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Definition of 'Wages' – Confusion worse confounded

By **Noorul Hassan**

News has reached that the implementation of the four labour codes that have subsumed 29 central labour legislations are not going to be implemented from 1 April 2021, due to non-framing of corresponding Rules by the State Governments. It is likely that this will happen once State elections are completed, mostly at the end of the first quarter or beginning of the second quarter.

There were solid reasons for introduction of the labour codes. One of the reasons was to universalize the definition of 'wage'. Prior to the Codes, the 'wage' had been defined in different ways and at times by using different terms. For instance, the Employees Provident Fund & Miscellaneous Provisions Act, 1952 defines the term 'basic wages', whereas the Equal Remuneration Act, 1976 uses the term 'remuneration', while the rest of the legislations mostly use the term 'wages'. There are different inclusions and exclusions while computing the wages and the corresponding contributions and benefits thereon.

The National Commission on Labour ('**NLC**'), in its vast Report submitted in the year 2002**,** acknowledged the need to have separate definitions of the two terms 'wages' and 'remuneration', to avoid endless litigation. It proposed to include only basic wages and dearness allowance under 'wages', and all other payments including other allowances as well as overtime payment together with wages under 'remuneration'[1].

Later on, the Report of the Working Group on 'Labour Laws & Other Regulations', as formulated by the Planning Commission for the Twelfth Five Year Plan (2012-17), recommended the consolidation of four legislations dealing with wages/ components of wages[2]. This Report also recommended having common definitions, it being a pre-requisite for codification/ consolidation of labour laws. Interestingly, the definition of 'wages', as defined under the Payment of Wages Act, 1936, was recommended to be adopted in all labour laws.

With a view to implement the above recommendations, the Code on Wages Bill, 2017[3] ('**Bill**') was introduced in the Parliament. The definition of the term 'wages', as given under the Bill, has different components – firstly, it has a 'means' clause defining what a 'wage' is, in broad terms; secondly it has an 'includes' clause, detailing components that are to be included; thirdly, an 'exclusion' clause excluding certain components; thereafter, a set of rules as to how the bonus is to be calculated which again has a 'means', 'inclusion' and an 'exclusion' clause along with a proviso; and lastly, an 'explanation'.

The Bill was subsequently referred to the Standing Committee on Labour (2018-19)

[1] Para 6.40 of Chapter VI (Review of Laws), Report of the Second National Commission on Labour, 2002.

[2] The Equal Remuneration Act, 1976; The Minimum Wages Act, 1948; The Payment of Bonus Act, 1965 and the Payment of Wages Act, 1936.

[3] Bill No. 163 of 2017

('**Committee**'). The Committee submitted its Report[4] noting certain shortcomings in the definition of 'wages' in the Bill, such as the lengthy 61-line definition which is likely to create confusion and difficulty in arriving at the computation of 'wages'. The Committee finally suggested a new definition in its Report[5].

Using the suggestions by the Committee as a base, a new definition was finally codified in the Wage Code, 2019[6] ('**Wage Code**'), streamlining the abovementioned shortcomings in the Bill, and attempting to further simplify the calculation. It may be appropriate to look at the said definition here:

(y) 'wages' means all remuneration whether by way of salaries, allowances or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes,—

(i) basic pay;

(ii) dearness allowance; and

(iii) retaining allowance, if any,

but does not include—

(a) any bonus payable under any law for the time being in force, which does not form part of the remuneration payable under the terms of employment;

(b) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate Government;

(c) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

(d) any conveyance allowance or the value of any travelling concession;

(e) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment;

(f) house rent allowance;

(g) remuneration payable under any award or settlement between the parties or order of a court or Tribunal;

(h) any overtime allowance;

(i) any commission payable to the employee;

(j) any gratuity payable on the termination of employment;

(k) any retrenchment compensation or other retirement benefit payable to the employee or any ex gratia payment made to him on the termination of employment:

Provided that, for calculating the wages under this clause, if payments made by the employer to the employee under clauses (a) to (i) exceeds one-half, or such other per cent. as may be notified by the Central Government, of the all remuneration calculated under this clause, the amount which exceeds such one-half, or the per cent. so notified, shall be deemed as remuneration and shall be accordingly added in wages under this clause:

Provided further that for the purpose of equal wages to all genders and for the purpose of payment of wages, the emoluments specified in clauses (d), (f), (g) and (h) shall be taken for computation of wage.

[4] Submitted the Forty Third Report in December 2018
[5] Para 3.21, 43rd Report of the Standing Committee on Labour, 2018.
[6] Section 2(y) of the Wage Code, 2019

Explanation.—Where an employee is given in lieu of the whole or part of the wages payable to him, any remuneration in kind by his employer, the value of such remuneration in kind which does not exceed fifteen per cent. of the total wages payable to him, shall be deemed to form part of the wages of such employee.

So, the above definition has already metamorphosed twice, before coming to the present version i.e., initially when it was introduced through the Bill, and second when the Committee suggested a new definition.

However, there are still certain interpretational issues that may come in the way of calculating 'wages', some of which have been discussed below:

Whether 'wages' includes 'remuneration'

'Wages' has been defined to mean all remuneration, whether expressed in terms of money or capable of being so expressed. However, the term 'remuneration' is not defined in the Wage Code. Due to the usage of the terms, it is not clear whether 'wages' is genus and 'remuneration' is its species. In actuality, it is the other way as suggested by the NLC in its 2002 Report.

Heterogenous class of exclusions

There are 11 components of exclusions, which do not form part of 'wages'. Out of these, two components are payable at the time of termination/ retrenchment, and the balance nine components have to be within the limit of 50% of all remuneration. There are varied classes of exclusion categories: (i) components like house rent allowance, conveyance allowance are payable on a monthly basis; (ii) components like bonus are payable on an yearly basis; (iii) some of the components are given in the form of kind like value of any house accommodation, supply of light, etc.; (iv) while contribution of the employer to the pension or provident fund are payable to a specified fund and not to the employee directly; (v) interest on pension and provident fund is not paid by employer but by the fund.

Fifty percent criteria

As explained above, nine components of exclusions, as stated in clauses (a) to (i), have to be within the limit of 50% of the all remuneration. The phrase '*the all remuneration calculated under this clause*' is causing confusion whether the remuneration referred here is to be total remuneration, without giving effect to the exclusions, or after giving such effect, as the remuneration to be 'calculated' under this clause.

'Remuneration in kind'

By virtue of the definition, remuneration can be expressed in terms of money or it can be capable of being so expressed. As explained above, the 'exclusion' category also includes value of house accommodation, supply of power, amenities provided, etc. The Explanation stresses that 'remuneration in kind', not exceeding 15% of the total wages, shall be deemed to form part of the wages. It is not clear whether the said remuneration in kind, up to 15%, is to be added back after ensuring 50% of remuneration (thereby bringing the wages up to 65%), or since it is already inclusive of the remuneration (by virtue of the 'means' clause of the definition), the Explanation merely clarifies that the 'remuneration in kind' cannot go beyond 15%, even before calculating the exclusions.

Conclusion

In India, the labour statutes have been by and large interpreted by the Courts to benefit the employees and workmen. If we were to adopt the same principle for the interpretation of the definition of 'wages', then it may result in much hardship to the employers/ industry. Thankfully, since the new labour Codes have not yet been implemented, it would be appropriate for the Government to give suitable clarifications (either by way of FAQs or otherwise) or bringing amendments, if found necessary, to iron out all the issues and enable smoother transitioning and implementation of the Codes.

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Notifications and Circulars

FDI ceiling in insurance sector to be raised to 79 per cent – Insurance (Amendment) Act 2021: The Insurance (Amendment) Act, 2021 ('**Amendment Act**') as enacted on 25 March 2021 to amend the Insurance Act, 1938 will be effective soon. The Amendment Act substitutes Section 2(7A)(b) of the Insurance Act, 1938 which previously allowed foreign investors to hold up to 49 per cent of the capital in an insurance company, and which must be owned and controlled by an Indian Entity. The amendments increase this FDI ceiling limit to 74 per cent so as to remove restriction on ownership and control. However, it may be noted that such foreign investment shall be subject to additional conditions as may be prescribed by the Central Government. Amendments have also been made in Section 114 of the Insurance Act, 1938 for this purpose. Earlier, the Ministry of Corporate Affairs had introduced the Insurance (Amendment) Bill 2021 in the Parliament in March 2021. It may be noted that the Ministry of Finance has also published the Draft Indian Insurance Companies (Foreign Investment) (Amendment) Rules, 2021 on 13 April in this regard.

Further, Section 27(7) of the Insurance Act, 1938 requires an insurer to hold a minimum investment in assets which would be sufficient to clear their insurance claim liabilities. If the insurer is incorporated or domiciled outside of India, such assets must be held in India in a trust and this trust must be vested with trustees who are Indian residents. The explanation to Section 27(7) stated that this condition will also apply to an insurer incorporated in India, in which at least (i) one-third capital is owned by investors domiciled outside of India, or (ii) one-third members of the governing body are domiciled outside India. The Amendment Act now omits this explanation.

Companies accounts – Recording audit trail of transactions to be mandatory from 1 April 2022: Every company which uses accounting software for maintaining its books of account, shall use only such accounting software which has a feature of recording audit trail of each and every transaction, creating an edit log of each change made in books of account along with the date when such changes were made and ensuring that the audit trail cannot be disabled. The Ministry of Corporate Affairs has added a proviso in Rule 3(1) of the Companies (Accounts)

Rules, 2014 for this purpose. It may be noted that as per the amendment Rules notified on 24 March 2021 this was to be ensured for the financial year commencing on or after the 1 April 2021 however, the date was substituted with 1 April 2022 by the Companies (Accounts) Second Amendment Rules, 2021 notified on 1 April 2021. Certain changes have also been made in the Companies (Audit and Auditors) Rules, 2014 for this purpose.

Penalty provisions in Sections 124 and 247 revised – Sections 23 and 45 of Companies (Amendment) Act, 2020 effective from 24 March 2021: Discretion of the authorities in imposition of penalty on a company or its officer, under Section 124 of the Companies Act, 2013 relating to unpaid dividend account, and on the valuers for contravention of the provisions of Section 247, has been removed. Amendments have been made for this purpose in Sections 124 and 247 of the Companies Act, 2013 by Sections 23 and 45 of the Companies (Amendment) Act, 2020 effective from 24 March 2021, as per MCA Notification No. 1303(E), dated 24 March 2021. E.g., penalty for failure to comply with provisions of Section 124 by the company, which was INR 5 lakh and was extendable to INR 25 lakh, has been revised to INR one lakh and in case of continuing failure, with a further penalty of INR five hundred for each day after the first during which such failure continues, subject to a maximum of INR ten lakh. In respect of valuers, the fine imposable earlier ranged from INR 25 thousand to INR one lakh and has now been revised to penalty of INR 50 thousand.

Guidelines on regulation of payment aggregators and payment gateways: The Reserve Bank of India *vide* Circular dated 17 March 2021 has issued 'Guidelines on Regulations of Payment Aggregators and Payment Gateways' **('PA Guidelines')**. The RBI through these guidelines has decided to (i) regulate, the activities of non-banking payment aggregators **('PAs')** and (ii) provide baseline technology related recommendations to payment gateways. The baseline technology related recommendations were mandatorily applicable to non-bank PAs.

Applicability:

- All existing non-bank entities offering payment aggregator services have been directed to seek an authorization from the RBI under the Payment and Settlement Systems Act, 2007 ('**PSSA**') on or before June 30, 2021.
- The RBI has also categorically clarified that the PA Guidelines are not applicable to '*delivery versus payment'* ('**DvP**') transactions.
- They cover transactions where the payment is made in advance while the goods are delivered in a deferred manner.

Capital and net-worth requirements:

- *Net-worth certificate:* The PA Guidelines prescribe strict minimum-net worth criteria, which if not complied with, will require the relevant entity to wind up its payment aggregation business.
- *Monitoring:* The PA Guidelines have placed an obligation on banks maintaining the nodal/ escrow accounts of such entities to monitor and report compliance with the net-worth requirement.

Governance:

- Where the '*promoters'* of the PA entity should satisfy the 'fit and proper' criteria prescribed by the RBI, and the directors of the applicant entity are required to submit a declaration in the requisite format.

- Under the PA Guidelines, PAs are directed to disclose comprehensive information regarding merchant policies, customer grievances, privacy policy and other terms and conditions on the website and / or their mobile application.

KYC and merchant onboarding:

- PAs maintaining an account-based relationship with the merchant, the KYC guidelines of the Department of Regulation of the RBI, that is, the Master Direction - Know Your Customer (KYC) Directions, 2016 ('**Master KYC Directions'**) are applicable.

Online Payment Gateway Service Providers for cross-border transactions:

- The domestic leg of import and export related payments facilitated by PAs is within the ambit of the PA Guidelines.
- In the Notification, the RBI has further prescribed that the entities operating as online payment gateway service providers ("**OPGSP"**) and undertaking cross-border transactions should ensure compliance with RBI's directions.

Security, fraud prevention and risk management framework:

- Merchant's compliance with PCI standards: the RBI has reiterated the responsibility of PAs to ensure compliance of merchants onboarded by them to security standards.
- Standard System Audit: optional for PAs to carry out a standard system audit, including cyber security audit, by CERT-In empanelled auditors.
- Prohibition on storage of card-on-file data: merchants are not allowed to store payment data and customer card credentials, irrespective of their compliance with the PCI-DSS.

Settlement and Escrow Account Management:

- *Intermediary Directions:* The RBI through the Notification has clarified that the Intermediary Directions (i) shall be considered repealed for authorised PAs from the date of their authorisation; and (ii) shall be considered repealed with effect from June 30, 2021 except for such PAs who have applied for authorisation and a decision on it is pending with the RBI.
- *Escrow Account:* RBI has directed non-bank PAs to maintain the amount collected by them in an escrow account with any scheduled commercial bank, with a discretion to PAs to maintain an additional escrow account with a different commercial bank.
- *End-of-the-day Reconciliation:* At the end of the day, the amount in the escrow account should not be less than the amount already collected from the customer as per 'Tp' (i.e., the date of charge or debit to the customer's account against the purchase of goods or services) or the amount due to the merchant.
- *Settlement to Merchants:* In instances where PAs have no control over incoming funds and delay thereof, the RBI has clarified that PAs need to follow the instructions and transfer the funds to the merchants within T+0/ T+1 basis, post receipt of funds into their account.
- Settlement accounts opened under the Bharat Bill Payment System ('**BBPS**') would be governed by the BBPS instructions.

Ratio Decidendi

A person ineligible to submit a resolution plan under IBC is also barred from proposing a scheme of compromise and arrangement under Companies Act

The Supreme Court has upheld the order passed by the National Company Law Appellate Tribunal ('**NCLAT**') holding that a person who is ineligible under Section 29A of the Insolvency and Bankruptcy Code, 2016 ('**Code**') to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013 ('**Act**'). A writ petition challenging the constitutional validity of Regulation 2B of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('**Regulations**'), which deals with compromises or arrangement proposed in the liquidation process for a Corporate Debtor, as also filed by the same Appellant and heard along with the appeal filed against the said NCLAT order by the Apex Court, was dismissed.

Brief Facts:

- Gujarat NRE Coke Limited ('**GNCL**'), moved an application before the National Company Law Tribunal, Kolkata Bench ('**NCLT**') as a Corporate Debtor under Section 10 of the Code for initiating Corporate Insolvency Resolution Process ('**CIRP**'), and the application was admitted in April 2017. Thereafter, Mr. Arun Kumar Jagatramka ('**Appellant**'), who is a promoter of GNCL, submitted a resolution plan for the Corporate Debtor ('**Plan**'), which was presented by the Resolution Professional ('**RP**') before the committee of Creditors ('**CoC**'). The Resolution Plan was put to vote in a meeting scheduled on 23-24 November 2017, before the CoC.
- However, the Code was amended *vide* the Insolvency and Bankruptcy (Amendment) Act, 2018 and Section 29A was added to the Code, with retrospective effect i.e., from 23 November 2017. The said Section 29A declares a list of persons ineligible to become a resolution applicant in a CIRP, based on certain conditions such as existence of fraudulent or extortionate transactions with the Corporate Debtor prior to the resolution process period.
- Due to the addition of Section 29A in the Code, the Appellant became ineligible to submit a resolution plan, and no resolution plan was subsequently approved by the CoC. Due to the same, NCLT passed an order of liquidation on 11 January 2018 ('**Liquidation Order**'). The said Order was challenged by the Appellant before the NCLAT, and the appeal was dismissed by NCLAT subsequently on 10 July 2018.
- During the pendency of the said appeal, the Appellant filed an application under Section 230-232 of the Act before the NCLT, proposing a scheme for compromise and arrangement between the erstwhile promoters and creditors of the Corporate Debtor. The said application was allowed by the NCLT ('**Compromise Order**').
- Thereafter, Jindal Steel and Power Limited ('**Respondent No. 1**'), which is an operational creditor of GNCL, filed an appeal against the Compromise Order, and NCLAT relying on Supreme Court's Judgment in *Swiss Ribbons Pvt. Ltd. and Anr.* v. *Union of India and Ors.* [Writ Petition (Civil) No. 99 of 2019], allowed the appeal and held that promoters who are ineligible to propose a

resolution plan under Section 29A of the Code are not entitled to file an application for compromise and arrangement under Sections 230 to 232 of the Act, so as to protect a corporate debtor from its own management ('**NCLAT Order**'). The NCLAT Order dated 24 October 2019 was then made subject of the appeal before the Supreme Court by the Appellant.

- *Vide* a Notification dated 6 January 2020, Regulation 2B which was inserted *vide* a Notification dated 25 July 2019, was amended, to render any person ineligible under the Code to submit a resolution plan from being a party in any manner to a scheme of compromise or arrangement proposed during liquidation. Aggrieved by the same, the Appellant has also filed a Writ Petition challenging the constitutional validity of Regulations 2B of the Regulations ('**Writ Petition**').

Issue:

- Whether a person who is ineligible under Section 29A of the Code to submit a resolution plan, shall also be ineligible to make an application or propose a scheme of Compromise and Arrangement under Section 230-232 of the Act?
- Whether Regulation 2B of the Regulations is unconstitutional and *ultra vires* the Companies Act, 2013?

Submissions by Appellant:

- The Appellant submitted that Section 230 of the Act does not place any embargo on any person for the purpose of submitting a scheme of compromise and arrangement.
- Further, in the absence of a specific disqualification under the Act, the NCLAT could not have read the ineligibility under Section 29A of the Code into Section 230 of the Act. This would amount to a judicial reframing of a legislation by the NCLAT, which is not permissible.
- Sections 230 and 230-A of the Act envisage a compromise or arrangement, and they both form a part of a settlement mechanism, which is on par with Section 12-A of the Code, since Section 12-A of the IBC permits withdrawal of an application under Section 7, 9 or 10; and Sections 230 and 230-A of the Act envisage a compromise or arrangement. The said Sections are not part of the resolution mechanism, to which alone the ineligibility under Section 29A applies. Hence, this ineligibility cannot now be engrafted into Section 230 of the Act.
- With regard to the Writ Petition filed under Article 32 of Indian Constitution, it is submitted that Regulation 2B of the Regulations, is *ultra vires* the provisions of Section 230 of the Act and violative of Articles 14, 19 and 21 of the Indian Constitution as it seeks to import an ineligibility under the provisions of the Code to a dissimilar provision in the Act.

Submissions by Respondents:

- When a company is under liquidation, a proposed scheme of compromise or arrangement under Section 230 of the Act, must comply with the requirement of the Code.
- If a person who is ineligible under Section 29A of the IBC is permitted to propose a scheme for revival under Section 230 of the Act of 2013 at the stage of liquidation, the same is against the letter and spirit of the Code.
- Since the proposal for a compromise or arrangement under Section 230 of the Act, where a company is in liquidation under the

Code, is in continuation of that liquidation process, a person who is ineligible under Section 29A of the Code also cannot propose a scheme for revival under Section 230 of the Act.

- The purpose of the disqualification under the Code, is to ensure a sustainable revival of a Corporate Debtor, which means that those responsible for the state of affairs of a company and other persons regarded by the legislature as undesirable should be excluded from the process.

Decision:

- The Supreme Court observed that the purpose of the ineligibility under Section 29A of the Code is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution, such as, a promoter of an erstwhile fraudulent management.
- The Court opined that when the process of invoking the provisions of Section 230 of the Act traces its origin or its trigger to the liquidation proceedings which have been initiated under the Code, it becomes necessary to read both sets of provisions in harmony.
- The Court held that the ineligibility under the Code will not automatically apply to proceedings under Section 230 of the Act where the scheme of compromise or arrangement proposed is in relation to an entity which is not the subject of a proceeding under the Code. Therefore, in the present matter, a harmonious construction has to be drawn between provisions of the Code and the Act.
- The scheme of compromise or arrangement under Section 230 of the Act of 2013 cannot also certainly be equated with a withdrawal simpliciter of an application, as is contemplated under Section 12-A of the Code. An application for withdrawal under Section 12-A is not intended to be a culmination of the resolution process.
- When a company is undergoing liquidation process, the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the Code must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013. In light of the above, the appeal filed against the NCLAT Order by Appellant was dismissed.
- Even in the absence of the Regulation 2B of the Regulations, a person who is ineligible under Section 29A of the Code, would not be permitted to propose a compromise or arrangement under Section 230 of the Act. Hence, there can be no manner of doubt that the *proviso* to Regulation 2B is clarificatory in nature and thus, the Writ Petition has been dismissed by the Hon'ble Court as having no merits.

[*Arun Kumar Jagatramka* v. *Jindal Steel and Power Limited & Anr.* – Judgement dated 15 March 2021 in Civil Appeal No. 9664 of 2019, Supreme Court]

Commercial wisdom of CoC not to be interfered with, except for the limited scope provided under IBC

The Supreme Court has held that the commercial wisdom of the Committee of Creditors ('**CoC**') is not to be interfered with. The Court held that the legislature has consciously not provided any ground to challenge the 'commercial wisdom' of the individual financial creditors or their collective decision before the Adjudicating Authority and that the CoC's 'commercial wisdom' was made nonjusticiable.

Brief facts:

- The Corporate Debtor filed an application before the NCLT for initiation of Corporate Insolvency Resolution Process for itself. Kotak Investment Advisors Ltd. ('**KIAL**') and Kalpraj Dharamshi submitted their respective resolution plans in the meeting of CoC and thereafter, the plan submitted by Kalpraj Dharamshi was approved by a majority. KIAL challenged this decision in the NCLT on grounds of delayed submission by Kalpraj Dharamshi. NCLT rejected the appeal made by KIAL.
- KIAL thereafter filed appeals before the NCLAT, which were allowed. Being aggrieved by the order passed by the NCLAT in favour of KIAL, Kalpraj Dharamshi filed an appeal before the Supreme Court.

Submissions:

- The Appellant submitted that the resolution plan was considered and duly deliberated in the CoC meeting considering the subject matter expressed by the creditors, and the decision was taken after due deliberation through voting by majority vote. This decision was taken as per the commercial wisdom of the creditors and as such, could not be deliberated or decided upon by the Adjudicating Authority.
- According to the Respondent, since Kalpraj Dharamshi had not responded with its resolution plan within the period prescribed under the expression of interest, it could not have been considered to be a resolution applicant. The Respondent further submitted that the entire participation of Kalpraj Dharamshi is illegal and the conduct of the RP as well as the CoC was in a manner that indicated favouritism towards Kalpraj Dharamshi and showed the intent to approve the resolution plan of Kalpraj Dharamshi in any event.

Decision:

- The legislature has consciously not provided any ground to challenge the 'commercial wisdom' of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC's 'commercial wisdom' was made nonjusticiable.
- The commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Insolvency and Bankruptcy Code 2016.
- The legislative scheme, as interpreted by various decisions of the Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the Insolvency and Bankruptcy Code 2016.

[*Kalparaj Dharamshi v. Kotak Investment Advisors Ltd* – Judgement dated 10 March 2021 in Civil appeal No. 29432944 of 2020, Supreme Court of India]

Arbitration – Period of limitation for filing objections to be from the date on which signed copy of award is made available to parties

In an interesting dispute regarding the timeline for filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, the Supreme Court has held that the limitation period for filing objections against an arbitral award would have to be calculated from the date on which the signed copy of the award is received by the parties as there can be no finality in award, except after it is signed. An award takes legal effect after it gets signed by the arbitrators.

Brief facts:

- A Service Level Agreement ('**SLA**') was executed by the Appellant-corporation in favour of the Respondent-company providing call centre services. The Appellant-corporation terminated the SLA, which led to the dispute between the parties.
- The dispute was referred to arbitration and the three-member tribunal decided in favour of the Respondent-company.
- Thereafter, the Appellant-corporation filed its objections under Section 34 before the Civil Court, Hisar, Haryana to challenge the award made by the arbitral tribunal along with an application for condonation of delay. The Civil Court dismissed the application for condonation of delay stating that the period of limitation starts running from the day that the arbitral award was received. Aggrieved, the Appellant-corporation file appeal in the High Court, and the Court dismissed the appeal and affirmed the civil court order.
- Aggrieved by the rejection of the objections under Section 34 on the ground of delay, the Appellant-corporation filed an appeal in Supreme Court.

Submissions:

- The Appellant-corporation submitted that 'arbitral award' in the Arbitration Act includes both the majority award as well as the minority opinion. Section 34 of the Act provides for objections to be filed against the arbitral award, and not the majority award alone. Consequently, the time limit to file objections against an award under Section 34(3) of the Act, does not relate to only the majority award, but to the arbitral award, which includes the opinion of the dissenting member of the tribunal.
- The Respondent-company submitted that the limitation period applicable under Section 34(3) would commence from the day on which the majority award was pronounced. A party may file objections to the award within a period of three months from the date of receipt of the award. The dissenting opinion of the minority member was not an award for the purposes of computing the limitation period prescribed under Section 34(3).

Decision:

- An unsigned copy of the award was provided to the parties for the purpose to point out any computation error, any clerical or typographical error, or any other error of similar nature which may have occurred in the award on the next date.
- An 'arbitral award' under the statute is the decision made by the majority members of an arbitral tribunal, which is final and binding on the parties. Section 31 provides the form and content of an arbitral award and states that it shall be made in writing and shall be signed by the members of the arbitral tribunal.
- The Court held that therefore, the period of limitation for filing objections under section 34(3) would have to be reckoned from the date on which the signed copy of the award was made available to the parties.

[*Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies Pvt. Ltd.* – Judgement dated 2 March 2021 in Civil appeal No. 971 of 2021, Supreme Court]

Adjudicating Authority cannot modify the resolution plan approved by CoC, though has authority to disapprove

The Supreme Court has held that there is no scope for interference with the commercial aspects of the decision made by the CoC and for any substitution of the commercial terms of the resolution plan approved by Committee of Creditors. If, within its limited jurisdiction, the Adjudicating Authority finds any shortcoming in the resolution plan, it would only send the resolution plan back to the Committee of Creditors for resubmission after satisfying the parameters given under the Code.

Brief facts:

- The corporate insolvency resolution process of the corporate debtor Jaypee Infratech Limited ('**JIL**') was initiated by IDBI Bank Limited before the NCLT. A resolution plan was submitted by the Respondent which was duly approved by a majority of the CoC.
- The NCLT proceeded to approve the resolution plan with some modifications to it. Further, the NCLT also gave certain directions while accepting some objections like those of the dissenting financial creditor bank and the land providing agency but rejected the objections raised by others, including those of the holding company of JIL. The Adjudicating Authority also left a few propositions open for adjudication in the appropriate forum.
- The Respondent filed an appeal against the order made by the NCLT before the NCLAT. The NCLAT passed an interim order wherein it stated that the resolution plan may be implemented subject to the outcome of the appeal. The NCLAT also directed that the RP shall constitute an 'Interim Monitoring Committee' that would comprise of the Respondent along with three major institutional financial creditors, who were members of the CoC.
- Various appeals were filed against this interim order of the NCLAT by six associations of homebuyers in the real estate development projects of JIL and by a few individual homebuyers before the Supreme Court.

Submissions:

- The Respondent NBCC submitted that some time be granted to the IRP to formulate at least a preliminary scheme so that the interest of all the stakeholders may be protected.
- The Appellant homebuyers submitted that they belong to the lower and middle-income group and have invested their life savings with JIL and with its holding company, Jai Prakash Associates Ltd. ('**JAL**'). They urged that the interest of the purchasers may be protected.
- The Respondent IDBI submitted that under the statutory scheme, the IRP must take over otherwise the letter and spirit of the Code is likely to be affected.

Decision:

- The Court had to deliberate on many issues in its judgment, including the extent of and limitations over the powers and jurisdiction of the Adjudicating Authority while dealing with the resolution plan approved by the Committee of Creditors.
- The Court observed that an Adjudicating Authority has a limited jurisdiction in the matter of approval of a resolution plan, which is provided by Sections 30(2) and 31 of the Code.
- The Court ultimately held that in the adjudicatory process concerning a resolution

plan under the Code, there is no scope for interference with the commercial aspects of the decision made by the CoC and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the Adjudicating Authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it can only send the resolution plan back to the CoC for re-submission after satisfying the parameters delineated by Code.

[*Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* – Judgement dated 24 March 2021 in Civil Appeal No. 3395 of 2020, Supreme Court]

News Nuggets

Consolidation of CIRP process with CIRPs of subsidiaries permissible even in absence of common financial creditors

The NCLAT has upheld the decision of the NCLT in a case where the adjudicating authority had, after relying upon its earlier decision of the NCLAT in the case of *State Bank of India* v. *Videocon Industry Ltd.,* consolidated the CIRPs of the Corporate Debtor with the CIRPs of its two subsidiaries. The NCLT had discussed the common control of the hundred percent subsidiaries and that there were common directors, common assets and liabilities. The inter-dependence and inter-lacing of finance was also considered as well as the pooling of resources. The NCLAT in this regard observed that only because one of the subsidiaries did not have Financial Creditors, it would not be sufficient to say that the yardsticks laid down in the matter of *State Bank of India* v. *Videocon Industry Ltd*. were not attracted. The NCLAT in the case *Oase Asia Pacific Pte Ltd*. v. *Axis Bank Ltd*. [Order dated 26 February 2021] observed that the appellant was only an Operational Creditor of one of the subsidiaries and was trying to find fault with the consolidation Order the object of which was resolution of the companies while the Appellant was more concerned that its money as Operational Creditor should be protected.

Arbitration – Limitation for application for appointment of arbitrator – Necessary for Parliament to amend Section 11

The Supreme Court has recently suggested that it is necessary for the Parliament to effect an amendment to Section 11 of the Arbitration and Conciliation Act, 1996, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitrator under said section. The Apex Court observed that in view of the legislative intent of the Act as amended in 2015 and 2019 (providing for expeditious conduction and conclusion of arbitration proceedings), the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act. It noted that since there was no provision prescribing period of limitation for such application, according to various decisions of the Court, Article 137 of the Limitation Act, prescribing 3 years, would apply. The Court in *Bharat Sanchar Nigam Ltd*. v. *Nortel Networks India Pvt. Ltd*. [10 March 2021] however held that the period of limitation to file an application under Section 11 for appointment of an arbitrator would be 3 years from the date of refusal to appoint the arbitrator, or on expiry of 30 days', whichever is earlier. It may be noted that the Apex Court also held that where the claims are *ex facie* time barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.

Insolvency proceedings against corporate guarantor when principal borrower not a corporate person

The 3-Judge Bench of the Supreme Court has rejected the contention that when an application under Section 7 of the Insolvency and Bankruptcy Code cannot be maintained against a principal borrower, who is not a 'corporate person', it must follow that no action under said section can be maintained against a company or corporate person, merely because it had extended guarantee thereto. The Court was of the view that as a consequence of default, the status of the guarantor metamorphoses into a debtor or a corporate debtor, if it happens to be a corporate person within the meaning of Section 3(8) of the Code. The Apex Court in the case *Laxmi Pat Surana* v. *Union Bank of India* [Judgement dated 26 March 2021] noted that there was no reason to limit the width of Section 7 despite the law permitting initiation of CIRP against the corporate debtor, if and when default is committed by the principal borrower.

Initiation of insolvency proceedings – Section 14 of Limitation Act applicable 'as far as may be'

Holding that Section 14 of the Limitation Act, 1963 is applicable, as far as may be, to the application filed for initiation of insolvency proceedings under Section 7 of the IBC, the Supreme Court has rejected the plea that prior proceedings under the SARFAESI Act do not qualify for the exclusion of time under Section 14, inasmuch as they are not civil proceedings in a Court. The Apex Court was of the view that the words 'as far as may be' permit a wider, more liberal, contextual and purposive interpretation by necessary modification, which is in harmony with the principles of the said Section. Further, rejecting the plea that the exclusion of time under Section 14 is available only after the proceedings before the wrong forum terminate, the Court noted that the substantive provisions of sub-sections (1), (2) and (3) of Section 14 do not say that Section 14 can only be invoked on termination of the earlier proceedings, prosecuted in good faith. It was of the view that Explanation (a), which only restricts the period of exclusion, cannot be construed in such a narrow pedantic manner. It observed that since the proceedings in the High Court were still pending on the date of filing of the application under Section 7 of the IBC in the NCLT, the entire period after the initiation of proceedings under the SARFAESI Act could be excluded. The Court in *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Co-operative Bank Ltd.* [Judgement dated 22 March 2021] also held that the delay can be condoned irrespective of whether there is any formal application.

Extension of loan moratorium period introduced due to COVID-19 ended

The Supreme Court has ended an extension of the statutory limitation period during which legal action can be brought or rights enforced under various laws. Such an extension was ordered previously by the Supreme Court in view of the COVID-19 pandemic. The Court has decided to end such extension due to the lifting of lockdown and resumption of functioning of all courts and Tribunals either physically or virtually. The period from March 15, 2020 to March 14, 2021 ('**Exemption Period**') will stand excluded when computing the period of limitation for filing of any suit, appeal, application, or proceeding. The Supreme Court, in its judgement dated 8 March 2021, also stated that where the actual limitation period has expired during the Exemption Period, it will be exempted by the higher of (i) the balance number of days remaining in the limitation period from March 15, 2020; or (ii) 90 days regardless of the actual balance period of limitation from March 15, 2021.

Supreme Court upholds removal of Cyrus Mistry as Chairman of Tata Sons, reverses decision of NCLAT

The Supreme Court in a long-awaited decision in the TATA-Mistry row, has upheld the removal of Cyrus Mistry as Chairman by the Tata Sons and has also answered all questions in favour of Tata Sons. The Apex Court stated that the NCLAT, by reinstating Mistry without any pleading or prayer, "has forced upon the appellant an Executive Chairman, who now is unable to support his own reinstatement."

The Court observed that NCLAT had also gone to the extent of reinstating Mistry not only on the Board of Tata Sons, but also on the Board of Tata group companies, without the Tata group companies being parties, and without there being any complaint against those companies under Section 241 of the Companies Act. According to the Court, these companies had followed the procedure prescribed by the Companies Act, 2013 and the articles of the respective companies and had validly passed resolutions for Mistry's removal.

Finance Act 2021 – LIC Act and Securities Contracts (Regulation) Act amended

The President of India gave his assent on 28 March 2021 to the Finance Bill, 2021 which gives effect to the financial proposals of the Central Government for the Financial Year 2021-2022. The Finance Act has made certain amendments to the LIC Act, 1956 which will enable LIC to be listed on stock exchanges through an IPO and will allow the government to begin the process of divestment in LIC. Further, the Securities Contracts (Regulations) Act, 1956 has been amended to include a concept pooled investment vehicle which is a fund established in India which will raise money from investors and invest such funds in accordance with regulations released by SEBI.

It may be noted that the overall capital expenditure for the F.Y. 2021-22 is INR 5.54 lakh crore, and with the healthcare sector taking the spotlight during the pandemic, the Central Government has announced the PM Aatmanirbhar Swasth Bharath Yojana to boost the country's healthcare infrastructure with an outlay of INR 64,180 crore over six years.

Vehicle Scrappage Policy announced to reduce population of old and defective vehicles and to formalize informal vehicle scrapping industry

The Ministry for Road Transport and Highways has announced the Vehicle Scrappage Policy in the interest of a clean environment, to reduce population of old and defective vehicles, to achieve reduction in vehicular air pollutants, to improve road and vehicular safety, to achieve better fuel efficiency and to formalize the informal vehicle scrapping industry. The Policy is expected to attract additional investments of around INR 10,000 crores and create as many as 35,000 job opportunities.

As per the Policy, commercial vehicles are to be de-registered after 15 years while private vehicles are to be de-registered after 20 years if found unfit or in case of failure to renew the registration certificate. Further all vehicles belonging to the Central Government, State Government, Municipal Corporation, Panchayats, State Transport Undertakings, Public Sector Undertakings and Autonomous bodies with the Union and State Governments may be de-registered and scrapped after 15 years from the date of registration.

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