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Laws related to economic offences – A primer

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Introduction:

In India, there is no legislation as such that defines an 'economic offence'. Economic offences encompass all crimes which occur during the course of any economic or business activity.

In the beginning, such offences including corruption and criminal misconduct were dealt with under the provisions of the Indian Penal Code, 1860 ('**IPC**'). However, with the steady increase in economic offences of many varieties, such as tax evasion, trafficking, smuggling etc., all of which are too specific to be brought under the purview of IPC alone, the Government of India felt the need for creating different legislations dealing with such offences.

The salient features of an economic offence were first discussed in the Report of the 47th Law Commission of India (1972), formulated on the topic of '*Trial and Punishment of Social and Economic Offences*' ('**Report'**). The Government of India, while formulating this Report, had recognized economic offences as a separate category of crimes that require special attention, to ensure swift disposal of cases and meting of punishment. Thereafter, special legislation such as the Prevention of Money Laundering Act, 2002 ('**PMLA**') was brought out to prescribe the procedures and penalties for economic offences.

It goes without saying that, due to such an *ad-hoc* arrangement, one set of facts expose an offender to prosecution under multiple legislations. Consequently, the gravity of the crime as well as the parameters for granting bails or deciding punishments for such crimes have not been very clear and there is an overlap of procedures. Therefore, in order to fully understand and organize how economic offences are being tackled today, we have examined the existing laws in relation to such offences, the amendments to the regime brought out by the Companies Act, 2013 ('**2013 Act**'), the judicial history of granting of bails/ anticipatory bails with respect to economic offences, and scope for further changes.

We summarize the legislations related to economic offences as follows:

- The *IPC* provides the punishment for certain economic offences such as criminal misappropriation, criminal breach of trust, receiving or dealing in stolen property, cheating, creating fraudulent deeds, concealment of property, forgery, falsification of accounts, sale of adulterated drugs etc.
- The *Central Excise Act, 1944* provides the punishment for evasion of excise duty.
- The *Income Tax Act, 1961* criminalizes tax evasion, income concealment etc. The Act also imposes a penalty on failure to furnish returns, comply with notices issued under the Act or concealment of particulars of income as well as any fringe benefits.
- The *Customs Act, 1962* regulates how the goods should be moved in or out of the country, confiscation for improperly

imported goods, and for safeguards against smuggling.

- The *PMLA* is a landmark legislation in India that lays down what acts constitute money laundering, punishment for money laundering, etc.
  - i. Section 3 of the PMLA defines 'Money laundering' as the direct or indirect attempts to indulge or knowingly assist or knowingly be a party or be actually involved in any process or activity connected with the proceeds of crime and protecting it as untainted property.
  - ii. 'Proceeds of crime' has been defined under Section 2(u) as any property derived or obtained, by any person as a result of criminal activity being directly a Scheduled Offence or relating to a Scheduled Offence or the value of any such property.
  - iii. The Schedule mentioned in the PMLA classifies the various offences, referred to as 'Scheduled Offences', into 3 parts, basis which the penalty is prescribed. Even though the offences described under the Schedule have already been covered under existing legislations like the IPC, the PMLA has been created to cater particularly to the handling of the proceeds from such offences.
  - iv. The Bombay High Court, in the case of *Hasan Ali Khan* v. *UOI*[1] , stated that an offence is committed under the PMLA when an attempt is made to demonstrate a legitimate source of earning with respect to a tainted property. The decision thus gave judicial support to the type of offences outlined under the PMLA.
- Money laundering is not just tackled through the PMLA. The Reserve Bank of India (RBI), in exercise of its powers conferred under the *Foreign Exchange Management Act, 1999*, as well as PMLA, has come out with the *Master Circular on Know-Your-Customer (KYC) norms/ Anti-Money Laundering Standards/ Combating of Financing of Terrorism (CFT)/ Obligations of banks under PMLA,* in 2008, that has made it mandatory to identify customers through KYC, to prevent money laundering. This Circular has been revised periodically and the introduction of this Circular, along with additional guidelines dealing with anti-money laundering have been instrumental in the efforts to address serious economic offences.
- The *Insolvency and Bankruptcy Code, 2016* deals with fraudulent initiation of bankruptcy proceedings, by imposing penalty of not less than INR 1 lakh which may extend to INR 1 crore in such cases.
- Other offences include land grabbing, for which many States have enacted legislations, including the *A.P. Land Grabbing (Prohibition) Act, 1982*; credit card fraud, dealt with in the IPC and the *Information Technology Act, 2002*; and stock market manipulations, regulated by the Securities and Exchange Board of India (SEBI) through the *SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 1995*, and other such rules and regulations.
- Various laws such as the *Transplantation of Human Organs and Tissues Act, 1994*,

[1] (2011) 10 SCC 235

which punishes trafficking of human organs, the *Arms Act, 1959* against trafficking of arms etc., have also been instituted to combat specialized instances of crime that affect the economy.

- Keeping in mind the offenders that have crossed the Indian borders and are evading arrest, the Central Government had also passed the *Fugitive Economic Offenders Act*, *2018* ('**FEO Act'**) which specifically caters to deter fugitive economic offenders from evading the process of law in India. While said Act does not define 'economic offences', the Schedule to the Act once again contains a list of offences for which, if any person has committed and has thereafter left India to avoid criminal prosecution, or being already abroad refuses to return to India, he is deemed a '***fugitive economic offender'***. The FEO Act borrows a lot of definitions from PMLA and empowers the Directors and Deputy Directors appointed under PMLA with additional rights to report/ declare fugitive economic offenders, details of their properties, etc., for attachment of the same.

Fraud under the Companies Act, 2013:

The list of legislations mentioned above show the many branched way in which economic offences are provided for in the country. While these legislations are structured in a 'cure-based' manner *viz.*, post commission of the offences, certain types of fraud as falling under the 2013 Act are subject to a 'prevention-based' model i.e., as soon as any event of fraud is detected, various steps are mandated under the Act to tackle them quickly and efficiently.

To begin with, as economic crime has taken on new and larger forms, the definition of 'fraud' in Section 447 of the 2013 Act has also been expanded to include any act, omission, concealment of fact, or abuse of position that is intended to gain an unfair advantage over, or harm the interests of the company, its shareholders and creditors. This brings all forms of corruption, deception, conflicts of interest, and bribery under its purview.

As per the new legislation, as soon as fraud is detected, it is recommended to reopen account books, and go for voluntary amendment of financial statements or the Director's Report, with the agreement of the jurisdictional National Company Law Tribunal (NCLT). Until now, auditors were only mandated to report serious fraud and were not required to evaluate whether fraud had occurred in any and every transaction. However, auditors now have an additional burden to pose as whistle-blowers by reporting immediately to the Central Government any fraud being perpetrated in the company's affairs.

The Serious Fraud Investigation Office (SFIO), subsisting under the 2013 Act, is now a statutory entity with the authority to make arrests for fraud-related offences. The National Financial Reporting Authority (NFRA) is meant to regulate auditors and has extensive powers to investigate professional or other misconduct by chartered accountants. Shareholders can also initiate class action suits against the company, its officers and auditors for failing to protect their interests. Accordingly, the penalties under the revamped law are more severe and are not compoundable. With the introduction of the new Act, even offences such as not filing of balance sheet, non-distribution of dividends without legitimate reasons, etc., are also open to judicial action.

Law relating to grant of bail/ anticipatory bail:

With the nature of these offences being severe, the protection offered to the accused in such offences also needs to be held with the highest safeguards. That means the strictest standards are to be employed when it comes to granting bail/ anticipatory bail to the accused in such economic offences.

This has been observed by the Supreme Court in the case of *Y.S. Jagan Mohan Reddy* v. *C.B.I.*[2], while considering a bail application, that:

'The economic offence having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of public/State and other similar considerations.'

This stance has also been maintained by the Supreme Court in *Chidambaram* v. *Directorate of Enforcement*[3], where anticipatory bail was denied by the Apex Court stating that the powers of anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 is an extraordinary power and that should be exercised sparingly, more so in cases of economic offences which affect the very fabric of the economy in our society.

In the recent cases of *Ashwini Kumar Patra* v. *Republic of India*[4] and *Pankaj Grover* v. *Directorate of Enforcement*[5], the prayers for bail have been dismissed outright by the High Courts, citing the huge amount of proceeds of crime. The Court also observed that the economically sound position of the accused would make them a flight risk, as they could abscond to any other country avoiding arrest as well as judicial proceedings. In short, a common yardstick adopted by all Courts when granting bail, that comes out from all these cases, is the amount of proceeds of crime, the apprehension of witness tampering or the chance for the accused to abscond, etc.

Scope for amendments in the law for economic offences:

With the steep rise in economic offences in India, the existing judicial system is over-burdened with cases, in turn resulting in decrease of arrests and convictions. Such dire situations call for a special court/ body that is dedicated solely to dealing with economic offences, to ensure that there is speedy disposal of cases.

Various attempts have been made over the past few years to pave way for this. The Special Court (Trial of offences relating to transactions in securities) Act, 1992 recommends constitution of special courts for trying offences related to securities. The PMLA also provides for setting up of special courts in relation to dealing with proceeds of crimes specified under the Schedule of said Act. The Special Courts set up under PMLA are also to oversee cases under the FEO Act. Basis such legislations, various special courts have been set up in the country.

That being so, while the special courts under said legislations have thus been constituted, sadly, the number of such designated courts are very limited and the Government has been slow in implementing these legislations.

Further, not just a procedural gap with the dealing of economic offences, but when it comes to substantive laws, the Banking Regulation Act, 1949 which is charged with regulating banking companies does not deal explicitly with any

[2] (2013) 7 SCC 439
[3] (2019) 9 SCC 24
[4] 2021 SCC OnLine Ori 438
[5] MANU/UP/1223/2021

cases of fraud. Accordingly, Section 403 of IPC (Criminal misappropriation) is to be relied upon heavily for cases of bank fraud. This lapse is evidenced by the frequent reporting of scams, such as the misappropriation of funds from the Punjab National Bank (PNB), the more recent *Bike Bots* scam case, amongst others. Even with respect to insurance frauds, the Insurance Act, 1938 does not define or provide effective legal remedies for such acts. One has to once again resort to action under the IPC. Therefore, there is much scope for change in the existing laws, on both the procedural and substantive front.

Conclusion:

The position of economic offences is one that is riddled with lacunae and is not yet on solid ground. With the statistics of economic offences showing a definite increase, the Government is now compelled to start coming up with ways to reduce the cases already piled in courts, by instituting separate special courts or tribunals, and by passing special legislations. It is clear that the Government is aware of the burgeoning economic offences in the country and is conducting research into improving the existing laws and streamlining them, to reduce confusion and overlaps.

However, looking at the slow evolution and execution of laws related to economic offences, it cannot be concluded that we are in a satisfactory regime for such offences at the moment. Developing more judicial or quasi-judicial fora to ensure speedier and more efficient disposal of cases has become the need of the hour.

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Notifications and Circulars

Corporate Insolvency Resolution and Liquidation Framework under IBC – MCA invites comments: On 23 December 2021, the Ministry of Corporate Affairs invited views of the public on proposed amendments to the Corporate Insolvency Resolution and Liquidation Framework under the Insolvency and Bankruptcy Code, 2016 (‘**IBC**’). Based on the issues raised by the Insolvency Law Committee and from various stakeholder consultations, various amendments to the IBC have been recommended to help achieve the objective of timely resolution of stressed assets while maximising value and balancing the interests of all stakeholders. Key changes proposed to be brought in have been discussed below.

To streamline the admission process for insolvency applications, it is proposed that certain categories of financial creditors are required to submit only Information Utility (‘**IU**’) authenticated records to establish default for the purposes of admission of a Section 7 Corporate Insolvency Resolution Process (‘**CIRP**’) application. Where such IU authenticated records are not available, and for all other financial creditors, current options of relying on different documents for establishing default for admission of a Section 7 CIRP application shall remain available.

SEBI notifies regulations for Vault Managers; paves way for operationalisation of gold exchange in India: The Securities and Exchange Board of India ('**SEBI**') on 31 December 2021 issued the Securities and Exchange Board of India (Vault Managers) Regulations, 2021 ('**Vault Manager Regulations**'), for the registration of vault managers in charge of electronic gold receipts ('**EGR**').

Body corporates incorporated in India having a minimum net worth of INR 50 crore and who fulfil the other eligibility criteria prescribed under the Vault Manager Regulations shall be eligible to apply for registration as a vault manager. Services offered by the vault manager in relation to gold shall mean the storage and safekeeping of gold for the purpose of trading in EGRs and providing incidental services thereto.

The vault manager shall ensure the quality specifications of the gold at the time of deposit are as per the gold standard. Further, they shall have data recovery systems in place to prevent loss or damage of electronic records, have adequate internal controls to prevent any manipulative activity and shall take necessary steps to maintain the quality and quantity of gold stored in the recognised vault(s). The vault manager shall not create an EGR without underlying physical gold corresponding to it.

The vault manager shall maintain a system for recording all transactions in electronic form including details of storage, transfer and withdrawal of gold, purity, quantity and weight of deposited gold, creation and extinguishment of EGRs and KYC documents of the depositors. Such records and documents shall be maintained for a minimum period of five years.

Direct Selling Rules introduced to regulate the direct selling industry: On 28 December 2021 the Consumer Affairs Ministry notified the Consumer Protection (Direct Selling) Rules, 2021 ('**Direct Selling Rules**') to, *inter alia*, prohibit direct selling entities from engaging in any money circulation or pyramid schemes.

The Direct Selling Rules shall apply to all goods and services bought or sold through direct selling and shall cover all models of direct selling (including e-commerce). A direct seller means a person authorized by a direct selling entity through a legally enforceable written contract to undertake direct selling business on principal to principal basis. A direct selling entity has been defined as the principal entity which sells or offers to sell goods or services through direct sellers.

Entities engaged in a money circulation scheme or pyramid scheme are excluded from the definition of a direct selling entity under the Direct Selling Rules. Further, a Pyramid scheme has been defined as one that has a multi-layered network of subscribers who are involved in enrolling more subscribers to receive any benefit, either directly or indirectly.

The direct selling entity must either be incorporated under the Companies Act of 2013. 1956, or registered as a partnership firm or LLP under the Partnership Act, 1932 or Limited Liability Partnership Act, 2008. The direct selling entity must register with the Department for Promotion of Industry and Internal Trade and shall have a registered office in India. It is interesting to note that the Rules require that the entity must ensure that all personal data provided by their customers must be stored within the jurisdiction of India.

Direct selling entities must have a grievance redressal officer and shall maintain a well-functioning website and provide the prescribed information to increase transparency with customers. Further, they are mandated to maintain documents such as the register of direct sellers, certificate of incorporation, PAN, TAN, IT returns, GST registration, FSSAI license in case of food items, amongst others.

Medical devices – Unique device identification postponed: The Ministry of Health and Family Welfare has postponed implementation of unique device identification of medical devices. As per the Medical Devices Rules, 2017, a medical device, approved for manufacture for sale or distribution or import, was to bear unique device identification containing device identifier and production identifier, with effect from 1 January 2022. Now Rule 46 of the abovementioned Rules has been amended by Notification dated 31 December 2021 to prescribe that such bearing of unique identification will be effective from such date as the Central Government may, by order specify.

Ratio Decidendi

NCLT cannot dismiss a Section 7 petition on grounds that corporate debtor has initiated settlement with financial creditors

The Supreme Court has held that the Adjudicating Authority, on application made to it under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('**Code**'), may either admit or reject an application. If there is a default by the corporate debtor, the Authority is bound to admit the application and cannot dismiss it on the ground that the corporate debtor has initiated settlement proceedings with the financial creditors.

Brief facts:

(i) The Respondent (Corporate Debtor), IDBI Trusteeship Limited ('**IDBI**') and Karvy Realty (India) Limited ('**KRIL**') entered into a Master Agreement to sell, for raising funds for development of agricultural land into a housing project, as per which plots would be sold to homebuyers on payment of a lumpsum and the Respondent would pay an interest @25% p.a. on the amounts received to the homebuyers. Failing to raise sufficient money, the Respondent entered into a Syndicate Loan Agreement ('**SLA**'), along with IDBI and KRIL raising money from several prospective lenders, which also executed a Deed of Adherence for implementing the loan arrangement in 2014.

(ii) Subsequently, the plots were not developed in time, and as per the Agreement, the purchase sum with interest became due to the purchasers. After seeking multiple extensions till 2019, the debt incurred under the Agreement was still not satisfied.

(iii) 83 investors/ purchasers instituted proceedings under Section 7 of the Code before the Adjudicating Authority ('**AA'**). Owing to the Respondent's *bona fide* attempts to settle the dispute, the proceedings were adjourned four times, and finally the Section 7 application ('**Application**') was dismissed. At that stage, the Respondent settled debts with 140 investors overall, of which only 13 were applicants in the Application.

(iv) The AA held that since proceedings under Section 7 of the Code are summary in nature, individual claims could not be examined. Therefore, directing the Respondent to settle the remaining claims within 3 months and allowing the investors/ applicants aggrieved by the settlement process to approach the Respondent, it dismissed the Application. It observed that initiation of Corporate Insolvency Resolution Process ('**CIRP**') proceedings would endanger the interests of home buyers and lenders who had invested in the project, as it was nearing completion. This decision was upheld by NCLAT, on appeal, and thereafter, the present appeal was filed before the Supreme Court under Section 62 of the Code by the investors/ Appellants.

Submissions:

(i) The counsel for the Appellants submitted that the AA had acted beyond its jurisdiction under Section 7 of the Code and was not empowered to direct settlement. It was submitted that NCLT could only give adjournments, when settlement was underway, as stated in *Pratap Technocrats (P) Ltd. & Ors*. v. *Monitoring Committee of Reliance Infratel Limited & Anr.*, 2021 SCC OnLine SC 569. Relying on *Innovative Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407, they submitted that the AA was bound to admit the Application after being satisfied that a default has been committed. Furthermore, 70 of the 83 petitioners had not reached a settlement with the Respondent.

(ii) The counsel for the Respondent submitted that the petition was not maintainable as the threshold of 100 creditors or 10% of total number of creditors required to file an application under Section 7 of the Code was not met. They further submitted that the Appellants had refused to settle the dispute in accordance with the orders of the AA and NCLAT.

Decision:

The Apex Court found that Section 7(5) of the Code allows the AA to undertake only two courses of action, i.e., to either admit an application or reject it. Relying on the decision in the *Innovative Industries* case, it observed that an application must be mandatorily admitted if a default has occurred. Therefore, it held that the AA had acted outside the scope of Section 7(5) of the Code by dismissing the application and compelling a settlement between the parties. While noting that the objective of the Code is to facilitate continuance and rehabilitation of a Corporate Debtor, it held that the AA could only encourage settlements for this purpose, and not direct them. Relying on the *Pratap Technocrats* case and the case of *Arun Kumar Jagatramka* v. *Jindal Steel & Power Ltd*., (2021) 7 SCC 474, it emphasised that the AA and NCLAT must exercise their jurisdiction in conformity with the provisions of the Code and abide by the discipline of the Code. Setting aside their orders, it held that they had abdicated their jurisdiction. Accordingly, the Apex Court restored the proceedings back to the AA for fresh consideration.

[*E S Krishnamurthy & Ors.* v. *Bharath Hi Tech Builders Pvt. Ltd.* – Judgment dated 14 December 2021 - 2021 SCC OnLine SC 1242, Supreme Court of India]

Haste of action by Resolution Professional to adhere to prescribed timeline does not constitute a material irregularity, and thereby is not a ground for appeal under Section 61

The Supreme Court has held that the refusal of the Resolution Professional ('**RP**') to place the Respondent's Resolution Plan for consideration, after the lapse of the deadline for submission of such plans, did not constitute a 'material irregularity', and thereby was held to not be a ground for appeal under Section 61(3) of the Insolvency and Bankruptcy Code, 2016 ('**Code**'). Accordingly, the Apex Court struck down the decision of the NCLAT and reinstated the order of the NCLT which had rejected the Appellant's Resolution Plan.

Brief facts:

(i) Insolvency proceedings were initiated against the Corporate Debtor/ by Allahabad Bank *viz.*, the Financial Creditor under Section 7 of the Code. An Interim RP was appointed and subsequently confirmed by the Committee of Creditors ('**CoC')**. The RP issued an invite for the Expression of Interest from prospective Resolution Applicants.

(ii) The Appellant had emerged as the H-1 bidder and the Resolution Plan submitted by it was approved unanimously by the CoC, and subsequently by the NCLT. Thereafter. Respondent No. 1 had sought a two-day extension from the RP to provide a revised offer before the CoC voted on the Appellant's Resolution Plan, which had been rejected by the RP, and had then approached the NCLT seeking a direction to the RP to present the revised Resolution Plan to the CoC. The NCLT, however, dismissed the Respondent's application.

(iii) The Respondent subsequently approached the NCLAT, challenging the validity of the NCLT orders approving of the Appellant's Resolution Plan, and had also impugned the order which rejected the application to have the RP present the revised Plan to the CoC. The NCLAT had struck down the orders of the NCLT and allowed the appeals, thereby allowing for re-submission of Respondent No. 1's revised Plan before the CoC. Aggrieved by the decision of NCLAT, the Appellant approached the Supreme Court *vide* the present appeal.

Submissions:

(i) The counsel for the Appellant submitted that the NCLAT order was erroneous as they overturned a decision taken by the CoC in their commercial wisdom. They also stated that the Respondent's revised Plan was made with *malafide* intentions. The Appellant also submitted that the Appellant's Resolution Plan had already been implemented and the debts of all the creditors had been repaid, and at this stage, no such re-submission can be permissible under law.

(ii) The counsel for Respondent No.1 submitted that the refusal of the RP to present the revised Plan of the Respondents to the CoC, and the haste in such a decision, constituted a material irregularity in the procedure so adopted, and was therefore a legitimate ground for appeal under Section 61(3) of the Code which authorised the NCLAT to strike down the orders of the NCLT.

Decision:

The Apex Court held that the procedure adopted by the RP was fair, transparent, and equitable and that the haste expressed by him to adhere to the schedule prescribed by the Code does not constitute a material irregularity and therefore, cannot be a ground for appeal under Section 61(3)(ii). The Court also noted that since the CoC had considered all proposals, the judiciary could not intervene in the decisions taken by the by the CoC, in its commercial wisdom. Rather, the Court observed that had Respondent No. 1 been permitted by the RP to present their proposal after the lapse of the prescribed time period, it would constitute a material irregularity. Therefore, the Supreme Court quashed the verdict of the NCLAT and reinstated the order of the NCLT approving the Resolution Plan of the Appellant and rejecting Respondent No. 1's plan.

[*Ngaitlang Dhar* v. *Panna Pragati Infrastructure Private Limited & Ors.* – Judgment dated 17 December 2021, 2021 SCC OnLine SC 1276, Supreme Court of India]

Pre-Packaged Insolvency – Adjudicating Authority can pass an order allowing for filing of objections against Resolution Plan

Section 54C of the Code allows a corporate debtor to make an application to the Adjudicating Authority (AA) to initiate pre-packaged insolvency resolution process ('**PPIRP'**), if conditions under Section 54A of the Insolvency and Bankruptcy Code, 2016 ('**Code**'), dealing with eligibility of corporate debtors for pre-packaged insolvency resolution have been satisfied. The Authority can admit or reject the application, based on whether it is complete. The NCLAT has now clarified that the AA can also allow objections to an application under Section 54C in exceptional circumstances.

Brief facts:

(i) The Corporate Debtor, intending to take recourse to PPIRP, had issued a notice convening a meeting of the Financial Creditors for the appointment of a Resolution Professional. The Professional so appointed submitted his report, subsequent to which insolvency proceedings were sought to be initiated.

(ii) The Corporate Debtor filed an application under Section 54C before the jurisdictional AA for initiation of PPIRP, after approval of the report of the RP. On the day of the first hearing, several objections were filed opposing the application and the AA passed an order, allowing the objections and directing the applicant/ corporate debtor to file replies to them, and awarded 1 week to the objectors to file rejoinders.

(iii) The Corporate Debtor filed the present appeal against the AA's order before the NCLAT under Section 61 of the Code, impugned the objectors to the application as Respondents.

Submissions:

(i) The counsel for the Appellant/ corporate debtor submitted that the AA has no jurisdiction to allow objections to be filed or to allow filing of rejoinder by the Respondents. They submitted that the PPIRP must be completed in a time bound manner and does not contemplate raising of objections. Relying on the judgment of the Supreme Court in *Ebix Singapore Pvt. Ltd.* v. *Committee of Creditors of Educomp Solutions Limited & Anr.*, (2021) SCC OnLine SC 707, the Appellant submitted that the AA cannot create procedural remedies that substantially affect the outcome of resolution, unless specifically provided for in the Code.

(ii) The counsel for the Respondents submitted that an application under Section 54C of the Code can only be filed after conditions laid down in Section 54A have been complied with, and the Appellant had failed to do so, by not giving a 5-day notice to the Financial Creditors for convening the requisite meeting, fraudulently treating related creditors as unrelated, wrongly counting votes of unrelated creditors, wrongly marking certain votes as 'YES' etc., and the PPIRP proposal was approved in a *mala fide* and fraudulent manner.

Decision:

The NCLAT observed that the AA, as per Section 424 of the Companies Act, 2013, can regulate its own procedure in accordance with the principles of natural justice. Since the Code does not prescribe any limitations on the AA from hearing interveners or objectors, it held that the AA can hear objectors in exceptional cases only, on valid grounds. An application under Section 54C of the Code can only be made after conditions mandated in Section 54A have been complied with. In the present case, since there was a *prima facie* non-compliance with the conditions laid down explicitly under Section 54A, read with the Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Regulations, the AA's order allowing filing of objections and replies was held to be justified. The *Ebix Singapore* case was distinguished. The NCLAT also noted that the present case was not where the Adjudicating Authority had created any procedural remedies.

[In RE: *Krrish Realtech Private Limited* – Judgment dated 21 December 2021, MANU/NL/0597/2021, National Company Law Appellate Tribunal]

News Nuggets

Limitation for judicial or quasi-judicial proceedings – Supreme Court excludes period from 15 March 2020 till 28 February 2022

Taking into consideration the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, the Supreme Court of India has directed that the period from 15 March 2020 till 28 February 2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. The Apex Court in this regard restored its earlier Order dated 23 March 2020.

It also stated that in cases where the limitation would have expired during the period between 15 March 2020 till 28 February 2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1 March 2022.

The Order dated 10 January 2022 also clarifies that that the said period shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits and termination of proceedings.

Arbitration – High Court when not inclined to appoint arbitrator under Section 11(6)

The Supreme Court of India has upheld the High Court decision where the lower Court had declined to exercise its jurisdiction under

Section 11(6) of the Arbitration and Conciliation Act for appointment of an Arbitrator. The appointment of an Arbitrator was made by the respondents after arbitration petition was filed by the appellant under Section 11(6). Court though observed that according to the settled position once an application under Section 11(6) was filed, the respondents forfeited their right to appoint an arbitrator, it upheld the dismissal of the Section 11(6) petition by the High Court. The Apex Court in its decision dated 4 January 2022 [*Durga Welding Works* v. *Chief Engineer, Railway Electrification*] observed certain peculiar facts of the case wherein after filing of an arbitration petition in the Registry of the High Court the appellant slept over the matter and the respondents were never served of any notice and further when the respondents called upon the appellant to suggest and select two names out of the panel of four for constitution of the Arbitral Tribunal, the appellant selected two officers and then appeared before the Tribunal once.

Arbitration – Section 5 of Limitation Act not applicable for condoning delay in Arbitration Section 34 petition

The 3-Judge Bench of the Supreme Court has reiterated that Section 5 of the Limitation Act is not applicable to condone the delay beyond the period prescribed under Section 34(3) of the Arbitration and Conciliation Act, 1996. The Court in its decision dated 16 December 2021 noted that the scope available for condonation of delay was self-contained in the proviso to Section 34(3). The Court noted that the respondents had earlier refused to accept service of the awards. Reliance was placed on the Supreme Court decisions in the cases of *Union of India* v. *Popular Construction Co.* [(2001) 8 SCC 470], *Himachal Pradesh & Anr.* v. *Himachal Techno Engineers & Anr.* [(2010) 12 SCC 210] and *P. Radha Bai* v. *P. Ashok Kumar* [(2019) 13 SCC 445]. The Division Bench decision of the High Court, condoning the delay after relying on Apex Court decision in the case of *Mst. Katiji and Others* [AIR 1987 SC 1353], was set aside by the Court in *Mahindra and Mahindra Financial Services Ltd.* v. *Maheshbhai Tinabhai Rathod*.

Representative complaint under Consumer Protection Act – Sameness of interest and not sameness of cause of action important

Observing that 'sameness of interest' is the pre-requisite for an application under Order I Rule 8 of the Civil Procedure Code read with Section 35(1)(c) of the Consumer Protection Act, 2019, the Supreme Court has held that it is necessary for the complainants to include in the consumer complaint, sufficient averments that would show sameness of interest. In a complained filed by 'representative' buyer of flats for delay in handing over possession, the Court noted that the delay in handing over possession might have given rise to a cause of action for the individual purchasers of flats to sue the builder but, sameness of the cause of action is not equal to sameness of interest. The builder had questioned the sameness of interest on the ground that when delay compensation was offered to the purchasers, some of them accepted the same without any protest, while a few others refused to accept. The Court in its decision dated 17 December 2021 [*Brigade Enterprises* v. *Anil Kumar Virmani*] also noted that the complainants cannot project sameness of interest when the period of delay varied from purchaser to purchaser. It was of the view that the sameness of interest must be tested on the basis of the nature of the reliefs claimed and the pleadings that pinpoint the sameness of interest. The complaint filed by the respondents was thus treated as a joint complaint and not a complaint in a representative capacity.

Income tax Authorities cannot issue Section 148 notice to a corporate debtor believed to have escaped assessment after approval of resolution plan

The Bombay High Court recently examined the scope of issuance of a notice under Section 148 of the Income Tax Act, 1961 ('**IT Act**'), for re-assessment of income tax returns, after approval of a Resolution Plan when the Assessing Officer (AO) had reasons to believe the Corporate Debtor escaped assessment in a year prior to the approval of a Resolution Plan. In *Murli Industries Limited* v. *Assistant Commissioner of Income Tax & Ors.* [Judgment dated 23 December 2021], after insolvency proceedings were initiated against the corporate debtor, being the Petitioner in the instant case, an RP was appointed, and subsequently, a Resolution Plan was prepared, approved and made effective. Respondent No. 1, being the AO, then issued a notice to the Petitioner under Section 148 of the IT Act, following which the Petitioner approached the Bombay High Court *via* a Writ Petition. The Court observed that a claim for such an assessment by the Respondents should have been raised when the RP had made a public announcement seeking proof of claims. All stakeholders are required to raise their claim and a failure to do so results in extinguishment of the right to such a claim, as upheld by the Apex Court earlier in *Ghanashyam Mishra and Sons Private Limited* v. *Edelweiss Asset Reconstruction Company Limited and others,* 2021(9) SCC 657. The failure by the IT Authorities in the present case to check the previous year's assessment of the corporate debtor and accordingly make a claim before the Resolution Professional meant that their claim stood extinguished.

Insolvency – Section 9 application cannot be made for default of listing fees, as they are 'regulatory dues' and not 'operational debt'

The NCLAT in *BSE Limited* v. *KCCL Plastic Limited* [Judgment dated 17 December 2021] has held that listing fees are 'regulatory dues' recoverable by SEBI, and not an 'operational debt' for which proceedings can be initiated under the Code. The application in the instant case had been filed in furtherance of defaults of listing fees, as prescribed in BSE's listing agreement, by the corporate debtor. The corporate debtor had claimed that the listing agreement was not valid as it was entered into under a different name *viz.*, the erstwhile name of the corporate debtor and the change of name had not been reflected in the agreement. The NCLAT upheld the order of the NCLT, which held that said agreement was invalid, regardless of payments in furtherance of listing fees made after the name change, because the change in name was not reflected in the agreement. Furthermore, the NCLAT held that listing fee is a 'regulatory due' rather than an 'operational due' and must be recovered by SEBI in accordance with the SEBI regulations.

Electronic Gold Receipt notified as security

The Finance ministry has notified 'Electronic Gold Receipt' ('**EGR**')as a security under the Securities Contracts (Regulation) Act 1956 *vide* Notification No. S.O.5401(E) published on 24 December 2021. This move will enable the trading of EGRs as instruments on any registered gold exchanges.

Just like shares, EGRs can now be held in dematerialized form and can be withdrawn in physical form when needed. Government has already announced its plan during the 2021-22 budget session to include EGR as a security and declared SEBI as the regulator for the same.

The EGR holder can continue to hold the EGRs as long as intended since EGRs will have perpetual validity. An EGR holder at his discretion can also withdraw the underlying gold from the vaults upon surrender of such receipts. To lower the costs associated with withdrawal of gold from the vaults, SEBI said EGRs will be made 'fungible' and 'interoperability between vault managers' will be allowed.

RBI proposes a separate FinTech department in view of sector's fast changing landscape

In an internal circular, the RBI announced the creation of a new FinTech department to focus and facilitate innovation in FinTech sector. The new Department has been created with effect from 4 January 2022 by subsuming the FinTech Division of DPSS, CO.

The objective of the freshly set up department is to promote innovation, identify challenges and opportunities and address them in a timely manner to better prepare against the dynamically changing financial landscape. The department will also provide a framework for further research on the subject of FinTech that could aid policy interventions by the RBI. Moreover, all matters related to the facilitation of constructive innovations and incubations in the FinTech sector, which may have wider implications for the financial sector / markets and falling under the purview of the RBI will be dealt with by the FinTech Department. The department will also deal with the matters related to international and inter-regulatory coordination.

Framework for facilitating small value digital payments in offline mode introduced

The RBI had first announced its intention in facilitating digital transactions in the offline mode on 6 August 2020 when it had permitted a pilot scheme to encourage technological innovations that enable small value digital transactions in offline mode. Based on the experience gained through the pilot scheme, a framework to enable small value digital payments in offline mode using cards, wallets, mobile devices, etc. has been released on 3 January 2021.

An offline payment is a transaction which does not require internet or telecom connectivity to take effect. They can be undertaken using channels or instruments like cards, wallets, mobile devices, etc. Offline payments can only be done face to face or through proximity mode. The upper limit for such a transaction shall be INR 200. The total limit for offline transactions on a payment instrument shall be INR 2,000 at any point in time. Customers may access the Reserve Bank – Integrated Ombudsman Scheme for grievance redressal under the framework.

Joint Parliamentary Committee submits its report on Data Protection Bill

The Joint Parliamentary Committee on the Personal Data Protection Bill, 2019 ('**JPC**') tabled its report before the Lok Sabha on 16 December 2021. The JPC has recommended expanding the ambit of the bill to regulate non-personal data and has consequently recommended amending the name of the draft law from 'Personal Data Protection Bill' to 'Data Protection Bill, 2021'.

Pertinent to note is that the report recommends that social media platforms shall not be allowed to operate in India unless the parent company handling the technology sets up an office in India. The JPC has also emphasised the importance of data localisation with measures to be taken to ensure that data generated in India be stored locally.

With regard to exemptions given to government agencies from complying with the provisions of the legislation, the JPC has recommended that any exemption must be subject to fair, reasonable and proportionate procedure and furthermore, public order is removed as a ground for exemption. Going one step further, a judicial oversight/ parliamentary oversight committee may be set up for granting exemption to government agencies. Apart from this, various safeguards have been suggested to reflect that the exemptions are by law, necessary and proportionate.

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