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Dear Readers,

The first section of this issue of the Case in Point is an article titled "*Re-examining The Force Majeure Jurisprudence In The Wake Of Covid-19 Pandemic*". The article analyses the jurisprudence on the doctrine of force majeure under the Indian law and assesses the response of the Indian judiciary and the legal system to the implications of the COVID-19 pandemic on the numerous commercial agreements.

The second section of this issue sets out some of the recent landmark decisions of the Hon'ble Supreme Court. In the section, we have reviewed the decision in *National Agricultural Cooperative Marketing Federation Of India v. Alimenta S.A.* wherein the Hon'ble Supreme Court dealt with the issue of enforceability of a foreign award and in the longstanding dispute between the parties, held the same to be unenforceable on the grounds of it being ex-facie illegal and in contravention of the public policy of India.

We have also examined the judgment in *Arnab Ranjan Goswami v. Union Of India & Others* wherein the Hon'ble Supreme Court upheld the right to freedom of expression of the Petitioner, a journalist, under Article 19(1)(a) of the Constitution by quashing all, except one, First Information Reports filed against the Petitioner, for the same cognizable offence. However, the Hon'ble Court recognized that freedom under Article 19(1)(a) is not unfettered and permitted investigations to continue pursuant to a FIR, in the manner deemed fit by the investigation agency.

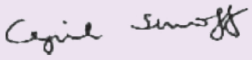
Further the decision of the Hon'ble Supreme Court in *Patel Engineering Limited v. North Eastern Electric Power Corporation Limited* has also been analysed by us, wherein it was held that a domestic award would be hit by patent illegality, if the arbitrator construed the contract in a manner that no fair-minded or reasonable person would construe or if the arbitrator committed an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to him.

Lastly, we examined the decision in *Shakti Bhog Food Industries Ltd. v. The Central Bank Of India & Another*, wherein the Hon'ble Supreme Court held that the right to sue under Article 113 of the Limitation Act, 1963 would be computed depending upon the last day when the cause of action arose. The Hon'ble Court further held that the phrase "when the right to sue accrues" used in Article 113 cannot be read as "when the right to sue (first) accrues" as this would tantamount to re-writing Article 113 of the Act and thereby defeat the intent of the legislature.

This issue of the Case in Point 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.

Regards,
CYRIL SHROFF



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Re-examining the force-majeure jurisprudence in India in the wake of unprecedented COVID-19 pandemic

Introduction

On March 11, 2020, the World Health Organisation acknowledged COVID-19 as a "pandemic". In the meanwhile, governments across the world including India, implemented emergency measures to tackle the pandemic which had disrupted international trade and even business activities within the localised regions. Thus, in the wake of the COVID-19 pandemic plaguing the world, it becomes relevant to focus on the implications of the *force majeure* provisions in contracts and the underlying jurisprudence.

Force Majeure under the Indian Law

'Force Majeure' means an *"event or effect that can be neither anticipated nor controlled . . . [and] includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)*.[1]" The intention of this principle is to save the performing party from the consequences of anything over which it has no control.[2]

Under the Indian law, over the years, the doctrine of *force majeure* has been developed by way of judicial precedents. However, the current scenario, i.e., the COVID-19 pandemic and the ensuing uncertainties may require a re-evaluation of the doctrine of *force majeure*. Whilst the Contract Act, 1872 ("**Contract Act**") does not expressly refer to *force majeure*, it is governed by two provisions of the Contract Act, i.e., Section 32 and Section 56.[3]

A *force majeure* event would either be incorporated in the contract or would occur dehors the contract. Assuming the *force majeure* event is incorporated by express or implied terms in a contract, it would then be governed by Chapter III (dealing with the contingent contracts) of the Contract Act, particularly, under Section 32.[4] However, if a *force majeure* event occurs dehors the contract it would be covered under the rule of frustration and be dealt with under Section 56 of the Contract Act.[5] Pertinently, Section 56 would not apply where the parties expressly contemplate an intervening event that renders the performance of the contract impossible or illegal and the recourse to be adopted by them in that event.

When a *Force Majeure* event is covered under the contract

As stated above, when a *force majeure* event is incorporated in a contract, it is governed by Section 32 of the Contract Act. In such a case, on the occurrence of a *force majeure* event, the obligation of the parties would be discharged in terms of the contract. Whilst determining the applicability of Section 32 of the Contract Act, which deals with enforcement of contracts contingent on an event happening or not, the determinative aspect is whether the contractual terms, either implied or expressed, contemplated such a situation wherein the performance of obligations would stand discharged on the happening of the contingent event. In this context, it is pertinent that when the parties have agreed that despite the occurrence of a contingent event, which might otherwise affect the performance of the contract, the contract would continue to operate, then no case of frustration can be made out as the basis of the contract was to demand performance notwithstanding the occurrence of the contingent event.[6]

When a *Force Majeure* event is not covered under the contract

When a *force majeure* event occurs *dehors* the contract, it is covered under Section 56 of the Contract Act and the party may claim that the contract is frustrated due to the occurrence of the *force majeure* event. To raise such a claim, the party will be required to satisfy the three ingredients envisaged under Section 56, i.e., (i) a valid and subsisting contract between the parties; (ii) some part of the contract which is yet to be performed; and (iii) the contract becomes impossible of performance after it has been entered into.[7]

The first paragraph of Section 56 specifies that an act, which is inherently impossible to perform by its very nature then no one,

1 Blacks Law Dictionary (11th Edition, 2019).
2 *Dhanrajamal Gobindram v. Shamji Kalidas And Co.*, AIR 1961 SC 1285.
3 Sections 32 and 56 of the Contract Act are reproduced herein below:
32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.
If the event becomes impossible, such contracts become void.
56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.
Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.
4 *Satyabrata Ghose v. Mugneeram Bangur and Co.*, AIR 1954 SC 44; *Energy Watchdog v. Central Electricity Regulatory Commission*, (2017) 14 SCC 80, ¶ 34.
5 Ibid.
6 Satyabrata Ghose v. Mugneeram Bangur and Co., AIR 1954 SC 44, ¶ 17.
7 *Industrial Finance Corporation of India Limited. v. Cannanore Spinning and Weaving Mills Limited*, (2002) 5 SCC 54, ¶ 42.
8 *Satyabrata Ghose v. Mugneeram Bangur and Co.*, AIR 1954 SC 44, ¶ 9.

can obviously be directed to perform it.[8] The second paragraph of Section 56 enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done.[9] The word 'impossible' as contained in the second paragraph of Section 56 "*has not been used in the sense of physical or literal impossibility*" but the performance of the act "*may be impracticable and useless from the point of view of the object and purpose which the parties had in view.*"[10] The third paragraph of Section 56 provides for compensation to the promisee in a case where the promisee has suffered loss because of the promise of the promisor, which the promisor knew or should have known to be impossible or unlawful to perform.

Importantly, the doctrine of frustration is an 'aspect or part of the law of discharge of contract' due to 'supervening impossibility or illegality of the act agreed to be done', thereby coming within the purview of paragraph 2 of Section 56, without leaving the matter to be determined according to the intention of the parties.[11] The Hon'ble Supreme Court in *Industrial Finance Corporation of India Limited. v. Cannanore Spinning and Weaving Mills Limited,*[12] whilst determining whether a contract of guarantee was hit by the doctrine of frustration, relied on an English case[13] which cogently elucidates frustration to occur "*whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.*"

Frustration and impossibility are often used interchangeably. However, it is crucial to note that this doctrine does not focus on the literal impossibility of something but on it being 'impracticable and useless from the point of view of the object and purpose' as contemplated by the parties. This impracticability or uselessness may arise due to some intervening or supervening event, not contemplated by the parties.[14]

Pertinently, it must be borne in mind that the doctrine of frustration is not an omnipotent defence. In this regard, the Hon'ble Supreme Court in *Naihati Jute Mills Limited v. Khyaliram Jagannath*[15] has held that "*It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would, if performed, be a different thing from that which was contracted for.*" Similarly, in *Alopi Parshad and Sons v. Union of India,*[16] the Hon'ble Supreme Court held that there is "*no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous.*"

Thus, an essential aspect that needs to be considered whilst seeking to rely on the doctrine of frustration is that of threshold. Whilst determining whether a contract is frustrated, the court would need to consider whether the intervening event is a mere hardship / inconvenience or has actually rendered the performance impossible.

COVID-19 as a *force majeure* event

The *force majeure* clauses under a contract typically attribute the cause for the failure or delay in performance of the contractual obligations to factors beyond the control of the defaulting party and often list specific events that will qualify as a *force majeure* event. If it is understood that COVID-19 would come within the purview of the underlying contract, it would be dealt with as per the principles of contractual interpretation in terms of Section 32 of the Contract Act. If the *force majeure* clause incorporates terms like 'pandemic', 'epidemic' etc., it is possible for a party to claim that COVID-19 would constitute a *force majeure* event. To the contrary, if the contract has a *force majeure* clause that is not wide enough to cover the on-going COVID-19 pandemic within its ambit, then it may not be available to the parties to rely on Section 32. Nevertheless, if a defaulting party is not in a position to claim protection under the *force majeure* clause listed under the contract, the party can then endeavour to make a case under Section 56 of the Contract Act by terming the obligation, it failed to fulfil under its contract, as an impossibility.

Whilst understanding the implications of COVID-19, it is also vital to delve into its indirect implications on the economic activity. Considering that a lockdown was being enforced through the invocation of various provisions *inter alia* under the Epidemic Diseases Act, 1897, the Criminal Procedure Code 1973 and the Disaster Management Act, 2005, it is open to a defaulting party to claim that the lockdown resulted in a situation of 'supervening impossibility or illegality of the act', or a situation whereby 'the very foundation upon which the parties arrived at their agreement has been jeopardised.' Even after the lockdown has been lifted, parties may still rely on the defence that as a consequence of the ongoing COVID-19 pandemic, the performance of their obligations under the contract has been rendered impossible thus frustrating the contract.

An important aspect here is that the nation-wide lockdown and the economic consequences stemming from the COVID-19 pandemic was for a specific period. Whether or not a contracting

9 Ibid.
10 Ibid.
11 *Boothalinga Agencies v. VTC Poriaswami Nadar*, AIR 1969 SC 110, ⁋ 9.
12 (2002) 5 SCC 54, ⁋ 41.
13 *Davis Contractors v. Fareham Urban District Council,* (1956) 2 All ER 145
14 *Delhi Development Authority v Kenneth Builders and Developers Limited,* (2016) 13 SCC 561, ⁋ 30.
15 AIR 1968 SC 522, ⁋ 5.
16 AIR 1960 SC 588, ⁋ 22.

party can plead the defence of *force majeure* under Section 56 would depend on whether COVID-19 made it impossible for the contracting parties or anyone of them to perform their contractual obligations. As held by the Hon'ble High Court of Delhi, "*The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case.*"[17] Further, COVID-19 cannot be used as an excuse for non-performance of a contract obligation where the deadline was prior to COVID-19.[18]

If a definite time limit for performance of obligations had been agreed to between the parties, then in such a case, when the restrictions continued beyond the expiry of the definite time limit, it would be open to a party to take a position that the performance of the contract was rendered impossible 'within the specified time and this would seriously affect the object and purpose of the venture.'[19] On the contrary, when no time limit for performance of obligations has been agreed to by the parties, i.e., if the obligations under a contract could be performed subsequent to the restrictions having been lifted, it would be difficult for a party to rely on the doctrine of frustration under Section 56. For instance, the Hon'ble High Court of Bombay refused to grant an injunction sought by Indian buyers of steel which had been shipped from South Korea, against encashment of letters of credit, inter alia on the ground that the lockdown was only temporary and could not enable the buyers to resile from their obligation of making payment to the supplier.[20]

Lastly, in so far as the compensation envisaged under Section 56 is concerned, the third paragraph of the said section provides that the promisor's obligation to compensate the promisee is triggered upon (i) the actual knowledge or presumed knowledge, through reasonable diligence, on part of the promisor that the obligation is impossible, (ii) lack of said knowledge on part of the promisee, and (iii) the promisee having suffered loss due to reasons thereof. Thus, in the context of COVID-19, the party lacking knowledge of the said impossibility may contend that the other party is liable to compensate it, if the other party had contracted to perform an obligation when it knew or could have known that the existing circumstances would make the fulfilment of the obligation impossible, resulting in a loss. However, it is to be seen whether Courts entertain compensation claims, which would ultimately depend on the terms of the underlying contracts and the factual scenario.

17 *Halliburton Offshore Services Inc v. Vedanta Limited* (Order dated 29th May 2020 passed by the Hon'ble High Court of Delhi in OMP(I) (COMM) No. 88/2020).
18 Ibid; *Indrajit Power Private Limited v. Union of India* (Order dated 28th April, 2020 passed by the Hon'ble High Court of Delhi in WP(c) No. 2957/2020).
19 *Satyabrata Ghose v. Mugneeram Bangur and Co.*, AIR 1954 SC 44, ¶ 23.
20 *Standard Retail Private Limited v. G.S. Global Corp.* (Order dated 8th April 2020 passed by the Hon'ble Bombay High Court in Comm. Arbitration Petition (L) No. 404 of 2020).

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National Agricultural Cooperative Marketing Federation Of India v. Alimenta S.A. [civil Appeal No. 667 Of 2012, Judgement Dated April 22, 2020.]

In the case of *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*, the Hon'ble Supreme Court dealt with the issue of enforceability of a foreign award and in the longstanding dispute between the parties, held the same to be unenforceable on the grounds of it being ex-facie illegal and in contravention of the public policy of India. Whilst dealing with the issue of enforceability of the foreign award, the Hon'ble Court also discussed the doctrine of frustration under Section 32 and 56 of the Indian Contract Act, 1881 ("**Contract Act**") and held that where the parties contemplated a contingency which eventually occurred, the contract cannot be said to be frustrated, and the terms of the contract would follow.

As a background to the filing of this appeal, National Agricultural Cooperative Marketing Federation of India ("**NAFED**"), being a canalizing agency for the Indian Government for the exports of Indian HPS groundnut, entered into a contract dated January 12, 1980 with Alimenta S.A. for the supply of 5,000 metric tonnes of Indian HPS groundnut ("**Agreement**"). The terms and conditions of the Agreement were as per the Federation of Oil, Seeds and Fats Associations Ltd., London ("**FOSFA**"), 20 Contract, which was a standard form of contract pertaining to CIF (Cost, Insurance and Freight) contracts and any dispute arising out of the Agreement was to be referred to arbitration in accordance with the Rules of Arbitration and Appeal of FOFSA. Out of the contracted quantity of 5000 metric tonnes, only 1900 metric tonnes could be shipped as the crops were damaged due to cyclone etc. Subsequently, on October 8, 1980, an addendum to the Agreement was executed between the parties for supply of the balance 3100 metric tonnes of the Indian HPS groundnut ("**Addendum**").

NAFED being a canalizing agency, required the express permission of the Indian Government to carry forward any export to the next year. Importantly, as per Clause 14 of the Agreement, in the event of any prohibition of export or any other executive or legislative act, the Agreement or any unfulfilled part thereof, would be treated as cancelled. NAFED stated that it was unaware about it not having the authority to enter into the Addendum and approached the Indian Government to grant permission thereof. However, NAFED was directed by the Indian Government, not to ship the leftover quantities from the previous years, citing certain quota restrictions.

As a result, Alimenta S.A. initiated arbitration proceedings before FOSFA. However, NAFED obtained an interim relief of stay on the arbitration proceedings. On NAFED's refusal to appoint an arbitrator, FOSFA appointed an arbitrator on behalf of the NAFED. Ultimately, by an award dated November 15, 1989, NAFED was directed to pay a sum of USD 4,681,000 with an interest at the rate of 10.5% per annum from the date of filing of the arbitration proceedings till the date of the award ("**Award**"). NAFED challenged the Award before the Board of Appeal as per the procedure envisaged under the Agreement. However, the challenge was dismissed by the Board of Appeal on September 14, 1990 and instead an enhanced rate of interest on the Award was granted against NAFED ("**Appeal Award**").

Alimenta S.A. sought the enforcement of the Award as modified by the Appeal Award under the Foreign Awards (Recognition and Enforcement) Act, 1961 ("**Foreign Awards Act**") before the Hon'ble High Court of Delhi which was objected to by NAFED on the ground of being violative of public policy of India. The Hon'ble High Court of Delhi, through its order dated January 28, 2000 held the Award as modified by the Appeal Award to be enforceable and non-violative of public policy of India. This order was then carried in appeal to the Hon'ble Supreme Court.

In the appeal, NAFED contended that the prohibition imposed by the Indian Government frustrated the obligation of NAFED and any enforcement thereof would be contrary to the public policy under Section 7(1)(b)(ii) of the Foreign Awards Act (which provides that a foreign award may not be enforced if the enforcement of the award will be contrary to public policy). On the other hand, Alimenta S.A. argued that the scope of interference in the enforcement of the foreign award is limited and that the Award as modified by the Appeal Award is not against public policy.

Before discussing the issue of public policy in its judgment, the Hon'ble Supreme Court determined whether NAFED was unable to export the HPS groundnut due to the Indian Government's refusal and if as a consequence of refusal of the Government, the Agreement became void. The Hon'ble Supreme Court in order to determine the aforesaid issue, referred to Clause 14 of the Agreement and the correspondences between the Indian Government and NAFED to hold that the refusal by the Indian Government resulted in NAFED being unable to export the groundnuts to Alimenta S.A and such prohibition being on account of the Indian Government was covered within Clause 14 of the Agreement. Relying on the position of law espoused by the Hon'ble Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur & Co.*[21] and *subsequent judgements*,[22] the Hon'ble Court held that the Agreement came to an end in terms of Clause 14 thereof and thus the Agreement became void in terms of Section 32 of the Contract Act. It further held that Section 56 of the Contract Act was not applicable, as the parties had provided for the contingency of such prohibition and consequent cancellation of the Agreement by the Indian Government. Accordingly, it was held that NAFED could not have been held liable to pay damages for the cancellation of the Agreement.

With regard to the Award as modified by the Appeal Award being contrary to public policy, relying on *Renusagar Power Co. Ltd. v. General Electric Co.*,[23] and referring to key subsequent judgements,[24] the Hon'ble Supreme Court held that as no export could have taken place without the permission of the Indian Government, the export if undertaken would have been foul of the fundamental policy of Indian law. The Hon'ble Supreme Court referred to the Indian Government's letter directing NAFED not to export the balance units of groundnuts and held that the enforcement of such an award would fall under the exception of public policy under Section 7(1)(b)(ii) of the Foreign Awards Act, thereby rendering the Award as modified by the Appeal Award unenforceable. Thus, the Award as modified by the Appeal Award being contrary to the fundamental policy of Indian law and the basic concept of justice, the Hon'ble Court held it to be unenforceable.

Arnab Ranjan Goswami v. Union Of India & Others [Writ Petition (Crl.) No. 130 or 2020, Judgement dated May 19, 2020.]

In the case of *Arnab Ranjan Goswami v. Union of India & Others*, the Hon'ble Supreme Court upheld the right to freedom of expression of the Petitioner, a journalist, under Article 19(1)(a) of the Constitution by quashing all, except one, First Information Reports ("**FIRs**") filed against the Petitioner, for the same cognizable offence. However, the Hon'ble Court recognized that freedom under Article 19(1)(a) is not unfettered and permitted investigations to continue pursuant to a FIR, in the manner deemed fit by the investigation agency.

As a background to the filing of this case, pursuant to broadcasts regarding the investigation into an incident in Palghar, Maharashtra, on Republic TV on April 16, 2020 and on R Bharat on April 21, 2020, in which the Petitioner is the Editor-in-Chef and Managing Director, respectively, several FIRs and criminal complaints were lodged against the Petitioner in various states and union territories of India. Thereafter, this writ petition was filed under Article 32 of the Constitution by the Petitioner, seeking *inter alia* (a) protection of his fundamental right to freedom of speech and expression under Article 19(1)(a) of the Constitution; and (b) a direction to quash all complaints and FIRs lodged against the Petitioner. Further, alleging that the Mumbai Police was not conducting a fair and impartial investigation, the Petitioner sought a transfer of the investigation to the CBI.

It was contended by the Petitioner that (a) this petition raises wider issues implicating journalistic freedom which fall within the ambit of Article 19(1)(a) and that it is necessary for this court to lay down safeguards protecting the same. Accordingly, multiple FIR's lodged against the Petitioner, arising from the same cause of action, need to be quashed as they attempt to stifle the free expression of views by an independent journalist; and (b) the manner in which investigation is being conducted by the Mumbai police leads to the conclusion that the authorities have malice and mala fide intentions towards the Petitioner and therefore it must be either stayed or transferred to CBI so that a fair and impartial investigation may be conducted.

On the other hand, the State of Maharashtra argued that the Petitioner, being the accused person in the FIRs, has no locus to question the line of investigation and interrogation (by an agency), and any right of the Petitioner under Article 19(1)(a) of the Constitution is subject to limitations embodied in Article 19(2). On attention being drawn to the fact that all the FIRs were prima -facie identical having arisen from the same cause of

21 AIR 1954 SC 44

22 *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, AIR 1968 SC 522; *Boothalinga Agencies v. V.T.C. Poriaswami Nadar*, AIR 1969 SC 110

23 1994 Supp. (1) SCC 644.

24 *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; *Shri Lal Mahal Limited v. Progetto Grano Spa*, (2014) 2 SCC 433; *Ssanyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*, (2019) 15 SCC 131.

action, it was submitted by the State of Maharashtra that in exercise of jurisdiction under Article 32 of the Constitution, the Hon'ble Court may quash all the other FIRs and permit investigation into the FIR transferred to the NM Joshi Marg Police Station. It was also urged that since the established legal position is that a complaint in regard to offence of defamation can only be at the behest of the aggrieved, the FIR does not cover any offence under Section 499 of the Indian Penal Code, 1860 ("**IPC**"). Further, it was submitted by the investigating agency of the Maharashtra police that this petition under Article 32 of the Constitution was an attempt by the Petitioner to leapfrog the procedure under Section 482 of the Criminal Procedure Code, 1973 ("**CrPC**"). It is a settled position of law that an accused has no locus to choose the investigative agency and transfer of investigation to the CBI is an extraordinary power of the Hon'ble Court.

Relying on the position of law laid down by the Hon'ble Court in *TT Antony v. State of Kerala*,[25] the Hon'ble Court held that filing of a second FIR for the same cognizable offence is impermissible, being an abuse of the statutory power of investigation, and is therefore liable to be quashed. Subjecting the Petitioner to the FIRs and complaints which arise out of the same incident, are similarly worded and have identical cause of action, necessitates the intervention of the Hon'ble Court to protect the rights of the Petitioner as a citizen and as a journalist to fair treatment (guaranteed by Article 14) and liberty to portray independent views (guaranteed by Article 19(1)(a)). Further requiring the Petitioner to approach respective High Courts for quashing of the multiple FIRs would lead to multiplicity of proceedings and unnecessary harassment to the Petitioner. However, Article 19(1)(a) of the Constitution does not provide complete immunity to the Petitioner from all investigation, hence FIR transferred to the NM Joshi Marg Police Station would be investigated while all other FIRs and complaints with respect to the same incident would be quashed.

Further, in so far as the prayer of the Petitioner to transfer of the case to CBI is concerned, the Hon'ble Court while relying on the law laid down by a Constitution Bench in *State of West Bengal v. Committee for Protection of Democratic Rights*[26], held that this was an "extraordinary power" which is to be used "sparingly" and "in exceptional circumstances". Additionally, the Hon'ble Court was of the view that as long as the investigation does not violate any provisions of law, it should refrain from interfering so that the investigation agency has the liberty and protection to conduct a fair, transparent and just investigation. Therefore, in view of the law laid down in a bevy of cases, the Hon'ble Court was of the opinion that mere allegations levelled by the Petitioner and displeasure expressed regarding the manner of investigation, does not warrant a transfer of the investigation to the CBI.

Lastly, the Hon'ble Court held that, even though maintainable, it would be inappropriate for the Hon'ble Court to exercise its jurisdiction under Article 32 to quash the FIR transferred to the NM Joshi Marg Police Station when an alternate efficacious remedy is available to the Petitioner under Section 482 of the CrPC and no exceptional grounds have been made out by the Petitioner to bypass the procedure under the CrPC. Therefore, the Hon'ble Court refused to quash the FIR and liberty was granted to the Petitioner to pursue any other remedy available under the CrPC before the competent forum. The Hon'ble Court

25 (2001) 6 SCC 181
26 (2010) 3 SCC 571

further clarified that for an offence under Section 499 of the IPC no FIR can be filed and only a complaint can be instituted by the aggrieved person, hence the FIR being investigated cannot cover the offence of criminal defamation and thus it cannot be a part of the investigation.

Patel Engineering Limited v. North Eastern Electric Power Corporation Limited [Special Leave Petition (Civil) Nos. 3584-85, 3438-3439, 3434-3435 of 2020, Order dated May 22, 2020.]

In the case of *Patel Engineering Limited v. North Eastern Electric Power Corporation Limited*, the Hon'ble Supreme Court whilst dealing with the issue of patent illegality, held that a domestic award would be hit by patent illegality, if the arbitrator construed the contract in a manner that no fair-minded or reasonable person would construe or if the arbitrator committed an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to him.

As a background to the filing of the special leave petitions, North Eastern Electric Power Corporation Limited ("**NEEPCO**") had acquired 710 hectares of land in Kameng, Arunachal Pradesh in the year 2000 and had issued Invitation for Bids under three separate packages for civil work for setting up the Kameng Hydro Electric Project in 2003. The three packages aggregating to INR 391.85 crores were awarded to Patel Engineering Limited ("**PEL**"). Due to certain external factors, the construction material for the project was required to be procured from places far away from the project sites, necessitating a meeting between NEEPCO and PEL to resolve the issue relating to the increased transportation costs. NEEPCO conveyed its decision that Clause 33(iii) of the Conditions of Contract regarding determination of rate for items of work would be applicable in calculating the increased transportation costs, whereas PEL contended that in terms of Clause 33(ii)(a) of the Conditions of Contract, the rates of similar items be made applicable.

The dispute between NEEPCO and PEL, in connection with each of the three work contracts, was referred to arbitration on June 16, 2014. The Ld. Sole Arbitrator passed declaratory arbitral awards dated March 29, 2016 in respect of each of the three work contracts, holding that the increased transportation costs would be calculated as per Clause 33(ii)(a) of the Conditions of Contract, as was contended by PEL.

NEEPCO then filed separate applications under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Act**") before the Ld. Additional Deputy Commissioner (Judicial), Shillong challenging the three Arbitral Awards dated March 29, 2016. The said applications under Section 34 were dismissed vide common order dated April 27, 2018 and the three arbitral awards were upheld. NEEPCO thereafter, filed three appeals under Section 37 of the Act before the Hon'ble Meghalaya High Court, challenging the common order dated April 27, 2018 on the ground that the interpretation adopted by the Ld. Sole Arbitrator was irrational and no reasonable person would arrive at such a conclusion. The Hon'ble High Court, by way of its common judgment dated February 26, 2019 allowing the three appeals held that the three arbitral awards were patently illegal and hence set aside the common order dated April 27, 2018. Aggrieved by the order dated April 27, 2018, PEL filed three special leave petitions before the Hon'ble Supreme Court. Since the Hon'ble Apex Court was not inclined to interfere in the matter, the petitions were dismissed vide order dated July 19, 2019.

Subsequently, PEL filed review petitions before the Hon'ble High Court on the ground that the common judgment of the Hon'ble High Court dated February 26, 2019 suffered from an error apparent on the face of the record. The aforesaid review petitions were dismissed by the Hon'ble High Court vide order dated October 10, 2019. This order of the Hon'ble High Court was the subject of challenge before the Hon'ble Supreme Court in the present special leave petitions.

It was contended by PEL that the Hon'ble High Court erroneously applied the provisions as applicable prior to the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**") and therefore suffered from an error apparent on the face of the record. It was further argued that the Hon'ble High Court wrongfully relied upon the decision in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Limited*[27] (*"**Saw Pipes**"*) and *Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited,*[28] which were no longer good law pursuant to the enactment of the 2015 Amendment. Additionally, it was contended that since the dismissal of the earlier special leave petitions vide order dated July 19, 2019 was a non-speaking order and not based on merits, no objection could be raised with regard to filing of the review petition.

On the other hand, it was contended by NEEPCO that PEL had raised all contentions including *inter alia* the effect of the 2015 Amendment to Section 34, in its earlier special leave petitions and hence, could not be allowed to reagitate the same. It was further contended that the special leave petitions were not maintainable against the order rejecting the application for review of the judgment when in fact the special leave petitions against the main judgment were already dismissed. Accordingly, PEL could not be allowed to reagitate the matter by filing a review petition.

The Hon'ble Supreme Court did not deem it appropriate to go into the question of maintainability of present special leave

27 (2003) 5 SCC 705
28 (2014) 9 SCC 263

petitions. As far as the issue of patent illegality is concerned, the Hon'ble Supreme Court relied on *Board of Control for Cricket in India v. Kochi Cricket Private Limited*[29] to hold that the provisions of the 2015 Amendment would apply to the present case as the arbitral award was made after October 23, 2015. The Hon'ble Supreme Court chronicled the development of patent illegality as being a ground for setting aside a domestic award starting from the judgment in Saw Pipes wherein it was held that an award would be "patently illegal" if it is contrary to the substantive provisions of law or the Act or terms of the contract. It further held that the introduction of Section 34(2A) gave a statutory recognition to patent illegality as a ground for setting aside of an award. The Hon'ble Supreme Court agreed with the decision in *Associate Builders v. Delhi Development Authority*,[30] which defined the contours of patent illegality, as later modified in *Ssangyong Engineering and Construction Company Limited*,[31] wherein, it was held that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes a contract in a manner which no fair minded or reasonable person would take.

The Hon'ble Supreme Court concurred with the view of the Hon'ble High Court that the findings in the arbitral award suffered from the vice of irrationality and perversity, and further held that the Hon'ble High Court had rightly followed the test of patent illegality in holding that no reasonable person could have arrived at the view as was taken in the arbitral awards. Accordingly, the Hon'ble Supreme Court held that the impugned order rightly dismissed the review petitions. Consequently, the three special leave petitions were dismissed.

Shakti Bhog Food Industries Ltd. v. The Central Bank Of India & Anr. [Civil Appeal No. 2514 of 2020, Judgement dated June 05, 2020.]

In the case of *Shakti Bhog Food Industries Limited v. The Central Bank of India & Anr.,* the Hon'ble Supreme Court adjudicated on the issue whether a plaint filed by Shakti Bhog Food Industries Limited ("**Appellant**") under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 ("**CPC**") was liable to be rejected on the ground that it was filed beyond the period of limitation as established in Article 113 of the Limitation Act, 1963 ("**Act**"). The Hon'ble Supreme Court, after analysing the plaint dated February 23, 2005 in its completion, held that the plaint was not barred by limitation as the right to sue under Article 113 of the Act would be computed depending upon the last day when the cause of action arose. The Hon'ble Court further held that the phrase "when the right to sue accrues" used in Article 113 of the Act cannot be read as "when the right to sue (first) accrues" as this would tantamount to re-writing Article 113 of the Act and thereby defeat the intent of the legislature.

By way of a background, the Appellant had availed a financial facility from the Central Bank of India ("**Respondent Bank**"). In July 2000, the Appellant observed that the Respondent Bank was unilaterally charging interest/commission on local cheques and drafts in an arbitrary manner and in violation of the assurance given by the Respondent Bank to the Appellant. On July 21, 2000, the Appellant wrote to the Respondent Bank to take corrective action, following which various letters were exchanged between the parties. Subsequently, the Assistant General Manager of the Respondent Bank vide its letter dated July 9, 2001 informed the Appellant that comments had been invited from the concerned branch office and that appropriate decision would be taken soon. Thereafter, on May 8, 2002, the Senior Manager of the Respondent Bank informed the Appellant that the cheques were being purchased at the prevailing rates. On September 19, 2002, the Senior Manager of the Respondent Bank again wrote to the Appellant affirming that the interest/commission charged was in accordance with the rules hence, the Appellant need not pursue the matter any further. Despite the aforesaid, the Appellant continued to correspond with the Respondent Bank with the hope to resolve the issue. On November 28, 2003, the Appellant issued a legal notice to the Respondent Bank, which was responded to by the Respondent Bank's counsel vide letter dated December 23, 2003. The Appellant issued another legal notice to the Respondent Bank on January 7, 2005.

Thereafter, a suit was filed by the Appellant on February 23, 2005 seeking (a) the rendition of true and correct accounts in respect of the interest/ commissions that had been charged and deducted by the Respondent Bank and (b) the recovery of excess amount charged by the Respondent Bank. The trial court

29 (2018) 6 SCC 287
30 (2015) 3 SCC 49
31 (2019) 15 SCC 131

rejected the suit on the ground that it was barred by limitation having been filed beyond the period of three years as prescribed under Article 113 of the Act. The trial court was of the view that since, the Act did not contain any other specific provision stipulating the period of limitation within which accounts can be sought by a party, Article 113 of the Act would be applicable in the present case. In this respect, the trial court held that since the financial facility as availed by the Appellant and the excess amount so charged by the Respondent Bank were till October, 2000, the right to sue accrued in favour of the Appellant in October, 2000.

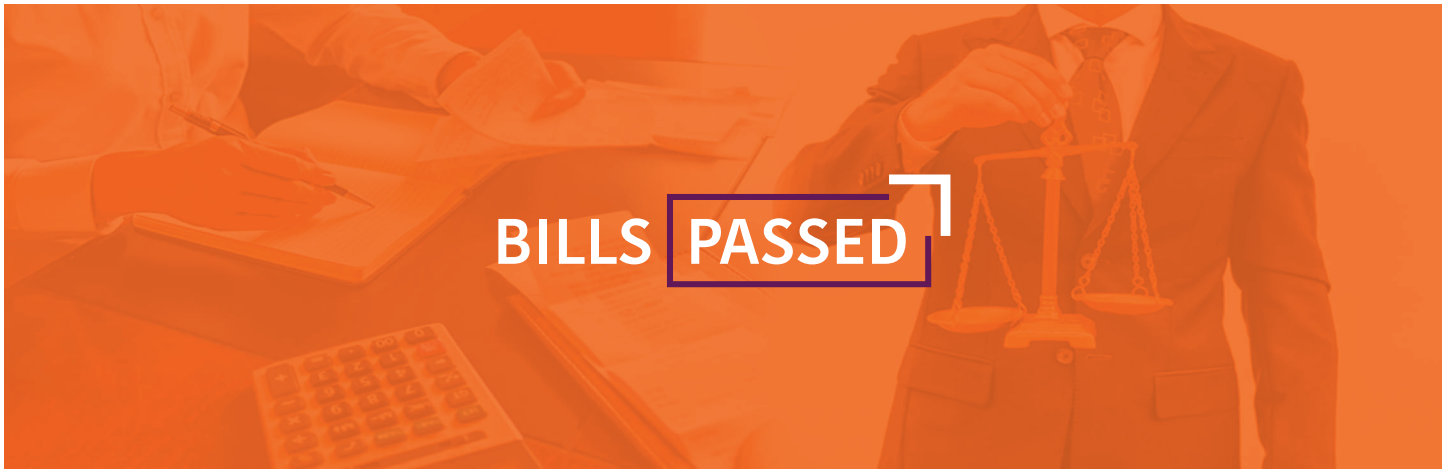
In doing so, the trial court rejected the contention of the Appellant that the cause of action arose on September 19, 2002 when the Respondent bank had communicated its refusal or denial of liability and after the final legal notice was served on January 7, 2005. To substantiate its decision, the trial court, relied on a judgment of the High Court of Delhi in *C.P. Kapur v. The Chairman & Ors.*[32] wherein it was held that the exchange of correspondences between the parties cannot extend the limitation period for institution of a suit, once the right to sue had accrued, which in the present case had accrued in October, 2000. The suit was filed in February 2005, i.e., beyond the period of three years from the date on which right to sue accrued to the Appellant, as stipulated in Article 113 of the Act. Thus, the plaint was rejected under Order VII Rule 11(d) of the CPC, which provides that a plaint is liable to be rejected where the suit appears from the plaint to be barred by any law.

The decision of the trial court was affirmed in appeal before the Additional District and Sessions Judge, Central, Tis Hazari Courts by way of order dated July 23, 2016 which in turn was further upheld by the Hon'ble High Court of Delhi by way of order dated January 2, 2017.

On a challenge to the aforesaid order, the Hon'ble Supreme Court elucidated that the expression used in Article 113 of the Act was "when the right to sue accrues", and this was distinct from the expression used in other articles in the first division of the Schedule which appertained to suits. Article 113 of the Act did not specify the happening of a particular event however merely referred to the accrual of a cause of action which would form the basis for conferring on the party, the right to sue. It was further propounded that if the view taken by the lower courts is adopted, then this would inevitably entail reading the expression in Article 113 of the Act as – when the right to sue (first) accrues, which in essence would be re-writing the provision, defeating the legislative intent. Placing its reliance on the findings in *Union of India & Ors. v West Coast Paper Mills Limited* and *Khatri Hotels Private Limited*[33] *& Anr v Union of India*[34] the Hon'ble Court held that, the period of limitation under Article 113 of the Act as opposed to other provisions of the Act, would be differently computed depending upon the last day when the cause of action arose. Article 113 of the Act was a residuary article, which meant that it was applicable to every kind of suit not otherwise provided for in the Schedule.

Further, the Hon'ble Supreme Court, while relying on a catena of judgments including *inter alia Madanuri Sri Rama Chandra Murthy v Syed Jalal*[35] *and Raptakos Brett & Co. Ltd. v Ganesh Property*[36], held that the lower courts erred by analyzing selected averments in the plaint instead of analyzing the plaint as a whole. The Hon'ble Court held that on a complete assessment of the plaint, the letter dated May 8, 2002 sent by the senior manager of the Respondent Bank was when the cause of action accrued in favour of the Appellant to sue the Respondent Bank. It was only upon receiving the letter dated September 19, 2002 that the Appellant had to send a legal notice on November 28, 2003. Until then, the Appellant was under the belief that its claim with the Respondent Bank would be favourably considered. Therefore, the plaint filed on February 23, 2005 was well within limitation and the rejection of the plaint under Order VII Rule 11(d) of the CPC did not arise.

32 (2013) 198 DLT 56
33 (2004) 3 SCC 747
34 (2011) 9 SCC 126
35 (2017) 13 SCC 174
36 (1998) 7 SCC 184



1. Consumer Protection Act, 2019

The Consumer Protection Act, 2019, which replaces the Consumer Protection Act, 1986, came into force on July 20, 2020. The key highlights of the Act are as follows:

(i) Widening of the definition of 'consumer' to cover E-Commerce transactions;

(ii) Setting up of the Central Consumer Protection Authority which has the mandate to promote, protect and enforce the rights of consumers, and an advisory council called the Central Consumer Protection Council;

(iii) Provision for penalty and imprisonment for manufacturers and endorsers for false or misleading advertisements;

(iv) Introduction of the concept of product liability, which covers the product manufacturer, product service provider and product seller,

(v) Overhauling of the complaint redressal mechanism through setting up of the Consumer Disputes Redressal Commission ("**CDRC**") (with pecuniary jurisdiction up to INR 1 crore) at the district level and State CDRC (with pecuniary jurisdiction up to INR 10 crore) and National CDRC (with pecuniary jurisdiction over INR 10 crore) at the appellate level. Further, complaints against an unfair contract can be filed with the State CDRC and National CDRC;

(vi) The CDRCs, State CDRCs and National CDRC will have a consumer mediation cell to facilitate and promote mediation as an alternate dispute resolution mechanism;

(vii) A consumer can institute a complaint from where he resides, unlike the previous regime where a complaint had to be initiated where the transaction took place;

2. The Banking Regulation (Amendment) Ordinance, 2020

The Banking Regulation (Amendment) Ordinance, 2020 was promulgated on June 26, 2020. The Ordinance amends the Banking Regulation Act, 1949, which regulates the functioning of banks, including aspects such as licensing, management and operations. The key change brought by the Ordinance is that it extends the powers already available with the Reserve Bank of India ("**RBI**") in respect of other banks, to Co-operative Banks. The other key changes are: (a) Bar on banks for investments /loans during the Moratorium period, (b) Issuance and regulation of paid-up share capital and securities by Co-operative banks and (c) Power to RBI to exempt Co-operative banks from the application of the Act.

3. The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Ordinance, 2020

The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Ordinance, 2020 was promulgated on June 5, 2020. It seeks to do away with the geographical restrictions placed on farmers' produce as provided for in the various state agricultural produce market laws. The other key changes brought by the Ordinance are: (a) Permission to trade in any place of production, collection or aggregation of farmers' produce (b) time bound payments to farmers (c) permission for electronic trading of farmers' produce (d) Prohibition on state governments from levying any market fee etc. in a trade area, (e) Establishment of dispute resolution mechanism for farmers. The Ordinance further provides that it will prevail over the state agricultural produce market laws.

4. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 was promulgated on June 5, 2020. The Ordinance provides for suspension of initiation of corporate insolvency in light of the COVID-19 pandemic. After the Ordinance. an application for CIRP cannot be filed where a default has arisen on March 25, 2020 and after, till a period of at least six months, extendable up to one year. Further, the Ordinance provides that no proceedings can ever be initiated for defaults occurring during the said period. The Ordinance further provides that the resolution professional of such a corporate debtor cannot file an application for directions against its partners or directors to make contributions to the assets of the company.

5. The Essential Commodities (Amendment) Ordinance, 2020

The Essential Commodities (Amendment) Ordinance, 2020 was promulgated on June 5, 2020. It amends the Essential Commodities Act, 1955, which provides for power to control the production, supply, distribution and trade of certain commodities by the central government. However, over years, the control regime resulted in more detrimental effects, contrary to the objective of the Act. Accordingly, the Ordinance provides for key changes such as: (a) Regulation of supply of food commodities only under extraordinary circumstances namely war, famine, extraordinary price rise and natural calamity of grave nature; (b) Imposition of stock limit on certain items to be based on specified price rise; (c) Exempting the processors of agricultural produce and value chain participants of any agricultural produce from the order regulating stock limit. The Ordinance is thereby seeking to increase competition in the agriculture sector and liberalise the regulatory system.

6. The Epidemic Diseases (Amendment) Ordinance, 2020

The Epidemic Diseases (Amendment) Ordinance, 2020 was promulgated on April 22, 2020. The Ordinance amends the Epidemic Diseases Act, 1897, which grants wide powers to the government to take measures for the prevention of spread of epidemic diseases. The Ordinance amends the Act to provide for prohibition of violence against healthcare service personnel fighting epidemic diseases and also provides for punishment for such offences and related aspects. It further expands the powers of the central government to prevent the spread of such diseases.

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case in point .

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cyril amarchand mangaldas
ahead of the curve

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