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Inside This Issue

Lexstone Insight:

The Hon'ble Court while deciding the Question of Limitation, has to read the contents of the Plaint wholly and not just a single point/para. Moreover, the contents of correspondence exchanged between the parties should also be taken into account.

LEGAL UPDATES

- Supreme Court settles the principles of limitation under Article 58 and Article 113 of the Limitation Act.

The Hon'ble Supreme Court (Headed by Justice A.M. Khanwilkar, Justice Dinesh Maheshwari & Justice Sanjiv Khanna) while deciding the question of law in ***Shakti Bhog Food Industries vs The Central Bank of India 2020 SCC online SC 482*** has extended its view to various provisions of law including provisions under Order VII Rule 11 of the Code of Civil Procedure, Article 58, 59, 104 and 113 of the Limitation Act.

The Hon'ble Supreme Court through the present Judgement made clear that if the plaint does not contain necessary averments relating to limitation, the same is liable to be rejected, and it is the duty of the person who files an application under Order VII Rule 11 to satisfy the Court that the plaint does not disclose how the same is within the Limitation period. The Hon'ble Supreme Court has further held that in order to examine the said question, it is incumbent on the part of the Court to verify the entire plaint while deciding the application under Order VII Rule 11. Further, the Court observed that Order VII Rule 12 mandates, where a plaint is to be rejected under Order VII Rule 11, the Court has to record the order to that effect with the reasons for such order.

The Hon'ble Supreme Court also observed the distinction between Article 58, 59, 104, and 113 of the Limitation Act, and held that Article 113 is distinct from the expressions used in other Articles in the First Division dealing with suits such as Article 58 (when the right to sue "***first***" accrues), Article 59 (when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded "***first***" become known to him).

The Hon'ble Court further in the judgment observed that the factum of the suit being barred by limitation, ordinarily, would be a mixed question of fact and that the exchange of letters or correspondence between the parties cannot be the basis to extend the period of limitation. But while deciding the captioned matter the Hon'ble Supreme Court went into the contents of the various letters exchanged within the parties and found that the same forms part of the Cause of Action and thus the present Suit filed by the Appellant is within Limitation.

: Rishi Vohra, Principal Associate

- Supreme Court guidelines to expedite the trial of cheque bounce cases.

The Constitutional Bench of the Supreme Court of India issued a series of guidelines on April 16th, 2021 to expedite the trial of cheque dishonour cases in accordance with Section 138 of the Negotiable Instruments ("NI") Act of 1881. The bench comprised of the then Chief Justice of India SA Bobde, Justices L Nageswara Rao, BR Gavai, AS Bopanna, and S Ravindra Bhat in the suo-moto case In Re Expeditious Trial of Cases Under Section 138 NI Act.

The guidelines issued by the Hon'ble Apex Court can be summarized as follows:

The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 NI Act, from Summary to Summons Trial.

An inquiry shall be conducted on receipt of complaints under Section 138 of the NI Act to arrive at sufficient grounds to proceed against the accused when such accused resides outside the territorial jurisdiction of the Court.

For the conduct of inquiry under Section 202 of the Code, the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to the examination of documents without insisting on the examination of witnesses.

That suitable amendments to be made to the Act for the provision of one trial against a person for multiple offences under Section 138 of the NI Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

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Supreme Court issued directions that Section 138 NI Act should be amended to allow one trial for multiple cases from a single transaction and steps should be taken to settle the disputes through mediation.

Judgments of the Hon'ble Court in **Adalat Prasad v Rooplal Jindal and others (2004) 7 SCC 338** and **Subramanium Sethuraman v State of Maharashtra (2004) 13 SCC 324** has been upheld.

Section 258 of the Code is not applicable to complaints under Section 138 of the N.I. Act.

The Hon'ble Apex Court further observed that the High Courts should identify the pending revisions arising out of complaints filed under Section 138 of the N.I Act and refer them to mediation at the earliest. The Courts before which appeals against judgments in complaints under Section 138 of the Act are pending should be directed to make an effort to settle the disputes through mediation.

: Sahil, Principal Associate

- HARERA instructs to sell flats/apartments only on a carpet area basis.

In order to curb the malpractices adopted by builders the Haryana Real Estate Regulatory Authority (HARERA) issued regulations for the sale of an apartment or a building in any real estate project on the basis of carpet area.

The regulations emerge as a progressive step in addition to the model Agreement to Sell provide in the Haryana Real Estate (Regulation and Development) Rules, 2017, which only stipulates the sale of an apartment based on carpet area.

HARERA has hinted at penal proceedings against the promoters/builders for violating the instructions.

Further, the HARERA has also made it succinctly clear that no conveyance deed of a real estate unit/apartment shall be registered except based on carpet area.

: Anuj Malhotra, Senior Associate

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This move is likely to be a boon for the innocent homebuyers, who used to fall into the traps of the builders and lose their hard-earned monies. However, a detailed analysis of the new regulations would be necessary to understand the on-ground implementation of the regulations.

- IBC (Amendment) Ordinance, 2021 introduces Pre-Package Insolvency for MSMEs.

The Ministry of Corporate Affairs (MCA) had set up a sub-committee of the Insolvency Law Committee (ILC) in June 2020 under the chairmanship of Dr. M.S. Sahoo, Chairperson Insolvency and Bankruptcy Board of India (IBBI) to explore the possibility of including what are called "pre-packs" under the current statutory framework of the Insolvency and Bankruptcy Code (IBC) while maintaining business continuity and thereby preserving asset value and jobs.

Finally, promulgated by the President on April 4, 2021, by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 upon being satisfied with the circumstances which rendered immediate action. The ordinance further amends the Insolvency and Bankruptcy Code, 2016 and provides for an efficient alternative insolvency resolution process for corporate persons classified as micro, small and medium enterprises ('MSME') under the Insolvency and Bankruptcy Code.

The ordinance has paved way for Pre-Packaged (*an agreement for the* resolution *of the debt of a distressed company through an agreement between* secured *creditors and investors instead of a public bidding process*) Insolvency Resolution Process for corporate persons classified as micro, small and medium enterprises ('MSME') by way of inserting CHAPTER III – A to the Code titled 'PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS' (PPIRP) further inserting Sections 54-A to 54-P to govern the entire PPIRP.

: Karan Valecha, Senior Associate

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PPIRP is certainly the need of the hour, however, under the present regime, insolvency professionals are still evolving the necessary expertise required over time, and as such application of pre-pack insolvency in India will require a much higher degree of expertise of insolvency professionals, as under such resolution methods, they have a much higher degree of control.

- Latest Amendments in Companies Act, 2013 by Ministry of Corporate Affairs (MCA)

With the dawn and beginning of the new financial year, i.e. from 01st April 2021 Ministry of Corporate Affairs (MCA) has notified certain amendments in the Companies Act, 2013 and rules made thereunder.

In the Union budget 2021, certain changes have been proposed in the company matters pursuant to which MCA notified certain amendments in the Companies Act, 2013 and its rules. Besides this, MCA has notified amendments in Schedule III of the Companies Act, 2013 and recently issued a circular regarding clarification on the spending of CSR funds.

Notified amendments and circulars issued by MCA are as follows:

A. Definition of "Small Company"

The Amendment in the definition of Small Company is effective from 01.04.2021. As per the revised definition, now the small company shall be "A company, other than a public company, which fulfils the criteria of paid-up capital of not more than 2 crores; and turnover as per last profit and loss account does not exceed 20 crores.

B. Provisions related to One Person Company (OPC)

In the case of One Person Company, the following are the amendments that have become effective from 01.04.2021:

- Earlier, only Person residing in India was eligible to incorporate the One Person Company. Now, Non-Resident Indians (NRIs) are also eligible to incorporate an OPC.
- For the purpose of setting up an OPC, the definition of "Resident in India" has been relaxed. Earlier, a person was considered as a resident in India if he stayed in India for a period of not less than 182 days during the immediately preceding financial year. Now the rule of 182 days has been relaxed to 120 days.
- Earlier, an OPC was mandatorily required to convert itself into a private or public company on exceeding the paid-up share capital or specified turnover. Now, this mandatory requirement is waived off.
- Earlier, an OPC cannot voluntarily convert itself into any other kind of company unless it fulfils the requisite condition. Now, an OPC can voluntarily convert itself into any type of company without meeting any of the aforesaid criteria.

C. Amendment in Schedule III of Companies Act, 2013

Certain amendments have been made in the rules under Schedule III of the Companies Act, 2013 to bring more transparency with the increased disclosures. The amendment shall apply to companies for the financial year commencing on or after 01st April 2021. Thus, the amendments shall take effect for the financial statement as of 31st March 2022.

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Changes and amendments in the Companies Act 2013 have paved a new way in the ease of doing business. An increase in the threshold of "small company" has put a lower compliance burden. Relaxation in the provisions of the "One Person Company" facilitates the ease of doing business. Amendment rules in Schedule III of the Companies Act have been introduced to provide more transparency with an increased number of disclosures and compliances in the financial statements and notes to the accounts. In a nutshell, the changes in the Companies Act are much needed and an effective step towards the development and ease of doing business.

D. Circular regarding clarification on the spending of CSR funds for setting up makeshift hospitals and temporary COVID Care facilities dated 22nd April 2021.

By circular no. 10/2020 dated 23.03.2020, MCA had clarified earlier that spending of CSR funds for COVID-19 is an eligible CSR activity. Now, MCA has further clarified that spending of CSR funds 'for setting up makeshift hospitals and temporary COVID Care facilities' is an eligible CSR activity under Schedule VII of Companies Act, 2013.

E. Amendment in Companies (Accounts) Rules, 2014 and Companies (Audit & Auditors) Rules, 2014.

MCA has issued a notification on 24.03.2020 regarding changes and amendments in the Companies (Accounts) Rules, 2014 and Companies (Audit & Auditor) Rules, 2014 in order to bring more transparency and accountability. The commencement date of the said notification was 01.04.2021. However, through another notification dated 01.04.2021, the date of commencement of certain amendments in the rules have been re-notified i.e. now they shall come into force from 01.04.2022.

: Akanksha Jain, Associate

- Directions of Delhi High Court for District Courts on the filings of recovery suits/cases.

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The electronic filing system has brought a change in the legal fora providing the Advocates an easier, accessible, and efficient way to file the matters.

The Hon'ble Chief Justice, of Delhi High Court on the recommendation of the Rules Committee under Section 123 of CPC, has issued the various practice directions in respect of the digital filing of Appeal/Petition/I.A./Reply/ Counter Claim/Affidavit, etc; digital signatures on the documents; online payments of court fees; preservation of original documents; electronic service to the other parties and more. For detailed directions click here

: Mohit Kumar Bansal, Associate

CLASSICAL JUDGMENTS

- **I. C. Golaknath & Ors Vs. State Of Punjab & Anrs. AIR 1967 SC 1643**

An Eleven Judges of the Supreme court reversed the position of law held in the ***Sankari Prasad v. Union of India*** wherein the Supreme court upheld the Power of the Parliament to amend any part of the Constitution, including which affects Fundamental Rights of citizens.

The question emerged before the Eleven Judges was whether the Fundamental Rights enshrined under the Constitution can be amended by the under the parliament powers or not? The Apex court held that laws made by the Parliament shall not be such that infringes and takes away the fundamental rights of the citizen which are provided by the Constitution of India.

This case was an important milestone in the Indian Judicial history that demonstrated the use of the "doctrine of prospective overruling". This landmark case also withheld the powers of the Parliament to curtail the Fundamental Rights as mentioned in the Constitution.

The ratio of the judgment was 6:5, the majority was favouring the petitioners. The CJI at that time and with other justices (J.C. Shah, S.M. Sikri, J.M. Shelat, C.A. Vaidiyalingam) wrote the majority opinion. Justice Hidayatullah agreed with CJI Subba Rao and therefore he wrote a separate opinion. Whereas Justices K.N. Wanchoo, Vishistha Bhargava, and G.K Mitter they all wrote single minority opinion and justices R.S. Bachawat & V. Ramaswami wrote separate minority opinions.

The bench observed that since 1950 the parliament had used Article 368 and had passed a number of legislations that had in one or another way have violated the fundamental rights under part III of the constitution. Therefore, the Apex court keeping in view the problem of fundamental rights and fearing that there can be a transfer of Democratic India into dictatorial India the majority said that the parliament has no right to amend the fundamental rights. These are fundamental rights and should be kept beyond the reach of parliamentary legislation. Therefore, to save the democracy from an autocratic action of the parliament the majority held that parliament cannot amend the fundamental rights enshrined under Part III of the Constitution of India the majority said that fundamental rights are the same as natural rights. These rights are important for the growth and development of a human being.

: Anuj Malhotra, Senior Associate

ARTICLES FOR PEER REVIEW

- Novation under the Indian Contract Act, 1872

An agreement enforceable by law is a contract[1]. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void[1]. a contract is entered into by the parties under coercion, threat, fraud, undue influence, etc. such a contract will be invalid.

In general connotation, **"novation"** means to replace with a new contract and the same obligations are performed by different parties. The concept of novation has been delineated under Section 62 of the Indian Contract Act, 1872. By virtue of Section 62, every contract can be novated, and novation can be effective only when there is a new contract and not a new agreement. Hence, mere agreement to substitute the existing contract will not be binding unless it has been accepted and executed mutually by all the parties in writing. Novel contractual obligations arise when parties novate a contract.

The process of novation starts with terminating the old contract and thereby engendering a new contract. It is an act substituting a new obligation or party in a contract in place of the old contract. Further, the newly substituted contract is mandated to be valid, enforceable, have a lawful consideration, and should be made by the mutual consent of the parties.

Essential ingredients of Novation are:

- Previous legal obligation;
- Parties concerned must agree to a new contract;
- The old contract must be terminated;
- Valid new contract.

In the case of ***Ramdayal v. Maji Devdiji***, it was observed by the Hon'ble Court that:

"Novation takes place by introducing new terms in the contract or by introducing new parties. A contract of novation requires a party to agree to extinguish or discharge his obligation or debt. Unless this has been accomplished there can be no novation. Therefore, the test is to know whether the parties intended to enter into a new contract between them or not."

Further, the mechanism of novation should take place before the expiry of the time of the performance of the original contract.

Novation can take place in the following manner:

- Where the obligation under a contract is replaced with a new one, and;
- Where a party is replaced by another party.

There is a concept of no novation as well wherein if the mandated conditions of novation are not satisfied, then it will be contemplated as no novation. In the case of ***Godan Namboothiripad v. Kerala Financial***, the Hon'ble High Court of Kerala observed that the essential features of a novation are the replacement or relinquishment of a right under the original contract by a new one and when these essential features are missing then, there will be no novation.

The intention of the parties is pivotal for a novation to take place. In the case of ***National Insurance Co. Ltd. v. Thirumalai Ammal And Ors.,*** the Hon'ble Court observed that substitution of one contract with another clearly depends upon the intention of the parties.

The concepts of rescission and alteration of a contract are different from novation. Rescission happens when the parties agree to cancel or terminate the contract in totality only after there has been a breach. Under alteration, the parties do not change and there is no substitution of a new contract, only certain terms, and conditions of the contract changes.

: Karishma Hans, Senior Associate

- Challenging an order passed by a Magistrate under Section 156(3) Cr.P.C. by way of revisional jurisdiction under Section 397 Cr.P.C.

When a crime is committed and the police receives information regarding the commission of a cognizable offence, the first thing which needs to be done as per law is, the police is duty-bound to register a First Information Report and then investigate the matter. However, there are circumstances when the police refuse to register FIR even after the commission of an offence that has duly been reported to the police. In such a scenario, a common man can approach the court and register a case under Section 156(3) of the Criminal Procedure Code (Cr.P.C) as per the procedure prescribed in law and after complying with the mandatory directions of the Hon'ble Supreme Court in ***Priyanka Srivastava Vs State of U.P*** reported in **(2015) 6 SCC 287**, wherein the court would then direct the police station concerned to investigate the matter. The idea behind the aforementioned section is noble, however over a period of time, it has appeared that the power has been misused by people in registering fake cases.

It may be noted here that the Hon'ble Delhi High Court in ***Nikhil Mehta and Anr. Vs Commissioner of Police & Ors.*** Reported in **2013 SCC OnLine Del 2283** has relied upon the observations of the Hon'ble Apex Court in ***Sakiri Vasu v. State of U.P.***, reported in **AIR 2008 SC 907**, and has held that before the filing of an application under Section 156(3) before the Magistrate, the person must exhaust all the alternative remedies provided under Section 154(1) and 154(3) Cr.P.C.

Now, the question arises what is the remedy available to the person aggrieved of the order passed under 156(3)? When an application filed under 156(3) Cr.P.C is rejected by the Magistrate the person aggrieved can file a revision application under 397 Cr.P.C and law is clear on this issue as it has been held by various courts in a catena of Judgments. This issue is no more *res integra*, and the same has been set at rest by the full bench of the Hon'ble High Court of Allahabad in ***Jagannath Verma and others Vs State of U.P*** and various other cases**.**

However, on the other hand, question arises that, when an application filed under 156(3) Cr.P.C is allowed by the Magistrate and direction has been given to the concerned Police Station to register FIR and investigate the matter, then what is the remedy available to the aggrieved person? and Whether a revision under Section 397 Cr.P.C is maintainable against that order?

This issue fell for consideration before a Division Bench of Hon'ble Bombay High Court in ***Avinash Vs State of Maharashtra*** reported in **2015 SCC OnLine Bom 5197** and the hon'ble division bench held that revision under section 397 Cr.P.C is maintainable against the order of the Magistrate allowing the 156(3) application.

Similarly, the Hon'ble Delhi High Court in ***Nishu Wadhwa Vs Siddharth Wadhwa*** reported in **2017 SCC OnLine Del 6444**, has held that revision under Section 397 Cr.P.C is maintainable against the order of the Magistrate allowing the 156(3) application and directing the concerned Police Station to register FIR.

The issue of whether an order passed under Section 156(3) of the Code would be amenable to the revisional jurisdiction has met with a myriad of responses from High Courts across the country. A Full Bench of the Allahabad High Court, while dealing with the said issue in a case reported in **2011 (2) ALJ 217** *in* ***Father Thomas v. State of U.P.*** had said that a prospective accused had no locus standi to challenge a direction for investigation under Section 156(3) Cr.P.C by filing a revision petition before cognizance or issuance of process against him. The Allahabad High Court decided that a revision petition against such an order directing registration of FIR under Section 156(3) Cr.P.C was not maintainable. The Full bench noted that the accused had a right to raise his defence only during the course of trial and even on the filing of a complaint, when the Magistrate proceeds to take cognizance, the prospective accused cannot intervene or raise his defence unless summons are issued. Thus, a direction to register FIR, in the view of the Allahabad High Court was not inherently revisable, being interlocutory in nature. Further, what the Court held was that if a Revision Application is held to be maintainable, then it would as good as conferring powers solely granted on the High Court under Section 482 of the Code or under Article 226/227 of the Constitution of India to the Sessions Court to quash the FIR.

Therefore, the question that whether a revision under 397 Cr.P.C is maintainable against the order passed by the Magistrate under 156(3) Cr.P.C allowing the application is maintainable or not remains unanswered as different conflicting views have been taken by the different Courts. The question that remains yet to be answered is whether an accused deserves a right before the Revisional Court challenging the order of the Magistrate when there is an absence of such right before the Magistrate and if the answer is in affirmative wouldn't it be equitable to grant such right at the time of hearing before the Magistrate to avoid multiplicity of proceedings.

However, the Hon'ble Supreme Court in ***State of Punjab Vs Davinder Pal Singh Bhullar*** reported in **(2011) 14 SCC 770** has categorically held that if initial action is not in consonance with law, all subsequent and consequential proceedings will fall through for the reason that illegality strikes at the root of the order, therefore, if any FIR has been registered pursuant to the order of the Magistrate under 156(3) Cr.P.C and if that order is set aside by the Revisional Court under Section 397 Cr.P.C, consequently the FIR will also set aside.

The Learned Additional Sessions Judge, Gurugram in Crl. Revision No. 133 of 2018 in ***Sarabjit Singh Vs Ramesh Kumar*** vide order dated 14.12.2018 allowed the revision filed against the order of the Magistrate directing registration of FIR under Section 156 (3) Cr.P.C which was upheld the Hon'ble Punjab and Haryana High Court in CRM-M-2521/2019 vide order dated 23.01.2019 (**upheld up to Hon'ble Supreme Court in SLP (Crl.) No. 5994/2019**).

Therefore, it has become necessary for the Hon'ble Apex Court to clear the cloud hanging over the maintainability of Revision Petition challenging the order of the Magistrate u/s 156(3) and also to resolve the necessary issues considering the right of the accused of a hearing as per the principles of Natural Justice.

: Sahil, Principal Associate

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