cyril amarchand mangaldas

CASE IN POINT

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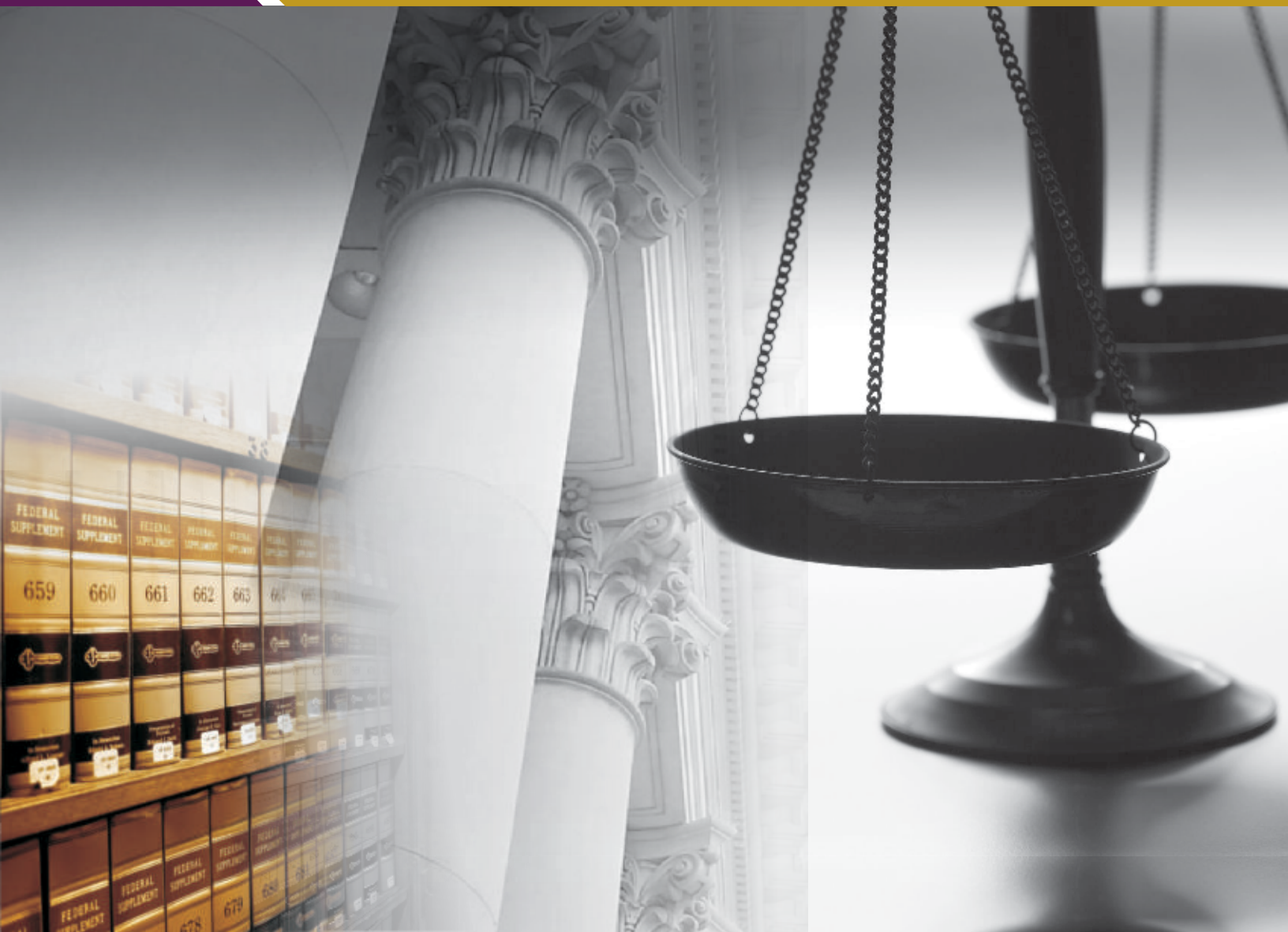

Foreword

The first section of this issue is an article titled COVID-19 and the Indian Statutory Regime: A Stitch in Time Saves Nine? The article analyses the legal framework which exists in India to deal with the COVID-19 crisis and the measures which have been taken thereunder.

The second section of this issue deals with some of the recent landmark decisions of the Hon'ble Supreme Court. In that section, we have examined the decision in *Union Bank of India v. Rajat Infrastructure Pvt. Ltd.* wherein the Hon'ble Supreme Court held that the Debt Recovery Appellate Tribunal cannot entertain an appeal under Section 18 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 without insisting on a pre-deposit.

We have also analysed the decision in *Bank of Baroda v. Kotak Mahindra Bank Ltd.* wherein the Hon'ble Supreme Court held that the limitation period for executing a decree passed by a foreign court of a reciprocating territory in India will be the limitation period prescribed in such reciprocating foreign country.

We further examined the decision in *Mankastu Impex Private Limited v. Airvisual Limited*, wherein the Hon'ble Supreme Court held that the mere expression of '*place of arbitration*' is not the basis to determine the '*seat of arbitration*'.

Thereafter, we examined the decision in *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited*, wherein the Hon'ble Supreme Court laid down the essential ingredients of a preferential transaction as contemplated in Section 43 of the Insolvency and Bankruptcy Code, 2016 and also held that person having only security interest over the assets of corporate debtor would stand outside the scope of 'financial creditors' as defined Section 5(7) of the Insolvency and Bankruptcy Code, 2016.

The decision in *New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage Pvt. Ltd.* has also been examined in this section wherein the Hon'ble Supreme Court held that the District Forum has no power to extend the time for filing the response to a complaint beyond a period of 45 days as prescribed under the Consumer Protection Act, 1986.

Lastly, we concluded this section of the issue by examining the decision in *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.*, wherein the Hon'ble Supreme Court while explaining the principles of enforcement of foreign awards under Section 48 of the Arbitration and Conciliation Act, 1996, held that the courts must warrant minimal interference while considering the grounds for setting aside a foreign award.

The issue is concluded by a section on other legal updates.

Feedback and suggestions from our readers would be appreciated.

Please feel free to send in your comments to cam.publications@cyrilshroff.com

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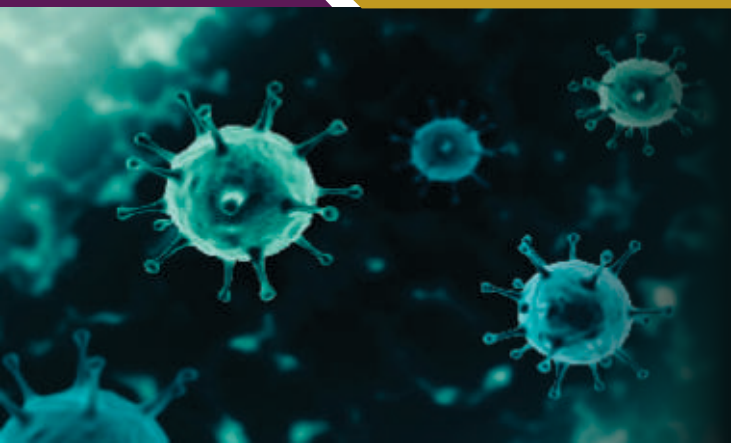

COVID-19 and the Indian Statutory Regime: A Stitch in Time Saves Nine?

Introduction

Nations across the globe are grappling with the novel coronavirus disease ("**COVID-19**"), a WHO-declared pandemic, fearing a collapse of their public health infrastructure and economies. Whilst keeping a close watch on the efforts being undertaken by countries that have so far been successful in their endeavours, the Government of India ("**GoI**") and various state governments have been continuously employing a series of proactive and timely measures to contain and manage COVID-19. This article seeks to examine the legal framework which exists to tackle a crisis of this nature, the measures which have been taken thereunder and an analysis thereof.

By and large, two legislations have been invoked so far to deal with COVID-19. These are the Epidemic Diseases Act, 1897 ("**EDA**") and the Disaster Management Act, 2005 ("**DMA**"). Certain provisions of the Code of Criminal Procedure, 1973 ("**CrPC**"), the Indian Penal Code, 1860 ("**IPC**") and certain sector specific laws have also been invoked to deal with this crisis.

THE EDA

Salient Features

This 123-year-old law was enacted to deal with the bubonic plague which terrorised the Bombay Presidency in 1896. The EDA was passed on February 4, 1897. It comprises a total of four sections and was enacted to prevent the spread of dangerous epidemic diseases in erstwhile British India.

Section 2 of the EDA enables state governments to take measures and prescribe, by way of a public notice, temporary regulations to be observed by the public or by any person or any class of persons, as may be deemed necessary to prevent the outbreak or spread of a dangerous epidemic disease. This power can be exercised when the relevant state government is satisfied that the state or any part thereof is visited by or threatened with the outbreak of a dangerous epidemic disease, and believes that the ordinary provisions of the law in force are insufficient to deal with the same.

The only specific measure contemplated in the EDA (as originally enacted) is inspection of persons travelling by rail "*or otherwise,*" their segregation in hospital and moving to temporary accommodation or otherwise, if suspected of being infected with any such disease.

In 1920, Section 2A was added to the EDA conferring powers on the GoI to take measures and prescribe regulations for the inspection of any ship or vessel leaving from or arriving at any port in India, and for the detention of any such ship, vessel, person intending to sail therein or arrive thereby, in the event of outbreak of a dangerous epidemic disease.

Section 3 of the EDA provides that disobedience of any regulation or order made under the Act is deemed to be an offence punishable under Section 188 of the IPC.[1]

On April 22, 2020, the President promulgated the Epidemic Diseases (Amendment) Ordinance, 2020 ("**Epidemic Diseases Ordinance**") to amend the EDA.[2] The Epidemic Diseases Ordinance *inter alia* prohibits violence against health care service personnel and damage to property during an epidemic and prescribes imprisonment of three months to five years and a fine of INR 50,000/- to INR 2,00,000/- for those who commit or abet the commission of an act of violence against a health care service personnel or abet or cause damage or loss to

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[1] Section 188. **Disobedience to order duly promulgated by public servant**. - Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Explanation - It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

Illustration

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

[2] http://egazette.nic.in/WriteReadData/2020/219108.pdf

any property. Where any such act of violence causes grievous hurt as defined in Section 320 of the IPC, the Epidemic Diseases Ordinance prescribes imprisonment of six months to seven years and a fine of INR 1,00,000/- to INR 5,00,000/-. These offences have been made cognizable and non-bailable and any person convicted is also liable to pay such compensation as may be decided by the court. A health service personnel has been defined as a person who, while carrying out his duties in relation to epidemic related responsibilities, may come in direct contact with affected patients and thereby is at risk of being impacted by such disease. The Epidemic Diseases Ordinance also amends Section 2A of the EDA to include any bus, train, goods vehicle or aircraft leaving or arriving at any land port or aerodrome.

Invocation of the EDA by states in India

As a primary measure to tackle the growing nation-wide public health emergency, the Prime Minister directed the constitution of a high level Group of Ministers ("**GOM**") to '*review, monitor and evaluate the preparedness and measures taken regarding management of Novel Coronavirus Disease (COVID-19*)' in the country. The GOM was duly constituted and held its first meeting on February 3, 2020. Another meeting of the GOM was held on March 11, 2020, wherein precautionary measures to be taken for the prevention and management of COVID-19 were discussed. It was decided that all states and union territories should be advised by the Ministry of Health and Family Welfare ("**MoHFW**") to invoke provisions of Section 2 of the EDA, so that all advisories being issued from time to time by the MoHFW/ states/ union territories are made enforceable.

Maharashtra

On March 13, 2020, the Maharashtra government enacted The Maharashtra COVID-19 Regulations, 2020[3] ("**Maharashtra Regulations**") valid for a period of one year or until further orders, in exercise of its powers under the EDA. The Maharashtra Regulations *inter alia* provide that (i) all hospitals, government and private, should have separate corners for screening of suspected COVID-19 cases; (ii) persons with travel history to countries or areas affected by COVID-19, in the last 14 days, shall quarantine themselves at home for a period of 14 days from the day of exposure; (iii) test samples for COVID-19 are to be taken only by authorised laboratories; (iv) officers empowered under the EDA are authorised to isolate a person who is developing COVID-19 symptoms; (v) in the event of COVID-19 being reported from a defined geographic area, the concerned authority shall be competent to implement certain containment measures including sealing of the area, barring entry and exit of population from the containment area, restricting vehicular movement, etc. Additionally, the Maharashtra Regulations prohibit persons, institutions and organisations from disseminating COVID-19 related information *via* print/ electronic or social media without prior clearance, making disobedience a punishable offence. The Maharashtra Regulations also provide that any person found disobeying the same shall be deemed to have committed an offence under Section 188 of the IPC.

On March 23, 2020, in exercise of its powers under Section 2 of the EDA, read with all other enabling provisions of the DMA, the Maharashtra government imposed an immediate lockdown in the entire state till March 31, 2020.[4] Some of the measures included sealing of all state borders other than for movement of essential and perishable commodities, suspension of public transport services and restrictions on plying of private vehicles and closure of commercial establishments, offices, factories, etc. The notification issued in this regard clarifies that any person violating the regulations prescribed therein shall be dealt with under the provisions of the EDA, DMA and other relevant acts and regulations. On April 13, 2020, the Maharashtra government extended the lockdown till April 30, 2020.[5]

Other states

Various other states have framed similar regulations under the EDA, including Delhi (National Capital Territory),[6] Haryana,[7] Karnataka,[8] Kerala,[9] Rajasthan,[10] West Bengal[11] and Telangana[12].

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3 Notification No. Corona 2020/CR-58/Aarogya-5 dated 13th March 2020 issued by the Maharashtra government, https://maharashtra.gov.in/Site/Upload/Acts%20Rules/English/Korona%20Notification%2014%20March%202020.pdf.

4 Notification No. DMU/2020/CR. 92/DMU-1 dated 23rd March 2020 issued by the government of Maharashtra, https://cdn.s3waas.gov.in/s302522a2b2726fb0a03bb19f2d8d9524d/uploads/2020/03/2020032416.pdf.

5 Notification No. DMU/2020/CR.92/DisM-1 dated 13th April 2020 issued by the Government of Maharashtra.

6 Notification No: F.51/DGHS/PH-IV/COVID-19/202-215 dated 12th March 2020 issued by the Health and Family Welfare Department, Government of NCT, https://main.sci.gov.in/pdf/cir/covid19_14032020.pdf.

7 Notification No. 46/4/2020-5HB-II dated 11th March 2020 issued by the Health Department, Haryana government, http://www.nhmharyana.gov.in/WriteReadData/userfiles/file/CoronaVirus/notification%20COVID-19.pdf.

8 Notification No. HFW 54 CGM 2020 dated 11th March 2020 issued by the Government of Karnataka, https://drive.google.com/file/d/1hOQX7MkNrt1TLPgiaQF7LMl_18oq_O-z/view?usp=sharing.

9 Order No. G.O. (Ms) No. 49/2020/GAD dated 23rd March 2020 issued by the Government of Kerala, https://kerala.gov.in/documents/10180/172d9bbc-b89d-4a56-b1bf-6f3a61221d75.

10 Notification Number F.NO. F9 (58) M&H/2/09 dated 12th March 2020 issued by the Medical, Health and Family Welfare Department, Government of Rajasthan, https://www.manupatrafast.com/covid_19/Rajasthan/Govt/Rajasthan%20Regulation.pdf.

11 Notification No. H&FW/118/20 dated 16th March 2020 issued by the Health and Family Welfare Department, Government of West Bengal, https://www.wbhealth.gov.in/uploaded_files/corona/Epidemic_Disease_Regulation_West_Bengal.pdf.

12 Order Number G.O. Ms. No. 13 dated 21st March 2020 issued by the Health and Family Welfare Department, Government of Telangana, https://chfw.telangana.gov.in/writereaddata/files/G.O.Ms.No.13%20The%20Epidemic%20Disease%20Act,%201897%20Covid-19.pdf.pdf.

Kerala

Kerala went a step further by promulgating the Kerala Epidemic Diseases Ordinance, 2020[13] ("**Kerala Ordinance**") on March 26, 2020, in exercise of the powers conferred on the Governor under Article 213 of the Constitution of India, 1950 ("**Indian Constitution**"), in order to unify and consolidate the laws relating to the regulation and prevention of epidemic diseases.

The Kerala Ordinance defines 'Epidemic Disease' as any disease declared as epidemic by notification published in the official gazette, by the Kerala government.[14] The Kerala government may, by notification in the official gazette, notify any disease as an epidemic disease for the purpose of the Kerala Ordinance.[15]

The Kerala Ordinance confers powers on the Kerala government to take certain measures by notifying temporary regulations or orders, such as : (i) prohibit any usage or act which the government considers sufficient to spread or transmit epidemic diseases from person to person in any gathering, celebration, worship or other such activities within the state; (ii) inspect persons arriving in the state by air, rail, road, sea or any other means or in quarantine or in isolation, as the case may be, in hospital, temporary accommodation, home or otherwise suspected of being infected with any such disease by authorised officers; (iii) seal state borders for such period as may be deemed necessary; (iv) impose restrictions on the operation of public and private transport; (v) prescribe social distancing norms; (vi) restrict or prohibit congregation of persons in public places and religious institutions; (vii) regulate or restrict the functioning of offices, government and private, and educational institutions in the state; (viii) impose prohibition or restrictions on the functioning of shops and commercial establishments, factories, workshops and godowns; (ix) restrict duration of essential or emergency services such as banks, media, health care, food supply, electricity, water, fuel, etc.; and (x) such other measures as may be necessary for the regulation and prevention of epidemic diseases as decided by the government.[16]

The Kerala government is authorised, under the Kerala Ordinance, to empower District Collectors to exercise such powers and duties as may be specified in the regulations or orders notified thereunder.[17] The Kerala Ordinance prescribes a punishment of imprisonment for a term which may extend to two years or a fine which may extend to ten thousand rupees or both, for any person/ institution/ company convicted for contravening or disobeying any regulation or order made under the Kerala Ordinance, or for obstructing any officer empowered under the Kerala Ordinance.[18]

Analysis

Given the central object of the EDA, whilst considering how far back in time it was conceived, the EDA is silent on several important and current aspects, including responsibility to ensure maintenance of sanitary conditions in quarantine zones and hospitals, availability of proper quarantine, testing, medication and treatment facilities, quality control of the drugs being administered to patients, compensation, restoration and rehabilitation of individuals affected by an epidemic disease, financial aid and continuity of remuneration to citizens. Such aspects thus, have to be provided for by way of executive policy and piecemeal rules, regulations and directives by government authorities, which may lead to inconsistent policy and application.

THE DMA

The DMA, enacted on December 23, 2005 sets out a detailed institutional, legal and financial framework at the national, state, district and local levels to facilitate prevention of disasters, mitigation, capacity-building and preparedness. Whilst it appears to be more of a general law when considered in the context of epidemic diseases, it is much more recent than the EDA, and provides a far more comprehensive framework and structure to deal with disasters. Though the Indian Constitution designates state legislatures as competent to enact laws relating to public health, the GoI is treating COVID-19 as a disaster under the DMA which is a central law empowering the GoI to give directions to state governments regarding measures to be taken in response to disasters.

Institutional framework under the DMA

The DMA provides for creation of a National Disaster Management Authority ("**National Authority**"),[19] headed by the Prime Minister; State Disaster Management Authorities ("**State Authorities**"),[20] headed by the respective Chief Ministers; and District Disaster Management Authorities ("**District Authorities**") headed

[13] Notification No. 6650/Leg.HI/2020/Law dated 26th March 2020 issued by the government of Kerala, https://go.lsgkerala.gov.in/files/gz20200327_25985.pdf.
[14] Section 2(a) of the Kerala Ordinance.
[15] Section 3 of the Kerala Ordinance.
[16] Section 4 of the Kerala Ordinance.
[17] *Ibid.*
[18] Section 5 of the Kerala Ordinance.
[19] Section 3 of the DMA.
[20] Section 14 of the DMA.

by the respective Collectors or District Magistrates or Deputy Commissioners, as the case may be.[21]

The National Authority has been tasked with laying down the policies, plans and guidelines for disaster management to ensure timely and effective response to disasters,[22] and is empowered to recommend relief in repayment of loans or for grant of fresh loans to persons affected by the disaster on such concessional terms as may be appropriate.[23] Apart from laying down plans, policies and guidelines for disaster management, the National Authority may also take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary.[24]

The DMA also provides for creation of the National Executive Committee ("**NEC**") which is the executive committee of the National Authority, to assist the National Authority in discharge of its functions, to implement policies and plans of the National Authority and to ensure compliance of directions issued by the GoI for the purpose of disaster management in the country. The NEC is empowered to *inter alia* (a) lay down guidelines for, or give directions to, the concerned ministries or departments of the GoI, the state governments and State Authorities, regarding measures to be taken by them in response to any threatening disaster situation or disaster and (b) perform such other functions as the National Authority may require it to perform.[25] The NEC comprises *inter alia* the Secretary to the GoI in charge of the ministry or department of the GoI having administrative control of disaster management (*ex officio* Chairperson), Chief of Integrated Defence Staff of the Chiefs of Staff Committee and secretaries to the GoI in the ministries or departments having administrative control over agriculture, atomic energy, defence, drinking water supply, environment and forests, finance (expenditure), health, power, rural development, science and technology, space, telecommunication, urban development and water resources.[26]

At the state level, the State Authorities, with their respective Chief Ministers as Chairperson, are responsible for laying down policies and plans for disaster management in their respective states.[27] The DMA also provides for constitution of State Executive Committee ("**SEC**") to assist the State Authority in performance of its functions.[28] The SEC is empowered to *inter alia* (i) control and restrict vehicular traffic to, from or within the vulnerable or affected area, (ii) control and restrict the entry of any person into, his movement within and departure from, a vulnerable or affected area, (iii) require any department of the state government or other body or authority or person in charge of any relevant resources to make available the resources for emergency response, rescue and relief, (iv) require experts and consultants in the field of disasters to provide advice and assistance for rescue and relief, (v) procure exclusive or preferential use of amenities from any authority or person as and when required and (vi) disseminate information to the public to deal with any threatening disaster situation or disaster.[29]

At the district level, the District Authority is headed by the District Collector, Deputy Commissioner or District Magistrate as the case may be.[30] The District Authority is the planning, coordinating and implementing body for disaster management at the district level, and is to act in accordance with the guidelines laid down by the National Authority and State Authority.[31] Some of the measures which the District Authority may take (apart from some of the measures to be taken by the SEC, which may also be taken by the District Authority) include (i) identifying buildings and places which could, in the event of any threatening disaster situation or disaster, be used as relief centres or camps and make arrangements for water supply and sanitation in such buildings or places, (ii) establishing stockpiles of relief and rescue materials or ensuring preparedness to make such materials available at short notice and (iii) ensuring that communications systems are in order.[32]

At the local level, the DMA casts responsibilities on local authorities such as panchayati raj institutions, municipalities, district and cantonment boards, town planning authorities, Zila Parishads or any other body or authority which renders essential services or controls and manages civic services, to further its objectives.[33]

For the purpose of a specialist response to a threatening disaster situation or disasters, the DMA provides for the constitution of a National Disaster Response Force ("**NDR**

[21] Section 25 of the DMA.
[22] Section 6 of the DMA.
[23] Section 13 of the DMA.
[24] Section 6(2)(i) of the DMA.
[25] Section 10 of the DMA.
[26] Section 8 of the DMA.
[27] Section 18 of the DMA.
[28] Section 20 of the DMA.
[29] Section 24 of the DMA.
[30] Section 25 of the DMA.
[31] Section 30 of the DMA.
[32] *Ibid.*
[33] Section 41 of the DMA.

Force").[34] The general superintendence, direction and control of the NDR Force are to be vested in and exercised by the National Authority.[35]

Where the National Authority, State Authority or District Authority is satisfied that immediate procurement of provisions or materials or immediate application of resources are necessary for rescue or relief, by reason of any threatening disaster situation or disaster, they are empowered to authorise the concerned department or authority to make emergency procurement. In such a case, the standard procedure requiring inviting of tenders is deemed to be waived.[36]

Financial framework under the DMA

The DMA enables the GoI to constitute a National Disaster Response Fund ("**NDR Fund**") to be made available to the NEC for expenses for emergency response, relief and rehabilitation, in accordance with the guidelines laid down by the GoI in consultation with the National Authority.[37]

Similarly, the DMA requires state governments to constitute a State Disaster Response Fund ("**SDR Fund**") at the state level, as well as district Disaster Response Fund at the district level.[38] The SDR Fund is the primary fund available with state governments for responses to notified disasters. The annual central contribution towards the SDR Fund is released in two equal instalments as per the recommendation of the Finance Commission and is used towards meeting the expenditure for providing immediate relief to disasters victims[39]. The NDR Fund supplements the SDR Fund of a state in case of a disaster of severe nature, provided adequate funds are not available in SDR Fund.[40]

On March 14, 2020, the GoI declared COVID-19 to be a notified disaster for the purpose of providing assistance under the SDR Fund.[41] A list of items and norms of assistance eligible for each item from the SDR Fund was also specified, along with a ceiling on the amount which can be appropriated from the SDR Fund for this purpose. The items include provision of temporary accommodation, food, clothing and medical care for people affected and sheltered in quarantine camps or for cluster containment operations; consumables for sample collection, support for checking, screening and tracing; cost for setting up additional testing laboratories; personal protection equipment for healthcare, municipal, police and fire authorities; thermal scanners, ventilators, air purifiers and consumables for government hospitals.[42] On March 29, 2020, the GoI clarified that the allocation under the SDR Fund towards provision of food and other supplies would also be applicable to homeless people including migrant labourers who are stranded due to lockdown measures and sheltered in relief camps and other places.[43]

The DMA empowers the GoI to constitute a National Disaster Mitigation Fund ("**NDM Fund**") exclusively for the purpose of mitigation, which is to be applied by the National Authority.[44] Similarly, state governments are required to constitute disaster mitigation funds at the state as well as district levels.[45]

Measures to be taken for disaster management

GoI[46]

The DMA requires the GoI to take all measures as it deems necessary or expedient for the purpose of disaster management, including with respect to the following matters:

i. coordination of actions of the ministries or departments of the GoI, state governments, National Authority, State Authorities, governmental and non-governmental organisations in relation to disaster management;

ii. ensuring appropriate allocation of funds for prevention of disaster, mitigation, capacity-building and preparedness by the ministries or departments of the GoI;

iii. deployment of naval, military and air forces, other armed forces of the Union or any other civilian personnel as may be required for the purposes of the DMA;

iv. coordination with United Nations agencies, international organisations and governments of foreign countries for the purposes of the DMA;

34 Section 44 of the DMA.
35 Section 45 of the DMA.
36 Section 50 of the DMA.
37 Section 46 of the DMA.
38 Section 37 of the DMA.
39 https://www.ndmindia.nic.in/response-fund.
40 *Ibid.*
41 Letter bearing reference no. 33-4/2020-NDM-1 dated 14th March 2020 issued by Ministry of Home Affairs (Disaster Management Division), https://www.ndmindia.nic.in/images/gallery/COVID-19.pdf.
42 Annexure to Ministry of Home Affairs' letter No. 33-4/2020-NDM-1 dated 14.03.2020 [Modified List of items & norms of assistance from State Disaster Response Fund) (SDRF) in the wake of COVID-19 virus outbreak], https://www.ndmindia.nic.in/response-fund.
43 Letter bearing reference no. 33-4/2020-NDM-1 dated 28th March 2020 issued by Ministry of Home Affairs (Disaster Management Division), https://www.ndmindia.nic.in/response-fund.
44 Section 47 of the DMA.
45 Section 48 of the DMA.
46 Section 35 of the DMA.

v. establishment of institutions for research, training, and developmental programmes in the field of disaster management; and

vi. such other matters as it deems necessary or expedient for the purpose of securing effective implementation of the provisions of the DMA.

Ministries and departments of the GoI[47]

The DMA provides that ministries and departments of the GoI shall *inter alia*:

i. take measures necessary for prevention of disasters, mitigation, preparedness and capacity-building in accordance with the guidelines laid down by the National Authority;

ii. allocate funds for measures for prevention of disaster, mitigation, capacity-building and preparedness;

iii. assist the National Authority and state governments in carrying out rescue and relief operations in the affected area, assessing the damage from any disaster and carrying out rehabilitation and reconstruction;

iv. make their resources available to the NEC or SEC for providing emergency communication in a vulnerable or affected area, transporting personnel and relief goods to and from the affected area, providing evacuation, rescue, temporary shelter or other immediate relief, setting up bridges, jetties and landing places and providing drinking water, essential provisions, healthcare and services in an affected area.

Similar responsibilities have also been placed on the departments of state governments.[48]

State governments and their departments[49]

The DMA requires state governments to take all measures specified in the guidelines laid down by the National Authority and such further measures as it deems necessary or expedient for disaster management including:

i. coordination of actions of different departments of the state government, State Authority, District Authorities, local authority and other non-governmental organisations;

ii. allocation of funds for measures for prevention of disaster, mitigation, capacity-building and preparedness by the departments of the state government;

iii. establishment of adequate warning systems;

iv. ensuring that resources of different departments of the state government are made available to the NEC or SEC or the District Authorities for effective response, rescue and relief in any threatening disaster situation or disaster; and

v. provide rehabilitation and reconstruction assistance to the victims of any disaster.

Offences and penalties under the DMA

The offences contemplated by the DMA, and the respective punishments are as follows:

I. *Obstruction of an authorised officer or refusal to comply with directions:* A person convicted of (a) obstruction of any officer or employee of the GoI or state government or authorised by the National Authority, State Authority or District Authority, in the discharge of his functions under the DMA or (b) refusal to comply with any direction given by or on behalf of the GoI or state governments or the NEC, SEC or the District Authority under the DMA, is punishable with imprisonment for a term which may extend to one year or with fine, or with both. If such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, the person on conviction shall be punished with imprisonment for a term which may extend to two years.[50]

ii. *False claims:* A person convicted of knowingly making a claim which he knows or has reason to believe to be false, for obtaining any relief, assistance, repair, reconstruction or other benefits consequent to disaster from any officer of the GoI, state governments, National Authority, State Authority or District Authority, is punishable with imprisonment for a term which may extend to two years, and also with fine.[51]

iii. *Misuse of money, material or goods meant for providing relief*: A person who is entrusted with any money or materials or otherwise being in custody of or having dominion over any money or goods meant for providing relief in any threatening disaster situation or disaster and convicted of misappropriating, appropriating for his own use or disposing of such money or materials, is punishable with imprisonment for a term which may extend to two years, and also with fine.[52]

[47] Section 36 and 37 of the DMA.
[48] Section 39 and 40 of the DMA.
[49] Section 38 of the DMA.
[50] Section 51 of the DMA.
[51] Section 52 of the DMA.
[52] Section 53 of the DMA.

iv. *False warnings:* A person convicted of making or circulating a false alarm or warning as to disaster or its severity or magnitude, leading to panic, is punishable with imprisonment which may extend to one year, or with fine.[53]

MEASURES TAKEN UNDER THE DMA

Some of the notable measures taken and advisories issued by the GoI, state governments and various authorities are set out below.

Advisories

The National Authority has been issuing advisories from time-to-time setting out the steps to be taken to contain the spread of COVID-19. On February 4, 2020, the National Authority issued an advisory summarising certain important action points to be undertaken by all states and union territories[54]. These include directions to promote advisories on travel and hygiene, avoiding crowd contact, quarantine of people arriving from countries notified by the MoHFW, use of personal protective equipment, isolation of patients and avoiding spread of fake news, rumours and unnecessary information through proper media management. Subsequently, on March 5, 2020, the National Authority issued a second advisory to all Chief Secretaries and Union Territory Administrators detailing further action plans that include (i) circulation of public hygiene and awareness etiquette; (ii) holding discussions on isolation, quarantine, infection control, confinement measures, home isolation; (iii) issuance of directives to avoid public gatherings and (iv) setting up psychosocial care helpline for panic prevention, etc.[55] Thereafter, another advisory was issued by the National Authority on March 17, 2020 advising district authorities to publish notifications that people who have arrived from certain specified countries should proactively contact local authorities, and mechanisms must be put in place to medically examine such people.[56]

Lockdown imposed by the GoI

In exercise of its powers under Section 6 (2)(I) of the DMA, the National Authority issued an order dated March 24, 2020 directing all ministries and departments of the GoI, state governments and State Authorities to take measures to ensure social distancing to prevent the spread of COVID-19 in the country, in accordance with guidelines to be issued by the NEC.[57] These measures were put in place for a period of 21 days starting from March 25, 2020.

Thereafter, the NEC, in exercise of the powers conferred by Section 10(2)(l) of the DMA, issued guidelines on the measures to be taken by ministries/ departments of the GoI, state/union territory governments and state/ union territory authorities for containment of COVID-19 in the country.[58] These guidelines prescribed certain mandatory containment measures, to be followed for a period of 21 days from March 25, 2020. These include directions that government offices, commercial, private and industrial establishments, educational institutions and places of worship will remain closed, and all transport services and hospitality services will remain suspended (with certain exceptions). Gatherings for various purposes were barred and funerals were limited to congregations of 20 (twenty) persons. All persons who arrived in India after February 15, 2020 and all persons who were so directed by health care personnel, were required to remain under strict home/ institutional quarantine for a period as decided by local health authorities, failing which they would be liable to action under Section 188 of the IPC. The guidelines also provide that any person violating the containment measures will be liable to be proceeded against as per provisions of Sections 51 to 60 of the DMA. These guidelines were further modified on March 25, 2020, March 27, 2020, April 2, 2020, April 3, 2020 and April 10, 2020 ("**Consolidated Guidelines**").[59]

On April 14, 2020, the National Authority directed all ministries/ departments of the GoI, state governments and State Authorities to continue the lockdown measures imposed on March 24, 2020, till May 3, 2020.[60] The National Authority also directed the NEC to issue any necessary modifications to the Consolidated Guidelines. The NEC issued directions to all ministries/ departments of the GoI, state/union territory governments stating that the lockdown measures stipulated in the Consolidated Guidelines would continue to remain in force until May 3, 2020.[61] On April 15, 2020, the NEC issued a revised version of the Consolidated Guidelines, with directions to

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53 Section 54 of the DMA.
54 Advisory bearing reference number D.O. No.1-137/2018-Mit-II(FTS-10548) dated 4th February 2020 issued by the National Authority, https://www.ndma.gov.in/images/covid/04022020.pdf.
55 Advisory bearing reference number No. 1-137/2018-Mit-II(FTS-10548) dated 5th March 2020 issued by the National Authority, https://www.ndma.gov.in/images/covid/05032020.pdf.
56 Advisory bearing reference number No. 1-137/2018-Mit-II(FTS-10548) dated 17th March 2020 issued by the National Authority, https://www.ndma.gov.in/images/covid/17032020.pdf.
57 Order No. 1-29/2020-PP (Pt.II) dated 24th March 2020 issued by the National Authority, https://mha.gov.in/sites/default/files/ndma%20order%20copy.pdf.
58 Order No. 40-3/2020-DM-I(A) issuing Consolidated Guidelines on the measures to be taken by Ministries/ Departments of Government of India, State/Union Territory Governments and State/ Union Territory Authorities for containment of COVID-19 Epidemic in the Country, as notified by Ministry of Home Affairs on 24.03.2020 and further modified on 25.03.2020 and 27.03.2020,https://mha.gov.in/sites/default/files/MHAorder%20copy.pdf; https://www.ndma.gov.in/images/covid/PR_ConsolidatedGuidelinesofMHA_28032020.pdf.
59 https://mha.gov.in/sites/default/files/PR_Consolidated%20Guideline%20of%20MHA_28032020%20%281%29_1.PDF.
60 Order No 1-137/2018-Mit-II(FTS-10548) dated 14th April 2020 issued by the National Authority, https://mha.gov.in/sites/default/files/MHA%20DO%20letter%20dt.14.4.2020%20to%20Chief%20Secretaries%20and%20Administrators%20for%20strict%20implementation%20of%20Lockdown%20Order%20during%20extended%20period.pdf.
61 Order No. 40-3/2020-DM-I(A) dated 14th April 2020 issued by the Ministry of Home Affairs, https://mha.gov.in/sites/default/files/MHA%20DO%20letter%20dt.14.4.2020%20to%20Chief%20Secretaries%20and%20Administrators%20for%20strict%20implementation%20of%20Lockdown%20Order%20during%20extended%20period.pdf.

all relevant authorities to ensure strict implementation thereof.[62] These guidelines also set out (a) certain additional activities which will be allowed to operate from April 20, 2020, in order to mitigate hardship to the public and (b) mandatory precautions and standard operating procedure to be followed in public spaces, work spaces, factories and establishments.

The Consolidated Guidelines were further revised on April 16, 2020,[63] April 19, 2020,[64] April 21, 2020[65] and April 24, 2020[66] to include further permissible activities and to specifically exclude operation of e-commerce companies[67] during the lock down period.

Mitigation of economic hardship faced by the migrant workers

In order to ensure effective implementation of the lockdown measures and to mitigate the economic hardship of migrant workers, the NEC directed the state / union territory governments, state / union territory authorities to take necessary action. They were also directed to issue necessary orders to their respective District Magistrates / Deputy Commissioners and Senior Superintendent of Police / Superintendent of Police / Deputy Commissioner of Police to take certain measures including ensuring that (i) there are adequate arrangements of temporary shelters and provision of food for poor and needy people including migrant labourers who are stranded due to lockdown measures in their respective areas; (ii) migrant people who have moved out to reach their home towns be kept in the nearest quarantine facility for a minimum period of 14 days after proper screening; (iii) all employers make payment of wages to their workers on the due date, without any deduction, for the period their establishments are under closure during the lockdown; (iv) where migrant workers are living in rented accommodation, their landlords do not demand payment of rent for a period of one month.[68] The order provides that landlords forcing labourers and students to vacate premises will be liable for action under the DMA.

Analysis

Whilst the DMA is inherently preventive and promotes the setting-up of disaster-fighting infrastructure, it retains a strong element of current practicality which will enable authorities to deal with disasters effectively. It focusses on preparedness and capacity-building at the national, state and district levels for dealing with disasters. It defines disasters broadly enough, clearly allocates responsibility between the central and state governments as well as various authorities, and arms them with sufficient powers to take physical and financial measures to deal with a crisis like COVID-19. Though the DMA is not restricted to epidemic diseases, and therefore, may not provide specialised situation-specific powers or responsibilities, this does not appear to have impacted the handling of the present situation so far. The National Authority, State Authorities, District Authorities, NEC, SEC, GoI and state governments, have all been given ample power to take necessary measures when faced with a disaster and to punish persons who violate such measures, along with a clear demarcation of power and responsibility *inter se*.

OTHER RELEVANT STATUTORY PROVISIONS

Section 144 of the CrPC[69]

Prohibitory orders have also been issued in certain states under Section 144 of the CrPC. Section 144 of the CrPC confers powers on a District Magistrate, Sub-Divisional Magistrate or any Executive Magistrate specially empowered by the state government in this behalf, in cases

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62 Order No. 40-3/2020-DM-I(A) dated 15th April 2020 issued by the NEC https://www.mha.gov.in/sites/default/files/MHA%20order%20dt%2015.04.2020%2C%20with%20Revised%20Consolidated%20Guidelines_compressed%20%283%29.pdf.

63 Order No. 40-3/2020-DM-I(A) dated 16th April 2020 issued by the NEC https://www.mha.gov.in/sites/default/files/MHA%20Order%20Dated%2016.4.2020%20on%20Consolidated%20Revised%20Guidelines.pdf.

64 Order No. 40-3/2020-DM-I(A) dated 19th April 2020 issued by the NEC https://www.mha.gov.in/sites/default/files/MHA%20Order%20Dt.%2019.4.20%20.pdf.

65 Order No. 40-3/2020-DM-I(A) dated 21st April 2020 issued by the NEC https://www.mha.gov.in/sites/default/files/MHAOrder_21042020.pdf.

66 Order No. 40-3/2020-DM-1(A) dated 24th April 2020 issued by the NEC https://www.mha.gov.in/sites/default/files/MHAopening_24042020.pdf

67 Order No. 40-3/2020-DM-I(A) dated 19th April 2020 issued by the NEC https://www.mha.gov.in/sites/default/files/MHA%20Order%20Dt.%2019.4.20%20.pdf.

68 Order No. 40-3/2020-DM-I(A) dated 29th March 2020 issued by the NEC, https://mha.gov.in/sites/default/files/PR_MHAOrderrestrictingmovement_29032020.pdf.

69 **144. Power to issue order in urgent cases of nuisance or apprehended danger** .- (*1*)In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity, or a riot, or an affray.
(*2*)An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte.*
(*3*)An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.
(*4*)No order under this section shall remain in force for more than two months from the making thereof:Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.
(*5*) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.
(*6*) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (*4*).
(*7*) Where an application under sub-section (*5*) or sub-section (*6*) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

where such magistrate is of the opinion that there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, to direct any person to abstain from a certain act or take certain order with respect to certain property in his possession or under his management, by way of a written order. Such an order can be passed if the magistrate considers that such direction is likely to prevent obstruction, annoyance or injury to any person lawfully employed, danger to human life, health or safety or a disturbance of public tranquillity, or a riot or affray and may either be directed to a person individually or to persons residing in a particular area, or to the public generally when frequenting or visiting a particular place or area.

On March 22, 2020, the Dy. Commissioner of Police (Operations) and Executive Magistrate, Greater Mumbai, in exercise of the powers available to him in his capacity as the Executive Magistrate under Section 144 of the CrPC, issued a prohibitory order thereunder.[70] This order was passed on the apprehension that there exists a likelihood of spread of COVID-19 through gatherings of persons in public or private areas, thereby causing grave danger to human life, health or safety. The order prohibits any presence or movement of five or more persons in public or private places, including religious places and also any vehicles carrying such persons for any reasons whatsoever, and exempts movement required for emergency and essential goods and services. The order prescribes punishment under Section 188 of the IPC to any person failing to adhere to the same.

Similar prohibitory orders under Section 144 of the CrPC have been issued in other states including Delhi (NCT), Kerala and Tamil Nadu.

Section 8B of the Aircraft Act, 1934

Section 8B of the Aircraft Act, 1934[71] confers emergency powers on the GoI for protecting public health. The section empowers the GoI to take such measures as it deems necessary in situations wherein it is satisfied that India or any part thereof is visited by or threatened with an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law are insufficient for prevention of danger arising to public health through the introduction or spread of disease by the agency of the aircraft. In any such case, the GoI is also empowered to make temporary rules with respect to the aircraft, the persons travelling, or the things carried therein and aerodromes.

In response to the COVID-19 situation and in exercise of its powers under Section 8B(1) of the Aircraft Act, 1934, the GoI issued an order through the Ministry of Civil Aviation on March 23, 2020 directing that the operation of all scheduled domestic flights (except all-cargo flights), flights operated by holders of non-scheduled operator permit and flights by private aircraft operators shall cease until March 31, 2020.[72] On March 26, 2020, the GoI ceased the operation of all scheduled international commercial passenger services till April 14, 2020.[73]

Section 2A of the Essential Commodities Act, 1955[74]

On March 13, 2020, the GoI declared masks and hand sanitisers to be essential commodities until June 30, 2020,[75] in exercise of its powers under Section 2A of the Essential Commodities Act, 1955.

This becomes relevant as Section 3 of the Essential Commodities Act, 1955 gives the GoI power to regulate the production, supply and distribution of and trade and commerce in essential commodities. This can be done by requiring any person holding stock or engaged in production or buying or selling of an essential commodity, to sell the whole or part of the quantity held in stock or produced or received by such person, or likely to be

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70 Order no. CP/XI(6)/144/(Prohibitory Order)/2020 dated 22nd March 2020 issued by Dy. Commissioner of Police (Operations) and Executive Magistrate, Greater Mumbai, http://bombaychamber.com/admin/uploaded/NEWS%20Block/Prohibitory%20Orders%20issued%20by%20the%20Commissioner%20of%20Police,%20Greater%20Mumbai,%20under%20Section%20144.pdf.

71 **8B. Emergency powers for protecting the public health**. - (1)If the Central Government is satisfied that India or any part thereof is visited by or threatened with an outbreak of any dangerous epidemic disease, and that the ordinary provisions of the law for the time being in force are insufficient for the prevention of danger arising to the public health through the introduction or spread of the disease by the agency of aircraft, the Central Government may take such measures as it deems necessary to prevent such danger.
(2)In any such case the Central Government may, without prejudice to the powers conferred by section 8A, by notification in the Official Gazette, make such temporary rules with respect to aircraft and persons traveling or things carried therein and aerodromes as it deems necessary in the circumstances.
(3)Notwithstanding anything contained in section 14, the power to make rules under sub-section (2) shall not be subject to the condition of the rules being made after previous publication, but such rules shall not remain in force for more than three months from the date of notification: Provided that the Central Government may by special order continue them in force for a further period or periods of not more than three months in all.

72 Circular No. 4/1/2020-IR dated 23rd March 2020 issued by Ministry of Civil Aviation, https://www.goa.gov.in/wp-content/uploads/2020/03/Order-Restriction-On-Flights-Carrying-Large-Number-Of-People-Dated-23032020-Ministry-Of-Civil-Aviation.pdf.

73 Circular No. 4/1/2020-IR dated 26th March 2020 issued by Ministry of Civil Aviation, https://drive.google.com/file/d/1q0pagZkwdo7JKkoTMk3MzmaO1fTXrkYO/view?usp=sharing.

74 **2A. Essential commodities declaration, etc.** - (1) For the purposes of this Act, essential commodity means a commodity specified in the Schedule.
(2) Subject to the provisions of sub-section (4), the Central Government may, if it is satisfied that it is necessary so to do in the public interest and for reasons to be specified in the notification published in the Official Gazette, amend the Schedule so as to
(a) add a commodity to the said Schedule;
(b) remove any commodity from the said Schedule, in consultation with the State Governments.
(3) Any notification issued under sub-section (2) may also direct that an entry shall be made against such commodity in the said Schedule declaring that such commodity shall be deemed to be an essential commodity for such period not exceeding six months to be specified in the notification:
Provided that the Central Government may, in the public interest and for reasons to be specified, by notification in the Official Gazette, extend such period beyond the said six months.
(4) The Central Government may exercise its powers under sub-section (2) in respect of the commodity to which Parliament has power to make laws by virtue of Entry 33 in List III in the Seventh Schedule to the Constitution.
(5) Every notification issued under sub-section (2) shall be laid, as soon as may be after it is issued, before both Houses of Parliament.

75 Gazette Notification No. S.O. 1087(E) dated 13th March 2020 issued by the Ministry of Consumer Affairs, Food and Public Distribution, https://www.mohfw.gov.in/pdf/218645.pdf.

produced or received by him, to the GoI or state government or such other person or class of persons as may be specified.

Section 26B of the Drugs and Cosmetics Act, 1940

The Drugs and Cosmetics Act, 1940 ("**DCA**") was enacted for the purpose of regulating the import, manufacture, distribution and sale of drugs and cosmetics in India. Section 26B of the DCA[76] empowers the GoI to regulate or restrict the manufacture, sale or distribution of a drug, where it is satisfied that such drug is essential to meet the requirements of an emergency arising due to an epidemic or natural calamity, and that it is necessary or expedient to do so in public interest. In exercise of the powers conferred by Section 26B of the DCA, upon satisfaction that the drug 'Hydroxychloroquine' is essential to meet the requirements of emergency arising due to COVID-19, the GoI directed that sale by retail of any preparation containing the drug 'Hydroxychloroquine' shall be in accordance with the conditions for sale of drugs specified in Schedule H1 to the Drugs and Cosmetic Rules, 1945 *i.e.* sale will be only upon presentation of a prescription.[77]

OTHER MEASURES TAKEN BY THE MINISTRIES AND DEPARTMENTS OF THE GOI

Various ministries and departments of the GoI have also issued a series of advisories, notifications, circulars and orders to deal with the current situation, some of which include:

I. The Ministry of Finance, Department of Expenditure, Procurement Policy Division clarified that the disruption of supply chains due to the spread of coronavirus in China should be considered a natural calamity. Accordingly, it directed that the *force majeure* clause contained in the Manual for Procurement of Goods, 2017 is to be invoked where appropriate.[78]

ii. The Ministry of Labour and Employment advised employers of public and private establishments not to terminate their employees, particularly casual and contractual workers, or reduce their wages.[79] The advisory also provided that any worker taking leave should be deemed to be on duty without any consequential deduction in wages, and if the place of employment is non-operational due to COVID-19, the employees of such unit will be deemed to be on duty.

iii. The Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry *inter alia* instructed State Authorities not to obstruct or call for closure of food processing units. It further directed that all manufacturing facilities of food processing companies, retail/ grocery, chemists, pharmacies and organised trade which stock and sell food products, medicines, water, etc. shall remain open and workers employed therein should be allowed to travel to their workplace.[80]

iv. The Ministry of Finance, on March 24, 2020, announced several important relief measures in view of COVID-19 outbreak, especially on statutory and regulatory compliance matters related to several sectors. These measures *inter alia* include (i) extension of last date for filing income tax returns from March 31, 2020 to June 30, 2020; (ii) extension of Aadhar-PAN linking date from March 31, 2020 to June 30, 2020; (iii) free cash withdrawal from ATMs of other banks for all debit card holders, for three months; (iv) waiver of minimum balance fee; (v) mandatory requirement of holding board meetings for companies within prescribed interval of 120 days extended by a period of 60 days till September 30, 2020, etc.

v. The Finance Minister on March 26, 2020 announced a Rs 1.70 lakh crore relief package under the 'Pradhan Mantri Garib Kalyan Yojana' which *inter alia* includes (i) insurance cover of Rs 50 lakh per health worker fighting COVID-19; (ii) provision of 5 kg wheat or rice and 1 kg of preferred pulses to 80 crore poor people free of cost every month for the next three months; (iii) *ex gratia* allowance of Rs 1,000 to 3 crore poor senior citizens, poor widows and poor disabled persons; (iv) state governments to use Building and Construction Workers Welfare Fund to provide relief to construction workers, as per GoI's order, etc.

vi. The MoHFW has issued various guidelines and advisories including advisory on home quarantine, advisory for hospitals and medical education institutions, guidelines on disinfection of common public places including offices, guidelines on dead

[76] **26B. Power of Central Government to regulate or restrict, manufacture, etc., of drug in public interest.** - Without prejudice to any other provision contained in this Chapter, if the Central Government is satisfied that a drug is essential to meet the requirements of an emergency arising due to epidemic or natural calamities and that in the public interest, it is necessary or expedient so to do, then, that Government may, by notification in the Official Gazette, regulate or restrict the manufacture, sale or distribution of such drug.

[77] Gazette Notification No. G.S.R. 219(E) dated 26th March 2020 issued by the Ministry of Health and Family Welfare, https://www.mohfw.gov.in/pdf/218927g.pdf.

[78] Office Memorandum No. F. 18/4/2020 – PPD dated 19th February 2020 to Secretaries of all GoI ministries/departments, https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf.

[79] Order No. M-11011/08/2020-Media dated 20th March 2020 issued by the Ministry of Labour & Employment, GoI, https://labour.gov.in/sites/default/files/file%201.pdf.

[80] Order No. 07/ DPIIT/ 2020 dated 23rd March 2020 issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, https://drive.google.com/file/d/1gVmty88mKmDSAnF9ox4cWelzYIR6ll__/view?usp=sharing.

body management, etc.

ANALYSIS

As far as epidemic diseases go, the EDA is *lex specialis*, given that it is "*An Act to provide for the better prevention of the spread of Dangerous Epidemic Diseases*", whereas the DMA is "*An Act to provide for the effective management of disasters and for matters connected therewith or incidental thereto*". The EDA essentially empowers states to take necessary measures to prevent the outbreak or spread of a dangerous epidemic disease, including by inspecting travelers and segregating them if they are suspected to be infected. These powers are broad and leave it to the discretion of the state government as to how best to use them in the circumstances. Whereas, the DMA is well ahead in time (and naturally so), in terms of institutional and financial framework and structure, and in contemplation of situations and countermeasures. Even the checks and balances contemplated in the DMA (including prosecution of government officers for offences) are absent in the EDA.

The EDA has been criticized as being antiquated and toothless to deal with a COVID-19-like situation, *inter alia* given that it was enacted as far back as 1897. Another perspective on offer is that had COVID-19 affected only one or a few states, the EDA may have been sufficient as it provides state governments with adequate and wide powers in such situations. This may be why states like Maharashtra and Karnataka, who were affected first and had to move quickly, resorted to the EDA. However, given that the crisis has become geography agnostic, the DMA remains the most effective arrow in the quiver.

There may be some force to the argument that the EDA is, in present times, redundant. The DMA empowers the central and state governments and other authorities to take necessary measures to prevent and deal with a disaster and has established an institutional and financial framework which ought to facilitate smooth disaster-fighting. The main advantage the EDA may offer, on first view, is that it accords autonomy to state governments to deal with epidemics, which may become necessary given that the incidence of a disease, the dynamics, demographics and logistical issues in each state are different, and therefore, it is the state government that is best placed to be in the driving seat. However, this is not something the DMA overlooks, by according sufficient wriggle-room to state governments and the State Authorities to deal with disasters which may occur only in a specific state, while keeping this within a broader (and much-needed) uniform central structure and framework.

However, whether all the measures taken by the GoI are strictly within the powers conferred by the DMA, is a question ripe for judicial determination. The DMA confers broad powers (i) on the National Authority to "*take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity-building for dealing with the threatening disaster situation or disaster as it may consider necessary*"[81] and (ii) on the NEC to "*lay down guidelines for, or give directions to, the concerned Ministries or Departments of the Government of India, the State Governments and the State Authorities regarding measures to be taken by them in response to any threatening disaster situation or disaster*".[82] Whether closure of private and commercial establishments, directions that employers should pay wages without any deduction to their workers for the period during which their establishments are closed during the lockdown, or that landlords should not demand rent for one month from migrant workers, fall within the powers conferred under the DMA, remains unclear. Whilst few have questioned the GoI's powers to impose these measures given that this situation is unprecedented and the concept of a social contract involves leaving it to the state to do what's best for the people, naysayers may argue that Sections 6(2)(i) and 10(2)(l) of the DMA have to be read *ejusdem generis*, and therefore, the residual provisions only enable the GoI to take other measures similar to the ones specified in these provisions. They may also argue that the GoI and the state governments are not empowered, under the DMA or the EDA, to take such measures, and that such aspects are governed by their own respective and specialised legislations and agreements.

It may be, perhaps, for this reason that the Kerala government chose to promulgate an ordinance which gave it legislative sanction to take certain measures. The Kerala Ordinance empowers the Kerala government to *inter alia* (i) regulate or restrict the functioning of offices, government and private, and educational institutions in the state, (ii) prohibit or restrict the functioning of shops and commercial establishments, factories, workshops and godowns and (iii) take such other measures as may be necessary for the regulation and prevention of epidemic diseases as decided by the government. However, even here it could still be argued that the Kerala government is now empowered to only take such other measures necessary for the regulation and prevention of epidemic diseases, which cannot be equated with the power to direct employers to pay wages to workers when their

[81] Section 6(2)(i) of the DMA.
[82] Section 10(2)(l) of the DMA.

establishments are closed.

The Industrial Disputes Act, 1947 ("**IDA**") specifically provides for situations where workers have to be laid-off on account of natural calamities and requires employers to pay laid-off workers 50% of the total basic wages and dearness allowance which would have been payable had they not been laid off, subject to certain criteria being met.[83] In view thereof, the NEC's directions under the DMA to state governments and authorities to ensure that all employers make payment of wages to their workers without any deduction, for the period their establishments are under closure during the lockdown, could also be argued to be contrary to the IDA. In the event that the Kerala government takes similar measures under the Kerala Ordinance, these may also be subject to challenge to the extent that they are contrary to the IDA. The IDA does provide that if a workman is entitled to benefits in respect of any matter, under any other statute or orders or notifications thereunder, which are more favourable to him than those which he is entitled to under the IDA then he will continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding the fact that he receives benefits in respect of other matters under the IDA.[84] However, an argument which may be taken in this regard is that any such statute should actually provide for such benefits to be given to workman or specifically authorise the executive to grant such benefits, which is absent in the DMA. Such an argument may be supported by the fact that the aforesaid provision of the IDA also declares that nothing contained in Chapter VA thereof (lay-off and retrenchment) shall be deemed to affect any other law for the time being in force in any state in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with Chapter VA of the IDA. Though this relates to other state legislations, it may be seen as a declaration by Parliament that rights and liabilities of workmen and employers relating to lay-off and retrenchment can only be as contemplated under the IDA, even to the exclusion of any other central law.

The direction that landlords should not demand rent for one month from migrant workers may be in conflict with relevant state rent and tenancy laws. This could also be argued to be tantamount to requisitioning of such premises by the government. The DMA provides, albeit in the context of requisitioning of premises for rescue operations, that when any premises are requisitioned then compensation shall be paid to the persons interested *inter alia* by taking into consideration the rent payable in respect of the premises.[85] It could, therefore, be argued that compensation based on similar consideration should have also been directed to be paid to landlords who are being required to house workers rent-free.

It may be pertinent to note that the DMA itself contains some in-built safeguards, insofar as it provides that:

a) notwithstanding anything contained in any other law for the time being in force, it shall be lawful for the GoI to issue directions to the ministries or departments of the GoI, NEC, state governments, State Authorities, etc., to facilitate or assist in disaster management, and such authority shall be bound to comply with such directions;[86]

b) the provisions of the DMA shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any other instrument having effect by virtue of any law other than the DMA;[87] and

c) no suit, prosecution or other proceeding shall lie in any court against the GoI, state governments or the authorities under the DMA in respect of any work done in good faith under the DMA.[88]

It would, however, also be possible to contend that the inconsistency with other laws referred to in the *non obstante* clauses in the DMA must be interpreted to mean only those laws which operate in the same field, and therefore, the DMA and measures taken thereunder can be said to override only such laws.

Whilst the GoI's intentions cannot be faulted, the measures taken could be challenged by aggrieved or motivated parties as being beyond the scope of the powers under the DMA, and in conflict with more specific statutes. A course of action, with a lesser likelihood of judicial censure, may be to promulgate ordinances specifically providing the GoI with powers to take such measures, and clarifying that these powers have overriding effect over specific statutes with which they may have discord. It remains to be seen whether any of these measures will be struck down as being *ultra vires* or if courts will (whether rightly or not) adopt an equity-oriented approach in view of the ongoing crisis.

[83] Section 25C of the IDA.
[84] Section 25J of the IDA.
[85] Section 66(1) of the DMA.
[86] Section 62 of the DMA.
[87] Section 72 of the DMA.
[88] Section 73 of the DMA.

UNION BANK OF INDIA V. RAJAT INFRASTRUCTURE PVT. LTD. [2020 SCC ONLINE SC 262]

In ***Union Bank of India versus Rajat Infrastructure Pvt. Ltd***., the Hon'ble Supreme Court held that the Debt Recovery Appellate Tribunal ("**DRAT**") cannot entertain an appeal under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") without insisting on a pre-deposit.

Facts

Union Bank of India (the "**Bank**") had challenged an order passed by the DRAT before the Hon'ble Bombay High Court. While directing the Respondent, Rajat Infrastructure Pvt. Ltd. ("**RIPL**") to avail the statutory remedy of appeal before the DRAT, the Hon'ble Bombay High Court held that in doing so no pre-deposit was required ("**BHC Order**"). The said BHC Order was challenged before the Hon'ble Supreme Court.

Separately, a review of the BHC Order was sought *inter alia* praying that the Hon'ble Court could not have dispensed with the requirement of a mandatory deposit prior to the filing of an appeal. However, the said review petitions were dismissed by the Hon'ble Bombay High Court *inter alia* observing that the question of the requirement of any pre-deposit would depend on the nature of the order.

Issue

The issue before the Hon'ble Supreme Court was whether the Hon'ble Bombay High Court was right in directing that pre-deposit was not required for entertaining an appeal before the DRAT as mandated by Section 18 of the SARFAESI Act.

Arguments

The Bank contended that the BHC Order was not only against the provisions of the SARFAESI Act but also against the law. The auction purchasers supported the argument of the Bank and submitted that no appeal on behalf of RIPL could lie without complying with the provisions of Section 18 of the SARFAESI Act which mandated a deposit of 50% (which could be reduced to not less than 25% by the Court) of the amount due, as claimed by the secured creditor or as determined by the Debt Recovery Tribunal ("**DRT**").

In response, RIPL submitted that the Hon'ble Bombay High Court's decision that no pre-deposit was required before the DRAT was in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. Further, it was submitted that as the highest bidder's offering was lower than the value of the property, the DRAT could entertain the appeal without any deposit.

Decision

The Hon'ble Supreme Court took into account its earlier decision in *Narayan Chandra Ghosh v. UCO Bank*[89], wherein it had considered Section 18 of the SARFAESI Act and *inter alia* held that the right of an appeal conferred under Section 18(1) of the SARFAESI Act was subject to the conditions laid down in the second *proviso*. The second *proviso* mandates that the party preferring an appeal has to make a pre-deposit of 50% of the debt due, which can at best be reduced to not less than 25% of the debt due, as provided in the third *proviso*.

Relying on the aforesaid decision, the Hon'ble Supreme Court held that a guarantor or a mortgagor, who has mortgaged its property to secure the repayment of the loan, stands on the same footing as a borrower and if such guarantor/ mortgagor wanted to file an appeal, the requirements of Section 18 of the SARFAESI Act must be complied with prior to filing of such an appeal.

The Hon'ble Supreme Court, while setting aside the BHC Order in relation to non-requirement of a pre-deposit, held that the High Courts have no power akin to powers vested in the Supreme Court under Article 142 of the Constitution of India and, therefore, the Hon'ble Bombay High Court could not give directions contrary to law.

[89] (2011) 4 SCC 548.

BANK OF BARODA V. KOTAK MAHINDRA BANK LTD. [2020 SCC ONLINE SC 324]

In ***Bank of Baroda versus Kotak Mahindra Bank Ltd.***,[90] the Hon'ble Supreme Court held that the limitation period for executing a decree passed by a foreign court (being Court of the country which is notified as a reciprocating territory under Section 44-A of Code of Civil Procedure, 1908 ("**CPC**")) in India will be the limitation period prescribed in such reciprocating foreign country.

Facts

In 1993, Bank of Baroda ("**Appellant Bank**") filed a suit against Vysya Bank (the predecessor of the Kotak Mahindra Bank Ltd. ("**Respondent Bank**")) in London for recovery of its dues. In 1995, the High Court of Justice, Queens Bench, Divisional Commercial Court of London passed a decree in favour of the Appellant Bank. The decree remained unchallenged and became final. However, the Appellant Bank did not proceed with the execution of the decree due to some inter-se arrangement between the parties. Under the said arrangement, Vysya Bank had made an inter-bank deposit with the main branch of the Appellant Bank with a request that the Appellant Bank should not proceed with the execution of the decree (which was passed in its favour). However, disputes arose between the parties pertaining to the aforesaid arrangement and proceedings were filed before the Debt Recovery Tribunal in 2003, which are presently pending.

In 2009 (i.e. after 14 years of the decree being passed), the Appellant Bank filed a petition under Section 44A read with Order 21 Rule 3 of the CPC for execution of the said decree. The trial court dismissed the execution petition as being time barred and held that Article 136 of the Limitation Act, 1963 (the "**Limitation Act**") applies to the case and, therefore, the foreign decree ought to have been filed within 12 years of it being passed. The High Court upheld the view of the trial court. The said order of the High Court was challenged before the Hon'ble Supreme Court.

Issues

The issues before the Hon'ble Supreme Court were (a) whether Section 44A of the CPC merely provides for the manner of execution of foreign decrees or does it also indicate the limitation period within which the execution proceedings are to be filed; (b) what is the period of limitation for executing a decree passed by a foreign court (being Court of the country which is notified as a reciprocating territory under Section 44-A of CPC) in India; and (c) from which date will the period of limitation begin to run in relation to a foreign decree being sought to be executed in India.

Arguments

The Appellant Bank contended that the Limitation Act did not prescribe a period of limitation for execution of a foreign decree and, therefore, the principle of delay and laches, as applicable to writ proceedings, may be applicable to the present execution proceedings. The Appellant Bank further contented that in view of the fact that there was no limitation period prescribed for executing foreign decree, the cause of action for filing an execution petition arises only when a petition is filed under Section 44A of the CPC which provides that a decree passed by a country in a reciprocating territory should be treated as an Indian decree. Consequently, the limitation period of 12 years (as provided in Article 136 of the Limitation Act) commences from the date of filing of the execution petition.

On the other hand, the Respondent Bank contended that the law of limitation of England would apply in the present proceedings *viz.* 6 (six) years for execution of a decree. An alternative contention, without prejudice, was also raised that even if the Indian law of limitation was to be applied, a foreign decree must be enforced within 12 years from the date of passing of the decree as provided under Article 136 of the Limitation Act.

[90] An analysis of this decision may be accessed at the following link: https://corporate.cyrilamarchandblogs.com/2020/03/sc-rules-on-limitation-period-for -execution-of-foreign-decrees-under-section-44a.

Decision

At the outset, the Hon'ble Supreme Court held that the Limitation Act applies to execution applications and, therefore, the principle of delay and laches which may be applicable to writ proceedings cannot be applied to civil proceedings and are not attracted in proceedings filed under the CPC, which must necessarily be filed within the prescribed period of limitation.

With regard to the first issue, the Hon'ble Supreme Court, after considering the Full Bench decision of the Madras High Court in *Sheik Ali versus Sheik Mohammed*[91] and the view taken by the Punjab and Haryana High Court in *Lakhpat Rai Sharma versus Atma Singh*[92], held that there is no concept of cause of action in execution petitions. It further observed that Section 44A of the CPC is an enabling provision which enables the District Court to execute the foreign decree as if it were a decree passed by an Indian Court but does not deal with the period of limitation. Accordingly, Section 44A of the CPC only lays down the procedure to be followed by the District Court.

While dealing with the second issue, the Hon'ble Supreme Court drew a distinction between laws of the *cause country* (i.e. the country where the decree is passed) and that of the *forum country* (i.e. the country where the decree is to be executed). The Hon'ble Court observed that, earlier the law of forum country used to govern the field, given the fact that the law of limitation was a procedural law. However, given the fact that the law of limitation deals with extinguishment of rights and remedies, there has been a transition in the approach towards the law of limitation and the same is no more considered as a procedural law. Further, relying upon international jurisprudence on the said aspect of transition, the Hon'ble Supreme Court observed that the world view appears to be that the limitation law of the *cause country* should be applied even in the *forum country*. Accordingly, the Hon'ble Supreme Court held that the limitation period for executing a decree passed by a foreign court (being Court of the Country which is notified as a reciprocating territory under Section 44-A of CPC) in India will be the limitation period prescribed in the said reciprocating foreign country.

On the third issue, the Hon'ble Supreme Court considered two situations. The first is where the decree holder does not take any steps for execution of the decree during the period of limitation prescribed in the *cause country*. The second situation is where the decree holder takes steps in aid to execute the decree in the *cause country*. It was held that the period of limitation would commence from the date the decree was passed in the foreign court of a reciprocating country. However, if the decree holder first takes steps in aid to execute the decree in the *cause country*, and the decree is not fully satisfied, then he can file a petition for execution in India within a period of 3 (three) years from the finalisation of the execution proceedings in the *cause country*.

[91] AIR 1967 Mad 45.
[92] AIR (58) 1971 P&H 476.

MANKASTU IMPEX PRIVATE LIMITED V. AIRVISUAL LIMITED [2020 SCC ONLINE SC 301]

The Hon'ble Supreme Court in ***Mankastu Impex Private Limited versus Airvisual Limited*** held that the mere expression of '*place of arbitration*' is not the basis to determine the '*seat of arbitration*'.

Facts

A Memorandum of Understanding ("**MoU**") was entered into between Mankastu Impex Private Limited ("**MIPL**"), an Indian company and Airvisual Limited ("**AVL**"), a company incorporated in Hong Kong, whereby MIPL was appointed as the exclusive distributor of AVL's air quality monitor products for a period of 5 (five) years. In addition to the same, non-exclusive rights were given to MIPL *qua* distribution for sales in Sri Lanka, Bangladesh and Nepal. Clause 17 of the MoU provided that the MoU was governed by Indian law and the courts at New Delhi had jurisdiction. It further provided that disputes under the MoU would be resolved by arbitration "administered in Hong Kong".

Subsequently, AVL was acquired by one entity namely IQAir AG ("**IQ**"). IQ informed MIPL that (a) it had acquired all technology and associated assets of AVL, (b) IQ would not assume any contracts or legal obligations of AVL and would work on a case to case basis with resellers and that the products would be made available under separate dealer agreements.

Accordingly, disputes arose between the parties and MIPL invoked the arbitration under Clause 17 of the MoU and proposed the name of an arbitrator. In response, IQ stated that it had not assumed any contractual or legal obligation of AVL and that the terms of the MoU were not enforceable against it. AVL responded by stating that Clause 17 of the MoU provides for arbitration administered and seated in Hong Kong and, therefore, MIPL should approach an arbitration institution in Hong Kong.

In view thereof, MIPL filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the "**Act**") seeking appointment of a sole arbitrator under the arbitration clause in the MoU.

Issue

The issue before the Hon'ble Supreme Court was whether the parties have agreed that the seat of arbitration is Hong Kong and, therefore, whether the Hon'ble Supreme Court lacks jurisdiction to entertain the petition.

Arguments

Relying on *Union of India versus Hardy Exploration and Production (India) INC*[93], MIPL contended that the arbitration clause in the MoU contemplated that the MoU would be governed by the laws of India and the courts at New Delhi would have jurisdiction. It further contended that the parties had only agreed to Hong Kong as the venue of arbitration and not as the juridical seat of arbitration and, therefore, Part I of the Act would be applicable.

On the other hand, AVL relied heavily on *BGS SGS SOMA versus NHPC Ltd.*[94] and submitted that Clause 17 of the MoU provides that "the place of arbitration shall be Hong Kong" and also that all disputes arising out of the MoU "shall be referred to and finally resolved by arbitration administered in Hong Kong". Therefore, it is clear that the arbitration between the parties would be seated in Hong Kong and Part I of the Act is not applicable.

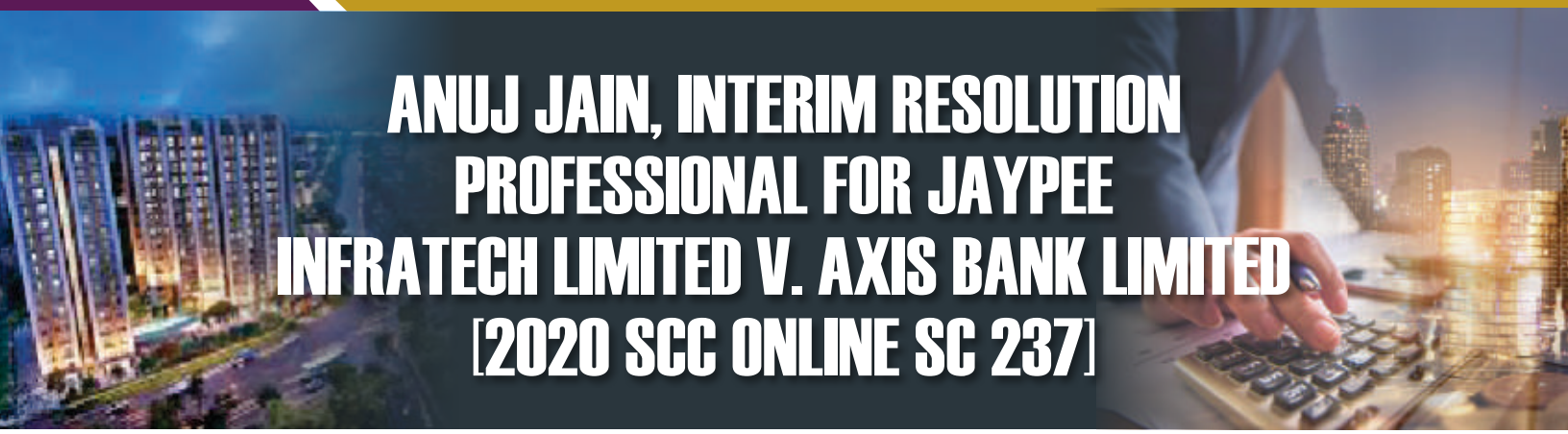
Decision

The Hon'ble Supreme Court held that '*seat of arbitration*' and '*venue of arbitration*' cannot be used interchangeably. The mere expression of '*place of arbitration*' cannot be the basis to determine the intention of the parties so as to

[93] (2018) 7 SCC 374.
[94] (2019) 17 SCALE 369.

conclude that they have intended that 'place' as the '*seat of arbitration*'. The intention of the parties as to the 'seat' should be gathered from the other clauses of the agreement and the conduct of the parties.

The Hon'ble Supreme Court dismissed the petition and held that since the reference to Hong Kong as the '*place of arbitration*' is not a simple reference as to the venue of the arbitral proceedings, but is a reference to Hong Kong for final resolution of disputes by arbitration administered in Hong Kong. The agreement between the parties clearly indicates that the parties have agreed that the arbitration be seated in Hong Kong and that the laws of Hong Kong would govern the arbitral proceedings as well as the power of judicial review over the arbitration award.



ANUJ JAIN, INTERIM RESOLUTION PROFESSIONAL FOR JAYPEE INFRATECH LIMITED V. AXIS BANK LIMITED [2020 SCC ONLINE SC 237]

In ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited versus Axis Bank Limited***,[95] the Hon'ble Supreme Court laid down the essential ingredients of a preferential transaction as contemplated under Section 43 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). It further held that mortgage by a corporate debtor to secure debts of third party is not a 'financial debt' within the meaning of Section 5(8) of the IBC and, therefore, a person having only security interest over the assets of corporate debtor would stand outside the scope of 'financial creditors' as defined Section 5(7) of the IBC.

Facts

In the Corporate Insolvency Resolution Process ("**CIRP**") of Jaypee Infratech Limited ("**JIL**") (the corporate debtor), the Interim Resolution Professional ("**IRP**") filed an application before the National Company Law Tribunal, Allahabad Bench ("**NCLT**"), *inter alia* seeking avoidance of certain transactions as being preferential, undervalued and fraudulent under Sections 43, 45 and 66 of the IBC. These transactions relate to several land parcels that JIL had mortgaged as collateral securities to secure loans and advances from banks and financial institutions to its holding company *viz* Jaiprakash Associates Limited ("**JAL**").

Accepting the submissions made by the IRP, the NCLT issued necessary directions for the avoidance of the said transactions, i.e. discharge of the security interest and vesting of the properties on JIL. Upon challenge, the National Company Law Appellate Tribunal ("**NCLAT**") reversed the order of the NCLT and held that (a) the transactions were not preferential, undervalued or fraudulent, and (b) the lenders of JAL were entitled to exercise their rights under the IBC. The said order of the NCLAT was challenged before the Hon'ble Supreme Court.

Separately, during the CIRP, two banks, namely ICICI Bank Limited and Axis Bank Limited sought their inclusion in the category of financial creditors of JIL. As the IRP declined to do so, the said banks filed applications under Section 60(5) of the IBC before the NCLT seeking their inclusion as financial creditors on account of facilities granted to JAL against securities provided by JIL. The NCLT rejected the applications while concluding that the lenders of JAL cannot be treated as financial creditors of JIL. The said order of the NCLT was challenged by the lenders of JAL before the NCLAT. The NCLAT dealt with the said appeals along with the other appeals filed challenging the decision of the NCLT on the issue of preferential transactions. However, without recording any discussion on this aspect, the NCLAT set aside the order of the NCLT which had the effect of the appeals (filed by the lenders of JAL) being allowed. Being aggrieved by the said non-speaking order of the NCLAT, India Infrastructure Finance Company Limited ("**IIFCL**"), one of the lenders of JIL, challenged this aspect before the Hon'ble Supreme Court. All the appeals filed against the order of the NCLAT were clubbed and heard together by the Hon'ble Supreme Court.

Issues

The issues before the Hon'ble Supreme Court were (a) whether the mortgage created by JIL for the benefit of the lenders of JAL constituted a preferential, undervalued and fraudulent transaction under Sections 43, 45 and 66 of the IBC, and (b) whether a mortgagee of a property belonging to a corporate debtor but securing third party debt would be a financial creditor of the corporate debtor under the IBC.

Arguments

With regard to the first issue, the IRP *inter alia* contended (a) that transactions in question have the effect of putting JAL (which is an equity shareholder and operational

[95] An analysis of this decision may be accessed at the following link: https://corporate.cyrilamarchandblogs.com/2020/03/the-jaypee-judgement-assessing-its-impact-on-the-indian-financing-landscape.

creditor of JIL) in a beneficial position than it would have in the event of distribution of assets *vis-à-vis* the other creditors, (b) the assets in question were released from the earlier mortgages and fresh mortgages were created with increased facilities at a time when JIL was itself in financial stress and the same was not done in the 'ordinary course of business' of JIL.

The lenders of JAL (the Respondents) contended that the concept of third party security was very ordinary and common for institutions engaged in the business of extending loans and if the same is prohibited for being preferential, it would have a devastating effect on the entire economy. Therefore, the security extended by JIL cannot be construed as preferential especially when it was done in the ordinary course of its business. Further, it was also urged that the said transactions did not occur during the relevant time i.e. 2 (two) years preceding the insolvency commencement date as provided in Section 43(4) of the IBC and in any event, the ingredients of Section 43(2) of the IBC were not met.

With respect to the second issue of whether or not to classify the lenders of JAL as financial creditors of JIL, IIFCL contended that as per Section 5(7) of the IBC, only such creditors can be termed as 'financial creditors' who owes financial debt to the corporate debtor. The requirement for a debt to be a financial debt is disbursal against consideration for the time value of money. It was pointed out that in the transactions in question, there was no disbursal against consideration for the time value of money *qua* JIL and, therefore, the lenders of JAL were not financial creditors. Further, mortgage is not included in the definition of Section 5(8) of the IBC and its sub-clauses which lists down transactions that can be classified as financial debts.

The lenders of JAL contended that (a) mortgage made by JIL was to secure the debt obligations of JAL, (b) mortgage debt is a debt within the meaning of Section 3(11) of the IBC, (c) as JIL stands in the position of a guarantor, the mortgage transactions are covered within the meaning of Section 5(8)(i) of the IBC, and (d) mortgage debt is a financial debt within the meaning of Section 5(8) of the IBC even if no amount is directly disbursed to the corporate debtor. They further contended that JIL had repayment obligations towards the relevant lenders of JAL under the relevant mortgage documents.

Decision

After considering the theory relating to avoidance of preferential transactions and analysing Section 43 of the IBC, the Hon'ble Supreme Court concluded that the said provision is to be strictly construed. It was held that for a transaction to be preferential under Section 43 of the IBC, the following criterion should be satisfied: (a) there should have been a transfer of asset or interest in that asset between the corporate debtor and its creditor or guarantor or a surety, (b) there should have been an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor, (c) such transfer ought to have the effect of putting such a creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets under the IBC, (d) the transfer ought to have happened at the relevant time, which is 2 (two) years preceding the insolvency commencement date for a related party and 1 (one) year preceding the insolvency commencement date for a non-related party, and (e) such a transfer should not fall within one of the exceptions provided in sub-section (3) of Section 43 of the IBC.

Applying the aforesaid principles to the facts of the case, the Hon'ble Supreme Court upheld the order of the NCLT and *inter alia* held that (a) the mortgage deeds entered into by JIL to secure debts of JAL resulted in creation of security interest to the benefit of JAL, (b) JAL had been providing financial, technical and strategic support to JIL and therefore, JIL owed antecedent financial debts as also operational debts and had other liabilities towards JAL, (c) the transactions put JAL in a beneficial position, as in the absence of such transactions, JAL, being an operational creditor, would have stood very low in the event of distribution of assets under the IBC, (d) the said transactions took place within the 2-year (two-year) period preceding the insolvency commencement date as is required under the IBC, and (e) that the said transactions did not take place in the ordinary course of business as creating encumbrances over its properties to secure debts of JAL at the cost of its own financial health, had never been the ordinary course of financial affairs of JIL. While laying down the aforesaid, the Hon'ble Supreme Court observed that the ingredients for fraudulent or an undervalued transactions would be different from those of a preferential transaction.

With regard to the second issue, the Hon'ble Supreme Court, at the outset, held that since the transactions have been held to be preferential and therefore avoided, the

lenders of JAL cannot be financial creditors of JIL. In any event, the Hon'ble Supreme Court, after considering its earlier rulings in the case of *Swiss Ribbons Pvt. Ltd. & Ors. v. Union of India*[96] and *Pioneer Urban Land Infrastructure Ltd & Ors. v. Union of India*[97], held that the lenders of JAL in their capacity as mortgagees cannot considered as financial creditors of JIL. While doing so, the Hon'ble Court gave a very narrow interpretation to the term 'financial debt' under Section 5(8) of the IBC. It held that the basic elements are disbursement of certain amounts to the corporate debtor against the consideration for time value of money falling within one of the components of financial debt as provided in Section 5(8) of the IBC, which were absent in the present case.

The Hon'ble Court further held that for a person/ entity to qualify as a financial creditor of the corporate debtor, it must be shown that the corporate debtor owes a financial debt to such person/entity. Therefore, a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor. It held that if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt but would not partake the character of a financial debt under Section 5(8) of the IBC. Therefore, the lenders of JAL may fall under the category of secured creditors by virtue of the mortgages. However, the said mortgages being neither towards any loan, advance or facility to the corporate debtor nor towards protecting any facility or security of the corporate debtor, cannot qualify as financial debt owed by the corporate debtor and, therefore, the lenders of JAL cannot be termed as financial creditors of JIL.

[96] (2019) 4 SCC 17.
[97] (2019) 8 SCC 416.

NEW INDIA ASSURANCE CO. LTD. V. HILLI MULTIPURPOSE COLD STORAGE PVT. LTD. [2020 SCC ONLINE SC 287]

In ***New India Assurance Co. Ltd. versus Hilli Multipurpose Cold Storage Pvt. Ltd.***, the Hon'ble Supreme Court held that the District Forum has no power to extend the time for filing the response to a complaint beyond a period of 45 days as prescribed under the Consumer Protection Act, 1986 (the '**Act**').

Two questions of law referred to the Constitution Bench of the Hon'ble Supreme Court were (a) whether the District Forum has power to extend the time for filing of response to a complaint beyond the period of 15 days, in addition to 30 days, as envisaged under Section 13(2)(a) of the Act, and (b) what would be the commencing point of limitation of 30 days stipulated in the said section.

Before dealing with the aforesaid issues, the Hon'ble Supreme Court closely examined various sections of the Act, the regulations framed thereunder as well as the Statement of Object and Reasons of the Act in order to understand the intention of the legislature behind enacting the Act. While doing so, the Hon'ble Supreme Court observed that a bare reading of Section 13 of the Act makes it clear that the intention of the legislature is that the District Forum should provide speedy disposal of consumer disputes.

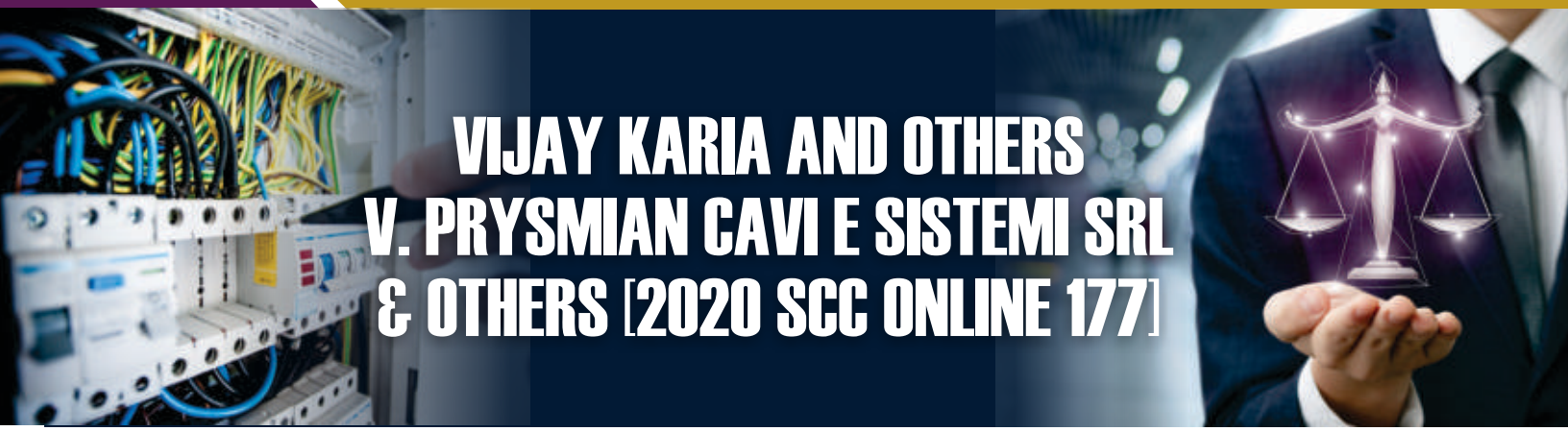
On the first issue, Hon'ble the Supreme Court, following the view taken in the case of *J.J. Merchant versus Shrinath Chaturvedi*[98], held that from the expression *"*within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum," it was clear that the intention of the legislature was to grant the opposite party with a time period of 30 days and an additional 15 days (at the discretion of the forum) only to file its response. No further time was intended to be granted to the opposite party. It was further observed that if the opposite party fails to file its response within 45 days and the complaint is proceeded *ex-parte*, the same would not amount to violation of the principles of natural justice. This is because sub-section (3) of Section 13 of the Act clearly provides that in the event the complaint is proceeded *ex parte* due to the failure of the opposite party to file its response within the prescribed time, such a party will not be allowed to take a plea that he was not given sufficient time or that principles of natural justice were not complied with.

With respect to the issue of whether sub section 2(a) of Section 13 of the Act granting a maximum period of 15 days in addition to 30 days is mandatory in nature, the Hon'ble Supreme Court, after analysing the other sections of the Act providing for a period of limitation for the requisite actions, held that a provision for extension of time beyond a period of 45 days would have been expressly provided had the legislature intended for the aforesaid section to be directory as has been provided for in the cases of filing of complaints and appeals under Sections 15 and 24A(2) of the Act.

It was further observed that since (a) the consequences for not filing the response within the time prescribed was provided, and (b) proceedings complying with Section 13(1) and (2) of the Act cannot be called in question before any court on the ground of violation of principles of natural justice, the intention of the legislature is clear that time limit specified in Section 13(2)(a) is mandatory and not directory.

With regard to the second question, the Hon'ble Supreme Court held that a conjoint reading of clauses (a) and (b) of Section 13(2) makes it clear that the commencing point of limitation of 30 days is from the date of receipt of notice accompanied by a copy of the complaint, and not merely receipt of the notice, as the opposite party is required to respond to the averments made in the complaint and the same cannot be done unless a copy of the complaint is served on such a party.

[98] (2002) 6 SCC 635.



VIJAY KARIA AND OTHERS V. PRYSMIAN CAVI E SISTEMI SRL & OTHERS [2020 SCC ONLINE 177]

In ***Vijay Karia & Ors. versus Prysmian Cavi E Sistemi SRL & Ors.***,[99] the Hon'ble Supreme Court allowed the enforcement of four foreign awards ("**Awards**") passed by a sole arbitrator in a London seated arbitration under the London Court of International Arbitration Rules ("**LCIA**"). While determining the enforceability of the Awards, the Hon'ble Supreme Court elucidated the principles pertaining to enforcement of foreign awards under Section 48 of the Arbitration and Conciliation Act, 1996 (the "**Act**") and held that while considering the grounds for setting aside a foreign award, the courts must warrant minimal interference.

Facts

A Joint Venture Agreement ("**JVA**") was entered into between Prysmian Cavi E Sistemi SRL ("**Prysmian**"), an Italian company and the Appellants, who were the individual, non-corporate shareholders of an Indian company *viz.* Ravin Cables Limited ("**Ravin**"). Pursuant to the JVA, Prysmian had acquired majority shares of Ravin while the balance shares were held by the Appellants and other individual and non-corporate shareholders of Ravin.

Disputes arose between the parties under the JVA and Prysmian initiated arbitration proceedings against the Appellants alleging material breach of the JVA. The Appellants also filed counter claims alleging material breach by Prysmian including *inter-alia* violation of non-compete and confidentiality obligations under the JVA. Prysmian as well as the Appellants invoked the 'Default' mechanism under the JVA whereby the successful party in the arbitration would be entitled to buy out the other party at a 10% premium or discount.

Consequently, a sole arbitrator was appointed by the LCIA. The Arbitrator passed the Awards that dealt with the disputes between the parties. The first Award settled matters of construction of various clauses of the JVA and the jurisdictional issues raised by Prysmian in respect of the Appellants' counter-claims. The second Award dealt with the merits of the dispute wherein the Arbitral Tribunal concluded that the Appellants were in fact in material breach of the JVA and dismissed all their counter claims. In the third Award, the Appellants were *inter alia* declared as the defaulting party under the JVA and all rights conferred on the Appellants under the JVA ceased to be effective. Finally, by way of the fourth award, final reliefs were granted in favour of Prysmian.

The Appellants challenged the Awards before the Hon'ble Bombay High Court, which *inter alia* held that the Awards do not require interference under Section 48 of the Act and, therefore, must be recognised and enforced. The Appellants preferred an appeal (under Article 136 of the Constitution of India) against the said judgment of the Hon'ble Bombay High Court.

Arguments

The Appellants *inter alia* contended that the Award was in contravention of the fundamental policy of Indian law and in violation of the most basic notions of justice. Further, the Appellants submitted that (a) an award which fails to deal with any claim of a party, and (b) is directly contrary to admitted facts, ought to be set aside on the ground that the same is (a) perverse, (b) in breach of the *audi alteram partem* principle, and (c) ought to shock the conscience of the court.

On the other hand, the Respondents *inter alia* submitted that each and every aspect of the matter that was contended by the parties was considered in detail in the Awards and that none of the grounds mentioned in Section 48 of the Act would be available to the Appellants in the form of objections to such a well-reasoned and balanced award. Relying on *Renusagar Power Plant Co. Ltd. versus General Electric Co.*[100], the Respondents contended that

[99] An analysis of this decision may be accessed at the following link: https://corporate.cyrilamarchandblogs.com/2020/04/supreme-court-denounces-speculative-litigation-seeking-to-resist-enforcement-of-foreign-awards.
[100] 1994 Supp (1) SCC 644.

interference by the court on the merits of the award would be outside the purview of Section 48 of the Act and that public policy must be understood in a narrow sense.

Decision

Enforcement of foreign awards under Section 48

The Hon'ble Supreme Court referred to its earlier judgment in *Renusagar*, wherein it had observed that the scope of enquiry in proceedings under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961, is limited to the grounds set out therein and does not enable the party to the said proceedings to impeach the award on merits. Further, it held that the expression 'public policy of India' is to be construed narrowly.

The Hon'ble Court then referred to *Shri Lal Mahal Ltd. versus Progetto Grano SPA*[101], which made it clear that the position of *Renusagar* would continue to apply to cases which arose under Section 48(2)(b) of the Act *viz.* the wider meaning given to 'public policy of India' in the domestic sphere would not be applicable. The law laid down in *Renusagar* was also reiterated in the judgment of *Sssanyong Engineering and Construction Co. Ltd. versus National Highways Authority of India*[102].

The Hon'ble Supreme Court then considered the judgment passed in *LMJ International Ltd. versus Sleepwell Industries*[103], wherein the Hon'ble Court while rejecting a challenge to enforcement of a foreign award, held that the scope of judicial interference has been consciously constricted by the legislature in relation to execution of foreign awards.

Applying the principle laid down by the aforesaid judgments, the Hon'ble Supreme Court held that enforcement of a foreign award would be refused only if the party resisting it furnishes proof that any of the grounds available under Section 48 of the Act was made out. The Hon'ble Court observed that the legislative intent behind restricting the scope of interference is to enable the award holder to enjoy the fruits of the award which has been challenged and which challenge has been turned down in the country of origin. Therefore, the power of the Supreme Court under Article 136 of the Constitution should not be used to circumvent the aforesaid legislative policy. It held that only in a very exceptional case where there has been a blatant disregard of Section 48 of the Act will the Supreme Court interfere with a judgment which recognises and enforces a foreign award.

General Approach to enforcement and recognition of foreign awards – the Pro-Enforcement Bias

The Hon'ble Supreme Court observed that the New York Convention and its signatories have adopted the approach that defenses to enforcement under the New York Convention are to be narrowly construed in order to encourage the recognition and enforcement of commercial arbitration agreements in international contracts. The Hon'ble Court observed that the pro-enforcement bias that has been adopted in Section 48 of the Act requires that the burden of proof in enforcement proceedings is on the party objecting to the enforcement of the foreign award.

Discretion of the Court to enforce foreign awards

The Hon'ble Supreme Court also dealt with the issue of whether courts may still proceed to enforce a foreign award even if some of the grounds under Section 48 of the Act have been made out due to the usage of the word "may".

The Hon'ble Court classified the grounds under Section 48 of the Act into three categories, *viz.* (a) affecting the jurisdiction of the arbitral proceedings, (b) affecting the party's interest alone, and (c) against public policy of India. In this regard, the Hon'ble Court held that if grounds affecting the jurisdiction of the arbitral proceedings or public policy of India are made out, no discretion can be exercised by the Hon'ble Court in enforcing the foreign award as an award made without jurisdiction or which is induced by fraud or corruption or which violate the fundamental policy of Indian law, cannot be enforced. However, if the grounds affecting the interest of the parties alone has been made out, the Court may exercise its discretion to enforce the award in the event no prejudice was caused to the parties. The discretion under Section 48 of the Act would be exercised depending on the facts and circumstances of each case.

The Natural Justice Ground under Section 48 of the Act

While dealing with the submission that the Appellants had been unable to present its case in so far the arbitrator failed to deal with a counter claim and had not made determination on several other counter-claims, the Hon'ble Supreme Court held that a foreign award must be read as a whole, fairly and without any nit-picking. It further held that if on a reading of the award as a whole, it appears that the basic issues raised by the parties have been addressed and the claims and counter-claims of the parties have been decided in substance, then the award must be enforced.

[101] (2014) 2 SCC 433.
[102] (2019) 15 SCC 131.
[103] (2019) 5 SCC 302.

The Hon'ble Court added that it is only when an award fails to determine a material issue or fails to decide a claim or a counter claim in its entirety, can the enforcement of the foreign award be refused.

Violation of FEMA Rules

The submission before the Hon'ble Supreme Court was that the Awards provided for shares to be purchased at a discounted value which would be in violation of the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 and, therefore, be in violation of the fundamental policy of India law. In view thereof, the Awards must not be enforced in India.

Upon consideration of the judgment passed by the Hon'ble Delhi High Court in *Cruz City 1 Mauritius Holdings versus Unitech Limited*[104], the Hon'ble Supreme Court held that contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. It held that the fundamental policy of Indian law must amount to breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised.

[104] (2017) 239 DLT 649.

LEGAL UPDATES

The Insolvency and Bankruptcy Code (Amendment) Act, 2020

a) The Insolvency and Bankruptcy Code (Amendment) Act, 2020 (**"IBC Amendment Act"**) received the assent of the President on March 13, 2020 and is enforced retrospectively from December 28, 2019. The IBC Amendment Act introduces and amends the existing provisions of the Insolvency and Bankruptcy Code, 2016 (the **"Code"**).

b) The IBC Amendment Act *inter-alia* has increased the threshold for certain class of creditors (i.e. allottees under a real estate project and financial creditors referred to in clauses (a) and (b) of sub-section (6A) of Section 21) to initiate corporate insolvency resolution process (**"CIRP"**) against the corporate debtor. An application by such classes of financial creditors must now be filed jointly by not less than one hundred of such creditors or not less than ten per cent of the total number of such creditors, whichever is less.

c) By introducing an explanation to Section 14 (1) of the Code, it is now clarified that the licenses, permits, registrations, quotas, concessions, clearances or a similar grants or rights (**"Permissions"**) given by various statutory/government authorities will not be suspended or terminated upon declaration of moratorium, unless there is a default in payment of current dues arising for the use or continuation of the said permissions during the moratorium period.

d) The Adjudicating Authority under the Code must now appoint an Interim Resolution Professional on the Insolvency Commencement Date (as defined under the Code) itself.

e) By substituting the existing proviso in Section 23(1) of the Code, the resolution professional can now continue to manage the operations of the corporate debtor even after the expiry of the CIRP period, till such time as an order is passed approving the resolution plan under Section 31(1) of the Code or a liquidator is appointed under Section 34 of the Code.

f) Newly inserted Section 32A states that the liability of a corporate debtor for an offence and/or any action against its property (which is covered under an approved resolution plan) in relation to an offence committed, prior to the commencement of the CIRP shall cease from the date resolution plan has been approved by the Adjudicating Authority under the Code, if *inter-alia* the resolution plan results in change in the management or control of the corporate debtor. The immunity against prior offences will be available only to persons prescribed in Section 32A, which *inter-alia* include persons who were not in control of the Corporate Debtor.

Ministry of Corporate Affairs notification dated March 24, 2020

Pursuant to the above notification, the threshold for default[105] under Section 4 of the Code has now been raised to INR 1 crore (from the existing threshold of INR 1 lakh) for the purposes of initiating proceedings under Part II of the Code.

The Companies (Amendment) Bill, 2020

The Government, on March 17, 2020 introduced the Companies (Amendment) Bill, 2020 (the **"Companies Bill"**) in Lok Sabha to amend certain existing provisions of the Companies Act, 2013 (**"Companies Act"**) and introduced certain new provisions.

Certain key amendments proposed in the Companies Bill are as follows:

[105] As per Section 3 (12) of the Code "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.

a) Pursuant to a new proviso added to the definition of 'listed companies' in Section 2(52) of the Companies Act, certain class of companies which have listed or intends to list such class of securities, as may be prescribed, will not be considered as listed companies.

b) Removal of punishments stipulated for various offences under the Companies Act such as: (i) default in non-compliance of the requirements pertaining to formation of companies with charitable objects, etc.; (ii) issuance of prospectus in contravention of the provisions of Section 26 of the Companies Act; and (iii) default in complying with the provisions relating to securities to be dealt with in Stock Exchanges (Section 40(5) of the Companies Act).

c) Substitution of the present Section 16(3) of the Companies Act with a new provision to state that when a company is in default of complying with the direction given under Section 16(1) of the Companies Act, the Central Government shall allot a new name to the company that will replace the old name in the register of companies and issue a fresh certificate of incorporation with the new name. Further, such company will not be prevented from subsequently changing its name in accordance with the provisions of Section 13 of the Companies Act.

d) A new Section 418A has been introduced which *inter-alia* provides that Central Government may establish new Benches of the National Company Law Appellate Tribunal to hear appeals against such direction, decision or order[106] as may be considered necessary.

e) A new chapter i.e. Chapter XXIA relating to Producer Companies has been introduced. While the said chapter was earlier part of the Companies Act, 1956, the same was not incorporated in the Companies Act.

The Banking Regulation (Amendment) Bill, 2020

The Banking Regulation (Amendment) Bill, 2020 was introduced in the Lok Sabha on March 3, 2020. The said Bill *inter-alia* seeks to bring the co-operative banks on par with the developments in the banking sector. The said Bill proposes to amend *inter-alia* Section 3 of the Banking Regulation Act, 1949 so as to make the provisions of the said Act inapplicable to: (i) primary agricultural credit societies, and (ii) cooperative societies whose principal business is long term financing for agricultural development, only if these societies opt to not use the words 'bank', 'banker' or 'banking' in their name or in connection with their business, nor act as an entity that clears cheques.

Companies (Meetings of Board and its Powers) Amendment Rules, 2020

a) Ministry of Corporate Affairs (**"MCA"**) on March 19, 2020 amended the Companies (Meetings of Board and its Powers) Rules, 2014 (**"2014 Rules"**), to take precautionary steps to overcome the outbreak of the coronavirus (COVID-19).

b) These amendment rules *inter-alia* relaxes the requirement of physical presence of directors while holding Board meetings and provides for the same to be held through video conferencing/ other audio visual means, till June 30, 2020 by duly ensuring compliance of rule 3 of the 2014 Rules.

The Maharashtra COVID-19 Regulations, 2020

a) Government of Maharashtra (through its Public Health Department) on March 14, 2020 issued the Maharashtra COVID-19 Regulations, 2020 under the Epidemic Diseases Act, 1897 (**"Epidemic Diseases Act"**). These regulations shall remain in force for a period of one year from March 14, 2020 or until further orders, whichever is earlier.

b) These regulations define 'Empowered Officer' within the meaning of Section (1) of the Epidemic Diseases Act as Commissioner, Health Services, Director of Health Services (DHS-I & II), Director, Medical Education & Research (DMER), all Divisional Commissioners of Revenue Divisions & all Collectors and Municipal Commissioners, who are empowered to take necessary measures to prevent the outbreak and spreading of COVID-19 within their jurisdictions.

c) Further, these regulations lays down detailed provisions for prevention and containment of COVID-19 such as: (i) hospitals to have separate corners for screening of suspected positive cases and to record travel history of such person to any country or area where pandemic has been reported; (ii) compulsory reporting of travel history by a person who has been to a country or area where COVID-19 has been reported, in the prescribed manner; and (iii) authorising empowered officers to isolate and/or

[106] Referred to in Section 53A of the Competition Act, 2002 and under Section 61 of the Insolvency and Bankruptcy Code, 2016.

admit a person who develops the symptoms of being infected with COVID-19. Further, such empowered officers can also initiate action under Section 188 of the Indian Penal Code, 1860 against such person / institution / organisation who are found violating any provision of these regulations.

Reserve Bank of India notification (RBI/2019-20/186) titled as 'COVID-19 – Regulatory Package'

a) RBI *vide* its notification dated March 27, 2020 issued detailed instructions to (i) mitigate the burden of debt servicing brought about by the disruptions on account of COVID-19 pandemic; and (ii) ensure the continuity of viable businesses which *inter-alia* include rescheduling of payments for the term loans.

b) Pursuant to the said notification all commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all-India Financial Institutions, and NBFCs (including housing finance companies) are permitted to grant a moratorium of three months on payment of all instalments of all term loans, falling due between March 1, 2020 and May 31, 2020. Further, repayment schedule for such loans as also the residual tenor, will be shifted across the board by three months after the moratorium period. It was clarified that interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period.

SEBI circular on relaxation from compliance with certain provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 due to the COVID-19 pandemic.

SEBI *vide* its circular dated March 27, 2020 extended the due date of filing disclosures, in terms of Regulations 30(1), 30(2) and 31(4) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 for the financial year ending on March 31, 2020 from April 15, 2020 to June 1, 2020.

Ministry of Corporate Affairs' general circular on special measures under Companies Act, 2013 and Limited Liability Partnership Act, 2008 in view of COVID-19 outbreak

a) MCA *vide* its General Circular dated March 24, 2020 issued certain measures to reduce the compliance burden and other risks to support and enable Companies and Limited Liability Partnerships (LLPs) in India to focus on taking necessary measures to address the disruptions caused by COVID-19 threat.

b) Such measures *inter-alia* include (i) relaxation of payment of additional fees for late filing during a moratorium period of April 1, 2020 to September 30, 2020, in respect of any document required to be filed in the MCA-21 Registry, irrespective of its due date; (ii) Relaxation of the mandatory requirement of holding meetings of the Board within the intervals provided in Section 173 of the Companies Act and the same shall stand extended by a period of 60 days till next two quarters (i.e., till September 30, 2020); (iii) Independent Directors shall not be viewed as violating the requirement (under Para VII (1) of Schedule IV to the Companies Act) of holding at least one meeting without the attendance of non-independent directors and members of management for the financial year 2019-20, in the event such Independent Directors of a company have not been able to hold such a meeting; (iv) Additional period of 180 days is granted to newly-incorporated companies required to file a declaration for Commencement of Business under Section 10A of the Companies Act; and (v) non-compliance of minimum residency requirement in India as per Section 149 of the Companies Act (i.e. minimum 182 days) by at least one director of every company shall not be treated as a non-compliance for the financial year 2019-20.

Office memorandum issued by Government of India (through Ministry of Finance, Department of Expenditure) on Force Majeure Clause (FMC)

The Government of India *vide* its Office Memorandum dated February 19, 2020 has clarified that the disruption of the supply chains due to spread of coronavirus in China or any other country should be considered as a case of natural calamity and Force Majeure Clause (FMC) may be invoked, wherever considered appropriate, following the due procedure laid down in Manual for Procurement of Goods, 2017.

Office memorandum issued by Government of India (through Ministry of New & Renewable Energy) on extension of time in Scheduled Commissioning Date of RE Projects in view of the disruption of the supply chains due to spread of coronavirus in China or any other country as Force Majeure (FM) event.

The Government of India vide its Office Memorandum dated March 20, 2020 has *inter-alia* directed that all

renewable energy implementing agencies and authorities to (a) treat delay on account of disruption of supply chain due to outbreak of COVID-19 in China and other countries as *force majeure* event; and (b) consider applications for extension of time in such situations objectively and grant/ approve such applications (based on the facts therein) as per the procedure laid down in the said Office Memorandum.

The Personal Data Protection Bill, 2019

a) The draft of the Personal Data Protection Bill, 2019 (**"Data Protection Bill"**) was tabled in Lok Sabha on December 11, 2019. The Date Protection Bill has been introduced pursuant to the Supreme Court of India constitutional bench judgment in the matter of ***Justice K.S. Puttaswami and another Vs Union of India WP 494 of 2012*** decided on September 26, 2018, wherein the Supreme Court declared that "privacy" is a fundamental right under Article 21 of the Constitution of India, 1950. The Supreme Court *inter-alia* also impressed upon the Government to bring out a robust data protection regime. The objective of the Data Protection Bill is to bring a strong and robust data protection framework for India and to set up an authority for protecting personal data and empowering the citizens with rights relating to their personal data.

b) The Date Protection Bill has been referred to a Joint Parliamentary Committee of both the Houses for examination.

Analysis of the provisions of the Date Protection Bill may be accessed at the following link: https://corporate.cyrilamarchandblogs.com/2019/12/personal-data-protection-bill-2019-analysis-india/

The Mineral Laws (Amendment) Act, 2020

a) The Mineral Laws (Amendment) Act, 2020 (**"MLAA 2020"**) received the assent of the President on March 13, 2020; however, the same shall be deemed to have come into force retrospectively from January10, 2020. The MLAA 2020 seeks to introduce some new provisions and amend the existing provisions of Mines and Minerals (Development and Regulation) Act, 1957 (**"MMDRA"**) and the Coal Mines (Special Provisions) Act, 2015 (**"CMSPA"**). The MLAA 2020 repeals the Mineral Laws (Amendment) Ordinance, 2020 which was promulgated on January 10, 2020.

b) Some key amendments to MMDRA are: (i) insertion of a new Section 4B which empowers the Central Government to prescribe conditions for sustained production of minerals by the holders of mining leases who have acquired rights, approvals, clearances etc. under Section 8B of the MMDRA; (ii) amendment to Section 5 of the MMDRA to provide for the exemption of the previous approval of the Central Government in respect of minerals specified in part A of the First Schedule of the MMDRA; and (iii) amendment to Section 10C of the MMDRA to provide incentives for exploration of deep seated minerals.

c) Some Key amendments to CMSPA are: (i) amendment to Sections 4, 5 and 8 for allocation of coalmines for composite prospecting licence-cum-mining lease; (ii) amendment to Section 9 to clarify the priority of disbursal of amount of compensation; and (iii) substitution of the erstwhile Section 20(2) with a new provision, which provides that a successful bidder or allottee may also use the coal mine from a particular Schedule I coal mine, in any of its plants or of its subsidiary or holding company engaged in same specified end-uses in such manner as may be prescribed.

Ministry of Finance (Department of Revenue) notification dated March 30, 2020

The Government of India has extended the *commencement of the provisions of Part I of Chapter IV of the* Finance Act, 2019 *relating to amendments to the Indian Stamp Act, 1899, from April 1, 2020 to July 1, 2020.*

Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020

a) The Insolvency and Bankruptcy Board of India (**"IBBI"**) vide a notification dated March 28, 2020 has amended the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

b) Some key amendments to the said regulations are as follows: (i) extension of timeline to pay fees for renewing the certificate of registration of an insolvency professional from April 30, 2020 to June 30, 2020, for the financial year 2019-2020; and (ii) insertion of a proviso to regulation 13(2)(b) which mandates the insolvency professional to inform the Board within a period of 30 days of an individual ceasing or joining as a director or partner, on and from the date of commencement of these Amendment Regulations and ending on the December 31, 2020 .

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020

Pursuant to a notification dated March 29, 2020, IBBI has clarified that the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak will not be counted for the purposes of calculating the timeline for any CIRP-related activity left incomplete due to such lockdown.

Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020

a) The IBBI vide a notification dated March 28, 2020 has amended IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (**"2016 Regulations"**).

b) Some key amendments are: (i) insertion of a proviso to clause 12A(5) of the Schedule under 2016 Regulations which mandates that if an application for authorisation for assignment is received on and from commencement of these Amendment Regulations and ending on the September 30, 2020, and within thirty days from the date of receipt of the said application if the authorisation for assignment is not issued, renewed or rejected by the insolvency professional agency, the same shall be deemed to have been issued or renewed, as the case may be; and (ii) insertion of a proviso to clause 12A(7) of the Schedule A under 2016 Regulations which provides that an aggrieved applicant whose application for issue of authorisation for assignment has been rejected by an insolvency professional agency, on and from the date of commencement of these Amendment Regulations and ending on the September 30, 2020, can appeal to the Membership Committee within a period of thirty days from the date of receipt of the rejection order.

Office memorandum issued by Government of India, Ministry of Corporate Affairs regarding clarification on contribution to PM CARES Fund as eligible CSR activity under item no. (viii) of the Schedule VII of Companies Act, 2013

MCA *vide* the captioned Office Memorandum dated March 28, 2020 has clarified that any contribution made to the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) which has been set up with the primary objective of dealing with any kind of emergency or distress situation such as that posed by COVID-19 pandemic, shall qualify as CSR expenditure under the Companies Act 2013.

SEBI circular regarding extension of deadline for implementation of the circular on Stewardship Code for all Mutual Funds and all categories of AIFs due to the Covid–19 pandemic

SEBI *vide* the captioned circular dated March 30, 2020 extended the implementation of the circular (dated December 24, 2019) on Stewardship Code from April 1, 2020 to July 1, 2020. The said circular was introduced for all Mutual Funds and all categories of AIFs, in relation to their investment in listed equities.

SEBI circular regarding continuation of Phase II of Unified Payments Interface with Application Supported by Block Amount due to COVID-19 pandemic

SEBI *vide* the captioned circular dated March 30, 2020 has decided to continue with the current Phase II of the Unified Payments Interface (**"UPI"**) with Application Supported by Blocked Amount (**"ASBA"**) till further notice. The modalities for the implementation of the Phase III of the UPI with ASBA shall be notified later after deliberations with stakeholders.

SEBI circular on relaxation from compliance with certain provisions of the circulars issued under SEBI (Credit Rating Agencies) Regulations, 1999 due to the COVID-19 pandemic and moratorium permitted by RBI

a) SEBI *vide* the captioned circular dated March 30, 2020 has temporarily relaxed the compliance obligations of Credit Rating Agencies (**"CRA"**) relating to recognition of default under the SEBI (Credit Rating Agencies) Regulations, 1999. The circular provides that in order to ascertain whether a default occurred is solely due to the lockdown or loan moratorium (imposed by RBI), a differentiation in treatment of default is required, on a case to case basis.

b) The circular further provides that in the event the CRA (upon its assessment) comes to a view that the delay in payment of interest/principle has arisen solely due to temporary operational challenges in servicing debt and procedural delays in approval of moratorium on loans by the lending institutions, the same may not be

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The views expressed in this newsletter do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas and should you have any queries in relation to any of the issues set out herein or on other areas of law, please feel free to contact us on cam.publications@cyrilshroff.com or write to us at the following coordinates:

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