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## Contents



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Article

# Electronic execution of contracts in the time of pandemic COVID-19

*By* **Kumar Panda**

### *Introduction:*

The novel Corona virus (COVID-19) is creating chaos in all industries across the world. Due to this crisis, execution of contracts has posed a challenge. This raises a question about the electronic execution of contracts and their legal enforceability. It may be noted that technology has changed drastically over the past two decades including the way the contracts are created and executed by electronic means.

### *Governing laws of contracts in India:*

Indian Contract Act, 1872 ("**Contract Act**") is one of the oldest laws that governs contracts, oral or written. It was not enacted keeping in mind the advent of internet and its technological advancements. Section 10 of the Contract Act describes the essential elements of a valid contract *viz.*, parties must be competent to contract with their free consent (and not under any undue influence, coercion or misrepresentation), for a lawful consideration and with a lawful object.

The Information Technology Act, 2000 ("**IT Act**") recognizes the electronic contracts. Pursuant to Section 4 of the IT Act, if any law mandates information in writing or in the typewritten or printed form, then, such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible so as to be usable for a subsequent reference.

As per the IT Act, an electronic form means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device and an electronic record is defined as data, record, or data generated, image, sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

Indian Evidence Act, 1860 considered the electronic records and recognized them as a documentary evidence. On a bare reading of Section 4 of IT Act and the definitions of the terms electronic form, electronic data, we may understand that electronic records are treated on par with the physical records.

We now need to understand the modes of execution of electronic records. The primary use of a document execution is that the executed documents are a primary evidence under the law. Section 5 of the IT Act provides legal recognition to electronic signature. Authentication of documents under the IT Act can be done by using electronic signatures which includes digital signatures as specified under Section 3 of the IT Act or electronic signatures as prescribed under Section 3A of the IT Act.

The Central Government under Section 3A has prescribed Aadhaar based e-authentication of documents. Documents authenticated by electronic signatures as per the procedure laid down under the IT Act are secure electronic records under Section 14 and 15 of the IT Act i.e., they are deemed to be executed by the

concerned party, unless contrary is proved. However, the contracting parties must be mindful of the requirements for electronic signatures as provided under IT Act.

Under the terms of Section 10A of IT Act, proposals, acceptance of proposals, the revocation of proposals and acceptances can be made through an electronic means. Therefore, communication of acceptance through emails can be a valid and binding contract provided the requirements under Chapter I of the Contract Act, are complied with. Chapter – I deals with communication, acceptance, revocation of proposals, promises express and implied. Therefore, where execution of documents physically or by electronically is not possible, the parties may send offer and acceptance by exchange of emails. The Supreme Court in *Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd*., *India* [2010 2 SCC 1]**,** has upheld the aforesaid and recognized offer and acceptance through e-mails as valid contract in absence of a formal contract.

The Madras High Court in *Tamil Nadu Organic Private Ltd v. State Bank of India,* [AIR 2014 Mad 103], noted that "*contractual liabilities could arise by way of electronic means and that such contracts could be enforced through law*." In the said case, the Court was dealing with the validity of e-auction sale process under the SARFAESI Act.

However, the inherent risk in e-mail communications is that they are not recognized as secure electronic records and are not authenticated documents as per the provisions of the IT Act and the parties can deny the existence of an email in the event of dispute. Therefore, as a precautionary measure, parties must record the special circumstances and intention to enter a binding contractual relationship through emails and a formal contract at a later stage once the things return to normalcy.

Apart from creating binding relation through electronic execution or through e-mail communication, the method includes: 'Click-wrap Agreements', 'Shrink-wrap Agreements' and 'Browse-wrap Agreements'. Click-wrap agreements are commonly used in software licences, social media terms of use, banking services and e-commerce portals which mandate users to accept the terms by clicking on a box or icon titled "I Agree". Shrink-wrap agreements are terms that come bundled with any product and using the product is deemed as acceptance of the terms of the contract. Browse-wrap agreements do not mandate any specific user action and by simply browsing the website/portal it is deemed as acceptance of the terms.

In such contracts, one party typically has no power to negotiate and the Courts in India have often viewed them as unconscionable. While it is no doubt that offer, acceptance, communication in relation to such contracts can satisfy the requirements of valid contract under the Contract Act, the enforceability is a question as they are not given equal status with electronic signatures under the IT Act. While there is a considerable jurisprudence on validity of Shrink-wrap, Browse-wrap and Click-wrap contracts in foreign jurisdictions, the Courts in India have not extensively dealt with the question of validity/enforceability of such contracts.

The Income Tax Appellate Tribunal, Mumbai in *DDDIT (IT) 3(1), Mumbai v. Gujrat Pipavav Port Ltd, Mumbai, vide* Order dated 10-02-2017 has discussed the validity of Shrink-wrap agreement as follows:

> "Suppose, in case of a company a product is purchased by the staff of the company, for its use in regular course of work or business of the company and an employee of the company while installing the software on the computer in the office of the company clicks the button or the icon 'I agree' and thereafter

such an employee or any other employee of the company violates any condition of the license agreement, ***can such license agreement be enforced against the company or the Directors of the company can be held liable for any such infringement, especially when they are not signatories to such an agreement and nor they have authorized any employee of the company to sign any agreement on behalf of the company and even no name of the company is even written in such type of agreement and even it is also not known as to who actually clicked the button 'I agree'. Under these circumstances, the enforceability of such a license is highly doubtful***."

(Emphasis Supplied)

The Tribunal further held as follows:

"So far as the legal enforceability of such Licence Agreements is concerned, in spite of the fact that it may fulfill all the requirements of a valid contract, such an agreement may not be enforceable, if, its stipulations conflict ***with the law governed in the country where such licenses are intended to be enforced, or if it is an unconscionable or unreasonable bargain***."

(Emphasis Supplied)

Therefore, it may be concluded that enforceability of Shrink-wrap, Browse-wrap, and Click-wrap Agreement may pose a considerable question of validity/enforceability before Courts in India.

### *Not all documents can be authenticated electronically:*

Sub-section (4) of Section 1 of the IT Act states that, nothing in the IT Act is applicable to documents specified under Schedule-I. The documents specified under Schedule-I are as follows:

1) A negotiable instrument (other than a cheque) a defined in Section 13 of the Negotiable Instruments Act, 1881
2) A power of attorney as defined in Section 1A of the Power of Attorney Act, 1882
3) A trust deed as defined under Section 3 of Indian Trusts Act, 1882
4) A Will as defined under Indian Succession Act, 1925 and includes any other testamentary deposition.
5) Any contract for the sale or conveyance of immovable property or any interest in such property.

Therefore, the above documents though executed electronically as per the procedure laid down under IT Act, cannot be considered as validly executed under the provisions of IT Act. We may however note that in *Tamil Nadu Organic* case (supra), the Court held that prohibition under Section 1(4), read with item 5 of the First Schedule of the IT Act, would not apply to the e-auction sale process followed by the respondent banks therein, as the conclusion of the contracts, in respect of the properties brought for sale and the conveyance of the interests therein are done manually.

### *Stamp Duty:*

Except the exemptions stated under Schedule-I, all other documents can be executed electronically. Several States have over the period of time included electronic records with in the definition of instruments chargeable to stamp duty. Further, we may note that stamp duty enactments generally state that an instrument is chargeable to stamp duty upon execution. Execution with reference to instruments, mean "signed" and "signature". Therefore, it can be safely concluded that the documents authenticated with electronic signatures following

the procedure prescribed under IT Act are validly executed and are liable to payment of stamp duty.

***Conclusion:***

As held by the Courts in catena of judgements, e-contracts are valid and enforceable under the laws of India. India has been and will be witnessing a surge in the execution of contracts electronically. Now, due to COVID-19, execution of contracts electronically has become inevitable. Considering the ease of execution coupled with the enforceability, there is an increased recognition for these forms of execution. However, parties must carefully analyse other implications such as payment of stamp duty, etc. Further, it is also necessary to deal with notarization of e-contracts. E-notarization has not been recognized in India so far. Therefore, e-notarization of e-contracts needs frame work from the appropriate authorities.

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# Notifications

**Name reservation and re-submission for companies and LLPs – Time limit extended:** The Ministry of Corporate Affairs (MCA) *vide* its Notification dated April 22, 2020 has relaxed various timelines in relation to name reservation and re-submission (of form) for companies and LLPs in the backdrop of COVID-19. The relaxations are as follows:

| Sl. No | Issue description | Extension Details |
|---|---|---|
| 1. | Names reserved for 20 days for new company incorporation. SPICe+ Part B needs to be filed within 20 days of name reservation. | Names expiring any day between March 15, 2020 to May 17, 2020 would be extended by 20 days beyond May 17, 2020. |
| 2. | Names reserved for 60 days for change of name of company. INC-24 needs to be filed within 60 days of name reservation. | Names expiring any day between March 15, 2020 to May 17, 2020 would be extended by 60 days beyond May 17, 2020. |
| 3. | Extension of RSUB (Resubmission) validity for Companies and LLPs | SRNs where last date of RSUB falls between March 15, 2020 to May 17, 2020, additional 15 days beyond May 17, 2020 would be |

| Sl. No | Issue description | Extension Details |
|---|---|---|
| | | allowed. However, for SRNs already marked under "Not to be taken on Record" (NTBR), extension would be provided on case to case basis. |
| 4. | Names reserved for 90 days for new<br>LLP incorporation/change of name.<br>FiLLiP/Form 5 needs to be filed within<br>90 days of name reservation. | Names expiring any day between March 15, 2020 to May 17, 2020 would be extended by 20 days beyond May 17, 2020. |

**Annual General Meeting (AGM) by Companies whose financial year ended on December 31, 2019 can be held by September 30, 2020:** The Companies Act, 2013 ("**CA 2013**") allows a company to hold its AGM within a period of six months (nine months in case of first AGM) from the closure of the financial year and not later than a period of 15 months from the date of last AGM. In the backdrop of lockdown imposed due to COVID-19, the MCA *vide* General Circular 18/2020 dated April 21, 2020 has clarified that the companies whose financial year (other than first financial year) has ended on December 31, 2019 can hold their AGM for such financial year within a period of nine months from the closure of the financial year (i.e. by September 30, 2020) and the same shall not be viewed as a violation of the provisions of CA, 2013.

Consequently, SEBI *vide* Circular dated April 23, 2020 has relaxed the requirement under Regulation 44(5) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('LODR Regulations') and permitted top 100 listed entities by market capitalization, whose financial year ended on December 31, 2019 to hold their AGM within a period of nine months from the closure of the financial year (i.e., by September 30, 2020). The time period was otherwise five months from the date of closing of the financial year.

**COVID-19 Regulatory Package – Review of Resolution Timelines under the Prudential Framework on Resolution of Stressed Assets:** Under the Prudential Framework on Resolution of Stressed Assets dated June 7, 2019 ('**Prudential Framework'**), lenders are required to undertake a *prima facie* review of the borrower account within thirty days from default ("**Review Period**") and implement a resolution plan in respect of such entities within 180 days from the end of Review Period.

The Reserve Bank of India, *vide* a Circular dated April 17, 2020, has decided that in respect of accounts which were within the Review Period as on March 1, 2020, the period from March 1, 2020 to May 31, 2020 shall be excluded from the calculation of the 30-day timeline for the Review Period. In respect of all such accounts, the residual Review Period shall resume from June 1, 2020, upon expiry of which the lenders shall have the usual 180 days for resolution. Similarly, in respect of accounts where the 180-day resolution period had not expired as on March 1, 2020, the timeline for resolution shall get

extended by 90 days from the date on which the 180-day period was originally set to expire.

**FDI from neighboring countries - Foreign Exchange Management (Non-debt Instruments) Rules amended:** The Government of India *vide* S.O. 1278 (E) dated April 22, 2020 has amended the existing FDI Policy [Schedule – I to Foreign Exchange Management (Non-Debt Instruments) Rules, 2019] to prohibit foreign direct investments into India under the automatic route from the countries bordering India by land. Accordingly, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route. The restriction is also applicable on transfer of existing or future FDI, resulting in beneficial ownership falling within the restriction.

**Acquisition of equity after renunciation of rights - Foreign Exchange Management (Non-debt Instruments) Rules amended:** The Government of India *vide* S.O. 1374(E) dated April 27, 2020 has inserted Rule 7A to the FEMA (Non-debt Instrument) Rules, 2019 ("**NDI Rules**"). Under the extant provisions, a resident Indian could renounce rights (in a rights issue) in favour of non-resident and pricing guidelines were not applicable to such acquisition of rights by non-resident investor. Now, pursuant to Rule 7A a person resident outside India who has acquired a right from a person resident in India who has renounced, may acquire equity instruments (other than share warrants) against the said rights only as per pricing guidelines specified under Rule 21 of NDI Rules.

Under the extant provisions, sourcing norms were not applicable up to three years from opening of first store by entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible. It has now been clarified that sourcing norms shall not be applicable up to three years from commencement of the business, i.e., opening of the first store or *start of online retail*, *whichever is earlier*.

Further, Intermediaries or insurance intermediaries including insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrators, Surveyors and Loss Assessors and such other entities, as may be notified by the IRDAI from time to time, are now eligible to receive 100% FDI under the automatic route.

**COVID-19 - Meetings (AGMs and EGMs) through Video Conferencing or Audio-Visual Means:** Considering the unprecedented circumstances, MCA has issued a clarification (General Circular No.14/2020 dated April 8, 2020) and has relaxed certain norms applicable to conduct of general meetings. As per the Circular, Companies have been allowed to conduct Extra-ordinary General Meeting (**EGM**) through these relaxed norms. In case of holding EGM by a company (which is not required to provide the facility of e-voting under the CA, 2013) before June 30, 2020, the following procedure must be followed:

a. The notice for the general meeting shall make disclosures with regard to the manner in which framework provided under the Circular No.14/2020 shall be available for use by the members and also contain clear instructions on how to access and participate in the meeting. A copy of the notice shall also be prominently displayed on the website of the company.
b. EGM conducted through Video Conferencing ("VC") or Other Audio Visual Means ("OAVM") shall be recorded and kept under safe custody. Convenience of

different persons positioned in different time zones shall be kept in mind before scheduling the meeting.

c. All care must be taken to ensure that such meeting through VC or OAVM facility allows two way teleconferencing or webex for the ease of participation of the members and posing questions. Participants may also submit questions in advance on the e-mail address of the company.
d. The facility for joining the meeting shall be kept open at least 15 minutes before the time scheduled to start the meeting and shall not be closed till the expiry of 15 minutes after such scheduled time.
e. Attendance of members through VC or OAVM shall be counted for the purpose of reckoning the quorum under Section 103 of the Act.
f. The facility of appointment of proxies by members will not be available for meetings through VC or OAVM. However, in pursuance of Section 112 and Section 113 of the Act, representatives of the members may be appointed.
g. Unless the articles of the company require any specific person to be appointed as a Chairman for the meeting, the Chairman for the meeting shall be appointed in the following manner:
    a. where there are less than 50 members present at the meeting. the Chairman shall be appointed in accordance with Section 104.
    b. In all other cases, the Chairman shall be appointed by a poll as prescribed under point (i) hereinbelow
h. At least, one independent director (where company is required to appoint) and the auditor or his authorized representative shall attend such meeting through VC or OAVM.
i. Where less than 50 members are present in a meeting, the Chairman may decide to conduct a vote by show of hands, unless a demand for poll is made by any member in accordance with Section 109 of the Act. In case of a poll, the company shall provide a designated email address to all members at the time of sending the notice of meeting so that the members can convey their vote, when a poll is required to be taken during the meeting on any resolution, at such designated email address.
j. All resolutions passed at such EGM are required to be filed with the Registrar of Companies within 60 days of the meeting, clearly indicating compliance with the provisions of the Circular and the CA, 2013.

A similar procedure is prescribed for entities that are required to have e-voting facility under CA, 2013 or have opted for e-voting facility. It may be noted that MCA *vide* General Circular 20/2020 dated May 05, 2020 has also permitted companies to conduct their annual general meetings through VC or OAVM, during the calendar year 2020 following the similar procedure as stated under General Circular 14/2020.

**Rights issue – Relaxations from certain provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018:** SEBI, *vide* Circular dated April 21, 2020 has temporarily relaxed certain provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 in respect of rights issue that open on or before March 31, 2021. The minimum subscription to be received in the issue is revised to 75% of the offer from the earlier requirement of 90%. The minimum threshold required for not filing draft letter of offer with SEBI is revised to ten crores, which was 'twenty-five crores' earlier.

Key relaxations offered for fast track rights issue are as follows:

| Sl. No | Existing Condition | Relaxed Requirement |
|---|---|---|
| 1. | The equity shares of the issuer have been listed on any stock exchange for a period of at least three years immediately preceding the reference date | Three years shall be read as 'eighteen months' |
| 2. | The average market capitalisation of public shareholding of the issuer is at least two hundred and fifty crore rupees | The words 'two hundred and fifty crores' shall be read as 'one hundred crores' |
| 3. | The issuer has been in compliance with the equity listing agreement or the SEBI (LODR) Regulations, 2015, as applicable, for a period of at least three years immediately preceding the reference date | The words 'three years' shall be read as 'eighteen months' |
| 4. | The issuer or promoter or promoter group or director of the issuer has not settled any alleged violation of securities laws through the consent or settlement mechanism with the Board during three years immediately preceding the reference date. | The issuer or promoter or promoter group or director of the issuer has fulfilled the settlement terms or adhered to directions of the settlement order(s) in cases of any alleged violation . |
| 5. | The equity shares of the issuer have not been suspended from trading as a disciplinary measure during last three years immediately preceding the reference date | The words 'three years' shall be read as 'eighteen months' |

**Export of goods and services – Realisation and repatriation of export proceeds – Relaxation:** The Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 requires an exporter to realise and repatriate the full export value of goods/ software/ services exported within nine months. Further, RBI is empowered to specify timelines, in consultation with the Government, from time to time. Accordingly, RBI had issued A. P. (DIR Series) Circular No. 27 dated April 1, 2020 pursuant to which the time period for realisation and repatriation of the export proceeds to India for the goods/ software/ services exported was increased from 9 (nine) months to 15 (fifteen) months from the date of export, for the exports made up to or on July 31, 2020.

**Mutual Funds - Relaxation in compliance with the requirements:** SEBI, *vide* Circular dated April 30, 2020 had deferred the implementation of certain policy initiatives as follows:

| Sl. No | Circular Name | Particulars | Extended Date |
|---|---|---|---|
| 1. | Risk management framework for liquid and overnight funds and norms governing | Liquid funds shall hold at least 20% of its net assets in liquid assets. | June 30, 2020 |

| Sl. No | Circular Name | Particulars | Extended Date |
|---|---|---|---|
| | investment in short term deposits dated September 20, 2019 | | |
| 2. | Review of investment norms for mutual funds for investment in Debt and Money Market Instruments dated October 1, 2019 | Existing open ended mutual fund schemes shall comply with the revised limits for sector exposure. | |
| 3. | Valuation of money market and debt securities dated September 24, 2019 | Amortization based valuation shall be dispensed with and irrespective of residual maturity, all money market and debt securities shall be valued in terms of paragraph 1.1.2.2 of the Circular | |

Similarly, the timelines for submission of cyber security audit reports as mandated in SEBI Circular dated January 10, 2019 has been extended by two months, i.e., till August 31, 2020. The timelines for filing annual reports for the year 2019-20 has been extended by one month, i.e., till August 31, 2020.

## Ratio Decidendi

### COVID-19 is a force majeure event justifying injunction on invocation of bank guarantees

The Delhi High Court has held that the ongoing COVID-19 situation amounts to a *force majeure event* justifying injunction against invocation of bank guarantees.

*Brief Facts:*

A contract was executed, between the petitioner and respondent No. 1 for integrated development of the three blocks. In terms of the said contract, various performance and advance bank guarantees were furnished by the petitioner. The due date for completion of the project was March

31, 2020. Owing to a complete lockdown, consequent to the COVID-19 pandemic, the petitioner was unavoidably handicapped in performing the contract. There were allegations, and counter-allegations, made by the petitioner, and the respondent, against each other, which were, *prima facie*, arbitrable in accordance with the provision for arbitration in the contract. With apprehension that the respondent would terminate the contract and encash bank guarantees, the petitioner preferred present petition under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim restraint, against respondent No. 1, from invoking/ encashing various bank guarantees (collectively referred to as "**Guarantees**").

*Submissions by Petitioners:*

a) It was submitted, that performance of the contract required travel of persons from overseas, as well as workmen from various parts of the country. In this scenario and owing to COVID-19, the petitioner invoked the *force majeure* clause in the aforesaid contract and sought the benefit thereof.
b) Relying on *Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Coop. Ltd.* [(2007) 6 SCC 470] and *U. P. State Sugar Corporation v. Sumac International Ltd*. [(1997) 1 SCC 568], it was submitted that in addition to egregious fraud, the existence of special equities is a ground on which the invocation of a bank guarantee can be stayed.

*Submissions by Respondents:*

a) Relying on *U. P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.* [(1988) 1 SCC 174] and *Svenska Handelsbanken v. Indian Charge Chrome* [(1994) 1 SCC 502]**,** it was argued that the only ground on which invocation of a bank guarantee can be stayed, is the existence of egregious fraud.
b) The project was specifically exempted from the lockdown, as imposed by the Government of India, *vide* Circular dated March 26, 2020 and therefore, no case, for grant of any relief to the petitioner, can be said to have been made out.

*Decision:*

a) The Court opined that the submission that judicial interference with invocation, or encashment, of bank guarantees, where they are unconditional, is permissible only in cases of egregious fraud, is not acceptable even on the anvil of the decisions relied on by the respondent 1. It noted that in *U. P. Cooperative Federation Ltd.* case it was held that special equities in the form of preventing irretrievable injustice between the parties is a ground for restraining the operation of bank guarantees.
b) If petroleum were to be treated as an essential commodity, and the activity of production thereof were exempted from the rigour of the lockdown, the petitioner is not engaged, *stricto sensu*, in the production of petroleum, but is, rather, engaged in drilling of the wells, which activity is substantially, if not entirely, impeded as the result of the imposition of the lockdown.
c) *Prima facie*, special equities do exist, to injunct the respondent from invoking the bank guarantees of the petitioner. Therefore, an *ad interim* stay on invocation and encashment of the eight Guarantees was granted.

[*Halliburton Offshore Services Inc* v. *Vedanta Limited & Anr.* – Judgement dated April 20, 2020 in O.M.P. (I) (COMM) & I.A. 3697/2020, Delhi High Court]

## SARFEASI Act is applicable to Cooperative Banks

A constitutional bench of Supreme Court of India has held that cooperative banks and multi-state cooperative banks are 'banks' under Section 2(1)(c) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**").

*Brief Facts:*

The primary question was related to the scope of the legislative field covered by Entry 45 of List I *viz.* 'Banking' and Entry 32 of List II *viz.* 'cooperative societies' of the Seventh Schedule of the Constitution of India. The moot question was the applicability of the SARFAESI Act to the co-operative banks. The matters were referred to the Constitutional Bench in view of the conflicting decisions in various cases.

*Submissions by Petitioners:*

a) It was submitted that Entry 43 of List I confers upon the Parliament the competence to pass law pertaining to 'incorporation, regulation and winding up' of a trading corporation, more particularly a banking corporation. However, 'co-operative societies' are expressly excluded from the purview of the Parliament's competence being a State subject under Entry 32 of List II.
b) The power of Parliament is confined to specific provisions of the Banking Regulation Act, 1949 (a legislation referable to Entry 45 of List I), and the Reserve Bank of India Act (a legislation referable to Entry 38 of List I). The Parliament lacks legislative competence to regulate any other business, function, or facets of the co-operative societies.
c) The object of the SARFAESI Act is to regulate securitisation and reconstruction of financial assets and enforcement of security interests. Financial assistance to members is another form of business that is not a banking business. Therefore, an attempt to regulate the assets of a co-operative bank by bringing them within the purview of the SARFAESI Act is contrary to the original intent of the extending provisions of the Banking Regulation Act, 1949 and that would amount to exercising control over the entities which are beyond the purview of competence of Parliament.
d) Banking business for a cooperative society is merely an incidental/ancillary business. A cooperative society doing business remains a co-operative society and is covered under Entry 32 of List II.

*Submissions by Respondents:*

a) Entry 45 of List I makes no difference whether an entity carrying business of banking is a company or statutory corporation or a co-operative society.
b) The 1965 amendment to the Banking Regulation Act, 1949, brought within its scope co-operative banks and has never been successfully questioned.
c) The expression 'incorporation, regulation and winding up' in Entries 43 and 44 of List I and Entry 32 of List II refers only to organisational aspects of the corporations. It does not have any bearing on the business/transactional aspects.
d) The SARFAESI Act is not a legislation relating to incorporation, regulation, and winding up of the co-operative societies or multi-state co-operative society engaged in banking.
e) The SARFAESI Act is for enforcement of security, and it is referable to Entry 6 of List III also, more so, because of the provisions contained in Sections 69 and 69A of the Transfer of Property Act, 1882

*Decision:*

a) The aspect of 'incorporation, regulation and winding up' of cooperative societies would be covered under Entry 32 of List II. However, banking activity of such co-operative societies/banks shall be governed by Entry 45 of List I.
b) Entries have to be given full effect in pith and substance considering forms of business of cooperative banks performing the activities of banking under a licence. Therefore, the same is covered within the purview of Entry 45 of List I.
c) The third proviso to Article 243ZL(1) of Constitution of India clarifies that in case of a cooperative society carrying on the business of banking, the provisions of the Banking Regulation Act, 1949 shall also apply besides the State enactments. Thus, it is clear that such cooperative banks are governed by Entry 45 of List I of the Seventh Schedule.
d) The recovery of dues would be an essential function of any banking institution and the Parliament can enact a law under Entry 45 of List I as the activity of banking done by co-operative banks is within the purview of Entry 45 of List I.
e) The concept of regulating non-banking affairs of society and regulating the banking business of society are two different aspects and are covered under different Entries, i.e., Entry 32 of List II and Entry 45 of List I, respectively. The law dealing with regulation of banking is traceable to Entry 45 of List I and only the Parliament is competent to legislate.
f) Considering the doctrine of pith and substance, co-operative banks are included in the definition of 'bank' and 'banking company' under Sections 2(1)(c) and 2(1)(d) of the SARFAESI Act.

[*Pandurang Ganpati Chaugule* v. *Vishwasrao Patil Murgud Sahakari Bank Limited* – Judgement dated May 05, 2020 in Civil Appeal No. 5674 of 2009, Supreme Court of India]

## News Nuggets

**Competition Commission of India issues advisory to businesses in the backdrop of COVID-19:** In the background of pandemic COVID-19, CCI has issued an advisory dated April 19, 2020 whereby CCI has recognised the need for businesses to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, etc. CCI has noted that the Competition Act, 2002 has in-built safeguards to protect businesses from sanctions for certain coordinated conduct, provided such arrangements, result in increasing efficiencies with due regard, amongst others, to the accrual of benefits to consumers; improvement in production or distribution of goods or provision of services. However, only such conduct of businesses which is necessary and proportionate to address concerns arising from COVID-19 will be considered by the authority.

**Approved Resolution Plan whether binding only on stakeholders involved in Resolution Plan – Amendment in Section 31(1) of IBC prospective:** A Division Bench of Jharkhand High Court has, on May 1, 2020, held that a resolution plan under Insolvency and Bankruptcy Code, 2016 ("IBC") is binding only on those stakeholders who were involved in the resolution plan. The Court noted that in the present case, no public announcement of the Corporate Insolvency Resolution Process (CIRP) was made in the State of Jharkhand and the State Government was never involved in the CIRP and as such, the resolution plan cannot be said to be binding on it. The Court also noted that Section 31(1) of the IBC was amended *vide* IBC (Amendment) Act, 2019, to make the approved resolution plan binding on the Government Authorities in relation to the statutory dues which was prospective in nature. It observed that the resolution plan of the petitioner was approved by the NCLT vide its order dated April 17, 2018 which was much prior to the aforesaid amendment. Accordingly, it was held that the said amendment in Section 31(1) of the IB Code, 2016 shall not apply to the resolution plan of the petitioner Company.

**Employee cannot choose a combination of employer's scheme and scheme under Payment of Gratuity Act, 1972:** The Supreme Court *vide* judgement dated April 29, 2020 has held that to attract Section 4(5) of the Gratuity Act, there must be better terms of gratuity available and extendable to an employee "under any award or agreement or contract with the employer" as against what has been provided for under and in terms of the Gratuity Act. Section 4(5) then stated that nothing in said Section shall affect the right of an employee to receive better terms of gratuity under "any award or agreement or contract with the employer". The Court, further relying on *Beed District Central Cooperative Bank Ltd v. State of Maharashtra* [(2006) 8 SCC 514] held that an employee must take complete package as offered by the employer or that which is available under the Gratuity Act and he could not have synthesis or combination of some of the terms under the scheme provided by the employer while retaining the other terms offered by the Gratuity Act.

**Independent directors – Time limit for inclusion in database extended:** Under Companies (Appointment and Qualification of Directors) Rules, 2014 every individual who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019 (December 01, 2019), shall within a period of five months from such commencement is required to apply online to the Indian Institute of Corporate Affairs for inclusion of his name in the data bank. Now, under the Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2020, the time limit for such inclusion has been revised to seven months from the existing five months.

**International Financial Services Centres Authority established from April 27, 2020:** Pursuant to the powers conferred by sub-sections (1) and (3) of Section 4 of the International Financial Services Centres Authority Act, 2019, the Central Government *vide* S.O 1383 (E) dated April 27, 2020 has appointed April 27, 2020 as the date of the establishment of the International Financial Services Centres Authority. The head office of the authority shall be at Gandhinagar, Gujarat.

**Draft Valuers Bill, 2020 – MCA seeks public comments:** The MCA *vide* Public Notice dated April 14, 2020 has sought public comments on the Draft Valuers Bill, 2020. MCA had constituted a Committee of Experts (CoE) under the Chairpersonship of Shri M. S. Sahoo, Chairperson, Insolvency and Bankruptcy Board of India (IBBI) on August 30, 2019 to examine the need for an institutional framework for regulation and development of valuation profession. The Draft Valuers Bill, 2020, is the recommendation of the CoE and proposes to establish a National Institute of Valuers. The due date for public comments is May 28, 2020.

**Draft procedure for submission of audit files to NFRA:** *Vide* Notification dated April 28, 2020, the National Financial Reporting Authority (NFRA) has issued draft procedure for submission of audit files by all entities regulated by NFRA, for public comments. Among other requirements, Audit File submitted to NFRA must be compiled only in an electronic format. Wherever hard copies/physical files/records are maintained, the entity shall take measures to ensure the integrity of such records. The hard copies shall be serially numbered, dated and signed and sealed, wherever applicable. All such hardcopies or physical files maintained shall be scanned to a PDF format with a scanning density of a minimum of 300 dots per inch (dpi).

**Extension of last date of filing Form NFRA-2:** The MCA vide General Circular 19/2020 dated April 30, 2020 has stated that time limit for filling NFRA-2 is 210 days from the date of deployment of the said form on the website of National Financial Reporting Authority.

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