

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

June 2022 / Issue-129

Contents

Article

Contract labour under the new regime –
An Overview 2

Notifications and Circulars 5

Ratio Decidendi..... 6

News Nuggets 11

June
2022





Article

Contract labour under the new regime – An Overview

By **Manan Chhabra**

Under the Constitution of India, 'labour' is a subject matter of the concurrent list. Therefore, both Central and State Governments have the power to enact labour and employment legislations. This has frequently resulted in legal quagmires because of numerous laws being enacted having overlapping provisions and governing similar subject matters relating to labour and employment.

To streamline labour legislations and bring uniformity in general labour related aspects, the Second National Commission of Labour submitted its report in 2002 wherein multiplicity of labour laws in India was identified as a major concern. In that backdrop, the Commission recommended that, at the central level, multiple labour laws should be subsumed and codified in 4 labour codes. Considering the same, the Government of India (GoI) introduced 4 labour codes which subsumed 44 central labour legislations i.e., (a) Code on Wages, 2019, (b) Industrial Relations Code, 2020, (c) Occupational Safety, Health, and Working Conditions Code, 2020, and (d) Code on Social Security, 2020. Although enacted and passed by the Parliament, the labour codes are yet to be made effective and put into force.

The Occupational Safety, Health, and Working Conditions Code, 2020 ('**OSHW Code**') subsumes 13 central labour legislations including the Contract Labour (Regulation and Abolition) Act of 1970 ('**CLRA Act**') which governs and regulates the employment of contract labour.

Once these labour codes are put into force, the existing regime concerning the contract labour will undergo significant changes. Some of the major changes introduced under the OSHW Code pertaining to contract labour are:

1. **Applicability:** Provisions relating to contract labour under OSHW Code shall now be triggered for, and be applicable to, an establishment if at least 50 contract labourers are deployed in that establishment or supplied by any contractor. Under the CLRA Act, the threshold was 20, except in some States where the threshold was 50.
2. **Single registration:** OSHW Code now provides for a single & common registration for every establishment employing at least 10 workers, irrespective of contract labour engagement, which can be obtained electronically through Shram Suvidha portal of the Ministry of Labour and Employment (MLE). If any establishment to which the OSHW Code applies on the date of commencement of the OSHW Code has an existing and valid registration, obtained under any central labour legislation or any other existing law applicable to such establishment as notified by the Central Government, the existing registration would be valid for the purposes of obtaining registration under OSHW Code. This is provided the establishment updates the registration

particulars on the Shram Suvidha portal within 6 months from the date on which the OSHW Code comes into force.

If no existing registration has been obtained under any central labour legislation or any other applicable law, such establishment employing 10 or more workers is required to obtain registration under the OSHW Code within 60 days from the date of applicability of OSHW Code.

3. **Widened definition of ‘contract labour’:** The definition of the term ‘contract labour’, as provided in the OSHW Code, now includes inter-state migrant workers. This change has received positive feedback from the stakeholders considering the hardship caused to the inter-state migrant workers during the COVID-19 pandemic. Further, the wage ceiling with respect to workmen in supervisory capacity who earn monthly wages has been enhanced from INR 500 to INR 18,000 under the OSHW Code. Therefore, workers employed at supervisory position and earning monthly wages upto the enhanced limit shall all now fall within the ambit of the Code.
4. **Single license:** OSHW Code has introduced a ‘single license’ system and the requirement of obtaining multiple licenses by contractors each time when deploying contract labour has been done away with. Under the OSHW Code, every contractor supplying 50 or more contract labour and engaging them in different establishments will be required to obtain a single license. Further, a single license can also be obtained by a contractor if he intends to supply contract labour in more than one State or

whole of India, which shall be issued by the authority designated by the Central Government in consultation with designated State authorities. This single license can be obtained electronically through Shram Suvidha portal of the MLE and shall be valid for a period of 5 years.

Further, a contractor may also obtain a ‘common license’ for supplying contract labour to a factory or an industrial premises for beedi and cigar work, or for any combination of factories or industrial premises for beedi and cigar work.

5. **Non-engagement in core activities:** Similar to the position under the Andhra Pradesh and Telangana Amendment of the CLRA Act, the OSHW Code prohibits engagement of contract labour in core activities of an establishment. As per the OSHW Code ‘core activity of an establishment’ means “*any activity for which the establishment is set up and includes any activity which is essential or necessary to such activity*”. The OSHW Code also enlists the activities which shall not be considered as ‘essential or necessary activity’, if the establishment is not set up for such activity, such as:
 - (i) sanitation works, including sweeping, cleaning, dusting and collection and disposal of waste;
 - (ii) watch and ward services including security services;
 - (iii) canteen and catering services;
 - (iv) loading and unloading operations;
 - (v) running of hospitals, educational and training Institutions, guest houses, clubs and the like where

- they are in the nature of support services of an establishment;
- (vi) courier services which are in nature of support services of an establishment;
 - (vii) civil and other constructional works, including maintenance;
 - (viii) gardening and maintenance of lawns and other like activities;
 - (ix) housekeeping and laundry services, and other like activities, where these are in nature of support services of an establishment;
 - (x) transport services including, ambulance services; or
 - (xi) any activity of intermittent nature even if that constitutes a core activity of an establishment.

To determine the 'core activity' of an establishment, Form-I (Application for Registration of Establishment) of the Draft Occupational Safety, Health, and Working Conditions (Central) Rules, 2020, requires every establishment to provide details of NIC (National Industrial Classification) Code. An NIC Code is issued by the Ministry of Statistics and Programme Implementation to meticulously trace businesses' commercial activities. Based on the NIC Code of an establishment, the core activity of such establishment can be determined for the purposes of OSHW Code.

Exceptions to employing contract labour in core activities include:

- a) when the normal functioning of the establishment is such that the activity is ordinarily done through contractor;

- b) when the activities are such that they do not require full time workers for the major portion of the working hours in a day or for longer periods, as the case may be; or
- c) when any sudden increase of volume of work in the core activity which needs to be accomplished in a specified time.

In the event there is an ambiguity pertaining to an activity, whether it falls under the category of core activity or not, the employer (or the aggrieved party) may make an application, to the Joint Secretary Government of India, MLE giving reasons along with supporting documents. Based on the information furnished, or after making such an enquiry as it deems fit, the Joint Secretary shall report to the appropriate Government, based on the submissions made to appropriate Government, and the appropriate Government shall decide whether the activity in question is a core activity or not.

Conclusion:

With the labour codes expected to be made effective from 1 July 2022, the labour/employment regime in India will undergo a major overhaul. The revised definition of 'wages' will result in a change in the CTC (Cost to Company) computation methodology adopted by companies and thus impact the take home salary, payment of gratuity, overtime wages, leave encashment and other benefits payable to employees, which are dependent on the wage component. There is also a huge uncertainty in the market concerning how these labour codes will be implemented and will the companies be offered some exemption from compliance to

allow them to revise the pay structure in accordance with these codes.

Regardless of the uncertainty, the changes introduced with respect to contract labour can be considered as a step in the right direction. The concept of Single License or Single Registration for one establishment, and obtaining of license or registration electronically, will reduce paper work to a significant level, and will promote ease of doing business by eliminating redundant compliances existing in the CLRA Act and

resolving the requirement of obtaining multiple licenses or registrations. A clear distinction between core and non-core activities under the OSHW Code will reduce the grey areas pertaining to identifying the set of activities in which contract labour cannot be engaged.

[The author is a Senior Associate in the Corporate and M&A advisory practice at Lakshmikumaran & Sridharan Attorneys, Hyderabad]



Notifications and Circulars

Appointment of directors – Additional requirement of security clearance from Ministry of Home Affairs for nationals of land bordering countries: The Ministry of Corporate Affairs has, *vide* Notification G.S.R.410(E) dated 1 June 2022, amended the Companies (Appointment and Qualification of Directors) Rules, 2014 to provide for an additional requirement of security clearance for appointment of directors from countries that share their land border with India. While provisos have been inserted in Rules 8 and 10(1), Forms DIR-2 (consent form) and DIR-3 (application for DIN) have been revised to provide for attaching the required security clearance from the Ministry of Home Affairs with the two forms.

Compromises, Arrangements and Amalgamations – New declaration in respect of companies in countries sharing land border with India: The Ministry of Corporate Affairs has, *vide* Notification G.S.R.401(E) dated

30 May 2022, amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 to provide that in case of a compromise or an arrangement or merger or demerger between an Indian company and a company/body corporate incorporated in a country which shares its land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under Section 230 of the Companies Act, 2013. Sub-rule (4) has been inserted in this regard in Rule 25A of the Rules. Form No. CAA 16 has also been introduced for this purpose of dealing with the declaration in terms of the revised Rule 25A.

LLPs allowed to file annual returns by 30 June 2022: The Ministry of Corporate Affairs has allowed LLPs to file e-form 11 (Annual Return of Limited Liability Partnership) for the Financial Year 2021-22, without payment of additional fees, till 30 June 2022. General Circular No. 4/2022 dated 27 May 2022 has been issued for the purpose.

Removal of names of companies from Register – Re-submission of defective applications: The Ministry of Corporate Affairs has amended the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 to provide for an additional option to re-submit the Form STK-2, after removal of pointed out defects, within 15 days, thereby, the number of re-submissions allowed of the Form has been made twice. It may be noted that after such first re-submission, if the form is again found to be incomplete/defective, the Registrar can give a further time of 15 days to complete the form. In both the cases, i.e. first re-submission and second re-submission, if the form is not completed and submitted, the Registrar will treat the form as not invalid in the electronic record and shall inform the applicant accordingly. However, upto two re-submissions of the Form are now permitted. Further, as per new sub-rule 4(c) to Rule 4, any re-submission of the application made prior to commencement of the new sub-rule, shall not be counted for reckoning the maximum number of re-submissions. Notification No. G.S.R.436(E), dated 9 June 2022 has been issued for the purpose.

Independent Directors – Restoration of name in databank for one year for clearance of online proficiency self-assessment test: The Ministry of Corporate Affairs has amended the Companies (Appointment and Qualification of Directors) Rules, 2014 to provide for restoration of the name of the independent director in the databank where the name was removed under sub-rule 6(4), i.e. for non-clearance of online proficiency self-assessment test. As per the procedure prescribed under new sub-rule (5) to Rule 6, payment of INR One Thousand needs to be made and the name of the person shall be shown in a separate restored category for a period of one year from the date of restoration. He/she would be required to pass the online proficiency self-assessment test within this period for inclusion of their name in the databank. The new sub-rule however also states that in case the person fails to pass said test within one year from the date of restoration, his name shall be removed from the data bank and he shall be required to apply afresh under sub-rule (1). Notification No. G.S.R.439(E), dated 10 June 2022 has been issued for the purpose.



Ratio Decidendi

Applications against Corporate Guarantor/Personal Guarantor to be filed before NCLT

The Supreme Court has upheld the National Company Law Appellate Tribunal (NCLAT)'s judgment as per which Section 60(2) of the

Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') is applicable only to decide the jurisdiction of the forum before which an application for initiating Corporate Insolvency Resolution Process ('CIRP') or Insolvency Resolution Process can be filed against a corporate guarantor/ personal guarantor when an

application is already pending before such forum. NCLAT had also observed that in a case where no application is already pending, it does not preclude any creditor from proceeding against the guarantor before the National Company Law Tribunal (NCLT) which has jurisdiction over such entity. Therefore, NCLAT determined that the appropriate forum for proceeding against a guarantor under Section 95 of the Code shall be NCLT.

Brief facts

The NCLT, Kolkata Bench had refused to admit application filed under Section 95 of the Code against a personal guarantor on the grounds that no liquidation or CIRP process had been initiated against the principal borrower-corporate debtor, and therefore, NCLT is not the appropriate forum to be approached. On appeal, the NCLAT had set aside the NCLT order and held that an application initiating insolvency proceeding against a personal guarantor can be filed even if no application for CIRP/ liquidation proceedings is pending against the principal borrower-corporate debtor, and such application can be filed before the jurisdictional NCLT. Aggrieved by said order, the present appeal was filed before the Apex Court.

Submissions by the Appellant before NCLAT (being the Respondent before Apex Court):

- It was submitted that the NCLT has made an incorrect interpretation of Section 60(2) of the Code. The application of the Appellant was suitably maintainable under Section 60(1) of the Code, despite non-pendency of application for CIRP against the principal borrower-corporate debtor.

Submissions by the Respondent before NCLAT (being the Appellant before Apex Court):

- It was submitted that Section 60(2) clearly provides that *only if* the application for

liquidation process and CIRP is pending before the NCLT, *can* the CIRP process application against personal guarantor/ corporate guarantor be filed before the NCLT. Therefore, since no application or proceeding for liquidation/insolvency process is pending before the NCLT, the application against the personal guarantor is premature.

Decision

The NCLAT had held that Section 60(1) provides that the Adjudicating Authority for corporate persons, including a corporate guarantor/ personal guarantor, shall be the NCLT. Due to the language of Section 60(2) of the Code, particularly since it starts with '*without prejudice to sub-section (1)*', it was held that there is no prohibition in filing of proceedings under Section 95 of the Code before NCLT having territorial jurisdiction, even if no proceedings are already pending against the principal borrower-corporate debtor. NCLAT thus revived the Section 95(1) application before the NCLT, Kolkata Bench. The Apex Court initially, in light of the observations made in *Lalit Kumar Jain v. Union of India*, 2021 (9) SCC 321 had stayed the operation of the NCLAT order. However, it later dismissed the appeal and upheld the NCLAT's order stating that the judgment warrants no interference. [*Mahendra Kumar Jajodia v. SBI Stressed Assets Management Branch* - Judgment dated 6 May 2022 in Civil Appeal No. 1871-1872/2022, Supreme Court]

Arbitration – Decision of MSME Council on its jurisdiction is not an interim/final award permitting an application under Section 34 of Arbitration and Conciliation Act

A Single Bench of the Calcutta High Court has held that the decision taken by the Ministry of Micro, Small & Medium Enterprises Facilitation Council ('**MSME Council**') pertaining to its

jurisdiction cannot be considered as an interim award or final award, within the meaning of 'arbitral award' under Section 2(1)(c) of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'). Thus, such an order of the MSME Council cannot be directly challenged under Section 34 of the Arbitration Act to set aside the same. The High Court held that such orders relating to jurisdiction must, in any case, pass the drill provided under Section 16(5) and 16(6) of the Arbitration Act, which deals with orders related to jurisdiction of an arbitral tribunal over the disputes referred to arbitration, and the aggrieved party, being the Petitioner in the present case, must wait till the final award is given by the Council to proceed under Section 34.

Brief facts

The parties to the dispute in the present case had entered into an agreement to carry out survey and repair work at one of the dock complexes belonging to the Petitioner-Port ('**Agreement**'). Because of disputes with regard to payments, the Respondent, being a unit entitled to remedies under the Micro, Small and Medium Enterprises Development Act, 2005 ('**MSMED Act**') referred the matter to the MSME Council under Section 18 of the MSMED Act. Thereafter, conciliation proceedings failed before the Council after which arbitration proceedings were initiated against the Petitioner. The Petitioner contended that the matter was not within the jurisdiction of the MSME Council as the Respondent had already invoked the arbitration clause mentioned in the Agreement. The MSME Council dismissed the objections raised by the Petitioner, after which the Petitioner approached the High Court by way of the present Arbitration

Petition under Section 34 of the Arbitration Act to set aside the jurisdiction order.

Submissions by the Petitioner

- It was submitted that the MSME Council does not possess jurisdiction to adjudicate the matter as the Respondent had already invoked the arbitration clause. Further, it was submitted that the order of an arbitral tribunal relating to jurisdiction was an interim award that can be directly challenged under Section 34 of the Arbitration Act. Thus, the need for passing of final award in order for challenging the jurisdiction of the tribunal does not arise.

Submissions by the Respondent

- It was submitted that the MSME Council has exclusive jurisdiction over the matter as the provisions of MSMED Act have an overriding effect.
- It was further contended that the impugned order cannot be considered an interim award, as per the meaning ascribed under Section 2(1)(c) of the Arbitration Act, and in any case, such an order has to adhere to the drill of Sections 16(5) & 16(6) of the Arbitration Act in order to be challenged under Section 34 of said Act. The cases of *Deep Industries Limited v. Oil and Natural Gas Corporation Limited and Another*, (2020) 15 SCC 706 and *Bhaven Construction v. Executive Engineer*, 2021 SCCOnLine 8 were relied upon in support of the argument.

Decision

The High Court held that the order given by the MSME Council pertains to the determination of its jurisdiction over the disputes, along with deciding upon the overriding effect of MSMED Act over the arbitration clause in the Agreement.

The Court held that since the jurisdiction order relates to the jurisdiction of the MSME Council, it does not qualify the test of an interim award allowing an application under Section 34 of the Arbitration Act, and the aggrieved party must wait till the passing of the final award, as is the norm for all applications dismissed under Section 16 of the Arbitration Act. The Court, thus, dismissed the Petition for want of maintainability. [*Board of Trustees for the Syama Prasad Mookerjee Port v. Marinecraft Engineers Pvt. Ltd. – Judgment dated 17 May 2022 in Arbitration Petition No. 442 of 2021, Calcutta High Court*]

Recovery certificate holder can initiate CIRP as financial creditor within three years of issuance of certificate

A 3-Judge Bench of the Supreme Court has held that issuance of a Recovery Certificate under Recovery of Debts and Bankruptcy Act, 1993 ('RDB Act') would qualify as 'Financial debt' under the Insolvency and Bankruptcy Code, 2016 ('Code'/'IBC') and would lead to a fresh cause of action under Section 7 of the Code.

Brief facts

Credit facilities had been extended to three companies between 1993-94 for which the Respondent-Corporate Debtor stood as a guarantor. On default, recovery proceedings were initiated against the borrowing companies along with the Respondent-Corporate Debtor. Later, the Appellant became an assignee to the loans, following which it entered a settlement with the Respondent-Corporate Debtor & the principal borrowers. On failure to meet the settlement terms, demand notices were issued, and applications were filed before the jurisdictional Debt Recovery Tribunal (DRT) under the RDB Act. The concerned DRT admitted said

applications and consequently, debt recovery certificates were issued in 2017. Based on such recovery certificates, the Appellant filed an application for initiating Corporate Insolvency Resolution Process ('CIRP') under section 7 of the Code against the Respondent-Corporate Debtor in 2018. The application was admitted in 2019 but, was later challenged before the NCLAT which held that the impugned application was time barred and the issuance of recovery certificates does not amount to initiation of a fresh period of limitation. Aggrieved by the same, the present appeal was filed before the Supreme Court.

Submissions by the Appellant

- It was submitted that the application filed under Section 7 was within the prescribed three (3) years period from the date on which the concerned recovery certificate was issued. Further, reliance was placed on *Dena Bank v. C. Shivakumar*, 2021 SCC OnLine SC 543 to support its position that fresh period becomes available from the date of issue of recovery certificate.
- The conduct of the Respondent was of dishonest borrower. Since the Respondent failed to comply with the consent terms, they are now no longer entitled to oppose the admission application filed under Section 7 of the Code. Merely because the judgment debt is now converted into recovery certificate, it does not lose its essence as a 'Financial Debt'.

Submissions by the Respondent

- Cause of action has merged into the order of issuance of the Recovery Certificate by the DRT and therefore, by application of the doctrine of merger, the debt no more survives.

Thus, the initiation of CIRP by the Appellant would amount to filing of second proceedings for the same cause of action and would be hit by the doctrine of *Res Judicata* and *Per Rem Judicatam*.

- Further considering the limited legal fiction under Section 19(22A) of the RDB Act, the debt recovery certificate cannot be considered as a decree for all purposes and is only deemed a decree or an order for initiating winding up proceedings. Thus, a decree holder could initiate CIRP as a financial creditor but the holder of a recovery certificate is not entitled to initiate CIRP proceedings under IBC either as a financial creditor or as a decree holder.
- The instant Section 255 of the Code, which deals with amendments to Companies Act, 2013 considering the Code, was brought into force, recovery certificate holders had lost their right to initiate winding up proceedings under the Companies Act. Reliance was placed on *Subhankar Bhowmik v. Union of India and another*, 2022 SCC OnLine Tri 208 to support the submission that CIRP cannot be initiated by a decree-holder.
- Reliance cannot be placed on *Dena Bank* case as it was delivered without considering the correct position of law relating to Section 19 of the RDB Act. The judgment is contrary to Apex Court's orders in *Jignesh Shah v. UOI* (2019 10 SCC 750) and other judgments, where it was held that despite the pending recovery proceedings, initiation of CIRP would be barred by limitation if it exceeds prescribed time limit, and hence should be rendered *per incuriam*.

Decision

The Apex Court, considering the judicial precedents, held a recovery certificate would be considered as a 'Financial Debt' as per Section 5(8) of the IBC. The list of arrangements mentioned under Section 5(8) was held as not exhaustive and therefore, Section 5 cannot be construed to exclude a recovery certificate against which exists a payment liability. Thus, a recovery certificate would be considered as a 'Financial debt' while the holder of such certificate would fall under the meaning of 'Financial Creditor' as provided under Section 5(7) of the Code. It was confirmed by the Court that the recovery certificate issued under RDB Act also results in a fresh cause of action under Section 7 of the IBC. While deciding upon the reliability of *Dena Bank* decision, the Court stated that said judgment only prohibits a decree holder from executing the decree against the corporate debtor who is already undergoing CIRP proceedings and is thus, inapplicable to the facts of the present case/ does not prohibit the Appellant from proceeding against the Respondent-corporate debtor under the Code. Further, it noted that none of the precedents cited by the Respondent-Corporate Debtor claiming that *Dena Bank* case was in contravention to these judgments had dealt with the question related to the creation of a fresh limitation period on issuance of debt recovery certificate, and thus, cannot be relied upon. In response to contentions raised over the interpretation of Section 19(22A), the Court stated that the interpretation of the Respondent is flawed and narrow, and that if such contentions are accepted, it would defeat the very purpose of such enactment. [*Kotak Mahindra Bank Limited v. A. Balakrishnan & Anr.* – Judgment dated 30 May 2022 in Civil Appeal No. 689 of 2021, Supreme Court]



News Nuggets

Export insurance contracts – Applicability of Rule of Contra Proferentem

The Supreme Court, while dealing with a case of insurance cover to exporters in case of failure of the foreign importer to pay, cited the Rule of Contra Proferentem, and held that an ambiguous term in an insurance contract is to be construed harmoniously by reading the contract in its entirety, and if after that, no clarity emerges, then the term must be interpreted in favour of the insured. The Court referred to the principle of business common sense laid down by the Supreme Court of the United Kingdom while dealing with ambiguous terms in insurance contracts.

Setting aside the order of the National Consumer Disputes Redressal Commission, the Apex Court in *Haris Marine Products v. Export Credit Guarantee Corporation of India (ECGC)* [Judgment dated 25 April 2022] opined that the date of loading goods onto the vessel, which commenced one day prior to the effective date of the insurance policy, is not as significant as the date on which the foreign buyer failed to pay for the goods exported, which was well within the coverage period of the policy. The policy in the present case was effective from 14 December 2012 to 13 December 2013, while the Bill of Lading was issued on 19 December 2012, but the date of onboarding was mentioned as 13 December 2012. The Court observed that the claim could not be dismissed simply on such basis, especially given that the date of loading the goods onto the vessel was immaterial to the purpose for which the policy was taken. It held that the risks sought to be covered must also be kept in mind while interpreting insurance

contracts. It also observed that a plain reading of para 9.12 of the Foreign Trade Policy (FTP) Handbook of Procedures showed that the date on the Bill of Lading must be considered as the date of despatch/shipment for exports, when no letter of credit (L/C) was executed.

Limitation for initiation of insolvency proceedings – SC reiterates applicability of Section 18 of Limitation Act

The Supreme Court has reiterated that the provisions of Section 18 of the Limitation Act, 1963 are not alien to and are applicable to the proceedings under the Insolvency and Bankruptcy Code, 2016. The Apex Court in *State Bank of India v. Krishidhan Seeds Private Limited* [Order dated 18 April 2022] held that an acknowledgement in a balance sheet without a qualification can furnish a legitimate basis for determining as to whether the period of limitation would stand extended, so long as the acknowledgement was within a period of three years from the original date of default. Setting aside the orders of NCLT and NCLAT on that basis, the Court restored the matter to the NCLT for adjudication afresh.

Landowner in the real estate development project is not a ‘financial creditor’

The NCLAT has held that a landowner intending to share profits emanating from the agreed venture, by way of a Memorandum of Understanding (MoU), would not fall within the ambit of the definition of ‘Financial Creditor’ as defined under Section 5 of the Insolvency and Bankruptcy Code, 2016 (**‘Code’**). The Appellate Tribunal in the case *Mukesh N Desai v. Piyush Patel* [Judgment dated 24 February 2022] was of the view that being a

profit share owner, who in the event of the success of the project would receive the residual gain, the amount invested in the land cannot be said to be a 'Financial Debt' as defined under Section 5(8) of the Code. The appellant was a Joint Development Partner who had entered into a consortium for developing the subject land. It held that the amount cannot be construed as 'Financial Debt' as there is no sum(s) i.e., owed, assigned or transferred to in compliance of the provisions of Section 5(8) of the Code.

NBFCs granted relief from application of State money lenders laws

A Division Bench of the Supreme Court has held that the State enactments that regulate money lending businesses, such as the Gujarat Money Lenders Act, 2011, Kerala Money Lenders Act, 1958 etc., will now have no application over the Non-Banking Financial Companies ('NBFCs') which are registered under the Reserve Bank of India Act, 1934 ('RBI Act'). The Apex Court, in the matter of *Nedumpilli Finance Company Limited v. State of Kerala & Ors.* [Judgment dated 10 May 2022], stated that Chapter III of the RBI Act dealing with entities such as the NBFCs is a 'complete code in itself' and the supervision of RBI over NBFCs registered under the RBI Act would prevail 'from the time of birth till time of death'. Thus, for lending businesses, one would be governed by the State laws only if it has not registered itself under the RBI Act.

Sale and proceedings under the SARFAESI Act cannot be continued post initiation of CIRP proceedings and imposition of moratorium

A Division Bench of the Apex Court has observed that once the Corporate Insolvency Resolution Process (CIRP) proceedings are initiated and a moratorium has been imposed

under Section 14 of the Insolvency and Bankruptcy Code, 2016 ('Code'), any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act') related to recovery, foreclosure, or enforcement of any security interest created by the corporate debtor, is prohibited. This also includes the process of sale that was initiated prior to filing of the application for initiating CIRP and not completed prior to initiation.

The petitioner in the current case of *Indian Overseas Bank v. RCM Infrastructure Ltd. & Anr.* [Judgment dated 18 May 2022] had argued that Section 14(1)(c) of the Code interdicts only those actions that are taken after the initiation of proceedings and thus, the current sale under SARFAESI Act would be upheld as the Code does not undo actions that are already taken. The case of *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited* [(2018) 18 SCC 786] and *Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited* [(2021) 9 SCC 657] was relied upon by the Court to hold that in terms of the non-obstante clause under Section 238 of the Code, the provisions of the Code will prevail over any other enactment and any post-initiation action is prohibited. The Court further noted that the sale under SARFAESI Act was not complete in the present case, since there was no receipt of full consideration of the amount towards the process of sale.

Moratorium period can be excluded in calculating the limitation period for a suit initiated by corporate debtor

A Division Bench of the Supreme Court held that the complete period for which the moratorium was in force with respect to a corporate debtor can be excluded in calculation of limitation period for a proceeding

or a suit to be initiated by the corporate debtor. The question posed before the Bench was *whether Section 60(6) of the IBC provides a new lease of life to proceedings initiated by the corporate debtor* on basis that a moratorium was placed by virtue of order passed under Section 14 of the Code. The Court in the case of *New Delhi Municipal Council v. Minosha India Limited* [Judgment dated 27 April 2022] stated that the language of the statute under Section 60(6) of the Code clearly states that the moratorium period should be excluded from calculation of limitation period for a corporate debtor even for a suit or proceedings initiated at the instance of the corporate debtor itself.

E-commerce food business operators directed to make provisions for display of nutritional and calorific value of food

The Food Safety and Standards Authority of India (FSSAI) has directed all e-commerce Food Business Operators (F&B Operators) to enable provisions in their online platforms, including mobile applications, for display of nutritional information as well as other specific requirements under the Food Safety and Standards (Labelling and Display) Regulations, 2020 ("**Regulations**"). The provisions are required to be made on the websites and mobile applications to enable F&B Operators to feed and update such information in respect of each dish/food they are offering for sale. Notably, provisions for display of information for food service establishments as per the abovementioned

Regulations will be effective from 1 July 2022. According to the provisions, food service establishments need to mention the calorific value against the food items displayed on the menu cards or boards. Such establishments are also required to provide nutritional information, allergen information, ingredient information and various specific requirements as provided in Schedule II to the said Regulations.

Corporate criminal liability – UK releases options paper

The United Kingdom has recently released an options paper in respect of corporate criminal liabilities. The paper elaborates on various things including the identification doctrine and alternative methods of attribution, 'failure to prevent' offences, directors' individual liability under 'consent or connivance' provisions, and the options available when sentencing corporations. It also discusses the various options for civil law measures to address criminal offending carried out on behalf of corporations.

According to the paper, the organisation could be liable if the conduct was intended to benefit it indirectly by assisting a client, but not if the intention was to harm the organisation itself. It also states that, in principle, the directors should not be personally criminally liable based on neglect if the offence is one which requires proof of a particular mental state and that liability for directors on the basis of neglect should be restricted to offences of strict liability or negligence.

NEW DELHI

5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI

2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI

2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU

4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD

'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : shyd@lakshmisri.com

AHMEDABAD

B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE

607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : ls pune@lakshmisri.com

KOLKATA

2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH

1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail : lschd@lakshmisri.com

GURUGRAM

OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)

3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI

First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@lakshmisri.com

JAIPUR

2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR

First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

Disclaimer: *Corporate Amicus* is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. Lakshmikumaran & Sridharan does not intend to advertise its services or solicit work through this newsletter. Lakshmikumaran & Sridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to Lakshmikumaran & Sridharan will not be treated as confidential and do not create attorney-client relationship with Lakshmikumaran & Sridharan. This issue covers news and developments till 20 June 2022. To unsubscribe e-mail Knowledge Management Team at newsletter.corp@lakshmisri.com

www.lakshmisri.com

www.gst.lakshmisri.com

www.addb.lakshmisri.com

www.lakshmisri.cn