, is a servant of none]. Furthermore, the drivers are free to decide their working hours, not mandated to report at any specific place, time, days etc. [arguing that there is no 'punching the clock' character of its drivers, as is the case in regular employer-employee relationships].

The respondent further pointed out that it's the driver-partners who *own* the vehicle they drive and not the cab aggregator [arguing that in a master-servant relationship, it is the master who provides machinery, and the servant brings the labour. Thus, anyone who owns their own machinery cannot be an employee but merely an independent contractor].

On their narrow and specific role, respondent argued that it merely provides a platform to connect independent drivers with passengers [arguing that it has no control whatsoever on either the independent drivers or the passengers]. To further substantiate, the aggregator drew a parallel with other intermediaries and e-commerce platform providers like Flipkart and Amazon [arguing that it would be absurd to determine the sellers on these e-commerce platforms as employees].

The respondent further argued that not only the commercial understanding between the aggregator and its drivers was sufficient proof for non-existence of an employer-employee relationship, but they also had the statutory backing under the PoSH Act.

Section 2(g) of the PoSH Act defines employee as 'a person ***employed*** at a workplace for any work…and includes…***a contract worker***…'. And though ***a contract worker*** is fairly and squarely covered under definition of employee, it's the word '***employed***' that the respondent contested upon.

It was submitted that unless the term 'employed' is established in relation to the respondent and its drivers, the remaining part of the definition cannot be thrusted upon them. [Their argument being, all *employed* workers can be said to be working in or in connection with the business of the employer, but all workers working in or in connection with the business of employer cannot be necessarily said to be *employed* by the employer.]

Finally, the cab-hailing service provider relied on a precedent from the Delhi High Court (*ANI Technologies Private Limited* v. *Rajdhani Tourist Driver Union and others*) which had previously determined that the drivers of the service provider are not employees.

The Court, to determine the employment status of the drivers, flipped the pages of the Subscription Agreement presented before it. On its face, the ingenious drafting appeared to negate any master-servant relationship. It employed specific terminology like 'driver-partner', 'driver-subscriber', 'independent contractor', and 'principal-to-principal basis', while describing respondent's role as an 'intermediary' and 'Online booking platform'.

The Bench left more anxious than satisfied, upon the patent examination of the Subscription Agreement, called in for a closer scrutiny of various terms and conditions in the Agreement in order to find the latent meaning (if any).

The Court looked at the Subscription Agreement through the oldest angle in the book, used for determining employer-employee relationship—control and supervision, and made crucial observations as follows.

First and foremost, the respondent exercises complete control over the technology infrastructure. All drivers are required to install and maintain an 'OLA device' under the company's supervision. Non-compliance leads to immediate termination, and notably, this device is essential to the respondent's business operations.

Next, drivers have no autonomy in core operational matters like, booking rides, choosing routes, communicating with users, negotiating fares, choosing passengers etc. The driver is required to complete all bookings allotted by the aggregator. They are prohibited from cancelling the booking allotted to them except under limited circumstances and that too with an explanation. Respondent mandates route adherence and vehicle speed limits, requiring notifications for any deviations. Drivers are even restricted from using their personal mobile phones while rendering the services.

And finally, the respondent maintains absolute control over the revenue being generated from the business, including, setting rates, processing payments, determining commission structures, handling tax treatments, and other ancillary matters.

The Court while examining the terms of the Subscription Agreement, held that even though the Agreement pins the driver as an independent contractor, there's hardly any independence vested in the hands of the drivers.

Drivers do not have any bargaining power in drafting the terms of Agreement. They are put to a take-it-or-leave-it scenario, however fair or unfair may be the terms. Not to mention the obvious, the drivers' inability to comprehend these complex agreements, that become binding through a mere click of a button.

The contractual clauses designating drivers as independent contractors cannot be read in isolation but must be considered in the light of the control wielded by the cab-aggregator.

A word like 'employed' in today's economy is not a crystal—transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the context in which it is used. If the context is a gig economy, the term has to be interpreted liberally.

And most importantly when a passenger books a ride using the respondent's platform, they rely on the company's goodwill for safe and secure conveyance. The respondent itself has given an impression to all its users that it is safe to use its services. In fact, in the Agreement itself, respondent shouldered the burden of ensuring passenger's safety and security—for which they evaluate the drivers and train them, pre and post engagement respectively [the Court's reasoning here being, if it was a principal-to-principal relationship why would the respondent take upon itself the responsibility of driver's customers and go an extra step to train the drivers].

Considering the commercial terms of the Agreement (which revealed respondent's extensive involvement in business management, supervision, and control) and the fulfilment of the POSH Act's objectives, the Court held that driver-subscribers qualify as employees for the Act's purposes, and the respondent transcends mere intermediary status.

The Court also drew parallels with international precedents: the UK Supreme Court's decision in *UBER B. V.* v. *Aslam*, the California Labor Commissioner's ruling in *Barbara Berwick* v. *UBER Technologies*, and the French Court of Cassation's judgment in *UBER France* v. *Mr. A. X.* These cases similarly found that the control and supervision of the cab-aggregator involved in these cases over its drivers created employment relationships. However, the Court did not comment on the Delhi HC judgment submitted by the respondent that concluded that driver-partners are not it's (respondent's) employees.

Consequently, the Court found both the ICC and the respondent guilty of deliberate negligence and inaction, making them liable for compensation to the petitioner and prosecution under the PoSH Act.

Conclusion

While the Court's inquiry focused on a specific question—whether cab-hailing service provider's drivers qualify as employees *for the purposes of PoSH Act*—the analytical framework employed to reach the conclusion i.e., examining the true nature of control and supervision in platform-based business models, can be used to draw similar conclusions for all other labour law statutes. If the driver-partners can be considered employees for the purposes of PoSH Act, basis the level of control and supervision wielded by the cab aggregator, why not for the purposes of employee compensation, state insurance, provident fund, gratuity, leaves, protection as a workman, etc.

No doubt the definition of 'employee' in the PoSH Act is a wide one—to the extent, it specifically includes a 'contract worker'. However, the Court could not draw much mileage from it, and had to rely on the interpretation of the Subscription Agreement to cross the line wherefrom an employer-employee relationship is established. Thus, it can be said that inherently there's nothing in the PoSH Act itself that was determinative in reaching the conclusion. However, on the other hand the principle of supervision and control remains a necessary *and* sufficient pre-condition for establishing an employer-employee relationship. And if the Subscription Agreement is sufficient to establish an employer-employee relationship, why cannot the same be used for the purposes of other labour and employment law statutes.

To say this judgment may have far-reaching implications, wouldn't even come close to explaining the gravity of the situation. This decision potentially opens the door to reconsidering the employment status of gig workers across various legislative domains in India.

The ramifications of this judgment on India's burgeoning gig economy are unthinkable. This warrants a complete rejigging of business models and operational structures of various platform-based companies (nothing to say about those who would not be able to survive the restructuring) consideration.

It may however be noted that the cab aggregator has a temporary reprieve as the judgment is currently under scrutiny of the Division Bench of the Karnataka High Court. Given the severity of the implication, it has all the potential to reach the Supreme Court as well. Thus, this case is on its way to becoming a pivotal instrument in shaping the future of platform-based employment relationships in India.

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Notifications & Circulars

- Guidelines for investments in overseas mutual funds/ unit trusts by Indian mutual funds notified
- 'Know Your Customer' Master Direction, 2016 amended
- Sovereign Green Bonds designated for non-resident investment under 'Fully Accessible Route'
- Reporting of Foreign Exchange Transactions to Trade Repository
- Reclassification of FPI investment into FDI – Procedure amended by SEBI and RBI
- Foreign Portfolio Investors – Simplified registration process introduced
- Master Circular for Credit Rating Agencies amended

Guidelines for investments in overseas mutual funds/ unit trusts by Indian mutual funds notified

The Securities and Exchange Board of India *vide* Circular No. SEBI/HO/IMD/IMD-PoD-1/P/CIR/149, dated 4 November 2024 has laid down the following guidelines to facilitate ease of overseas investment in Mutual Funds/Unit Trusts ('**MF/UTs**'), with exposure to Indian securities, as also contemplated in the SEBI Master Circular (SEBI/HO/IMD/IMD-PoD-1/P/CIR/2024/90) dated 27 June 2024:

1. ***Investment limitations:*** Indian Mutual Funds may invest in overseas MF/UTs with exposure to Indian securities, provided that such exposure does not exceed 25% of the total assets of the overseas MF/UT.
2. ***Conditions for investment:***
    a. *Pooling of investments*: All investor contributions in the overseas MF/UT must be pooled into a single investment vehicle, without any segregated portfolios or sub-funds.
    b. *Equal Rights*: Investors shall have pari-passu and pro-rata rights to the returns, proportionate to their respective contributions.
    c. *Independent Fund Management*: The overseas MF/UT must be managed by an independent investment manager, free from any direct or indirect influence from investors.
    d. *Transparency*: The overseas MF/UT must disclose its portfolio on a quarterly basis.
    e. *No Advisory Agreement*: Indian Mutual Funds shall not enter into advisory agreements with the overseas MF/UT to avoid conflicts of interest.
3. ***Exposure breach:*** If the exposure exceeds 25%, a 6-month observation period will be permitted for rebalancing. During this period, no new investments can be made.
4. ***Rebalancing and Liquidation:*** If the exposure remains above 25% after 6 months, the Indian Mutual Fund must liquidate its position within the subsequent 6-month 'liquidation period.'
5. ***Non-Compliance:*** Failure to comply with these requirements will result in the suspension of new subscriptions, new scheme launches, and the waiver of exit loads on investor redemptions.
6. ***Fundamental Attribute Change:*** In case of a breach exceeding 25%, Indian Mutual Funds may switch to other overseas MF/UTs with similar investment objectives, subject to issuance of a notice to investors.

'Know Your Customer' Master Direction, 2016 amended

The Reserve Bank of India *vide* Circular No. RBI/2024-2025/87, DOR.AML.REC.49/14.01.001/2024-25, dated 6 November 2024, has notified amendments to the 2016 Know Your Customer (**'KYC'**) Master Direction, to align with the recent changes in the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, and the corrigendum issued by the Government of India regarding Section 51A of the Unlawful Activities (Prevention) Act, 1967 ('**UAPA**'). These amendments aimed at enhancing KYC compliance and streamlining customer identification processes include:

1. ***Customer Due Diligence (CDD):*** A revision in Paragraph 10(f) clarifies that Regulated Entities (**'REs'**) need not conduct a fresh CDD when an existing KYC-compliant customer opens another account or avails of additional services from the same RE.
2. ***High-Risk Accounts:*** The 'Explanation' that 'High risk accounts have to be subjected to more intensified monitoring' is applicable to sub-paragraphs (a) and (b) of Paragraph 37 and accordingly, the 'Explanation' has been shifted.
3. ***Periodic KYC Updates:*** Changes to Paragraph 38 introduce the term 'periodic updation' for clarity on KYC updates.
4. ***KYC Data Upload and Sharing:*** Paragraph 56 has been revised to ensure that all KYC records are uploaded to the Central KYC Records Registry (**'CKYCR'**) and updated as necessary, with mandatory reporting of changes within seven days.
5. ***KYC Identifier:*** Paragraph 56(j) stipulates that REs must use the KYC Identifier to retrieve KYC records from CKYCR without requiring customers to resubmit KYC documents unless specified conditions are met.
6. ***UAPA Changes:*** Annex II reflects the change in the designation of the Central Nodal Officer for UAPA implementation from 'Additional Secretary' to 'Joint Secretary.'

Sovereign Green Bonds designated for non-resident investment under 'Fully Accessible Route'

The Reserve Bank of India *vide* Circular No. RBI/2024-25/88, FMRD.FMD.No.06/14.01.006/2024-25, dated 7 November 2024, has designated Sovereign Green Bonds with a 10-year tenor to be issued by the Government in the second half of the fiscal year

2024-25 as 'specified securities' under the Fully Accessible Route (**'FAR'**). The same has been done in lieu of the issuance calendar for marketable dated securities for October 2024 - March 2025, announced on 26 September 2024.

The FAR, introduced by the RBI through A.P. (DIR Series) Circular No. 25 dated 30 March 2020, allows certain Government securities to be fully accessible to non-resident investors without restrictions, in addition to being available to domestic investors. The Sovereign Green Bonds issued in H2-FY 2024-25 will now be included under this route.

Reporting of Foreign Exchange Transactions to Trade Repository

The Reserve Bank of India *vide* Circular No. RBI/2024-25/89, FMRD.MIOD.07/02.05.002/2024-25, dated 8 November 2024, has expanded the reporting requirements for foreign exchange transactions to the Trade Repository ('**TR**') of Clearing Corporation of India Ltd., effective 10 February 2025. Under this update, Authorised Dealers ('**ADs**') will now be required to report inter-bank foreign exchange contracts ('**FX contracts**'), including foreign exchange cash, tom, and spot deals, to the TR in a phased manner. For inter-bank contracts involving INR, ADs must report transactions in hourly batches within 30 minutes of completion. Non-INR inter-bank contracts executed before 5 p.m. must be reported by 5:30 p.m., with those executed post 5 p.m. due by 10 a.m. the next day.

Additionally, ADs must report FX contracts with clients meeting the following thresholds: Contracts of USD 1 million or more by 12 May 2025, and Contracts of USD 50,000/- or more by 10 November 2025, with reports due by noon on the next business day. All ADs are responsible for ensuring the accuracy of reported transactions and reconciling balances between their books and the TR.

Reclassification of FPI investment into FDI – Procedure amended by SEBI and RBI

The Securities and Exchange Board of India *vide* Circular No. SEBI/HO/AFD/AFD-POD-3/P/CIR/2024/152, dated 11 November 2024, has modified the procedure specified under Para 17 of Part C of the Master Circular for Foreign Portfolio Investors, Designated Depository Participants and Eligible Foreign Investors, bearing Circular No. SEBI/HO/AFD/AFD-PoD-2/P/CIR/P/2024/70 dated 30 May 2024.

The amendment made to Para 17 as mentioned above, now specifies the process for reclassifying FPI investments when they exceed 10% of a company's total equity. Under Regulations 20(7) and 22(3) of the SEBI (Foreign Portfolio Investor) Regulations, 2019, if a Foreign Portfolio Investor (‘**FPI**’) does not divest its holdings above the prescribed threshold within five trading days, the investment will be deemed as Foreign Direct Investment (‘**FDI**’). All FPIs seeking to reclassify their investments are expected to adhere to applicable FEMA Rules and circulars. The respective Custodian shall be tasked with notifying the intent to SEBI and halting any further purchases until the said reclassification is completed. The amendment has come into force with immediate effect, post the issuing of this Circular.

Further, the Reserve Bank of India *vide* Circular No. RBI/2024-25/90, A.P. (DIR Series) Circular No. 19, dated 11 November 2024, has also notified the reclassification of Foreign Portfolio Investment to Foreign Direct Investment, effective immediately. According to Schedule II of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, FPI investments should not exceed 10% of a company’s total paid-up equity capital on a fully diluted basis. In cases where this limit is breached, FPIs may either divest their holdings and if not, opt for reclassification from FPI to FDI within five trading days of settlement.

The reclassification option is available under specific conditions:

1. The FPI must seek necessary government approvals, including compliance with sectoral caps and conditions for FDI.
2. The Indian investee company must consent to the reclassification and ensure adherence to FDI regulations.
3. Reclassification will be reported through Forms FC-GPR (for fresh issuances) and FC-TRS (for secondary market acquisitions), and AD Category-I banks will report the reclassified investment under the LEC (FII) reporting.

Once reclassification is complete, the FPI’s investment will be treated as FDI, subject to FDI regulations, and can continue to be considered FDI even if it falls below the 10% threshold. All AD banks have been instructed to facilitate the reporting and processing of these transactions.

Simplified registration process introduced for Foreign Portfolio Investors

The Securities and Exchange Board of India (‘**SEBI**’) *vide* Circular No. SEBI/HO/AFD/AFD-PoD-3/P/CIR/2024/156, dated 12 November 2024, introduced a more clear-cut registration process for Foreign Portfolio Investors (‘**FPIs**’).

A Master Circular issued by SEBI, dated 30 May 2024, requires all FPI applicants to submit a duly signed Common Application

Form ('**CAF**') along with the necessary supporting documents for registration. However, for certain FPI applicants, including funds with an Investment Manager or sub-funds already registered as FPIs, the relevant details are already captured in the depository's CAF module. These applicants may now choose to complete an abridged version of the CAF, filling only the fields specific to them, thereby minimizing duplication and streamlining the process. The remaining fields shall either be auto-populated or disabled, with the applicant's explicit consent confirming the accuracy of all unchanged information. All Designated Depository Participants ('**DDP**') are responsible for updating the CAF details accordingly and ensuring that the CAF module reflects complete and accurate information. The implementation standards for these changes will be developed by the Custodians and DDP Standards Setting Forum in consultation with SEBI. This Circular will come into effect three months from the date of issuance mentioned above.

Master Circular for Credit Rating Agencies amended

The Securities and Exchange Board of India *vide* Circular No. SEBI/HO/DDHS/DDHS-PoD-3/P/CIR/2024/160, dated 18 November 2024 has introduced amendments to Para 15 of Master Circular for Credit Rating Agencies ('**CRAs**') dated 16 May 2024. The following changes have been discussed and brought about, according to the current scenario:

1. ***Reiteration of the definition of default:*** Under Annexure 11 of the SEBI Master Circular, any delay of one day or a shortfall of even one rupee in repayment is considered a default, with no exemptions except for rescheduled debt prior to the payment due date. This requirement has been reiterated and remains unchanged since the notification of the SEBI (Credit Rating Agencies) Regulations, 1999
2. ***Duration of Post-Default Curing Period***: Following the COVID-19 pandemic, CRAs may upgrade a default rating to non-investment grade after 90 days of regularized payments, based on satisfactory performance. CRAs may deviate from this period, with deviations subject to internal policy and board approval.
3. ***Technical Defaults:*** Technical defaults caused by factors like incorrect information or account freezes, must be verified by CRAs, including the availability of funds and payment reasons. Payments must be placed in an escrow account. Accordingly, 'Technical default' is removed from Para 15.3, which now includes changes like management shifts, acquisitions, or significant fund inflows that alter the issuer's credit risk.

4. ***Dissemination of Default Information:*** CRAs must report default details (security name, ISIN, payment amounts, failure reasons) to Stock Exchanges, Depositories, and Debenture Trustees on the same day as the rating release, to curb non-payment of debt (principal and/ or interest) which may arise due to reasons beyond the control of the issuer and ensure verification of the availability of adequate funds with the issuer.

5. ***Penny-Drop Verification:*** CRAs should encourage issuers to use penny-drop verification to prevent payment failures.

Ratio Decidendi

- Property of Personal Guarantors cannot be sold under SARFAESI Act during interim moratorium period under IBC Section 96 – *NCLT Mumbai*
- Exercising unilateral control over the selection of Arbitrators violates the principles of impartiality and fairness – *Supreme Court*
- Application for extension of time under Section 29A(4) of Arbitration Act can be filed even after expiry of period for making arbitral award – *Supreme Court*
- Employment law – Time served on duty is immaterial if the appointment is not as per law – *Patna High Court*
- Sale of corporate debtor as a going concern under IBC liquidation regulations takes precedence over scheme of compromise or arrangement under Section 230 of Companies Act, 2013 – *NCLAT Chennai*

Property of Personal Guarantors cannot be sold under SARFAESI Act during interim moratorium period under IBC Section 96

The National Company Law Tribunal (NCLT / Tribunal) ruled that any sale of properties conducted under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (‘**SARFAESI Act**’) is invalid if it occurs during the interim moratorium as outlined in Section 96 of the Insolvency and Bankruptcy Code, 2016 (‘**IBC**’). The Tribunal emphasised that the provisions of the IBC override the SARFAESI Act.

In the present case, State Bank of India, a Financial Creditor, extended credit facilities to M/s Deogiri Infrastructure Private Limited (‘**Corporate Debtor**’) secured by a personal guarantee given by the Applicant, Raghavendra Joshi, and his wife. Following defaults in repayment, the loan account was classified as a Non-Performing Asset on 30 October 2018. Subsequently, the Financial Creditor issued a demand notice under Section 13(2) of the SARFAESI Act and took symbolic possession of the Applicant's property on 8 January 2019. On 26 April 2022, the Financial Creditor filed a petition under Section 95 of the IBC to initiate insolvency resolution against the Applicant. With the filing of the petition, the interim moratorium under Section 96 of the IBC came into effect.

Despite the commencement of the interim moratorium under Section 96 of the IBC, the Financial Creditor conducted an e-auction of the Applicant’s property on May 10, 2022, and issued a sale certificate on May 31, 2022, under the provisions of SARFAESI Act. The Applicant challenged the auction before the NCLT, contending that the Financial Creditor violated the interim moratorium and placed reliance on judicial precedents affirming the precedence of IBC over the SARFAESI Act. The Applicant also emphasized that the interim moratorium safeguards both the debtor and their assets to preserve insolvency value. The Financial Creditor contended that the auction was valid because symbolic possession was taken before the moratorium. It was further contended that NCLT lacked jurisdiction and that the disputes under SARFAESI should be heard by the DRT.

NCLT held that it has jurisdiction under Section 60(5) of the IBC to adjudicate matters related to the insolvency resolution of personal guarantors, as the Corporate Debtor’s insolvency resolution was already pending before the same forum. The Tribunal noted that Section 96 establishes a broad interim moratorium that applies to all debts of the personal guarantor and halts all legal proceedings, including the enforcement of security interests under SARFAESI Act. The Tribunal also reiterated that the IBC is a comprehensive code and has an overriding effect under Section 238 of the IBC.

NCLT concluded that the sale of the Applicant's property violated Section 96 of IBC, as the interim moratorium had commenced on 26 April 2022, before the auction was conducted on 10 May 2022. Accordingly, the sale of properties conducted under the SARFAESI Act was held invalid.

[*Raghavendra Joshi* v. *Indian Bank and Anr.* – Order dated 13 November 2024 in Interlocutory Application (I.A) No. 2247/2023 in Company Petition (C.P) NO. 575(IB)/MB/2022, NCLT Bench, Mumbai]

Exercising unilateral control over the selection of Arbitrators violates the principles of impartiality and fairness

A five-judge Bench of the Supreme Court has held that an arbitration clause allowing one party to curate a panel of arbitrators from which the other party selects is against the principle of impartiality and fairness as mandated by the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**').

In the present case, the dispute arose from a contract for railway electrification between the Central Organization for Railway Electrification ('**CORE**') and M/s ECI-SPIC-SMO-MCML (JV) ('**Contractor**'), governed by Clause 64(3)(b) of the Indian Railways General Conditions of Contract. The said clause provided that disputes arising under the contract would be referred to arbitration by a panel appointed and approved by the General Manager of Railways. The panel was composed exclusively of retired railway officers, with the General Manager retaining the authority to appoint the presiding arbitrator. While the Contractor was permitted to nominate two arbitrators from the list provided by CORE, the unilateral control of appointments by CORE effectively undermined the neutrality of the arbitral tribunal.

The Contractor challenged the validity of the arbitration clause, contending that it deprived them of an impartial and balanced tribunal. The Contractor further contended that such clauses violate the foundational principles of fairness and equal treatment of parties, as envisaged under the Arbitration Act.

The Hon'ble Supreme Court, while adjudicating the matter, held that arbitration clauses allowing a single party, particularly a public sector entity such as CORE to unilaterally control the selection of arbitrators are invalid as they undermine the principles of impartiality and equality. The Court specifically struck down Clause 64(3)(b) of the contract, finding it violative of Section 12(5) of the Arbitration Act, which prohibits the appointment of arbitrators having close relationships with one of the parties, and Section 18 of the Arbitration Act, which ensures equal treatment of the parties. The Apex Court also reiterated that while public sector undertakings may empanel arbitrators, the process for appointment must ensure neutrality and impartiality.

[*Central Organization for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)* – Judgement dated 8 November 2024 in Civil Appeal No. 8375 of 2024, Supreme Court]

Application for extension of time under Section 29A(4) of Arbitration Act can be filed even after expiry of period for making arbitral award

The Supreme Court has held that an application for an extension of the time period for passing an arbitral award under Section 29A(4) read with Section 29A(5) of the Arbitration and Conciliation Act, 1996, ('**Arbitration Act**') is maintainable even after the expiry of the twelve-month or the extended six-month period, as the case may be.

The High Court of Calcutta held that the application for extension of time under Section 29A(4) and 29A(5) of the Arbitration Act can only be entertained if filed before the expiry of the arbitral tribunal's mandate and accordingly dismissed the appellant's request for extension.

The aforesaid order was challenged before the Supreme Court, wherein the Apex Court held that an application for an extension of the time period for passing an arbitral award under Section 29A(4) and 29A(5) is maintainable even after the expiry of the twelve-month or the extended six-month period, as the case may be. The Apex Court further held that while adjudicating such extension applications, the Court should rely on the principle of sufficient cause and extension should not be automatically granted upon application. The Supreme Court in this regard also observed that the court granting extension may also impose terms and conditions while granting an extension.

[*Rohan Builders (India) Private Limited* v. *Berger Paints India Limited* – Judgement dated 12 September 2024 in Civil Appeal No. 10620 of 2024, Supreme Court]

Employment law – Time served on duty is immaterial if the appointment is not as per law

The High Court of Patna has held that a candidate's appointment, even after serving for several years, would remain invalid if it was not in accordance with the law. The Court upheld the order of the Single Judge, which denied relief to the Appellant (Head Clerk) who was appointed despite not being on the merit list at the time of appointment.

The Appellant, along with Respondent No. 5, applied for the post of Head Clerk, where the merit list was to be shortlisted and candidates were to be invited for interviews in a 1:10 ratio, as there was only one vacancy. A total of 10 candidates were to be called for the interview. However, despite the Appellant ranking 11th in the merit list, he was allowed to participate in the selection process and was eventually appointed and thereafter he served for five years as the Head Clerk.

In 2014, Respondent No. 5 challenged the Appellant's appointment before a Single Judge Bench, which ruled in favor of Respondent No. 5. Aggrieved by this, the Appellant filed an appeal before the Division Bench.

The Appellant contended that, according to Clause-2 of the Advertisement dated 19 May 2012, the Appellant was entitled to the position since he was already working with the Department. It was further contended that given the Appellant's five years of service, it would be unjust to dismiss him from his post.

The Court examined whether the Appellant was eligible to be called for an interview for the Head Clerk position and whether he had any legal or statutory right to the post. Upon reviewing the Advertisement, the Court noted that only the top 10 candidates were to be interviewed for the single available post and the Appellant, being ranked 11th, was ineligible for this preference.

Relying on the Supreme Court's judgment in *M.S. Patil (Dr.)* v. *Gulbarga University* [(2010) 10 SCC 63], the Court held that while the Appellant had served as Head Clerk for five years, his appointment was still unlawful because his appointment was not in accordance with the law.

[*Amit Shrivastava* v. *State of Bihar & Ors.* – Judgement dated 25 October 2024 in Civil Writ Jurisdiction Case No.9550 of 2014, Patna High Court]

Sale of corporate debtor as a going concern under IBC liquidation regulations takes precedence over scheme of compromise or arrangement under Section 230 of Companies Act, 2013

The Hon'ble National Company Law Appellate Tribunal has determined that the sale of a Corporate Debtor as a going concern, in accordance with Regulations 32(e) and 32A of the Insolvency and Bankruptcy Board of India (IBBI) Liquidation Process Regulations, 2016, takes precedence over a Scheme of

Compromise or Arrangement under Section 230 of the Companies Act, 2013 (‘**Companies Act**’).

The NCLAT emphasized that the process outlined in the Insolvency and Bankruptcy Code, 2016 (‘**IBC**’) is designed to be more efficient and transparent, particularly when a sale is conducted in compliance with the IBC’s liquidation framework. Therefore, a scheme under Section 230 of the Companies Act should not override the established procedures under the IBC, especially when a sale has already been concluded.

In the given case, M/s Kamachi Industries Limited (‘**Corporate Debtor**’), entered the Corporate Insolvency Resolution Process following a default on its debt. After several unsuccessful Resolution Plans, the Committee of Creditors voted for liquidation. Consequently, on 9 December 2022, the National Company Law Tribunal ordered the liquidation.

On 16 October 2023, the Liquidator issued a public announcement for the sale of the Corporate Debtor as a going concern. An e-auction took place on 31 January 2024, where Mr. Virendra Jain and Mr. Ankit Jain emerged as the highest bidders and were issued a Letter of Intent. At the same time, a Scheme of Arrangement proposed by a minority shareholder (‘**Appellant**’) was rejected by the Stakeholders Consultation Committee (‘**SCC**’) due to its inadequate value and lack of clarity regarding its funding sources (‘**Scheme**’)

The Appellant filed two appeals before the NCLAT, challenging the rejection of the Scheme and seeking to annul the e-auction process. The Appellant contended that its Scheme should have been prioritized under Section 230 of the Companies Act, 2013 and claimed that the auction process was flawed. However, the NCLAT upheld the NCLT’s decision, stating that the SCC had thoroughly considered the Scheme and rejected it based on its merits.

The NCLAT also observed that the e-auction was conducted in compliance with legal requirements. The Successful Bidder’s offer of INR 487 crore surpassed the reserve price, ensuring that the sale was valid and consistent with the goals of IBC. NCLAT determined that the sale process, aimed at preserving the Corporate Debtor’s operations and maximizing its value, took precedence over the Appellant's proposed Scheme, which was rightly rejected by the Liquidator and the SCC.

[*Narottamka Trade & Vyapaar Pvt. Ltd.* v. *SPP Insolvency Professionals LLP and Anr.* – Judgement dated 14 November 2024 in Company Appeal (AT) (CH) (Ins) No.305/2024 and IA No. 817/2024, NCLAT Bench, Chennai]

News Nuggets

- No NOC required for release of 1% security deposit made with stock exchanges
- Social media giant imposed a penalty of INR 213 crore by Competition Commission
- 45 days shelf life mandatory for food products sold via e-commerce
- SEBI mulls expanding the ambit of unpublished price sensitive information
- eShram portal introduced for the unorganised workers
- Adani Energy issued a notice by SEBI for wrongful categorisation of investors

No NOC required for release of 1% security deposit made with stock exchanges

The Securities and Exchange Board of India has eliminated the requirement for entities to submit a No-Objection Certificate (‘**NOC**’) for the release of the 1 per cent security deposit made with the stock exchanges as a refundable security deposit under the listing process. Notably, the requirement of making the security deposit was done away with by an amendment to SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 on 17 May 2024. Now, SEBI has also clarified that the listed entities need not furnish any NOCs to release the said deposits and directed the stock exchanges to introduce joint standard operating procedures for processing pending refunds of deposits made under the previous framework.

[*Source*: CNBC TV18, published on 21 November 2024]

Social media giant imposed a penalty of INR 213 crore by Competition Commission

The Competition Commission of India has imposed a penalty of INR 213.14 crore on Meta Platforms (‘**Meta**’) for its anti-competitive practices linked to WhatsApp’s 2021 privacy policy update. Further, CCI has also prohibited Meta owned WhatsApp from sharing user data collected on its platform with other Meta entities or products for advertising purposes for a period of five years. Notably, the WhatsApp Privacy Policy 2021 required users to accept the revised terms, which included an expanded scope of data collection and mandatory data sharing with Meta entities, to continue using the platform creating a ‘take it or leave it’ situation for the users thereby triggering ‘abuse of dominant position’ in the market.

[*Source*: Digit, published on 19 November 2024]

45 days shelf life mandatory for food products sold via e-commerce

The Food Safety and Standards Authority of India (‘**FSSAI**’) has recently directed the e-commerce food business operators to mandatorily adhere to the expiry regulations i.e., provide a minimum shelf life of 30 per cent or 45 days before expiry at the time of delivery to the consumer. Further, FSSAI also emphasised that the expiry date or best-before date must be clearly visible on the packaging of the food product sold through the online platforms by the food business operators.

[*Source*: Business Line, published on 12 November 2024]

SEBI mulls expanding the ambit of unpublished price sensitive information

The Securities and Exchange Board of India has proposed in its recent consultation paper, to widen the scope of the definition of 'Unpublished Price Sensitive Information' (**UPSI**). Accordingly, SEBI may consider expanding the ambit of UPSI to include restructuring plans, proposed fundraising activities, one-time bank settlements, agreements that would impact the management and control of the listed entity, fraud or defaults by a listed entity, its promoters, directors and senior management, actions initiated, or orders passed by any regulatory authority, etc. In the said regard, SEBI has also sought comments from the public on the consultation paper.

[*Source*: Business Line, published on 11 November 2024]

eShram portal introduced for the unorganised workers

The Ministry of Labour & Employment unveiled the 'eShram – One Stop Solution' portal for unorganised workers. The said initiative aims at providing seamless access to various social security schemes such as One Nation One Ration Card, National Social Assistance Programme, National Career Service, etc.

[*Source*: The Print, published on 21 October 2024]

Adani Energy issued a notice by SEBI for wrongful categorisation of investors

The Securities and Exchange Board of India (**SEBI**) has issued a show cause notice to Adani Energy Solutions Limited for the alleged wrongful categorisation of certain investors as public shareholders by the entity. Notably, the SEBI regulations require that the listed entities have at least 25 per cent of their equity owned by public investors and, foreign portfolio investors associated with the promoter group, in most cases are considered a part of the promoter holding.

[*Source*: Business Today, published on 23 October 2024]

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