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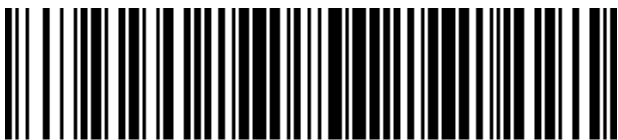
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Covid and Commercial Laws- A Regulatory Overhaul

Pratyush Mohanty

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ABSTRACT

This topic tries to interpret the impact of the current Covid Pandemic on the Indian Economy. As we all know that India is a developing country and the impact of Covid-19 has been very hard on India. Indian Economy is going through a very rough financial distress Phase although the government has been trying hard to lessen the impact on Indian Economy. Through this article I have tried to analyse the impact of the key legal decisions taken by the Indian government to safeguard its economy and to ease the impact of the current pandemic on the Indian Economy. First I tried to analyse the Force Majeure clause as clarified by NDMA of the Indian government. This stand gave a major relief to the all the corporate parties who were bound by some or the other contractual obligations. Next Point highlighted is the 3 months moratorium as granted by the RBI. This came as a big relief to all the individual as well as the institutional creditors as in times of cash crunch and liquidity problems this seemed a big relief for a period of 90 days. Next major decision taken was to put a halt on the FDI from the neighbouring countries as during such times it was necessary for the government to prevent the economy from opportunistic takeovers and then the next point highlighted in this paper is on the hardships being faced by the labourers or the migrant workers and laws that have been established to protect their rights in such times. The last issue that has been highlighted is regarding the limitation period as instructed by the Hon'ble Supreme court and its interpretation by various high courts along with its impact on the commercial sector.

INTRODUCTION

COVID-19 or CORONAVIRUS PANDEMIC has been declared as the worst period that this mankind will ever had to go through. Economically, mentally, financially this pandemic has been draining humans from all ends. And talking from the economic prospective this pandemic has completely disrupted the economic mechanism. As a consequence India's credit rating has been downgraded by the world- bank and other such credit rating agencies who have also staged India's growth rate at a three –decade low which is for the first time post 1991 liberalization. As per the projections by various economic advisors India is looking at negative growth in the current fiscal year and a huge financial boost is required to contradict the above said projections. Post the lockdown imposed within a month the unemployment rose to 26% from 6.5% in India during which an estimated of around 14 crores people lost their job and mostly in the urban areas. As per an estimate our economy was to lose about 32,000 crore per day during the first phase of the imposed lockdown. Though the government has announced various schemes and other financial remedies but their actual implementation is a question that needs to checked by seeing the ground reality. On the other hand the legal industry has also been moving all up and down by amending laws so as to ease the impact of COVID-19. Below 5 major legal impacts of COVID-19 that will drastically affect the corporate or the commercial world have been highlighted.

FORCE MAJEURE

The covid-19 Pandemic as defined by WHO (World Health Organisation) has brought the entire world to a standstill. The factories, industries, all primary and secondary sectors have been completely shut over a period of 45 days and the cost of which is being borne by all starting from the bottom line labourers to the Top line CEOs. As the commercial sector has been completely shut so it has also given rise to various legal disputes and one of them being concerned with the law of contracts.

As law of Contracts is an essential part in the corporate or the commercial world. As every aspect of the commercial world deals with law of contracts be it employment contracts in pertinence to salaries or wages or contract with sellers, buyers, other business entities or any third party deals, all of these can't be executed without the use of law of contracts.

Coming to the law of contracts which is applicable in India there is one major clause which is being highlighted at this present scenario i.e. Force Majeure which has been impliedly defined under the Section 56 of the Indian Contract Act. "Basically Force Majeure is the clause which would release one or both the parties from the liability to perform their part of the contract when their action is prevented by any event or circumstance which is beyond the control of the parties"¹. This clause can also be interpreted from the section 32 of the Indian Contract Act which talks about "Enforcement of the contracts contingent to the happening or not happening of any event."²

Force Majeure can also be understood through another concept which is called Doctrine of Frustration.

The applicability of the above mentioned clauses can be traced back to English Common Law as it was very rigid initially, a contract had to be performed despite any occurrence or non-occurrence of any contingent event upon which the contract was based or due to happening of any event to which the parties had no control, despite that the parties had to discharge their part of the contract. But things started to change post the Taylor v Caldwell landmark contract law case "where it was held that if certain contingent event happens or doesn't happen due to which the performance of the contract becomes impossible for the parties then the parties cannot be held liable under the English common law and can be lawfully discharged from their contractual obligations."³

¹ "Section 56 of the Indian Contract Act"

² "Section 32 of the Indian Contract Act"

³ "Taylor v Caldwell [1863] EWHC QB J1"

But if we try to trace the timeline of its applicability in India then in the case of Raja Dhruv v Raja Harmohinder Singh (1968) “ In this case agricultural lands were leased in undivided Punjab before partition for the purpose of cultivation, but such cultivation became impossible because of partition, then the lessee initiated action for refund of the paid rents , here the supreme court dismissed the claim of applicability of Force Majeure on two major grounds. First lease is not simply contractual rights as it is governed under the Transfer of Property Act,1872 and secondly this clause is not applicable to cases where no further performance is required.”⁴

If we go into the dictionary meaning of the above said term then according to Black’s Law Dictionary Force Majeure is a “superior force” whereas Collins dictionary defines it as “irresistible force or compulsion such as will excuse a party from performing his or her part of the contract”.

The next question which arises is that how far can the applicability of this particular clause of Force Majeure be used as there a complete blanket over its scope. As per the general definition of law Force Majeure can be available only if

- The contract under which the parties have obligation to perform their duties clearly mentions the Force Majeure clause
- And the Force Majeure clause covers the relevant unforeseen event which in this case is a Pandemic.

But in the light of recent cases which have come before the court further certain precedents can be obtained as in the case of Standard Retail Private Limited vs M/s G.S. Global Corp & Ors “the petition was filed before the Bombay high court under section 9 of the arbitration and conciliation act as the petitioner had sought for the termination of the contract in the view of the lockdown imposed by its respective central or state government and also for restraining the respondent bank for encashing or negotiating the letter of credit. But the court held that as per the guidelines issued by the government for the lockdown steel was covered under the essential commodities and there was no restriction on its movement. The court also refused to grant the ad-interim relief in respect of the letter of credit as the court considered it to be an independent transaction.”⁵

From the above judgment it can be interpreted that the term Force Majeure can’t be used as a blanket protection for non-performance by the parties of their contractual obligations.

⁴ “Raja Dhruv Dev Chand vs Harmohinder Singh & Anr 1968 AIR 1024, 1968 SCR (3) 339”

⁵ “ Standard Retail Pvt. Ltd vs Gs Global Corp And 3 Ors, COMMERCIAL ARBITRATION PETITION (L) NO. 404 OF 2020, IN THE HIGH COURT OF JUDICATURE at Bombay”

Then in another case of Halliburton offshore Services V. Vedanta Limited “ This petition was filed before the Delhi High Court in which Vedanta wanted to invoke the bank guarantees against Halliburton Offshore but the hon’ble high court held that lockdown because of Covid-19 is in nature of Force Majeure and it stopped Vedanta from further invoking bank guarantees.”⁶

Thus on reading of the above mentioned cases it can be clearly interpreted that the present situation of the Covid-19 Pandemic does constitute an impediment or impossibility or impracticability in performance of contract. But the question arises what if there is no scope of pandemic under force majeure under the contract or the contract is so rigidly drafted that the present pandemic situation can’t be read into it. In that case the party shall be held in breach of the contract as post that only one solution is left i.e. of renegotiating which generally negligible, unless the parties decide to consider the current pandemic situation which has resulted in lockdown and non – performance of contract.

But as we know all contracts are different in nature and law needs to be applied accordingly for instance just because there is certain delay in performance of the contract where time is not of the essence then in that case force Majeure can’t be claimed as the obligation can be fulfilled on a future date through mutual consent of the parties .

3 MONTHS MORATORIUM PERIOD GRANTED BY THE FINANCE MINISTRY.

As because of the lockdown imposed due to the global pandemic of Covid-19 due to which all sectors of the economy have come to a complete standstill. Due to this standstill there has been a complete shortage of cash revenue and MSME’s are to going through a lot of liquidity issues as there has been complete stop on the inflow. The impact on these can also be seen on the finance sector of the economy which is considered to be the backbone of any developing nation.

So in order to soften the overall impact of this Pandemic on the Finance Sector, the monetary policy committee (MPC) of the Reserve Bank of India decided to prepone its meeting which was originally scheduled for 31st March 2020 but it met on 24th April 2020 to carefully evaluate the current economic scenario.

After extensive discussions the RBI announced a moratorium for a period of 3 months starting from 1st March 2020 till 31st May 2020. But the clause 5 of the RBI statement though didn’t make it mandatory but it was said as a discretionary guideline. As per the IRAC (Income recognition and asset classification) Guidelines , RBI has a 3 step-process before an account is declared as NPA (Non-

⁶ “Halliburton offshore Services V. Vedanta Limited O.M.P. (I) (COMM) & I.A. 3697/2020”

Performing Asset) . On default of first 30 days, the borrower's account is classified as SMA-1 i.e. Special Mention Account -1 then on further default of 60 days it is classified as SMA-2 and then finally if the instalment is not paid for over a period of 90 days then it is classified as a NPA.

As the decision was made on a discretionary point of view so if the borrower is in a good financial position then he can pay his respective EMI with interest and opt out of the moratorium option but on the other hand if he opts for the moratorium then it would not only lead to downgrading the credit rating but further affect that borrower's risk classification. However the interest on the loan shall continue to accrue on the outstanding amount and it shall collectively become due after the expiry of deferment period.

After such issuance of guidelines by the RBI the first case which came up was before the Delhi High Court in the case of Anant Raj Ltd. V. Yes Bank “ In this case a question was raised whether an account which has been declared SMA-2 on 01.03.20 would be eligible to avail the moratorium period or not ? The high court then further interpreted the guidelines and held that RBI has said that an account which has been already classified as SMA-2 cannot further derail to an NPA and it will be continue to have the same status till the end of the moratorium period”.⁷

Then similarly another legal question was raised before the Bombay High Court in the case of Transcon Sky City Pvt Ltd. V ICICI Bank “ Here the question before the Bombay High Court was that whether the moratorium period of 90 days is excluded in computation of the 90 day period for the amounts fell due before 01-03-20 and which were unpaid and in default. But in this case the court held that the protection i.e.sought by the transcon will be applicable only to amounts due after 01.03.20”⁸ Another interesting controversy arose before the Delhi High Court in the Indiabulls Commercial Credit Ltd V SIDBI “ Here the Indiabulls challenged the demand of Small Industrial Development Bank of India for the month of April 2020. Here then the court considered that the moratorium is also

applicable to NBFC (Non Banking Financial Institutions) as there was no clarity issued by the RBI in the same matter”⁹

So from the above cases it can be clearly ascertained that although RBI had try to ease the impact of the Global Pandemic but its major drawback came in the form of guidelines issued as there was no

⁷ “ Anant Raj Ltd. V. Yes Bank W.P.(C) URGENT 5/2020 IN THE HIGH COURT OF DELHI “

⁸ “Transcon Sky City Pvt Ltd. V ICICI Bank IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION WRIT PETITION LD-VC NO. 28 OF 2020”

⁹ “Indiabulls Commercial Credit Ltd V SIDBI W.P.(C) 2955/2020 “

standing legal order and only certain guidelines issued which gave discretionary powers to individual institutions and that lead to the rise of legal disputes and now post the judgements the borrowers are happy as it has eased their burden through the correct interpretation of RBI circulars by the courts but it would be interesting to see whether the Financial Institutions challenge the orders and if not then how do they cope up with it . But here the RBI as well as the Financial Institutions should also ensure that such moratorium doesn't become a shield for wilful defaulters to escape from legal obligations. As taking the current scenario the courts have acted through a pragmatic approach in which they tried to find a solution to the economic as well as the financial difficulties of the borrowers but at the same time they shouldn't completely ignore the other side i.e. the financial institutions which have been seeing a downfall over past few financial years.

CURB ON THE HOSTILE TAKEOVER ATTEMPT BY FOREIGN ENTITIES THROUGH AMENDMENT IN THE FDI POLICY.

As we all know that the present Pandemic of Covid-19 originated from the Wuhan province in China in the month of November 2019 and started spreading worldwide and got its feet across the world by the month of March 2020. By then the curve across china has started to flatten out and by the first week of April normalcy had returned to the Chinese Economy. Industries, factories and even the retail sector had started to open up, and on the contrary the entire world was under Lockdown with industries, factories everything going up for a toss. So once the Chinese economy got back on its track opportunist investors saw this lockdown period as an golden opportunity for expanding their branches across the globe and attempted at increasing their stakes overseas and in India it was targeted by foreign investors through the FDI policy i.e. Foreign Direct Investment.

So it was the foremost duty of the Indian government to safeguard the interests of its economy and to prevent it from any opportunistic takeover by any foreign entity. This was possible only through amending the FDI policies.

As per the existing clauses of the FDI Policy an entity which is non-resident of India could invest in India except in those sectors or activities which are strictly prohibited by the government. However if any citizen or any company which is incorporated in Bangladesh can invest only through the government route and similar clause applies to any citizen or company incorporated in Pakistan and the sectors which are prohibited are majorly defence, space, atomic energy and etc.

But as per the amendments under para 3.1.1 of the FDI Consolidated Policy of 2017

(a) any foreign entity or non-resident can invest in India as per the FDI Policy however if the entity is of such a country which shares any land boundary with India or where the beneficial owner is situated in or by default is a citizen of such country residing in any other country then such investment can be done only through government route.

(b) And if there is any change in the beneficial ownership of any existing or future FDI entity in India who happens to be a falling within the above restriction then that also needs to go through the government route.

Through this decision the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry has tried to safeguard the interests of the Indian Economy and thus preventing the MSME's as well as the Big Ventures from any opportunistic takeovers.

IMPACT OF THE COVID LOCKDOWN ON LABOURERS AND STRANDED MIGRANT WORKERS.

As we know that India is a developing country and here majority of the workforce is engaged in the unorganized sector where they are not entitled to any benefits such as medical assistance, educational help, or house rent or any such facilities. Majority of them are not even permanent employees with their respective organizations which further deteriorates their position to enforce any legal right as constituted by the government.

Since 24th March 2020 when our Hon'ble Prime Minister Narendra Modi announced the entire country wide lockdown, all the factories and industries went into complete shutdown leaving the fate and future of all labourers in vain.

As per the census report of the year 2011 the total number of internal migrants in India are around 45.36 crores and as per the latest report of 2017 around 65 million inter-state migrants are there in India and around 33 percent of these are daily-wage workers in un-organized sector.

Post the announcement of Lockdown the future of these labourers are completely uncertain following which a petition was filed before the supreme court in which "the petitioner had requested the court to issue any order or direction as it may deem fit to the respective state governments or the central government to ensure minimum wages for all the stranded or migrant labourers so as to help them to combat them this pandemic or else they would be pushed down to the BPL (Below Poverty line)"¹⁰

¹⁰ "Harsh Mander v. Union of India, WP (Civil) Diary No(s). 10801/2020"

However the central Home Ministry has directed all the employers to pay entire wages to all their workers during the period of Lockdown but no specific guidelines has been issued as to till when the said lockdown would last and till how much period the employers will have to pay their workers despite no revenue generation and as per the Notification of MHA dated 30th April on which the entire country was divided into 3 zones i.e. Red, Orange and Green where it was said that activities could start with certain restrictions in orange and green zones and in red zone it was completely barred. So on this also the question rose as it would be discriminative for industries falling under red zone to not generate any revenue and still pay the wages whereas the scenario started getting different under orange and green zones? Another Question also rose as to what would be status of workers who reside in red zone but were working in industries under the orange or green zone, are the employers also liable to pay them?

However to ensure the sustainability of every such labourers the supreme court through its order dated on 31-03-2020 “Had directed the Government to ensure that migrant workers have access to basic amenities and medical assistance so as to sustain their livelihood during this period of lockdown”

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As per the existing legislations in relation to labour laws in India , it appears that it is quite insufficient as when it comes to the status of such Migrant workers but despite that there are certain provisions to safeguard the interests of such workers such as THE UNORGANIZED WORKERS’ SOCIAL SECURITY ACT 2008.

This act was enacted specifically to protect the interests of the unorganized sector and to ensure social security and welfare of workers under such sector of the economy. However to avail the benefits under the said act the workers had to register them under section 10(7) where the workers had to submit an application to their respective district administration which would on receipt of such application would issue an identity card with a UIN i.e. unique identification number. Once registered all the workers are entitled to any benefits which the central government formulates for the benefit of the unorganized sector. However the major hindrance that workers face in India is that they get themselves registered in their home-state and migrate to another state for work hence they become ineligible to avail the benefits of the PDS (Public Distribution System).

Apart from this there are various other acts also which have been enacted to protect the interests of the migrant workers such as The inter-state Migrant workmen Act, The Contract labour act, etc.

¹¹ “Alakh Alok Srivastava v. Union of India, 2020 SCC OnLine SC 345”

However post the lockdown the government has announced various financial packages to ease the impact of Covid-19 upon the economy and specially for that specific section of the society which is unable to sustain itself due to the Lockdown.

Through one such measure the government had directed for usage of the BOCW welfare fund which is the Building and other construction workers welfare fund and is collected through 1-2% cess levied by the states on the construction establishments under the BOCW welfare cess.

And recently in the year 2018 the Supreme Court clarified the status regarding the Implementation of the BOCW fund. Here the Supreme Court suo-moto took the cognizance regarding the ignorance over the plight of construction workers.

“The Supreme Court under its investigation found that the states have completely ignored the section 62 of the BOCW act and have not framed any rules in accordance with the above said section, then it also found that the absence of registration of construction establishments led to difficulty in reaching of the benefits to the construction workers and the supreme court also found that there has been no progress in making of state building & construction workers welfare board. During the course of this case the court also took the cognizance of its order or the directive that it had issued in the year 2008 where the government found sheer ignorance of its order and completely unnoticed lying of 3000 crores of the above said fund. On further the court issued four major directions on 19-03-2018

- To put in place and improve the efficiency of the registration mechanism
- To establish and strengthen the machinery for collection of the cess
- Directed the concerned ministry to further make a scheme under the above act which would benefit all the stakeholders
- And further it also directed for the conduct of social audit of the scheme.”¹²

Therefore it becomes the moral obligation of the Supreme Court to take some extraordinary decisions so as to ease the impact of the blanket of uncertainties which lies hanging upon the head of millions of such stranded and migrant workers as their lives are hanging under our crippling economy.

APPLICABILITY OF THE LIMITATIONS AS ORDERED BY THE HON’BLE COURTS.

As we all know that the last few months of the year 2020 have been filled with extreme difficulty and hardships for all of us as the battle against Covid-19 goes on. During this period there has been

¹² “National Campaign Committee for Central Legislation on Construction Labour v. Union of India, (2018) 5 SCC 607”

a certain blockade on the working of the judiciary which has severely affected all the sectors of the economy.

As we know that the on march 23rd the Hon'ble supreme court while taking into consideration of the prevailing conditions of Covid-19 and to avoid the rushing of lawyers/litigants into the courts for filing of suits or petitions the court decided to extend the period of limitation on all proceedings irrespective of the limitation prescribed under the general law or special laws w.e.f from 15th March. The supreme court passed the following order under the power given to it by Article 141 and 142 of the constitution of India.

But on 6th May the Hon'ble Court extended the applicability of the 23rd march order until further orders. The 6th May order came in the light that as the initial period was till 2 weeks post the lockdown is lifted but as during the lockdown most of the litigants have travelled back to their hometowns and it won't be possible for them to come back to their workplace before a certain normalcy is visible in the existing Covid situation.

In *Rategain Travel Technologies v Ujjwal Suri*¹³ the Hon'ble Delhi high court relied upon the may 06 order of the Supreme Court and stated that the parties who had a dispute under the arbitration act have a period of two weeks post the lockdown is lifted to approach the court for any requirements, however it is still unclear that whether the said judgement can be relied upon on other cases concerning the arbitration and negotiable instruments act.

Separately in another case of *Settu S/o.Govindaraj v State*¹⁴ the Madras High Court interpreted the 23rd March and 6th May order and said that these are not applicable to matters concerning CRPC i.e. Code of Criminal Procedure. But 3 days after the said order the High Court in the matter of *S. Kasi v State*¹⁵ the Hon'ble Chief Justice said that the supreme court order of 23rd march and 6th may are applicable to all the proceedings under section 167 of the CRPC and also referred the same to a larger bench.

As this pandemic has halted various legal disputes despite which the judiciary is trying its level best to hear and resolve the urgent matters through the available technology but the same can't be made applicable in the extreme remote areas due to which there has been a certain amount of hindrance which is being faced the commercial sector.

¹³ O.M.P. No. 14 of 2020, decided on May 11, 2020.

¹⁴ CRL OP(MD). No.5291 of 2020, decided on May 8, 2020.

¹⁵ CRL OP(MD). No.5296 of 2020, decided on May 11, 2020.

CONCLUSION

As per the statement of former RBI Governor Raghuram Rajan this Covid Pandemic “may be the greatest emergency India would have faced since independence”. The above article tried to address the various implications of the legal decisions on the commerce and corporate world. As many business are looking for a prolonged period of making losses and there lies a complete uncertainty over their survival also as i.e. the major task in the present scenario. With Covid Cases climbing more than 70000 as per the latest reports on 12th may and with certain traces of community transmission there doesn't seem to any near end for this pandemic and with companies and big giants being shut for already a period of around 2 months with no big relief in regards to costs being incurred during this lockdown, many companies are on the verge of filing of bankruptcy which would further increase the unemployment rate which has already seen a great spike.

Through the above said amendments in the laws the government has tried to ease the economic impact like through the force majeure clause the parties in a commercial contract have got certain relief, whereas through the moratorium period granted millions of individuals have been exempted from immediate payment obligations in the period of such cash crunch and this also came as a big relief to the corporate sector as their immediate EMI obligation was set aside for a period of 90 days. Then the next change that has been highlighted in the above article is in regarding to the applicability of the limitations act as the extension as laid down by the Hon'ble Supreme court through the two different orders on 23rd march and 6th may , the judiciary has kind of been halted from working efficiently as only urgent matters are being taken to be heard through the online platforms and this has laid down a severe impact on the commercial sectors as this decision is also applicable to the matters under arbitration.

Although projection is that the current economy is looking for a V shaped recovery but there is a forecast of a prolonged recession. As per the recommendation of the confederation of Indian Industry three major steps need to be taken i.e. direct cash transfer to the JAN DHAN accounts, relief packages for the MSME's and gradual lifting of lockdown as to not let the economy downgrade any further.

Therefore while the entire world battles against this global pandemic, the economy can't be completely side-lined as to fight this battle sustainability of the economy is a major factor and finally as the saying goes “life will never be the same” post this pandemic.

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