MONTHLY NEWSLETTER

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CONTENTS

MSME ELIGIBILITY GAUGES FOR PRE-PACKED INSOLVENCY PROCESS

IBC (Amendment) Ordinance, 2021 was hailed by the experts and several bodies of the industries for introducing the notion of pre-packed insolvency process. The underlined objective of the same was to provide an efficient alternative insolvency resolution process to the small and medium enterprises (MSME's). In light of the ongoing pandemic, indubitably the ordinance is a welcome step towards the resolution of insolvent MSME's, the devastating impact pandemic as fashioned on the businesses, financial markets and economies of all the countries over the world including India which has inevitably pushed these MSME's into financial distress. For the sake of brevity "*Pre-packs are a form of restructuring that allows creditors and debtors to work on an informal plan and then submit it for approval. The incumbent management typically retains control until the final deal*"

However, at the threshold it appears *prima-facie* that most of the MSME's in India will not be eligible for the pre-packed insolvency resolution process under the Insolvency and Bankruptcy Code (IBC). To specify the reason, the Ordinance of 2021 mandates for the Corporate Debtor to sought prior registration under the Micro, Small and Medium Enterprises Development Act, to be eligible for pre-packed insolvency resolution process.

"*An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor classified as a micro, small or medium enterprise under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006*," noted the Ordinance 2021.

In this regard it would not be of less importance to specify that according to National Sample Survey (2015-2016), India is a hub to roughly 6.7 crore MSME's. However, according to the data available with Udyam

Registration (MSME Registration) the number of total registered MSME in India are nearly 26.44 lakh only, meaning which that the unregistered MSME's cannot take the recourse under the pre-packed regime for insolvency resolution.

Apart from the restriction as abovementioned, the new Ordinance furthered the list of restrictions; restricting even the registered MSME's to avail pre-pack insolvency resolution process. Pursuant to the Insolvency and Bankruptcy Board of India (Pre –Packaged Insolvency Resolution Process) Regulation, 2021 the Pre-pack insolvency extends only to companies and Limited Liability Partnerships and therefore, any proprietorship, partnerships and Hindu Undivided Family forms of MSMEs have been kept outside the realm of the pre pack process thereby further imposing a filter on the number of MSMEs to become eligible for pre pack. So far it appears that the scope of novel concept pre- pack insolvency process is narrow and engulfs only MSME's incorporated as LLPs and Companies in the absence of applicability of Chapter III of the IBC, 2016 which shelters the insolvency for Partnerships, Sole Proprietorship & HUF's as the same has not been notified.

WHETHER A PRIVATE VEHICLE WOULD CONSTITUTE AS A PUBLIC PLACE

The law whether your private motor vehicle would constitute under the purview of a "public place" is extremely confusing and the answer changes as you change the facet of law.

The Supreme Court of India recently in the case of ***Boota Singh v. State of Haryana* (Criminal Appeal 421/2021)**[1], held that a private vehicle would not fall within the definition of a "public place" as per Section 43 of the Narcotic Drugs and Psychedelic Substances Act ("NDPS Act").

In this case, the appellants argued that the recovery of the poppy straw was made while the accused were in jeep at a public place and as such the provisions of Section 43 of the NDPS Act which relates to *power to seizure and arrest in public place* would not apply. It was an admitted fact that the jeep was registered as private vehicle and not a public conveyance, though it was parked on a public road. The Supreme Court on the basis of the explanation in Section 43 which states that "*the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.*", held that the private vehicle cannot come under the ambit of a "public place" instead would be governed under Section 42 of the NDPS Act. Therefore, as the Police failed to comply with the provisions of Section 42, the accused were entitled to acquittal.

Recently, the Delhi High Court in the case of **Saurabh Sharma v. Sub Divisional Magistrate (East) (W.P Civil 6595/2020)**[2], held that wearing facemasks was compulsory even while driving alone in your personal vehicle. The Court held that the concept of 'public place' would change from statute to

[1] 2021 SCC Online SC 324

[2] 2021 SCC Online Del 398

statute. Presently, in view of the trying times of COVID-19 and the regulations issued under the Disaster Management Act, the term 'public place' would exercise with extra caution to reduce the transmission of the virus. Therefore, the court held that the rule of wearing face masks while driving would also apply to persons driving their own personal vehicles, even if they are alone.

This narrative however changed with respect to the provisions of the Bihar Excise Act. The Supreme Court in the case of ***Satvinder Singh Saluja v. State of Bihar*** **(Criminal Appeal 951/2019)**[3], held that consuming liquor in a private vehicle in a public road would amount to an offence. In this case, the Court expanded the ambit of "public place", so as to include any place which the public will have access whether as a matter of right or not and includes all places visited by the general public and also includes any open space. The Court stressed upon the term "access" and observed that it cannot be accepted that public cannot have any access to the private vehicle while they are passing through a public road. Furthermore, the Act defined public place to include both the private and public means of transport.

Even the Kerala High Court in the case of Rajendran Pillai v. State of Kerala, held that drinking inside a private car would constitute as "public place".

Therefore, it is clear that the definition and the scope of private vehicle falling under the ambit of "public place" would defer from statute to statue and would be judged to a case-to-case basis.

[3] (2019) 7 SCC 89

CONSUMER PROTECTION ACT, 2019 – THE JOURNEY SO FAR!

The Consumer Protection Act, 2019 ("2019 Act") repealed the Consumer Protection Act, 1986 ("1986 Act"). The 2019 Act received the President's assent on 09.08.2019 and came into force from 20.07.2020 and 24.07.2020.

The 2019 Act enhanced pecuniary jurisdiction of the Consumer Commissions to:-

	DISTRICT COMMISSION	STATE COMMISSION	NATIONAL COMMISSION
1986 Act	UPTO RS. 20 LAKHS	RS. 20 LAKHS TO RS. 1 CRORE	> RS. 1 CRORE
2019 Act	UPTO RS. 1 CRORE	RS. 1 CRORE TO RS. 10 CRORE	> RS. 10 CRORE

Determination of Jurisdiction

Section 11, 17 and 21 of the 1986 Act, which determined the jurisdiction of the District, State & National Commission respectively, prescribed that the jurisdiction shall be determined on the basis of the value of the goods/services, ***or*** any reliefs claimed to the actual consideration paid for the goods/services availed. However, the corresponding provisions of the 2019 Act, namely Section 34, 47 and 58, restricted the determination only on the basis of the value of goods and services paid.

The National Consumer Disputes Redressal Commission ("NCDRC") vide notification dated **20.07.2020** clarified that the Act of 2019 has been enforced with effect from 20.07.2020, therefore, the value has to be determined strictly according to the consideration paid and not by the value of the goods/services or any relief claimed.

Furthermore, the NCDRC affirmed in the judgment of **M/s Pyaridevi Chabiraj Steels Pvt. Ltd. v. National Insurance Co. Ltd. & Ors.** [4]dated 28.08.2020, that Section 34(1), 47(1)(a)(i) and 58(1)(a)(i) of 2019 Act are very clear and do not warrant any two interpretations. Therefore, as per the 2019 Act, the value of goods/services paid as consideration ***actually paid*** has to be taken into consideration while determining the pecuniary jurisdiction.

[4] Manu/CF/0451/2020

Prospective Applicability

The issue whether the 2019 Act is prospective or retrospective in nature was settled by the NCDRC in the case of ***Narender Chopra v. Jaiprakash Associates***[5] *dated 16.03.2021*, wherein the Hon'ble Commission held that a statute which affects substantive rights is presumed to be prospective in operation unless made retrospective expressively or by necessary intendment. If Section 34, 47 and 58 of the 2019 Act are given a retrospective applicability it would give rise to an anomalous situation. Additionally, the 2019 Act does not contain any specific provision to transfer the pending complaints filed before the National or State Commission to the fora now having the pecuniary jurisdiction. The NCDRC has held that the complaints instituted before the coming into force of the 2019 Act shall be adjudicated by the District, State and National Commission in accordance with the provisions of the 1986 Act, in which they were originally instituted.

Transfer of Cases

The Supreme Court settled another controversy regarding the transfer of cases instituted before the coming into effect of the 2019 Act in the judgment of **Neena Aneja & Ors. Jai Prakash Associates Ltd.**[6] dated 16.03.2021. The Apex Court laid emphasis on Section 107 of the 2019 Act by which the 1986 Act was repealed. It held that the Section 107 had saved the previous operation of the repealed enactment and the right accrued on the date of the institution of the complaint under 1986 Act is preserved. The Court observed that there would be serious hardship to the consumers, if cases which have been already instituted before the NCDRC were required to be transferred to SCDRCs as a result of the alteration of pecuniary limits by the 2019 Act. The bench comprising of Justice Chandrachud and Justice Shah set aside the directions of the NCDRC for transferring the previously instituted cases under the 1986 Act to the respective forum as per the 2019 Act. The Court however, clarified that Section 34, 47 and 58 of the 2019 will undoubtedly apply to the Complaint instituted after 20.07.2019.

Statutory Amount to be deposited before filing of an Appeal

The 1986 Act through Section 15 made a requirement for the appellant to pay **50%** of the awarded amount or **Rs. 25,000/-** (*Rupees*

[5] MANU/CF/0078/2021

[6] 2021 SCC Online SC 225

Twenty Five Thousand Only), whichever is less before filing an Appeal before the State Commission. Similarly, Section 19, increased that limit to **Rs. 35,000/-** (*Rupees Thirty Five Thousand Only*) or 50% of the awarded amount, whichever is less, before filing an appeal before the National Commission.

The 2019 Act omits the two options and through Section 41 and 51 brings in uniformity of depositing 50% of the awarded amount before filing an appeal before the State and National Commission respectively.

This change was widely debated as to its applicability on complaints which were decided under the 1986 Act and now an appeal is being filed against their order after the enforcement of the 2019 Act.

The NCDRC dealt with the issue extensively in the case of **Sahyog Homes Ltd. & Ors. v. Manoj Shah**[7] dated 12.10.2020, whereby the Hon'ble Commission laid down it has no more *res integra* that the 2019 Act is prospective in nature. The right to appeal is a substantive right and it gets accrued from the initiation of the proceedings i.e the day the complaint is filed before the appropriate forum. Therefore, as the Consumer Protection Act is a socially beneficial legislation the enhanced provisions through Section 41 and 51 of the 2019 Act would not be applicable where the order challenged has been passed under the 1986 Act, even if it is after the enforcement of the 2019 Act.

The 2019 Act has brought some radical changes in the Consumer Protection regime of the country and has coped with the digitalization era. It would be interesting to see whether the District and State Forums would be able to efficiently handle and adjudicate the high values cases as bestowed upon them by the Act.

[7] Diary No. 13929 - 13932/NCDRC/2020

BALANCE SHEET ENTRIES CAN AMOUNT TO ACKNOWLEDGMENT OF DEBT U/S 18 OF LIMITATION ACT- CONUNDRUM SETTLED BY THE APEX COURT

The Apex Court in the case of ***Asset Reconstruction (India) Pvt Ltd v Bishal Jaiswal and Anr* (*Civil Appeal No.323 of 2021*)**[8] vide its judgment dated 15.04.2021, set aside the NCLAT order in ***V Padmakumar v Stressed Assets Stabalization Funds* (*Company Appeal (AT) (Insolvency) No. 57/2020*)**[9], and held that the entries in the balance sheet would amount to acknowledgment of debt under Section 18 of Limitation Act.

The Bench comprising Hon'ble Justice R.F.Nariman, B.R. Gavai, Rishikesh Roy dealt with the issues of whether an entry made in a balance sheet of a corporate debtor would amount to an acknowledgement of liability under Section 18 of the Limitation Act. The next issue dealt by the court was whether Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgement of debt made in writing and signed by the corporate debtor, is also applicable under Section 238A, given the expression "as far as may be" governing the applicability of the Limitation Act to the IBC.

The second issue is no longer *res-integra* as it has already been settled by the Apex Court in the case of ***Sesh Nath Singh v. Baidyabati Sheoraphuli Co-operative Bank Ltd* of 2019**[10] **and *Laxmi Pat Surana v UBI* of 2020**[11]. Hence, the Apex Court did not venture much further in the second issue. The Hon'ble Apex Court

has exhaustively dealt with the judgment in the *Bengal Skills Case* delivered by the High Court of Calcutta, wherein it was held:-

...The balance-sheet contains admissions of liability; the agents of the company who makes and signs it intends to make those

[8] 2021 SCC Online SC 321
[9] MANU/NL/0192/2020
[10] MANU/SC/0205/2021
[11] MANU/NL/0211/2020

admissions. The admissions do not, cease to be acknowledgments of liability merely on the ground that they were made in discharge of a statutory duty.

In light of the aforementioned judgment and in consonance with the provisions of Companies Act relating to the filing of financial statement/balance sheet, the Hon'ble Apex Court affirmed the statutory duty for filing a balance sheet and any non-compliance shall inevitably invite penalisation.

However, the Court further opined that mere compulsion of filing the balance sheet does not compel one to the admissibility of the contents therein and the examination of such has to be done on case-by-case basis in order to establish whether an acknowledgment of liability has been made extending limitation under Section 18 of Limitation Act.

The Apex Court whilst setting aside the Five Judges bench decision of NCLAT opined that the same was contrary to the views laid down by various High Courts of the country and *ex-facie* the order appeared contrary to the provisions of the Company law.

The position of law with respect to the issue in hand was inconsistent due to divergent rulings of the various High Courts of the country which was further put to web of complexity after the pronouncement of majority ruling of five-member Bench in the case of *V Padmakumar,* certainly it would have added further inconsistencies and could have opened a can of litigation. But In light of the analysis made by the Apex Court in its recent judgment has ruled out all the possible inconsistencies and has helped in removing the long-seated conundrum.

STREAMLINING JUDICIAL APPOINTMENTS THROUGH AD-HOC JUDGES

As per the data released by the Ministry of Law & Justice there exist around 411 vacancies in the Supreme Court and around 25 in the High Courts of the country. The nation has roughly 19.78 judges per million population. However, India is languishing in comparison to other countries as U.S.A, Canada and Australia have around 107, 75 and 41 respectively for judges per million population. These comparative figures are self-explanatory to showcase the overburdening of the Indian judiciary.

The current procedure for appointment of judges under Article 217 and 224 of the Constitution of India and the Memorandum of Procedure ("MoP") were relooked by the Supreme Court recently in the case of **M/s PLR Projects Pvt. Ltd v. Mahanadi Coalfields Ltd. (T.P Civil 2419/2019)**[12] In this case, the Court emphasised that the Chief Justice of the High Courts must recommend names to fill up the vacancies as early as possible, regardless of the fact that the earlier recommendations made by the concerned High Court are still in the pipeline. The delay caused by the executive once the names have been recommended by the High Court Collegium needs to be curtailed and a fixed timeline should be made for every stage of the process. In order to facilitate timely appointments, the court recommended certain guidelines such as; the Intelligence Bureau (IB) should submit its reports within 4 to 6 weeks from the date of recommendation of the High Court Collegium to the Central Government.

Additionally, it also mandates that if the Supreme Court Collegium after the consideration of the inputs of the Central Government reiterates the recommendations, then the appointments should be made within 3 to 4 weeks.

[12] 2021 SCC Online SC 332

While hearing a PIL, seeking the invocation of Article 224A of the Constitution of India, which provides for appointment of Retired Judges for sittings at High Court in the case of Lok Prahari v. Union of India (W.P Civil 1236/2019)[13], the Supreme Court held that *ad hoc* appointments cannot be a substitute for regular appointments. The Court further emphasized that it would not like to encourage an environment where Article 224A is sought as panacea for inaction in making recommendations to the regular appointments.

The Apex Court laid trigger points after which the procedure enshrined under Article 224A can be activated namely:-

a) *If the vacancies are more than 20% of the sanctioned strength.*

b) *The cases in a particular category are pending for over five years.*

c) *More than 10% of the backlog of pending cases are over five years old.*

d) *The percentage of the rate of disposal is lower than the institution of the cases either in a particular subject matter or generally in the Court.*

e) *Even if there are not many old cases pending, but depending on the jurisdiction, a situation of mounting arrears is likely to arise if the rate of disposal is consistently lower than the rate of filing over a period of a year or more.*

The salaries and allowances of these ad-hoc judges would be at par with the Permanent Judge of the Concerned Court minus the pension and the term of these judges shall not be more than 2-3 years.

The Court further observed that 224A should be activated only after endeavors have been made to fill up the existing vacancies.

It would be interesting to see whether these guidelines iron out the differences between the executive and the judiciary and clear the roadblock for the judicial appointments.

[13] 2021 SCC Online SC 333

LEGAL NEWS AND UPDATES

- Hon'ble Justice Nuthalapati Venkata Ramana took oath as the 48th Chief Justice of India on 24th April 2021. He was appointed as a Permanent Judge of the Andhra Pradesh High Court on 27th June 2000, thereafter as the Chief Justice of Delhi High Court on 2nd September 2013 and subsequently elevated to the Apex Court on 17th February 2014. Justice Ramana will hold office till 26th August 2022.

- The Supreme Court appointed Senior Advocates Jaideep Gupta and Meenakshi Arora as the Amicus Curiae in the Suo Motu Case relating to the COVID-19 management in the country. Hon'ble Delhi High Court on the other hand appointed Senior Advocate Rajshekhar Rao as the Amicus Curiae in the case concerning COVID-19 situation in the National Capital.

- Justice AIS Cheema has been appointed as the Chairperson of the National Company Appellate Tribunal (NCLAT) on 18.04.2021.

- The three judge bench of the Hon'ble Supreme Court comprising of Justice Bobde, Justice Bopanna and Justice Ramasubramanian appointed Mr. Arun Bharadwaj and Mr. Sanjay Bansal as Special Judges to deal with and exclusively try the offences pertaining to coal block allocation matters.

- Hon'ble Justice Indu Malhotra demitted office on 12th March 2021. Justice Malhotra was the first woman lawyer to be directly elevated from the bar to the bench of the Apex Court.

- Hon'ble Justice Govind Mathur, who was elevated as a Judge of the Rajasthan High Court in 2004 retired as the Chief Justice of Allahabad High Court on 13th April 2021.

- Government of National Capital Territory of Delhi (Amendment) Act 2021, which enhances the powers of Lieutenant Governor of Delhi over the elected government of Delhi, has been notified by the Central Government with effect from 27th April 2021.

- The President of India on 4th April 2021, promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance 2021 to allow pre-packaged insolvency resolution process for corporate debtors classified as micro, small or medium enterprises under the Micro, Small and Medium Enterprises Development Act, 2006.

- Additionally, on the same day the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 was promulgated. The Ordinance dissolves the Airport Appellate Tribunal, Appellate Board under the Trade Marks Act, Film Certification Appellate Tribunal and the Authority for Advance Ruling under the Income Tax Act.

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