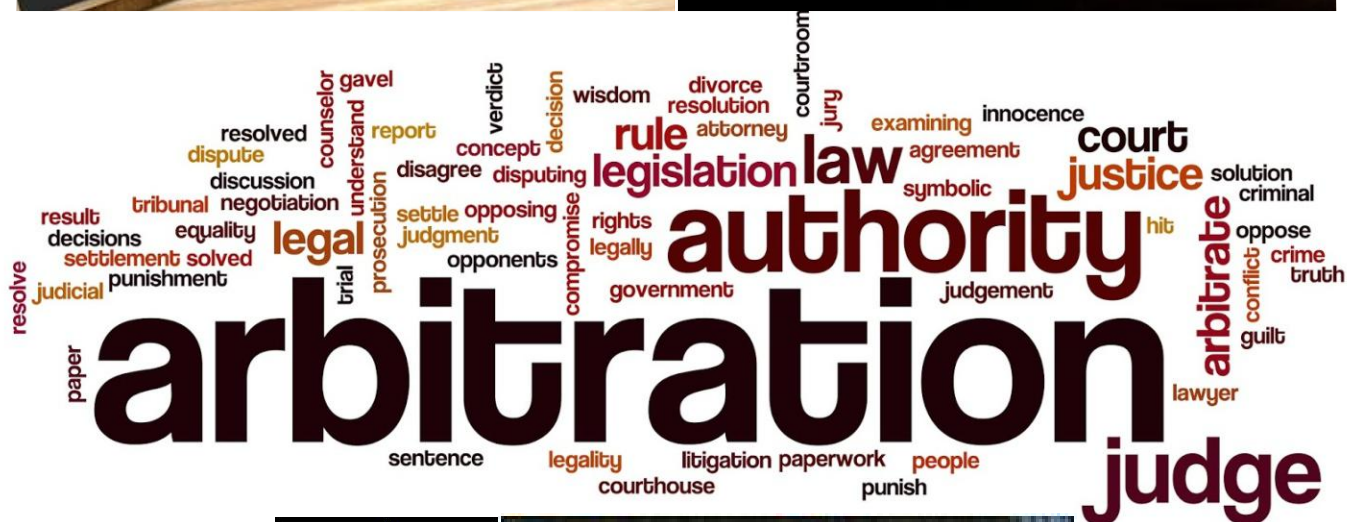


# INDIAN LEGAL IMPETUS®





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Dear Friends,

***“An investment in knowledge pays the best interest.”*** – Benjamin Franklin

It is our sincere pleasure to welcome you once again to Indian Legal Impetus.

It gives us immense pleasure to bring to you our April 2018 (Volume XI Issue IV) edition of Indian Legal Impetus, whose inaugural edition was published in 2007. We sincerely hope that you find reading this edition, enjoyable and informative.

This issue discusses corporate laws relating to the applicability of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Moratorium under the Insolvency and Bankruptcy Code 2016, Registration of Charge under Companies Act 2013, the Draft Labour Code on Social Security 2018 and provides detailed analysis of recent case laws on various legal principles.

To begin with, this edition provides an analysis on the mandatory nature and validity of Section 13(3A) of the SARFAESI Act, 2002 which provides that a secured creditor *shall* consider the representation of the debtor and if it is not acceptable then the creditor shall communicate the reasons for his non-acceptance. Next, this edition also discusses the issue whether Section 14 of the Insolvency and Bankruptcy Code, 2016 (Moratorium) limits the rights of a creditor to proceed against the guarantor during the currency of moratorium period. There's another article in this edition regarding the applicability of the provisions relating to Moratorium under the Insolvency and Bankruptcy Code, 2016 on proceedings for setting aside arbitral award under the Arbitration and Conciliation Act, 1996.

Further, in this edition we also discuss the (Draft) Labour Code on Social Security, 2018 which is a Central Government initiative for universalization of Social Security to tackle the lacunae of existing labour laws. This is followed by an article discussing legal compliances under the Companies Act, 2013 on registration of charge created on assets as security for corporate borrowings.

The next three articles cover recent judicial pronouncements on varied questions of law. Namely, whether the execution of an arbitral award can be filed in the Court where assets are located, the crucial verdict declaring that foreign lawyers/ firms are not entitled to an absolute right to practice law in India, lastly, the conditions for execution of a valid arbitration agreement.

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# ANALYSIS OF “ITC LTD. VS. BLUE COAST HOTELS LTD. & ORS.”(SECTION 13 (3-A) OF THE SARFAESI ACT IS MANDATORY AND NOT DIRECTORY)

*Akshay Abrol*

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (“**Act**”) is a mighty tool in the hands of the secured creditors for recovery of outstanding debt. Recent trends show the keenness of the banks in taking recourse to the provisions of the Act as a first resort for recovering loans. However, the banks have also been misusing the provisions of the Act, by jumping into coercive actions and throwing overboard the due process as prescribed under the Act to recover the debt.

Under Section 13 of the Act, the banks have the power to initiate the recovery process without approaching the courts. The bank, after declaring the account of a borrower as Non-Performing Asset (“**NPA**”)<sup>1</sup>, issues a notice in writing to the borrower under Section 13(2) of the Act calling upon the borrower to discharge in full his liabilities to the secured creditor within 60 days from the date of the notice. The borrowers on receiving such notice may make representation or raise objections under Section 13 (3-A) of the Act which shall be considered by the secured creditor within a period of 15 days of receipt of such representation or objection. In the case *ITC Limited vs. Blue Coast Hotels Ltd. & Ors.*,<sup>2</sup> the question which was required to be decided by the Hon’ble Supreme Court was, “*whether the Parliament*

*intended for a total invalidity to result from the failure to reply and give reasons for the non-acceptance of the borrower’s representation. In other words, whether sub-section (3A) of Section 13 is mandatory or directory in nature.*”<sup>3</sup>

The Hon’ble Supreme Court, in its decision in *ITC Limited vs. Blue Coast Hotels Ltd. & Ors.*, held that once the proceedings have been initiated by a secured creditor under Section 13 of the Act, it is mandatory for the secured creditor to consider the representations made by the debtors under Section 13 (3A) of the Act.

In the said case, Industrial Financial Corporation of India (IFCI) had entered into a corporate loan agreement with Blue Coast Hotels for a sum of Rs. 150 Crores. The said loan was secured by creation of special mortgage of debtor’s hotel property including the agricultural land on which the debtor was to develop villas. On default in repayment of the outstanding loan amount, the account of the debtor was declared NPA and a notice under Section 13(2) of the Act was sent by IFCI calling upon Blue Coast Hotel to pay the overdue amount within a period of 60 days. On receiving the Notice under Section 13(2) of the Act, Blue Coast Hotel sent a proposal to IFCI for extension of time for the payment of the outstanding dues. However, IFCI failed to deal with the said representation of Blue Coast Hotel.

IFCI took symbolic possession of the hotel property of Blue Coast Hotel in June 2013 and a notice for auction sale was also published. Blue Coast Hotel aggrieved by the said auction sale notice, filed a Securitization Application (“**S.A.**”) against the said notice before the Ld. Debt Recovery Tribunal (“**DRT**”) wherein, the Ld. DRT passed an interim order directing IFCI not to take any steps in the next 60 days with respect to the sale of the hotel property. The Ld. DRT also set aside the Notice sent by IFCI under Section 13(2) of the Act on the ground of non-compliance by IFCI with the provisions of Section 13(3-A) of the Act and for issuance of demand

<sup>1</sup> As per para 2.1.2 of the Reserve Bank of India Master Circular on Income Recognition, Asset Classification & Provisioning pertaining to advances (RBI/2014-15/74) bearing DBOD No. BP.BC.9/21.04.048/2015-15 dated 1 July 2014 a Non Performing Asset is a loan or advance where : (i) interest and/ or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan; (ii) the account remains ‘out of order’ as indicated at paragraph 2.2, in respect of an Overdraft/Cash Credit (OD/CC); (iii) the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted; (iv) the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops; (v) the instalment of principal or interest thereon remains overdue for one crop season for long duration crops; (vi) the amount of liquidity facility remains outstanding for more than 90 days, in respect of a securitisation transaction undertaken in terms of guidelines on securitisation dated February 1, 2006; and (vii) in respect of derivative transactions, the overdue receivables representing positive mark-to-market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.

<sup>2</sup> Decided on 18.03.2018 by the Hon’ble Supreme Court.

<sup>3</sup> Para 25 of *ITC Ltd. vs. Blue Coast Hotels Ltd. & Ors.*



notice jointly for agricultural land and the mortgaged property. The Ld. DRT also clarified that the provisions of the Act do not apply to the agricultural land as specified under Section 31(i) of the Act.

IFCI aggrieved by the order passed by the Ld. DRT, filed an appeal before the Ld. Debt Recovery Appellate Tribunal (**"DRAT"**). The Ld. DRAT allowed the appeal and upheld the validity of the notice issued under Section 13(2) of the Act by IFCI. Thereafter, Blue Coast Hotel filed Writ Petitions against the order of the Ld. DRAT before the Hon'ble Bombay High Court.

In the meantime, IFCI issued another auction notice in December 2014 and the hotel property was eventually purchased by ITC Ltd. However, the Hon'ble Bombay High Court held that:

- a. Since IFCI failed to reply to the proposal given by Blue Coast Hotel, IFCI violated the provisions of Section 13(3-A) of the Act;
- b. IFCI had issued the notice under Section 13(2) of the Act for agricultural land and hence the same was in violation of the Section 31(i) of the same Act; and
- c. Auction/ sale of the mortgaged property on the basis of symbolic possession is contrary to the scheme of the Act and Rules.

ITC Ltd. aggrieved by the said order passed by the Hon'ble Bombay High Court, filed a SLP before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court held that *"We find the language of sub-section (3A) to be clearly impulsive. It states that the secured creditor 'shall' consider such representation or objection and further, if such representation or objection is not acceptable or tenable, he shall communicate the reasons for non-acceptance" thereof. We see no reason to marginalize or dilute the impact of the use of the imperative 'shall' by reading it as 'may'. The word 'shall' invariably raises a presumption that the particular provision is imperative."*<sup>4</sup>

It was further held by the Hon'ble Supreme Court that *"As the Section stood originally, there was no provision for the above-mentioned requirement of a debtor to make a representation or raise any objection to the notice issued by the creditor under Section 13(2). As it was introduced via sub-section (3A), it could not be the intention of the*

*Parliament for the provision to be futile and for the discretion to ignore the objection/representation and proceed to take measures, be left with the creditor. There is a clear intendment to provide for a locus poenitentiae which requires an active consideration by the creditor and a reasoned order as to why the debtor's representation has not been accepted."*<sup>5</sup>

However, considering the facts in the instant matter, the Hon'ble Supreme Court held that *"we have no doubt that the failure to furnish a reply to the representation is not of much significance since we are satisfied that the creditor has undoubtedly considered the representation and the proposal for repayment made therein and has in fact granted sufficient opportunity and time to the debtor to repay the debt without any avail. Therefore, in the fact and circumstances of this case, we are of the view that the debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief."*<sup>6</sup>

Accordingly, in view of the Hon'ble Supreme Court of India's judgment in the aforesaid matter, it is mandatory (and not discretionary) for all banks who have issued a notice under Section 13(2) of the Act to give consideration to the representations or objections that may be raised by the borrower under Section 13(3A) of the Act and if the said representations or objections are not acceptable or tenable then the banks are mandated to communicate the reasons for the same to the borrower within 15 days of receipt of such representations or objections.

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<sup>4</sup> Para 28 of ITC Ltd. vs. Blue Coast Hotels Ltd. & Ors.

<sup>5</sup> Para 29 of ITC Ltd. vs. Blue Coast Hotels Ltd. & Ors.

<sup>6</sup> Para 34 of ITC Ltd. vs. Blue Coast Hotels Ltd. & Ors.

# APPLICABILITY OF MORATORIUM TO PERSONAL GUARANTORS OF THE CORPORATE DEBTOR UNDER SECTION 14 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

Aishwarya Mishra & Rahul Pandey

## INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "**the Code**"), was passed with the objective of consolidating and amending laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all stakeholders. However, within a year of its enactment, the Code has run into several roadblocks creating a deadlock between different authorities as regards to its interpretation. One such deadlock is the question regarding the applicability of the imposition of moratorium under Section 14 of the Code to the personal guarantors of the corporate debtors.

"Moratorium" in plain language is defined as a legal authorization to debtors to postpone payment to creditors; a suspension of activity or a waiting period set by an authority<sup>1</sup>. The wording of the said provision has created a sea of confusion and ambiguity regarding its application, with National Company Law Tribunals in different parts of the country giving varying directives on the same.

## JUDICIAL INTERPRETATION

A contract of guarantee is defined under Section 126 of the Indian Contract Act, 1872, as a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. Section 128 of the Indian Contract Act, 1872 provides that the liability of the surety is co-extensive with that of the principal debtor unless provided otherwise by the contract.

In *Central Bank of India v. C L Vimla*<sup>2</sup>, the Supreme Court observed that, "*The creditor has a right to obtain a decree against the surety and the principal debtor. The surety neither has the right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor nor does he have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance. Thus, we are of the view that guarantor cannot escape from her liability as a guarantor for the debt taken by the principal debtor.*" Thus, it has been established beyond doubt that the creditor has the discretion to proceed against either the principle debtor or the guarantor as he deems fit.

However, Section 14 of the Code limits the rights of the creditor, to proceed against the debtor, once the period of moratorium has been imposed. It lays down that-

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date<sup>3</sup>, the Adjudicating Authority<sup>4</sup> shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off, by the corporate debtor, any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation

<sup>1</sup> Oxford Dictionary

<sup>2</sup> (2012) 11 SCC 511

<sup>3</sup> As per Section 5(12) of the Code insolvency commencement date means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or 10 of the Code as the case may be.

<sup>4</sup> As per Section 5(1) of the Code Adjudicating Authority means the National Company Law Tribunal.

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

In light of the said provision, the question which arises is **whether the aforementioned provision also limits the right of the creditor to proceed against the guarantor during the period of moratorium?**

This issue has been discussed comprehensively in various decisions. The Ld. NCLAT, in an appeal against judgment of Ld. NCLT, Mumbai Bench, in the case of *Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd. & Ors.*<sup>5</sup> opined upon the question regarding treatment of properties of the guarantors during a moratorium under Section 14 of the Code. In the said case, the personal properties of the promoters had been given as security to the banks. The question before the Ld. NCLT Mumbai was whether such properties that are not owned by the corporate debtor would fall within the ambit of a moratorium under the Code. Applying the principle of strict interpretation, the Ld. NCLT Mumbai held that the term "its" under Section 14(1)(c) of the Code refers to the property of the corporate debtor undergoing a Corporate Insolvency Resolution Process ("**CIRP**"). Accordingly, the property not owned by the corporate debtor would not fall within the ambit of the moratorium imposed under the Code. Upholding the decision of the Ld. NCLT, the Ld. NCLAT held that the moratorium would not be applicable to any assets, movable or immoveable, that do not belong to the corporate debtor.

Similarly, in *Schweitzer Systemek India Pvt. Ltd. v. Phoenix ARC Pvt. Ltd.*<sup>6</sup>, the Ld. NCLT, Mumbai Bench interpreted the benefit of the moratorium to be limited only to corporate debtors. Reiterating the same principle, the Ahmedabad Bench of Ld. NCLT in *IDBI Bank Ltd. v. BCC Estate Pvt. Ltd.*<sup>7</sup> held that "*The liability of Guarantor is co-extensive with that of the Principal Borrower. It is for the creditor to choose against whom he wants to proceed. There is thus, no bar in the law which prevents any creditor to proceed against both, the Principal Borrower and Guarantors.*" A contention that the resolution plan for Principal Borrower, undergoing CIRP (i.e. Corporate

Debtor), would also include corporate guarantor, was rejected by NCLT as the corporate guarantor is an independent corporate body.

From the aforementioned adjudications, it seemed that the settled principle of law was that the imposition of moratorium would not preclude the creditor from proceeding against the guarantors.

However, this principle underwent a sea of change after the judgment of the Hon'ble Allahabad High Court in the case of *Sanjeev Shriya v. State Bank of India*<sup>8</sup> ("**Sanjeev Shriya Case**"). The factual matrix of the said matter is as follows- M/s. LML Ltd. ("**LML**") was declared as a 'sick industrial company' by the Board for Industrial Financial Reconstruction on May 8, 2007. Under the provisions of the RDDBFI Act, 1993<sup>9</sup>, State Bank of India ("**SBI**") filed an application before the Ld. DRT for recovery of the dues jointly and severally from LML as well as from the personal guarantors. LML filed an application to initiate the corporate insolvency process under Section 10 of the Code. On May 30, 2017, the Ld. NCLT - Allahabad Bench admitted the application and imposed a moratorium upon proceedings against LML. In view of the NCLT's order, the Ld. DRT stayed the proceedings but only against LML and observed that there was no order to restrain the proceedings against the personal guarantors. The personal guarantors challenged this order of the Ld. DRT before the Hon'ble Allahabad High Court.

While staying the proceedings at the Ld. DRT against even the personal guarantors, the Hon'ble Allahabad High Court observed that in cases where the insolvency resolution process has already begun and the liability has not been crystallized against either the principle debtors or the guarantors, then the proceedings pending before the Ld. DRT cannot go on and are stayed until the finalization of the corporate insolvency resolution process or till the Ld. NCLT approves the resolution plan under Section 31(1), of the Code or passes an order for liquidation under Section 33 of the Code.

The Hon'ble Allahabad High Court relied on Sections 60(1) and 60(2) of the Code, which provide that the Adjudicating Authority in relation to personal guarantors shall be the NCLT and observed that in

<sup>5</sup> Company Appeal (AT) (Insol.) No. 116 of 2017

<sup>6</sup> Company Appeal (AT) (Insolvency) No. 129 of 2017

<sup>7</sup> CP. (I.B) No. 80/7/NCLT/AHM/2017

<sup>8</sup> 2017 141 CLA 305 (All.)

<sup>9</sup> Recovery of Debt Due to Banks and Financial Institutions Act, 1993



cases where the insolvency resolution process has already begun, the application relating to insolvency resolution of a personal guarantor would also lie before the same NCLT. Based on this reasoning, the proceedings at the Ld. DRT even against the personal guarantors were stayed.

Following the lead of the Hon'ble Allahabad High Court in the Sanjeev Shriya case, the Ld. NCLAT, New Delhi in *State Bank of India v. V Ramakrishnan and Ors.*<sup>10</sup> upheld the order of the Ld. NCLT, Chennai. The Ld. NCLT, in this instance, had ordered the initiation of insolvency proceedings against Vecons Energy Systems Pvt. Ltd., and SBI, one of the majority creditors, submitted its claim after the CIRP was initiated. The promoter and managing director, Mr. V. Ramakrishnan, had given a personal guarantee for the said loan. SBI had initiated action to the sell the assets of the promoter given as personal guarantee. Mr. Ramakrishnan moved the Ld. NCLT against the action of SBI. The Ld. NCLT ruled in favor of Mr. Ramakrishnan and offered the reasoning *that in case a guarantor's personal property is sold to realize the dues from the principal debtor during the moratorium period of the principal debtor, then the guarantor would have a charge upon the property of the principal debtor for recovering such amounts. Thus, a charge on the assets of the principal debtor would be created in favor of the guarantor, during the continuance of the moratorium period, which is prohibited under Section 14 of the Code.* The Ld. NCLAT stated that, "We hold that the 'Moratorium' will not only be applicable to the property of the 'Corporate Debtor' but also on the 'Personal Guarantor'."

In *SBI v. R Inderjeet*<sup>11</sup>, where the creditor i.e. SBI had moved an application under Section 7 of the Code to initiate insolvency proceedings against the personal guarantors of the corporate debtors, the Ld. NCLT Chennai, referring to the decision in Sanjeev Shriya case, observed that, "SBI should not proceed against the personal guarantors till the moratorium period comes to an end or till the Adjudicating Authority approves a resolution plan under Sub Section 1 of Section 31 or passes an order for liquidation of corporate debtor under Section 33."

The Kolkata Bench of the Ld. NCLT also passed a decision along similar lines in the case of *ICICI Bank v.*

*Vista Steel Ltd.*<sup>12</sup>, holding that, "In this case, insolvency petition has already been admitted under Section 7 against the principal borrower. Therefore, another insolvency proceeding against the corporate guarantor is barred on account of moratorium order passed under Section 14 (1)(a) of the Code against the principal borrower". The Ld. NCLT further held that "It is clear that the present petition filed against the corporate debtor who happens to be a corporate guarantor of the principal borrower which is barred by the provisions of the moratorium order passed under Section 14(1) (c) of Code. Therefore, we hold that at the moment the petition under Section 7 is not maintainable until finalization of insolvency proceedings against the principal borrower. Thus, the petition filed under Section 7 of the Code deserves to be dismissed with liberty to file a fresh petition, when the moratorium already in force is vacated."

## ANALYSIS

The Hon'ble Allahabad High Court in the Sanjeev Shriya Case stayed proceedings in the Ld. DRT against the guarantors on the ground that the liability has not been crystallized against either the principle debtors or the guarantors, therefore the proceedings pending before the Ld. DRT cannot go on and the same were stayed until the finalization of the corporate insolvency resolution process or till the Ld. NCLT approves the resolution plan under Section 31(1), of the Code or passes an order for liquidation under Section 33 of the Code.

In *Northway Spaces & Anr. v. Sicom Spaces and Anr.*<sup>13</sup> the Ahmedabad bench of the Ld. NCLT while dismissing the application filed by the appellants seeking a direction against the respondent to stop them from taking possession of the properties of the appellants, who were the guarantors of the corporate debtor, held that, "By any stretch of analogy, the said decision (Sanjeev Shriya) is not at all applicable to the proceeding initiated by the applicants or to the prayer made by the applicants. In short, the prayer of the applicants is to extend the moratorium order imposed in respect of the properties of the Corporate Debtor also to the properties of the guarantors/ Applicants without there being any proceeding in respect of the guarantors for initiation of CIRP before this Authority. Therefore, the above said decision relied upon by the applicants is not applicable to the facts of this case." The Bench also held that, "The

<sup>10</sup> Company Appeal (AT) (Insolvency) No. 213 of 2017

<sup>11</sup> MANU/NC/0668/2018

<sup>12</sup> MANU/NC/2661/2017

<sup>13</sup> C.P. (I.B) No. 28/14, 19 & 20/NCLT/AHM/20

*moratorium order passed under Section 14(1) of the Code applies only to the security interest created by the Corporate Debtor in respect of its properties but not to the properties of the guarantors."*

## **CONCLUSION**

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From the aforementioned judgements, it appears that there are a host of new issues in the Code which need further consideration to render a purposive and final interpretation of the provisions, including relating to Section 14 of the Code.

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# THE (DRAFT) LABOUR CODE ON SOCIAL SECURITY 2018

*Harsimran Singh*

## INTRODUCTION

The Labour Code on Social Security 2018 (**'Labour Code'**) is the Central Government's initiative to tackle following existing lacunae:

- almost 90% of the current workers are not covered under any social security;
- unorganized sector workers are largely excluded;
- prevailing schemes have very limited outreach;
- multiplicity of applicable laws, policies, schemes and governmental instrumentalities;
- current thresholds for wage and number of workers employed for a labour law to become applicable creates tenacious incentives for the employers to avoid joining the system which results in exclusions and distortions in the labour market.

To begin with, the Labour Code aims to simplify, rationalize and consolidate multiple statutes into one consolidated law, which will be easier in terms of understanding, implementation and enforcement. The Code finds its genesis in the Report of the Second National Commission on Labour (2002) and many other subsequent studies and reports on social security policies including UN SDGs of the 2030 Sustainable Development Goals Agenda along with expert technical assistance from the International Labour Organization on the policy framework.

The Labour Code aims at universalization of Social Security and hence, the definition of *employee* covers all kinds of employment including part-time workers, casual workers, fixed term workers, piece rate/commission rated workers, informal workers, home-based workers, domestic workers and seasonal workers. However, the said universalization does not mean that all the workers proposed for coverage under the code would be covered straight away. Those categories of workers who are initially not covered would be included in Schedule- I (Exclusions) and the

ambit of coverage will be extended gradually. The Labour Code requires all workers (who are currently active) to get registered under the (Aadhar based) Universal Registration system envisaged in the Code as per the registration protocols decided by the Central Board for universal applicability and portability of registration. However, actual registration in the field will be performed by local bodies (i.e. gram panchayats / municipal bodies), under the supervision of the State Boards and through facilitation centers for registration services set up on PPP basis.

The Labour Code also aims to streamline and centralize the investments for maximizing returns. Under the provisions of the Labour Code, any current surplus in a Fund, is to be transferred by the State Boards to the Central Board for professional management of investment of the Scheme Funds. This is to ensure that economies of scale may be utilized to the maximum possible extent and good returns can be fetched on the investment. The Central Board has been provided with the responsibility to manage the investment of the Funds mentioned above on behalf of the States in accordance with the investment pattern notified by the Central Government. The amount so transferred to the Central Board continues to vest in the State Board, and the Central Board is also obliged to remit, to the State Boards, from time to time, such amounts from the State's Scheme Fund or Gratuity Fund being managed by it, as may be required by the State Board to meet the Scheme obligations.

The Labor Code derives its understanding of Social Security from the fundamental ILO Convention on Social Security (C102) and includes nine types of social security covers as described in the said Convention. Social Security Fund in each State is to provide for schemes such as Pension, Sickness Benefit, Maternity Benefit, Disablement Benefit, Invalidity Benefit, Dependent's benefit, Medical Benefit, Group Insurance Benefit, Provident Fund, Unemployment Benefit and International worker's pension benefit.

## ENTITY, ESTABLISHMENTS, ENTERPRISE AND BUSINESS

The Labor Code clarifies the difference between the said three terms. *Entity* is a broad term which includes the entire spectrum of units (wherein work is done by persons) irrespective of the nature and quantum of work. *Enterprise* is a sub-set of the larger universe i.e. Entity. This differentiation has been provided for in the Labour Code to distinguish between the enterprises which engage workers for any economic activity and households who engage workers for domestic requirements. Further, *Enterprise* may or may not employ any worker whereas *Establishments* are the ones that employ at least one worker.

The term 'business' has been used to specify the kind of activity the 'Enterprise' undertakes – such as manufacturing, agriculture, etc. The term Enterprise also includes the units in which an own account worker (i.e. owner-cum-worker) works. Households are also included in the term 'Entities' and 'Employer'. Thus, as such (if not specifically excluded through an entry in Schedule-I) the Labour Code applies to households and domestic workers as well.

## DEACTIVATION OF WORKERS' REGISTRATION

The Labour Code intends to pass on its benefits only to those covered under the definition of 'worker'; therefore, the minimum period for which a person needs to work in a particular year to entitle him to be classified as a worker and avail benefits under the Labour Code is to be decided by the National Council. Any period wherein the worker is out of work on account of employment injury, sickness or maternity is considered as work and the provisions of deactivation do not apply to such cases. The primary obligation to register a worker falls on the employer, except for own-account worker, who needs to register himself; accordingly, the Labor Code provides for penalties for employing an unregistered worker beyond a specified period apart from provisioning that if the employer fails to register the worker within the specified time period, the worker can self-register.

## CATEGORIZATION OF WORKERS

The Labor Code provides for a system of classification of workers based upon socio-economic parameters that will be scientifically designed and notified in the Rules to the Labour Code and the workers will be

required to provide requisite data at the time of registration and based on this, the categorization will be automatically determined. The funding of social security under the Labor Code will be a combination of (i) employer / employee funded and (ii) taxpayer funded (for workers belonging to poorest socio-economic category). A proper percentage based structure for contribution, vis-à-vis socio economic category and minimum notified wage, has been put in place under the Labour Code.

## FUTURE OF EPFO, ESIC, DGLW RUN WELFARE FUNDS AND OTHER MECHANISMS

In India, currently there are fifteen social security laws applicable to a worker but once the Labor Code is put into effect, these laws will be obsolete & replaced as the Labor Code provides for comprehensive social security structure, subject to states adapting the new Labour Code and notifying respectively. The beneficiaries under the ceased schemes shall be entitled to draw the benefits, not less than the benefits that were sanctioned to them under the ceased schemes and the successor boards shall be liable to bear the financial liabilities created by the decisions taken by predecessor organizations. Any Exemption granted under Section 17 of Employees' Provident Fund Act, 1952, or Section 87 or 88 of Employees' State Insurance Corporation Act, 1948, shall deemed to be a permission to operate Alternate Coverage Mechanism granted under the Labour Code from the corresponding Scheme(s) under the Labour Code for a period until –

- (i) validity of the exemption so granted expires, or
- (ii) one year from the commencement of applicability of the Labour Code, whichever is earlier.

## EMPLOYER'S LIABILITY

It arises only where the employer neglects to pay the contribution in respect of a worker or the worker does not complete the qualifying service for entitlement of dependent or disablement benefit. An employee shall be deemed to have been in continuous service of the Principal Employer for the purpose of Gratuity entitlement so long as he has served continuously for the same Principal Employer, whether or not through same or different contractors. Contribution Augmentation Funds would be established through which governments could contribute to the social



security in respect of workers who are unable to pay contribution.

## **CONTRIBUTION AUGMENTATION FUNDS**

The Labor Code empowers the Central Government or the State Government to establish Contribution Augmentation Fund as deemed necessary by the Central or State Government, as the case may be. The Contribution Augmentation Fund would be administered by the respective State Boards. The State Boards shall be empowered to credit to the State Social Security Fund from the State contributions on behalf of workers by general or special orders. This amount credited to the State Social Security Fund would then be credited to the VIKAS of the beneficiary workers by the State Board in consultation with the State Advisory Committees.

## **NATIONAL STABILIZATION FUND**

National Stabilization Fund will be used for harmonizing the Scheme Funds across the country and will be managed by the Central Boards. Any actuarial surpluses in any scheme or unclaimed amounts will be credited to the National Stabilization Fund, and it will be used if any state's scheme fund falls in distress. It can be used for providing loans or grants to State Boards in case of deficit found in any scheme after actuarial evaluation.

## **ACCOUNTABILITY AND TRANSPARENCY OF THE SOCIAL SECURITY ORGANIZATIONS**

The Labor Code introduces new approaches to ensure a transparent and fair financial set up, such as:

- (i) Time bound preparation of Accounts within six months of the end of the financial year;
- (ii) Provision for social audit of social security schemes by State Boards after every five years by agencies empaneled by the Central Board. Since the social security mechanism envisaged in the Labour Code operates at various levels including that of local bodies' level, social audit may help in creating sense of ownership amongst the subscribers specially in the lower socio-economic workers strata whose contribution will be subsidized from the Government fund which will help in identifying the corrective measures right at the ground level;
- (iii) Accounts of Intermediate Agencies to be subject to CAG Audit on the same lines as that of Social Security Organizations.

## **WAGE CEILING AND INCOME THRESHOLD**

The term 'wage ceiling' is for the purpose of determining a maximum limit on contribution payable; whereas the term 'income threshold' is for the purpose of enabling the government to provide for two different kind of schemes (for same purpose) for two different class of workers.

## **ADMINISTRATIVE CHARGES**

As per the Labour Code, these are to be paid by the employers as per the prescribed manner of calculation of contribution which has been changed slightly as compared to EPF system. Instead of certain percentage of wage, these charges shall be certain percentage (less than 4%) of contribution.

## **PRIVATIZATION OF SOCIAL SECURITY SYSTEM**

For better implementation of the Labor Code and for enabling PPP system in administering social security, licensing of Intermediate Agencies in the fields of fund management, point of presence, service delivery, benefit disbursement, record keeping and facilitation has been introduced. As per the Labour Code, being the agents of the Board, these agencies are required to deliver certain services, however, the ultimate liability and responsibility of providing the services / benefits remains that of the Boards including adequate safeguards for exercising control over Intermediate Agencies for protecting the interest of subscribers (including the suppression of the Governing Board of the intermediate agency, if necessary).

## **APPELLATE AUTHORITY**

A detailed grievance redressal mechanism, in order to make social security a right of each and every worker, has been prescribed in the Labor Code. Where if the beneficiary is aggrieved by the action or inaction on his complaint made to the *Samajik Suraksha Mitra*, the first level appeal can be filed to the departmental appellate officer. Similarly, in the cases where the employer is aggrieved by the orders passed by the assessing officer, an appeal lies to the appellate officer. The First Appellate Officer also hears appeals against other orders of the authorities (under the Labour Code) such as orders related to registration (or denial thereof), orders relating to entitlement of gratuity, confiscation of

unclaimed amounts, etc. The First Appellate Officer has also been given the role of determining answers to certain questions and disputes, such as whether any person will be treated as employee or not, whether any entity is principal employer or not, etc.

## **COMMUNITY SERVICE ORDER**

This is based on the notion that a person committing an offence with regard to social security legislation does not commit an offence only against an individual but also against the society as a whole, thereby, putting the entire social security system in jeopardy and as such should be reformed against committing such acts in future. As such, the Labour Code provides for Community Service Order to undertake unpaid work as directed by the court, in cases where the punishment for the offence committed is not more than two years of imprisonment and the court considers it a fit case for awarding the Community Service Order. This is quite similar to what has been prevalent in many western jurisdictions.

## **MEDICAL BENEFITS PROPOSED IN THE CODE VIS-À-VIS MEDICAL CARE PROVIDED BY THE CENTRAL/STATE GOVERNMENTS**

At the moment, the Central/State Government provides medical facilities through its healthcare set-up such as primary health centers, dispensaries and hospitals, to the unorganized sector workers who are not covered through social security legislation. After the medical benefit/insurance under the Labour Code is put into effect, this existing health set up may get integrated into the medical benefit scheme proposed under the Labour Code and the same would be strengthened due to inflow of funds through contributions and welfare funds where necessary.

## **COLLECTION OF THE BUILDING AND OTHER CONSTRUCTION WORKERS' CESS**

The cess shall be collected by the Local Authority or the State Government and proceeds of the cess shall further be transferred to the State Government after deducting collection charges, if any. The BOCW Welfare Cess Act, 1996, also provides for the levy and collection of BOCW Cess in above mentioned manner. The municipal bodies can collect cess at the time of passing of Plans.

## **PROTECTION OF PRIVACY OF PERSONAL DATA**

The Labour Code envisages provisions whereby no person can intentionally disclose, transmit, copy or otherwise disseminate any information collected in the course of implementing the provisions of the Labour Code, to any person not authorized under the Labour Code. Similarly, the Labour Code prohibits unauthorized access, download, stealing, tampering or destroying of the data of any Social Security Organization (SSO). Chapter F of the Labour Code, classifies as "confidential" the data and information produced during the implementation of the Labour Code and lays down the exceptions where this restriction of confidentiality shall not apply to the Governments, their agencies and the Courts.

## **CONTRIBUTION DEDUCTION AT SOURCE (CDS)**

CDS is provided for incentivizing coverage for workers in the course of works contract so as to prevent tax avoidance/evasion. Under CDS, in case of works contract, the Employer is the person executing the works contract, and he, in any-case is liable for covering his employees in the Social Security system. However, to prevent avoidance, it is proposed that the person awarding the works contract will make a fixed deduction from the payment to be made to the works contractor, and deposit it in the Social Security Fund (where it will go into a suspense account) as CDS and give a certificate to the works contractor. This certificate is like a 'credit note' with the Contractor and he can use it when he files his returns.

The above are some of the key highlights of the Labour Code; however, the ambit and implication of the Labour Code is huge keeping in view the intent and beneficial spirit of this proposed legislation.

Vide a Circular dated March 01, 2018 (Z-13025/13-2015/LRC), the Ministry of Labor & Employment, Government of India invited comments/suggestions to the Draft Labour Code from the Employers' Organizations, Central Trade Unions (recognized by the Central Government) and the State Governments. An updated version of the Labour Code, based on inputs so received, is expected soon.

# COMPLIANCES FOR REGISTRATION OF CHARGE UNDER THE COMPANIES ACT, 2013

*Pankhuri Agarwal*

Borrowing funds is an important source for a company to raise capital for financing large-scale projects and expanding its business. Corporate borrowings involve loans obtained by a company by way of creating a charge on its assets as security to the lender company. As defined in the Companies Act, 2013, ("**Act**") "charge" means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage. The Act prescribes for registration of charges with the Registrar of Companies.

According to Section 77(1) of the Act, it is the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge, with the Registrar of Companies within thirty days of its creation. The provisions of Section 77 of the Act relating to registration of charges shall, so far as may be, apply to a company acquiring any property subject to a charge within the meaning of that section; or any modification in the terms or conditions or the extent or operation of any charge registered under that section. Where a charge is registered with the Registrar of Companies, he shall issue a certificate of registration of such charge to the company and/ or to the person in whose favor the charge is created.

## FORM AND MANNER OF REGISTRATION

The method of registration of a charge is the filing of particulars of charge along with the instrument creating charge, with the Registrar of Companies within the period prescribed in Section 77(1) of the Act. However, in the event of failure to file the particulars within the prescribed period, the company can get the charge registered by seeking condonation from the Central Government. This is also known as "rectification of the register of charges".<sup>1</sup>

The application for registration of charge is to be submitted to the Registrar of Companies in such form, on payment of such fees and in such manner as prescribed in the Companies (Registration of Charge) Rules, 2014.

For registration of charge as provided in Section 77(1), Section 78 and Section 79 of the Act, the particulars of the charge (together with a copy of the instrument, if any, creating or modifying the charge) shall be filed with the Registrar of Companies within a period of thirty days of the date of creation or modification of charge along with the fee, in Form No.CHG-1 (for other than Debentures) or Form No.CHG-9 (for debentures including rectification), as the case may be, duly signed by the company and the charge holder.

## EXTENSION OF TIME FOR REGISTRATION

The proviso to Section 77(1) of the Act provides for extension of time for filing particulars for registration of charge. It is stated therein, that the Registrar of Companies may allow such registration to be made within a period of three hundred days of such creation on payment of additional fees. Rule 4 provides that the application for delay shall be made in Form No.CHG-1 and supported by a declaration from the company signed by its secretary or director that such belated filing shall not adversely affect the rights of any other intervening creditors of the company.

However, if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time for filing of the particulars or for the registration of the charge from the Central Government (in eForm CHG-8) in accordance with Rule 12 and Section 87 of the Act. The eForm CHG-1 for registration of charge, will be processed by the Registrar of Companies office after the order of Central Government for approval for condonation of delay (in eForm INC 28) has been filed with the Registrar of Companies. The Central Government can provide for extension of time on the ground that the omission to file with the Registrar of Companies, the particulars of

<sup>1</sup> Section 87 of the Companies Act, 2013

any charge or, the omission to register such charge, was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company, or any other grounds, it is just and equitable to grant relief.

In the case of *Tristar Container Service (Asia) P. Ltd. v. WW Shipping Agencies P. Ltd.*<sup>2</sup>, an application for extension of time was filed by a creditor. The petitioners were under the impression that respondents have filed the particulars of charges, but on a search conducted into records of the Registrar of Companies, it was found that the particulars of charges were not filed. However, in spite of the petitioners requesting the respondents to cause registration of the charges, the respondents did not effect the registration of the charges and therefore, the petitioners filed the said petition, which, if allowed would not cause prejudice to any stakeholder or the respondents, including the creditors. It was held that, in these circumstances the delay in filing of the particulars of the charges be condoned and time be extended for filing such particulars, with direction to the respondents to sign Form No. 8 as well for its registration. In the said case the petitioners showed that the delay was due to a sufficient cause and therefore, extension of time was granted for filing particulars of the charge.

## **EFFECT OF NON-REGISTRATION OF CHARGE**

Section 77(3) of the Act states that, in case no charge is created by a company, i.e. a charge is not registered, and a certificate of registration is not issued by the Registrar of Companies, then the charge shall not be taken into account by the liquidator or any other creditor. However, nothing provided in Section 77(3) of the Act shall prejudice any contract or obligation for the repayment of the money secured by a charge.

Section 86 of the Act, provides for punishment for contraventions of Section 77 of the Act. It is provided that, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term

which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

Therefore, an application must be made for registration of charges to the Registrar of Companies in the prescribed format so that the Registrar of Companies after being satisfied with the application, may issue a certificate of registration of charge and entitle the company and its creditors to rights at the time of liquidation

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<sup>2</sup> (2008) 141 Com Cases 944



# MORATORIUM APPLICABLE ON PROCEEDING U/S 34 OF THE ARBITRATION & CONCILIATION ACT, 1996

*Himanshu Chawla*

In the recent judgment delivered by the Hon'ble Delhi High Court in the case of *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*<sup>1</sup>, the Hon'ble High Court dwelled upon the question - whether a proceeding going on under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "**the Act**") need to be stayed, in light of Section 14(1)(a) of the Insolvency and Bankruptcy Code ( hereinafter referred as "**the Code**").

In the instant case, a petition was filed under Section 34 of the Act, for setting aside the arbitral award passed by the arbitral tribunal in favour of the Respondent. During the pendency of the abovementioned petition, an application under Section 7 of the Code, was filed by a financial creditor against the Respondent company before the National Company Law Tribunal- Mumbai (hereinafter referred as "**the NCLT**") seeking initiation of the corporate insolvency resolution process against the Respondent and by an order dated July 04, 2017, the Ld. NCLT had admitted the said application and had declared a moratorium under Section 14 of the Code.

Section 14(1)(a) of the Code runs as under-

*"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely-*

- (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;"*

Hence, the issue was - if the word "*proceedings*" used in Section 14(1)(a) of the Code, be read to mean '*all legal proceedings*' or it should be read restrictively to mean a particular type of legal proceeding viz. debt recovery action which may have an effect of dissipating or

diminishing the debtor's assets during the period of its insolvency resolution.

The respondent argued that if the proceedings are stayed, the respondent would be unable to execute the award given in its favour for an extended period till the moratorium exists and will be unable to recover its dues thereby further impeding its financial condition.

While settling the issue in the favour of the Respondent (i.e. corporate debtor), the Hon'ble High Court observed that the term '*proceeding*' as is mentioned in Section 14(1)(a) of the Code is not preceded by the word '*all*' to indicate the moratorium provisions would not apply to all the proceedings against the corporate debtor.

Further, the Hon'ble Delhi High Court also observed that the object of the Code is to provide relief to the corporate debtor through a 'standstill' period during which its assets are protected from dissipation or diminishment, and as a corollary, during which it can strengthen its financial position. In the present case extending the unexecutability of the award would prevent the Respondent (i.e. corporate debtor) from recovering money due to it and adding to its financial corpus. Therefore, Section 14 of the Code would not apply to the proceedings which are for the benefit of the corporate debtor as these proceedings are not a '*debt recovery action*'.

Moreover, the Hon'ble Delhi High Court also remarked that the proceedings under Section 34 of the Act are a step prior to the execution of an award. Only after determination of objections under Section 34 of the Act, the party may move a step forward to execute such award and in case the objections are settled against the Respondent

<sup>1</sup> Decided on 11 December 2017

(i.e. corporate debtor), then its enforceability under Section 36 of the Act shall certainly be covered by moratorium of Section 14(1)(a) of the Code.

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# EXECUTION OF ARBITRAL AWARD: SETTLING THE DIVERGENT VIEWS IN THE LIGHT OF SUNDARAM FINANCE VS. ABDUL SAMAD & ANR.

Anmol Jassal

## INTRODUCTION

The question to be decided by the Hon'ble Supreme Court of India in the matter titled "*Sundaram Finance v. Abdul Samad & Anr.*"<sup>1</sup> was whether an award under the Arbitration & Conciliation Act, 1996, (hereinafter referred to as "**the Act**") is required to be first filed in the court having jurisdiction over the arbitration proceedings for execution and then to obtain transfer of the decree or whether the award can straightway be filed and executed in the Court where the assets are located. Before the decision in the present case, different High Courts had divergent views on this issue. While the Hon'ble Madhya Pradesh, Karnataka, and Himachal Pradesh High Courts have taken one view, the Hon'ble Delhi, Rajasthan, Madras, and Kerala High Courts have adopted a different view.

## FACTS LEADING TO THE APPEAL

The Appellant and the Respondent had entered into a Loan Agreement, in which it was alleged by the Appellant that the Respondent committed a default in payment of instalments. As provided in the Loan Agreement, arbitration proceedings were initiated and an *ex parte* Arbitral Award was passed. The case of the Appellant is that the award being enforceable as a decree under Section 36 of the Act, execution proceedings were filed in the jurisdiction of the court at Morena, Madhya Pradesh under Section 47 read with Section 151 and Order 21 Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as "**the Code**"). However, the Learned Trial Court vide its order dated March 20, 2014, returned the execution application on account of lack of jurisdiction, directing the application to be presented to the court of competent jurisdiction. The effect of the judgment was that the Appellant was required to file the execution proceedings first before the court of competent jurisdiction in Tamil Nadu, and then obtain a transfer of the decree and then could the proceedings be filed in

the trial court at Morena. This view adopted by the Learned Trial Court was based on the judgments of the Hon'ble Madhya Pradesh High Court and the Hon'ble Karnataka High Court. The Appellant did not approach the Hon'ble Madhya Pradesh High Court against the said order but approached the Hon'ble Supreme Court by filing the Special Leave Petition on the ground that no useful purpose would be served by approaching the Hon'ble Madhya Pradesh High Court in light of the view already expressed by that court in conflict with the opinions of some other high courts.

## THE CONFLICTING VIEWS

One view is that the transfer of decree should first be obtained before filing the execution petition before the court where the assets are located. The aforesaid view has been adopted by the Hon'ble Madhya Pradesh and Himachal Pradesh High Courts. In the case of "*Computer Sciences Corporation India Pvt. Ltd. v. Harishchandra Lodwal & Anr.*"<sup>2</sup>, the Learned Single Judge of the Hon'ble Madhya Pradesh High Court took recourse to the provisions of Section 42 of the Act, dealing with the issue of jurisdiction in respect of an arbitration agreement read with Section 2(e) of the Act which defines the word 'Court'. In the context of Section 36 of the Act dealing with the enforcement of an award prescribing that "*the award shall be enforced under the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court,*" it was observed that the same principle would apply as for enforcing of a decree. Since Section 37 of the Code defines the Court which passes the decree and Section 39 lays down the procedure for transfer of decree, it was opined that for execution of an award a transfer of the decree was mandatory.

While the other view is that an award is to be enforced in accordance with the provisions of the Code in the same manner as if it were a decree of the Court as per Section 36 of the Act, it does not imply that the award

<sup>1</sup> Civil Appeal No. 1650 of 2018; Decided on 15 February 2018.

<sup>2</sup> AIR 2006 Madhya Pradesh 34

is a decree of a particular court. Thus, this view holds that the award can be filed for execution before the court where the assets of the debtor are located, which is supported by various decisions of the Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Madras High Court such as "*Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*"<sup>3</sup>, "*Maharashtra Apex Corporation Limited v. V. Balaji G. & Anr.*"<sup>4</sup>, "*Kotak Mahindra Bank Ltd. v. Sivakama Sundari & Ors.*"<sup>5</sup>.

## THE DECISION

On an analysis of the provisions of the Act and the Code, it was observed by the Hon'ble Supreme Court in *Sundaram Finance v. Abdul Samad & Anr* that an award is to be enforced in accordance with the provisions of the Code in the same manner as if it were a decree. It is, thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the arbitral tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree, the award is to be enforced in the same manner as if it was a decree under the Code. It was held that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings.

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<sup>3</sup> 2009 159 DLT 579

<sup>4</sup> 2011 (4) KLJ 408

<sup>5</sup> (2011) 4 LW 745



# SUPREME COURT PROHIBITS PRACTICE OF LAW BY FOREIGN LAWYERS/LAW FIRMS IN INDIA

*Divya Harchandani*

The division bench of the Hon'ble Supreme Court of India consisting of Justice A.K. Goel and Justice U.U. Lalit recently passed a crucial verdict in the matter titled *Bar Council of India vs. A.K. Balaji and Ors.*<sup>1</sup> declaring that foreign lawyers/firms are not entitled to practice law in India either on the litigation or non-litigation side unless they fulfill the requirement of the Advocates Act, 1961, and the Bar Council of India Rules.

In the petition, the main averments were that to practice law in India, a person has to be an Indian citizen and should possess a degree in law from a recognized University in India. Nationals of other countries could be admitted as advocates in India only if citizens of India are permitted to practice in such other countries. A foreign degree of law from a university outside India requires recognition by the Bar Council of India. Indian advocates are not allowed to practice law in U.K., U.S.A., Australia and other foreign nations except on fulfilling onerous restrictions like qualifying tests, experience, work permit, etc. Foreign lawyers thus, should not be allowed to practice in India without reciprocity. Under the Advocates Act (**"the Act"**), a foreigner is not entitled to practice in India in view of the bar contained in Section 29 of the Act.

The issue arose from the judgment of Hon'ble Madras High Court in the matter of *A.K. Balaji v. The Government of India*<sup>2</sup> as well as the judgment of Hon'ble Bombay High Court in *Lawyers Collective v. Bar Council of India*<sup>3</sup>.

## ENTRY OF FOREIGN LAWYERS ON "FLY-IN AND FLY-OUT BASIS"

The Hon'ble Madras High Court held that Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfil the requirement of the Advocates Act, 1961 and the Bar Council of India Rules; however there was no bar for foreign law firms or foreign lawyers to visit India for a temporary period on a "fly-in and fly-

out" basis for giving legal advice on their own system of foreign law and on diverse international legal issues.

The Hon'ble Supreme Court modified the above order and clarified that the expression "fly-in and fly-out" will only cover a **casual visit not amounting to "practice"**. In case of a dispute whether a foreign lawyer was limiting himself to "fly-in and fly-out" on a casual basis or was in substance doing prohibited legal practice can be determined by the Bar Council of India. The Bar Council of India or Union of India will be at liberty to make appropriate rules in this regard.

## (INTERNATIONAL COMMERCIAL) ARBITRATION PROCEEDINGS IN INDIA

While the Hon'ble Madras High Court held that having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration, the Supreme Court clarified that there was **no absolute right of the foreign lawyer to conduct arbitration proceedings in respect of such disputes.**

The submission of foreign law firms, that if they are not allowed to take part in negotiations, for settling up documents and conducting arbitrations in India, it will have a counterproductive effect on the aim of the Government to make India a hub of International Arbitration and if foreign law firms are denied entry to deal with arbitrations in India, then India will lose many of the arbitrations to foreign countries, was also opposed by the Bar Council which stated that such submissions are made only in the business interest of foreign law firms.

The Apex Court after due consideration held that if the Rule of Institutional Arbitration applies or the matter is covered under the provisions of the Arbitration and Conciliation Act, 1996 foreign lawyers may not be debarred from conducting arbitration proceedings

<sup>1</sup> Civil Appeal Nos. 7875-7879, 7170 and 8028 of 2015; Decided on 13.03.2018

<sup>2</sup> AIR 2012 Mad 124. Civil Appeal No. 7875-79 of 2015

<sup>3</sup> 2010 (2) Mah LJ 726, Civil Appeal No. 8028 of 2015

arising out of international commercial arbitration in view of Sections 32 and 33 of the Advocates Act. However, they will be governed by the code of conduct applicable to the legal profession in India and Bar Council of India or Union of India are at liberty to frame rules in this regard.

the Advocates Act, certainly applies to any foreigner also.

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## **SERVICES PROVIDED BY BPO COMPANIES**

The Hon'ble Madras High Court had also held that the B.P.O. Companies providing wide range of customised and integrated services and functions to its customers like word-processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc., do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules; however, in the event of any complaint made against these B.P.O. companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies.

On the other hand the Hon'ble Supreme Court held that BPO companies providing a range of customized and integrated services and functions to its customers may not violate the provisions of the Advocates Act, only if the services provided in pith and substance do not amount to practice of law. The manner in which they are styled may not be conclusive. If their services do not directly or indirectly amount to practice of law, the Act may not apply. This is a matter which may have to be dealt with on a case-to-case basis taking in considerations the facts of the situation.

## **CONCLUSION**

Accordingly, Foreign law firms/companies or foreign lawyers do not have an absolute right to practice law in India and they will be governed by the code of conduct applicable to the legal profession in India. Practicing of law includes not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion. The Scheme in Chapter-IV of the Advocates Act makes it clear that advocates enrolled with the Bar Council alone are entitled to practice law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Regulatory mechanism for conduct of advocates applies to non-litigation work also. The prohibition applicable to any person in India, other than advocate enrolled under

# ANALYSIS OF THE RECENT DECISION OF THE BOMBAY HIGH COURT IN BOARD OF TRUSTEES OF JAWAHARLAL NEHRU PORT TRUST VS. M/S. PSA MUMBAI INVESTMENTS PTE. LIMITED

*Tanya Tiwari*

The Hon'ble Bombay High Court by its judgment dated March 01, 2018, in the case titled *Board of Trustees of Jawaharlal Nehru Port Trust vs. M/s. PSA Mumbai Investments Pte. Limited* numbered ARBP No.1227/2016, set aside the order passed by the Learned ("Ld.") Arbitrator in an application under Section 16 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "**the Act**") in an appeal under Section 37 of the Act.

The Respondent who were the original Respondents before the Ld. Arbitrator objected to the jurisdiction of the Ld. Arbitrator under Section 16 (2) of the Act on the ground that there was no arbitration clause/agreement between the parties.

## FACTS OF THE CASE

The Petitioner - Claimant is a major port constituted under the Major Port Trusts Act. In 2009, it had issued a global invitation of Request for Qualification inviting applications for the development of 4th Container Terminal project on Design, Build, Finance, Operate and Transfer basis ("**RFQ**"). Pursuant to the said RFQ, bids were received from various bidders. The consortium of Respondent No.1, a subsidiary of PSA International Pte. Ltd. Singapore, as the lead member and the Respondent No.2, M/s. ABG Ports Private Limited, was shortlisted to bid for the said project and Request for Proposal ("**RFP**") was issued to it. The consortium submitted its RFP bid in October 2010.

The financial bid was opened in June 2011 and the Respondent consortium was declared a successful bidder of the said Project. On September 26, 2011, the Petitioner issued a Letter of Award to the Respondent Consortium and the Consortium accepted it and returned a signed copy thereof to the Petitioner on September 29, 2011.

Clause 6 of the said Letter of Award provided that the Concession Agreement was to be signed within 30 days from the date of the letter of acceptance. However, the signing of the Concession Agreement was delayed by the Respondents, first, on account of objecting to pay stamp duty on the Agreement stating that it was not compulsorily registerable, and then on account of disputes inter se the Respondents leading to Respondent No.2, having 26% share in the Consortium, requesting the Petitioner to allow it to withdraw as member of the Consortium. The Minister of Shipping in consultation with the Ministry of Law concluded that change in composition could not be allowed at the belated stage and accordingly, the Petitioner, by its letter dated August 30, 2012, again called upon the Consortium to sign the Concession Agreement.

The Respondent No.1, vide its letter dated September 15, 2012, in response to the Petitioner's Show Cause notice, reiterated its request to allow the change in composition of the Consortium since it was competent to satisfy all the conditions of the tender documents on its own also. The Petitioner, vide its letter dated October 16, 2012, terminated the letter of acceptance granted to the Respondent Consortium and encashed the Bank Guarantee provided by Respondent No. 1 for Rs. 67 crores.

The Petitioner, thereafter, raised a demand vide its letter dated November 26, 2014, calling upon the Respondents to pay damages of Rs. 4,46,28,46,454/-. Respondent No.1 denied any liability and called upon the petitioner to withdraw its claim. The Petitioner, thereafter, issued a notice of arbitration dated February 18, 2015, invoking the arbitration clause contained in Clause 19.3 of the Concession Agreement.

The Arbitrator entered upon reference and the Respondent No. 1 filed an Application under Section 16(2) of the Act inter alia challenging the jurisdiction of the Ld. Arbitrator to proceed with the arbitration

proceedings contending that in view of certain material issue between the parties in respect of stamping of the agreement, the date of the execution of the Concession Agreement was extended mutually between the parties and during that period the Respondents mutually decided that Respondent No.2 would withdraw from the consortium since such change was permissible under the terms of the RFQ and RFP.

It was also contended that the Concession Agreement containing the arbitration clause was never signed by the parties and thus there was no valid and enforceable agreement between the parties. It was contended that since there was no signed arbitration agreement between the parties, the invocation of the unsigned arbitration clause by the Petitioner and the subsequent request to the Ld. Arbitrator for a preliminary meeting for directions was ex-facie, bad in law and not maintainable.

The Ld. Arbitrator allowed the said application filed by the Respondent No.1 and rejected the reference of the Petitioner holding that there did not exist an arbitration agreement between the parties and thus there was no question of referring any dispute to the Arbitral Tribunal.

Being aggrieved by the said order of the Ld. Arbitrator, the Petitioner filed a Petition under Section 37(2)(a) of the Act. The Hon'ble High Court of Bombay decided in favor of the Petitioner setting aside the impugned order of the Ld. Arbitrator and restoring the arbitration proceedings to file, directing the Ld. Arbitrator to proceed with the arbitration proceedings expeditiously. It was also held that the arbitration agreement recorded in Clause 19.3 of the Concession Agreement exists between the parties.

## REASONING

The Hon'ble Bombay High Court observed that the bidding process came to be completed upon submission of the bids by the Respondents and other bidders in accordance with Clause 1.2.1 of the RFQ and therefore the Letter of Award issued by the Petitioner to the Respondents and return of the said Letter of Award duly counter signed by the Respondent No.1 formed a concluded contract between the parties. Further, the Respondents did not dispute that the Letter of Award issued by the Petitioner was signed by the Respondents and returned to the Petitioner

accepting all the terms and conditions of the bidding documents which includes the Concession Agreement. It was also relied on that the Authorized Representative of Respondent No.1 had put his initials on every page of the bid document submitted by the Respondent No.1 which included the draft Concession Agreement containing the arbitration clause.

The Hon'ble Bombay High Court also observed that signing of the Concession Agreement after issuance of Letter of Award was one of the requirement to be complied with by the Respondents but was not a condition precedent for the contract. It was held that the contract was already concluded between the parties prior to the date of signing the Concession Agreement.

The Hon'ble Bombay High Court also relied on Clause 3.3.6 of the RFQ which provided that after acknowledgement of the Letter of Award by the selected bidder, it shall execute the concession agreement within the period prescribed in clause 1.3 and such selected bidder is not entitled to seek any deviation in the concession agreement. The Hon'ble Bombay High Court stated that by way of Clause 3.3.6 and a perusal of the documents exchanged between the parties and the acceptance of letter of award by the Respondents was indicative that the acceptance of the said letter would be binding as a concluded contract.

The Hon'ble Bombay High Court also relied on the principles laid down by the Hon'ble Supreme Court in case of Kollipara Sriramulu (deceased) by his Legal Representative vs. T. Aswatha Narayana (deceased) by His Legal Representative & Ors.<sup>1</sup> In the said case, the Hon'ble Supreme Court held that the intention of the parties in this case was very clear that the parties had intended that the letter of award issued by the Petitioner and accepted by the Respondents and return of such letter of award duly signed, to the Petitioner would amount to a concluded contract.

## ANALYSIS

The conditions for execution of a valid contract are different from the conditions of execution of a valid arbitration agreement. Even an oral contract which fulfills the requisite preconditions of offer, acceptance, consensus as idem, consideration, competence of parties to enter into the contract and legal purpose, is

<sup>1</sup> AIR 1968 SC 1028



a valid and binding contract. However, the conditions for an arbitration agreement as per Section 7 of the Act requires such agreement to be in writing in one of the methods provided in Section 7(4) of the Act. Section 7 (4) (b) of the Act states as follows

“Section 7 ...

(4) An arbitration agreement is in writing if it is contained in—

....

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

...”

In the present case, by way of submission of the initialed bid documents including the Concession Agreement which couldn't be altered, by the Respondents, and the acceptance of Letter of Award, the parties entered into a valid arbitration agreement which was binding on the parties.

Petition for Special Leave to Appeal before the Hon'ble Supreme Court has been filed against the said judgment of the Hon'ble Bombay High Court. The case numbered as Special Leave to Appeal (C) No(s). 8166/2018 titled M/S PSA Mumbai Investments Pte. Limited Versus the Board of Trustees of the Jawaharlal Nehru Port Trust & Anr. is pending grant of leave.

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