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Articles

Cross-border insolvency – The ever-evolving framework

By **Manasa Tantravahi**

Introduction:

We had dealt with the draft chapter on Cross Border Insolvency ('**CBI**'), proposed to be included within the framework of Insolvency & Bankruptcy Code, 2016 ('**IBC**'/ '**Code**') *vide* Public Notice dated 20 June 2018, in our previous article featured in August 2018. Majority of the laws pertaining to CBI have developed further since then. *Vide* this present Article, we wish to highlight the law as it stands today.

Cross Border Insolvency involves situations where the debtor has assets in more than one jurisdiction/country, or when its creditors are overseas and outside the jurisdiction of a country. With the sharp jump in the number of cases filed against large Multi-National Companies (MNCs) seeking initiation of Corporate Insolvency Resolution Process ('**CIRP**') against them, and with the assets of these corporate debtors frequently situated overseas, or with proceedings seeking insolvency resolution already commenced outside India, the need for a CBI framework has become the need of the hour.

Prior to the Code, a limited mechanism for enforcement of foreign judgments was included under the Civil Procedure Code, 1908 ('**CPC**'). However, such provision was not broad enough to include for all insolvency processes, including orders for reorganization, administrative and interim orders, etc.

Even though the United Nations Commission on International Trade Law (UNCITRAL) came out with its Model Law on CBI as early as in 1997 ('**Model Law**')[1], only 50 countries have subscribed to the Model Law so far, and India is not one of those countries. The Model Law prescribes four main necessities to a CBI law:

(a) '*Access*', which means access by insolvency officials and creditors of one country to the courts of another, and to be able to directly participate in the proceedings of the other country.

(b) '*Recognition and Relief*', which allows for recognition of foreign proceedings, be it final awards or interim orders, and segregation of multi-country proceedings into 'main proceedings' and 'non-main proceedings' to determine distribution of jurisdiction/ powers of courts for resolution.

(c) '*Cooperation and Co-ordination*' between all stakeholders of the resolution process, inter-country *viz*., courts/ tribunals and insolvency professionals, and notifications with respect to commencement of insolvency proceedings; and

(d) *'Public Policy'*, which allows for countries to determine the acts that goes against the public policy of their jurisdiction, and to restrain from passing any directions with respect to the same.

However, since the Model Law only serves as a template for the States to build their own

[1] UNCITRAL Model Law on Cross Border Insolvency (1997), available at: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency

legislations along the lines of the points mentioned above, India has taken substantial time in adopting the Model Law. For ease of understanding, we list down the various attempts made by the lawmakers and the Tribunals in India till date to formulate a CBI framework below:

Evolution of laws:

- The Bankruptcy Law Reforms Committee ('**BLRC**'), charged with drafting of the IBC, in its report from November 2015, first observed that CBI issues include *'Indian financial firms having claims upon defaulting firms which are global, or global financial persons having claims upon Indian defaulting firms,'* and expressed a need to address such issues.
- This need was recognized later by the Joint Parliamentary Committee ('**JPC**'), in its report in April 2016 reviewing the BLRC's report, which recommended adding Sections 234 and 235 to the Code, in its final version.
- Section 234 deals with agreements with foreign countries, as per which the Central Government can enter into an agreement with a foreign government for enforcing provisions of the Code. Pursuant to such agreement, the Code can be modified in its application to assets or property of a corporate debtor situated outside India.
- Section 235, on the other hand, deals with letters of request to be made with respect to assets of a corporate debtor located outside India, pursuant to the agreement executed under Section 234. If any evidence is needed or action to be taken in respect to such assets, an application shall be first made by the resolution professional ('**RP**'), liquidator or bankruptcy trustee to the jurisdictional National Company Law Tribunal ('**NCLT**'), followed by a letter of request issued by the NCLT to the court/ insolvency authority of such other country which can deal with such request.
- The language of the sections has left in ambiguity whether or not foreign creditors can participate in the insolvency proceedings in India. Therefore, the Supreme Court, in the case of *Macquarie Bank Limited* v. *Shilpi Cable Technologies Ltd.*, (2018) 2 SCC 674, clarified that the meaning of 'person' under Section 3(23) of the Code includes persons resident outside India. Accordingly, foreign creditors/ foreign banks and financial institutions can participate in the insolvency resolution process in India. However, to what extent has not been determined.
- The Insolvency Law Committee ('**ILC**'), thereafter, charged with reviewing the implementation under the Code, in its report of March 2018, suggested that a new chapter dealing with CBI be inserted into the Code, for ease of procedures. Therefore, the draft chapter, built on the Model Law, was released in June 2018, to be inserted into the Code ('**Draft Part Z**'/ '**Draft**')[2].
- The Draft left various issues unattended, such as: amendments to be made to the Code to bring it in line with Draft Part Z, absence of provisions for penalties against foreign representatives, absence

[2] Report of Insolvency Law Committee on Cross Border Insolvency (October 2018), available at: https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf

of powers of regulation and imposition of penalties etc. Hence, a second report was released in October 2018 by ILC, which provided further recommendations on the framework, such as drafting a code of conduct for foreign representatives and recommending their registration with IBBI etc. However, this second report, too, retained certain problems with the Draft.

- In the interregnum, the NCLT, Mumbai Bench, in *State Bank of India* v. *Jet Airways (India) Ltd.,* CP/2205(IB)/MB/2019, was faced with the question of parallel cross-border insolvency proceedings being conducted against Jet Airways. In its Order dated 20 June 2019[3], the Bench stated that even though insolvency proceedings against Jet Airways had already been initiated before the Noord – Holland District Court, since there is no provision and mechanism in the Code to recognize the judgment of an insolvency court of any foreign nation, and the Sections 234 and 235 have not been notified as enforceable yet, the same cannot be taken into consideration by the tribunals in India.
- The bankruptcy administrator from Holland for Jet Airways ('**Administrator**') had also filed an application for being an Intervenor in the Indian insolvency application proceedings and wished to take control of the assets of Jet Airways in India, as per the bankruptcy laws in Netherlands. However, in the absence of any reciprocal agreement between the countries, such request was held unsustainable, and the order of Noord-Holland District Court was held a *nullity ab initio.*
- On appeal, the National Company Law Appellate Tribunal ('**NCLAT**'), New Delhi Bench observed that *via* a Joint Agreement between the RP in India and the Administrator, interests of all stakeholders can be balanced and maximization of the assets of the corporate debtor can be achieved. Some procedural directions such as cooperation between the professionals from both countries, collation of claims of creditors from both countries and exchange of such lists, and interim stay on the selling, alienation or transfer of assets in both countries etc. were issued by NCLAT, throwing some light on the type of procedures required under the CBI regime.
- Some practical difficulties such as cooperation between the Committee of Creditors ('**COC**') here in India and the Administrator, responsibility of funding fees payable to the Administrator as well as RP, division of creditors that are eligible to file their claims before the Administrator as well as RP, whether the Administrator should be allowed to attend COC meetings and have a right to vote etc. were also exposed.
- However, the questions of whether proceedings itself can be initiated in another country, when one has already started, the way forward if liquidation has been directed in one country, as opposed to insolvency resolution in another, among others, were left open for interpretation.
- In another case before the NCLT, Mumbai Bench, in *State Bank of India* v.

[3] *State Bank of India and Ors.* v. *Jet Airways (India) Limited,* MANU/ND/7877/2019 (Dated 20 June 2019)

Videocon Industries Limited, MANU/NC/7959/2020, even though no parallel proceedings have been instituted before another jurisdiction, the questions of whether foreign assets in that other jurisdiction can be included in the Indian insolvency proceedings, and whether the moratorium under Section 14 of the Code can be made applicable to foreign assets, were debated and it was held in the affirmative. However, no explanations have been provided on the administration aspect of these assets.

- Meanwhile, a case before the NCLT, Chandigarh Bench, in *SBI* v. *SEL Mfg. Co. Ltd*., 26 CP (IB) No. 114/Chd/Pb/2017, has been recognized as the 'foreign main proceeding' within the meaning of Section 1502(4) of the US Bankruptcy Code ('**US Code**'), by the US Bankruptcy Court, based on the Model Law. By doing say, the US Bankruptcy Court made applicable all reliefs to the corporate debtor under Section 1520 of the US Code, as per which the assets and properties of the corporate debtor shall be protected under US Bankruptcy laws. This was a good example of the ease of insolvency resolution, in the presence of a uniform law built on the Model Law.
- Taking into consideration these developments, The Cross-Border Insolvency Rules/ Regulations Committee (CBIRC), in its report of June 2020[4], made more modifications to Draft Part Z.

[4] Available at: https://mca.gov.in/bin/dms/getdocument?mds=rrg9eENnNT9kek31pVicTQ%253D%253D&type=open

Notice dated 24 November 2021:

Vide the latest Notice, the Ministry of Corporate Affairs ('**MCA**')[5], Government of India, has released another slew of recommendations to ensure Draft Part Z is finally made into a law:

- The Notice extends the coverage under the Draft to include personal guarantors and recommends provisions for adjudicating on applications filed against the personal guarantors.
- The Notice clarifies that the pre-packaged insolvency resolution process shall not entertain CBI provisions at this stage, and entities governed by special laws have also been brought out of the purview, particularly financial service providers notified under Section 227 of the Code.
- All benches of the NCLT and DRT are now recommended to have jurisdiction to adjudicate applications under Draft Part Z. Not just with powers of recognition of foreign proceedings/ judgments, but the NCLT/ DRT shall now be empowered to enforce foreign judgments as well.

Keeping the above in mind, the latest Notice brings India a step closer to finalizing a framework. However, the latest recommendations are also a work in progress.

While the increase of coverage of Draft Part Z to personal guarantors is a welcome and time-saving move, there is scope for ambiguity since, in case of initiation of insolvency resolution against Part III debtors (which includes personal guarantors), the main adjudicating authority is the jurisdictional Debt Recovery Tribunal (DRT), whereas in case of adjudication of insolvency

[5] Notification, bearing File No. 30/27/2018-Insolvency Section, dated 24 November 2021, issued by the Ministry of Corporate Affairs, Government of India, available at: https://prsindia.org/files/parliamentry-announcement/2021-12-15/Cross-Border%20Insolvency%20under%20IBC.pdf

proceedings against such guarantor before NCLT, cross-border applications may also be filed in NCLT. This overlap of jurisdiction may result in much confusion, with scope for forum-shopping or multiple applications filed questioning the jurisdiction of the authority. Further, these additional enforceability powers to the NCLT/ DRT may interfere with the powers of a civil court under the CPC.

The Notice itself is still subject to revisions, and the preparation and issuance of a formal Bill to make Draft Part Z a legislation/ as a part of the Code is still pending.

Conclusion:

As can be seen above, the various interpretations given by the courts, along with the drafts released, pose many gaps and much room for speculation. Relief in cases involving CBI so far has been very ad-hoc and in dire need of a formal legislation.

With the Draft Part Z, even after the latest Notice, some other clarifications such as about the term 'public policy' which is very wide in its ambit, the accountability of a foreign representative, *via* a code of conduct or otherwise, are yet to be provided. The latest recommendations also cover only single entities' insolvency resolution and do not cater to corporate groups. Also, as of now, any litigation or arbitration proceedings in India may continue even if insolvency proceedings have been initiated against the corporate debtor in foreign countries, creating a legal quagmire.

In short, India still has a long way to go to arrive at a proper Cross Border Insolvency law, but the number of judicial precedents, skeleton drafts, and recommendations being circulated indicate that steps are being taken in the right direction. The formal legislation is now awaited to understand the next steps.

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BOCW Act: Applicability on factories?

By **Apeksha Bansal**

Introduction:

The article discusses the applicability of Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ('**BOCW Act**') to factories wherein construction activity for the purpose of expansion or constructing godowns is being undertaken.

Definition of 'building or other construction work'[6]:

The term, 'Building or other construction work' has three limbs:

(a) First limb deals with the different activities which are to be undertaken,

[6] Section 2(d) of BOCW Act

namely, construction, alteration, repairs, maintenance or demolition.

(b) Second limb covers those buildings or works in relation to which the aforesaid activities are carried out.

(c) The third limb contains the exclusion clause i.e., any building or other construction works to which the provisions of the Factories Act, 1948 ('**Factories Act**') or the Mines Act, 1952 apply instead.

It is worthy to note that construction in a factory will get covered within the first two limbs of the definition.

On the other hand, on a plain reading of the exclusion clause, one can also take the view that since expansion or construction of a godown or any other place will take place inside the factory, which is subject to the provisions of Factories Act, therefore, said exclusion will apply to such construction.

A legal scrutiny of the above exclusion clause is required from the perspective of the Factories Act which is as follows:

(a) 'Factory' means any premises where manufacturing process is carried on with or without the aid of power[7].

(b) 'Worker' covers a person who is employed in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process[8].

(c) The activity of undertaking construction of a godown, or any other place or for expansion of the factory, is not a manufacturing process[9].

In light of the above, the building constructed, as a godown or as a part of expansion of the factory, will not be treated as a factory since no manufacturing process is being carried out.

Consequently, workers engaged in the construction of said building by the contractor will also not be treated as workers for the purpose of Factories Act.

Accordingly, one can take a view that the provisions of Factories Act apply when the manufacturing process in the building which is being constructed has commenced and not to the activity of construction of the project itself[10]. Therefore, the exclusion from the definition of 'building or other construction work' will not be available.

In case any contrary view is taken, there is a possibility that the workers engaged in the construction of building will get excluded from both the welfare legislations i.e. BOCW Act as well as the Factories Act.

Who is liable to pay cess?

The employer, in relation to an establishment, means the owner and the contractor. The contractor includes a sub-contractor[11].

Building and Other Construction Workers Welfare Cess Act, 1996 ('**Welfare Cess Act**') provides for the levy and collection of a cess on the cost of construction incurred by an employer. The cess levied shall be paid to the cess collector by the employer within thirty (30) days of completion of the construction project, or within

[7] Section 2(m) of Factories Act
[8] Section 2(l) of Factories Act
[9] Section 2(k) of Factories Act
[10] *Lanco Anpara Power Limited* v. *State of Uttar Pradesh* [2016 (10) SCC 329] and *Wardha Power Company Limited* v. *State of Maharashtra* [2017 (4) Mh.L.J.]
[11] Section 2(i) and 2(g) of BOCW Act

thirty (30) days of the date on which assessment of cess payable is finalised, whichever is earlier[12].

Different mechanisms are prescribed for payment of cess for building and construction work (a) of a Government or of a Public Sector Undertaking, and (b) where approval from a local authority is required.

In case of building and construction work of private companies, the employer is to pay cess to the cess collector. The question arises as to who is liable to pay cess i.e., whether the employer of the establishment or the contractor, as the definition of employer covers both the owner and the contractor.

It is worthwhile to note that the Supreme Court has held that, as per the BOCW Act and the Welfare Cess Act, the liability to pay cess falls not only on the owner of a building or establishment but also on the contractor. It is to ensure that the cess is collected at source from the bills of the contractors to whom payments are made by the owner. The burden of cess is passed on from the owner to the contractor[13].

Accordingly, one can take a view that the contractor is to collect cess and make payments to the collector.

There are certain provisions in BOCW Act which cast the welfare related responsibility of the workers on the employer of the establishment such as for canteens, accommodation, creches, and first-aid.

On a concluding note, while paying and collecting cess, the impact of the BOCW Cess read with Welfare Cess Rules should be appropriately dealt with by businesses.

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Ratio Decidendi

Sessions Judge or Additional Sessions Judge lacks jurisdiction to try offences under the Insolvency and Bankruptcy Code, 2016

The Division Bench of the Bombay High Court, by setting aside the order passed by the jurisdictional Additional Sessions Judge under Section 73(a) and Section 235A of the Insolvency and Bankruptcy Code, 2016 ('**Code**'/ '**IBC**'), has held that an Additional Sessions Judge or a Sessions Judge does not have the jurisdiction to try offences under the Code, as the same is a 'Special Court' under Section 435 of the Companies Act, 2013 ('**Act**') only for trying offences under said Act itself. For all other offences, such as offences under the Code, the High Court held that only a Judicial Magistrate

[12] Section 3(2) of Welfare Cess Act read with Rule 4 of The Building and Other construction Workers' Welfare Cess Rules, 1998
[13] *Dewan Chand Builders and Contractors* v. *Union of India* [2012 (1) SCC 101]

First Class or a Metropolitan Magistrate can try such offences, by virtue of Sections 236 and 237 of the Code read with Section 435 of the Act.

Brief facts:

The Insolvency and Bankruptcy Board of India ('**IBBI**') had filed a complaint before the jurisdictional Additional Sessions Judge ('**ASJ**'), wherein the ASJ passed an order of 'issue process' under Section 73(a) and Section 235A of the Code. The Petitioner challenged this order by filing the present Writ Petition before the Bombay High Court, on the ground that ASJ does not have the jurisdiction to entertain such complaints by IBBI.

Submissions:

i. The counsel for the Petitioner submitted that only the Special Court under Section 236 of the Code read with Section 435 of the Act (as amended in 2017), has the jurisdiction to try offences under the Code. As per Section 236 of the Code, only the Special Courts are empowered to deal with offences under the Code. The Special Court, set up under Section 435 of the Act, is empowered to try offences 'under the Act' punishable with imprisonment two or more years, and comprises of Judges who were previously holding the position of Sessions Judge or an ASJ. Judges holding the office of a Judicial Magistrate First Class or Metropolitan Magistrate have the jurisdiction to try 'all other offences', which include offences under the Code. Therefore, Section 236 of the Code deems the Special Court as the court presided over by the Judicial Magistrate First Class or Metropolitan Magistrate.

ii. The counsel for the Respondent submitted that, on a plain reading of Section 236 of the Code and Section 435 of the Act, the ASJ or a Sessions Judge alone have the jurisdiction to try the offences under the Code as the offence in the present case is punishable with imprisonment for more than three years.

Decision:

The High Court, after analysing Section 236 of the Code, concluded that the offences under the Code shall be tried by the Special Court established under the Act. Provisions of Criminal Procedure Code, 1973 will regulate the procedure and the proceedings of the Special Court. After Section 236 of the Code was introduced, there has been an amendment to the Act in 2017where Section 435 of the Act was amended. By the amended Section 435 of the Act, another class of Special court has been enacted consisting of Metropolitan Magistrate or Judicial Magistrate of First Class for speedy trial of the offences under the Code and to lessen the burden over the Special Court comprising of ASJ or Sessions Judge, which is already empowered to try offences under the Act. Section 435(2)(b) of the Act expressly allows the Special Court presided by a Judicial Magistrate First Class or Metropolitan Magistrate to try 'all other offences' which includes in its sub-section offences under the Code. The Bombay High Court, therefore, set aside the order of the ASJ for its lack of jurisdiction and held that the appropriate court would be the Judicial Magistrate First Class or Metropolitan Magistrate to try the offences under the Code.

[*Satyanarayan Bankatlal Malu* v. *Insolvency and Bankruptcy Board of India* - Judgment dated 14 February 2022, Writ Petition no. 2592 of 2021, Bombay High Court]

For initiating Insolvency Resolution Process against personal guarantors, commencement of Corporate Insolvency Resolution Process of the corporate debtor not mandatory

The National Company Law Tribunal ('**NCLT**'), Kochi Bench has held that commencement of Corporate Insolvency Resolution Process

('**CIRP**') is not a prerequisite to initiate Insolvency Resolution Process ('**IRP**') against the personal guarantors of a corporate debtor, for maintainability of the application under Section 95 of the Insolvency and Bankruptcy Code, 2016 ('**Code**').

Brief facts:

i. The Respondent invoked Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to the Corporate Debtor) Rules, 2019 and issued a demand notice to the personal guarantors of the corporate debtor, even though CIRP has not been commenced against the corporate debtor. The NCLT permitted the application and appointed a resolution professional for IRP.

ii. The personal guarantors, thereafter, filed an application challenging and for recall of the order of NCLT passed.

Submissions:

i. The counsel for the Applicant submitted that the application of appointing IRP cannot be sustained by virtue of Section 60 of the Code where commencement of CIRP is essential to initiate IRP against the personal guarantors.

ii. The counsel for the Respondent submitted that the personal guarantors to the corporate debtor are a separate class of creditors under Section 2(e) of the Code, and the rules of the Code do not impose as a pre-requisite commencement of CIRP before initiating IRP against the personal guarantors.

Decision:

The NCLT, relying on the judgment of *Lalit Kumar Jain* v. *Union of India and Ors.,* 2021 SCC OnLine SC 396, dealing with the constitutional validity of Section 2(e) of the Code, held that personal guarantors, in view of their intrinsic connection with corporate debtors, shall be dealt with differently through the same adjudicating process as the corporate debtor, and that the Code views personal guarantors as another category from the corporate debtors, to whom the Code has been extended. Thus, the NCLT dismissed the application and held that commencement of CIRP is not a pre-requisite to maintain the application under Section 95 of the Code to initiate IRP against the personal guarantors under the Code.

[*E. Iqbal* v. *State Bank of India* IBA/45/KOB/2020, Judgment dated 22 January 2022, NCLT, Kochi Bench]

Insufficiency of stamp duty in arbitration agreement does not render application for arbitrator's appointment before the court non-maintainable

The Bombay High Court has held that once the parties acknowledge the existence of an arbitration clause in a contract executed between them, the application filed under Section 11 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') before the High Court is maintainable and the court cannot be prevented from disposing such application.

Brief facts:

i. The Applicant was required to carry out certain work including construction and maintenance, pursuant to a sub-contractor tripartite agreement executed with the two Respondents ('**Agreement**'). On account of disputes, the Applicant had invoked the arbitration proceedings against the Respondents basis the Agreement, which prescribed for a three-person arbitral tribunal. Subsequently, an application was filed under Section 11 of the Arbitration Act seeking appointment of a Sole Arbitrator.

ii. The High Court ordered impounding of the Agreement since it was insufficiently stamped.

The Court further found that the original Agreement was not available by the parties. However, the existence of the Agreement was not opposed by the Respondents.

iii. The Court, while dealing with this matter, faced the issues of (a) whether in the absence of the original Agreement, it was possible to impound a copy of the agreement, (b) whether in the arbitration agreement providing for three arbitrators, a sole arbitrator can be appointed, and (c) whether on account of insufficiency of stamping, there is a prohibition against appointing an Arbitrator, in view of the decision in *InterContinental Hotels Group (India) Pvt. Ltd. & Anr.* v. *Waterline Hotels Pvt. Ltd*., [Arbitration Petition (Civil) No.12 of 2019].

Submissions:

i. The counsel for the Appellant submitted that an instrument can be stamped even if it is a copy and the original is unavailable. By virtue of the decision in *InterContinental Hotels Group* Case, when a court is faced with the issue of insufficient stamping, there is no bar against proceeding with appointing an arbitrator, and the stamp-duty payable can be considered at a later stage after a statutory appeal against adjudication is filed.

ii. The counsel for the Respondent disputed the proposition that a photocopy can be stamped in the absence of the original document. Basis the same, he submitted that the court ought not to proceed with the appointment, because the instrument is not sufficiently stamped

Decision:

The High Court held that, even though none of the parties had the original Agreement, no party disputed the existence of the arbitration clause in the Agreement. Since its contents have been accepted, reference to an arbitral tribunal basis the Agreement cannot be denied. As per Section 3 (Instrument Chargeable with Duty) of the Maharashtra Stamp Act, 1958 ('**Stamp Act**'), every instrument listed in Schedule-I of aid Act, which is not executed previously, needs to be stamped on and after the commencement of the Act. Under Section 3(b) of the Stamp Act, whether or not a true copy is available of the original instrument, the same shall be chargeable with full stamp duty. The Court, therefore, proceeded with appointment of a Sole Arbitrator.

[*Pigments & Allieds* v. *Carboline (India) Pvt. Ltd. and Anr.* – Arbitration Application No. 225 of 2016, Judgment dated 28 February 2022, Bombay High Court]

News Nuggets

Damages mandatorily payable by employer for delays in payment of EPF contribution

The Supreme Court has held that any default or delay in the payment of Employees Provident Fund (EPF) contribution by the employer under the Employees Provident Fund & Miscellaneous Provisions Act, 1952 ("**EPF Act**") is *sine qua non* for levy of damages under Section 14B of the Act. Relying on its earlier decision in the case of *Union of India* v. *Dharmendra Textile Processors*,

the bench in the case of *Horticulture Experiment Station Gonikoppal Coorg* v. *Regional Provident Fund Organization* [Judgment dated 23 February 2022]**,** reiterated that *mens rea* or *actus reus* is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities. The Apex court accordingly dismissed the appeal filed against the judgment of the Karnataka High Court which had held that the employer is liable to pay damages if he has failed to deposit the contribution of EPF. The Court observed that EPF Act is a legislation for providing social security to the employees working in any establishment and engaging 20 or more persons on any day, and casts an obligation upon the employer to make a compulsory deduction for provident fund and to deposit the same in the workers' account in the concerned EPF Office.

Interest liability on compensation under Employee's Compensation Act arises from date of accident

Observing that the liability to pay the compensation would arise from the date of the accident for which the employee is entitled to compensation under the Employee's Compensation Act, 1923 ("**Act**"), the Supreme Court has held that the liability to pay interest on the amount of arrears/compensation shall also be from the date of accident and not from the date of the order passed by the Commissioner. The Apex Court, in this case of *Shobha* v. *Chairman, Vithalrao Shinde Sahakari Sakhar Karkhana Ltd.* [Judgment dated 11 March 2022], further observed, while directing the employer to pay the interest from the date of the order passed by the Commissioner, that the High Court did not consider Section 4A(3)(a) of the Act [dealing with award of interest when employer is in default] and considered Section 4A(3)(b) only [penalty provision]. The Court, thus, allowed the appeal and held that the claimants shall be entitled to the interest @ 12% p.a. on the amount of compensation as awarded by the Commissioner from the date of the incident.

Consumer complaint against telecom companies is maintainable even if arbitral remedy prescribed under the Indian Telegraph Act, 1885

The three-Judge Bench of the Supreme Court of India has held that the existence of an arbitral remedy will not oust the jurisdiction of the consumer forum. Under Section 7B of the Indian Telegraphic Act 1885, any dispute concerning a telegraph line, appliance, or apparatus, between the telegraph authority and the person for whose benefit the line, appliance or apparatus is or has been provided has to be determined by arbitration. However, the Court was of the view that it would be open to a consumer to opt for the remedy of arbitration, but there is no compulsion in law to do so, and it would be open to a consumer to seek recourse to the remedies which are provided under the Consumer Protection Act of 1986, now replaced by the Consumer Protection Act, 2019 ('Act of 2019').

The bench, in this case *Vodafone Idea Cellular Ltd. v. Ajay Kumar Agarwal* [Judgment dated 16 February 2022], further said that the insertion of the expression 'telecom services' in the definition contained in Section 2(42) of the Act of 2019 cannot be construed to mean that telecom services were excluded from the jurisdiction of the consumer forum under the Act of 1986. On the contrary, the definition of the expression 'service' in Section 2(o) of the Act of 1986 was wide enough to comprehend services of every description including telecom services.

Consumer – 'Services availed for earning livelihood by means of self-employment', explained

The Supreme Court of India has held that a stockbroker, who had filed a complaint against a Bank which had earlier granted him the facility of overdraft for expanding business, was not a 'consumer' as envisaged under Section 2(1)(d) of the Consumer Protection Act, 1986. Observing that, to come within the meaning of 'consumer' a person will have to establish that the services were availed exclusively for the purposes of earning his livelihood by means of self-employment, the division bench said that there cannot be any straitjacket formula and such a question will have to be decided in the facts of each case, depending upon the evidence placed on record.

The Apex Court remarked that the relations between the appellant (stock-broker) and the respondent (Bank) were pure 'business to business' relationships and hence the transactions would come within the ambit of 'commercial purpose'. It noted that the appellant was also the stock-broker for the bank. The Court was of the view that it could not be said that the services were availed 'exclusively for the purposes of earning his livelihood by means of self-employment'. The Court, on 22 February 2022, in the case of, *Shrikant G. Mantri* v. *Punjab National Bank*, hence dismissed the appeal challenging the judgment passed by National Consumer Disputes Redressal Commission.

Consumer Protection Act, 2019 covers services of medical practitioners

Observing that the definition of 'services' in Section 2(42) of the Consumer Protection Act, 2019 is inclusive and not exhaustive, the Kerala High Court has held that medical services would fall within the ambit of said Section 2(42). The Court was of the view that all services which are made available to potential users would fall under Section 2(42), except those services which are rendered free of charge or under a contract of personal service. It, in this regard, observed that the words 'but not limited to' appearing in Section 2(42) clarifies the intention of the Parliament. Rejecting the contention that the health sector was deliberately excluded by the Parliament while enacting the new law, the Court held that external aid like the Draft Bill can only be taken for interpreting a statutory provision when there is ambiguity in the express provisions of the statute. It held that in the case of Section 2(42), the definition is clear and devoid of any ambiguity whatsoever. Supreme Court's decision in *Indian Medical Association* v. *V.P. Shantha & Ors.* [(1995) 6 SCC 651], holding that services rendered by a medical practitioner would fall within the ambit of 'service' as defined under Section 2(1)(o) of the Consumer Protection Act, 1986, was also relied upon by the High Court in its decision in *Dr.Vijil* v. *Ambujakshi T.P.* [Judement dated 10 February 2022].

No compensation under Sections 73 and 74 of Indian Contract Act, 1872 unless actual loss/damage is sustained

The Kerala High Court has held that, when courts are dealing with matters pertaining to breach of contract, compensation under Sections 73 and 74 of the Indian Contract Act, 1872 ('**Contract Act**') cannot be granted unless the breach does not result in actual damage/loss to such party. The High Court, in *Devchand Construction* v. *Union of India* [Judgment dated 16 February 2022], noted that when a party is claiming compensation either under Section 73 or 74 of the Contract Act by mere breach of contract by the act of

parties, the same is not sufficient to claim compensation under these provisions. The Court held that the party is required to prove that such act or breach by the other party has resulted in actual loss/damage suffered by the first party.

Penalty cannot be imposed under Companies Act, 2013 when dealing with application under Insolvency and Bankruptcy Code

The NCLAT, New Delhi Bench, has noted that when proceedings have been initiated before the adjudicating authority under the Code, the adjudicating authority does not have the power to impose a penalty by invoking the provision of Companies Act, 2013. The NCLAT, in *Ashish Chaturvedi* v. *Inox Leisure Limited* [Judgment dated 14 February 2022], where the adjudicating authority imposed penalty upon the corporate debtor for non-filing of the reply under Section 128(6) of the Companies Act, set aside the order of the adjudicating authority by noting that when an application is filed under the Code, the adjudicating needs to decide the same under the requirement of law prescribed under the Code not from other legislations.

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