



# XIV EDITION



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### **CELEBRATING PRIDE!**

Pride month is a celebratory period for commemorating the struggle for the rights and recognition of the LGBTQIA+ community. By observing the month of June, Pride Month, in actuality, seeks to celebrate the recognition laid down by the Clinton Administration to the LGBTQIA+ community in the year 1999.



Courtesy: Free Press Journal

From revolutionary fights, parades, and instances that paved the way for the recognition and acknowledgement of same-sex couples and transgender people as no different than heterosexual beings, Pride Month celebrates a distinguished past of the community.

The United States of America (USA) was one of the first countries to acknowledge the necessity to safeguard and protect the rights of the LGBTQIA+ community (which included the right to health and the right to marry). However, the work undertaken by the community to achieve this feat was neither short-lived nor easy.

In fact, it may also be needful to note that the members of the community, inside and outside the USA, continue with their endeavours to attain basic human rights, including the right to live with dignity.

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Did you know that the members of the LGBTQIA+ are not allowed to donate blood in many countries across the globe?

In India, the struggle for the recognition of the rights of the community achieved a momentous milestone when the Hon'ble Supreme Court of India, in the case of Navtej Singh Johar vs. Union of India & Ors., read down Section 377 of the Indian Penal Code (repealed by the Bharatiya Nyaya Sanhita, 2023, which came into force on July 1, 2024), wherein the provision in question penalised the acts of homosexuality. In its landmark judgment, the Hon'ble Court held that,

"History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by <u>Article 14</u>. It infringed the Fundamental Right to non-discrimination under <u>Article 15</u>, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21."

However, while this battle was won with full pomp and show, the work of the community to attain the right to marry a person of choice continues with full gusto.

What's in a name? That which we call a rose by any other name would smell as sweet...

--William Shakespeare (Romeo & Juliett)



This Pride Month, thus, Legacy Law Offices LLP celebrates the rich history of the community and seeks to bring certain wellknown facts, not only about the endeavours of the community but also about the issues being faced by them across the globe.

### Did you Know?

- India is a rich country with a vast history filled with many known visionaries promoting belonging to the or LGBTQIA+ community. From Shikhandi, a known trans from the Mahabharata reign, who changed the entire fate of the war for the Pandavas, to the carvings made by Khujarao in the Temples of Madhya Pradesh, the origin of the community in ancient India is undeniable and apparent.
- The first Pride Parade in India was organized in 1999 by Mr Pawan Dhawall, an Activist from Kolkata. To protect themselves from criminal prosecution, instead of using the name "Pride Parade" or a "Pride March," the activists used the name "Friendship Walk" and scheduled the 'walk' to occur on the 30th anniversary of the Stonewall Riots.
- Taiwan became the first Asian Country to give recognition to the LGBTQIA+ community, by legalizing same-sex marriages in the year 2019. The only known Asian Countries to recognize this integral right, other than Taiwan, include Nepal and Thailand.
- Across the globe, same-sex marriages are recognized by merely 34 countries.

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- Even in the USA, very few states allow the LGBTQIA+ community to adopt and raise children, while 5 states allow agencies to legally refuse the adoption rights of the community.
- In various countries across the Globe, including various States in the USA, the condemned 'gay conversion therapy' is still prevalent and even legal.
- The father of Artificial Intelligence, Alan Turing, was a closeted homosexual and was penalized with chemical castration, even after he played an instrumental role in facilitating Britain's victory in the Second World War through enigma.
- While India has come a long way in recognizing the rights of the transgender community, the first person of the community to be elected in the Indian legislative domain were Shabnam Mausi, wherein they were elected as a Member of the Legislative Assembly in 2000 from the Shahdol District in Madhya Pradesh.
- Even after years of continuous struggles, the LGBTQIA+ community continues to discrimination in terms face of employment, medical care, living with dignity, crimes of hate, and even in achieving places of residence. The plight faced by the community is a major cause for large numbers of members to be living in the closet in fear of hate and segregation from their families and loved ones. A major causal effect of such tyranny is also the high rate of suicidal rates amongst the community.



### **SNIPPETS: LEGACY RECAP**

Legacy Law Offices LLP continues on its path to success and growth in terms of the awards and the recognition/appointments of its lawyers in various prestigious positions. A brief insight into our achievements during the previous quarter has been enumerated below.

### **FIDIC Contracts Committee**

**Mr Gagan Anand** has been appointed as a Member of the FIDIC Contracts Committee on account of his distinguished contribution to the field of contracts and Public-Private-Partnership Projects (PPP Projects). As a matter of additional **pride**, Mr Gagan Anand has become the sole Indian to have become a member of the Committee. Through this appointment, Mr Anand has become the Contracts Committee Liaison for Task Group 18 and will be aiding the FIDIC Contracts Committee in formulating the basis of PPP Contracts.

### Law Firm Awards 2024

Legacy Law Offices LLP has been awarded with the Law Firm Awards 2024 in the categories of Infrastructure and Project Finance. The Awards organized by the Indian Business Law Journal are based on the nominations made by the clients and peers of the Law Firm and commemorate the achievements of Legacy and its lawyers in the sector.

We wish to extend our gratitude to the clients and peers of Legacy Law Offices LLP for their continuous support and trust which made this achievement possible.

"Legacy has been our organisation's go-to law firm for resolving various projects undertaken by the company as well as the matters pertaining to dispute resolution and arbitration," said Saurabh Khanna, president of Intercontinental Consultants & Technocrats. "They have provided diverse legal services including legal advisory, due diligence, contract management, and extensive litigation and arbitration services, thereby safeguarding our rights and ensuring favourable results."



"Additionally, the firm has a diverse team of individuals holding expertise in different sectors and fields that enables them to provide best-inclass legal services in response to different legal issues encountered within different sectors and industries of operation."

#### FIDIC Contract Users's Conference 2024

On May 29 and 30, 2024, Mr. Gagan Anand formed part of the Panel for Discussion on the FIDIC Golden Principles at the FIDIC Contract Users' Conference. The Panel Discussion was unique in that all attendees were given a free hand to engage in the discussion with the Members of the Panel and provide insights into the usage and importance of the Golden Principles in their jurisdiction.



### JUSTICE FOR DEMOCRACY: SUPREME COURT RULES AGAINST ELECTORAL BONDS

### Background

On February 15, 2024, the Hon'ble Supreme Court of India delivered a landmark judgment, Electoral Bond declaring the Scheme unconstitutional [1]. This decision, rendered by a Constitutional Bench comprising the Hon'ble Chief Justice of India, Dr Dhananjaya Y Chandrachud, Hon'ble Mr Justice Sanjiv Khanna, Hon'ble Mr Justice B.R. Gavai, Hon'ble Mr Justice J.B. Pardiwala, and Hon'ble Mr Justice Manoj Misra, was rooted in the principle of the right to information under Article 19(1) (a) of the Indian Constitution. This ruling not only marks a significant stride transparency towards ensuring and accountability in political funding but also sets a crucial precedent in the legal landscape of India.

### The Electoral Bonds System

Notified by the Ministry of Finance on January 2, 2018, the Electoral Bond Scheme allowed donations to political parties through the purchase of bonds from the State Bank of India (SBI). These bonds, akin to promissory notes, could be bought by donors without disclosing their identity, thus making donations anonymous. Political parties could encash these bonds through designated bank accounts.

The scheme was born amidst substantial controversy.

Critics argued that it not only facilitated corruption but also backdoor lobbying and quid pro quo arrangements, thereby undermining the democratic process by obfuscating the sources of political funding. This critique highlights the potential for misuse and the need for more transparent and accountable systems of political funding.

### Legal Challenges and Constitutional Questions

The Association for Democratic Reforms (ADR) filed a writ petition in 2017, challenging the constitutional validity of the scheme. This led to a flurry of cases, including opposition from the Election Commission of India, which argued that the scheme compromised transparency in political financing.

The Hon'ble Supreme Court had to address two pivotal questions:

- 1. Did the Electoral Bond Scheme and the amendments to the Representation of People Act, Companies Act, and Income Tax Act violate the Right to Information under Article 19(1)(a) of the Constitution?
- 2. Did the allowance of unlimited corporate funding to political parties infringe on the principle of free and fair elections under Article 14 of the Constitution?

[1] Association for Democratic Reforms & Anr. vs Union of India & Ors., W.P. (C) No. 880 of 2017.

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### Supreme Court Verdict

### Violation of Right to Information:

The Court's verdict was clear: the Electoral Bond Scheme infringed upon the voters' right to information. The scheme's provision for anonymous donations created a veil of opacity, hindering voters' ability to know the source of political funding. This lack of transparency directly affected their electoral choices and right to vote. The Court underscored that the right to information is a facet of the freedom of speech and expression, a crucial element for fostering a participatory democracy.

The argument that the scheme was a measure to curb black money was found unconvincing. The Court highlighted that such a justification did not align with the reasonable restrictions under Article 19(2). Furthermore, the scheme failed the proportionality test, which assesses whether the infringement of a fundamental right is justified. The Court proposed alternatives like the Electoral Trust, which mandates transparency in donations, to achieve objective without the same violating fundamental rights.

#### Corporate Funding and Free Elections:

Addressing the amendments to the Companies Act, the Court noted that allowing unlimited contributions from both profit-making and loss-making companies was arbitrary. Such provisions gave undue influence to corporations over the political process, violating the principle of "one person, one vote." The Court asserted that equating corporate contributions with individual was manifestly arbitrary donations and detrimental to electoral fairness and political equality.

### **Directions from the Court**

In its directive, the Hon'ble Supreme Court ordered:

- 1. The cessation of the issuance of electoral bonds by SBI.
- 2.SBI to disclose details of all electoral bonds issued and encashed since April 12, 2019, including the names of purchasers and recipient political parties.
- 3. The Election Commission of India will publish this information on its official website by March 13, 2024.
- 4. The return of any valid but unencashed electoral bonds to the purchasers.

### Conclusion

The Hon'ble Supreme Court's decision to strike down the Electoral Bond Scheme is monumental. It reaffirms the essential right to information and underscores the need for transparency in political funding. This ruling is a significant step towards ensuring free and fair elections, fortifying the democratic fabric of India by holding political parties accountable and promoting electoral integrity.

### About the Author

**Mr Aamir Zafar Khan** is the Associate Partner in the Dispute Resolution Practice Team in the Delhi Office of Legacy. With over 8 years of experience in handling disputes across a variety of sectors, Mr Khan has attained a pristine reputation as an emerging lawyer in energy and electricity law practice areas.



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### SNIPPETS: INDIA IN 90 DAYS

## Judgments from the Supreme Court of India

The Hon'ble Supreme Court of India, in the previous quarter, passed a number of Landmark Judgments, excerpts from a few of which have been reproduced below:

- In the recent case of Chief Engineer (NH) PWD (Roads) vs. M/S BSC & C and C JV, S.L.P. (C) No. 10544/2024, the Hon'ble Court upheld the provisions under Section 29 of Arbitration and Conciliation Act, 1996, by holding that the High Courts, in the absence of original civil jurisdiction, cannot extend the time limit for passing of the arbitral award.
- In the case of Rajesh Kumar Vs Anand Kumar & Ors. (Civil Appeal No. 7840 Of 2023), the Hon'ble Court held that specific performance may be refused if the suit was not filed immediately after the breach of contract, irrespective of the fact that the suit may be within the limitation period. The Court also held that "A plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness.... A third party having no personal knowledge about the transaction cannot give evidence about the readiness and willingness."

### India-Europe Free Trade Agreements

Near March 11, 2024, India became a signatory to momentous FTAs with 4 European countries, including Norway, Switzerland, Iceland and Liechtenstein. The FTAs will lead to an investment of approximately USD 100 billion in the Country amongst other benefits.

### New Criminal Justice System

On July 1, 2024, the new and reformed laws relating to crime came into force in the country. The laws included the following:

- Bharatiya Nyaya Sanhita, 2023 (to replace the Indian Penal Code, 1860);
- Bharatiya Nagrik Suraksha Sanhita, 2023 (to replace the Code of Criminal Procedure, 1973); and
- Bharatiya Sakshya Adhiniyam, 2023 (to replace the Indian Evidence Act, 1872).

While enacting the laws, the Legislature specified that the laws would bring muchneeded reforms in the criminal justice system of laws and would further diminish the Colonial footprint on the Indian laws.

Amongst the various amendments brought in by way of the new laws, one of the notable features is the provision providing for the inclusion of electronic and digital evidence in the definition of 'document' under the New Evidence Act.

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### CONCURRENT DELAYS IN INFRASTRUCTURE PROJECTS & THE INDIAN CONTRACT ACT, 1872

The article was first published on Mondaq on June 6, 2024.

"Delay" in infrastructure projects has become the norm, whereas timely completion of the project has become the exception. During the execution of an infrastructure project, the parties may encounter several events which delay the execution and completion of the Project.

Delay in completion of projects brings with itself a host of questions left to be determined by contract administrators, courts and tribunals. At its core, lies the question - who is responsible for the delay? & consequences thereof!

If the delay is occasioned by any act of the Employer ("Employer's Delay Event"), the Contractor will be entitled to an extension of time and/or compensation for such extended period of work whereas if the delay is attributable to the Contractor ("Contractor's Delay Event"), the Employer is entitled to inter alia recover delay damages (which is usually in the form of liquidated damages).

However, it is often seen that such delay events at the instance of either party do not occur in isolation and at different times. They are often concurrent in nature. The Indian Contract Act, 1872 ("Contract Act") does not define the term 'Concurrent Delays'. However, the SCL Delay and Disruption Protocol, 2nd Edition [1] ("SCL Protocol") provides that "True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time." For instance, a Contract provides that encumbrance-free land is to be handed over by the Employer within 30 days from its execution. Within the same time frame of 30 days, the Contractor is required to prepare its layout design and drawings and submit the same with the Employer. Without land, there cannot be commencement of construction works. At the same time, without layout design drawings also. there and cannot be commencement of construction works. Both parties delay the performance of their obligations by 30 days from the due date. Both delay events are critical in nature since they affect the critical path of the project. ('Illustration')

In the above Illustration, land handover is a promise made by the Employer, after which the Contractor can commence the works. However, the commencement of works is also dependent upon the performance of the Contractor's obligation to prepare and submit its layout design and drawings. Failure of either party affects the critical path of the project and results in delay.

The Contract Act is the substantive law governing contracts in India. It is an exhaustive code governing the rights and liabilities of parties arising from their contractual relations.



Section 54 of the Act, which applies with full vigour to the issue of concurrent delays, provides that in a contract consisting of reciprocal promises (1st promise and 2nd promise), such that the 2nd promise cannot be performed unless the 1st promise is performed, and the promisor of 1st promise delays such performance, such a promisor cannot claim the performance of the 2nd promise and must make compensation to the other party for the loss suffered by it due to non-performance of 1st promise.

Although, what is contemplated by Section 54 is the consequence of non-performance of the 1st promise by its promisor, however, the basic public policy principle enshrined under Section 54 is based on the latin maxim *nullus commodum capere de sua injuria propria* i.e. no one can derive advantage from his own wrong. The party defaulting in performing the 1st promise cannot seek performance of the 2nd promise, because such a defaulting party is the cause for non-performance of the 2nd promise.

Apropos, the 1st promise in the above Illustration consists of two elements to be performed by both parties i.e. land handover and submission of layout drawings and designs and the 2nd promise was commencement and completion of works to be done by the Contractor. Naturally, neither party can complain against the other on account of delay in performance of the 2nd promise since they have themselves failed to perform their own respective parts of the 1st promise. Thus, an anomalous situation is created whereby the parties are at a deadlock insofar as treatment of the delayed period is concerned. This is where the Act leaves much to be desired. There is presently no provision which effectively deals with the nuances of the issues emerging from the concept of concurrent delays. Suitable provisions ought to be introduced in the Contract Act which may provide a mechanism to determine the entitlement of the parties for extension of time, compensation and delay damages. Since autonomy of the parties to determine and provide for such provisions is pivotal, therefore any such provisions in the Contract Act may be made subject to any agreement between the parties. However, sans any contractual provisions, it would be ideal for the parties to refer to and rely upon the Contract Act for dealing with such issues.

In this regard, reference may be made to the SCL Protocol which deals with the issue of concurrent delays in detail. It provides that "Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due." In the same breath, the SCL Protocol also provides that in cases of concurrent delays, compensation can only be paid if the Contractor "is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those additional costs."

#### **Extension of Time**

Essentially, what the SCL Protocol provides is that the Contractor's Delay does not to absolve the Employer from its liability to grant EOT on account of Employer's Delay.



This, as per the SCL Protocol itself, is based on the English Law principal namely the 'prevention principle' (which precludes the Employer from taking advantage of the non-fulfilment of a condition, the performance of which the Employer has hindered).

This 'prevention principle', as it applies to India, stands codified inter alia in sections 51 to 55 of the Contract Act.

Section 51 provides that a promisor is not bound to perform its part, unless the promisor of the reciprocal promise is ready and willing to perform its part. Section 52 of the Contract Act provides the Order of performance of reciprocal promises and obligates the parties to follow the contractually mandated order and in absence thereof, they are required to be performed in that order which the nature of the transaction requires. Section 53 entitles the party, which is prevented by the other party from performing its obligations, to rescind the contract and seek compensation from the other party. Section 54 deals with the effect of default as to that promise which should be performed (first), in contract consisting of reciprocal promises. Whereas section 55 deals with the failure to perform within the time so fixed and other alike incidental issues.

Thus, unlike the SCL Protocol, there is no absolute proposition under the Contract Act that in each case of Employer's Delay Event, the Contractor is eligible for an extension of time irrespective of the Contractor's Delay Event. Rather, the facts of each case have to be analyzed in the context of Sections 51 to 55 as well as other provisions governing performance of contractual obligations under the Contract Act. For instance, in the above Illustration, what could be argued on behalf of the Employer is that since the Contractor failed to submit its layout drawings and designs thereby failing to show its readiness and willingness to perform, the Employer, in terms of Section 51, is not obligated to ensure handing over of land. Consequently, a claim for even EOT would not be maintainable on account of the Employer's Delay Event.

Thus, grant of EOT in cases of concurrent delays would be a matter of determination by the contract administrator, court or tribunal after considering the facts and circumstances of each case and no straight jacket formula can be said to be applicable.

### **Delay Damages**

A natural consequence of the project getting delayed due to Contractor's Delay Event is the simultaneous imposition of delay damages by the Employer. The delay damages are usually in the form of Liquidated Damages recoverable by the Employer. Normally, when an EOT is granted by the Employer, delay damages cannot be imposed.

The SCL Protocol provides that once EOT is granted by the Employer, Delay damages cannot be imposed for such extended period.

The position under the Contract Act may be interpreted to be slightly different since under Section 55, at the time of accepting belated performance, the Employer is entitled to indicate that it intends to impose delay damages. Section 55 read with Section 63 of the Contract Act clearly empowers the Employer to reserve its right to recover delay damages despite granting EOT.

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However, without indicating such intention, at the time of granting EOT, the Employer would not be entitled to recover delay damages.

Normally, when an EOT is granted by the Employer, it is on account of Employer's Delay Events and no delay damages can be imposed once EOT is granted since the Employer virtually accepts its shortcomings and remedies the situation by granting EOT. However, a situation may arise where the Employer grants an extension, however, at the same time, it also imposes delay damages, keeping in view the Contractor's Delay Events. There is no absolute bar under the Contract Act and such a situation will be governed by the facts and circumstances of each case as well as the contract between the parties.

### Compensation

Section 73 of the Contract Act provides for 'Compensation for loss or damage caused by breach of contract'. The party claiming compensation has to establish that the contract has been broken by the other side and as a consequence thereof, the claimant has suffered such loss or damage, which is a natural and usual consequence of such a breach, or which the parties knew at the time of making the contract, to be the likely result of such breach. It specifically excludes indirect and remote losses and provides that the Court has to take into consideration the mitigate measures to be adopted by the Claimant in minimizing the effect of such breach.

Thus, for the Contractor to claim compensation under section 73, it has to prove that the loss or damage suffered by the Contractor is a direct and natural result of the Employer's Delay Event.

The words 'party who suffers by such breach is entitled to receive' used in section 73 along with the words 'from the party who has broken the contract' gives a clear legislative indication that the loss or damage suffered should solely be accountable to the breach being complained of. However, at the same time it also cannot have any nexus with the Contractor's Delay Events.

When the loss or damage can also be traced to the Contractor's own breach, notwithstanding the Employer's breach, a claim under section 73 would not be maintainable unless the Contractor is able to segregate the loss or damage arising out of the Employer's breach from that of the Contractor's breach. To this extent, the position under the Contract Act seems to be in consonance with the SCL Protocol which also disentitles the Contractor from claiming compensation on account of Employer's Delay Event which runes concurrently with the Contractor's Delay Event unless the Contractor is able to segregate its compensation claim on account of the losses suffered or costs incurred due to the Employer's Delay Event from the losses and costs incurred by it on account of the Contractor's Delay Event.

### Conclusion

Keeping in view the exponential rise in infrastructure projects, there is a need to provide certainty to the parties keeping in view the variety of circumstances which may arise during the execution of a project.



Although the abovementioned provisions of the Indian Contract Act of 1872 may be referred to in order to deal with the issue of concurrent delays, it is always advisable for parties to contemplate and incorporate the procedure to be followed while dealing with the issue of concurrent delays and the method to be adopted for assessing its impact. While doing so, the parties must also agree to a contemporaneous evaluation of the EOT claims as and when the delay event triggers and adversely affects the works. In doing so, provisions regarding the maintenance of proper project records on a day-to-day basis may go a long way in assisting the project administrator in assessing the delay event and EOT claims and save valuable costs and efforts by the parties in attempting to resolve the disputes through dispute resolution mechanisms.

#### **End-Notes**

1.SCL\_Delay\_Protocol\_2nd\_Edition\_Final.pdf < Delay and Disruption Protocol | Society of Construction Law UK (scl.org.uk) >.

### About the Authors

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The expertise held by Ms Fatma is impeccable and vast.

"She knows the subject and is good at litigation."

-- Benchmark Litigation



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