STUDY MATERIAL

PROFESSIONAL PROGRAMME

MULTIDISCIPLINARY CASE STUDIES

MODULE 3

PAPER 8

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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Instructions to Students

Students may please note that the Case laws/Studies are indicative only. For detailed understanding of respective subjects, it is advised to refer to amendments related to Regulations/ Rules/Act/Circular/ Notifications etc. The student are advised to study the orders relating to the subjects under the syllabus, by different authorities/judiciaries including Supreme Court, High Court, NCLT, NCLAT, CCI, Income Tax authorities etc.

PROFESSIONAL PROGRAMME
Module 3
Paper 8
Multidisciplinary Case Studies (Max Marks 100)

SYLLABUS

Objective

To test the students in their theoretical, practical and problem solving abilities.

Case studies mainly on the following areas:

Detailed Contents

1. Corporate Laws including Company Law
2. Securities Laws
3. FEMA and other Economic and Business Legislations
4. Insolvency Law
5. Competition Law
6. Business Strategy and Management
7. Interpretation of Law
8. Governance Issues

PROFESSIONAL PROGRAMME
MULTIDISCIPLINARY CASE STUDIES

CONTENTS

1

CORPORATE LAWS INCLUDING COMPANY LAW

26/03/2021	**TATA Consultancy Services Ltd (Appellant)** **vs.** **CYRUS Investments Pvt Ltd (Respondent)**	**Supreme Court of India** **Civil Appeal No.440 - 441 0f 2020 with connected appeals**

Companies Act, 2013- section 242- oppression and mismanagement- removal of chairman- minority group alleges acts of oppression and mismanagement- NCLT dismissed the petition- NCLAT allowed the appeal of the minority group- Whether correct- Held, No.

Brief facts:

This is the final match between Tata sons and SP group in the fight in which CPM was removed from the Chairman post. NCLT upheld the action taken by Tata sons while, NCLAT on appeal, turned down the decision of the NCLT. Both the groups i.e., Tata and Tata trust companies on one hand and SP Group on the other hand challenged the decision of NCLAT. In total there were 15 Civil Appeals, 14 of which are on Tata's side, assailing the Order of NCLAT in entirety. The remaining appeal is filed by the opposite SP group, seeking more reliefs than what had been granted by the Tribunal.

Decision: Tata Sons appeals are allowed. SP group appeals are dismissed.

Reason:

The first question of; aw arising for consideration is whether the formation of opinion by the Appellate Tribunal that the company's affairs have been or are being conducted in a manner prejudicial and oppressive to some members and that the facts otherwise justify the winding up of the company on just and equitable ground, is in tune with the well settled principles and parameters, especially in the light of the fact that the findings of NCLT on facts were not individually and specifically overturned by the Appellate Tribunal ?

Ans: But all these arguments lose sight of the nature of the company that Tata Sons is. As we have indicated elsewhere, Tata Sons is a principal investment holding Company, of which the majority shareholding is with philanthropic Trusts. The majority shareholders are not individuals or corporate entities having deep pockets into which the dividends find their way if the Company does well and declares dividends. The dividends that the Trusts get are to find their way eventually to the fulfilment of charitable purposes.

Therefore, NCLAT should have raised the most fundamental question whether it would be equitable to wind up the Company and thereby starve to death those charitable Trusts, especially on the basis of uncharitable allegations of oppressive and prejudicial conduct. Therefore, the finding of NCLAT that the facts otherwise justify the winding up of the Company under the just and equitable clause, is completely flawed.

The second question of law arising for consideration is as to whether the reliefs granted, and directions issued by NCLAT including the reinstatement of CPM into the Board of Tata Sons and other Tata Companies are in consonance with (i) the pleadings made, (ii) the reliefs sought and (iii) the powers available under Sub-Section (2) of Section 242.

Ans: As we have seen already, the original motive of the complainant companies, was to restrain Tata Sons from removing CPM as Director. Subsequently, there was a climb down and the complainant companies sought what they termed as "reinstatement" of a representative of the complainant companies. Thereafter, it was modulated into a cry for proportionate representation on the Board.

In other words, the purpose of an order both under the English Law and under the Indian Law, irrespective of whether the regime is one of "oppressive conduct" or "unfairly prejudicial conduct" or a mere "prejudicial conduct", is to bring to an end the matters complained of by providing a solution. The object cannot be to provide a remedy worse than the disease. The object should be to put an end to the matters complained of

and not to put an end to the company itself, forsaking the interests of other stakeholders. It is relevant to point out that once upon a time, the provisions for relief against oppression and mismanagement were construed as weapons in the armoury of the shareholders, which when brandished in terrorem, were more potent than when actually used to strike with. While such a position is certainly not desirable, they cannot today be taken to the other extreme where the tail can wag the dog.

The Tribunal should always keep in mind the purpose for which remedies are made available under these provisions, before granting relief or issuing directions. It is on the touchstone of the objective behind these provisions that the correctness of the four reliefs granted by the Tribunal should be tested. If so done, it will be clear that NCLAT could not have granted the reliefs of (i) reinstatement of CPM (ii) restriction on the right to invoke Article 75 (iii) restraining RNT and the Nominee Directors from taking decisions in advance and (iv) setting aside the conversion of Tata Sons into a private company.

The third question of law to be considered is as to whether NCLAT could have, in law, muted the power of the company under Article 75 of the Articles of Association, to demand any member to transfer his shares, by injuncting the company from exercising the rights under the Article, even while refusing to set aside the Article.

Ans: It was contended that Article 75 was repugnant to Sections 235 and 236 of the Companies Act, 2013. We do not know how these provisions would apply. Section 235 deals with a scheme or contract involving transfer of shares in a Company called the transferor company, to another called the transferee company. Similarly, Section 236 deals with a case where an acquirer acquired or a person acting in concert with such acquirer becomes the registered holder of 90% of the equity share capital of the Company, by virtue of amalgamation, share exchange, conversion of securities etc. These provisions have no relevance to the case on hand.

Even the contention revolving around Section 58(2) is wholly unsustainable, as Section 58(2) deals with securities or other interests of any member of a Public Company. Therefore, the order of NCLAT tinkering with the power available under Article 75 of the Articles of Association is wholly unsustainable. It is needless to point out that if the relief granted by NCLAT itself is contrary to law, the prayer of the S.P. Group in their Appeal C.A. No.1802 of 2020 asking for more, is nothing but a request for aggravating the illegality.

The fourth question of law to be considered is whether the characterisation by the Tribunal, of the affirmative voting rights available under Article 121 to the Directors nominated by the Trusts in terms of Article 104B, as oppressive and prejudicial, is justified especially after the challenge to these Articles have been given up expressly and whether the Tribunal could have granted a direction to RNT and the Nominee directors virtually nullifying the effect of these Articles.

Ans: Affirmative voting rights for the nominees of institutions which hold majority of shares in companies have always been accepted as a global norm. As a matter of fact, the affirmative voting rights conferred by Article 121 of the Articles of Association, confers only a limited right upon the Directors appointed by the Trusts under Article 104B. Article 121 speaks only about the manner in which matters before any meeting of the Board shall be decided. If it is a General Meeting of Tata Sons, the representatives of the two Trusts will actually have a greater say as the Trusts have 66% of shares in Tata Sons. Therefore, if we apply Section 152(2) strictly, the Trusts which own 66% of the paid-up capital of Tata Sons will be entitled to pack the Board with their own men as Directors. But under Article 104B, only a minimum guarantee is provided to the two Trusts, by ensuring that the Trusts will have at least 1/3 rd of the Directors, as nominated by them so long as they hold 40% in the aggregate of the paid-up share capital.

Under Section 10(1) of the Companies Act, 2013, the Articles of Association bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member. However, this is subject to the provisions of the Act. Article 94 of the Articles of Association of Tata Sons is in tune with Section 47(1)(b), as it says that upon a poll, the voting rights of every member, whether present in person or by proxy shall be in proportion to his share of the paid-up capital of the company. Therefore, a shareholder or a group of shareholders who constitute majority, can always seek to be in the driving seat by reserving affirmative voting rights. So long as these special rights are incorporated in the Articles of Association and so

long as they are not in contravention of any of the provisions of the Act, the same cannot be attacked on these grounds.

Coming to the argument revolving around the duty of a Director, it is necessary that we balance the duty of a Director, under Section 166(2) to act in the best interests of the company, its employees, the shareholders, the community and the protection of environment, with the duties of a Director nominated by an Institution including a public charitable trust. They have fiduciary duty towards 2 companies, one of which is the shareholder who nominated them and the other, is the company to whose Board they are nominated. If this is understood, there will be no confusion about the validity of the affirmative voting rights. What is ordained under Section 166(2) is a combination of private interest and public interest. But what is required of a Director nominated by a charitable Trust is pure, unadulterated public interest. Therefore, there is nothing abhorring about the validity of the affirmative voting rights.

The claim for proportionate representation can also be looked at from another angle. RNT who was holding the mantle as the Chairman of Tata Sons for a period of 21 years from 1991 to 2012, actually conceded a more than proportionate share to the S.P. Group by nominating CPM as his successor. Accordingly, CPM was also crowned as Executive Deputy Chairman on 16.3.2012 and as Chairman later. CPM continued as Executive Chairman till he set his own house on fire in 2016. If the company's affairs have been or are being conducted in a manner oppressive or prejudicial to the interests of the S.P. group, we wonder how a representative of the S.P. Group holding a little over 18% of the share capital could have moved up to the topmost position within a period of six years of his induction. Therefore, we are of the considered view that the claim for proportionate representation on the Board is neither statutorily or contractually sustainable nor factually justified. 19.49 Placing reliance upon section 163 of the Companies Act, 2013, it was contended that proportionate representation is statutorily recognised. But this argument is completely misconceived. Section 163 of the 2013 Act corresponds to section 265 of the 1956 Act. It enables a company to provide in their Articles of Association, for the appointment of not less than two thirds of the total number of Directors in accordance with the principle of proportionate representation by means of a single transferable vote. First of all, proportionate representation by means of a single transferable vote, is not the same as representation on the Board for a group of minority shareholders, in proportion to the percentage of shareholding they have. It is a system where the voters exercise their franchise by ranking several candidates of their choice, with first preference, second preference etc. Moreover, it is only an enabling provision, and it is up to the company to make a provision for the same in their Articles, if they so choose. There is no statutory compulsion to incorporate such a provision.

Therefore, the fourth question of law is also to be answered in favour of the Tata group and the claim in the cross appeal relating to affirmative voting rights and proportionate representation are liable to be rejected.

The 5th question of law formulated for consideration is as to whether the reconversion of Tata Sons from a public company into a private company, required the necessary approval under section 14 of the Companies Act, 2013 or at least an action under section 43A(4) of the Companies Act, 1956 during the period from 2000 (when Act 53 of 2000 came into force) to 2013 (when the 2013 Act was enacted) as held by NCLAT ?

Ans: Interestingly, it is not disputed by anyone that today Tata Sons satisfy the parameters of section 2(68) of the 2013 Act. The dispute raised by the S.P. Group and accepted by NCLAT is only with regard to the procedure followed for reconversion. NCLAT was of the opinion that Tata Sons ought to have followed the procedure prescribed in Section 14(1)(b) read with Subsections (2) and (3) of Section 14 of the Companies Act, 2013 for getting an amended certificate of incorporation. NCLAT was surprised (quite surprisingly) that Tata Sons remained silent for more than 13 years from 2000 to 2013 without taking steps for reconversion in terms of Section 43A(4) of the 1956 Act. While on the one hand, NCLAT took note of the "lethargy" on the part of Tata Sons in taking action for reconversion, NCLAT, on the other hand also took adverse notice of the speed with which they swung into action after the dismissal of the complaint by NCLT.

But what NCLAT failed to see was that Tata sons did not become a public company by choice but became one by operation of law. Therefore, we do not know how such a company should also be asked to follow the rigors

of Section 14(1)(b) of the 2013 Act. As a matter of fact, Section 14(1) does not ipso facto deal with the issue of conversion of private company into a public company or vice versa. Primarily, Section 14(1) deals with the issue of alteration of Articles of Association of the company. Incidentally, Section 14(1) also deals with the alteration of Articles "having the effect of such conversion".

By virtue of the proviso to subsection(1A) of Section 43A of the 1956 Act, Tata Sons continued to have articles that covered the matters specified in subclauses (a), (b) and (c) of Clause(iii) of Subsection(1) of Section 3 of the 1956 Act. Though it did not have the additional stipulation introduced by Act 53 of 2000, namely the stipulation relating to acceptance of deposits from public, this additional requirement disappeared in the 2013 Act. Therefore, Tata Sons wanted a mere amendment of the Certificate of Incorporation, which is not something that is covered by Section 14 of the 2013 Act. NCLAT mixed up the attempt of Tata Sons to have the Certificate of Incorporation amended, with an attempt to have the Articles of Association amended. Since Tata Sons satisfied the criteria prescribed in Section 2(68) of the 2013 Act, they applied to the Registrar of companies for amendment of the certificate. The certificate is a mere recognition of the status of the company, and it does not by itself create one.

The only provision that survived after 13.12.2000 was Sub-section (2A) of Section 43A. It survived till 30012019 until the whole of the 1956 Act was repealed. There are two aspects to Sub section (2A). The first is that the very concept of "deemed to be public company" was washed out under Act 53 of 2000. The second aspect is the prescription of certain formalities to remove the remnants of the past. What was omitted to be done by Tata Sons from 2000 to 2013 was only the second aspect of Subsection (2A), for which Section 465 of the 2013 Act did not stand as an impediment. Section 43A(2A) continued to be in force till 3001 2019 and hence the procedure adopted by Tata Sons and the RoC in July/August 2018 when section 43A(2A) was still available, was perfectly in order.

Therefore, question of law No. 5 is accordingly answered in favour of Tata Sons and as a consequence, all the observations made against the appellants and the Registrar of companies in Paragraphs 181, 186 and 187 (iv) of the impugned judgment are set aside.

Thus, in fine, all the questions of law are liable to be answered in favour of the appellants Tata group and the appeals filed by the Tata Group are liable to be allowed and the appeal filed by S.P. Group is liable to be dismissed.

15/03/2021	**Arun Kumar Jagatramka (Appellant)** **vs.** **Jindal Steel And Power Ltd and Anr (Respondent)**	**Supreme Court of India**

Section 230 of the Companies Act,2013 read with section 29A of the Insolvency and Bankruptcy Code, 2016- CIRP - person ineligible to submit a resolution plan- can he submit a scheme of compromise and arrangement- Held, No. Law explained.

Brief facts:

By its judgment dated 24 October 2019, the National Company Law Appellate Tribunal held that a person who is ineligible under Section 29A of the Insolvency and Bankruptcy Code, 2016 to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013. The judgment was rendered in an appeal filed by Jindal Steel and Power Limited, an unsecured creditor of the corporate debtor, Gujarat NRE Coke Limited. The appeal was preferred against an order passed by the National Company Law Tribunal8 in an application9 under Sections 230 to 232 of the Act of 2013, preferred by Mr Arun Kumar Jagatramka, who is a promoter of GNCL. The NCLT had allowed the application and issued directions for convening a meeting of the shareholders and creditors. In its decision dated 24 October 2019, the NCLAT reversed this decision and allowed the appeal by JSPL. The decision of the NCLAT dated 24 October 2019 is challenged in the appeal before this Court.

Decision: Appeal dismissed.

Reason:

Having narrated the submissions advanced by both sides, we now turn to the legal position and the interplay between the proposal of a scheme of compromise and arrangement under Section 230 of the Act of 2013 and liquidation proceedings initiated under Chapter III of the IBC.

Section 29A of the IBC was introduced with effect from 23 November 2017 by Act 8 of 2018. The birth of the provision is an event attributable to the experience which was gained from the actual working of the provisions of the statute since it was published in the Gazette of India on 28 May 2016. The provisions of the IBC were progressively brought into force thereafter.

The purpose of the ineligibility under Section 29A is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution. Section 29A, it must be noted, encompasses not only conduct in relation to the corporate debtor but in relation to other companies as well. This is evident from clause (c) ("an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as a nonperforming asset"), and clauses (e), (f), (g), (h) and (i) which have widened the net beyond the conduct in relation to the corporate debtor.

The prohibition which has been enacted under Section 29A has extended, as noted above, to Chapter III while being incorporated in the proviso to Section 35(1)(f). Under the Liquidation Process Regulations, Chapter VI deals with the realization of assets.

The statutory scheme underlying the IBC and the legislative history of its linkage with Section 230 of the Act of 2013, in the context of a company which is in liquidation, has important consequences for the outcome of the controversy in the present case. The first point is that a liquidation under Chapter III of the IBC follows upon the entire gamut of proceedings contemplated under that statute. The second point to be noted is that one of the modes of revival in the course of the liquidation process is envisaged in the enabling provisions of Section 230 of the Act of 2013, to which recourse can be taken by the liquidator appointed under Section 34 of the IBC. The third point is that the statutorily contemplated activities of the liquidator do not cease while inviting a scheme of compromise or arrangement under Section 230. The appointment of the liquidator in an IBC liquidation is provided in Section 34 and their duties are specified in Section 35. In taking recourse to the provisions of Section 230 of the Act of 2013, the liquidator appointed under the IBC is , above all, to attempt a revival of the corporate debtor so as to save it from the prospect of a corporate death. The consequence of the approval of the scheme of revival or compromise, and its sanction thereafter by the Tribunal under Sub-section (6), is that the scheme attains a binding character upon stakeholders including the liquidator who has been appointed under the IBC.

In this backdrop, it is difficult to accept the submission that Section 230 of the Act of 2013 is a standalone provision which has no connect with the provisions of the IBC. Undoubtedly, Section 230 of the Act of 2013 is wider in its ambit in the sense that it is not confined only to a company in liquidation or to corporate debtor which is being wound up under Chapter III of the IBC. Obviously, therefore, the rigors of the IBC will not apply to proceedings under Section 230 of the Act of 2013 where the scheme of compromise or arrangement proposed is in relation to an entity which is not the subject of a proceeding under the IBC.

But, when, as in the present case, the process of invoking the provisions of Section 230 of the Act of 2013 traces its origin or, as it may be described, the trigger to the liquidation proceedings which have been initiated under the IBC, it becomes necessary to read both sets of provisions in harmony. A harmonious construction between the two statutes would ensure that while on the one hand a scheme of compromise or arrangement under Section 230 is being pursued, this takes place in a manner which is consistent with the underlying principles of the IBC because the scheme is proposed in respect of an entity which is undergoing liquidation under Chapter III of the IBC. As such, the company has to be protected from its management and a corporate death. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor as a 'going concern', are somehow permitted to propose a compromise or arrangement under Section 230 of the Act of 2013.

The IBC has made a provision for ineligibility under Section 29A which operates during the course of the CIRP. A similar provision is engrafted in Section 35(1)(f) which forms a part of the liquidation provisions contained in Chapter III as well. In the context of the statutory linkage provided by the provisions of Section 230 of the Act of 2013 with Chapter III of the IBC, where a scheme is proposed of a company which is in liquidation under the IBC, it would be far-fetched to hold that the ineligibilities which attach under Section 35(1)(f) read with Section 29A would not apply when Section 230 is sought to be invoked. Such an interpretation would result in defeating the provisions of the IBC and must be eschewed.

An argument has also been advanced by the appellants and the petitioners that attaching the ineligibilities under Section 29A and Section 35(1)(f) of the IBC to a scheme of compromise and arrangement under Section 230 of the Act of 2013 would be violative of Article 14 of the Constitution as the appellant would be "deemed ineligible" to submit a proposal under Section 230 of the Act of 2013. We find no merit in this contention. As explained above, the stages of submitting a resolution plan, selling assets of a company in liquidation, and selling the company as a going concern during liquidation, all indicate that the promoter or those in the management of the company must not be allowed a back-door entry in the company and are hence, ineligible to participate during these stages. Proposing a scheme of compromise or arrangement under Section 230 of the Act of 2013, while the company is undergoing liquidation under the provisions of the IBC lies in a similar continuum. Thus, the prohibitions that apply in the former situations must naturally also attach to the latter to ensure that like situations are treated equally.

Based on the above analysis, we find that the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC. As such, Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B(1), is also constitutionally valid. For the above reasons, we have come to the conclusion that there is no merit in the appeals and the writ petition. The civil appeals and writ petition are accordingly dismissed.

19/04/2021	**Brillio Technologies Pvt. Ltd (Appellant)** **vs.** **Registrar Of Companies & Anr (Respondent)**	**NCLAT** **Company Appeal (AT) No. 293 of 2019**

Companies Act, 2013- section 66- reduction of share capital- scheme envisaged reduction of capital by way of reducing promoter shares- NCLT rejected the petition whether correct- Held, Yes.

Brief facts:

The Board of Directors of the Company resolved to reduce the equity share capital, by reducing 89,52,637/-equity shares of Re. 1/-each from non- promoter equity shareholders for a consideration of Rs. 5,61,33,034/- being 89,52,637/- equity shares of Re. 1/- each with premium of Rs. 5.27/- per share paid out of the Securities Premium Account. The Security Premium Account of Rs. 15,24,81,955/- shall accordingly be reduced to Rs. 10,53,01,558/-. Thereafter, an Extraordinary General Meeting was held on 04.02.2019, wherein by special resolution duly passed in accordance Section 66 (1) read with Section 114 of the Act, the 100% members present, voted in favour of the resolution for reduction of share capital of the Company.

NCLT observed that no objections have been received from creditors and consent affidavits on their behalf has not been produced. Ld. Tribunal held that as per Section 52 (2) of the Act, Security Premium Account may be used only for the purpose specifically provided under Section 52 (2) of the Act. Selective reduction in equity share capital to a particular group involving non-promoter shareholders and bringing the company as a wholly owned subsidiary of its current holding company and also return excess of capital to them. This is an arrangement between the company and shareholders or a class of them and hence, it is not covered under Section 66 of the Act. However, the case may be covered under Sections 230-232 of the Act. Wherein compromise or arrangement

between the Company and its creditors or any class of them or between a Company and its members or any class of them is permissible. Therefore, the Company failed to make out any case under Section 66 of the Act and thus, the petition is dismissed with the liberty to file appropriate application as per extant provisions of the Act.

Decision: Appeal allowed.

Reason:

The grounds of dismissal of the Petition and issues raised by the Respondents were answered by the Appellate Tribunal as under: Ground (i): No proper genuine reason has been given for reduction of share capital.

Ans: The non-promoter shareholders requested the company to provide them an opportunity to dispose of their shareholding in the petitioner company. (Please see Pg. 500 to 509 Vol. 3 of Appeal Paper Book). There is no law that a Company can reduce its capital only to reduce any kind of accumulated loss. With the aforesaid it cannot be said that the Appellant Company has not given any genuine reason for reduction of share capital.

Ground (ii): Consent affidavit from creditors has not been obtained.

Ans: Admittedly, after service of notice, no representation has been received from the creditors within three months. Therefore, as per proviso to Section 66(2) of the Act, it shall be presumed that they have no objection to the reduction. Thus, we are of the view that the observation of Ld. Tribunal in Para 11 of the impugned order "It is observed that while objections have not been received from creditors, neither has any consent affidavits on their behalf been produced, with regard to reduction of share capital." is erroneous.

Ground (iii): Security Premium Account cannot be utilized for making payment to the non-promoter shareholders.

Ans: The argument of the Regional Director (NR) is that the "Securities Premium Account" can be applied only for the specific four purposes mentioned in Section 78(2) of the Act and for no other purpose. In my view, the interpretation advanced by learned counsel for the Regional Director (NR) is not correct. If the interpretation as advanced by the Regional Director (NR) is accepted, it would render otiose the provisions contained in sub-Section (1) of Section 78. The entire Section 78 has to be read as a whole and all the sub Sections of this Section have to be read and interpreted so as to give a meaningful interpretation.

(After discussing various judgements) In the light of the aforesaid Judgments, we are of the view that the SPA can be utilized for making payment to non-promoter shareholders. We are unable to convince with the submissions made by Ld. Counsel for the Respondents that the amount laying the SPA can be applied by the company, only for the purposes which are specifically provided in sub-Section 2 of Section 52 of the Act and for no other purpose.

Ground (iv): Selective reduction of shareholders is not permissible.

Ans: It is clear, that majority shareholders have decided to reduce the share capital. Normally, decision of the majority is to prevail. It is also their right to decide the manner in which the shareholding is to be reduced and, in the process, they can decide to target a particular group (of course it is to be seen that this is not with mala fide and unfair motive which aspect is discussed hereinafter). Thus, such a step cannot be treated as buying back the shares and the provisions of Section 77A of the Act would not be attracted. Similarly, there is no question of following provisions of Section 391 of the Act, although in the instant case even the procedure prescribed therein has been substantially followed. Likewise, provisions of Article 300A of the Constitution of India would not be attracted.

In the light of aforesaid proposition of law, we can safely hold that selective reduction is permissible if the non-promoter shareholders are being paid fair value of their shares. In the present case, none of the non-promoter shareholders of the Company have raised objection about the valuation of their shares. It is nobody's case that the proposed reduction is unfair or inequitable. It is also made clear that the proposed reduction is for whole non-promoter shareholders of the company.

Ground (v): The Petition for reduction of capital under Section 66 of the Act, is not maintainable. However, it may be filed under Section 230-232 of the Act.

Ans: With the aforesaid citation, we hold that Section 66 of the Companies Act, 2013 makes provision for reduction of share capital simpliciter without it being part of any scheme of compromise and arrangement. The option of buyback of shares as provided in Section 68 of the Act, is less beneficial for the shareholders who have requested the exit opportunity.

Admittedly, there is a provision in Article 45 and 47 of the Article of Association that the company may by special resolution reduced its capital and, in the EGM, held on 04.02.2019 a special resolution was duly passed for reduction of share capital. The Appellant Company has pleaded the genuine reason for reduction of share capital and has secured the rights of 171 non- promoter shareholders who are not traceable.

With the aforesaid we are of the view that the Tribunal has erroneously held that the Application for reduction of share is not maintainable under Section 66 of the Act, consent affidavits from the creditors is mandatory for reduction of share capital, SPA cannot be utilized for making payment to non- promoter shareholders, consent from 171 non-promoter shareholders who are not traceable is required, selective reduction of shareholders of non-promoter shareholders is not permissible. The Tribunal has dismissed the Application on untenable grounds. Therefore, we hereby set aside the impugned order passed by the Tribunal and the reduction of equity share capital resolved by the special resolution set out in Paragraph 11 of the Petition is hereby confirmed.

21/05/2021	**Vijaya Sai Poultries Pvt. Ltd (Appellant) vs. Vemulapalli Sai Pramella & Ors (Respondent)**	**NCLAT** **Company Appeal (AT) No. 296 of 2019**

Companies Act, 2013- oppression and financial mismanagement- forensic audit of the accounts ordered by NCLT- whether tenable- Held, No.

Brief Facts:

The Appellant had filed this Appeal against the order passed by National Company Law Tribunal, Amaravati Bench, whereby the Adjudicating Authority allowed the application filed by Petitioners (Respondents herein) and directed that forensic audit be conducted of the Appellant Company since 31.03.2004.

Decision: Appeal allowed.

Reason:

After hearing the Ld. Counsel for the parties, we have considered their rival submissions and examined the record. In the application, there is a vague allegation of fabricating, share transfer deeds and the resignation letter.

In the application, it is not mentioned that in what manner Mr. Naveen Kishore siphoned off the money from the Appellant Company and when has he purchased 50 properties in the name of his family members out of the funds of the Company. Even in the application it is not mentioned as to how and when the Respondents got the knowledge that Mr. Naveen Kishore has indulged in fraudulent sale transactions. Further, in support of said allegations the Respondents have not place any document on record.

The Hon'ble Supreme Court in the case of Karanti Associates Pvt. Ltd. & Ors. Vs. Masood Ahmad Khan & Ors. (2010) 9 SCC 496 after considering many earlier judgments summarized the principles on the recording of reasons. In light of the principles laid down by the Hon'ble Supreme Court, we have examined the Impugned Order which is reproduced in Para4 of this order.

There is nothing in the order to justify the directions for conducting forensic audit of accounts of the Company that too for more than 15 years. The Adjudicating Authority must record reasons in support of conclusions. However, in the impugned order no reasons are mentioned for the said directions. The order is cryptic and non-

speaking; therefore, it cannot be sustained. With the aforesaid discussions, we have no option but to set aside the Impugned Order.

19/11/2020	**Kaledonia Jute & Fibres Pvt Ltd (Appellant)** **Vs.** **Axis Nirman & Industries & Ors (Respondent)**	**Supreme Court of India** **Civil Appeal No. 3735 of 2020[@ SLP(C) No.5452 of 2020) S.A.Bobde, A.S. Bopanna & V. Ramasubramanian, JJ.**

Whether any creditor, other than the creditor who filed the winding up petition, can apply?

Brief facts:

On the winding up petition of M/s Girdhar Trading Co., the 2nd respondent herein, the High Court of Allahabad, passed the winding up order against the first respondent and appointed the Official Liquidator. Thereafter, the 1st respondent paid the entire amount due to the petitioning creditor (the second respondent herein) along with costs. However, the Company Court kept the winding up order in abeyance, directing the Official Liquidator to continue to be in custody of the assets of the Company. While things stood thus, the appellant herein, claiming to be a creditor of the first respondent herein, filed an application before the NCLT, and it moved an application before the company court seeking a transfer of the winding up petition to the NCLT, Allahabad. This application was rejected by the Company Court, on the sole ground that the requirement of Rule 24 had already been complied with and that a winding up order had already been passed. It is against this order of the High court, refusing to transfer the winding up proceedings from the Company Court to the NCLT that the financial creditor has come up with this civil appeal.

Issues for Consideration:

The main issues that arise for consideration in this appeal are that

(i) What are the circumstances under which a winding up proceeding pending on the file of a High Court could be transferred to the NCLT; and

(ii) At whose instance, such transfer could be ordered.

Decision:

Thus, the proceedings for winding up of a company are actually proceedings in rem to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors. Therefore, the word "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of section 434 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator. The words "party or parties" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 would take within its fold any creditor of the company in liquidation.

The above conclusion can be reached through another method of deductive logic also. If any creditor is aggrieved by any decision of the official liquidator, he is entitled under the 1956 Act to challenge the same before the Company Court. Once he does that, he becomes a party to the proceeding, even by the plain language of the section. Instead of asking a party to adopt such a circuitous route and then take recourse to the 5th proviso to section 434(1)(c), it would be better to recognise the right of such a party to seek transfer directly.

As observed by this Court in Forech India Limited (supra), the object of IBC will be stultified if parallel proceedings are allowed to go on in different fora. If the Allahabad High Court is allowed to proceed with the winding up and NCLT is allowed to proceed with an enquiry into the application under Section 7 IBC, the entire object of IBC will be thrown to the winds.

Therefore, we are of the considered view that the petitioner herein will come within the definition of the expression "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 of the Companies Act, 2013 and that the petitioner is entitled to seek a transfer of the pending winding up proceedings against the first respondent, to the NCLT.

It is important to note that the restriction under Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016 relating to the stage at which a transfer could be ordered, has no application to the case of a transfer covered by the 5th proviso to clause (c) of subsection (1) of Section 434. Therefore, the impugned order of the High court rejecting the petition for transfer on the basis of Rule 26 of the Companies (Court) Rules, 1959 is flawed.

Therefore, the appeal is allowed, the impugned order is set aside and the proceedings for winding up pending before the Company Court (Allahabad High Court) against the first respondent herein, is ordered to be transferred to the NCLT, to be taken up along with the application of the appellant herein under Section 7 of the IBC. There will be no order as to costs.

20.10. 2020	**Ashish O. Lalpuria(Appellant)** **Vs.** **Kumaka Industries Ltd & Ors (Respondent)**	**National Company Law Appellate Tribunal New Delhi** **Company Appeal (AT) No. 136 of 2020** **(Arising out of judgement and order dated 6th July, 2020 passed in CP(CAA)/190/MB.I/2017 by National Company Law Tribunal, Mumbai Bench)**

Brief facts:

The Respondent Company i.e. Kumaka Industries Limited presented a Scheme of Arrangement Under Section 391-394 of Companies Act, 1956 (Existing Sections 230-232 of Companies Act, 2013) for sanction of the Arrangement embodied in the scheme originally filed before Bombay High Court which by virtue of notification issued by Ministry of Corporate Affairs (MCA) on 7th December, 2016 got transferred to NCLT, Mumbai.

The Appellant is a shareholder of Respondent Company and he pointed out certain irregularities and non-compliances and raised the objections that the Scheme of Arrangements is a mere rectification of action already taken by the Respondent company without obtaining approval of the Tribunal and other Regulatory Authorities as required under the provisions of Companies Act. NCLT, Mumbai passed the order dated 6th July, 2020 stating that the scheme appears to be fair and reasonable and does not violate any provision of law and is not contrary to public policy or public interest. Hence, the Appellant on being aggrieved by the order of NCLT, Mumbai have preferred this appeal under section 421 of Companies Act, 2013.

Decision & Reason:

National Company Law Appellate Tribunal in para 30 & 31 & 32 observed that it is pertinent to note under section 230 (5) provides that a notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectorial regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals. The basic intent behind this provisions of law is that these authorities plays a vital role in the overall legal structure and should work harmoniously with the Tribunal in order to ensure that the proposed scheme is not violative of any provision of law and is also not against the public policy.

NCLT has overruled the objections raised by the Regional Director on the ground that the objections are mere on the procedural aspects and do not raise any illegality in the scheme or that it is against public policy. Even

if the objections are procedural but it is the jurisdiction of the Tribunal that such procedural aspects need to be duly complied with before sanctioning of the scheme, as it would lay down a wrong precedent which would allow companies to do whatever acts without the compliances and confirmation of the Court and other sectoral and regulatory authorities and thereafter get it ratified by the Court under the Umbrella of "scheme". It should havebeen contemplated that compliance of law in itself is a part of public policy. It is the duty of the Tribunal or any court that their Orders should encourage compliances and not defaults.

The Scheme under section 230 of Companies Act, 2013 cannot be used as a method of rectification of the actions already taken. Before the scheme gets approved, the company must be in compliance with all the public authorities and should come out clean. There must be no actions pending against the company by the public authorities before sanctioning of a scheme under section 230 of the Companies Act, 2013.

In light of the above observations the appeal is allowed and National Company Law Appellate Tribunal aside the impugned order dated 6th July, 2020 passed by National Company Law Tribunal, Mumbai.

06/07/2020	**Aruna Oswal (Appellant) Vs.** **Pankaj Oswal & Ors (Respondent)**	**Supreme Court of India** **Civil Appeal No. 9340 of 2019 with connected appeals** **Arun Mishra & S. Abdul Nazeer, JJ.**

Companies Act,2013- Sections 72, 241 & 242 – Nomination shares in favour of wife- son disputing the nomination and claiming one-fourth share in the total number of shares in a civil suit- son filed petition before NCLT- NCLT admitted the petition inspite of the civil suit pending- whether admission of the petition is tenable -Held, No.

Brief facts:

The case is the outcome of a family tussle. Appellant is the mother while the respondent No.1 is the son of Late Mr. Abhey Kumar Oswal, who was holding 39.88% shares in Oswal Agro Mills. Ltd. and 11.11% shares in M/s. Oswal Greentech Ltd. He filed a nomination according to section 72 of the Act in favour of the appellant, his wife. The name the appellant, was registered as a holder as against the shares held by her deceased husband. The respondent No.1, filed a partition suit claiming onefourth share in the shareholdings of his father in the above two companies. Further he filed a petition before the NCLT claiming oppression and suppression against his mother and others. The appellant challenged the maintainability of the petition, inter alia, under the ground that the respondent No.1 is not holding the required shares to file such petition. The NCLT dismissed the application challenging the company petition's maintainability. NCLT held respondent No.1 as legal heir was entitled to one-fourth share of the property/shares. Aggrieved thereby, three appeals were filed before NCLAT, which have been dismissed vide the impugned judgment and order. Aggrieved thereby, the appellants are before this Court.

Decision& Reason:

Admittedly, respondent No.1 is not holding the shares to the extent of eligibility threshold of 10% as stipulated under section 244 in order to maintain an application under sections 241 and 242. He has purchased the holding of 0.03% in M/s. Oswal Agro Mills Ltd. in June 2017 after filing civil suit and remaining 9.97% is in dispute, he is claiming on the strength of his being a legal representative. In M/s. Oswal Greentech Ltd., the shareholding of the deceased was 11.11%, out of which onefourth share is claimed by respondent No.1. Admittedly, in a civil suit for partition, he is also claiming a right in the shares held by the deceased to the extent of one-fourth. The question as to the right of respondent no.1 is required to be adjudicated finally in the civil suit, including what is the effect of nomination in favour of his mother Mrs. Aruna Oswal, whether absolute right, title, and interest vested in the nominee or not, is to be finally determined in the said suit. The decision in a civil suit would be binding between the parties on the question of right, title, or interest. It is the domain of a civil court to determine the right, title, and interest in an estate in a suit for partition.

It is admitted by respondent no.1 that he was not involved in day to day affairs of the company and had shifted to Australia to set up his independent business w.e.f. 2001. His grievance is that the family had not recognised him as holder of the onefourth shares. They were registered in the ownership of his mother Mrs. Aruna Oswal; that also he had submitted to be an act of oppression. He acquired 0.03% share capital after filing of the civil suit, otherwise he was not having any shareholding in M/s. Oswal Agro Mills Ltd.

In the instant case, we are satisfied that respondent no.1, as pleaded by him, had nothing to do with the affairs of the company and he is not a registered owner. The rights in estate/ shares, if any, of respondent no.1 are protected in the civil suit. Thus, we are satisfied that respondent no.1 does not represent the body of shareholders holding requisite percentage of shares in the company, necessary in order to maintain such a petition.

It is also not disputed that the High Court in the pending civil suit passed an order maintaining the status quo concerning shareholding and other properties. Because of the status quo order, shares have to be held in the name of Mrs. Aruna Oswal until the suit is finally decided. It would not be appropriate, given the order passed by the civil Court to treat the shareholding in the name of respondent No.1 by NCLT before ownership rights are finally decided in the civil suit, and propriety also demands it. The question of right, title, and interest is essentially adjudication of civil rights between the parties, as to the effect of the nomination decision in a civil suit is going to govern the parties' rights. It would not be appropriate to entertain these parallel proceedings and give waiver as claimed under section 244 before the civil suit's decision. Respondent No.1 had himself chosen to avail the remedy of civil suit, as such filing of an application under sections 241 and 242 after that is nothing but an afterthought.

We refrain to decide the question finally in these proceedings concerning the effect of nomination, as it being a civil dispute, cannot be decided in these proceedings and the decision may jeopardise parties' rights and interest in the civil suit. With regard to the dispute as to right, title, and interest in the securities, the finding of the civil Court is going to be final and conclusive and binding on parties. The decision of such a question has to be eschewed in instant proceedings. It would not be appropriate, in the facts and circumstances of the case, to grant a waiver to the respondent of the requirement under the proviso to section 244 of the Act, as ordered by the NCLAT. It prima facie does not appear to be a case of oppression and mismanagement. Our attention was drawn by the learned senior counsel appearing for respondent No.1 to certain company transactions. From transactions simpliciter, it cannot be inferred that it is a case of oppression and mismanagement. We are of the opinion that the proceedings before the NCLT filed under sections 241 and 242 of the Act should not be entertained because of the pending civil dispute and considering the minuscule extent of holding of 0.03%, that too, acquired after filing a civil suit in company securities, of respondent no. 1. In the facts and circumstances of the instant case, in order to maintain the proceedings, the respondent should have waited for the decision of the right, title and interest, in the civil suit concerning shares in question. The entitlement of respondent No.1 is under a cloud of pending civil dispute. We deem it appropriate to direct the dropping of the proceedings filed before the NCLT regarding oppression and mismanagement under sections 241 and 242 of the Act with the liberty to file afresh, on all the questions, in case of necessity, if the suit is decreed in favour of respondent No.1 and shareholding of respondent No.1 increases to the extent of 10% required under section 244.

We reiterate that we have left all the questions to be decided in the pending civil suit. Impugned orders passed by the NCLT as well as NCLAT are set aside, and the appeals are allowed to the aforesaid extent. We request that the civil suit be decided as expeditiously as possible, subject to cooperation by respondent No.1. Parties to bear their costs as incurred.

02/09/2020	**Sandeep Agarwal & Anr (Appellant)**	**High Court of Delhi**
	Vs.	**W.P. (C) 5490/2020 & CM APPLs. 19779-80/2020**
	Union of India & Anr (Respondent)	**Prathiba M. Singh, J.**

Companies Act, 2013- Section 164-disqualification of directors- one of the company failed to file returns while the other companies did file- whether disqualification is correct-Held, No.

Brief facts:

The Petitioners are directors in two companies namely Koksun Papers Pvt Ltd ("Koksun Papers") and KushalPower Projects Pvt Ltd (hereinafter, "Kushal Power"). The name of Kushal Power was struck off from the Register of the Companies on 30th June, 2017, due to non-filing of financial statements and annual returns. The Petitioners, being directors of Kushal Power were also disqualified with effect from 1st November, 2016 for a period of five years till 31st October, 2021 under Section 164(2)(a) of the Companies Act, 2013 (hereinafter, "Act"). Pursuant to their disqualification, their Director Identification Numbers ("DIN") and Digital Signature Certificates ("DSC") have also been cancelled. In view thereof, they are unable to carry on the business and file returns etc. in the active company Koksun Papers. By the present petition, the disqualification is challenged and quashing is sought of the impugned list of disqualified directors.

Decision & Reason:

The Court has heard the ld. counsel for the parties and perused the record. The judgment in Mukut Pathak & Ors. v. Union of India & Ors., 265 (2019) DLT 506, insofar as the merits of the case is concerned, is squarely applicable in the present case. The said judgment clearly holds that the proviso to Section 167(1) (a) of the Act cannot be read to operate retrospectively. It was further held that the said proviso, being a punitive measure with respect to the rights and obligations of directors, cannot be applied retrospectively unless the statutory amendment expressly provides so.

In the present case, the facts and circumstances show that the Companies Fresh Start Scheme (CFSS) is a new scheme, which has been notified on 30th March, 2020. The scheme is obviously launched by the Government in order to give a reprieve to such companies who have defaulted in filing documents and they have been allowed to file their requisite documents and to regularize their operations, so as to not face disqualification. The Scheme also envisages non-imposition of penalty or any other charges for belated filing of the documents. This Scheme provides an opportunity for active companies who may have defaulted in filing of documents, to put their affairs in order. It thus provides Directors of such companies a fresh cause of action to also challenge their disqualification qua the active companies.

In the present case, the Petitioners are Directors of two companies - one whose name has been struck off and one, which is still active. In such a situation, the disqualification and cancellation of DINs would be a severe impediment for them in availing remedies under the Scheme, in respect of the active company. The purpose and intent of the Scheme is to allow a fresh start for companies which have defaulted. In order for the Scheme to be effective, Directors of these companies ought to be given an opportunity to avail of the Scheme. The launch of the Scheme itself constitutes a fresh and a continuing cause of action. Under such circumstances, the question of delay or limitation would not arise.

In view of the fact that in the present case, the Petitioners are directors of an active company Koksun Papers in respect ofwhich certain documents are to be filed and the said company is entitled to avail of the Scheme, the suspension of the DINs would not only affect the Petitioners qua the company, whose name has been struck off, but also qua the company which is active.

Considering the COVID-19 pandemic, the MCA has launched the Fresh Start Scheme-2020, which ought to be given full effect. It is not uncommon to see directors of one company being directors in another company. Under such circumstances, to disqualify directors permanently and not allowing them to avail of their DINs and DSCs could render the Scheme itself nugatory.

In order to enable the Directors of Koksun Papers i.e. the Petitioners herein, to continue the business of the active company Koksun Papers, in the fitness of things and also in view of the judgment in Mukut Pathak (supra), the disqualification of the Petitioners as Directors is set aside. The DINs and DSCs of the Petitioners are directed to be reactivated, within a period of three working days.

20.10. 2020	**Ashish O. Lalpuria (Appellant)** **Vs.** **Kumaka Industries Ltd & Ors(Respondent)**	**National Company Law Appellate Tribunal New Delhi** **Company Appeal (AT) No.136 of 2020** **(Arising out of judgement and order dated 6th July, 2020 passed in CP(CAA)/190/MB.I/2017 by National Company Law Tribunal, Mumbai Bench)**

Brief facts:

The Respondent Company i.e. Kumaka Industries Limited presented a Scheme of Arrangement Under Section 391-394 of Companies Act, 1956 (Existing Sections 230-232 of Companies Act, 2013) for sanction of the Arrangement embodied in the scheme originally filed before Bombay High Court which by virtue of notification issued by Ministry of Corporate Affairs (MCA) on 7th December, 2016 got transferred to NCLT, Mumbai.

The Appellant is a shareholder of Respondent Company and he pointed out certain irregularities and non-compliances and raised the objections that the Scheme of Arrangements is a mere rectification of action already taken by the Respondent company without obtaining approval of the Tribunal and other Regulatory Authorities as required under the provisions of Companies Act. NCLT, Mumbai passed the order dated 6th July, 2020 stating that the scheme appears to be fair and reasonable and does not violate any provision of law and is not contrary to public policy or public interest. Hence, the Appellant on being aggrieved by the order of NCLT, Mumbai have preferred this appeal under section 421 of Companies Act, 2013.

Decision & Reason:

National Company Law Appellate Tribunal in para 30 & 31 & 32 observed that it is pertinent to note under section 230 (5) provides that a notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectorial regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals. The basic intent behind this provisions of law is that these authorities plays a vital role in the overall legal structure and should work harmoniously with the Tribunal in order to ensure that the proposed scheme is not violative of any provision of law and is also not against the public policy.

NCLT has overruled the objections raised by the Regional Director on the ground that the objections are mere on the procedural aspects and do not raise any illegality in the scheme or that it is against public policy. Even if the objections are procedural but it is the jurisdiction of the Tribunal that such procedural aspects need to be duly complied with before sanctioning of the scheme, as it would lay down a wrong precedent which would allow companies to do whatever acts without the compliances and confirmation of the Court and other sectoral and regulatory authorities and thereafter get it ratified by the Court under the Umbrella of "scheme". It should havebeen contemplated that compliance of law in itself is a part of public policy. It is the duty of the Tribunal or any court that their Orders should encourage compliances and not defaults.

The Scheme under section 230 of Companies Act, 2013 cannot be used as a method of rectification of the actions already taken. Before the scheme gets approved, the company must be in compliance with all the public authorities and should come out clean. There must be no actions pending against the company by the public authorities before sanctioning of a scheme under section 230 of the Companies Act, 2013.

In light of the above observations the appeal is allowed and National Company Law Appellate Tribunal aside the impugned order dated 6th July, 2020 passed by National Company Law Tribunal, Mumbai.

30.09. 2020	**Mr. Pankaj Kumar Mishra (Appellant)** **vs.** **Registrar ofCompanies, Mumbai & Ors. (Respondents)**	**NCLAT** **Company Appeal (AT)No. 121 of 2020** **Justice Jarat KumarJain Member (Judicial)** **Balvinder Singh Member (Technical)**

The Tribunal must give a reasonable opportunity of making representations and of being heard before passing an order, to the Registrar, the Company and all the persons concerned under Section 252 (1) of the Companies Act, 2013.

Fact of the case

The name of the Company (Viking Ship Mangers Pvt. Ltd.) was struck off by ROC Mumbai from the Register of Companies. The Principal Commissioner of Income Tax-15, Mumbai (Respondent No. 2 herein) challenged the order of ROC before the NCLT, Mumbai bench (Tribunal) under Section 252 of the Companies Act, 2013. It is stated before the Tribunal that the Company has certain Financial transactions that have been entered into by the Company for the Assessment year 2011-12 and information regarding this were received from the office of ITO Income Tax Officer 15 (3) (2) Mumbai. However, no return of income has been filed. Therefore, notice under Section 148 of the IT Act, 1961 has been issued for Assessment year 2011-12 proposing to assess/ reassess the income. The Company has been struck off from the Register of Companies. Therefore, it is difficult to assess the defunct Company and it will cause huge loss of revenue to the Government of India. Hence, it was prayed that the name of the Company be restore in the Register of Companies.

The Authorized representative for the Registrar of Companies submitted before the Tribunal that they do not have any objection to restore the name of the Company in the Register of Companies. The NCLT, Mumbai Bench by the impugned order allowed the Appeal and directed to restore the name of the Company in the Register of Companies. However, before passing of impugned order no notice has been served on the Company, but the Company was arrayed as the Respondent.

Being aggrieved with this order, the Appellant Ex-Director and Majority Shareholder and Power of Attorney Holder of the Company has filed this Appeal. Appellant submitted that Section 252 (1) of the Companies Act, 2013, provides that before passing any order under this Section, the Tribunal must give a reasonable opportunity of making representations and of being heard to the Registrar, the Company and all the persons concerned. Rule 37 of the NCLT Rules, 2016 also provides that the Tribunal shall issue notice to the Respondent to show cause against the Application or Petition on date of hearing to be specified in the notice.

Issue

The main contention of Appellant was:

Whether the order given by the Tribunal of restoring the name of the company in Register of Companies is sustainable in Law, as it has been passed without giving any reasonable opportunity of making representations or of being heard to the Appellant?

Judgement

The NCLAT held that without giving any opportunity of being heard, the order has been passed by the NCLT.

Hence, the order is not sustainable in law. Therefore, it is set aside, and the matter is remitted back to the NCLT, Mumbai bench with the direction that after hearing the parties decide the said appeal under Section 252 of the Companies Act, 2013, as per law without influence by its earlier Order.

23.09. 2020	**Alibaba Nabibasha (Petitioner)** **vs.** **Small Farmers Agri- Business Consortium & Ors.(Respondents)**	**Delhi High Court** **CRL. M.C. 1602/2020,CRL. M.A. 9935/2020** **Justice V. KameswarRao**

After resignation, Director can't be held responsible for daily affairs of Company including Cheques issued and dishonoured

Fact of the case

The petition was filed seeking quashing of five complaint cases initiated against the Petitioner. These complaint cases are primarily grounded on the return of five cheques which were issued on behalf of the Respondent No.2 company for a total amount of Rs. 45 Lakhs. Petitioner submitted that he ceased to be the Director of the Respondent No.2 company w.e.f. 27. 10. 2010, at least eight years prior to the issuance of the cheques in question and the resignation of the Petitioner was also notified to the Registrar of Companies by the Respondent No.2 by filing Form 32 dated 04. 01.2011, which is a public document.

The Petitioner contended that he was not the Director when the underlying contract was executed between the

Respondent No.1 and Respondent No.2, nor when the cheques were issued and when they were presented.

According to the Respondent, the Petitioner was involved in the discussion before an agreement was executed between the Respondent No.1 and the Respondent No.2. Further, the Petitioner being a responsible Director of accused Respondent No.2 Company participated in meetings and assisted the officials of the Respondent No.1 who had visited the Respondent No.2 for verification of its financial and physical status.

Issue:

The contention of the Petitioner was:

Whether Director of the Company after resignation is still held responsible for daily affairs of Company including Cheques issued and dishonoured?

Judgement

Delhi High Court held that, in cases where the accused has resigned from the Company and Form 32 has also been submitted with the Registrar of Companies then in such cases if the cheques are subsequently issued and dishonoured, it cannot be said that such an accused is in-charge of and responsible for the conduct of the day-to-day affairs of the Company, as contemplated in Section 141 of the NI Act. Thus, Petitioner after his resignation cannot continue to be held responsible for the actions of the Company including the issuance of cheques and dishonour of the same. Hence, complaint cases filed under Section 138 of the NI Act, against the petitioner are quashed.

21.09. 2020	**Dr. Rajesh Kumar Yaduvanshi (Petitioner) vs. Serious Fraud Investigation Office (SFIO) & Anr. (Respondents)**	**Delhi High Court** **CRL. REV. P. 1308/2019 and CRL. M.A. Nos. 43209/2019, 3644/2020, 7626/2020, 7627/2020 & 10502/2020** **Justice Vibhu Bakhru**

Person as a Nominee Director of the Company can't be summoned for offences in respect of Sections 128, 129, 448 read with Section 447 of the Companies Act, 2013, without any specific allegations against him in Investigation report of being complicit or having acted in bad faith, when he is not involved in the day to day affairs of the company as well as not assigned with any of executive work of the company.

Fact of the case

The petitioner has filed the present petition impugning a summoning order dated August 16, 2019 issued

by the learned ASJ in Complaint Case No. 770/2019 captioned *"Serious Fraud Investigation Office (SFIO) vs. Bhushan Steel Limited* and Ors.", to the limited extent that it directs issuance of summons to the petitioner. The learned Court had found that there was sufficient material placed on record against the petitioner for him to face prosecution in respect of offences under Sections 128, 129, 448 read with Section 447 of the Companies Act, 2013. The petitioner was Punjab National Bank Limited's nominee on the Board of Directors of Bhushan Steel Limited ('BSL') at the material time.

Issue:

The principal issue that arises for consideration is:

- whether the petitioner can be prosecuted for the alleged fraud committed by BSL and/or promoters solely for the reason that the petitioner was a director of BSL and,
- Whether there is any material on record to indicate that the petitioner was complicit in the commission of the alleged offence.

The Petitioner submitted that there is no specific allegation in the SFIO report that the petitioner was even remotely connected or aware of the same and, therefore, his name does not feature as being involved in the fraudulent routing of funds. Further, it was submitted that merely mentioning the petitioner's name as being one of the persons who is allegedly liable to be prosecuted under Sections 128, 129 and 448 of the Companies Act, 2013, without ascribing any specific role or pointing out any culpable conduct would not constitute sufficient material to persuade any Court to issue summons. Hence, there was no allegation in the complaint that the petitioner has connived with the Promoters or any other person to falsify the accounts and, therefore, the impugned order is wholly erroneous.

The Respondent submitted that the petitioner was a Nominee Director appointed by PNB on the Board of BSL and was expected to be independent, vigilant and cautious against any fraudulent acts committed by BSL. He was also required to raise red flags and inform PNB of any fraudulent activity.

Judgement

Delhi High Court observed that there is no allegation that the petitioner was involved in the affairs of BSL except in his capacity as a Nominee Director of PNB. In such capacity, he was not assigned any executive work of BSL but was merely required to attend and participate in the Board Meetings of BSL.

Even, SFIO investigation report does not contain any specific allegations against the Petitioner of being complicit or having acted in bad faith.

There is a material difference between the allegation that a Nominee Director has been negligent or has failed to discharge his responsibility and an allegation that he has connived or has been complicit in approving financial statements, which he knows to be false or conceal material information. While the latter may constitute an offence under Section 448 of the Companies Act, 2013, the former does not constitute any such offence.

Hence, the reasoning of the learned Trial Court that the petitioner had connived with the Promoters and is liable to be proceeded against, is clearly unsustainable and not supported by the allegations made in the complaint or the SFIO Investigation Report. Hence, the impugned summons issued to the petitioner and the impugned order, to the limited extent that it directs issuance of summons to the petitioner, are set aside.

14 .09.2020	**QVC Exports Pvt. Ltd. & Ors. (Appellants)** **vs.** **Cosmic Ferro Alloys Ltd. & Ors. (Respondents)**	**NCLAT** **Company Appeal (AT) No.92 and 93 of 2020** **Justice Jarat Kumar Jain Member (Judicial)** **Mr. Balvinder Singh Member (Technical)** **Dr. Ashok Kumar Dixit Member (Technical)**

Removal of Nominee Director with majority vote in duly convened EGM giving special notice Fact of the case:

1st Appellant and 2nd Respondent jointly entered into a Consortium Agreement and agreed to form a partnership to submit a Resolution Plan to take over 1st Respondent Company. Resolution plan was submitted and approved by the COC as well as ratified by NCLT, Kolkata under Section 31 of Insolvency & Bankruptcy Code, 2016. As per the Resolution Plan, Appellants are 34% shareholders and the 2nd Respondent is 51% shareholder. The remaining 15% shares are yet to be issued to the Employees' Trust and in effect the Appellants are holding 40% and 2nd Respondent is holding 60% shares of 1st Respondent. Accordingly, as per the mutual understanding nominee directors of both the parties were appointed in 1st Respondent Company.

Appellant argued that due to several disputes which arose between both the parties, special notice was issued for removal of nominee director of Appellant from directorship and the resolution was passed in an EGM, thereby ousting the appellant from the consortium without giving a fair opportunity to give representation. Further, it was stated that in a quasi-partnership company or closely held company, a nominee director of the two partners cannot be removed, that too without any reason.

Respondents argued that there is no bar for removal of nominee of minority shareholder under the Companies Act, 2013. Further, in spite of giving notice, no shareholders from 1st to 3rd appellant were present and thus they did not raise any objection to passing of the resolution for removal of nominee director and the removal has already been approved by the Registrar of Companies.

Issue:

Whether Nominee Directors appointed in a quasi-partnership company or closely held company by mutual understanding between partners can be removed by passing majority vote in EGM after giving special notice?

Judgement:

The NCLAT held that as proper notice was issued to convene EGM and the same was received by the appellants including the nominee director, but they did not make any representation and the EGM voted for removal of nominee director with majority. Thus, there is no illegality in this process and dismissed the appeal.

24.08.2020	**Economy Hotels India Services Private Limited (Appellant)** **vs.** **Registrar of Companies & Anr. (Respondents)**	**NCLAT** **Company Appeal (AT)No. 97 of 2020.** **Justice Venugopal M, Member (Judicial), Mr. Kanthi Narahari, Member (Technical)**

Reduction of Capital' under Section 66 of the Companies Act, 2013 Fact of the case

The Appellant / Petitioner has focused the instant Company Appeal (AT) No. 97 of 2020 being dissatisfied with the order dated 27.05.2020 passed by the 'National Company Law Tribunal', Bench V in Company Petition No. 149/66/ND/2019 in rejecting the petition filed under Section 66(1)(b) of the Companies Act, 2013 and granting liberty to file fresh application after complying with all the requirements of Section 66 of the Companies Act, 2013.

The Appellant / Company is a closely held private Company, limited by shares, incorporated on 08.08.2012 under the provisions of Companies Act, 1956. The authorized share capital of the Company as on March 31st, 2018 was Rs. 90 lakhs only divided into 9 lakhs equity shares of Rs. 10/- each and that the issued, subscribed and paid up share capital of the Company as on 31.03.2019 was Rs. 30 lakhs divided into 3 lakhs equity shares of Rs. 10/- each. Further, the Company had 67,17,900 unsecured fully compulsory convertible debentures of Rs. 100/- each as on 31.03.2019.

The Appellant / Company had filed a petition under Section 66(1)(b) of the Companies Act praying for passing of an order for confirming the reduction of share capital.

The pre-mordial plea of the Appellant is that the 'National Company Law Tribunal' had failed to appreciate the creeping in of an 'inadvertent typographical error' figuring in the extract of the 'Minutes of the Meeting' characterising the 'special resolution' as 'unanimous ordinary resolution'. Moreover, the Appellant/Petitioner had fulfilled all the statutory requirements prescribed u/s 114 of the Companies Act, 2013 and as such the impugned order of the Tribunal is liable to set aside.

The Appellant has also submitted that only due to a 'typographical error' in the extract of 'Minutes', a resolution passed unanimously by the shareholders will not ceased to be a 'special resolution'.

Issue

Whether as inadvertent 'typographical error' in the extract of 'Minutes', characterising the 'special resolution' as 'unanimous ordinary resolution' will render a resolution passed as 'special resolution' as invalid?

Judgement:

NCLAT observed that 'Reduction of Capital' under Section 66 of the Companies Act, 2013 is a 'Domestic Affair' of a particular Company in which, ordinarily, a Tribunal will not interfere because of the reason that it is a 'majority decision' which prevails.

As the Appellant has admitted its typographical error in the extract of the Minutes of the Meeting characterising the 'special resolution' as 'unanimous ordinary resolution' and also taking into consideration of the fact that the Appellant had filed the special resolution with ROC, which satisfies the requirement of Section 66 of the

NCLAT allowed the Appeal, thereby confirming the reduction of share capital of the Appellant Company.

17.08.2020	**K.V. Brahmaji Rao (Appellant)** **vs.** **Union of India(Respondent)**	**NCLAT** **Company Appeal (AT) No. 126 of 2019** **Justice Jarat Kumar Jain Member (Judicial)** **Balvinder Singh Member (Technical)** **Kanthi Narahari Member (Technical)**

The person who may be the head of some other organizations cannot be roped and his/her Assets cannot be attached in exercising the powers under Sections 337 & 339 of the Companies Act, 2013.

Fact of the case

The Appellant K.V. Brahmaji Rao has preferred this Appeal under Section 421 of the Companies Act, 2013 against the order dated 31.01.2019 passed by National Company Law Tribunal, Mumbai Bench, at Mumbai in

M.A. No. 406 of 2019 and M.A. No. 407 of 2019 in CP No. 277 of 2018. Whereby impleaded the Appellant in CP No. 277 of 2018 as Respondent No. 83 and passed the order of attachment of Appellant's Assets.

The Respondent herein had initiated petition against the persons who had been named as accused in the FIR dated 31.01.2018 and further on 15.02.2018 filed by Punjab National Bank (In Short 'PNB'). FIRs were registered against some known and unknown accused who had been alleged to be perpetration of the huge Financial Scam against the PNB. The Respondent ordered investigation into the affairs of 107 Companies and 7 LLPs under the provisions of the Companies Act, 2013 and LLP Act, 2008 and also sought to supplement the investigation by seeking indulgence of the Tribunal as per the provisions of Sections 221, 222, 241, 242 and 246 r/w Section 339 of the Companies Act, 2013.

At the relevant time the Appellant was Executive Director, PNB, Head Office, New Delhi. NCLT, Mumbai bench, by the impugned order allowed the Applications and passed the order for frizzing Assets of the Appellant and injuncted him from disposing movable and immoveable Properties/Assets.

The Appellant submits that the impugned order has been passed in violation of Principle of Natural Justice

since the Appellant was not served with advance copy of the said Application and without giving opportunity of hearing impugned order has been passed.

Issue:

Whether any person who is head of some other organizations can be roped and his/her Assets can be attached in exercising the powers under Sections 337 & 339 of the Companies Act, 2013?

Judgement

The NCLAT observed that the person who may be the head of some other organizations cannot be roped and his or her Assets cannot be attached in exercising the powers under Sections 337 & 339 of the Companies

Act, 2013. Admittedly, the Appellant was the Executive Director of PNB, Head Office, New Delhi i.e. employee of other organization. Therefore, he cannot be impleaded as Respondent in the case against the Nirav Modi Group and Gitanjali Group of Companies. Thus, the impugned order of NCLT, Mumbai bench is set aside, and the Appeal is allowed.

04.08.2020	**Vijay Goverdhandas Kalantri & Anr. (Petitioners)** **vs.** **Unionof India & Ors. (Respondents)**	**Punjab & Haryana HighCourt** **CWP-11209-2020 (O&M)** **Justice Alka Sarin**

The jurisdiction of the High Court is limited to the territorial jurisdiction of the State(s) of which it is the High Court

Facts of the case

This petition was filed as a civil writ petition under Articles 226/227 of the Constitution of India for issuance of a writ of certiorari for setting aside the impugned action of Respondent Nos.1, 2 and 3 disqualifying the petitioners to act as Director from 01.11.2018 under Section 164(2)(a) of the Companies Act, 2013. In the present case, admittedly, both the Petitioners are residents of Mumbai and the Company-Respondent no.4 itself is registered with the Registrar of Companies, Mumbai (Respondent no.3) and has no connection with the Registrar of Companies, Punjab and Chandigarh (Respondent no.2). The counsel for the petitioners has been unable to show how the present writ petition was maintainable before this Court.

Faced with this situation, Petitioners contended that since the petitioners wish to invest in a company within the jurisdiction of this Court, hence, the present writ petition has been filed.

Issue:

Whether the High Court can exercise power outside the territorial jurisdiction of the State(s) of which it is the High Court?

Judgement

Punjab & Haryana High Court observed that there is no ground whatsoever made out for invoking the jurisdiction of this Court under Articles 226/227 of the Constitution of India in as much as neither the Petitioners are residents of Punjab, Haryana or UT Chandigarh nor is the Company-Respondent no.4, qua which the Petitioners were disqualified to act as Directors, registered with the Registrar of Companies, Punjab and Chandigarh (Respondent no.2). The jurisdiction of the High Court is limited to the territorial jurisdiction of the State(s) of which it is the High Court. Article 226 of the Constitution of India, in clear terms, empowers the High Court to entertain a writ petition if the cause of action to file such a writ petition against the Respondents of the said writ petition has arisen wholly or in part within the territorial jurisdiction of the High Court.

In the present case the petitioners have been unable to show as to what part of the cause of action arose within the territorial jurisdiction of this Court. Thus, the present writ petition seems to have been filed only to gain

benefit of the interim order passed by the Court of Punjab & Haryana *in CWP. No.24977 of 2017 'Gurdeep Singh & Ors. vs. Union of India & Anr.*' and other similar cases, though the initiation of the writ proceedings before this High Court is clearly unsustainable and an abuse of jurisdiction. In view of the above, the present writ petition is dismissed with exemplary costs.

06.07.2020	**Aruna Oswal (Appellant) vs. Pankaj Oswal & Ors.(Respondents)**	**Supreme Court of India** **Civil Appeal No.9340,9399 & 9401 of 2019** **Justice Arun MishraJustice S. Abdul Nazeer**

Dispute of Inheritance of Shares is a civil dispute, it cannot be decided under section 241/242 of the Companies Act, 2013

Fact of the case:

The brief facts of the case are that Late Mr. Abhey Kumar Oswal, during his lifetime, held as many as 5,35,3,960 shares in M/s. Oswal Agro Mills Ltd., a listed company. He died on 29.3.2016. Mr. Abhey Kumar Oswal filed a nomination according to Section 72 of the Companies Act, 2013 in favour of Mrs. Aruna Oswal, his wife. Two witnesses duly attested the nomination in the prescribed manner. The name of Mrs. Aruna Oswal, the Appellant, was registered as a holder on 16.4.2016 as against the shares held by her deceased husband.

Pankaj Oswal (Respondent no. 1), son of late Abhay Oswal filed a partition suit in High Court claiming entitlement to 1/4th of the estate of his father including the deceased's shareholdings. The High Court passed an interim order to maintain status quo concerning shares and other immoveable property.

While the suit was pending in High Court, Mr. Pankaj Oswal- Respondent No.1 filed Company Petition No.56/CHD/PB/2018, Pankaj Oswal v. Oswal Agro Mills Ltd. & Ors., alleging oppression and mismanagement under Section 241/242 of the Companies Act, 2013 in the affairs of Respondent No.2 company in NCLT, Chandigarh. A prayer was also made against M/s. Oswal Greentech. Ltd.

Respondent No.1 claimed eligibility to maintain the petition on the ground of being a holder of 0.03% shareholding and claiming entitlement and legitimate expectation to 9.97% shareholding of M/s. Oswal Agro Mills Ltd. by virtue of his being the son of deceased Abhey Kumar Oswal. The Appellant challenged the maintainability of the petition. The NCLT directed filing of reply to the petition, without deciding the question of maintainability.

This was challenged before NCLAT by the Appellant, which in turn directed the NCLT to decide the question of maintainability of the petition. The NCLT thereafter dismissed the challenge to maintainability and held that the Respondent no.1, being a legal heir, was entitled to one-fourth of the property/shares. Therefore, the matter eventually reached the Supreme Court of India.

Issue:

- Whether the dispute raised as to the inheritance of the estate of the deceased is a civil dispute or could be said to be an act of oppression and mismanagement in the affairs of the Company?
- Whether such a dispute could be adjudicated in a company petition filed during the civil suit's pendency?

Judgement:

Supreme Court observed that the basis of the petition is the claim by way of inheritance of 1/4th shareholding so as to constitute 10% of the holding. This is the right, which cannot be decided in proceedings under Section 241/242 of the Companies Act, 2013. Thus, filing of the petition under sections 241 and 242 seeking waiver is a misconceived exercise as the, Respondent no.1 has to firmly establish his right of inheritance before a civil

court to the extent of the shares he is claiming, more so, in view of the nomination made as per the provisions contained in Section 71 of the Companies Act, 2013. In order to maintain the proceedings, the Respondent should have waited for the decision of the right title and interest, in the civil suit concerning shares in question.

The entitlement of Respondent No.1 is under a cloud of pending civil dispute. It is appropriate to direct the dropping of the proceedings filed before the NCLT regarding oppression and mismanagement under sections 241 and 242 of the Companies Act, 2013 with the liberty to file afresh, on all the questions, in case of necessity, if the suit is decreed in favour of Respondent No.1 and shareholding of Respondent

No.1 increases to the extent of 10% required under section 244 of the Companies Act, 2013. Hence, the orders passed by the NCLT as well as NCLAT are set aside, and the appeals are allowed.

24.06.2020	**The Registrar of Companies, West Bengal (Appellant) vs. Karan Kishore Samtani (Respondent)**	**NCLAT** **Company Appeal (AT) No. 13 of 2019** **Justice Jarat Kumar Jain, Member (Judicial)** **Mr. Balvinder Singh, Member (Technical)** **Dr. Ashok Kumar Mishra, Member (Technical)**

The issue for consideration is, whether Tribunal can impose the compounding fees under Section 441

(1) of the Companies Act, 2013 less than minimum fine prescribed for the offence under Section 165 (1) read with Section 165(6) of the Companies Act, 2013.

Fact of the case:

The Respondent was the Director, for more than 20 Companies till 31.03.2015. The Respondent tendered his resignation as the Director of the Company M/s Fabius Properties Pvt. Ltd. The same was accepted by the Board of Directors of the Companies on 29.12.2015. However, the intimation of his resignation was sent to the Registrar of Companies vide Form DIR-12 on 10.02.2016.

On 27.01.2016 the Registrar of Companies, West Bengal sent show cause notice and asking him as to why prosecution under Section 165(1) read with Section 165(3) of the Companies Act, 2013 should not be initiated against him on the ground that he was the Director of more than 20 Companies at once. The Respondent admitted the guilty and sent representation to the Registrar with a request to compound the offence under Section 441(1) of the Companies Act, 2013. ROC forwarded the representation along with his report to the Tribunal.

After hearing the parties the NCLT Kolkata Bench (Tribunal) allowed the compounding application under Section 441(1) of the Companies Act, 2013 subject to payment of compounding fees of Rs. 50,000/-. Being aggrieved with this order ROC has filed this Appeal.

The contention of the Appellant is as per the provisions of Section 165 (6) of the Companies Act, 2013 Respondent is liable for minimum fine prescribed for the violation, whereas Tribunal has imposed compounding fees Rs. 50,000/- which is less than the minimum fine prescribed under Section 165 (6) of the Companies Act, 2013.

Issue:

The issue for consideration is, whether Tribunal can impose the compounding fees under Section 441 (1) of the Act, less than minimum fine prescribed for the offence under Section 165 (1) read with Section 165(6) of the Companies Act, 2013.

Judgement:

The NCLAT has observed that the Respondent has violated the provisions under Section 165(1) read with Section 165(3) of the Companies Act, 2013 for a period 01.04.2015 to 28.12.2015 which is punishable under

Section 165(6) of the Act, The NCLT, Kolkata bench has imposed compounding fees of Rs. 50,000/- which is less than minimum fees prescribed under Section 165(6) of the Companies Act, 2013.

Hence, the NCLAT held that the NCLT, Kolkata Bench has failed to notice the minimum fine prescribed under sub-section 6 of Section 165 of the Companies Act, 2013 which was applicable at relevant time.

The Respondent has contravened the provisions of 165(1) of the Companies Act, 2013 which is punishable under Sub-Section 6 of Section 165 of the Companies Act, 2013. Taking into consideration, the facts and circumstances of the case, NCLAT imposed minimum fine at the rate of 5000 rupees for every day for the period 01.04.2015 to 21.02.2016 i.e. 272 days. The NCLAT quantified the penalty amount to Rs. 13,60,000/-. The Respondent has already paid Rs. 50,000/- after adjustment, now he is liable to pay Rs. 13,10,000/-. Therefore, the Respondent is directed to pay such amount within a period of 60 days in National Company Law Tribunal, Kolkata.

24.06.2020	**S. P. Velumani & Anr. (Appellants) vs. Magnum Spinning Mills India Pvt. Ltd. & Ors. (Respondents)**	**NCLAT** **Company Appeal (AT) No.299 of 2019** **Justice Jarat Kumar Jain, Member (Judicial)** **Mr. Balvinder Singh, Member (Technical)** **Dr. Ashok Kumar Mishra, Member (Technical)**

The decision of the Board of Directors to write off the bad debt is a commercial decision, which does not warrant any judicial interference

Fact of the case:

The Respondent is a closely held company incorporated on 29.10.2010 under the name of Magnum Spinning Mills Private Limited engaged in the business of running a spinning mill. The Company has seven directors. The Appellant pointed out the bogus transactions and siphoning of funds taking place in the company is an act of Oppression and Mismanagement and filled a company petition in NCLT, Chennai. After having heard the averments made by the parties the NCLT, Chennai Bench dismissed the Company Petition stating that the acts complained of are not falling within the purview of Oppression and mismanagement. Being aggrieved by the said order of the NCLT the appellant has filed the present appeal.

The contention of the Appellant that during the financial year 2017-18, an amount of Rs. 48,41,801/- has been written off as bad debts, while in the previous year it was nil and the details as to identity of the party, whether related party or otherwise is not disclosed.

Further, Appellant No. 1 also submitted that when he started questioning, the respondents with an intend to put an end to the intervention of the Appellant No. 1, decided to change the mandate for operating the bank accounts of the company and concocted a plan as if an alleged Board Meeting was conducted on 22.08. 2016 and resolution were allegedly passed by which any two directors can operate the account.

The Respondent No. 1 filed its reply and stated that while the Appellant have claimed alleged irregularity in respect of certain payments, the Appellant was estopped from challenging the transection ex facie, as the relevant purchase documents have been pursued and passed for payment only by Appellant No. 1 and cheques also issued only by the Appellant No. 1. The Appellant has raised the issue for the first ever time only in 2017 in the Company Petition and has not raised the issue in any prior correspondence. It is further stated on behalf of Respondent No. 1 that there is no contractual arrangement or promoters' agreement or Articles of Association mandating that the Appellant No. 1 should remain compulsory signatory for operating bank account.

Issues

Whether the decision of the Board of Directors to write off the bad debt and operation of bank Account warrants judicial interference in respect of Oppression and Mismanagement of Companies?

Judgement:

The NCLAT observed that the records of Appellant attending the meeting and the signatures put on the entry register shows that Appellant No. 1 was present at the registered office of respondent No. 1 Company, where the meeting was conducted. In that meeting the resolution was passed by the majority directors to regulate the procedure pertaining the signatories to the bank accounts of Respondent No. 1 Company, which is in no way oppressive as the decision relating to the Operation of bank account is within the domain of the Board of Directors.

NCLT has rightly put its reliance on Judgement of NCLAT in *Upper India Steel Manufacturing and Engineering Co. Ltd. & Ors. Vs. Gurlal Singh Grewal & Ors.* where it was held that cheque signing power is solely a business decision and cannot be interfered. Further after the authority to sign the cheques has been revised we do not have any fact whether after the revision of the authority the appellant has been totally excluded or not from the operation of the account. In case a person is excluded positively not to have signed even a single cheque after the revision this could be colourable exercise. No evidence has been brought forth to make the change in authorisation to operate the bank account as a colourable exercise. Therefore, this contention has no weight.

The NCLAT upheld the decision of the NCLT, Chennai bench that decision of the Board of Directors to write off the bad debt is a commercial decision, which does not warrant any judicial interference. The allegations made by Appellants are baseless.

In the same matter the NCLT, Chennai bench rightly opined that to invoke the provisions of oppression and Management the acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved.

18.03.2020	**Late Mona Aggarwal through her Legal heir Mr. Vijay Kumar Aggarwal & Anr. (Appellants) vs. Ghaziabad Engg. Company Ltd. & Ors. (Respondents)**	**NCLAT** **Company Appeal (AT) No. 320 of 2019** **Justice Jarat Kumar Jain Member (Judicial)** **Mr. Balvinder Singh, Member (Technical)** **Dr. Ashok Kumar Mishra, Member (Technical)**

Section 248 of the Companies Act, 2013 in no manner will affect the powers of the Tribunal to wind up a company the name of which has been struck off from the register of companies.

The question for consideration is that during the pendency of winding up petition the name of the company has been struck off under Section 248 of the Companies Act 2013. In such circumstances whether the NCLT can proceed with winding up petition or not?

This appeal was filed by Late Smt. Mona Aggarwal (since deceased) through her legal heirs Mr. Vijay Kumar Aggarwal and other shareholders of the Respondent No. 1 company against the order dated 7.8.2019 passed by NCLT, New Delhi in Company Petition No. 1176/2016 thereby dismissing the petition with liberty to file fresh one as and when the company's name is revived.

Fact of the case:

Brief facts of this appeal are that on 22.11.2016, Appellants as shareholder of Respondent No.1 filed a petition before Hon'ble High Court of Delhi seeking winding up under the provisions of Section 433(c), (f) and (g) of the Companies Act, 1956. On 12.4.2017 the Hon'ble High Court as per notification Regd. No.D.L.-33004/99 dated 7.12.2016 issued by Ministry of Corporate Affairs transferred the said petition to NCLT Principal Bench, New Delhi. NCLT vide order dated 28.7.2017 directed the petition to be amended to refer to the relevant sections of the Companies Act, 2013. In compliance of the directions the petition was amended i.e. the petition treated as filed under Section 271 of the Companies Act, 2013.

On 19.9.2017, NCLT issued notice on the petition for winding up of the Respondent No. 1 to the Respondents herein. During the pendency of the petition, ROC vide order dated 30.6.2017 exercising powers under sub-section (5) of Section 248 of the Companies Act 2013 struck off the name of the Company from register of companies with effect from 7.6.2017. The Respondent No.2 filed an appeal before NCLT Delhi under Section 252 of the Companies Act, 2013 for revival of the Company which is pending for adjudication before the NCLT.

However, on 7.8.2019 NCLT rejected the petition for winding up with liberty to the petitioner (Appellants) to file a fresh one as and when the Respondent company is revived. Being aggrieved with this order the Appellants have filed this appeal.

Appellant submitted that during the pendency of the petition before NCLT, the name of the company was struck off by the ROC under Section 248 of the Companies Act, 2013 for which an appeal under Section 252 of the Companies Act, 2013 for revival of the company is pending. However, the NCLT has rejected the company petition on the ground that the company's name has been struck off by the ROC and after revival the appellants herein are at liberty to file the petition. This order is erroneously passed. Even if the name of the company has been struck off the power of NCLT to wind up the company shall not be affected as per the provisions under Section 248 (8) of the Companies Act, 2013.

For this purpose, the appellant placed reliance on the judgement of this tribunal in the case of *Hemang Phophalia vs The Greater Bombay Cooperative Bank Ltd.*, *Company Appeal (AT) No. 765/2019 decided on 5.9.2019*. It is submitted that the impugned order be set aside and the matter be remitted back to NCLT for deciding the petition afresh on merit.

Respondents submits that the appeal is not maintainable as the Appellants have sought the same relief on the same ground and cause of action as they have filed this appeal as well as filed the application before NCLT for review of the impugned order. Appellant cannot be permitted to exercise concurrent jurisdiction over the same dispute over the same parties for the same relief and on same ground and same cause of action. In such circumstances the possibility of conflicting decisions cannot be ruled out.

Issues:

The question for consideration is that during the pendency of winding up petition the name of the company has been struck off under Section 248 of the Companies Act 2013, in such circumstances whether the NCLT can proceed with winding up petition or not?

Judgement:

The NCLAT observed that from sub-section (8) of Section 248, it is clear that Section 248 in no manner will affect the powers of the Tribunal to wind up the company, the name of which has been struck off from the register of companies. Therefore, even after removal of the name of the company from the register of companies the NCLT can proceed with the petition for winding up under Section 271 of the Companies Act, 2013.

Hence, impugned order is not sustainable in law and is hereby set aside and the matter is remitted to NCLT, New Delhi for deciding the winding up petition on merit as per law.

29.01.2020	**Bank of Baroda (Appellant) vs. Aban Offshore Limited (Respondent)**	**NCLAT** **Company Appeal (AT) No. 35 of 2019** **Justice Jarat Kumar Jain, Member (Judicial)** **Mr. Balvinder Singh, Member (Technical)** **Dr. Ashok Kumar Mishra, Member (Technical)**

Remedies available for Preference shareholders in relation to redemption of preference shares Fact of the case

The present Appeal has been filed by the Appellant w.r.t the NCLT, Chennai Bench (Tribunal) order who has dismissed the application of Appellant solely on the ground that the Appellant being preferential shareholders has no locus standi to file application for redemption of shares under Section 55(3) of the Companies Act, 2013 or even under Section 245 of the Companies Act, 2013.

The Appellant has submitted that the Respondent Company is a listed Company with Madras Stock Exchange Limited, Bombay Stock Exchange Limited and National Stock Exchange of India Limited. The Appellant has subscribed on various dates i.e.09.07.2005, 29.05.2007 and out of total subscription of Rs. 30,00,00,000/- worth of cumulative Redeemable Non-Convertible Preference Shares at varying coupon rate of 8% and 9% per annum; has also consented on 31.10.2011 for extended/rolled over of redemption of preference share for a period of 3 years from the date of original redemption date.

The Appellant has also submitted that the Respondent Company has not yet redeemed any preference shares inspite of they are paying equity dividend to the extent of 180% for the equity shareholders in the financial Year 2014-15. The Respondent has defaulted on the redemption as well as payment of dividend for the Financial Year 2015-16 onwards and the said defaults continues till date. The Appellant has also submitted that they have been made the remediless by the Tribunal for not considering the issue of redemption of preference shares either under Section 55 or Section 245 of the Companies Act, 2013.

The Respondent has submitted that the Appellant is only representing in these proceedings and none others representatives from the class of shareholders i.e. Preference shareholders class are representing. They are not eligible to file application under Section 245 of the Companies Act, 2013 because Section 245 clearly reflects that an application must be filed by minimum requisite members of the Company. They cannot unilaterally decide that they are empowered to represent a class of shareholders.

Further, the Respondent has submitted that they have every intention of redeeming its preference shares upon improvement in the financial situation as their business has gone drastically in rough weather. In view of uncertainty in crude oil prices and their cash flow position, they were under severe strain due to the non-realization of receivables from the Middle East rendering them unable to redeem their preference share (Dividend in 2014-15 was paid to both Equity and Preference shareholders as per the terms and conditions of the issues).

Issues:

Whether there is any remedy under law available to preference shareholders for filing application for redemption of preference shares?

Judgement:

The NCLAT examined the intention of legislature for enacting Section 55 as well Section 245 of the Companies Act, 2013. Section 55(3) of the Companies Act, 2013 clearly states that the Company, when not in a position of redeem its preference shares, 'may' with the consent of 3/4th in value of such preference shares and the approval of the Tribunal (on a petition filed in this behalf), issue further redeemable preference shares equal to the amount due (including dividend, if any) in respect of such unredeemed shares. However, there is a proviso, in ordering such further issue, the Tribunal shall forthwith order redemption of preference shares held by such persons who do not consent to such further issue.

The Section stipulates that the Company only with the requisite consent of preference shareholders and filing a petition in this behalf before the Tribunal and its consequent approval - can issue further redeemable preference shares with regard to the unredeemed preference shares. The Section though requires prior consent of the shareholders, does not provide for any action that can be taken by the concerned preference shareholders prior to filing of such petition by the Company. Thus, remedies available to such preference shareholders are only by way of either consenting or dissenting with such further issue.

However, intention of the legislature while promulgating Section 55 of the Companies Act, 2013 was to compulsorily provide for redemption of preference shares by doing away with the issue of irredeemable preference shares. Therefore, even though there is no specific provision stipulated under the Companies Act, 2013 through which relief can be sought by preference shareholders in case of non-redemption by the company or consequent non-filing of petition under Section 55 of the said Act, the intention of the legislature being clear and absolute, Tribunal's inherent power can be invoked to get an appropriate relief by an aggrieved preference shareholder(s).

Alternatively, preference shareholders coming within the definition of 'member(s)' under Section 2(55) read with Section 88 of the Companies Act, 2013, may file a petition under Section 245 of the said Act, as a class action suit, being aggrieved by the conduct of affairs of the company. Thereby, it was held that preference shareholders are not remediless and for redemption of preference shares, they can file an application under Section 55(3) of the Companies Act, 2013 or alternatively they may also file application under Section 245 of the Companies Act, 2013 as a class action suit and the NCLT while exercising the inherent power viz. Rule 11 of NCLT Rules, 2016 can pass appropriate order.

Hence, the findings of the NCLT that the Appellant being preference shareholders has no locus standi to file application for redemption of preference shares does not hold good. Thus, NCLT, Chennai Bench impugned order was set aside. The matter is remitted back to NCLT, Chennai Bench to decide the application as per law.

20.12.2019	**Joint Commissioner of Income Tax (OSD), Circle (3)(3)- 1, Mumbai (Appellant) vs. Reliance Jio Infocomm Ltd. & Ors. (Respondents)** **And** **Income Tax Officer, Ward 3(3)-1, Mumbai (Appellant) vs. M/s. Reliance Jio Infratel Pvt. Ltd. & Ors. (Respondents)**	**NCLAT** **Company Appeal (AT) Nos. 113 & 114 of 2019** **Justice S. J. Mukhopadhaya, (Chairperson)** **Justice A.I.S. Cheema, Member (Judicial)** **Mr. Kanthi Narahari, Member (Technical)**

Mere fact that a Scheme of Compromise or Arrangement may result in reduction of tax liability does not furnish a basis for challenging the validity of the same.

Brief facts of the case

'Reliance Jio Infocomm Limited'- Demerged/ Transferor Company (Petitioner Company No.1), 'Jio Digital Fibre Private Limited'- Resulting Company (Petitioner Company No.2) and 'Reliance Jio Infratel Private Limited'- Transferee Company (Petitioner Company No. 3) moved joint petition under Sections 230-232 of the Companies Act, 2013, seeking sanction of the Composite Scheme of Arrangement amongst 'Reliance Jio Infocomm Limited' and 'Jio Digital Fibre Private Limited' and 'Reliance Jio Infratel Private Limited' and their respective shareholders and Creditors ("Composite Scheme of Arrangement").

The Petitioner Companies (Respondents herein) filed Company Application seeking dispensation of the meeting of Equity Shareholders of the Petitioner Company No.2 and the Petitioner Company No.3 by seeking directions to convene and hold meetings of Secured Creditors (including Secured Debenture Holders), Unsecured Creditors (including Unsecured Debenture Holders), Preference Shareholders and Equity Shareholders of the Petitioner Company No.1.

By order dated 11th January, 2019, passed in Company Application, the National Company Law Tribunal ("Tribunal" for short), Ahmedabad Bench, ordered dispensation of the meeting of the Equity Shareholders of the Petitioner Company No.2 and the Petitioner Company No.3, directing for holding and convening the meetings of the Secured Creditors (including Secured Debenture holders), Unsecured Creditors (including Unsecured Debenture holders), Preference Shareholders and Equity Shareholders of the Petitioner Company No.1.

Notices were directed to be issued on Regional Director, North Western Region, Registrar of Companies,

concerned Income Tax Authority (in case of Petitioner Company No.1), 'Securities and Exchange Board of India', 'BSE Limited' and 'National Stock Exchange of India Limited' (in case of Petitioner Company No.1) stating that the representation, if any, to be made by them, within a period of 30 days from the date of receipt. Publication was also directed to be made and published in the Newspaper in English language having all India circulation and in Gujarati language having circulation in Ahmedabad. Statutory notice was issued and Affidavits were also filed.

The NCLT, Ahmedabad Bench, taking into consideration the Chairperson's Report of the meeting of the Secured Creditors; Chairperson's Report of the meeting of the Unsecured Creditors; Chairperson's Report of the meeting of the Preference Shareholders; Chairperson's Report of the meeting of the Equity Shareholders of the Petitioner Company No.1, by order dated 11.01 2019, directed the Regional Director, North Western Region to make a representation under Section 230(5) of the Companies Act, 2013 and the Income Tax Department to file representation.

The Joint Commissioner of Income Tax (OSD), Circle (3)(3)-1, Mumbai and the income Tax Officer, Ward 3(3)-1, Mumbai have preferred these appeals.

According to the Appellants, the Tribunal has not adjudicated upon the objections raised by the Appellant-Income Tax Department at the threshold before granting any sanction to the proposed composite scheme of arrangement. It was submitted that the Tribunal has not dealt with specific objection that conversion of preference shares by cancelling them and converting them into loan, it would substantially reduce the profitability of Demerged Company/ 'Reliance Jio Infocomm Limited' which would act as a tool to avoid and evade taxes.

The main thrust of the argument was that by scheme of arrangement, the transferor company has sought to convert the redeemable preference shares into loans i.e. conversion of equity into debt which is not only contrary to the well settled principles of company law as well as Section 55 of the Companies Act, 2013 but also would reduce the profitability or the net total income of the transferor company causing a huge loss of revenue to the Income Tax Department.

According to the Appellants, the scheme seeks to do indirectly what it cannot do directly under the law. By way of the composite scheme, there is an indirect release of assets by the demerged company to its shareholders which is used to avoid dividend distribution tax which would have otherwise been attracted in light of Section 2(22) (a) of the Income Tax Act.

Further, as per the law, dividend arising out of preference shares can only be paid by the company out of its accumulated profits. However, when preference shares are converted into loan, the shareholders turn into creditors of the company. There are two consequences of such conversion of preference shares into loan. Firstly, the shareholders who are now creditors can seek payment of the loan irrespective of whether there are accumulated profits or not and secondly, the company would be liable to pay interest on the loans to its creditors, which it otherwise would not have had to do to its shareholders. Payment of interest on such huge amounts of loan would lead to reducing the total income of the company in an artificial manner which is not permissible in law.

Issues

Whether an assumption that the scheme of Compromise or arrangement may result in reduction of tax liability will furnish a basis for challenging the validity of the same?

Judgement

The NCLAT, held that without going to the record and without placing any evidence or substantiating the allegation of avoidance of tax by appearing before the Tribunal, it was not open to the income tax department to hold that the composite scheme of arrangement amongst the petitioner companies and their respective shareholders and creditors is giving undue favour to the shareholders of the company and also the overall scheme of arrangement results into tax avoidance. The NCLAT observed that mere fact that a scheme may result

in reduction of tax liability does not furnish a basis for challenging the validity of the same.

The Income Tax Department, which sought for liberty, while accepted by the Petitioner Companies (Respondents herein) and the NCLT, Ahmedabad bench while approving the Composite Scheme of Arrangement has granted liberty. Such liberty to the Income Tax Department to enquire into the matter, if any part of the Composite Scheme of Arrangement amounts to tax avoidance or is against the provisions of the Income Tax and is to let it take appropriate steps if so required.

Thus, NCLAT upheld the decision of NCLT, Ahmedabad bench and in view of the liberty given to the Income Tax Department decided not to interfere with the Scheme of Arrangement as approved by the Tribunal and dismissed the appeals filed.

04.12.2019	**Registrar of Companies, Kerala (Appellant) vs. Ayoli Abdulla (Respondent)**	**NCLAT** **Company Appeal (AT) No.145 of 2019** **Justice Jarat Kumar Jain, Member (Judicial)** **Mr. Balvinder Singh Member (Technical)** **Dr. Ashok Kumar Mishra Member (Technical)**

NCLT per se has no power to waive the filing fee & additional fee. Fact of the case

The Appeal has been preferred by Registrar of Companies, Kerala ('for short ROC') under Section 421 of the Companies Act, 2013 R/w Section 248, 252 403 R/w Rule 12 of Companies (Registration Offices & Fees) Rules, 2014 and also Rule 87A(4)(d) NCLT Rules, 2016 by inter alia seeking to set aside the order dated 07.03.2019 passed by NCLT, Chennai Bench, so far as it relate to waival of additional fee in filing of balance sheet and Annual Return; to direct the Respondent to file all the pending statutory returns viz., Balance Sheets and Annual Returns with filing fee and additional fee as envisaged under Section 403 of the Companies Act, 2013 etc.

The Appellant i.e. Registrar of Companies, Kerala has preferred the Appeal and the Appellant has no objection in restoring the name of the company as ordered by the said NCLT but the Appellant is aggrieved by waival of the additional fee in filing of the pending statutory returns of the Company viz., Balance Sheets and Annual Returns. As per Section 403 (1) of the Companies Act, 2013 it says that any documents required to be filed under the Act shall be filed within the time specified in the relevant provisions on payment of such fee as may be prescribed and also provided for payment of such additional fee which shall not be less than one hundred rupees per day and different amounts may be prescribed for different classes of Companies. Rule 12 of Companies (Registration Offices & Fees) Rules, 2014 also states similarly.

The Respondent Company was under the management dispute in the year 2011 onwards and the same was settled before the NCLT Chennai Bench vide order dated 07.08.2017. The Respondent in the present case was reinstated as Managing Director of the Company as mentioned in the order of NCLT Chennai Bench. The NCLT reinstated the Respondent as the Managing Director of the Company and declared all documents filed on or after 27.04.2011 as null and void which included the Annual Financial Statements and Annual Returns for the Financial Years of the Company viz. 2003-2004 to 2010-2011 filed on 7.10.2011 under the Company Law Settlement Scheme (in vogue at the time).

Issues:

Whether NCLT has power to waive additional fees levied on defaulted statutory documents?

Judgement

The NCLAT set aside the order passed by the NCLT, Chennai Bench to the extent of waival of additional fee for filing of Balance Sheet and Annual Return and held that NCLT per se has no power to waive the filing fee & additional fee. The Registrar of Companies, Kerala is directed to charge minimum additional fee.

The Respondent is directed to file all the pending statutory returns viz., Balance Sheet and Annual Return with filing fee and additional fee within a period of 30 days from the date of receipt of this order and RoC, Kerala is directed to accept the same with minimum additional fee.

04.12.2019	**Regional Director, Southern Region and Ors. (Appellants) vs. Real Image LLP and Ors. (Respondents)**	**NCLAT** **Company Appeal (AT) No. 352 of 2018** **Justice Jarat Kumar Jain, Member (Judicial)** **Mr. Balvinder Singh, Member (Technical)** **Dr. Ashok Kumar Mishra, Member (Technical)**

If an Indian Limited Liability Partnership ('LLP') is proposed to be merged into an Indian company then firstly, the LLP has to apply for registration under Section 366 of the Companies Act, 2013.

Fact of the case

National Company Law Tribunal, Chennai vide impugned order dated 11.06.2018 allowed the company petition filed by respondents and permitted amalgamation of the Limited Liability Partnership firm into Private Limited company. Hence the appellant Regional Director, Southern Region and Registrar of Companies have preferred this appeal under Section 421 of the Companies Act, 2013.

M/s. Real Image LLP (hereinafter referred to as transferor LLP) with M/s. Qube Cinema Technologies Pvt. Ltd. (hereinafter referred to as transferee company) and their respective partners, shareholders and creditors moved joint company petition under Section 230 to 232 of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamation) Rules 2016 and National Company Law Tribunal Rules, 2016 before NCLT, Chennai. Transferor LLP is proposed to be amalgamated and vested with transferee company. Transferor LLP is incorporated on 4.1.2016 under the provisions of Limited Liability Partnership Act, 2008 having its registered office in Chennai. The transferee company is a private limited company incorporated on 12.1.2017 under the Companies Act, 2013 and having its registered office also in Chennai. Both the incorporated bodies are engaged in the business of establishing and or acquiring Audio and Video Laboratories for Recording, Re-recording, Mixing, Editing, Computer Graphics and special effects for Film, Television Video and Radio Productions etc.

NCLT after considering the scheme found that all the statutory compliances have been made under Section 230 to 232 of the Companies Act, 2013 (in brief Act 2013). NCLT further found that as per Section 394(4)(b) of companies Act, 1956, LLP can be merged into company but there is no such provision in the Companies Act, 2013. However, explanation of sub-section (2) of Section 234 of the Companies Act 2013 permits a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Companies Act, 2013 prohibits of a merger of an Indian LLP with an Indian company.

Thus, there does not appear any express legal bar to allow merger of an Indian LLP with an Indian company. Therefore, NCLT applying the principal of Casus Omissus, by the impugned order allowed the amalgamation of Transferor LLP with transferee company.

Being aggrieved the appellants have filed the present appeal.

Issues

Issue for consideration before NCLAT is that by applying the principal of casus omissus a Indian LLP incorporated under the LLP Act 2008 can be allowed to merge into an Indian Company incorporated under the Act, 2013?

Judgement:

NCLAT observed that it is undisputed that transferor LLP is incorporated on 04.01.2016 under the provisions of LLP Act, 2008 and the transferee company is incorporated on 12.01.2017 under the Companies Act, 2013. Thus, these corporate bodies were governed by the respective Acts and not by earlier Act, 1956. Hence, it is apparent

that as per Section 232 of the Companies Act, 2013, a company or companies can be merged or amalgamated into another company or companies. The Companies Act, 2013 has taken care of merger of LLP into company. In this regard Section 366 of the Companies Act, 2013 provides that for the purpose of Part I of Chapter XXI the word company includes any partnership firm, limited liability partnership, cooperative society, society or any other business entity which can apply for registration under this part. It means that under this part LLP will be treated as company and it can apply for registration and once the LLP is registered as company then the company can be merged in another company as per Section 232 of the Companies Act, 2013.

NCLAT further observed that the provisions of the Companies Act, 2013 as a whole in reference of conversion of Indian LLP into Indian company there is no ambiguity or absurdity or anomalous results which could not have been intended by the legislature. The principal of casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. There is no such occasion to apply the principal of casus omissus.

The legislature has enacted provision in the Companies Act, 2013 for conversion of Indian LLP into Indian Company and vice versa in the Limited Liability Partnership Act, 2008. Thus there is no question infringement of any constitutional right of the Respondent.

The NCLAT held that the impugned order passed by NCLT, Chennai Bench is not sustainable in law and thus, set aside, which is allowing the merger of an Indian LLP with an Indian company without such registration.

Cassus Ommisus: a situation omitted from or not provided for by statute or regulation and therefore governed by the common law.

02.12.2019	**G. Vasudevan (Petitioner) vs. Union of India (Rep. by Secretary, Ministry of Corporate Affairs and Ministry of Law and Justice) (Respondents)**	**Madras High Court** **Writ Petition No. 32763 of 2019 and WMP. No.** **33188 of 2019** **Mr. A. P. Sahi (Chief Justice)** **Justice Subramonium Prasad**

Section 167(1)(a) Companies Act not violative of Articles 14, and 19(1)(g) of the Constitution of India.
Fact of the case:

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Declaration, to declare the "Proviso" in Section 167(1)(a) of the Companies Act 2013, as inserted vide the Companies (Amendment) Act 2017 as ultra vires the Articles 14, 19(1)(g) of the Constitution of India and declare illegal and null and void.

The challenge in the instant writ petition is to the vires of the proviso to Section 167(1)(a) of the Companies Act, as inserted by the Companies (Amendment) Act 2017. The same is extracted hereunder: -

"(i) in clause (a), the following proviso shall be inserted, namely: — "Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.";

Section 167 of the Companies Act gives instances where the office of a Director shall become vacant. Section 167(1)(a) states that if a Director incurs any disqualification specified in Section164, then he vacates his seat as a Director. The proviso which is under challenge in the instant writ petition states that, when a company commits a default as stipulated in sub-section 2 of Section 164, then a Director of such defaulting company does not vacate the post in the company in which the default is committed but a Director of such a company has to vacate his seat as a Director in all other companies in which he is Director.

The petitioner contends that proviso to Section 167(1)(a) of the Companies Act, leads to unequal treatment being met out to Directors of a defaulting company based on whether they are Directors in other companies or

not. The petitioner claims that since this proviso states that such Directors of a defaulting company would only have to vacate Directorship in other companies while retaining the same in the defaulting company, this leads to unfair treatment to those Directors who hold such posts in multiple companies.

The petitioner further claims that this differential classification is not based on an intelligible differentia and that there is no justification provided for mandating the vacation of Directorship in other companies, thus leading to this provision being arbitrary and violative of Article 14 of the Constitution of India. It is also contended that the impugned provision irrationally has a detrimental effect on other, non-defaulting companies and punishes individual Directors for the defaults of a company even when fault cannot be directly attributed to them. The petitioner also claims that the impugned proviso also violates the principles of natural justice.

Issue

The primary issue in this case relates to whether or not the proviso to Section 167(1)(a) was without justification irrationally mandating the vacating of Directorship in other companies while not providing for the same in the defaulting company?

Judgement:

The Madras High Court held that the proviso to Section 167(1)(a) must be interpreted in ordinary terms and would apply to the entirety of Section 164 including sub-section 2. The Court has further held that this proviso can be justified on two grounds. Firstly, it has been reiterated that the exclusion of Directors from vacating their posts in the defaulting company while doing so in all other companies where they hold Directorship has been done in order to prevent the anomalous situation wherein the post of Director in a company remains vacant in perpetuity owing to automatic application of Section 167(1)(a) to all newly appointed Directors. Secondly, the underlying object behind the proviso to Section 167(1)(a) is seen to be the same as that of Section 164(2) both of which exist in the interest of transparency and probity in governance, Owing to these justifications, the Court thus holds that the proviso to Section 167(1)(a) is neither manifestly arbitrary nor does it offend any of the fundamental rights guaranteed under Part III of the Constitution of India. Thus, the writ petition is dismissed.

04.11.2019	**Mukut Pathak & Ors. vs. Union of India & Anr.**	**Delhi High Court** **W.P. (C) 9088/2018 &CM** **Appln. No.35006/2018 Justice Vibhu Bakhru**

Penalty u/s 164(2) of Companies Act not to apply retrospectively. Fact of the Case:

The petitioners were directors in various companies and were disqualified from being appointed/ reappointed as directors for a period of five years u/s 164(2)(a), for default on the part of their concerned companies, in filing of the annual returns and financial statements for the financial year 2014-2016. The said list of directors, who were disqualified, was published in 2017. The petitioners challenged the list of disqualified directors, for defaults, pertaining to the financial years 2012-2014 and 2013-2015 before the High Court.

Issues

A. Whether the provisions of Section 164(2)(a) are retrospective?

B. Whether a prior notice and an opportunity of being heard was required to be given before publishing the list of the disqualified directors?

C. Whether the directors of a company are disqualified from being re-appointed as directors in other non-defaulting companies in which they were directors at the time of incurring the disqualification?

Judgement

A. It was held that the provisions of Section 164 (2) would apply prospectively and that it a well settled law, that no statute should be construed to apply retrospectively, unless such construction appears clear

from the language of the enactment or otherwise necessary by implication. It was also equally trite that a statute is not retrospective merely because it affects existing rights or because a part of the requisites for its action is drawn from a time antecedent to its passing.

B. With respect to the second issue, it was noted that principles of natural justice are only meant to supplement the law and are a kind of code of fair administrative procedure in the decision making process.

However, in the present case, the administrative authorities are not required to take any qualitative decision, in as to when a director would be disqualified. Section 164(2) merely sets out the conditions, which if not complied with, would disqualify a person from being reappointed or appointed as a director. Thus, it was unable to accept that exclusion of the "audi alteram partem" rule resulted in any procedural unfairness.

C. Lastly, Section 164(2) provides that no person who is or has been a director of company that has defaulted u/s 164(2) shall be eligible to be re-appointed as a director of 'that company' or appointed in any 'other company'.

The expression 'other company' is used to refer to all companies other than the company which has committed the defaults as specified in clauses (a) and (b) of Section 164(2).

It was also noted that the term appointment would include any 'reappointment' as well. Thus, it was held that the directors of the defaulting companies were not eligible to be appointed or reappointed as directors in any company for a period of five years. It is clarified that the petitioners would continue to be liable to pay penalties as prescribed under the Act.

24.10.2019	**Jindal Steel and Power Limited (Appellant) vs. ArunKumar Jagatramka and Ors. (Respondents)**	**NCLAT** **Company Appeal (AT)No. 221 of 2018** **Justice S.J. Mukhopadhaya(Chairperson)** **Justice Bansi Lal Bhat,Member (Judicial)**

During the Liquidation proceeding under Insolvency and Bankruptcy Code, 2016 a petition under Section 230 to 232 of the Companies Act, 2013 is maintainable.

Fact of the case

Gujarat NRE Coke Limited ('Corporate Debtor'/ 'Corporate Applicant') moved an application under Section 7 of the I&B Code before the Adjudicating Authority (NCLT), Kolkata for initiation of 'Corporate Insolvency Resolution Process' on account of various defaults committed by it. It was admitted by the Adjudicating Authority on 7.04.2017 and 'Corporate Insolvency Resolution Process' was initiated.

In absence of any 'Resolution Plan', the Adjudicating Authority passed order of 'Liquidation' on 11.01.2018 after the expiry of 270 days. First Respondent-Mr. Arun Kumar Jagatramka (Promoter) filed Appeal before NCLAT against the order of 'Liquidation' in Company Appeal (AT) (Insolvency) No.55-56 of 2018, challenging the ineligibility under Section 29A of the I&B Code as 'Resolution Plan' submitted by him was not accepted. NCLAT allowed the liquidation proceeding to continue.

In the meantime, 1st Respondent-Mr. Arun Kumar Jagatramka (Promoter) moved an application under Sections 230 to 232 of the Companies Act, 2013 before the NCLT, Kolkata for Compromise and Arrangement between erstwhile Promoters and the Creditors. In the said case, the impugned order dated 15.05.2018 was passed.

Jindal Steel and Power Limited (Appellant), an unsecured creditor of Gujarat NRE Coke Limited ('Corporate Debtor') has preferred this Appeal under Section 421 of the Companies Act, 2013 against order dated 15.05.2018 passed by NCLT, Kolkata Bench, which allowed the application under Section 230 to 232 of the Companies Act, 2013, preferred by Promoter - Arun Kumar Jagatramka ordered for taking steps for Financial Scheme of Compromise and Arrangement between Applicant - Arun Kumar Jagatramka (Promoter) and the Company ('Corporate Debtor') through the 'Liquidator', after holding the debts of shareholders, creditors etc., in terms of Section 230 of the Companies Act, 2013.

Issues

The Appellant has challenged the same on following grounds: -

(i) Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016 the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act, 2013?

(ii) If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible under Section 29A of the Insolvency and Bankruptcy Code, 2016 to submit a 'Resolution Plan'?

Judgement:

The NCLAT observed that during the liquidation process, step required to be taken for its revival and continuance of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its management and from a death by liquidation. During a Liquidation proceeding under Insolvency and Bankruptcy Code, 2016, a petition under Section 230 to 232 of the Companies Act, 2013 is maintainable.

NCLAT further, stated that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, 2013, the 'Corporate Debtor' is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A of Insolvency and Bankruptcy Code, 2016, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act, 2013. Proviso to Section 35(f) of Insolvency and Bankruptcy Code, 2016 prohibits the Liquidator to sell the immovable and movable property or actionable claims of the 'Corporate Debtor' in Liquidation to any person who is not eligible to be a Resolution Applicant

Further, Promoter, if ineligible under Section 29A of Insolvency and Bankruptcy Code, 2016 cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the 'Corporate Debtor'.

The NCLT by impugned order dated 15.05.2018, though ordered to proceed under Section 230 to 232 of the Companies Act, failed to notice that such application was not maintainable at the instance of 1st Respondent-Arun Kumar Jagatramka (Promoter), who was ineligible under Section 29A to be a 'Resolution Applicant'.

The NCLAT thus, set aside the order passed by the NCLT, Kolkata bench and remitted the case to Liquidator/

Adjudicating Authority to proceed. Hence, the Appeal is allowed.

19.09. 2018	**M/s Ind-Swift Limited (Appellant) vs. Registrar of Companies (Punjab & Chandigarh) (Respondent)**	**NCLAT** **Company Appeal (AT)No.52 - 53 of 2018** **Justice A.I.S. Cheema,Member (Judicial)** **Mr. Balvinder Singh,Member (Technical)**

Repayment of Deposits accepted before Commencement of the Companies Act, 2013 Fact of the case

Appellant is a Listed company, it had accepted deposits since 2002 and regularly paid back till 28.02.2013. In 2013, it started facing liquidity problems and incurred losses. The Appellant company filed application before CLB and obtained relief under Section 58AA read with Section 58A (9) of the erstwhile Companies Act, 1956 and got instalments fixed to repay deposits, Appellant again sought re-fixing of periods, instalments and rate of interest from NCLT, New Delhi bench under Section 74 of the Companies Act, 2013. NCLT rejected the application. This appeal is against rejection of the application/s.

Issues:

Whether the Appellant company which has already got relaxation from CLB under Section 58AA read with Section 58A (9) of the erstwhile Companies Act, 1956 and got instalments fixed to repay deposits, can again apply for re-fixing of periods, instalments and rate of interest for repayment of deposits accepted before commencement of the Companies Act, 2013 ?

Judgement:

The NCLAT observed that the NCLT considered that the Appellant had at the time of first grant of time got relief of huge extension and that there was no reason to accept the plea for further extension. The NCLT appears to have found that when big relief had already been granted to the Company, further extension was not justified.

Section 76(2) read with Sections 73 and 74 would apply to acceptance of deposits from public by eligible Companies but it saves the Company which had accepted or invited public deposits under the relevant provisions of the Companies Act, 1956 and Rules there under and has been repaying such deposits and interests thereon in accordance with such provisions, then the provisions of Clause (b) of Sub-Section (1) of Section 74 of the new Companies Act, 2013 shall be deemed to have been complied with. This is, however, subject to the fact that the Company complies with the requirements under the Companies Act, 2013 and the Rules and "continues to repay such deposits and interest due thereon on due dates for the remaining period" as per the terms and conditions.

Considering these provisions, it appears that Section 74(1)(b) was attracted and when it appears from record that the Appellant defaulted, the penal provisions would get attracted.

Thus, when once a scheme had been got settled, from CLB, default on the part of the Appellant would attract penal provisions as the earlier scheme itself laid down. Hence, present appeal for further extension is dismiss

09.07.2019	**S. Gopakumar Nair & Anr. vs. Obo Bettermann India Pvt.Ltd.**	**NCLAT** **Company Appeal (AT)No. 272/2018** **Justice A.I.S. CheemaMember (Judicial)** **Mr. Balvinder SinghMember (Technical)**

Purchase of minority shares without compliance to Companies Act amounts to oppression and mismanagement.

Fact of the case:

The Appellants held 100% shares in Cape Electric India Pvt. Ltd. ("CEIPL"). Subsequently, OBO Bettermann Holdings- GMBH Ltd. ("OBO Germany") acquired 76% of the shares in CEIPL, pursuant to a shareholder's agreement entered into with the appellants. Over the course of time, the name of CEIPL was changed to OBO Bettermann India Pvt. Ltd. ("OBO India") and the shareholding of the appellant was reduced to 0.36% in OBO India.

OBO Germany made attempts to buy out the equity shares of the appellants pursuant to a put and call option agreement and later, being in control of OBO India, issued notice u/s 236 of the Companies Act, to buy the shares of the appellants in spite of their resistance. A petition was filed before the NCLT u/s 241, which was held as not maintainable. Aggrieved by the order, an appeal was filed before the NCLAT.

Issues:

A. Whether the appellants' petition filed u/s 241 is maintainable.
B. Whether Section 236 could be invoked to acquire the minority shareholding in the present case.

Judgement:

It was observed that there were only three shareholders in OBO India, which included OBO Germany and the two Appellants. One of the criteria u/s 241 stated that the petition was maintainable if not less than one-tenth of the total number of members had filed an application making grievances of oppression and mismanagement.

Thus, it was held that appellants were eligible to file petition on the basis of the number of members. The argument that the petition wasn't maintainable as the Appellants ceased to exist as the members of OBO India was rejected, since the cause u/s 241 arose only when the shares of the appellants were wrongfully acquired

u/s 236 of the Companies Act, 2013. In the present case, there was a gradual change in shareholding as per different agreements executed between OBO Germany and the Appellants. However, Section 236 could be invoked only in case of amalgamation, share exchange and conversion of securities and for any other reasons. It was observed that the words "for any other reasons" had to be read 'ejusdem generis' with the preceding word and must take the same or similar colour.

If this was not the intention of the legislature, then it could have generally mentioned that, in the event of any person or group of persons becoming 90% shareholder of the issued equity share capital of the company, such members could express their intention to buyout the remaining stake. Thus, it was held that the respondents could not have invoked Section 236 to acquire the minority shares of the Appellants as the said provision wasn't applicable to their case. Hence, the appeal was allowed.

04.06.2019	**Hari Sankaran (Appellant) vs. Union of India & Ors.(Respondents)**	**Supreme Court of India** **Civil Appeal No. 3747 of2019** **Justice M. R. Shah Justice Indu Malhotra**

Companies Act, 2013 - Section 130 – Application by central government for reopening and recasting of accounts – Objection by ex-director of the company – NCLT allowed the application by Central Government - on appeal NCLAT concurred with NCLT.

Facts of the case:

The facts leading to the present appeal in nutshell are as under:

The Respondent No. 2 – IL&FS is a company incorporated under the provisions of the Companies Act, 1956. That the said company IL&FS has 348 group companies, including IFIN and ITNL. That the said IL&FS is a core investment company and systemically important Non-Banking Finance Company duly approved under the Reserve Bank of India Act, 1931.

Over the years, it had inducted institutional shareholders. That on 01.10.2018, the Central Government through the Ministry of Corporate Affairs filed a petition before the learned Appellate Tribunal under Sections 241 and 242 of the Companies Act alleging inter alia, mismanagement by the Board of IL&FS and that the affairs of IL&FS were being conducted in a manner prejudicial to public interest. It was found that the management of IL&FS and other group company/companies were responsible for negligence and incompetence, and had falsely presented a rosy financial statement.

To unearth the irregularities committed by IL&FS and its companies, the provisions of Section 212(1)(c) of the Companies Act were invoked for investigation into the affairs of the company. The investigation was to be carried out by the Serious Fraud Investigation Office (hereinafter referred to as 'the SFIO') in exercise of powers under Section 212 of the Companies Act. The SFIO submitted an interim report dated 30.11.2018 to the Central Government placing on record that the affairs in respect of IL&FS group Companies were mismanaged, and that the manner in which the affairs of the company were being conducted was against the public interest.

The Registrar of Companies also conducted an enquiry under Section 206 of the Companies Act, and prima facie concluded that mismanagement and compromise in corporate governance norms and risk management has been perpetuated on IL&FS and its group companies by indiscriminately raising long term and short terms loans/borrowings through Public Sector Banks and financial institutions.

This appeal was filed by Infrastructure Leasing & Financial Services Limited (referred to as 'IL & FS') before the Supreme Court of India against the order dated 31.01.2019 passed by the NCLAT, vide. the said order the Appellate Tribunal has dismissed the appeal preferred by the Appellant and has confirmed the order passed by the NCLT, Mumbai Bench dated 01.01.2019 by which the NCLT allowed the application preferred by the Central Government under Section 130(1) & (2) of the Companies Act, 2013 and has permitted recasting and re- opening of the accounts of IL&FS, IL&FS Financial Services Limited ("IFIN") and IL&FS Transportation Networks Limited ("ITNL") for the last five years.

Issues

The question which is posed for consideration before the Hon'ble Supreme Court is, whether in the facts and circumstances of the case, can it be said that the order passed by the learned Tribunal is illegal and/or contrary to Section 130 of the Companies Act?

Judgement:

The Supreme Court of India inter-alia observed that the NCLT may, under Section 130 of the Companies Act, 2013, pass an order of reopening of accounts if it is of opinion that

(i) the relevant earlier accounts were prepared in a fraudulent manner; or

(ii) the affairs of the company were mismanaged during the relevant period casting a doubt on the reliability of the financial statements.

Thus, the Tribunal would be justified in passing the order under Section 130 of the Companies Act, 2013 upon fulfilment of either of the said two conditions.

In view of the above referred legal position in addition to the reports of SFIO & ICAI, the specific observations made by the NCLT while passing the order under Section 241/242 of the Companies Act, 2013 and considering the fact that the Central Government has entrusted the investigation of the affairs of the company to SFIO in exercise of powers under Section 242 of the Companies Act, it cannot be said that the conditions precedent while invoking the powers under Section 130 of the Companies Act, 2013 are not satisfied.

Based on the facts and circumstances of the case, narrated hereinabove, and also in the larger public interest and when thousands of crores of public money is involved, the Tribunal is justified in allowing the application under Section 130 of the Companies Act, 2013 which was submitted by the Central Government as provided under Section 130 of the Companies Act, 2013.

The Supreme Court of India upheld the order passed by NCLAT & NCLT under Section 130 of the Companies Act, 2013 for reopening of the books of accounts and re-casting the financial statements of the Infrastructure Leasing & Financial Services Limited; IL&FS Financial Services Limited and IL&FS Transportation Networks Limited for the last five years, viz. from Financial Year 2012-13 to the Financial Year 2017-18 in larger public interest and dismissed the appeal.

07.05.2019	**CADS Software India Pvt. Ltd. and Ors (Appellant) vs.Mr. K.K. Jagadish & Ors., (Respondents)**	**NCLAT** **Company Appeal (AT) No.320 of 2018** **Justice A.I.S. Cheema, Member (Judicial)** **Mr. Balvinder Singh, Member (Technical)**

Removal of director due to loss of confidence as argued by the appellant does not appear in the Companies Act and Managing Director is eligible for compensation

Fact of the case

1st Respondent was removed as Director of the Appellant Company pursuant to the Management losing confidence in him at the EGM on 7.8.2015 which resulted in 1st Respondent to file company petition before the NCLT, Chennai for relief against oppression and mismanagement under Sections 241 and 242 of the Companies Act, 2013. The 1st Respondent alleged five acts of oppression while alleging three acts of mismanagement. The Appellants pleaded that the Company Petition is filed with the ulterior motive of extracting Rs. 10 crores from the Company.

The NCLT held that in terms of Section 202(3) of the Companies Act, upon removal, the Managing Director of a company would be entitled to receive remuneration which he would have earned if had been in office for the remainder of his term or for three years, whichever is shorter. Accordingly, it is deem fit to order a compensation

of Rs.105 lakhs (calculated at the rate of Rs.35 lakhs p.a. for three years) together with interest @ 10% from the date of removal of the petitioner (Respondent herein) from the office of Managing Director, plus other benefits as already offered, till the date of payment to the Petitioner by the R1 company/other respondents (Appellants herein). Being aggrieved by the impugned order dated 19.7.2018 the Appellants (Original 1st and 6th Respondent) have preferred this appeal.

The Appellants have stated that the 1st Respondent was not legally entitled to any compensation for the loss of office as Managing Director in the absence of any breach by the 1st Appellant and in the absence of any fixed period of appointment as Managing Director. The Appellants further stated that the removal of the 1st Respondent as Director of the company is valid as they have done substantial compliance with Section 169 of Companies Act, 2013.

Issues:

Whether a person removed from the post of Managing Director is eligible for compensation, when he is removed due to the reason of loss of confidence?

Judgement:

The NCLAT observed that the 1st respondent was functioning as Managing Director of the company since 17.4.1996 and was not appointed for a fixed tenure. 1st respondent was removed from the company. Upon removal as Managing Director, 1st respondent is entitled to compensation for loss of office as per Section 202 of the Companies Act, 2013.

The arguments advanced by the Appellant that 1st Respondent was removed due to loss of confidence. The Tribunal held that the term loss of confidence does not appear in the Companies Act and accordingly, the NCLT Chennai bench has rightly given his findings and arrived at to give compensation of Rs.105 lakhs (calculated at the rate of Rs.35 lakhs p.a. for three years) together with interest @ 10% from the date of removal of the 1st Respondent as Managing Director plus other benefits as already offered, till the date of payment by the company/other respondents.

Hence, the Appeal is accordingly dismissed.

Companies Act, 2013 – Sections 242 & 242 – Oppression and mismanagement proceedings – Impleadment of creditor bank allowed by NCLT

Fact of the case:

The Appellant 'Usha Martin Ventures Ltd. & Ors.' filed Petition under Section 241 & 242 of the Companies Act, 2013 alleging oppression and mismanagement against 'Usha Martin Ltd. & Anr.' -Respondents. The State Bank of India filed an intervention application, which was allowed by National Company Law Tribunal. Appellants challenged the impleadment of SBI in this appeal.

The Appellants submitted that State Bank of India being a lender is not a necessary party nor a formal party and, therefore, it cannot be impleaded as Respondents in a petition under Section 241 & 242 of the Companies Act, 2013.

The Respondent submitted that the bank has a nominee Director in the Board of Directors of the company who is required to be present in board meetings in the interest of the company.

Issues:

The Respondent- State Bank of India is not a necessary party, inspite of the same, it has allowed to intervene the Respondents by the NCLT, Kolkata bench.

Judgement:

NCLAT held that as the lender State Bank of India has a nominee as one of the Director of the Company and the petitioner have alleged mismanagement of the company, The NCLT rightly allowed the State Bank of India to intervene in the matter. The appeal is accordingly dismissed.

28.01.2019	**Kanodia Knits Pvt. Ltd. (Appellant) vs. Registrar of Companies Delhi & Haryana (Respondent)**	**NCLAT** **Company Appeal (AT)No. 216 of 2018** **Justice A.I.S. Cheema,Member (Judicial)** **Mr. Balvinder Singh,Member (Technical)**

The documents placed by the Appellant company failed to prove that it was carrying on business or was in operation when its name was struck off.

Fact of the case:

The name of the appellant company was struck off by the Registrar of Companies, as the company had not been carrying on business or nor in operations for two immediately preceding five years and the company had not obtained the status of dormant company under Section 455 of the Companies Act, 2013.

The Appellant filed the appeal before NCLT claiming that it had not been served with Notice under Section 248(1) of the Companies Act, 2013 and the Registrar of Companies (ROC) had proceeded to issue notice under Section 248(5) of the Companies Act, 2013 and the name of the appellant company was then struck off. The Appellant claimed that the company had been doing business and was in operation and audited financial statements for the year financial year 2012-13 to FY 2016-17 were filed.

The NCLT considered the case put up before it as well as the documents and came to the conclusion that the appellant company failed to prove that it was carrying on business or was in operation when its name was struck off and dismissed the appeal which was filed before it. Against the dismissal the present appeal has been filed and the same claim is put up by the Appellant referring to the documents which were filed before NCLT.

The ROC filed reply before the NCLAT and affidavit of ROC claims that the Appellant company had not filed financial statements from the financial year ending 31.3.2004 till 31.3.2011. The balance sheet and annual return was filed for the year ending 31.3.2012 and thereafter again there was no filing and according to ROC, STK-1 notice was duly issued to company on 21.3. 2017 and the copy of the same has been filed. According to the ROC the Appellant did not respond to the notice and further steps to strike off the company were taken. Hence, later on public notice as per Section 248(5) was issued.

Issues:

- Whether the ROC had served Notice under Section 248(5) of the Companies Act, 2013 before proceeding towards striking off the name of the Appellant Company?
- Whether Appellant company was in business or operation when it was struck off?

Judgement:

The NCLAT held that there is no doubt, that the affidavit filed by the ROC attaching copy of the Notice dated 21.3.2017 as per STK 1 and the affidavit which claims that such notice was issued to the Appellant company as per the official records of the ROC. Apart from this the appeal filed before NCLT itself admitted that notice under Section 248 was published in the official gazette, copy of notice STK 5 also gave opportunity to the appellant to move the ROC if it was aggrieved by the proposed removal of the company name. After such notice the Appellant made no effort to move the ROC and put up its case that the Appellant was in business or in operation when the name was struck off. Thus, the contention that opportunity to the Appellant was not given is not accepted.

Regarding the merits of the claim that the Appellant was in business or in operation the documents filed before NCLAT include two income tax returns for the assessment years 2016-17 and 2017-18. The return for 2016-17 claims that the gross total income of the year was Rs.504 and the income tax return for 2017-18 claims that the gross total income was Rs.1473/-. If the invoices are seen, the seller is shown as Kanodia Hosiery Mills and buyer is Kanodia Knit (P) Ltd. If the address of the seller is perused in these invoices it is 35, North Basti Harphool Singh, Sadar Thana Road, Delhi. This is the same address of the Appellant, Kanodia Knits Pvt Ltd, also. How much weight such documents should be given is a foregone consequence. Thus, claim of Appellant regarding such documents does not prove that the company was in business or in operation.

Having heard the Appellant, and seeing the documents findings and observations of the NCLT, NCLAT found no reason to differ from NCLT. Hence, there is no substance in this appeal. The appeal is rejected.

08.01.2019	**Shashi Prakash Khemka (Dead) Through LRs. and Anr. (Appellants) vs. Nepc Micon & Ors. (Respondents)**	**Supreme Court of India** **Civil Appeal Nos.1965-1966 of 2014** **Justice L. NageswaraRao** **Justice Sanjay KishanKaul**

Power vested with the NCLT to deal with issues pertaining to rectification of register of members and not the civil courts.

Fact of the case

The appellant had filed a petition before the Company Law Board ("CLB"), seeking rectification of the register of members u/s 111- A of the erstwhile Companies Act, 1956. It was held that the petitions were maintainable and didn't suffer from limitation, and CLB decided to hear the matter on merits.

However, an appeal was filed by the respondent before the High Court of Madras, which reversed the decision of the CLB and in effect, relegated the parties to a civil suit. Thus, a special leave petition was filed before the Supreme Court by the appellant to resolve the subject matter of dispute in the exercise of power u/s 111-A of the erstwhile Companies Act, 1956.

Issues

Whether issue related to transfer of shares would be adjudicated by the Civil Courts or by the Company Law Board.

Order

Reliance was placed on the judgment in Ammonia Supplies Corporation (P) Ltd. vs. Modern Plastic Containers Pvt. Ltd. and Others to canvass the proposition that while examining the scope of Section 155 of the Companies Act, 1956 (the predecessor to Section 111), a view was taken that the power was fairly wide, but in case of a serious dispute as to title, the matter could be relegated to a civil suit.

Furthermore, it was noted that subsequent legal developments had a direct effect on the present case as Companies Act, 2013 had been amended which provided for the power of rectification of the Register u/s 59 of the Companies Act, 2013 and conferred such powers on the NCLT. A reference was also made to Section 430 of the Companies Act, 2013 which completely barred the jurisdiction of the civil courts in matters in respect of which the power had been conferred on the NCLT. In light of the above facts, the Supreme Court was of the view that relegating the parties to a civil suit would not be appropriate, considering the manner in which Section 430 was widely worded.

Hence, the appeal was allowed and it was held that the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act, 2013.

14.11.2018	**S. Ahamed Meeran (Appellant) vs. Ronny George & Ors (Respondents)**	**NCLAT** **Company Appeal (AT)No. 162 of 2018** **Justice S.J. Mukhopadhaya,Chairperson** **Justice A.I.S. CheemaMember (Judicial)**

Eligibility criteria to maintain petition before the Tribunal & Grant of waiver to maintain application under Sections 241 & 244 of the Companies Act, 2013

Fact of the case :

This appeal has been preferred by Appellant against order dated 14.03.2018 passed by NCLT, Single Bench Chennai, whereby and where under the Tribunal granted waiver in favour of 1st Respondent – 'Ronny George' under Proviso to Sub-section (1) of Section 244 of the Companies Act, 2013 for entertaining a petition alleging oppression and mismanagement in the company.

The Appellant submitted that the 1st Respondent is a minority shareholder of 2nd Respondent Company holding 8.99% shares. According to him the 1st Respondent failed to make out a case of any 'exceptional circumstances' to get the application for waiver allowed in its favour.

The 1st Respondent submitted that the Appellant is reagitating the issue on wholly irrelevant ground. According to him, the NCLT has considered critical facts laid down by this Appellate Tribunal in '*Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.*' and after careful consideration and taken into consideration the fact that 1st Respondent is the member of the company and the matter of complaint pertains to oppression and no similar allegations of oppression were made earlier, the waiver was allowed.

Issues:

Eligibility criteria to maintain Petition under Section 241 & 244 of the Companies Act, 2013

Judgement:

In *'Cyrus Investment Pvt. Ltd. & Anr. V.Tata Sons Ltd. & Ors.,* NCLAT has noticed the shareholding pattern and taking into consideration the fact that majority of the shareholders having less than 10% of the shareholding, except 2 got more than 10% and that the Appellant 'Cyrus Investment Pvt. Ltd.' has invested about Rs.1,00,000 Crore in 'Tata Sons Ltd.' out of the total investment of Rs.6,00,000 Crore, held that the Appellant of the said case namely 'Cyrus Investment Pvt. Ltd.' has made out an exceptional case to maintain a petition for waiver under Proviso to Sub-section (1) of Section 244 of the Companies Act, 2013.

The present case of the 1st Respondent 'Ronny George' is not only different but a reversal case where majority of the shareholders have more than 10% of shareholding except two who are less than 10% shareholding. Therefore, it cannot be held that the 1st Respondent has made out a case of exceptional circumstances for grant of waiver to maintain an application under Section 241- 242 on such ground. This apart, no exceptional circumstance has been shown by the Tribunal to grant waiver. The factors recorded by NCLT of the impugned order are no grounds to treat them as exceptional circumstances keeping in view our Judgment in the matter of *'Cyrus Investment Pvt. Ltd. & Anr. v. Tata Sons Ltd. & Ors.' (Supra).*

In view of the aforesaid fact, the impugned order of Tribunal being based on wrong presumptions of fact and law and as the1st Respondent has failed to make out a case for waiver, the said order is set aside. The petition under Section 241 and 242 preferred by 1st Respondent (Petitioner) before the Tribunal in respect to 2nd

Respondent Company – 'Professional International Couriers Private Limited' is not maintainable and to be dismissed. The appeal is allowed with aforesaid observations.

24.10.2018	**K. J. Suwresh & Anr. (Appellants) vs. Teamlease Staffing Services Pvt. Ltd. & Anr. (Respondents)**	**NCLAT** **Company Appeals (AT)Nos.30 & 167 of 2018** **Justice AIS Cheema,Member (Judicial)** **Mr. Balvinder Singh,Member (Technical)**

NCLAT dismissed the objection raised by the Appellants on alleged non- receipt of notice regarding scheme of Amalgamation.

Fact of the case:

These appeals arise out of the order of merger passed by NCLT Chennai and NCLT Mumbai. The appellants challenge the amalgamation of the companies on the ground that they were not put to notice of the amalgamation.

To put the case of the Appellants in a nutshell, their grievance is that they were holding 100% equity shares in the transferor Company No.1 - ASAP Info Systems Private Limited and there was Share Purchase Agreement ('SPA', in short) dated 04.07.2016 between them and the transferee Company whereby the 100% shareholding was to be transferred by them to the transferee Company. Their grievance is that the payments were to be made by the Transferee Company in tranches and after initial payment, there has been default.

Issues:

The contention of Appellants is that they ought to have been treated either as shareholder or creditors of the transferee Company and in either case they were entitled to Notice. It is claimed that no Notice was given to them and hence they are aggrieved by such amalgamation.

Judgement:

The NCLAT held that the Respondents rightly submitted that with such Affidavits executed by the Appellants in May, 2017, on record, it is clear and apparent that the Appellants had knowledge. The Appellants clearly had knowledge and information regarding the scheme of amalgamation of these Companies and had given their No Objections, even if they relate to Appellant No.1 in capacity of Director of Lakshmi Car Zone Limited.

The arguments on behalf of the Appellants is not convincing that they had different capacity as the 100% shareholders of the transferor Company No.1 which had entered into the Share Purchase Agreement and thus in that capacity Notice should have been given to them and their objections or no objections should have been taken.

At the time of arguments, Counsel for the Appellants accepted that Diary No.4167 shows that the audited balance sheet as available was till 31.03.2016 and the Share Purchase Agreement was of subsequent date of 04.07.2016. Although it is argued that the Share Purchase Agreement being subsequent, the Auditors may not have known about the same and so did not refer, we find from the certified copy of record of proceedings before NCLT, Chennai filed with Diary No.4167 that the Official Liquidator in his Report noted that the CA did record that there was change in management in the month of August, 2016 in respect of transferor Company No.1. The Report of Official Liquidator shows that both the transferor Companies were wholly owned subsidiaries of transferee Company.

What appears is that after the Appellants executed the SPA, they handed over their shares and admitted that they had resigned as Directors on 01.01.2017. In fact, the Appellants even approved the balance sheet of the transferor Company No.1, as on 31st March, 2016 by signing the same on 31.08.2016.

The NCLAT after going through such documents observed that it clear that the Appellants were clearly aware of the proceedings relating to the scheme of amalgamation and had no difficulties initially but it appears that, as their transaction based on SPA landed in difficulties and so, now they want to raise grievances to the scheme

of amalgamation on the plea that Notice to them also was necessary. Going through the material on record, NCLAT did not find that there is any substance in the grievance raised by the Appellants. Dispute relating to SPA is before Arbitration and Transferee Company is facing it. If Appellants had difficulty, they never went before NCLT to raise Objections although they knew about the amalgamation process going on. This being so, both the Appeals are rejected.

16.10.2018	**SAS Hospitality Pvt. Ltd. & Anr. (Petitioner) vs. Surya Constructions Pvt. Ltd. & Ors. (Respondent)**	**Delhi High Court** **CS (Comm) 1496 of2016** **Justice Prathiba M.Singh.**

Whether civil court has jurisdiction regarding dispute over Sections 59 & 62 – Allotment of shares under the Companies Act, 2013

Facts of the case:

SAS Hospitality Pvt. Ltd. is the Plaintiff No.1 in the present suit and Plaintiff No.2 Mr. Anant Kumar Aggarwal is the shareholder of the Plaintiff No.1. The Defendant No.1 - Surya Construction Pvt. Ltd. (Company) is a company, which owned a hotel property at New Delhi. The authorised share capital of the Company was 1 crore divided into 1 Lakh equity shares of Rs.100/- each. The actual issued share capital as on 31st March, 2013 was Rs.85,76,500/- comprising of 85,765 shares of Rs.100/- each. The Defendant Nos.2 to 4 Mr. Samir Nawalgari, Mr. Sharad Nawalgari and Mr. Vaibhav Jhawar were managing the Company. The majority shareholder of the Defendant No.1 Company to the tune of 99.96% was the Plaintiff Company.

The suit was filed on the basis of the following allegations.

a) That the Defendant Nos.5 to 9 were allotted shares of the Company in an illegal and clandestine manner on 5th October, 2013.

b) That the said allotment was made known by virtue of returns filed on 7th December, 2013

c) That the allotment of shares was done in an illegal and unlawful manner by transferring the moneys belonging to the Company and showing artificial deposit of Rs.1.6 crores. In fact, the same amount of Rs.48 Lakhs belonging to the Company was rotated repeatedly to show that the Defendant Nos.5 to 9 had paid the Company between 6th and 9th September, 2013, whereas in fact they had not made the said payments.

d) That in a fraudulent manner the shareholding of the Plaintiff in the Company, which was to the tune of 99.96%, was diluted to 21.44%.

e) That the share warrants, which were purportedly issued on 30th March, 2013, were illegal as the share capital did not permit issuance of share warrants. Moreover, share warrants could only be issued by a public limited company and not by a private limited company.

f) That by circulating the same amount on four different occasions and showing that the Defendant Nos.5 to 9 had subscribed to the share capital, allotment of share was made in their names, which is completely illegal.

The Defendants have filed their written statement and raised a preliminary issue as to the maintainability of the present suit. It is stated that the Company was in severe financial crisis due to a loan taken by the Company from India Bulls Housing Finance Ltd. In fact, it is stated that the only property of the Company has already been attached under Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter, 'SARFAESI Act') and the same has, in fact, been sold. The purported sole asset of the Defendant No.1 Company is no longer an asset of the Plaintiff Company.

Issues:

Whether civil court has jurisdiction over disputes regarding Allotment of shares under the Companies Act, 2013?

Judgement:

Before going into the question as to whether this Court has the jurisdiction to entertain and try the present suit and grant reliefs prayed for, it is necessary to analyse the scheme of the Companies Act, 2013, along with the constitution of the NCLT. The NCLT has been vested with powers that are far reaching in respect of management and administration of companies. The said powers of the NCLT include powers as broad as "regulation of conduct of affairs of the company" under Section 242(2) (a), as also various other specific powers. NCLT is a tribunal which has been constituted to have exclusive jurisdiction in the conduct of affairs of a company and its powers can be contrasted with that of the CLB under the unamended Companies Act, 1956.

In the Companies Act, 2013, Sections 407 onwards deal with the constitution of the Tribunal. Section 420 has vested the Tribunal with powers to 'pass such orders thereon as it thinks fit'. The Tribunal is also vested with the power of review. Under Section 424 of the Companies Act, 2013, the Tribunal also has the same powers and functions as are vested with a Civil Court. In addition to the above, the Tribunal also has the power to punish for contempt which was hitherto not available with the CLB. In various ways, the NCLT is not merely exercising the jurisdiction of a Company Court under the new Companies Act, 2013, but is also vested with inherent powers and powers to punish for contempt. It is in this background that the court has to decide the issue of jurisdiction, which has been raised by the Defendant.

Under Section 62 of the Companies Act, 2013, a procedure has been prescribed for issuance of share capital. The said procedure involves sending of a letter of offer to existing shareholders [Section 62(1) (a)] and to employees [Section 62(1) (b)]. The manner of sending of the said offer is also prescribed. The said offer also has to contain the details as to the terms under which the offer is being made, including the terms for conversion of debentures or loans to shares. Upon this procedure being followed, the subscribed share capital can be increased by the company.

The effect of the increase in the share capital and allotment of the same to any person has an automatic effect, i.e., it results in the alteration of the register of members under Section 59 of the 2013 Act. Thus, while the power to issue share capital vests in the company, the said power, without the section implementing the said issuance, is of no effect, and has no consequence. Any dispute in respect of rectification of the register of members under Section 59 of the Companies Act, 2013, can be raised by any person aggrieved to the Tribunal i.e., the NCLT.

The bar contained in Section 430 of the Companies Act, 2013 is in respect of entertaining "any suit", or "any proceedings" which the NCLT is "empowered to determine". The NCLT in the present case would be empowered to determine that the allotment of shares in favour of the Defendant Nos.5 to 9 was not done in accordance with the procedure prescribed under Section 62 of the Companies Act, 2013.

The NCLT is also empowered to determine as to whether rectification of the register is required to be carried out owing to such allotment, or cancellation of allotment ordered, if any. The NCLT can also determine if in the interregnum, the Defendant Nos.5 to 9 ought to exercise any voting rights. The NCLT would be empowered to pass any such orders as it thinks fit, for the smooth conduct of the affairs of the company, which would include an injunction order protecting the assets of the Defendant No.1 Company. The NCLT would also be empowered to oversee and supervise the working of the company, and also appoint such persons as it may deem necessary to regulate the affairs of the company.

The allegations in the present case relate to non-compliance of the stipulations in Section 62 of the Companies Act, 2013. The non-compliance of any conditions contained in Section 62 of the Companies Act, 2013, also constitutes mismanagement of the company, inasmuch as under Section 241 of the Companies Act, 2013, the conduct of affairs of the company "in a manner prejudicial" to any member or "in a manner prejudicial to the interest of the company", would be governed by the same. The jurisdiction to go into these allegations, vests with the Tribunal under Section 242 of the Companies Act, 2013. Under Section 242(2), the NCLT has the power to pass "such order as it thinks fit", including providing for "regulation of conduct of affairs of the company in future". These powers are extremely broad and are more than what a Civil Court can do.

Even if in the present case, the Court grants the reliefs sought for by the Plaintiff, after a full trial, the effective orders in respect of regulating the company, and administering the affairs of the company, cannot be passed in these proceedings. Such orders can only be passed by the NCLT, which has the exclusive jurisdiction to deal with the affairs of the company.

The Legislative scheme having been changed, with the amendments which have brought about and for all the reasons stated herein above, this Court holds that the present suit is liable to be rejected leaving the Plaintiff to avail its remedies, in accordance with law before the NCLT.

23.05.2018	**Karn Gupta (Petitioner) vs. Union of India & Anr.(Respondents)**	**Delhi High Court** **W.P.(C) 5009/2018 and CM No.19290/2018** **Justice C. Hari Shankar**

The petitioner has resigned from the directorship of the company in question. The petitioner would not incur a disqualification under Section 164 of the Companies Act, 2013.

Fact of the case:

The writ petitioner complains that he had been appointed as a director in a company registered under the name of Eternal Wellness Centre Pvt. Ltd. on 11.07.2012. From where he resigned on 05.12.2012. The company failed to submit Form 32 regarding his resignation in accordance with the provisions of the erstwhile Companies Act, 1956 with the Registrar of Companies.

On 6.09.2017 and 12.09.2017 MCA notified a list of directors who have been disqualified under Section 164(2) (a) of the Companies Act, 2013 as directors with effect from 1.11.2016. Petitioners name features in this list, irrespective of his resignation. As a result, the Petitioner stands prohibited from being appointed or re-appointed as a director in any other company for a period of five years.

Hence, it is submitted that as the Petitioner has resigned from the directorship of the company in question, He would not incur a disqualification under Section 164 of the Companies Act, 2013.

Consequently, the disqualification as notified in the lists dated 6.09.2017 and 12.09.2017 by the Respondent no.1 was incorrect and illegal.

This position is not disputed by the respondents.

Issue:

Whether the petitioner who has resigned from the directorship of the company in question. would incur a disqualification under Section 164 of the Companies Act, 2013?

Judgement:

Delhi High Court held that the disqualification of the petitioner as notified in the impugned list as disqualification of the petitioner as a director of the company and the resultant prohibition under Section 164(2)(a) of the Companies Act, 2013 by virtue of the petitioner's name featuring in the lists dated 6.09.2017 and 12.09.2017 is hereby set aside and quashed. The Registrar of Companies is directed to ensure that its records are properly rectified to delete the name of the petitioner from the lists.

01.03.2017	**Rishima SA Investments LLC (Petitioner) vs. Registrar of Companies, West Bengal & Ors.(Respondent)**	**Calcutta High Court** **W.P. No. 20044 (W) of 2016** **Justice Debangshu Basak**

A person other than member or creditor can also challenge the 'Striking' off the Company Name Fact of the case :

The petitioner assails a decision of the Registrar of Companies, West Bengal striking off the name of Rama Inn (International) Private Limited from the Register maintained in respect of companies. The petitioner is neither a member nor a creditor or the company itself to apply under Section 560(6) of the erstwhile Companies Act, 1956 for recall of the order of the Registrar.

He submits that, the impugned decision of the Registrar of Companies is dated September 10, 2015 when the provisions of the Companies Act, 2013 had not been notified. He further submits that, on the date of filing of the writ petition being 08.09.2016, the same position with regard to the notification of the provisions of the Companies Act, 2013 had continued. He submits that, the provisions of Section 248 of the Companies Act, 2013 have been notified subsequent to the filing of the writ petition. Therefore, the petitioner did not approach the National Company Law Tribunal under the Act of 2013.

Referring to the impugned decision of the Registrar of Companies, Petitioner submits that, no reasons have been ascribed by the Registrar why the name of the company was struck off. He submits that, the petitioner, the company and another legal entity had entered into an agreement with regard to a hotel business. Such agreement contains an arbitration clause. Disputes and differences had arisen between the parties to such agreement. The petitioner had referred such disputes to arbitration in terms of the arbitration clause. Such arbitration proceedings are pending. The company was a party respondent in such arbitration proceedings. In order to non-suit the petitioner in the arbitration proceedings, the respondent nos. 2 and 3 who were the persons in control and management of such company have made an application under Section 560 of the Act of 1956 before the Registrar of Companies, West Bengal. The decision of the Registrar of Companies to strike off the name of the Company in this regard is, therefore, perverse.

The Respondent nos. 2 and 3 submits that, the Petitioner has no locus standi to file the writ petition. He submits that, the Petitioner is neither the company itself nor is a member or creditor of the company. The petitioner, therefore, cannot be allowed to achieve something indirectly which is not permitted to it directly. The petitioner is not entitled to apply under Section 560(6) of the Act of 1956. The petitioner is, therefore, not entitled to challenge a decision of the Registrar of companies taken under Section 560 of the Act of 1956.

Issues:

The pleadings and the contentions of the rival parties give rise to the following issues:-

- Is a person, not being a member or a creditor or the company itself, entitled to challenge the striking off of the name of the company under Section 560 of the erstwhile Companies Act, 1956?
- Does the petitioner have the locus standi to file and maintain the present writ petition?
- If the answers to the first two issues are in the affirmative, is the impugned order of the Registrar vitiated as being perverse and without reason?

Judgement :

The Calcutta High Court held that though the petitioner is not the company nor its member or creditor & it is not the person named in Section 560(6) of the erstwhile Companies Act, 1956. He does not have the statutory right to apply under Section 560(6) of the erstwhile Companies Act, 1956 but there is a remedy for every violation of a right. The petitioner claims violation of its rights by the impugned decision of the Registrar of Companies. It cannot be said that, the Petitioner does not have any forum before which it can ventilate its grievances or seek redressal with regard to the impugned decision of the Registrar of companies. The constitutional right to approach a Court Article 226 of the Constitution of India, cannot be taken away by statute. Such a person can approach a regular Civil Court or apply under Article 226 of the Constitution of India for redressal of his grievances in respect of a decision of the Registrar of Companies striking off the name of a company.

The respondent nos. 2 and 3 had activated the Registrar of Companies by way of an application under Section 560 of the Companies Act, 1956. Apparently, the respondent nos. 2 and 3 were acting under an Exit Scheme

under Section 560 of the Act of 1956.

Section 560 of the Act of 1956 allows the Registrar to strike a defunct company from the Register. Sub-section (1) of Section 560 allows the Registrar when it has reasonable cause to believe that, the company is not carrying on business or its operation, to issue a notice calling upon the company to explain whether the company is carrying on business.

In the present case, the respondent nos. 2 and 3 apparently had applied under such exit policy. Even under the exit policy, the respondent nos. 2 and 3 has to demonstrate and the Registrar has to come to a finding that, the company had not carried on business or its operation for the name of the company to be struck off under Section 560 of the Act of 1956. The claim of the Respondent nos. 2 and 3 before the Registrar of Companies is that, the company was inoperative.

The NCLAT observed that a company having a paid up capital of Rs.50,00,000/-, inventories of Rs.50,51,500/-, holding shares worth Rs.13,84,61,540/- and entering into tripartite agreement to carry on hotel business cannot be said to be without business or being inoperative since incorporation. The decision of the Registrar of

Companies impugned herein dated September 10, 2015 is, perverse. Therefore, the Registrar of Companies, West Bengal shall forthwith restore the name of Rama Inn (International) Private Limited in the Register of

Companies and shall take all consequential follow up steps to give effect to such restoration.

CASE STUDY

The case study on Cyrus Investments Pvt. Ltd. & Anr. Vs. Tata Sons Ltd. & Ors. Background:

Tata Group is an Indian multinational conglomerate founded in 1868 by Jamsetji Tata, the company gained international recognition after purchasing several global companies. One of India's largest conglomerates, Tata Group is owned by Tata Sons. The group operates in more than 100 countries across six continents, with a mission 'To improve the quality of life of the communities we serve globally, through long-term stakeholder value creation based on Leadership with Trust'.

Tata Sons is the principal investment holding company and promoter of Tata companies. Approximately 66% of the equity share capital of Tata Sons is held by philanthropic trusts, which supports education, health, livelihood generation, art, culture etc. The next major chunk of approx 18% is controlled by Shapoorji Pallonji Group, whose heir apparent is Cyrus Mistry.

Mr. Cyrus Mistry was appointed as the chairman of Tata Sons in the year December, 2012 who was the sixth chairman of Tata Sons.

Timeline of Events:

Cyrus Mistry's Ouster

1) In the Board meeting of Tata Sons Limited held on ***24th October, 2016***, Mr. Cyrus Mistry, was replaced from the post of Executive Chairman with immediate effect on ground of growing trust deficit and repeated departures from the culture and ethos of the Tata group and Mr. Ratan Tata was appointed as the interim Chairman of Tata Sons and a committee was formed to hunt for a new chairman in four months.

2) On ***25th October, 2016***, Tata Sons filed caveats in Supreme Court, Bombay High Court and National Company Law Tribunal to prevent ousted Tata Sons Chairman Cyrus Mistry from getting an ex-parte order against his sacking. They don't want any court to pass any ex-parte orders without hearing their side of the story.

Legal Battle

3) In ***December, 2016***, two investment firms backed by Mistry family in the names -'Cyrus Investments Private Limited' and 'Sterling Investment Corporation Private Limited', the minority group of shareholders/ 'Shapoorji Pallonji Group' ("SP Group" for short) holding 18.37% of equity share capital "hereinafter

referred to as Petitioner" filed a suit in National Company Law Tribunal (NCLT), Mumbai bench under Sections 241-242 of the Companies Act, 2013 alleging prejudicial and oppressional acts of the majority shareholders. They also challenged Cyrus Mistry's removal.

4) In reply to this suit, Tata Sons alleged that Mistry family backed investment firms don't have the requisite eligibility conditions to file a suit against them. As the petitioners do not hold at least 10% of the "**issued share capital**" of Tata Sons or representing at least one-tenth of the total number of members, as required by the Companies Act, 2013. According to Tata Sons, though the petitioners hold 18.37% of equity share capital of the company, their holding fell to approximately 2.17% when both equity and preference shares were taken into account. With regard to the power of a tribunal to waive off such requirements if applied for by a petitioner, Tata Sons has contended that since, the petitioners had not sought such a waiver during the filing of the petition, such a request should not be accommodated at a later stage.

5) In the application filed by Mistry family firms stated that the Tata Sons' understanding of the legal provision is not correct. They hold 18.37% of equity shares in the Company and if preference shareholding is considered none of the groups would have the requisite 10% issued and paid up share capital and would lead to an absurdity as none of them would be able to maintain an application. Further, it requested the tribunal to waive off the 10% minimum shareholding norm requirement stating that there are enough 'facts, circumstances and sufficient reasons' which warrants the tribunal to exercise its powers so that the petition can be heard on its merits. If not done so "the grave issues raised in the petition would go entirely un-investigated".

Provisions under the Companies Act, 2013

Under Section 244 of the Companies Act, 2013, the following members of a Company shall have the right to file application under Section 241 of Companies Act, 2013 namely:

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than **one-tenth of the issued share capital** of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) above so as to enable the members to apply under section 241 of Companies Act 2013, for prevention of oppression or mismanagement against minority shareholders.

6) Meanwhile during pendency of the case in NCLT, Tata Sons issued notice in month of January calling for Extraordinary General Meeting ('EGM') of the company on ***6th February, 2017*** with subject of business being removal of Mr. Cyrus Mistry as director of Tata Sons.

7) On ***6th February, 2017***, shareholders of Tata Sons removed Mr. Cyrus Mistry as director of Tata Sons.

8) With effect from ***21st February, 2017,*** Mr. N Chandrasekaran took the charge as Executive Chairman of Tata Sons.

9) The National Company Law Tribunal (NCLT), Mumbai Bench, initially dismissed the petition under Sections 241-242 of the Companies Act, 2013 being non-maintainable, citing that no cause of action was established in any of the allegations raised by the Petitioners, they didn't meet the criteria of 10% ownership in a company for the filing of a case of alleged oppression of minority shareholders under the Companies Act, 2013 and also dismissed the petition for waiver.

10) Petitioner moved The National Company Law Appellate Tribunal (NCLAT), challenging NCLT order which rejected their petitions over maintainability. They also challenged rejection of their waiver plea.

11) NCLAT by its order dated ***21st September, 2017*** allowed the plea by the petitioners seeking waiver in filing case of oppression and mismanagement against Tata Sons taking into consideration the exceptional circumstances and directed the Mumbai bench of the NCLT to proceed in the matter.

Allegations of the Petitioner:

i) The Articles of Association of the Company ("Articles") are per se oppressive as they ensure that Sir Ratan Tata Trust and Sir Dorabji Tata Trust control the affairs of the Company.

ii) Huge interference of Mr. Ratan N. Tata and Mr. N.A. Soonawala in every decision of the Company.

iii) The Petitioners alleged that the powers vested under certain Articles were not exercised in a judicious manner and should be struck off in entirety. However, the Petitioners failed to disclose in their pleadings whether at the time of making amendments to the specific Articles, they did not attend the meeting, contested and voted against the resolution.

iv) Overpriced Corus acquisition- Tata Steel Limited purchased Corus Group PLC (Corus) for a sum approximately in excess of USD 12 billion at a substantial premium, the value of which was more than 33% of its original offer price.

v) Continuation of doomed business of Nano Car Project undertaken by Tata Motors upon insistence of Mr. Ratan Tata.

vi) Use of Tata Sons shareholding in certain Tata Group Companies to requisition EGM for removal of Cyrus Mistry as Director from the Board of Tata Sons.

vii) Illegal removal of Mr. Cyrus Mistry as the Chairman of the Company was in violation of law, principles of governance, fairness, transparency and probity.

viii) Actions of Tata Sons undermined the position and status of independent Directors in listed Tata Group companies and taking steps to remove Nasli Wadia as he expressed support towards Mr. Cyrus Mistry.

ix) Joint Venture between Air Asia Limited and Telstra Trade place Private Limited entering the aviation sector including possible fraudulent, hawala transactions as indicated in the Deloitte Forensic Report.

x) Actions of Mr. Ratan Tata constitute breach of SEBI Regulations on prohibition of Insider Trading.

xi) Close relationship of Ratan Tata with Shiva leading to leakage of Board meeting discussions.

xii) Bestowing contracts upon Mr. Mehli Mistry and enriching him at the cost of Tata companies.

Reply to the petition on behalf of Tata Sons:

i) The company says that this petition is primarily filed to advocate the cause of Mr. Cyrus Mistry's removal as illegal and prejudicial to the petitioners so that to raise the issues of alleged oppression against the petitioners and alleged mismanagement in the company, but in reality, it is nothing but a strategy by Mr. Cyrus Mistry to publicly express his displeasure at the loss of his office as executive chairman of the company and also to tarnish the reputation of the company.

ii) Mr. Ratan Tata was appointed as chairman of the company in the year 1991 and continued for about 21 years until his retirement in the year 2012 upon attaining the retirement age of 75 years, and that in his leadership, Tata group witnessed best significant growth and the valuation of the company increased more than 500 times.

iii) In December 2012, the board of the company decided to re-designate Mr. Cyrus Mistry as executive chairman of the company ,in the same board meeting, the board decided that Mr. Ratan Tata should, as a special and a permanent invitee to the board meetings, continue to receive notices, agenda papers and the minutes of the board meetings, so that Mr. Ratan Tata could attend at his choice, any meeting which he would feel appropriate but whereas Mr. Ratan Tata clarified that he would no longer be on the board, he would always be available if the directors needed his guidance.

iv) As to the allegations regarding arbitrary articles of the Company are concerned, shareholders of the company passed an unanimous resolution introducing a right to Tata Trusts to jointly nominate "one-third of the prevailing number of directors on the Board" so long as the Trusts own and hold in aggregate at least 40% of the paid-up ordinary share capital of the company and that all "matters before any meeting of the board which are required to be decided by a majority of the directors shall require the affirmative vote of all the directors appointed pursuant to article 104B at the meeting". This article was subsequently amended by the shareholders of the company pursuant to which, the affirmative vote could be exercised by "majority of directors appointed pursuant to Article 104B present at the meeting". Tata Sons states that it is pertinent to note that Mr. Pallonji Shapoorji Mistry was present at the General Meeting and voted in favour of the adoption of the new version of the Articles of Association which the petitioners now want to struck off in entirety.

v) During the tenure of Mr. Cyrus Mistry, several disturbing facts emerged in relation to his leadership in respect to capital allocation decisions, slow execution on problems that were identified, which are called as "hot spots", strategic plan and business plan lacked specificity and no meaningful steps to enter new growth businesses, reluctant to embrace the articles of association leads to growing trust deficit between the Board of Directors and Mr. Cyrus Mistry.

vi) Mr. Cyrus Mistry in a systematic manner reduced the representation of the company on the Boards of other major Tata Companies. Over a period of time, several directors of the company on the Board of Tata group Companies retired. Exercising the executive power, Mr. Cyrus Mistry did not appoint any directors of the company on the Boards of other Tata Companies, as was practice in the past. This systemic dilution weakened the bind through which Tata values, ethos, governance principles, group strategies were to be implemented across the Tata Group Companies. In most of the cases, Mr. Cyrus Mistry ensured that he was the only director who was common to the company and Tata group companies, effectively making himself the only channel between the company and Tata Group Companies.

vii) Mr. Cyrus Mistry acted unwisely in acquiring Welspun Renewables Energy Ltd. by Tata Power Renewable Energy Ltd., a subsidiary of Tata Power company, to which purchase consideration for the transaction was estimated to be approximately in excess of USD l billion, because Tata power was in already 40,000 crores debt apart from non-resolution of tariff issue of its Mundra Project. In addition to this problem, Mr. Cyrus Mistry, without placing it before the Directors of the company, agreed for such an execution.

viii) The Articles of Association against which these Petitioners making hue and cry were unanimously approved either by the father of Mr. Cyrus Mistry or by Mr. Cyrus Mistry himself, though amendments have come to these Articles long before, they did never become a problem to these Petitioners until before Mr. Cyrus Mistry's removal, now all those past acts have all of sudden become oppressive against the Petitioners from the day he was removed as Chairman.

ix) As to historical business decision and investment by the Tata Group, the company says, Tata Steel acquisition of Corus Group is the largest overseas acquisition by Indian corporate, making Tata Steel the world's sixth largest steel producer. The launch of Nano Car by Tata Motors, is a revolutionary aimed at changing the landscape of Indian Passenger car market. Siva group is a Consultant to TTSL as an equity investor. The company re-entered into an aviation business through joint ventures with two of Asia's leading airline carriers in the low cost segment and premium full service business. As to Mr. Mehli is concerned, it has nowhere been mentioned in the Petition that Mr. Cyrus Mistry was the director on the board of Tata Power from the year 2002 approving many of the transactions, Tata Power entered into with Mr. Mehli. The company submits that all the above issues raked up by the petitioners were all hit by delay and laches for many of them or almost all of them were issues in between 1993 and 2008, therefore those issues cannot be issues before this Bench solely because Mr. Cyrus Mistry was removed as Chairman.

x) The company submits that this petition is sponsored by Mr. Cyrus Mistry to pursue personal vendetta against Mr. Ratan Tata and Mr. Soonawala to adopt a "scorched earth policy" so as to tarnish the reputation

of the company on being removed as Chairman of the board of directors of the company

xi) The company submits that the allegations in the petition do not constitute the affairs of the company, which in fact is a petition sought to impugn the affairs of public charitable trusts which is not permissible under law, of course, the allegation of violation of Insider Trading Regulation and FEMA Regulations is not triable by this Bench.

xii) The Company submits that it is weird to hear that Tata Trusts acting detrimental to the interest of the company, if such is the case, Trusts are the first persons to suffer because such action would directly hurt the investments held by the Trusts in the company.

xiii) The company submits that the petitioners have cherry picked certain business decisions predicating Mr. Ratan Tata has taken certain decisions during his tenure which the petitioners consider imprudent and non-judicious which have allegedly caused loss to the company. When they say Corus and Nano are instances of bad business deal, why they have not referred Tetley acquisition and immensely successful Jaguar Land Grover acquisition and phenomenal rise and success of TCS.

xiv) As to the allegation of interference by Mr. Soonawala, it has been said that he has held various positions on financial side in the company including that of Finance Director from 1988-89 to 2000,thereafter for 11 years as Vice Chairman and Finance Advisor of the company, therefore it was unanimously resolved that Mr. Soonawala would be available as an advisor to the company as such Mr. Cyrus himself and other persons from the company approached Mr. Soonawala on various occasions seeking his guidance and advice.

xv) It is denied that the removal of Mr. Cyrus Mistry as chairman of the company is wholly illegal, ultra- vires and constitutes suppression of the petitioners and it is against the interest of the company. It is submitted that the removal process does not suffer from any impropriety and it is in complete conformity with the provisions of the Act

12) On ***September 21, 2017***, Tata Sons' shareholders approved conversion of Tata Sons from Public Limited Company to a Private Limited Company.

13) In ***November, 2017***: Cyrus Mistry's camp moves petition to the NCLT, Mumbai, against Tata Sons going private.

14) On ***July 9, 2018***: NCLT Mumbai dismissed pleas of Mr. Mistry challenging his removal as Tata Sons chairman and also the allegations of rampant misconduct on part of Mr. Ratan Tata and the company's Board. NCLT said it found no merit in his allegations of mismanagement in the Company. The two-judge bench also cleared the deck for Tata Sons going Private.

15) Accordingly, NCLT highlighted the past and products of the 'Tata Sons Limited' and observed that "The petitioners have petitioned to this Tribunal asking to seasoning of Tata Sons functioning, which keeps seasoning our daily food with Tata Salt. Irony is salt also at times needs salt to be seasoned….." and passed stricture observations against the Petitioners and dismissed the petition.

16) The Petitioners approached the NCLAT against the order of the NCLT of dismissal of plea of Mr. Mistry challenging his removal as chairman of the company. The NCLAT admitted petition filed by the petitioners and also admitted Mr. Cyrus Mistry's petition in his personal capacity and decided to hear along with the main petitions filed by the two investment firms.

17) On ***August 6, 2018***: Tata Sons got nod from Registrar of Companies for conversion from Public to Private Company.

18) On ***May 23, 2019***: NCLAT reserves its order after completing the hearing in the matter.

19) On ***December 18, 2019***, the NCLAT gave its judgement in favour of Mistry camp and set aside the order of NCLT. The NCLAT reinstated Mr. Mistry as the Executive Chairperson for Tata Sons for his remaining term, and declared that the appointment of Natarajan Chandrasekaran as executive chairman of Tata Sons was

illegal, but suspended its implementation for four weeks in order to provide time for Tatas to appeal. The NCLAT order had also set aside Tata Sons' decision to convert itself into a private company. The NCLAT enquired the Registrar of Companies (RoC) to explain the rationale behind allowing Tata Sons to convert into a private company and also sought details of the process for the permission.

20) In ***January 2020***, Tata Sons appealed to the Supreme Court against National Company Law Appellate Tribunal (NCLAT) decision to re-instate Mr. Cyrus Mistry as its Chairman as this decision is a blow to corporate democracy and rights of the Board of Directors.

Ground of Appeal

i) Restoration of Cyrus Mistry "undermines corporate democracy". He was replaced after a majority in the Board voted against him.

ii) Mr. Mistry never sought re-instatement after his tenure ended.

iii) NCLAT's conclusions are based on an error that Tata Sons continues to be a Public Company.

iv) NCLAT imposed an unsolicited consultative process by asking the Tatas to consult minority shareholders Shapoorji-Pallonji group before appointing the executive chairman.

v) Restraint imposed by NCLAT on Mr. Ratan Tata and the nominee of the 'Tata Trusts' "from taking any decision in advance which requires majority decision of the Board of Directors or in the Annual General Meeting". According to Tata Sons such a direction was "wholly nebulous and seeks to stifle the exercise of rights of the shareholders and board members, resulting in their disenfranchisement which cripples corporate democracy".

21) The Hon'ble Supreme Court on ***10th January, 2020*** stayed NCLAT order reinstating Mr. Cyrus Mistry as the executive chairman of Tata Sons and restoring his directorships in the holding company, with a preliminary observation that the first impression of the order was "not good" and that the tribunal 'could not have given consequential relief that had not been sought in the first place'.

22) On ***24th January, 2020*** The Supreme Court put stay on the NCLAT order of dismissing the Registrar of Companies (RoC) plea seeking modification of its verdict in the Tata-Cyrus Mistry matter.

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SECURITIES LAWS

22.03.2021	**Shruti Vora, Neeraj Kumar Agarwal, Parthiv Dalal and Aditya Omprakash Gaggar (Appellants) vs. Securities and Exchange Board of India (SEBI) (Respondent)**	**Securities Appellate Tribunal (SAT)** **Justice Tarun Agarwala,** **Presiding Officer** **Dr. C.K.G. Nair, Member** **Justice M.T. Joshi, Judicial Member**

A "forwarded as received" WhatsApp message circulated on a group regarding quarterly financial results of a Company closely matching with the vital statistics, shortly after the in-house finalization of the financial results by the Company and some time before the publication/disclosure of the same by the concerned Company, would not amount to an UPSI under the provisions of SEBI (Prohibition of Insider Trading) Regulations.

Facts of the case :

The case pertains to the circulation of Unpublished Price Sensitive Information (UPSI) in various private WhatsApp groups about certain companies including Bajaj Auto Ltd., Bata India Ltd., Ambuja Cements Ltd., Asian Paints Ltd., Wipro Ltd. and Mindtree Ltd. As a result, SEBI vide its orders imposed a penalty of Rs. 15 Lakh each on Shruti Vora, Neeraj Kumar Agarwal, Parthiv Dalal and Aditya Omprakash Gaggar for violating the Sections 12 A (d) & 12 A (e) of the SEBI Act, 1992 and Regulation 3 (1) of SEBI (Prohibition of Insider Trading) Regulations, 2015 (PIT Regulations).

Hence, the appeals were filed by the appellants to SAT.

The SEBI orders show that numerous messages were retrieved from the devices of the appellants Quarterly financial results of the above six companies for different period of time say December, 2016, March, 2017 were finalized after about 15 days of closure of the quarter by the respective finance team, tax team, auditor's team etc. All those were finalized around 15 days prior to respective disclosure of the same on the platform of the stock exchange. However, within a day or two of the finalization of the financial results, one liner WhatsApp messages in the present group were circulated which closely matched with the respective later on published financial results.

For instance the WhatsApp message was "Wipro revenue 13700 PBIT 2323 PBT 2758". Actual figure of the financial results published later on in details disclosed the essence as revenue 13764 crores PBIT 2323.6 ("PBIT – Profit before Interest and Tax") and PBT 2758.9 ("PBT – Profit before Tax").

Thus, the deviation between the figures given in the WhatsApp message and actual result was 0.47% regarding revenue, 0.03% in the case of PBIT and 0.03% in the case of PBT. Similar pattern was observed regarding the other WhatsApp messages regarding other companies for different quarterly period.

The SEBI in its orders reasoned that though the appellants were involved as employees or Case Snippets otherwise in the securities market, their duties did not involve sending any such messages to any of the clients and some of the entities to whom the messages were forwarded were not even clients.

Further the proximity of the circulation of the WhatsApp messages with publication of financial results, striking resemblances between the figures circulated via messages and actual results declared by the respective companies, also weighed with the learned AO in each of the case to come to the conclusion that the message was nothing but circulation of unpublished price sensitive information in violation of PIT Regulations.

Each of the appellant raised similar defenses. They submitted that the messages mined by the respondent SEBI from the devices admittedly would show that none of the appellants were the originator of the messages but they had simply forwarded the messages as received from some other sources.

SAT Order :

The SAT set aside the penalty imposed by the SEBI for forwarding allegedly UPSI of six companies on WhatsApp.

Further, the SAT said that AO of the SEBI failed –

- to appreciate that the appellants were pleading that the WhatsApp messages might have been originated from the brokerage houses, or from the estimates found on the platform of Bloomberg which were floated and were in the public domain.
- to take into consideration that there were numerous other messages of similar nature received and forwarded by the appellant which did not at all match with the published financial results.

Appellant Shruti Vora in the case of Wipro has specifically pointed out that along with the said message, a similar message regarding Axis Bank had also reached her which she had also forwarded. The published results, in that case, however, were widely different. The AO did not give any weightage to the same, SAT said.

- to prove any preponderance of probabilities that the impugned messages were unpublished price sensitive information, that the appellants knew that it was unpublished price sensitive information and with the said knowledge they or any of them had passed the said information to other parties.

For details: http://sat.gov.in/english/pdf/E2021_JO2020313_25.PDF

08.07.2020	**ICICI Bank Limited (Appellant) vs. SEBI (Respondent)**	**Securities Appellate Tribunal** **Appeal No. 583 of 2019 Justice Tarun Agarwala, Presiding Officer** **Dr. C.K.G. Nair, Member** **Justice M.T. Joshi, Judicial Member**

Undue delay in initiating the proceedings by the SEBI by itself causes prejudice and would ultimately attach a stigma pursuant to any adverse order that may be passed.

Brief facts of the case:

This appeal has been preferred aggrieved by the order of the Adjudicating Officer of SEBI dated September 12, 2019. By the said order a penalty of Rs. 5 lakh each has been imposed on the appellant for violation of Clause 36 of the Equity Listing Agreement read with Section 21 of the Securities Contracts (Regulation) Act, 1956 and Regulation 12(2) of the SEBI (Prohibition of Insider Trading) Regulations, 1992.

The question raised in this appeal is, whether the information relating to signing of a Binding Implementation Agreement on May 18, 2010 by an Authorized Executive Director of the appellant with the dominant Shareholders of the Bank of Rajasthan was liable to be disclosed on an immediate basis under Clause 36 of the Listing Agreement and Regulation 12(2) of the PIT Regulations, 1992.

Decision:

Therefore, SAT are of the considered view that issuance of a penalty order against the appellant in September, 2019 for certain disclosure violations in mid-May 2010 by issuing a show cause notice on June 26, 2018 has caused prejudice to the appellant and the order suffers from laches. After all the charge against the appellant is one trading day's delay in disclosure, but the delay on the part of SEBI to show cause is 2955 days from the date of the event and about 2130 days from the date of the preliminary investigation report, which is too wide a gap to be ignored.

Though there are laches, that by itself in the peculiar circumstances of the case, will not vitiate the proceedings but definitely the penalty amount of Rs. 10 lakh imposed on the appellant cannot be sustained and deserves to be substituted by a lesser penalty. In the result, while upholding the impugned order on merits, SAT modify the penalty imposed on the appellant to only a warning which will meet the ends of justice in the given facts and circumstances of the matter. Appeal is thereby partly allowed.

For more details, please click on http://sat.gov.in/english/pdf/E2020_JO2019583.PDF

01.07.2020	**India Ratings and Research Private Ltd. (Appellant) vs. SEBI (Respondent)**	**Securities Appellate Tribunal Misc. Application no.159 of 2020Appeal No. 103 of 2020** **Justice Tarun Agarwala, Presiding Officer** **Dr. C.K.G. Nair, Member** **Justice M.T. Joshi, Judicial Member**

SEBI can call for and examine records of any proceedings if it considers the orders passed by the adjudicating officer erroneous and not in the interests of securities markets. After making inquiry, SEBI may enhance the quantum of penalty imposed, if the circumstances of the case so justify.

Brief facts of the case:

The Adjudicating Officer by the impugned order dated 26th December, 2019 has imposed a penalty of Rs.25 lakhs upon the Appellant for violating the Code of Conduct to the Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999 while granting credit rating to IL&FS for the financial year 2018-19.

SEBI issued a second show cause notice dated 28th January, 2020 by exercising powers under Section 15-I(3) of the SEBI Act directing the Appellant to show cause as to why penalty should not be enhanced as in their opinion the order of the Adjudicating Officer was not in the interest of the securities market.

"Under Section 15-I(3), the SEBI can call for and examine records of proceedings if it considers the orders passed by the adjudicating officer erroneous and not in the interests of securities markets. After examining the matter, the SEBI can enhance the quantum of penalty imposed."

Misc. Application no.159 of 2020 has been filed in Appeal no.103 of 2020 praying that proceedings initiated by SEBI pursuant to the second show cause notice dated 28th January, 2020 issued under Section 15-I(3) of the SEBI Act, should be stayed.

Decision:

SEBI has the power to initiate proceedings under Section 15-I(3) of the SEBI Act. SAT directed the Appellant to deposit a sum of Rs.25 lakhs pursuant to the impugned order dated 26th December, 2019 before the Respondent within four weeks which would be subject to the result of the appeal. SAT further directed that the proceedings in pursuance to the second show cause notice dated 28th January, 2020 will continue and the Respondent will pass appropriate orders after giving an opportunity of hearing to the Appellant either through physical hearing or through video conferencing but any order that is passed by the Respondent shall not be given effect to during the pendency of this appeal. Misc. Application is accordingly disposed of.

For more details, please click on http://sat.gov.in/english/pdf/E2020_JO2020103.PDF

27.06.2020	**Dr. Udayant Malhoutra (Appellant) vs. SEBI (Respondent)**	**Securities Appellate Tribunal Misc. Application no.154 of 2020Misc. Application no.155 of 2020Appeal No. 145 of 2020** **Justice Tarun Agarwala, Presiding Officer** **Dr. C.K.G. Nair, Member** **Justice M.T. Joshi, Judicial Member**

There is no doubt that SEBI has the power to pass an interim order and that in extreme urgent cases SEBI can pass an ex-parte interim order but such powers can only be exercised sparingly and only in extreme urgent matters.

Brief facts of the case:

The present appeal has been filed against an ex-parte order dated June 15, 2020 passed by the Whole Time

Member ('WTM') of SEBI directing the appellant to deposit a sum of Rs. 2,66,59,215/-plus interest till date totaling Rs.3,83,16,230.73 in an Escrow Account towards notional loss allegedly avoided by him by using unpublished price sensitive information and further directed that the bank accounts / demat accounts of the appellant shall remain frozen till such time the amount is not deposited. The WTM further directed the appellant to show cause as to why an order of disgorgement should not be passed.

The facts leading to the filing of the present appeal is, that the appellant is the Chief Executive Officer and Managing Director of a listed company known as Dynamatic Technologies Limited ('DTL') which is engaged in the manufacturing of aerospace, automotive and engineered products. The appellant has been the Managing Director since 1989. The charge leveled against the appellant is, that he had sold 51,000 shares of the company DTL on October 24, 2016 having inside knowledge of the price sensitive information, namely, the unaudited financial results of the quarter ending September 30, 2016. It was alleged that the financial results were approved by the Board of Directors on November 11, 2016 whereupon the price of the scrips of the company drastically went down. It was alleged that the appellant had inside information of the price sensitive information and, being a connected person had sold the shares and thus made a notional gain or averted a notional loss.

Decision:

In the instant case, SAT do not find any case of extreme urgency which warranted the respondent to pass an ex-parte interim order only on arriving at the prima-facie case that the appellant was an insider as defined in the SEBI (Prohibition of Insider Trading) Regulations, 2015 without considering the balance of convenience or irreparable injury. In the light of the aforesaid, the impugned order cannot be sustained and the same is quashed at the admission stage itself without calling for a counter affidavit except the show cause notice. The appeal is allowed.

For more details, please click on http://sat.gov.in/english/pdf/E2020_JO2020145.PDF

17.01.2019	**Indus Weir Industries Limited (Appellant) vs. SEBI(Respondent)**	**Securities Appellate Tribunal** **Appeal No. 85 of 2018 Justice Tarun Agarwala, Presiding Officer** **Dr. C.K.G. Nair, Member**

Penalty imposed by SEBI on violating SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013, further reduced by SAT to meet the end of justice in the matter.

Brief facts of the case:

Appellant, a Company registered under the Companies Act mobilized funds through issuance of Redeemable Preference Shares ("RPS") during 2010-11 to 2013-14. Admittedly, the appellant collected an amount of Rs. 33,39,86,230/- from 32,454 investors during this period of 4 years. This appeal has been filed challenging the order of the Adjudicating Officer of SEBI dated January 15, 2018 whereby a penalty of Rs. 1,00,00,000/- (Rupees One Crore only) has been imposed on the appellant under Section 15HB of SEBI Act for violation of Regulations 4(2) and 16 of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013.

Since the number of investors from whom money was collected by the appellant through issuance of RPS exceeded 49 in each of the 4 years, it is held in the impugned order that the appellant has violated Regulation 4(2) and 16 of the Issue and Listing Regulations, 2013. This act of collecting funds from more than 49 investors is tantamount to a deemed public issue which has been done without following the procedure as stipulated by the regulations for such public issue and listing, and hence the violations.

Decision:

While upholding the impugned order on merit, SAT reduce the amount of penalty imposed on the appellant from Rs. 1 crore to Rs. 50 lakh. Appellant is directed to pay the penalty of Rs. 50 lakh to SEBI within a period of 4 weeks from the date of this order. In the event, the appellant fails to deposit the penalty within the stipulated

period of 4 weeks SEBI is at liberty to recover the amount of Rs. 50 lakh along with interest @ 12% p.a. from the date of the impugned order. Appeal is partly allowed and is disposed of on above terms with no order as to costs.

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO201885.PDF

28.02.2019	**Mr. Mahendra Girdharilal (Appellant) vs. NSE, SEBI and T. Stanes And Company Limited (Respondents)**	**Securities Appellate TribunalMisc. Application no.91 of 2019 Appeal No. 73 of 2019** **Justice Tarun Agarwala, Presiding Officer** **Dr. C.K.G. Nair, Member** **Justice M.T. Joshi, Judicial Member**

Where the buy-back offer is made with the intention to provide an exit opportunity to the existing shareholders at a fair price, the stock exchange may remove the company from the Dissemination Board of the stock exchange.

Brief facts of the case:

The scrips of T. Stanes And Company Limited were listed in the Madras Stock Exchange. The said Stock Exchange surrendered its recognition due to non-fulfillment of the criteria stipulated by SEBI. As a result, the Company's share was placed in the Dissemination Board of the NSE with effect from December 1, 2014. A circular in this regard was issued by the Company dated December 2, 2014 to its shareholders intimating that they can avail the limited facility of buying and selling their shares on the Dissemination Board of the NSE.

The appellant is a shareholder of T. Stanes And Company Limited. The appellant being aggrieved by the order dated July 2, 2018 passed by the National Stock Exchange of India Limited ('NSE'), allowing T. Stanes And Company Limited, to be removed from the Dissemination Board has filed the present appeal praying for the quashing of the order dated July 2, 2018 passed by the NSE and further praying that a direction should be issued to bring back the T. Stanes And Company Limited on the Dissemination Board of NSE.

Decision:

SAT finds that SEBI issued a circular dated July 25, 2017 permitting the Company to buyback the shares so as to provide an exit to the public shareholders. In view of the said circular SAT do not find any illegality being made in the buy-back of the shares by the Company. In the light of the aforesaid, SAT do not see any illegality in the order of NSE dated July 2, 2018 removing T. Stanes And Company Limited Company from the Dissemination Board. The appeal fails and is dismissed.

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO201973.PDF

25.02.2019	**Synergy Cosmetics (Exim) Limited (Appellant) vs. BSE Limited (Respondent)**	**Securities Appellate Tribunal** **Misc. Application No. 414 of 2018** **Appeal No. 469 of 2018 Justice Tarun Agarwala, Presiding Officer** **Dr. C.K.G. Nair, Member**

The delay in filing the appeal is condoned and the application for condonation of delay is allowed on sufficient cause.

Brief Facts of the case:

The respondent BSE Limited by the impugned order dated 26.06.2018 issued an order compulsorily delisting the securities of the appellant company. The appellant being aggrieved by the computation of the fair value of the shares at Rs. 9.07 per equity share has filed the appeal under Section 23L of the Securities Contracts (Regulation) Act, 1956.

There is a delay of 73 days in filing the appeal. It has been urged that the reason for the delay is that the appellant company has its registered office at Ahmedabad, in Gujarat and it took them some time to find a specialized lawyer dealing in securities market. Thereafter, it took some time to collect, compile as well as collate various documents as required by the advocate. It was also urged that the appellant is in financial difficulties and that they had to pool the resources to file the appeal which also took time. It was contended that they are not aggrieved by the order of delisting but are only aggrieved by the determination of the fair value as determined by the independent valuer at Rs. 9.07 per equity share for which purpose they approached the respondent to provide the details with regard to the determination of the fair value. It was contended that since no information was supplied the present appeal was filed along with an application for condoning the delay.

Decision:

SAT of the opinion that sufficient cause has been explained by the appellant which is adequate as well as satisfactory and, therefore, SAT of the opinion, that the delay of 73 days in filing the appeal should be condoned

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO2018469.PDF

25.02.2019	**Nicer Green Housing Infrastructure Developers Ltd. &Ors. (Appellant) vs. SEBI (Respondent)**	**Securities Appellate Tribunal** **Appeal No. 307 of 2018Justice Tarun Agarwala,** **Presiding Officer** **Dr. C.K.G. Nair, Member**

In the absence of any evidence that the appellants had refunded and that they are ready and willing to pay the balance amount to investors in a time bound manner, SAT is of the opinion that there is no infirmity in the order passed by SEBI disposing of their representations.

Brief facts of the case:

The Nicer Green Housing Infrastructure Developers Ltd., Appellant No. 1 is a company incorporated under the Companies Act, 1956 as a public limited company and is engaged in the business of acquiring agricultural land and developing the same for the purpose of re-sale. SEBI found that the activity of fund mobilization by the appellant no. 1 under its scheme fell within the ambit of "Collective Investment Scheme" as defined under

Section 11AA of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, 'SEBI Act').

SEBI issued an order dated November 9, 2015 under Section 19 read with Sections 11(1), 11B and 11(4) of the SEBI Act read with Regulation 65 of Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 issuing a slew of directions restraining the appellant and its directors from collecting any money from the investors or to launch or to carry out any investments schemes.

SEBI further directed to refund the money collected under its scheme to the investors and thereafter wind up the company. The appellants being aggrieved by the said order filed an Appeal before the Securities Appellate Tribunal wherein the appellants contended that they are ready and willing to comply with the order passed by SEBI contending that out of an amount of Rs. 31.71 crore collected the appellants have already refunded Rs. 27.48 crore and that the appellants are ready and willing to refund the balance amount in a time bound manner.

Decision:

SAT finds that no proof has been filed either before SEBI or even before this Tribunal to show that the appellants had refunded a sum of Rs. 27.48 crore and that they are ready and willing to pay the balance amount in a time bound manner. In the absence of any evidence being filed, SAT is of the opinion that there is no infirmity in the order passed by SEBI disposing of their representations. The appeal lack merit and is dismissed summarily.

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO2018307.PDF

07.07.2020	**Final Order in the matter of M/s Sungold Capital Limited**	**Securities and Exchange Boardof India** **WTM/AB/IVD/ID5/8189/2020-21** **Ananta Barua, Whole Time Member**

One of the principles underlying under SAST Regulations is exit opportunity to the public shareholders of the Target Company at the best price and accordingly, the provisions of SAST Regulations deals with offer price, that offer price in an open offer highest of the prices of shares of the Target Company derived through various methods.

Brief facts of the case:

The respective acquirers/PAC's after acquiring shares/voting rights of Sungold Capital Limited ("Target Company") beyond the threshold of initial/creeping acquisition have failed to make an open offer in terms of Regulation 10 and 11(1) of SAST Regulations, 1997, on, April 1, 2007 and September 14, 2007, respectively. As per Regulation 21(19) of SAST Regulations, 1997, the acquirer and the PAC's were jointly and severally liable for discharge of obligations under SAST Regulations, 1997.

SAST Regulations, 1997 has been repealed by Regulation 35(1) of SAST Regulations, 2011 and has been replaced by SAST Regulations, 2011. Regulation 35(2)(b) of SAST Regulations, 2011,provides that all obligations incurred under the SAST Regulations, 1997, including the obligation to make an open offer, shall remain unaffected as if the repealed regulations has never been repealed.

Therefore, the obligations to make open offer, incurred by the acquirers/PAC's under SAST Regulations, 1997, are saved and can be enforced against them by virtue of Regulation 35 of SAST Regulations, 2011.

Decision:

SEBI directed acquirers/PAC's of the target company to make a public announcement of a combined open offer for acquiring shares of Sungold Capital Ltd., under Regulation 10 and 11(1) of the SAST Regulations, 1997, within a period of 45 days from the date when this order comes into force, in accordance with SAST Regulations, 1997. The acquirers/PAC's shall along with the offer price, pay interest at the rate of 10% per annum for delay in making of open offer, for the period starting from the date when the Noticees incurred the liability to make the public announcement and till the date of payment of consideration, to the shareholders who were holding shares in the Target Company on the date of violation and whose shares are accepted in the open offer, after adjustment of dividend paid, if any.

For more details, please click on https://www.sebi.gov.in/enforcement/orders/jul-2020/final-order-in-the-matter- of-sungold-capital-ltd-_47016.html

06.07.2020	**Final Order in respect of Mr. Amalendu Mukherjee(Noticee) in the matter of Ricoh India Limited**	**Securities and Exchange Board ofIndia** **WTM/MPB/IVD-ID6/120/2020** **Madhabi Puri Buch, Whole Time Member**

The practice of insider trading is intended to be prohibited in order to sustain the investors' confidence in the integrity of the security market.

Brief facts of the Case:

The Noticee, Amalendu Mukhergee, traded through the account of Fourth Dimension Solutions Limited ("FDSL") in the scrip of Ricoh India Limited ("Ricoh") while in possession of UPSI during the period of UPSI. Noticee traded through the account of FDSL from August 14, 2014 to November 17, 2015. While trading so, the Noticee made a wrongful gain of Rs.1,13,56,118/- in the account of FDSL. Similarly, the Noticee wrongfully avoided a loss of Rs.1,16,77,892/- in the account of FDSL.

The Noticee is the Managing Director and Promoter, having shareholding of 73.23% in FDSL and control over its financials and operations. In view of,

a. improper conduct of insider trading

b. the fraud of manipulation of accounts of Ricoh with the involvement of FDSL and its Managing Director i.e, the Noticee, and

c. being the ultimate beneficiary as controlling promoter and dominant shareholder of FDSL.

d. for the protection of interest of investors relating to Ricoh, the corporate veil of FDSL requires to be lifted in the present facts and circumstances of the case.

As the corporate veil is lifted, the Noticee is also liable for the above discussed insider trading and its consequences. Therefore, Noticee is also individually liable for an amount of INR2,30,34,010/-and interest there on.

Decision:

SEBI directed Fourth Dimension Solutions Limited (FDSL) Managing Director Amalendu Mukherjee to disgorge an amount worth over INR2,30,34,010/- for insider trading in the scrip of Ricoh India Ltd. The amount has to be paid along with 12 per cent interest within 45 days. In addition, Amalendu Mukherjee has been restrained from accessing securities markets for a period of seven years.

For more details, please click on https://www.sebi.gov.in/enforcement/orders/jul-2020/order-in-respect-of-mr-amalendu-mukherjee-in-the-matter-of-ricoh-india-limited_47010.html

01.07.2020	**Final Order in the matter of inspection of Vishal Vijay Shah (Noticee)**	**Securities and Exchange Board of India** **WTM/GM/EFD/15/2020-21** **G. Mahalingam, Whole TimeMember**

The objective of opening and maintaining a separate account for the clients' securities is to segregate and identify them separately and to prevent its use by the Stock Broker for any purpose. The debiting of any client's account for transactions which are not related to that client defeats the very purpose of maintaining client's account separately.

Brief facts of the Case:

In the facts of the instant proceedings, it is observed that the Vishal Vijay Shah ("Noticee"), a registered Stock Broker had received funds in the client and settlement bank accounts from third parties in cash and had made payments to third parties on behalf of clients. It is further observed that the Noticee had also made withdrawal of cash from the client bank accounts. Under the SEBI Circulars, a responsibility has been cast on the Stock Broker to ensure that payments are received directly from the respective clients and not from third parties. Accordingly, the Noticee should have taken expedient steps to ensure that funds received from third parties are exceptionally dealt with and suitable explanations should have been asked from the client when such blatant third party monetary amounts were received. However, there is nothing on record to suggest that such steps were indeed taken.

Further, the Noticee in its submissions has itself admitted to having carried out such irregular practices. The aforementioned conduct of the Noticee clearly demonstrates that it failed to maintain fairness in the conduct of its business, exercise due skill and care and comply with the statutory requirements. Thus, in addition to the violation of the SEBI Circulars the Noticee has also violated the provisions of Clauses A(1), (2) & (5) of the Code of Conduct as specified under Schedule II read with Regulation 9(f) of the Stock Brokers Regulations.

The BSE had earlier conducted inspection of the Noticee and upon a consideration of the BSE Inspection Reports in light of the Inspection Report, it is observed that the violations committed by the Noticee in the instant proceedings are repetitive in nature. Further, it is a well settled position of law that SEBI may initiate multiple proceedings for the same set of violations.

Decision:

The Noticee had violated the aforementioned provisions of the Stock Brokers Regulations and aforementioned SEBI Circulars. Having regard to the facts and circumstances of the instant proceedings, SEBI accept the recommendation of the Designated Authority that the Certificate of Registration of the Noticee be suspended for a period of one year.

For more details, please click on https://www.sebi.gov.in/enforcement/orders/jul-2020/order-in-the-matter-of-inspection-of-vishal-vijay-shah_46988.html

25.06.2020	**Adjudication Order in respect of M/s BeckonsIndustries Limited (Noticee)**	**Securities and Exchange Boardof India** **Adjudication Order No.: Order/BD/ VS/2020-21/7999** **B J Dilip, Adjudicating Officer**

It is important to note that timely disclosure of information, as prescribed under the statute, is an important regulatory tool intended to serve a public purpose. Timely disclosures are also an essential part of the proper functioning of the securities market and failure to do so prevents investors from taking a well-informed investment decision.

Brief facts of the case:

In this case, it is established that Beckons Industries Limited ("Noticee") by employing fraudulent arrangement with regard to subscription of GDRs had acted in a manner which is fraudulent and deceptive, thereby detrimental to the interest of investors in the Indian securities market. The Noticee defrauded the Indian investors by entering Pledge Agreement with respect to subscription of GDRs outside India and thereby inducing the Indian investors to deal in the shares of Beckons by deliberately making false/misleading statements, misrepresenting, actively suppressing and concealing material facts /regarding GDR proceeds being available at Beckon's disposal when in fact GDR issuance, was just a facade to create underlying equity shares without receipt of consideration. It is particularly evident from the established facts that the entire proceedings of GDR

which was transferred in the EURAM's account of Noticee served as collateral to the loan taken by Vintage FZE ("Vintage") in subscribing GDR and such amount was ultimately transferred to the Noticee's Indian Bank Account, only as and when Vintage repaid the loan to EURAM. Thus, the manner in which the entire scheme of fraudulent and deceptive scheme was planned and executed demonstrates beyond reasonable doubt the manipulative intent to deliberately withhold the critical information to Stock Exchange and also to the investors which ultimately enabled them to carry out the fraud. Such a conduct by a listed company erodes the trust and confidence of investors and also threatens the integrity of the securities market. Therefore, such lapses need to be dealt with sternly to protect the interest of investors in the securities market. Therefore, SEBI found it appropriate to impose suitable penalty on the Noticee.

It is established that Beckons had deliberately and actively concealed the true and material facts and made false and misleading disclosures and also made misrepresentation of facts to the stock exchange and investors in its shares. Such acts on the part of the Listed Company cannot be viewed leniently.

Decision:

SEBI imposed monetary penalty of Rs. 10,00,00,000/- on Beckons Industries Limited under 15HA of the SEBI Act alleging that the company issued the GDRs in a fraudulent way by way of credit agreement and account charge agreement, which was not disclosed to the stock exchanges and also made misleading disclosure to the stock exchanges that "it had successfully closed its Global Depository Receipts issue.." and thereby violated the provisions of section 12A (a),(b) and (c) of SEBI Act read with Regulation 3 (a) (b) (c) (d), 4 (1), 4 (2) (f) (k) (r) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003.

For more details, please click on https://www.sebi.gov.in/enforcement/orders/jun-2020/adjudication-order-in-respect-of-beckons-industries-limited-in-the-matter-of-issuance-of-gdr_46931.html

30.06.2020	**Adjudication Order in respect of Mr. Gurmeet Singh ("Noticee-1"), Mr. I.S. Sukhija ("Noticee-2") and Mr.** **H. S. Anand ("Noticee-3") in the matter of Beckons Industries Limited**	**Securities and Exchange Boardof India** **Adjudication Order No.: Order/ BD/VS/2020-21/8164-8166** **B J Dilip, Adjudicating Officer**

A basic premise that underlies the integrity of the securities market is that entities connected with the securities market conform to standards of transparency, good governance and ethical behaviour prescribed in securities laws and do not resort to fraudulent activities.

Brief facts of the case:

In this case, it is established that Mr. Gurmeet Singh ("Noticee-1") and Mr. I.S. Sukhija ("Noticee-2") by employing fraudulent arrangement with regard to subscription of GDRs had acted in a manner which is fraudulent and deceptive, thereby detrimental to the interest of investors in the Indian securities market. The Noticees actively played a role in defrauding the Indian investors by entering Pledge Agreement with respect to subscription of GDRs outside India and thereby inducing the Indian investors to deal in the shares of Beckons Industries Limited ("Beckons") by deliberately making false/misleading statements, misrepresenting, actively suppressing and concealing material facts /regarding GDR proceeds being available at Beckon's disposal when in fact GDR issuance, was just a facade to create underlying equity shares without receipt of consideration. It is particularly evident from the established facts that the entire proceedings of GDR which was transferred in the EURAM's account of Beckons served as a collateral to the loan taken by Vintage FZE ("Vintage") in subscribing GDR and such amount was ultimately transferred to the Beckons' Indian Bank Account, only as and when Vintage repaid the loan to EURAM. Thus, the manner in which the entire scheme of fraudulent and deceptive scheme was planned and executed demonstrates beyond reasonable doubt the manipulative intent to deliberately withhold

the critical information to Stock Exchange and also to the investors which ultimately enabled them to carry out the fraud. Such a conduct by a listed company erodes the trust and confidence of investors and also threatens the integrity of the securities market. Therefore, such lapses need to be dealt with sternly to protect the interest of investors in the securities market. Therefore, SEBI found it appropriate to impose suitable penalty.

Decision:

In view of the above, it was alleged that the Noticees violated the provisions of section 12A (a), (b) and (c) of Securities and Exchange Board of India Act, 1992 read with regulations 3(a), (b), (c), (d) and 4(1) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003.

In this regard, SEBI imposed monetary penalty of Rs. 1 crore on Mr. Gurmeet Singh and Rs. 20 lakh on Mr. I.S. Sukhija, directors of Beckons Industries Limited for employed fraudulent arrangement with regard to subscription of GDRs and had acted in a manner which was fraudulent and deceptive, thereby detrimental to the interest of investor.

For more details, please click on https://www.sebi.gov.in/enforcement/orders/jun-2020/adjudication-order-in-respect-of-mr-gurmeet-singh-mr-i-s-sukhija-and-dr-h-s-anand-in-the-matter-of-issuance-of-gdr-by-beckons-industries-limited_46981.html

22.06.2020	**Adjudication Order in respect of M/s Ashlar Commodities Private Limited (Noticee)**	**Securities and Exchange Board of India** **Adjudication Order No.:** **Order/BD/AP/SK/2020-21/7964** **Amit Pradhan, Adjudicating Officer**

The platform of the stock exchange has been used for a non-genuine trade. Trading is always with the aim to make profits. But if one party consistently makes loss and that too in pre-planned and rapid reverse trades, it is not genuine; it is an unfair trade practice.

Brief facts of the case:

Ashlar Commodities Private Limited ('Noticee") was indulged in execution of alleged non genuine trades. It was observed from the trade log of the Noticee that it had traded in 530 unique contracts in the Stock Options segment of BSE during the relevant period, in which it has allegedly entered into non genuine trades in 528 contracts wherein it executed a total of 1154 trades out of which 1151 trades were allegedly non genuine trades which had resulted into creation of artificial volume of total 2,87,13,000 units in the given 528 contracts. It is further observed that the Noticee, by executing non genuine trades during the relevant period, registered a positive close out difference of ₹ 8,06,09,700. The trades entered by the Noticee were reversed on the same day within few minutes with same counterparty at a substantial price difference without any basis for significant change in the contract price which indicates that these trades were artificial and non-genuine in nature.

Decision:

Taking into consideration all the facts and circumstances of the case, SEBI imposed monetary penalty of Rs. 84 lakh on Ashlar Commodities Private Limited under section 15HA of the SEBI Act for market abuse and fraudulent practices considering the fact that the trades of the company in 528 stock option contracts which resulted into artificial volume in range of 1% to 100%, generated out of the 528 non-genuine trades of the company and such trades had created a misleading appearance of trading in the scrip.

For more details, please click on https://www.sebi.gov.in/enforcement/orders/jun-2020/adjudication-order-in-respect-of-ashlar-commodities-private-limited-in-the-matter-of-illiquid-stock-option-at-bse_46904.html

16.07.2020	**Adjudication Order in respect of Mr. B Renganathan ('Noticee') in the matter of Edelweiss Financial ServicesLtd.**	**Securities and Exchange Board of India** **Adjudication Order No.:** **Order/KS/VC/2020-21/8265 K Saravanan, Chief General Manager and Adjudicating Officer**

Compliance officers are expected to discharge a responsible role in the corporate functioning. The standards of good compliance aid and build up good corporate governance to add value and confidence to the market and its investors.

Brief facts of the case

SEBI, upon receipt of examination report from National Stock Exchange (NSE), conducted investigation in the dealings in the scrip of Edelweiss Financial Services Ltd. ('EFSL'/'Company') to examine the violation, if any, of the provisions of SEBI (Prohibition of Insider Trading) Regulations, 2015 ('PIT Regulations, 2015') for the period of January 25, 2017 to April 05, 2017 ('Investigation Period'/'IP').

The Company is listed on NSE and Bombay Stock Exchange (BSE). It is observed that Mr. B Renganathan ('Noticee') was the compliance officer and Company Secretary of EFSL during IP. During the course of investigation, it was observed by SEBI that Ecap Equities Limited ('Ecap'), a wholly owned subsidiary of EFSL, had acquired Alternative Investment Market Advisors Private Limited ('AIMIN'), a fintech company, on April 05, 2017 by entering into a share purchase agreement (SPA). The same was disclosed by EFSL to NSE and BSE on the same day. Further, a Term Sheet in respect of the said transaction was signed between Ecap and AIMIN on January 25, 2017. Therefore, it was alleged that the acquisition of AIMIN by Ecap was a price sensitive information which had come into existence on January 25, 2017 upon signing of Term Sheet. Despite that, the Noticee, being the compliance officer of the company, failed to close the trading window during the period of January 25, 2017 to April 05, 2017. By his failure to close the trading window during this period, it is alleged that the Noticee has violated the provisions of Clause 4 of Minimum Standards for Code of Conduct to Regulate, Monitor and Report Trading by Insiders mentioned in Schedule B read with Regulation 9(1) of PIT Regulations, 2015. In view of this, adjudication proceedings were initiated against the Noticee under the provisions of section 15HB of the 'SEBI Act'.

Decision:

Adjudicating Officer, SEBI find non-compliance on the part of the Noticee by failing to close trading windows when necessary as per law. Therefore, there were repeated instances wherein the Noticee had failed to close the trading window. In view of the above the argument of the Noticee that there was no repetition of violation is not acceptable. Adjudicating Officer's considered view that a repetitive violation, in disregard to the applicable provisions of law, cannot be construed to be a technical violation.

After taking into consideration the facts and circumstances of the case, material/facts on record, the reply submitted by the Noticee, Adjudicating Officer imposed a penalty of Rs. 5,00,000/- (Rupees Five Lakh only) on the Noticee. The Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order.

For more details, please click on https://www.sebi.gov.in/enforcement/orders/jul-2020/adjudication-order-in-respect-of-b-renganathan-in-the-matter-of-edelweiss-financial-services-ltd-_47075.html

25.09.2019	**Dr. Uppal Devinder Kumar (Appellant) vs. SEBI (Respondent)**	**Securities Appellate Tribunal** **Appeal No. 220 of 2017 Justice Tarun Agarwala,** **Presiding Officer** **Dr. C.K.G. Nair, Member** **M. T. JOSHI, JUDICIALMEMBER**

Section 11AA, read with section 11B, of the Securities and Exchange Board of India Act, 1992, and Regulations 3 and 4 of the SEBI (Collective Investment Schemes) Regulations, 1999 - Collective Investment Scheme

The question referred can be enumerated and summarized as follow:

1. Whether thus, SEBI was not justified in holding that appellant had sponsored or carried out CIS specially when SEBI had specifically recorded that month-wise mobilization of companies was not available.
2. Whether thus, impugned order passed by SEBI imposing penalty upon appellant was not justified.

Brief Facts of the Case:

The company-PACL was a real estate company involved in the sale and purchase of agricultural land. The said company mobilised funds from the general public by sponsoring a scheme which was in fact a Collective Investment Scheme without obtaining registration from Securities and Exchange Board of India (SEBI). SEBI conducted an investigation into the affairs of the company 'PACL' and eventually a show- cause notice was issued, for violation of the SEBI (Collective Investment Schemes) Regulations, 1999 and section 12(1B). Based on the show-cause notice an order was passed by SEBI under sections 11 and 11B directing the company to refund the amount collected under the Collective Investment Schemes (CIS) and further restrained the directors including the appellant from accessing the securities market till such time the amount was refunded.

The SEBI also passed an order against the company and its directors imposing a penalty of Rs. 7269.49 crore to be paid jointly and severally by the company and its directors.

The appellant being aggrieved by the said order filed an appeal contending vehemently that he was never appointed as a director and thus could not be made liable for the wrongs committed by the company. The Tribunal allowed the appeal and set aside the order of the Adjudicating Officer. The Tribunal remitted the matter back to the Adjudicating Officer with a direction to decide the matter afresh and record a specific finding as to whether the appellant had acted as a director.

Based on the order of Tribunal, proceedings were again initiated and after considering the reply of the appellant a fresh order was passed imposing a penalty of Rs. 1 crore. The appellant being aggrieved by the said order had filed the instant appeal.

Decision:

A perusal of section 12(1B) clearly indicates that no person shall sponsor or cause to be sponsored or carry on or cause to be carried on any collective investment scheme, unless he obtains a certificate of registration from the Board in accordance with the regulations.

According to Shorter Oxford Dictionary 6th edition 'sponsor' means a person taking responsibility or standing surety for another; contribute to or bear the expenses of an event; support in a fund-raising activity by pledging money in advance. Black's Law Dictionary 6th edition defines 'sponsor' as a surety; one who makes a promise or gives security for another, particularly a godfather in baptism. In the civil law, one who intervenes for another voluntarily and without being requested.

From the aforesaid, it is clear that the appellant has not made a promise or given surety for another. The appellant has not sponsored not pledged any money in advance. There is no evidence to indicate that he had contributed to bear the expenses of the scheme in return for some gain. Section 12(1B), read with regulations 3 and 4 further states that no person shall carry on or cause to be carried on any collective investment scheme. There is no specific finding by the SEBI that the appellant was involved in carrying on the CIS or was involved in the execution of the scheme or was involved in the collection of the money pursuant to the scheme. Appellant was director only for 50 days and there is no evidence brought on record to show that the appellant attended any meeting of the Board of Directors nor there is any document to show that the appellant had any role at all in connection with the CIS or sponsoring a CIS or being responsible for the registration of the CIS. In fact, the evidence on the record is writ large, namely, that the scheme was launched/ sponsored and executed by other directors of the company prior to the appointment of the appellant as a director. The SEBI in its order while penalizing other directors to a sum of Rs. 7269 crore has given a categorical finding that the said directors were directly involved in the initiation and sponsoring of the scheme and were directly instrumental in the collection of the monies. Thus, the finding of the SEBI that appellant had sponsored and carried on the CIS is patently based on surmises and conjectures. Thus, in the absence of any documentary evidence the SEBI was not justified in holding that the appellant had sponsored or carried on the CIS or was instrumental in the collection of the monies pursuant to the scheme especially when the SEBI has specifically recorded that month-wise mobilization of the companies was not available.

If a company is liable to refund the monies received from the investors and if the company fails to pay the amount then the amount can be recovered jointly and severally from every director of the company who is an officer in default. Therefore, when the company is the offender, the vicarious liability of the acts of the directors cannot be computed automatically. The contention that being a director of the company the appellant cannot disown his responsibility for the acts of the company is misconceived. It is not possible to lay down any hard and fast rule as to when a director would be vicariously responsible for the acts as a director in charge of day-to-day affairs of the company. However a finding has to be arrived at that the appellant was responsible for the day-to-day affairs of the company and was involved in the collection of the monies and in the implementation of the schemes. It is not necessary that every director is required to be penalized merely because he is a director on the ground that he was deemed to be responsible for the affairs of the company. If the director can explain that he had no role to play in the alleged default or that he was not responsible for the affairs of the company in which case penalty could not be fastened upon him on the mere ground that he was a director.

Further, as per section 150, a maximum penalty of Rs. 10,000 for each day could be imposed. The appellant was a director only for 50 days and if a maximum penalty of Rs. 10,000 per day is taken into consideration then a maximum penalty of Rs. 5 lakh could be imposed. By no stretch of imagination a penalty of Rs. 1 crore could be imposed.

The SEBI by a separate order has already given a finding that the company and its directors were directly responsible for sponsoring the CIS without registration and were instrumental in generating the monies through this scheme in violation of the Regulations and the Act. The SEBI has already imposed penalties against the company and the said directors. The appellant in the instant case no doubt was a director only for a period of 50 days and there is no finding that he was responsible either for sponsoring the scheme or for carrying out the scheme. The appellant was not instrumental in the launching/sponsoring or carrying on the scheme.

Conclusion

Thus, no penalty could be imposed upon the appellant. In view of the aforesaid the impugned order passed by,

SEBI cannot be sustained and is quashed. The appeal is allowed.

For more details, please click on http://www.sat.gov.in/english/pdf/E2019_JO2017220.PDF

03.12.2019	**Bajaj Finance Limited (Appellant) vs. SEBI and KarvyStock Broking Limited (Respondent)**	**Securities Appellate Tribunal** **Appeal (L) No. 585 of 2019** **Dr. C.K.G. Nair, Member** **M. T. JOSHI, JUDICIAL MEMBER**

Brief fact of the case:

Bajaj Finance Limited ("Appellant"), a Non-Banking Financial Company ('NBFC') aggrieved by the interim order of the Securities and Exchange Board of India ('SEBI') dated November 22, 2019 in the matter of M/s. Karvy Stock Broking Ltd. ('Karvy') has filed an appeal. Appellant is particularly aggrieved by direction no.

(iv) as mentioned in the order, ***which prohibited transfer of pledged shares by Karvy to the Appellant. The*** **transfer of securities from Karvy shall be permitted only to the respective beneficial owner who has paid in full against these securities, under supervision of NSE.**

It is the contention of the appellant that Karvy has an outstanding obligation of Rs. 345 crore plus applicable interest and other charges towards the appellant and its said rights got destroyed by the impugned order.

Appellant is in the normal business of an NBFC including lending against pledged securities. Accordingly, by way of a Loan Against Securities Arrangement with Karvy, it has been lending funds towards working capital requirements against pledge of securities since December 2014. Karvy has an outstanding obligation of Rs. 345 crore plus applicable interest and other charges towards the appellant.

Further, there has been an undertaking from Karvy that such pledged securities were owned by Karvy itself and not from clients' accounts.

Further, Karvy violated certain clauses of the loan agreement and withdrew beyond the sanctioned amount a Loan Recall Notice was issued to Karvy seeking refund of the full outstanding loan of Rs. 345 crore (approximately) along with interest and charges.

In the event of failure by Karvy to refund the same the appellant was planning to invoke the pledge.

However, on account of the impugned order dated November 22, 2019 which inter alia prohibited transfer of securities from Karvy with immediate effect the appellant could not invoke the pledge.

At the same time before passing such an order which affected its rights the appellant was not given any notice or opportunity of being heard in any manner.

On becoming aware of the impugned order, immediately on November 23, 2019 despite being a Saturday the appellant sent a representation to SEBI raising all these issues which, however, remain unanswered even today. Such unilateral action by SEBI has left the appellant to face the consequences of the impugned order despite no fault of the appellant.

Rights of the appellant are seriously affected and not providing an opportunity by SEBI has seriously prejudiced the appellant, the appellant seeks to quash the impugned order or in the alternative stay on the direction to transfer the shares held by the appellant in the form of pledge to respective beneficial owners.

Decision:

Having heard the parties it is found by SAT that the impugned order notes that Karvy had raised funds pledging securities from banks and NBFCs and therefore was aware that rights of those entities would be impacted by the said order.

As such, even if appellant could not be heard while passing the impugned order at the least on their representation they were entitled to be heard. It is on record that the appellant wrote to SEBI on November 23, 2019.

It is also an undisputed fact that lending against securities is a normal and permitted business activity of banks and NBFCs and SEBI is fully aware of the same.

Therefore, SAT considered view that the impugned order has prejudiced and adversely affected the rights of the appellant as a bonafide lender.

Accordingly, without commenting on the merit of the case, SAT directs SEBI to hear the appellant on the basis of their representation dated November 23, 2019.

Thereafter, the SEBI shall consider the representations of the appellant and, after giving an opportunity for personal hearing, pass an order as per law. .

Appeal is disposed of on above terms at the stage of admission itself. No order on costs.

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO2019585.PDF

28.02.2019	**Adjudicating Officer, SEBI (Appellant) vs. Bhavesh Pabari (Respondent)**	**Supreme Court** **Civil Appeal No(s).11311 of 2013 with connected appeals** **Ranjan Gogoi, Deepak Gupta & Sanjeev Khanna, JJ.**

SEBI Act – Section 15J read with sections 15A to H – Powers of adjudicating officer in levying penalty

Supreme Court clarifies law. Brief facts of the case:

Two primary questions, in a way interconnected, have been referred by the Referral judgment and order dated

14th March 2016 passed in Siddharth Chaturvedi Vs. Securities and Exchange Board of India (2016) 12 SCC

119. The questions referred can be enumerated and summarized as follows:

(i) Whether the conditions stipulated in clauses (a), (b) and (c) of Section 15J of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI Act") are exhaustive to govern the discretion in the Adjudicating Officer to decide on the quantum of penalty or the said conditions are merely illustrative?

(ii) Whether the power and discretion vested by Section 15J of the SEBI Act to decide on the quantum of penalty, regardless of the manner in which the first question is answered, stands eclipsed by the penalty provisions contained in Section 15A to Section 15HA of the SEBI Act?

Decision & Reasoning :

For the purposes of the present reference, we may proceed to consider the provisions contained in Chapter VIA of the SEBI Act. Sections 15A to 15HA are the penalty provisions whereas Section 15I deal with the power of adjudication and Section 15J enumerates the "factors to be taken into account by the Adjudicating Officer" while adjudging the quantum of penalty. So far as the second question is concerned, if the penalty provisions are to be understood as not admitting of any exception or discretion and the penalty as prescribed in Section 15A to Section 15HA of the SEBI Act is to be mandatorily imposed in case of default/ failure, Section 15J of the SEBI Act would stand obliterated and eclipsed. Hence, the question referred. Sections 15A(a) to 15HA have to be read along with Section 15J in a manner to avoid any inconsistency or repugnancy. We must avoid conflict and head on clash and construe the said provisions harmoniously. Provision of one section cannot be used to nullify and obtrude another unless it is impossible to reconcile the two provisions. The explanation to Section 15 J of the SEBI Act added by Act No.7 of 2017, quoted above, has clarified and vested in the Adjudicating Officer a discretion under Section 15J on the quantum of penalty to be imposed while adjudicating defaults under Sections 15A to 15HA. Explanation to Section 15J was introduced/added in 2017 for the removal of doubts created as a result of pronouncement in M/s. Roofit Industries Ltd. case (supra).

We are in agreement with the reasoning given in reference order dated 14th March 2016 that M/s Roofit Industries Ltd. had erroneously and wrongly held that Section 15J would not be applicable after Section 15 A(a) was amended with effect from 29th October 2002 till 7th September 2014 when Section 15A(a) of the SEBI Act was again amended. It is beyond any doubt that the second referred question stands fully answered by clarification through the medium of enacting the Explanation to Section 15J vide Act No.7 to 2017, which also states that the Adjudicating Officer shall always have deemed to have exercised and applied the provision. We, therefore, deem it appropriate to hold that the provisions of Section 15J were never eclipsed and had continued to apply in terms thereof to the defaults under Section 15A(a) of the SEBI Act.

Reference Order in Siddharth Chaturvedi & Ors. (supra) on the said aspect has observed that Section 15A(a) could apply even to technical defaults of small amounts and, therefore, prescription of minimum mandatory penalty of Rs.1 lakh per day subject to maximum of Rs.1 crore, would make the Section completely disproportionate and arbitrary so as to invade and violate fundamental rights. Insertion of the Explanation would reflect that the legislative intent, in spite of the use of the expression "whichever is less" in Section 15A(a) as it existed during the period 29th October 2002 till 7th September 2014, was not to curtail the discretion of the Adjudicating Officer by prescribing a minimum mandatory penalty of not less than Rs. 1 lakh per day till compliance was made, notwithstanding the fact that the default was technical, no loss was caused to the investor(s) and no disproportionate gain or unfair advantage was made. The legislative intent is also clear as Section 15A(a) was amended by the Amendment Act No.27 of 2014 to state that the penalty could extend to Rs. 1 lakh for each day during which the failure continues subject to a maximum penalty of Rs. 1 crore. This amendment in 2014 was not retrospective and therefore, clarificatory and removal of doubt Explanation to Section 15J was added by the Act No. 7 of 2017.

Normally the expression "whichever is less" would connote absence of discretion by prescribing the minimum mandatory penalty, but in the context of Section 15A(a) as it was between 29th October,2002 till 7th September, 2014, read along with Explanation to Section 15J added by Act No.7 of 2017, we would hold the legislative intent was not to prescribe minimum mandatory penalty of Rs.1 lakh per day during which the default and failure had continued. We would prefer read and interpret Section 15A(a) as it was between 25th October, 2002 and 7th September, 2014 in line with the Amendment Act 27 of 2014 as giving discretion to the Adjudicating Officer to impose minimum penalty of Rs.1 lakh subject to maximum penalty of Rs.1 crore, keeping in view the period of default as well as aggravating and mitigating circumstances including those specified in Section 15J of the SEBI Act.

This will require us to consider the first question referred. Having dealt with the submissions advanced by the rival parties, (both parties have actually canvassed for a wider and more expansive interpretation of Section 15J), we are inclined to take the view that the provisions of clauses (a), (b) and (c) of Section 15J are illustrative in nature and have to be taken into account whenever such circumstances exist. But this is not to say that there can be no other circumstance(s) beyond those enumerated in clauses (a), (b) and (c) of Section 15J that the Adjudicating Officer is precluded in law from considering while deciding on the quantum of penalty to be imposed.

A narrow view would be in direct conflict with the provisions of Section 15I (2) of the SEBI Act which vests jurisdiction in the Adjudicating Officer, who is empowered on completion of the inquiry to impose "such penalty as he thinks fit in accordance with the provisions of any of those sections."

Therefore, to understand the conditions stipulated in clauses (a), (b) and (c) of Section 15J to be exhaustive and admitting of no exception or vesting any discretion in the Adjudicating Officer would be virtually to admit/ concede that in adjudications involving penalties under Sections 15 A, 15B and 15C, Section 15J will have no application. Such a result could not have been intended by the legislature. We, therefore, hold and take the view that conditions stipulated in clauses (a), (b) and (c) of Section 15 J are not exhaustive and in the given facts of a case, there can be circumstances beyond those enumerated by clauses (a), (b) and (c) of Section 15J which can be taken note of by the Adjudicating Officer while determining the quantum of penalty.

There is a distinction between a continuing offence and a repeat offence. The continuing offence is a one which is of a continuous nature as distinguished from one which is committed once and for all. The term "continuing offence" was explained and elucidated by giving several illustrations in State of Bihar vs. Deokaran Nenshi & Ors. (1972) 2 SCC 890. In case of continuing offence, the liability continues until the rule or its requirement is obeyed or complied with. On every occasion when disobedience or noncompliance occurs and reoccurs, there is an offence committed. Continuing offence constitutes a fresh offence every time or occasion it occurs. In Union of India & Anr. Vs. Tarsem Singh (2008) 8 SCC 648, continuing offence or default in service law was explained as a single wrongful act which causes a continuing injury. A recurring or successive wrong, on the other hand, are those which occur periodically with each wrong giving rise to a distinct and separate cause of action. We have made reference to this legal position in view of clause (c) of Section 15J of the SEBI Act which refers to repetitive nature of default and not a continuing default. The word "repetitive" as used therein would refer to a recurring or successive default. This factum has to be taken into consideration while deciding upon the quantum of penalty. This dictum, however, does not mean that factum of continuing default is not a relevant factor, as we have held that clauses (a) to (c) in Section 15J of the SEBI Act are merely illustrative and are not the only grounds/factors which can be taken into consideration while determining the quantum of penalty.

For more details, please click on https://main.sci.gov.in/supremecourt/2013/36291/36291_2013_Judgement_28-Feb-2019.pdf

12.04.2019	**PVP Global Ventures Pvt. Ltd. (Appellant) vs. SEBI (Respondent)**	**Securities Appellate Tribunal** **Appeal No. 451 of 2018 with batch of connected appeals** **Justice Tarun Agarwala,** **Presiding Officer** **Dr. C.K.G. Nair, Member** **M. T. Joshi, Judicial Member**

Section 28A of the SEBI Act, 1992 read with section 220 of the Income Tax Act,1961 – Recovery proceedings – Interest imposed by recovery officer – Whether tenable – Held, Yes.

Brief facts of the case:

This batch of appeals involves a common issue and, therefore, the same are being decided together. Penalty imposed on the appellants, by the adjudicating Officer, attained finality and thereafter the recovery officer issued a certificate of recovery which included interest on the penalty and in the process attached the bank account of the appellants. Against this, appellants have filed the present appeals before the Tribunal challenging that interest cannot be levied by the recovery officer and that a separate demand notice for the recovery is required to be issued.

Decision: Appeals dismissed. Reason

The object and intention of inserting Section 28A to the SEBI Act was to provide a mechanism for recovery of the amount due to SEBI. Instead of prescribing an independent mechanism for collection and recovery of the amounts due to SEBI, the legislature deemed it fit to follow the mechanism provided under the Income Tax Act and accordingly inserted Section 28A to SEBI Act wherein the provisions of the Income Tax Act relating to collection and recovery have been incorporated. Thus, the legislature by inserting Section 28A to SEBI Act has provided that if a person fails to pay the amounts referred in Section 28A, then the Recovery Officer shall draw up a statement/certificate and proceed to recover the amounts specified in the certificate by any one or more of the five modes specified therein.

This Tribunal in *Dushyant N. Dalal & Anr.* v. *SEBI* decided on March 10, 2017 (Appeal No. 41 of 2014) which

judgment was affirmed by the Supreme Court reported in 2017 SCC OnLine SC 1188, after considering the provision of Section 28A of SEBI Act read with Section 220 of the Income Tax Act held that the liability to pay interest under Section 28A read with Section 220 is automatic and arises by operation of law.

We further find that the Adjudicating Officer in its order while imposing penalty had also directed the appellant to pay the penalty amount within 45 days. In our view this order of penalty would also be deemed to include a notice of demand and thus a formal requirement for issuance of a separate notice of demand pursuant to the order of penalty is no longer required. Thus, the contention raised by the appellant is not sustainable and is rejected.

The contention that interest was impliedly waived when the penalty was reduced by the Tribunal or that interest cannot be imposed with retrospective effect is patently misconceived. Hon'ble Supreme Court while affirming the judgment of this Tribunal in *Dushyant Dalal's case* (*supra*).

From the aforesaid, it becomes clear that interest was not only chargeable under Section 28A read with Section 220(2) of the Income Tax Act but the provisions of Interest Act, 1978 could also be taken into consideration and interest could be charged from the date on which the penalty became due.

In the light of the aforesaid, we are of the view that the Recovery Officer was justified in charging interest from the date of the order passed by the Adjudicating Officer. In view of the aforesaid, we find no merit in these appeals and are dismissed. In the circumstances there shall be no order on costs.

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO2018452.PDF

01.05.2019	**M/s Therm Flow Engineers Pvt. Ltd. (Appellant) vs. SEBI(Respondent)**	**Securities Appellate Tribunal** **Appeal No. 349 of 2018 Justice Tarun Agarwala,** **Presiding Officer** **Dr. C.K.G. Nair, Member** **M. T. JOSHI, JUDICIALMEMBER**

SEBI takeover code read with SEBI Act – Takeover of company – Acquisition of minuscule proportion above the permitted limit – Transfer of shares between promoters via open market – No public announcement made – WTM directed public announcement – Whether correct – Held, No.

Brief facts of the case :

The appellant is aggrieved by the order of the Whole Time Member where under the present appellant was directed to make public announcement to acquire shares of M/s. Patel Airtemp (India) Limited (hereinafter referred to as "Target Company") within a period of 45 days from the date of the order and to pay interest at the rate of ten percent per annum as detailed in the order. The appellant is promoter of the Target Company consisting of a consortium of individual promoters.

Decision: Appeal partly allowed. Reason

In the present case, we have found that the acquisition is of miniscule proportion above the permitted limit, that too between the promoters. In the case of *Nirma Industries Ltd & Anr* v. *SEBI* (2013) 8 SCC 20, the Hon'ble Supreme Court in para 17 observed that in the given set of circumstances of that case the withdrawal of the open offer to acquire 20 percent of shared of the Company was neither in the interest of the investor nor in the development of the securities market. Thus, the case of Nirma was decided in its own circumstances.

In the case of *SEBI* v. *Kishore R. Ajmera* (2016) 6 SCC 368, the Hon'ble Supreme Court found that the manipulative and fraudulent market practices are required to be curbed by brining a comparative legislative to bring about some clarity and certainty which cannot be disputed.

Considering all the aspects of the case that violation of the Takeover Regulation is only to the extent of 0.04 percent and that too due to transfer of shares between the promoters via open market, in our view the direction of the WTM to make public announcement to acquire shares would be disproportionate. In the circumstance, the directions as provided by Rule 32(1) (b) of the Takeover Regulations as cited supra would meet the ends of justice. The appellant can be directed to transfer 0.04 percent shares i.e. 2000 shares through open market and to direct to deposit an amount of Rs.3,60,300/- (2000 shares x Rs.180.15 : purchase price) in the Investor Protection and Education Fund would meet the ends of justice. Hence the following order:

Order

1. The appeal is hereby partly allowed. The order of the WTM directing the appellant to make public announcement to acquire shares of the target company and to pay interest at the rate of 10 percent as detailed in the order is hereby set aside.
2. Instead it is hereby directed that the appellant shall transfer 2000 shares in open market within a period of 4 weeks and shall deposit an amount of Rs.3, 60,300 in the Investor Protection and Education Fund established by SEBI within a period of six weeks from the date of this order.
3. In default, the amount shall carry interest at the rate of 12 percent p.a. from the date of this order till the date of deposit.

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO2018349.PDF

10.06.2019	**GRD Securities Ltd. (Appellant) vs. National Stock Exchange of India & SEBI (Respondents)**	**Securities Appellate Tribunal** **Appeal No. 285 of 2018 Justice Tarun Agarwala,** **Presiding Officer** **Dr. C.K.G. Nair, Member** **M. T. JOSHI, JUDICIALMEMBER**

SEBI Act – Currency derivative segment transaction – Margin money deposited with delay – Heavy penalty levied – Whether correct – Held, No.

Brief facts of the case:

This appeal is filed challenging the decision of the Disciplinary Action Committee ('DAC' for short) of the National Stock Exchange of India Limited ('NSE' for short) whereby the review application of the appellant was rejected. Consequently, the earlier decision of the DAC which directed the appellant to pay a penalty of Rs. 2,05,43,900/- and face suspension of one trading day in the currency derivative segment of the Exchange stood confirmed.

The appellant is a member broker in the Capital Market (CM), Futures and Options (F&O) and Currency Derivatives (CD) segments of the NSE. During a regular inspection of the books and records of the appellant for the calendar year 2016 in February 2017 NSE noticed that the appellant falsely reported margin amounting to Rs. 2,05,43,947/- in the CD segment in respect of two clients on two occasions on April 26, 2016 and June 21, 2016. Accordingly, DAC in its meeting held on January 12, 2018, after considering the oral and written submissions of the appellant, imposed a monetary penalty to the tune of Rs. 2,05,43,900/- and suspension of one trading day in the CD segment after giving three weeks' notice. This was communicated to the appellant on February 8, 2018. This matter came up in appeal before this Tribunal which quashed the said order passed by the DAC of NSE on March 1, 2018 and directed the appellant to file a review application before the DAC. The order impugned in this appeal is issued by the DAC of NSE further to giving another opportunity of personal hearing to the appellant and considering their written submissions.

Decision: Appeal partly allowed. Reason:

We do not agree with the contentions of the appellant that it was only a technical violation. It is quite evident from the facts that though cheques may have been received from the clients the appellant had not credited these amounts to the account upfront which is a basic requirement of margin collection from clients. Moreover, in respect of client Monotype India it is not even clear whether the margin was ever collected. The submission that margin requirement as on T + 5, not as on the trading day, is what is relevant is not correct and hence not admissible. Upfront collection of margins is an important mechanism for ensuring prompt settlement and in promoting market integrity. As such any explanation to the contrary is not sustainable.

However, we are not able to agree with the stand of SEBI and NSE that no discretion in imposition penalty can be exercised, once a violation is established. The Circular issued by SEBI dated August 10, 2011 specifies different percentages of penalty with respect to short collection / non-collection of margins from clients in equity and currency derivatives segment. While it specifies small proportion of 5% to 10% of margin short fall as penalty for non-reporting, it specifies that 100% of the short collection shall be imposed as penalty. If such violation is noticed at the time of inspection, then in addition to 100% penalty one day suspension has to be imposed. The said circular does not differentiate between situations involving upfront collection of cheques but late depositing or late crediting of the said amount and no upfront collection at all and hence suffers from the proportionality principle. In order to incorporate proportionality, as is provided for small percentages of short falls in margin collection in the same circular itself, the word 'shall' in the circular has to be read as 'may' as it would enable the Exchange authorities to distinguish between no collection of margin at all and delayed collection of margin, particularly, in situations like no impact on the settlement or market at all. Accordingly, we are unable to agree with the interpretation of the spirit of the circular provided by SEBI as well as NSE.

In this matter before us the penalty imposed is Rs. 2, 05, 43,900/- and suspension from trading in the Currency Derivatives segment for one day. The appellant before us submits that the annual income from brokerage from CD segment is only to the tune of about Rupees three lakh which is not disputed. While we totally agree that upfront collection of margin is an important regulatory tool to safeguard market integrity, at the same time we are equally concerned with proportionality while imposing a penalty of a very heavy amount which can completely ruin an entity for a single violation. It is an undisputed fact that the appellant has not committed any other violation. While the SEBI circular is quite mechanical in directing the Exchanges to impose a fixed penalty, the Exchange Rules provide for an appeal / review and empowers the authority to review / rescind / reconsider the penalty imposed. Given these factors we are of the considered view that based on the facts and circumstances of the present matter, the law has to be interpreted in its spirit invoking proportionality.

Though we are inclined to reduce the penalty given these facts, the penalty has to be in tune with the violation. The appellant's submission that brokerage from the CD segment is only just over Rs. 3 lakh is incomplete since it has not disclosed the total earnings including that from other segments of the market. Moreover, it is imperative to underscore the importance of prompt upfront margin collection for promoting market integrity. Balancing all these, a penalty of Rupees Fifty Lakh and one day suspension from the CD segment would meet the ends of justice in the matter. Appellant is directed to pay the penalty within four weeks from today. Respondent NSE shall implement the one-day suspension after giving fifteen days' notice to the appellant.

For more details, please click on http://sat.gov.in/english/pdf/E2019_JO2018285.PDF

23.02.2016	**SEBI (Appellant) vs. Kishore Rajmera (Respondent)**	**Supreme Court** **Civil Appeal No. 2818 of 2008with Civil Appeal No.8769 of 2012, Civil Appeal No.6719 of2013, Civil** **Appeal No.252 of 2014 & CivilAppeal No.282 of 2014** **Ranjan Gogoi & Prafulla C. Pant,JJ.**

SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations

and SEBI (Stock-Brokers and Sub-Brokers) Regulations – Penalty for matching trade – Whether tenable– Held, No – Penalty for synchronised trade and circular trade – Whether tenable - Held, Yes. Brief facts of the case:

Civil Appeal No. 2818 of 2008 (SEBI v. Kishore R. Ajmera) is with regard to the allegation of indulging in "matching trades" thereby creating artificial volumes in the scrip of M/s. Malvica Engineering Ltd. (MEL).

Civil Appeal No.6719 of 2013 (SEBI Vs. Ess Intermediaries Pvt. Ltd.), Civil Appeal No.252 of 2014 (SEBI Vs. M/s. Rajendra Jayantilal Shah, Civil Appeal No.282 of 2014 (SEBI Vs. M/s. Rajesh N. Jhaveri) are with regard to indulging in "synchronised trades" in the scrip of M/s. Adani Export Ltd. (AEL) by respondents who were sub-brokers.

Civil Appeal No. 8769 of 2012 (SEBI Vs. Networth Stock Broking Ltd.) is with respect to "circular trading" of the scrip on behalf of one Indumati Goda.

In all the above cases the Whole time member of the SEBI imposed penalty which was set aside by the SAT. Therefore, SEBI challenged the orders of SAT before the Supreme Court.

The question of law arising in this group of appeals is "what is the degree of proof required to hold brokers/ sub- brokers liable for fraudulent/ manipulative practices under the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations and/or liable for violating the Code of Conduct specified in Schedule II read with Regulation 9 of the SEBI (Stock – Brokers and Sub-Brokers) Regulations, 1992? ('Conduct Regulations, 1992').

Decision : C.A. No.2818 of 2008 dismissed; Rest of the appeals allowed.

Reason:

It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion.

Insofar as C.A. No.2818 of 2008 SEBI v. Kishore R. Ajmera is concerned the proved facts are that (i) Both the clients are known to each other and were related entities;(ii) This fact was also known to the sub-broker and the respondent-broker;(iii) The clients through the sub-broker had engaged in mutual buy and sell trades in the scrip in question, volume of which trade was significant, keeping in mind that the scrip was an illiquid scrip. Apart from the above there is no other material to hold either lack of vigilance or bona fides on the part of the sub-broker so as to make respondent-broker liable. An irresistible or irreversible inference of negligence/lack of due care etc., in our considered view, is not established even on proof of the primary facts alleged so as to make respondent-broker liable under the Conduct Regulations, 1992 as has been held in the order of the Whole Time Member, SEBI which, according to us, was rightly reversed in appeal by the Securities Appellate Tribunal.

This will take us to the second and third category of cases i.e. M/s Ess Intermediaries Pvt. Ltd., M/s Rajesh N. Jhaveri and M/s Rajendra Jayantilal Shah [second category] and M/s Monarch Networth Capital Limited (earlier known as Networth Stock Broking Limited) [third category]. In these cases the volume of trading in the illiquid scrips in question was huge, the extent being set out hereinabove. Coupled with the aforesaid fact, what has been alleged and reasonably established, is that buy and sell orders in respect of the transactions were made within a span of 0 to 60 seconds. While the said fact by itself i.e. proximity of time between the buy and sell orders may not be conclusive in an isolated case such an event in a situation where there is a huge volume of trading can reasonably point to some kind of a fraudulent/manipulative exercise with prior meeting

of minds. Such meeting of minds so as to attract the liability of the broker/sub-broker may be between the broker/ sub-broker and the client or it could be between the two brokers/sub-brokers engaged in the buy and sell transactions. When over a period of time such transactions had been made between the same set of brokers or a group of brokers a conclusion can be reasonably reached that there is a concerted effort on the part of the concerned brokers to indulge in synchronized trades the consequence of which is large volumes of fictitious trading resulting in the unnatural rise in hiking the price/value of the scrip(s).

It must be specifically taken note of herein that the trades in question were not "negotiated trades" executed in accordance with the terms of the Board's Circulars issued from time to time. A negotiated trade, it is clarified, invokes consensual bargaining involving synchronizing of buy and sell orders which will result in matching thereof but only as per permissible parameters which are programmed accordingly.

The conclusion has to be gathered from various circumstances like that volume of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors.

The fact that the broker himself has initiated the sale of a particular quantity of the scrip on any particular day and at the end of the day approximately equal number of the same scrip has come back to him; that trading has gone on without settlement of accounts i.e. without any payment and the volume of trading in the illiquid scrips, all, should raise a serious doubt in a reasonable man as to whether the trades are genuine. The failure of the brokers/sub-brokers to alert themselves to this minimum requirement and their persistence in trading in the particular scrip either over a long period of time or in respect of huge volumes thereof, in our considered view, would not only disclose negligence and lack of due care and caution but would also demonstrate a deliberate intention to indulge in trading beyond the forbidden limits thereby attracting the provisions of the FUTP Regulations. The difference between violation of the Code of Conduct Regulations and the FUTP Regulations would depend on the extent of the persistence on the part of the broker in indulging with transactions of the kind that has occurred in the present cases. Upto an extent such conduct on the part of the brokers/sub-brokers can be attributed to negligence occasioned by lack of due care and caution. Beyond the same, persistent trading would show a deliberate intention to play the market. The dividing line has to be drawn on the basis of the volume of the transactions and the period of time that the same were indulged in. In the present cases it is clear from all these surrounding facts and circumstances that there has been transgressions by the respondents beyond the permissible dividing line between negligence and deliberate intention.

For more details, please click on https://main.sci.gov.in/judgment/judis/43427.pdf

02.06.2016	**Neesa Technologies Limited & ORS**	**Securities and Exchange Board of IndiaWTM/ PS/46/WRO/JUN/2016** **Prashant Saran, Whole Time Member**

SEBI (Issue and Listing of Debt Securities) Regulations, 2008 read with SEBI Act and Companies Act, 1956 – Issue of NCDs violation of provisions- whether the company is liable for the violations – Held, Yes.

Brief facts of the case:

On the basis of the material available on record i.e., correspondences exchanged between SEBI and NTL; complaint and additional documents received by SEBI and information obtained from the Ministry of Corporate Affairs' website i.e. MCA 21 Portal and IDBI Trusteeship Services Limited (ITSL), SEBI vide an ex-parte interim order dated June 03, 2015 (hereinafter referred to as 'interim order'), *prima facie* observed that Neesa Technologies Limited (hereinafter referred to as the 'Company' or 'NTL') had engaged in fund mobilizing activity from the public, through its offer and issue of Non-Convertible Debentures (hereinafter referred to as 'NCDs') and violated the provisions of Sections 56, 60, 73 and 117C of the Companies Act, 1956 and the

provisions of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (hereinafter referred to as the 'ILDS Regulations').

Company and its directors filed replies contending that they have not violated any of the provisions of the companies Act or Regulations as alleged.

Decision : NCD's to be refunded with interest.

Reason:

In the present matter, the Company had offered and allotted NCDs to 341 persons during the financial year 2013-2014 and mobilized Rs.5.96 crore. Considering the number of persons to whom the NCDs were offered and issued, I conclude that the Company made a public issue of NCDs during the relevant period, in terms of the first proviso to section 67(3) of the Companies Act, 1956.

The Company had contended that the NCDs were treated as 'deposits' by RoC and therefore SEBI would not have jurisdiction in the matter. In this regard, I note that the Company vide letter dated November 05, 2014, had admitted issuing Non-Convertible Debentures. Further, the RoC notice dated July 07, 2015 has also mentioned about the NCDs for Rs.5.96 crore. The allegation of the RoC *inter alia* is that the Company failed to pay the interest on such NCDs or pay back the money collected under such NCDs in violation of Section 74(1) and (2) of the Companies Act, 2013. Section 67(3) is in respect of "shares" and "debentures". In view of the same, the Company having admittedly issued debentures in a public issue is under the jurisdiction of SEBI.

Accordingly, Sections 56, 60 and 73 of the Companies Act, 1956 are required to be complied with by a company making a public issue of securities. In addition to the above, the Company was mandated to comply with 117C of the Companies Act, 1956 and the provisions of the ILDS Regulations in respect of its public offer and issuance of NCDs. These provisions have allegedly not been adhered to by the Company.

By making a public issue of NCDs, the Company had to compulsorily list such securities in compliance with Section 73(1) of the Companies Act, 1956. A Company making a public issue of securities cannot choose whether to list its securities or not as listing is a mandatory requirement under law. As per Section 73(1) of Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange.

Further, there is no material to say that the Company has filed an application with a recognized stock exchange to enable the securities to be dealt with in such stock exchange. Therefore, the Company has failed to comply with this requirement.

As the Company failed to make an application for listing of such securities, the Company had to forthwith repay such money collected from investors under NCDs. If such repayments are not made within 8 days after the Company becomes liable to repay, the Company and every director is liable to repay with interest at such rate. The liability of the Company to refund the public funds collected through offer and allotment of the impugned securities is continuing and such liability would continue till repayments are made. There is no record to suggest that the Company made the refunds as per law.

As the amounts mobilized through the issue of NCDs have not been refunded within the time period as mandated under law, it would therefore be appropriate to levy an interest @ 15% p.a. as provided for under the above section read with rule 4D (which prescribes that the rates of interest, for the purposes of sub-sections (2) and (2A) of section 73, shall be 15 per cent per annum) of the Companies (Central Government's) General Rules and Forms, 1956 on the amounts mobilized by the Company through its offer and issue of NCDs, from the date when the same was liable to be repaid till the date of actual payment to the investors.

Section 117C stipulates that, where a company issues debentures, it shall create a debenture redemption reserve for the redemption of such debentures, to which adequate amounts shall be credited, from out of its profits every year until such debentures are redeemed. There is no record to suggest that the Company had created a debenture redemption reserve and has therefore violated Section 117C of the Companies Act, 1956.

As NCDs are 'debt securities' in terms of the ILDS Regulations, the Company was also mandated to comply with the provisions of the ILDS Regulations in respect of its public issue of NCDs. However, the Company failed to comply with the provisions of the ILDS Regulations.

From the foregoing, I conclude that the Company failed to comply with the provisions of Sections 56, 60, 73 and 117C of the Companies Act, 1956 in respect of its offer and issuance of NCDs and the aforesaid provisions of the ILDS Regulations and therefore liable for suitable action under the Companies Act, 1956, the SEBI Act and the ILDS Regulations including action for default under section 73(2) of the Companies Act, 1956.

For more details, please click on https://www.sebi.gov.in/sebi_data/attachdocs/1464948152217.pdf

11.07.2016	**SEBI (Appellant) vs. M/s Opee Stock–Link Ltd. & Anr(Respondents)**	**Supreme Court** **Civil Appeal No. 2252 of 2010** **with Civil Appeal Nos. 2285, 2286, 2294 & 2303 of 2010** **Anil R. Dave & R. Banumathi, JJ.**

SEBI Act – Section 15Z – Cornering of shares in IPO through benami demat accounts – Supreme Court upholds the penalty and punishment imposed by SEBI on the erring stock brokers.

Brief facts of the case:

These are the cases which reflect the manner of getting excessive number of shares in an irregular manner, which would adversely affect Retail Individual Investors (RII), who are the persons with relatively less means and who desire to invest their hard earned money into shares of companies, whereby they also make an effort to participate in the progress of the economy. We are concerned with issue of shares in the nature of IPO made by Jet Airways Limited and Infrastructure Development Finance Company Limited, which had been over-subscribed.

Investigations was made by the officials of the SEBI and in pursuance of the said investigation it was revealed that in the matter of the IPO of the aforestated two companies, shares which were meant for RIIs had been cornered through hundreds of benami/fictitious demat account holders.

As modus operandi was quite similar in applications for shares made in respect of both the companies and parties concerned are common, we have referred to the issue of Jet Airways India Limited. It was found by the SEBI that respondent in Appeal No. 20 of 2009 before the SAT had received 12,053 shares out of which 3272 shares were transferred before the day of listing of shares of the company with the stock exchange, 3598 shares on the day of listing and 5183 shares after the day of listing. The said shares were purchased through off market transactions from 553 demat account holders, who had been allotted shares of the said company. The shares of the company were listed on 14th March, 2005.

The said 553 demat account holders sold the shares to the said respondent at the rate of Rs. 1170/- per share, though the market value of the said shares was much more than Rs. 1170/- per share. The said shares were thereafter sold by the said respondent at a higher price. Upon investigation, it was also found that most of those 553 demat account holders were not genuine persons.

The Whole Time Member [WTM] of the SEBI came to the conclusion that the dealings of the respondents were not fair and were in violation of the Act as well as the Regulations, and imposed penalty on the respondents. On appeal, SAT set aside the order of the WTM. SEBI challenged the order of SAT before the Supreme Court.

Decision: Appeals allowed.

Reason:

We do not find any substance in the submissions made on behalf of the respondents to the effect that the price

of the shares of Jet Airways India Ltd. paid by the respondents to the demat account holders was reasonable. Even according to the submission made by the learned counsel, value of the said shares, during the said period varied from Rs.1172/- to Rs. 1339/- and in such circumstances, nobody would believe that all the demat account holders would sell their shares at the same rate, viz. Rs.1170/- per share to the respondents. These transactions are, therefore, definitely of fishy nature.

The submission to the effect that no Retail Individual Investor had made any complaint to the SEBI is not at all relevant because the SEBI need not act only on the basis of a complaint received. If from its independent sources, the SEBI, after due enquiry comes to know about some illegality or irregularity, the SEBI has to act in the manner as it acted in the instant case. The fact, however, remains that because of the undue advantage which the respondents got, some small investors or RII must have not got the shares, which they ought to have been allotted.

We do not agree with the submission that a common address given by several demat account holders would not show any irregularity, because normally a person would give his own address when he is opening his demat account. Rarely, a person would give someone else's address if he is not having any permanent address or is likely to shift his residence. In the instant case, not one or a few, but several demat holders had given one particular address and it is also pertinent to note that upon initiation of an inquiry at the instance of the SEBI, most of the demat accounts had been closed by the demat account holders.

The submission was also to the effect that the shares could have been sold before they were listed with a stock exchange and such a sale cannot be said to be an illegality. Looking at the fact that number of persons, having common address of their demat accounts, selling their shares at the same price to a particular person before listing of shares of a company with a stock exchange is not a normal thing. In the facts and circumstances of the case, we do not accept the said submission made by the learned counsel appearing for the respondents.

The submission made to the effect that the Tribunal is a final fact finding authority cannot be disputed. According to the learned counsel, the facts found by the SAT should not be disbelieved by this Court. However, for coming to a definite conclusion contrary to the findings arrived at by the lower authority, the appellate authority, in the instant case, the SAT, ought to have recorded specific reasons for arriving at a different conclusion, but we do not find any sound reason for coming to a different conclusion in the impugned order. On the other hand, we find detailed discussion for coming to a particular conclusion in the order, which was passed by the Whole Time Member of the SEBI and therefore, we do not see any reason for the SAT to disturb the said finding without mentioning any strong and justifiable reason for coming to a different conclusion.

For more details, please click on https://main.sci.gov.in/judgment/judis/43778.pdf

02.12.2016	**SEBI (Appellant) vs. Burren Energy India Ltd. &Ors. (Respondents)**	**Supreme Court** **Civil Appeal No. 361 of 2007** **Ranjan Gogoi & N.V. Ramana,JJ.**

SEBI Acquisition & Takeover Regulations – Acquirer entered into a MoU (share purchase agreement) for the acquisition of shares on 14/02/2005 – Acquirer appointed its nominees as directors in the parent company of the target company on 14/02/2005 – Public offer made on 15/02/2005 – Whether the appointment of directors violates the provisions of the Takeover Regulations – Held, Yes.

Brief facts of the case:

Burren Energy India Ltd ("Burren") is incorporated in England, to acquire the entire of the equity share capital of one Unocal Bharat Limited ("UBL"), which is incorporated in Mauritius. The shares of UBL were acquired by one Unocal International Corporation ("UIC") incorporated in California in USA. UBL at the relevant time, held 26.01% of the issued share capital of Hindustan Oil Exploration Co. Ltd. ("the target company").

Burren entered into a share purchase agreement with UIC on 14th February, 2005 to acquire the entire equity share capital of UBL, in England and by virtue thereof all the shares of UBL were registered in the name of Burren on the same day itself. On account of this transformation Burren came to hold 26.01% of the share capital in the target company. As the acquisition was beyond the stipulated 15% of the equity share capital of the target company the Regulations got attracted making it obligatory on the part of Burren to make a public announcement, which was accordingly made for sale/purchase of 20% of the shares of the target company at a determined price of Rs.92.41 per fully paid up equity share was made on 15th February, 2005 by Burren and UBL acting as a person acting in concert.

On 14th February, 2005 i.e. date of execution of the share purchase agreement Burren appointed two of its Directors on the board of UBL and on the same date UBL, which is a person acting in concert with Burren, appointed the same persons on the board of directors of the target company. This, according to SEBI, amounted violation of Regulation 22(7) of the Regulations inasmuch as the said appointment was made during the offer period which had commenced on and from 14th February, 2005 i.e. date of execution of the share purchase agreement. The adjudicating authority imposed a penalty of Rs.25 lakhs which was set aside by the Securities Appellate Tribunal. Hence the appeal by SEBI.

Decision: Appeal allowed.

Reason:

The main thrust of the contentions advanced on behalf of the appellant appears to be that the words 'Memorandum of Understanding' are, in an appropriate situation may also include a concluded agreement between the parties. Even in a given case where a Memorandum of Understanding is to fall short of a concluded agreement and, in fact, the concluded agreement is executed subsequently, the 'offer period' would still commence from the date of the Memorandum of understanding. If the offer period commences from the date of such Memorandum of Understanding, according to the learned counsel, there is no reason why the same should not commence from the date of the share purchase agreement when the parties had not executed a Memorandum of Understanding. It is also submitted that the commencement of the 'offer period' from the date of public announcement would primarily have relevance to a case where acquisition of shares is from the market and there is no Memorandum of Understanding or a concluded agreement pursuant thereto.

In reply, the respondents urged that Regulation 22(7) of the Regulations can have no application to the present case inasmuch as the disqualification from appointment on the board of directors of the target company will operate only when the acquirer or persons acting in concert are individuals and not a corporate entity. In the present case, while Burren was the acquirer, UBL was the person acting in concert. This is evident from the letter of offer (public announcement) dated 15th February, 2005. The embargo under Section 22(7) is both on the acquirer and a person acting in concert. The expression 'person acting in concert' includes a corporate entity [Regulation 2(1) (e) (2) (i) of the Regulations] and also its directors and associates [Regulation 2(1) (e) (2)(iii) of the Regulations]. If this is what is contemplated under the Regulations we do not see how the first argument advanced by Shri Divan on behalf of the respondents can have our acceptance.

Insofar as the second argument advanced by Shri Divan is concerned it is correct that in the definition of 'offer period' contained in Regulation 2(1)(f) of the Regulations, relevant for the present case, a concluded agreement is not contemplated to be the starting point of the offer period. But such a consequence must naturally follow once the offer period commences from the date of entering into a Memorandum of Understanding which, in most cases would reflect an agreement in principle falling short of a binding contract.

If the offer period can be triggered of by an understanding that is yet to fructify into an agreement, we do not see how the same can be said not to have commenced/started from the date of a concluded agreement i.e. share purchase agreement as in the present case. On the view that we have taken we will have to hold that the learned Tribunal was incorrect in reaching its impugned conclusions and in reversing the order of the Adjudicating Officer. Consequently the order of the learned Tribunal is set aside and that of the Adjudicating

Officer is restored. The penalty awarded by the Adjudicating Officer by order dated 25th August, 2006 shall be deposited in the manner directed within two months from today.

For more details, please click on https://main.sci.gov.in/judgment/judis/44356.pdf

07.03.2017	**National Securities Depository Ltd. (Appellant) vs. SEBI(Respondent)**	**Supreme Court** **Civil Appeal No. 5173 of 2006 with Civil Appeal No. 186 of 2007** **Pinaki Chandra Ghose & R.F.Nariman, JJ.**

SEBI Act, 1992 – Sections 11 and 15T – Appealable orders – Whether administrative circular issued by SEBI is appealable before the SAT – Held, No.

Brief facts of the case:

The present appeal raises an interesting question as to whether an administrative circular that is issued by SEBI under Section 11(1) of the Securities Exchange Board of India Act, 1992, can be the subject matter of appeal under Section 15T of the said Act.

By an administrative circular dated 9th November, 2005, SEBI under the caption "review of dematerialization charges" issued an administrative circular under Section 11(1) of the SEBI Act to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

Depositories were advised by the said circular to amend all relevant bye-laws, rules and regulations in order to see that with effect from 9th January, 2006, no charges shall be levied by a depository on DPs and consequently by a DP on a beneficiary owner when a beneficiary owner transfers all securities lying in his account to another branch of the same DP or to another DP of the same depository or another depository, provided the BO account at transferee DP and that transferor DP are identical in all respects.

A preliminary objection was raised in the appeal filed by the respondent before the Securities Appellate Tribunal. It was urged that under the SEBI Act, SEBI has administrative, legislative and quasi-judicial functions. Appeals preferred to the Securities Appellate Tribunal can only be from quasi-judicial orders and not administrative and legislative orders.

This preliminary objection was turned down by the impugned judgment dated 29th September, 2006, by the Securities Appellate Tribunal. According to the Tribunal, the expression "order" is extremely wide, and there being nothing in the Act to restrict an appeal only against quasi- judicial orders, appeals would lie against all three types of orders under the Act i.e. administrative orders, legislative orders as well as quasi- judicial orders. This was held purportedly following the decision in Clariant International Ltd. & Anr. v. Securities & Exchange Board of India [(2004) 8 SCC 524]. The Tribunal, therefore, rejected the preliminary objection and went into the merits of the arguments against the impugned circular, and dismissed the same.

Cross appeals have been filed before us. Civil Appeal No.5173 of 2006 has been filed by the National Securities Depositories Ltd, on the merits of the dismissal, whereas Civil Appeal No.186 of 2007 has been filed by the SEBI against the rejection of the preliminary objection raised before the Securities Appellate Tribunal.

Decision: Appeal of SEBI allowed. Appeal of NSDL dismissed.

Reason:

We will take up the second appeal first inasmuch as if the preliminary objection were to succeed, it is clear that the merits would not have to be gone into.

We have now to determine on a conspectus of the authorities as to whether Section 15T refers only to quasi-

judicial orders, quite apart from the construction placed upon the Section earlier in this judgment. SEBI is an expert body created by the Act which, as has been stated earlier, has administrative, legislative and quasi-judicial functions.

It may be stated that both Rules made under Section 29 as well as Regulations made under Section 30 have to be placed before Parliament under Section 31 of the Act. It is clear on a conspectus of the authorities that it is orders referable to Sections 11(4), 11(b), 11(d), 12(3) and 15-I of the Act, being quasi-judicial orders, and quasi- judicial orders made under the Rules and Regulations that are the subject matter of appeal under Section 15T. Administrative orders such as circulars issued under the present case referable to Section 11(1) of the Act are obviously outside the appellate jurisdiction of the Tribunal for the reasons given by us above.

Civil Appeal No.186 of 2007 is, therefore, allowed and the preliminary objection taken before the Securities Appellate Tribunal is sustained. The judgment of the Securities Appellate Tribunal is, accordingly, set aside.

In this view of the matter, Civil Appeal No.5173 of 2006 being a challenge to the merits of the impugned circular, has necessarily to be dismissed. We make it clear that liberty is granted to take appropriate steps in judicial review proceedings to challenge the aforesaid circular in accordance with law. Civil Appeal No.5173 of 2006 is disposed of accordingly.

For more details, please click on https://main.sci.gov.in/judgment/judis/44673.pdf

13.07.2017	**Laurel Energetics Pvt. Ltd. (Appellant) vs. SEBI (Respondent)**	**Supreme Court** **Civil Appeal No. 5675 of 2017 with Civil Appeal No. 5694** **of 2017** **R.F. Nariman & S.K. Kaul, JJ.**

SEBI Act, 1992 read with Regulation 10 of the SEBI Takeover Regulations, 2011 – Shares of target company – Interse transfer between promoters in July 2014 at Rs.6.20 per share – Acquirer promoters of the target company are the promoters of parent company also – Public announcement for open offer made in 2015 at Rs.3.20 per share – SEBI rejected the offer price and directed to increase it to Rs.6.20 – whether corporate veil could be lifted to avail exemption under section 10 of the Regulations – Held, No.

Brief facts of the case:

Indiabulls Real Estate Ltd ("IBREL"), a listed company, had two lines of business viz real estate and power generation. The target Company "Rattan India Infrastructure Ltd ["Rattan Company] is the WoS of IBREL. The Appellant ("Laurel") is the WoS of Nettle Construction Pvt. Ltd, which was wholly owned by one Rajiv Rattan. Appellant company and Rajiv Rattan have been listed as promoters of IBREL in the year 2009-10.

In 2011, IBREL demerged its power business to Rattan Company i.e. target company. The target company was listed in BSE and NSE in July 2012. The appellant acquired 18% of the equity share holding of the target company at a price of Rs.6.30 per share sometimes in July, 2014. It made certain other purchases with which we are not concerned, because the price paid for those acquisitions was less than Rs.6.30 per share.

On 20th October, 2015 Laurel and Arbutus Consultancy LLP along with various other entities, who were persons acting in concert, made a public announcement under Regulation 15(1) of the SEBI Substantial Acquisition of Shares and Takeover Regulations, 2011 when an open offer was made for acquisition of 35,93,90,094 equity shares of the Target Company from the equity shareholders of the Target Company at the price of Rs.3.20 per share.

SEBI observed, by an order, that the exemption provisions contained in Regulation 10 would not apply to the 2014 acquisition, as a result of which the price of Rs.3.20 per share was not accepted and the higher price of Rs.6.30 was stated to be an amount that would have to be paid to the equity shareholders of the Target Company.

From the aforesaid order, the Appellate Tribunal dismissed an appeal on 5th April, 2017, holding that Regulation 10 did not exempt the acquisitions of 2014, as a result of which the price payable per share necessarily became Rs.6.30 instead of Rs.3.20 per share. The correctness of the aforesaid order is now before the Supreme Court.

Issue:

Whether the appellant could be considered as the promoter of the target company also being the promoter of the parent company so as to consider it as a promoter for more than 3 years in the target company also by lifting the corporate veil of the parent company and the target company?

Decision: Appeal dismissed.

Reason :

When we come to Regulation 10 itself, and we see some of the other clauses contained in the regulation, with which we are not directly concerned, the corporate veil is lifted in certain specified circumstances.

A reading of sub regulation (iii) would show that holding companies and their subsidiaries are treated as one group subject to control over such companies being exclusively held by the same persons. This shows that it has been statutorily recognized in sub regulation (iii) that in a given situation viz. holding subsidiary relationship, the corporate veil would be lifted.

When we come to sub regulations (iv) and (v), it is clear that these two sub regulations follow the pattern contained in sub regulation (ii) in as much as when it comes to persons acting in concert, the period should be not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing agreement. Also, when it comes to shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the listing agreement, the corporate veil is not lifted. The difference between sub regulations(ii), (iv) and (v) on the one hand, and sub regulation (iii) on the other, again shows us that it is impermissible for the court to lift the corporate veil, either partially or otherwise, in a manner that would distort the plain language of the regulation. Where the corporate veil is to be lifted, the regulation itself specifically so states.

In the factual scenario before us, it is not possible to construe the regulation in the light of its object, when the words used are clear. This statement of the law is of course with the well known caveat that the object of a provision can certainly be used as an extrinsic aid to the interpretation of statutes and subordinate legislation where there is ambiguity in the words used.

As has already been stated by us, we find the literal language of the regulation clear and beyond any doubt. The language of sub regulation (ii) becomes even clearer when it is contrasted with the language of sub regulation (iii), as has been held by us above.

Having gone through the appellate tribunal's judgment, we find that, for the reasons stated by us, we cannot fault its conclusion and accordingly the appeals stand dismissed.

For more details, please click on https://main.sci.gov.in/supremecourt/2017/13304/13304_2017_Judgement_13-Jul-2017.pdf

04.10.2017	**Dushyant N Dalal and Another (Appellants) vs. SEBI (Respondent)**	**Supreme Court** **Civil Appeal No. 5677 of 2017 with batch of appeals** **R.F. Nariman & S.K. Kaul, JJ.**

SEBI Act, 1992 – Section 28A – Recovery of interest on penalty and disgorgement of unlawful gains cases – Whether interest could be recovered – Held, Yes.

Brief facts of the case:

The present appeals raise an interesting question under Section 28Aof the Securities and Exchange Board of India Act, 1992 (SEBI Act), namely, as to whether interest can be recovered on orders of penalty issued under the Act and/or orders of disgorgement of unlawful gains, when the said amounts have remained unpaid. In the penalty cases, it is SEBI who is before us as appellant, whereas in the disgorgement case, it is private individuals who are before us.

C.A. 5677 of 2017 is the disgorgement case. In this case while awarding interest for the years 2005 to 2009, WTM had not expressly awarded any future interest and that this was done deliberately inasmuch as if the amount of Rs. 6 crores was not paid within 45 days from the date of the order, the consequence was specified as being debarment for a further period of 7 years which was so severe that further future interest was deliberately not found necessary to be awarded. SAT upheld that interest is payable. Aggrieved broker appealed against this order.

Insofar as the penalty orders are concerned, the delinquent persons paid the penalty but did not pay the interest charged under section 28A. SAT held that the imposition of interest has to operate prospectively and set aside that portion of the order levying interest. It is against this part of the order that SEBI has appealed.

Decision : Appeals allowed.

Reason :

We are of the view that an examination of the Interest Act, 1978 would clearly establish that interest can be granted in equity for causes of action from the date on which such cause of action arose till the date of institution of proceedings.

It is clear, therefore, that the Interest Act of 1978 would enable Tribunals such as the SAT to award interest from the date on which the cause of action arose till the date of commencement of proceedings for recovery of such interest in equity. The present is a case where interest would be payable in equity for the reason that all penalties collected by SEBI would be credited to the Consolidated Fund under Section 15JA of the SEBI Act. There is no greater equity than such money being used for public purposes. Deprivation of the use of such money would, therefore, sound in equity. This being the case, it is clear that, despite the fact that Section 28A belongs to the realm of procedural law and would ordinarily be retrospective, when it seeks to levy interest, which belongs to the realm of substantive law, the Tribunal is correct in stating that such interest would be chargeable under Section 28A read with Section 220(2) of the Income Tax Act only prospectively. However, since it has not the same 2014 Amendment which introduced Section 28A, with effect from 18.7.2013, also introduced Section 15JB retrospectively, with effect from 20.4.2007. This is a positive indication that Section 28A was intended only to have prospective application. It must be taken into account the Interest Act, 1978 at all, we set aside the Tribunal's findings that no interest could be charged from the date on which penalty became due. The Civil Appeals 10410- 10412 of 2017 are allowed insofar as the penalty cases are concerned.

However, going to the facts in Civil Appeal No. 5677 of 2017, we observe that the same whole time member of SEBI has passed similar orders in other cases where all the aforesaid orders show that the said whole-time member was fully cognizant of his power to grant future interest which he did in all the aforesaid cases. In fact, in the last mentioned case, whose facts are very similar to the facts of the present case, the order was passed "without prejudice to SEBI's right to enforce disgorgement along with further interest till actual payment is made." The words "along with further interest till actual payment is made" are conspicuous by their absence in the order dated 21.7.2009. In the circumstances, if there is default in payment of Rs. 6 crores within the stipulated time, no future interest is payable inasmuch as a much severer penalty of being debarred from the market for 7 years was instead imposed. We have noticed how the appellant has, in fact, suffered the aforesaid debarment and how he made payment of Rs. 6 crores on 6.1.2014 from the sale of shares. The SAT was incorrect in stating that the order dated 21.7.2009 contained an obligation to pay interest at the rate of 12% per annum

on the unlawful gain of Rs.4.05 crores till payment. We, therefore, allow C.A. 5677 of 2017 and set aside the SAT's judgment in this appeal as well.

For more details, please click on https://main.sci.gov.in/supremecourt/2017/13024/13024_2017_Judgement_04-Oct-2017.pdf

23.10.2007	**Ratnabali Capital Markets Ltd. (Petitioner) vs. SEBI & ORS (Respondent)**	**Supreme Court** **Civil Appeal No. 4945 of 2007 with Civil Appeal No.** **3674 of 2007** **S. H. Kapadia &** **B. Sudershan Reddy, JJ.**

SEBI Act,1992 read with section 391 of the Companies Act, 1956 – Merger of companies dealing in stocks and shares – Benefit of payment of registration fees – Merged entity operated in derivative market – Whether fee exemption available – Held, No.

Brief facts of the case:

The short question that arises for our consideration in these civil appeals filed is whether the appellants were entitled to the benefit of fee continuity under para 7 of Circular dated 30.9.2002 issued by SEBI.

In 1995 Ratnabali Securities Ltd. ("RSL") was registered as a broker with National Stock Exchange ("NSE") and had paid initial registration fees for the first year and thereafter it had paid fees on turnover basis for subsequent four years. No further fees on turnover basis was paid by RSL under the said Regulations for continuation of registration except a fee of rupees five thousand for a block of next five years. RSL operated in cash and spot market.

SEBI adopted recommendations of Gupta Committee stating that no company whose net worth was less than rupees three crores would be allowed to trade as a broker in the derivative segment of the Stock Exchange. To meet this net worth criteria, RSL and RCML merged under the Scheme of Amalgamation sanctioned by the order of the Calcutta High Court. Under that order, all rights, licences, assets, properties and registrations of RSL stood transferred by operation of law to RCML.

On 30.9.2002 SEBI issued a circular stating that in the case of merger carried out as a result of compulsion of law, fees would not have to be paid afresh by a transferee entity provided that majority shareholders of transferor entity (RSL) continues to hold majority shareholding in the transferee entity (RCML).

After the merger of RSL with RCML, a demand was made by SEBI for registration fees on turnover basis. According to RCML, when the above two companies stood merged on 9.2.2000, which merger was approved by Calcutta High Court, all assets and liabilities, including benefits in the form of licences obtained by RSL, stood transferred by operation of law in the hands of RCML. According to RCML, the concept of merger constitutes transfer by operation of law. According to RCML, the concept of merger operates on account of legal compulsion or compulsion in law. According to RCML, in the case of merger, which takes place after complying with the procedure prescribed by Sections 391 to 394 of the Companies Act, duly approved by the High Court, the assets and liabilities of the transferor company comes into the hands of RCML on account of legal compulsion. There is nothing voluntary in such cases of merger. According to RCML, the registration fees once paid by RSL should be given the benefit of continuity vide para 7 of Circular dated 30.9.2002 issued by SEBI. In other words, RCML now claims that it is entitled to the benefit of registration fees which RSL had paid from time to time as a broker in the cash and spot market. This claim of RCML has been rejected by the impugned decision. Hence, this civil appeal.

Decision : Appeals dismissed.

Reason :

We repeat that there is a dichotomy between functions of the stock exchange and the functions performed by SEBI. The licences given by the stock exchange enables the stock- broker to buy and sell securities on the exchange whereas the regulation of the trade per se is done by SEBI for which it is entitled to charge requisite registration fees.

In the present case, we have no doubt in our mind that, on merger of the above two companies, a new entity stood emerged/constituted, which was given a right to operate in the derivative segment and, therefore, it had to pay fresh registration fees on the turnover basis. That new entity (RCML) was not entitled to the benefit of continuity of fees deposited earlier by RSL, which got merged into RCML. According to RCML, the two companies were required to merge because of acceptance of recommendations of Gupta Committee by SEBI. According to the report of the said Committee, if a broker desires to enter derivative market then he is required to have a net worth of at least rupees three crores. According to RCML, the said requirement constituted a pre-condition for entering the derivative market. According to RCML, this pre-condition of possessing net worth of rupees three crores constituted compulsion of law, which made RSL merged into RCML and, in the circumstances, the appellants were entitled to the benefit of Circular dated 30.9.2002 issued by SEBI. Under the said circular, mergers/amalgamations carried out as a result of compulsion of law stood excluded from payment of fees afresh.

We do not find any merit in the above arguments. Two points arises for determination in the present case. They are interconnected. Firstly, whether RCML, on amalgamation, duly sanctioned by Calcutta High Court, was entitled to claim the benefit of Fee Continuity and, secondly, whether the demand made by SEBI imposing fresh turnover/registration fees on the merged entity (RCML) constituted an act in derogation of the provisions of any other law for the time being in force in terms of section 32 of the said 1992 Act.

We make it clear that it would depend on the facts of each case whether a scheme under section 391 could be construed as an alternative to liquidation. It is not in every matter that the scheme under section 391 would constitute an alternative to liquidation. Therefore, it would depend on the facts of each case. Under circular dated 30.9.2002 what SEBI intends to say is that fresh turnover/registration fees would not be payable by a company which goes for amalgamation/merger as an alternative to liquidation. In other words, if the company's net worth is negative and if that company is on the brink of liquidation, which compels it to go for a scheme under section 391, then in such cases SEBI exempts such companies from payment of fresh turnover/ registration fees. Such is not the case herein. On the contrary, in the present case, amalgamation has taken place in order to increase the "reserves" component of the net worth. The difference between the amount recorded as fresh share capital issued by the transferee company on amalgamation and the amount of share capital of the transferor company to be reflected in the Revenue Reserve(s) of the transferee company was the sole object behind amalgamation. Therefore, SEBI was right, in the present case, in refusing to give the benefit of exemption to the transferee companies. These transferee companies were not on the brink of liquidation. The scheme under section 391 was not an alternative to liquidation. Hence, the transferee companies were not entitled to claim the benefit of Circular dated 30.9.2002. Further, we do not find any merit in the argument that the demand raised by SEBI for fresh turnover/registration fees constituted an act derogatory of the provisions of the Companies Act. In our view, on the emergence of a new entity, which was entitled to operate in derivative market, SEBI was certainly entitled to regulate its trade in the derivative segment for which it was entitled to charge requisite fees. Under the 1992 Act, a duty is cast on SEBI to protect the interest of investors in securities and to regulate the trade in securities on the Stock Exchange. Such Regulation is not a part of the Companies Act. Derivative market is highly speculative. It carries lot of risks. In fact, history shows that many investors and traders lost money earlier when badla transactions were prevalent. Derivative market, to a certain extent, replaces badla. The point to be noted is that Gupta Committee recommended the net worth of rupees three crores in order to secure the interests of investors and traders who regularly play in derivatives. In the circumstances, it cannot be said that raising of an amount of rupees three crores as net worth constituted legal compulsion for RSL to merge into RCML. As stated above, the Government decided to vest SEBI with statutory powers in order to deal effectively with all matters

relating to capital market. The main function of SEBI is to regulate the trade which takes place in the securities market and for that purpose it is entitled to charge registration fees. In the present case, we are concerned with merger of two distinct independent companies. In the present case, we are not concerned with merger of firms. In the present case, we are not concerned with joint ventures. After the merger of RSL into RCML a new entity has emerged. In the circumstances, SEBI was entitled to charge the stipulated fees.

For more details, please click on https://main.sci.gov.in/judgment/judis/29713.pdf

17.04.2018	**Penta Gold Limited (Appellant) vs. National Stock Exchange of India Limited (Respondent)**	**Securities AppellateTribunal** **Appeal No. 116 of 2018** **Justice J.P. Devadhar,** **Presiding Officer** **Dr. C.K.G. Nair, Member**

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 – Regulation 106P – Discharge of underwriter's obligation – Done through procuring applications from third parties – Whether permissible – Held, Yes.

Brief facts of the case:

Where a public issue is undersubscribed, whether, the underwriters to the public issue are entitled to discharge their obligation contained in regulation 106P of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations' for short) by procuring applications from third parties is the basic question raised in this appeal.

Decision : Appeal allowed.

Reason :

In the present case, the underwriting agreement executed on September 26, 2017 in accordance with the model underwriting agreement prescribed by SEBI specifically records that the underwriters agree to underwrite and/or procure subscription for the issue of shares in case the issue is undersubscribed. Admittedly the said underwriting agreement was vetted by NSE before the public issue was opened.

Thus on one hand, regulation 106P(2) of ICDR Regulations require the merchant banker to underwrite at least 15% of the issue size on his own account and further regulation 106P(4) provides that if the other underwriters or the nominated investors fail to fulfil their obligation then the merchant banker shall fulfil their underwriting obligations. On the other hand, the model underwriting agreement prescribed by SEBI in the year 1993 which continues to be in force till date permits the underwriters to procure applications from the investors to subscribe to the unsubscribed shares if the issue is undersubscribed. The model underwriting agreement prescribed by SEBI further provides that in the event of failure by the underwriters to subscribe to the shares, the issuer company shall be free to make arrangement with one or more persons to subscribe to such shares without prejudice to the rights of the issuer company to take such measures and proceedings as may be available to it against the underwriters including the right to claim damage for any loss suffered by the company by reason of failure on part of the underwriters to subscribe to the shares.

In the present case the underwriting agreement executed by and between the appellant and the underwriters was in accordance with the model underwriting agreement prescribed by SEBI and the said underwriting agreement was admittedly vetted by NSE. Having vetted the underwriting agreement executed by the appellant company and the underwriters which is in consonance with the model underwriting agreement prescribed by SEBI, NSE is not justified in rejecting the basis of allotment submitted by the appellant on ground that the underwriters have failed to subscribe to the unsubscribed shares as contemplated under regulation 106P of the

ICDR Regulations.

In these circumstances, in the interest of investors and securities market, we dispose of the appeal by passing the following order:-

(a) The impugned communication of NSE dated April 6, 2018 is quashed and set aside;

(b) Appellant is at liberty to ascertain from the underwriters within 3 days from today as to whether they are ready and willing to discharge their obligation set out in regulation 106P of the ICDR Regulations and intimate the same to the NSE immediately thereafter.

(c) If the underwriters express their inability to discharge their obligation under the ICDR Regulations, then the appellant company be permitted to take into consideration the shares subscribed by the 8 investors and proceed to complete the public issue process.

(d) If the underwriters agree to discharge their obligation set out in the ICDR Regulations, then, in the peculiar facts of present case, no action need be taken against the underwriters.

Before concluding we deem it proper to bring to the notice of SEBI that there is no clarity between the ICDR Regulations and the model underwriting agreement prescribed by SEBI in the year 1993 (which is still in operation) in relation to the obligations to be discharged by the underwriters. Therefore, it would be just and proper that SEBI addresses itself on the above issue expeditiously and ensure that there is clarity in relation to the obligations to be discharged by the underwriters.

For more details, please click on http://sat.gov.in/english/pdf/E2018_JO2018116.PDF

12.04.2018	**BOI Shareholding Limited (Appellant) vs. SEBI (Respondent)**	**Securities Appellate Tribunal** **Appeal No. 256 of 2017 Justice J.P. Devadhar,** **Presiding Officer** **Dr. C.K.G. Nair, Member**

SEBI Act – Section 15HB – Delay in implementation of anti-money laundering policy – Imposition of penalty of Rs. 40 lakhs – Whether tenable – Penalty reduced.

Brief facts of the case:

This appeal is filed challenging the order of the Adjudicating Officer ('AO' for short) of SEBI whereby a penalty of Rs.40 Lakh has been imposed on the appellant under Section 15HB of SEBI Act read with Section 19G of the Depositories Act, 1996 for delayed implementation of the SEBI Circulars / Guidelines relating to anti-money laundering (AML) policy.

Decision : Quantum of penalty reduced.

Reason :

We have perused the records produced before us. In the Master Circular on AML/CFT dated December 31, 2010 issued by SEBI we note that all the registered intermediaries were directed to comply with the requirements contained therein on an immediate basis. Similarly, subsequent amendments made on January 24, 2013 also required adoption on immediate basis though the Circular dated March 12, 2014 does not specify the implementation time schedule. However, following the spirit of the basic policy it has to be presumed that implementation has to be done at the earliest. From the evidence produced before us it is clear that the appellant has implemented all the requirements of the AML/CFT policy as specified in the SEBI Circulars though belatedly. We have also noted that for delayed implementation / violation SEBI has imposed varying penalty including no penalty in some cases. However, under the relevant Sections i.e. 15HB of SEBI Act read with Section 19G of

the Depositories Act, 1996 the penalty imposable for each violation shall not be less than Rs. 1 Lakh which may extend to 1 Crore rupees. Accordingly, the minimum penalty imposable in case of six violations committed by the appellant should be in tune with the statutory provisions relating to the penalty.

Given the fact that, though belatedly, the appellant has implemented all the required policies and procedures on AML/CFT policy as stipulated under the various circulars of SEBI and by the penalty precedent set by SEBI itself we are of the view that the penalty of Rs.40 Lakh imposed on the appellant is excessive. We, therefore, reduce the amount of penalty imposed on the appellant to Rs.6 Lakh.

For more details, please click on http://sat.gov.in/english/pdf/E2018_JO2017256.PDF

NSE- DARK FIBRE CO-LOCATION CASE

NSE Co-location Facility

Under the NSE co-location facility, trading members can place their servers in the exchange's data centre, where they get faster access to the price feed, helping in swift execution of trades. The NSE's co-location facility provides access to brokers for a cost to execute trades faster.

NSE Co-location: Case in Brief

In NSE – Dark Fibre case, the Noticees (herein referred to the group of individuals to whom notice were issued by SEBI, unless the context specifies otherwise) have been alleged to have followed unfair conduct while allowing an unauthorized service provider i.e. Sampark Infotainment Private Limited ("Sampark") to provide the P2P connectivity to only a few selective registered stock brokers so as to help them gain undue advantage of latency vis- a- vis other stock brokers.

Explanation: A dark fibre or unlit fibre, with respect to network connectivity, refers to an already laid but unused/ passive optical fibre, which is not connected to any active electronics/equipment's and does not have other data flowing through it and is available for use in fibre-optic communication.

Further, it has been alleged that by permitting an unauthorized service provider i.e. "Sampark", to provide the dark fiber connectivity for certain stock brokers, the Noticees allowed these stock brokers to gain more bandwidth and lower latency for their data transmission and again by allowing "Sampark" to continue the service even after it was found that "Sampark" did not possess the necessary license from the Department of Telecommunications to provide the required P2P connectivity to the brokers of NSE.

Also, the Noticees have allegedly acted in violation of NSE circular in which, NSE had authorized only four (04) specific Telecom Service Providers from whom its brokers could avail the P2P connectivity.

The Noticees allegedly being the Director and/or KMP of NSE can be held liable thus, the Show Cause Notice issued to the Noticees in the present proceedings broadly cover the following points/issues:

- NSE allowed Sampark to lay down a P2P connectivity,
- By allowing Sampark to provide the P2P connectivity to stock broker, despite not having the authorised licence for the same, NSE has acted in violation of its own circular no. NSE /MEM/12985 dated August 31, 2009 which states to inform all the Trading Members about the introduction of co-location services, to facilitate better use of DMA and ALGO trading.
- Preferential treatment granted to certain stock brokers by NSE in accessing its Co-location facility to install P2P connectivity while refusing the request of some others.

Note: Companies which have Infrastructure Provider Category – I registration, can provide assets such as Dark Fibres, etc. on lease / rent / sale basis to the licensed providers of Telecom Services having license under Section 4 of Indian Telegraph Act, 1885, on a mutually agreed terms and conditions.

Detailed Background

In NSE – Dark Fibre, the Securities and Exchange Board of India ("SEBI") received complaints alleging various irregularities in respect of Co-location facility provided by NSE. To deal with the same, a Cross Functional Team of SEBI officials was constituted to undertake a preliminary fact finding with respect to various irregularities alleged in these complaints.

Subsequently, another complaint was received which alleged inter alia, that certain stock brokers were permitted to avail of Point to Point ("P2P") dark fibre connectivity from "Sampark", a non-empanelled service provider and the P2P connectivity provided by "Sampark" conferred a latency advantage to a few brokers which resulted in substantial increase in their turnover during the period April-August, 2015.

Based upon the preliminary findings on the above complaints, a common Show Cause Notices was issued to a number of entities including the Noticees covered in the instant proceedings, inter alia alleging that :-

- NSE system architecture allowed the Tick–by-Tick ("TBT") price information to be disseminated sequentially in the order in which the stock brokers were connected/logged-into the server. However, multiple TBT servers at NSE have experienced varied load and have started at different points of time. Further, the back-up servers were allowed to be accessed by certain stock brokers(s) as load on such servers was low.
- The above set-up enabled 'first-to-connect' stock brokers to receive data ahead of others and thus, they were able to react to the information earlier than the rest of the stock brokers.
- Differential access in the form of 'dark fibre' was given to a certain brokering firms/ members at NSE, especially to connect across NSE and BSE co-location facilities at least 4-5 months ahead of other members.

In the Show Cause Notice, the Noticees were called upon to explain as to why direction under Section 11(1), 11(2) (a), 11(2)(j) and 11B of Securities and Exchange Board of India Act, 1992 ("SEBI Act") should not be issued to them for acting in breach of the code of ethics prescribed in regulations 26(2) of SEBI (Stock Exchanges and Clearing Corporations) Regulation, 2012 ("SECC Regulations").

A detail investigation into the complaint was carried out by SEBI to find out possible violation of provisions of SEBI Act, Securities Contracts (Regulation) Act, 1956 ("SCR Act") and/ or the Rules and the Regulations made there-under such as SECC Regulations and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations").

Investigation so conducted by SEBI revealed various irregularities in addition to the preliminary findings cited above and accordingly another show cause Notice was issued to different entities/ persons for violations of different provisions of SEBI Act, SECC Regulations and PFUTP Regulations by them. It is observed that NSE allowed Sampark Infotainment Private Limited to provide lease lines in NSEs co-location facility despite not being on authorized service provider of NSE. NSE has acted in contradiction to its own policy by allowing an unauthorized service provider to lay dark fibre/ lease line.

In view of the above, it has been alleged that the Noticees covered in the present proceedings who were Directors/KMPs for discharging various functions at NSE, failed to act in a manner to ensure fairness, openness, transparency and to provide fair, equal, unrestricted and transparent access to its co-location facilities and trade data etc., to all market participants in conformity with the SECC Regulations. Consequently, it was alleged that the Noticees have not complied with the Code of conduct specified under Regulation 26(2), of the SECC Regulations read with SEBI Master Circular Dated December 31, 2010.

Directors/KMP Roles and Responsibilities

To providing equal, fair and transparent access to trade data by the stock exchanges to persons in the securities market is one of the underlying unassailable principles, which is embodied in the SCRA as well as in the regulations framed thereunder, more particularly in regulation 41(2) of SECC Regulations.

Regulation 41(2) of SECC Regulations provide that "the recognised Clearing Corporation and recognised Stock Exchange shall ensure equal, unrestricted, transparent and fair access to all persons without any bias towards its associates and related entities."

The fundamental principle of corporate law i.e. the obligation to comply with the abovementioned principle of equality and fair access as enshrined in the SECC Regulations rigorously applies to the Directors, management and Key Managerial Persons (KMP) of the stock exchanges.

Further, regulation 26 (1) of SECC specifically casts such onus on the Directors of the stock exchange by requiring them to abide by the Code of Conduct specified under Part-A of Schedule-II of SECC Regulations.

Regulation 26(2) additionally requires the Directors and KMPs to abide by the Code of Ethics specified under Part-B of Schedule-II of SECC Regulations.

The provisions contained in clause V (b) of the Code of Conduct, affirm that every Director shall endeavour to analyse and administer the stock exchange with professional competence, fairness, impartiality, efficiency and effectiveness. Therefore, a comprehensive understanding of the SECC Regulations and the Code of Conduct and Code of Ethics prescribed thereunder for Directors and KMPs explicitly makes it imperative to "establish a minimum level of business/ professional ethics to be followed by these Directors and KMPs, toward establishing a fair and transparent market place."

SECC Regulations cast an omnibus duty on the stock exchange, its Directors and/or KMPs to abide by the fundamental principle of providing equal, fair and transparent access to all the market participants and not to resort to granting favour to any select market participants at the cost of interest of other participants or to indulge in any acts of discrimination while dealing with market participants.

It has been noted that while granting permission to the stock brokers for the purpose of establishing P2P connectivity from its Co-location facility with the help of "Sampark", NSE has adopted a discriminatory approach towards large number of other stock brokers, by allowing "Sampark" services to be availed by only a few selected stock brokers.

Under this circumstances, it has been alleged that NSE has not acted in a fair and equitable manner while dealing with its members and also by allowing a selected few market participants to avail the dark fiber services of "Sampark", NSE has indulged in a practice of differential and discriminatory treatment vis- a- vis its stock brokers and has promoted preferential treatment to some of the members, at the cost of large number of other stock brokers.

Submission by Noticees

The Noticees have stated that the Dark fibre team was not reporting to them at any point of time during their tenure as employees or consultants of NSE. Therefore, the Noticees did not have any role in relation to either allowing the 'Sampark' to lay down the dark fibre line so as to provide P2P connectivity between Co-location facility of NSE and Co-location center of BSE or in facilitating brokers to avail the service of 'Sampark'.

Further, show cause notices were issued based on the complaints received and some preliminary observation thereon by SEBI. There is no specific evidence available on record pointing out the liability of the Noticees. There is no independent evidence available which could indicate the involvement of Noticees in allowing "Sampark" to establish P2P connectivity from Co-location facility of NSE to Co-location center of BSE.

It has further been submitted that the functional reporting of the Co-location team was with the business development team and none of the Noticees was part of the business development team at the relevant point of time. As per the Noticees, during the relevant period of time, none of them was in-charge of the Co-location facility at NSE. They have also not participated in any discussions, verbal or written, relating to laying of the dark fibre by 'Sampark'.

SEBI Observations

The replies and submissions of the Noticees have been carefully perused and their explanations and arguments have been considered by SEBI. On perusal of the Show Cause Notice, the materials available on record and the submissions made by the Noticees, SEBI observed that the allegations pertaining to the involvement of the Noticees have been made only because of their association in some capacities with NSE during the relevant period of time. Since, it is the liability of a Director and/or KMP for breaches, if any, ought to be determined by taking into consideration, the specific functions entrusted to such Directors or KMPs by virtue of their position or designation in the organisation.

Therefore, it is an admitted position that none of the Noticees was occupying the position of a Director or KMP in NSE, when 'Sampark' was allowed to lay down dark fibre lines to establish P2P connectivity between the two stock exchanges for a few selected stock brokers during the relevant period i.e. April – July 2015.

During this period, when "Sampark" was allowed to install dark fibre connectivity in the Co-location facility of NSE, the Noticees were not working /employed with NSE either in the capacity of a Director or as a KMP. Thus, from the records, SEBI did not find any evidence or any material that establishes or even remotely indicates any role played by any of the Noticees as far as establishment of P2P connectivity by 'Sampark' is concerned. The allegations have been made on the presumption that the Noticees were holding the post of KMP.

It is further observed that, the available records do not indicate any role played by the Noticees in permitting "Sampark" to either lay down the dark fibre optical lines or to continue with the services despite the fact that "Sampark" did not possess the desired eligibility to provide such services.

Conclusion

In the above high profile NSE Co-location case, SEBI exonerated the Noticees (nine current and former officials of NSE) as they could not be held responsible for any misconduct or non compliance in dark fibre issue and hence, disposed off proceedings initiated against the Noticees.

References

Order dated January 16, 2020 in the matter of NSE- Dark Fibre. Detailed order is available at *https://www.sebi.gov.in/enforcement/orders/jan-2020/order-dated-january-16-2020-in-the-matter-of-nse-dark-fibre_45694.html*

3

FEMA AND OTHER ECONOMIC AND BUSINESS LEGISLATIONS

10.12.2018	EMAAR MGF LAND LIMITED (APPELLANT) vs. AFTAB SINGH (RESPONDENT)	SUPREME COURT OF INDIA

Consumer Protection Act, 1985 read with Arbitration and Conciliation Act, 1996 – Flat buyer's agreement – Consumer dispute – Agreement contained arbitration clause – Purchaser filed consumer complaint – Whether liable to be referred to arbitration – Held, No.

Brief facts:

A Buyer's agreement was entered into between the appellant and the respondent. In the Buyer's agreement, there was an arbitration clause providing for settlement of disputes between parties under the 1996 Act. On 27.07.2015, the respondent filed a Consumer Complaint before the NCDRC against the appellant praying for delivery of possession of the built up Villa, adjustment of excess payment and compensation for deficiency of service. Appellant filed an application under Section 8 of the 1996 Act for referring the matter to arbitration for and on behalf of the appellant. The single judge referred the issue to the larger Bench and the larger bench dismissed the application on the ground that the consumer dispute is not arbitrable. On appeal, The Supreme Court also concurred with the National commission but the appellant sought a review of the judgement under the present review petition.

Decision: Petition dismissed.

Reason:

This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above.

Not only the proceedings of Consumer Protection Act, 1986 are special proceedings which were required to be continued under the Act despite an arbitration agreement, there are large number of other fields where an arbitration agreement can either stop or stultify the proceedings. For example, any action of a party, omission or commission of a person which amounts to an offence has to be examined by a criminal court and no amount of agreement between the parties shall be relevant for the said case. For example, there may be a commercial agreement between two parties that all issues pertaining to transaction are to be decided by arbitration as per arbitration clause in the agreement. In case where a cheque is dishonoured by one party in transaction, despite the arbitration agreement party aggrieved has to approach the criminal court. Similarly, there are several issues which are non- arbitrable. There can be prohibition both express or implied for not deciding a dispute on the basis of an arbitration agreement.

We have already noted several categories of cases, which are not arbitrable. While referring to judgment of this Court in Booz Allen & Hamilton Inc v. SBI Home Finace Ltd. & Ors. (2011) 5 SCC 532 those principles have again been reiterated by this Court in A. Ayyasamy v .A. Paramasivam & Ors. (2016) 10 SCC 386.

The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in National Seeds Corporation Limited(supra) is no more a

good law cannot be accepted. The words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall entitle to look into various facets of the arbitration agreement, subject matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning.

We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/ special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration. We, thus, do not find that any error has been committed by the NCDRC.

14.12.2018	**CARLSBERG BREWERIES A/S. (PLAINTIFF) vs. SOM DISTILLERIES AND BREWERIES LTD. (DEFENDANT)**	**DELHI HIGH COURT**

Infringement of design and passing off of the plaintiff's trade dress – Composite suit filed – Whether maintainable – Held, Yes.

Brief facts:

The reference to this larger, Special Bench of five judges, was occasioned by the detailed speaking order of a learned Single Judge, in the present suit, which sought the reliefs of infringement of design and a decree for injunction against passing off. The learned Single Judge, by the order dated 02.05.2017, referred the question as on the whether the decision in Mohan Lal v. Sona Paint, 2013 (55) PTC 61 (Del) (FB) - hereafter "Mohan Lal" on the aspect of maintainability of a composite suit in relation to infringement of a registered design and for passing off, where the parties to the proceedings are the same needs re-consideration by a larger bench in the light of Order II Rule 3 CPC, which permits joinder of causes of action. The decision in Mohan Lal (supra) was by a Full Bench of three judges, which held that "infringement of design" and "passing off" cannot be combined in a composite suit.

The present suit (out of which this reference arose) was filed, complaining of infringement of a registered design as well as passing off (of the plaintiff's trade dress) in respect of the bottle and overall get up of the "Carslberg" mark. The defendant objected to the frame of the suit, pointing out that per Mohan Lal (supra), the two claims (for passing off and reliefs regarding design infringement) could not be combined in one suit. The single judge analysed parties" submissions and felt that the issue decided in Mohan Lal (supra) required a second look; he therefore, referred the matter for appropriate orders to the Chief Justice.

Decision: Composite suit is maintainable.

Reason:

The issue therefore which is required to be squarely addressed by this Full Bench is as to whether there would arise common questions of facts and law in the two causes of action of infringement of registered design and passing off so that these two causes of action can be joined under Order II Rule 3 CPC, and which is an issue which was not decided either in Dabur India Limited v. K.R. Industries, (2008) 10 SCC 595 or in the case of Dhodha House v. S.K. Maingi, (2006) 9 SCC 41. Before however we go on this aspect, the general law with respect to joinder of causes of action under Order II Rule 3 CPC can be usefully referred to and as held in the case of Prem Lata Nahata & Anr v. Chandi Prasad Sikaria, (2007) 2 SCC 551.

The ratio of the judgment in the case of Prem Lata Nahata & Anr (supra) is that with respect to entitlement or otherwise of joinder of causes of action, the question to be asked is as to whether the evidence to be led in the two causes of action would be common, and if the substantial evidence of two causes of action would be common, then there can be joinder of causes of action under Order II Rule 3 CPC. Putting it negatively if the evidence is for the most part different of the two causes of action, then there cannot be joinder of causes of action.

Therefore since the crux of the matter for joinder of causes of action under Order II Rule 3 CPC is to see if common questions of law and facts arise in two separate causes of action and whereupon there can be joinder of causes of action under Order II Rule 3 CPC in one composite suit which joins two causes of action, therefore we now proceed to examine as to whether there would exist common questions of law and fact in the two causes of action of infringement of registered design and passing off. For so deciding first it would be necessary to refer to the meaning of cause of action.

Let us now accordingly examine as to what are the bundle of facts, or the bundle of material facts, in the two causes of action of infringement of a registered design and passing off, and as to whether there would arise common questions of law and fact in the two bundle of facts of the two causes of action of infringement of registered design and passing off.

To decide the issue of existence of common questions of law and fact in the two causes of action of infringement of a registered design and passing off, at this stage it would be instructive to refer to a judgment passed by the Division Bench of this Court in the case of M/s. Jay Industries v. M/s. Nakson Industries, 1992 SCC Online Del 84; AIR 1992 Del 338 because this judgment lays down the ratio for the issue at hand as to when there can be joinder of causes of action.

A reading of the observations made in the judgment of M/s. Jay Industries (supra) shows that the Division Bench was of the view that two different causes of action in fact can be a part of the same transaction. The same transaction is that transaction of the selling of goods by the defendant by packing and labelling them in such a manner which infringes the trademark and the copyright of the plaintiff. In such facts there would be common bundle of facts in the two causes of action of infringement of trademark and copyright, because there is a single and same transaction of sale of the goods by the defendant of its goods in cartons under being similar to the cartons in which the plaintiff sells its goods and which as per plaintiff results in violation of his rights in his registered trade mark and copyright in his label.

The Division Bench has concluded that since the transaction of sale by the defendant in effect results in the infringement of both the trademark rights and violation of copyright of the plaintiff, therefore under Order II Rule 3 CPC it is permissible to join the two causes of action against the same defendant and that in fact in such cases the joinder of causes of action would result in avoidance of multiplicity of proceedings.

It is therefore seen that once a transaction of sale which is impugned by the plaintiff results in infringement of two rights of the plaintiff of infringement of plaintiff's trademark and violation of plaintiff's copyright, since there would be common questions of law and facts because it is the transaction of sale with its bundles of facts which is impugned being common in both the causes of action, therefore joinder of causes of action can take place under Order II Rule 3 CPC, and ought to be done because this will avoid multiplicity of proceedings.

The reference is answered by holding that one composite suit can be filed by a plaintiff against one defendant by joining two causes of action, one of infringement of the registered design of the plaintiff and the second of the defendant passing off its goods as that of the plaintiff on account of the goods of the defendant being fraudulent or obvious imitation i.e. identical or deceptively similar, to the goods of the plaintiff.

13.12.2018	**HINDUSTAN INFRASTRUCTURE CONSTRUCTION CORPORATION LTD. (PETITIONERS) vs. M/S. R.S. WOODS INTERNATIONAL & ORS (RESPONDENTS)**	**DELHI HIGH COURT**

Indian Partnership Act, 1932 read with Negotiable instruments Act, 1881 – Dishonour of cheque – Civil suit filed by unregistered partnership firm – Whether suit is barred under section 69(2) – Held, No.

Brief facts:

In the suit filed by the Respondent, the petitioners/defendants Nos. 2 & 3 have filed an application under Order VII Rule 11 CPC for rejection of the plaint on the ground that the suit is barred under Section 69 (2) of the Indian Partnership Act, 1932 ('the Act').

By the impugned order, the learned ADJ dismissed the application of the petitioners by relying upon a judgment of the Kerala High Court in Afsal Baker v. Maya Printers 2016 SCC OnLine Ker 29914. The petitioners have challenged the above judgement in the present revision petition.

Decision: Petition dismissed.

Reason:

The above provision i.e. Section 69 deals with the effect of non-registration of a partnership firm and bars filing of a suit by or on behalf of such firm to enforce a right arising from a contract by or on behalf of such firm against any third party.

Admittedly the respondents/plaintiff has filed a Civil Suit for recovery of Rs.24,41,967/- against the petitioners/ defendant on account of dishonour of cheques bearing no.482933 dated 18.11.2013 for Rs.5 lacs, no.482934 dated 19.11.2013 for Rs.5 lacs, no.482935 dated 20.11.2013 for Rs.5 lacs , no.709846 dated 18.11.2013 for Rs.5 lacs and no.709845 dated 20.11.2013 for Rs.4,41,967/-, total of which comes to Rs.24,41,967/-, which is the suit amount.

The Kerala High Court in Afzal Baker (surpa) observed as under:- "10. In the instant case, as noticed above, by virtue of Section 30 and 37 of the Negotiable Instruments Act, on the dishonour of a cheque, the statute creates a liability on the drawer, apart from the general law of contracts. The right to sue on the contract is available and open to the party. However, apart from that, the statute creates a liability as against the drawer of the instrument. If the suit is on the original cause of action based on the original contract between the parties, there is no doubt, the suit would be hit by Section 69 (2) of the Indian Partnership Act. But, in the instant case, what is sought to be enforced is the liability created under the Negotiable Instruments Act. It is not a case where suit is filed on the original cause of action by producing the cheques as a piece of evidence to prove the liability under the original contract. Here, the suit itself is laid on the instrument. A reading of the plaint leaves no room for doubt regarding that. The bar under Section 69(2) of the Indian Partnership Act would apply only where the suit is sought to be laid on a contract and not in a case where statutory right/liability is sought to be enforced. In the instant case, the suit being purely based on the liability under Section 30 and 37 of the Negotiable Instruments Act, it is a suit based on statutory liability dehors the contract between the parties. The suit cannot be held to be barred under Section 69(2) of the Indian Partnership Act."

In the instant case, the respondent is seeking enforcement of the liability of the petitioners created under Section 30 and 37 of the Negotiable Instruments Act, 1881 as the cause of action for the plaint is based on the dishonour of the said cheques. Since, the suit is not based on any contract between the parties, the bar under Section 69 (2) of the Act would not apply.

In view of this, I do not find any illegality or infirmity in the impugned order. Accordingly, the revision petition along with application, being C.M. No.4276/2018, is dismissed with no order as to costs.

08.01.2019	**M/S. SICAGEN INDIA LTD. (APPELLANT) vs. MAHINDRA VADINENI & ORS (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Negotiable Instruments Act, 1881 – Section 138 – Dishonour of cheque – Complaint filed on the basis of second notice – Whether maintainable – Held, Yes.

Brief facts:

Case of the appellant-complainant is that they had business dealings with the respondents and in the course of business dealings, the respondents had issued three cheques, which when presented for collection were dishonoured and returned with the endorsement "insufficient funds". The appellant-complainant had issued first notice to the respondent(s) on 31.08.2009 demanding the repayment of the amount. The cheques were again presented and returned with the endorsement "insufficient funds". The appellant had issued a statutory

notice on 25.01.2010 to the respondent(s). Since the cheque amount was not being paid, the appellant-complainant had filed the complaint under Section 138 of the Negotiable Instruments Act based on the second statutory notice dated 25.01.2010.

The respondent(s)-accused filed petition before the High Court under Section 482 Cr.P.C. seeking to quash the criminal complaint filed by the appellant-complainant on the ground that the complaint was not filed based on the first statutory notice dated 31.08.2009 and the complaint filed based on the second statutory notice dated 25.01.2010 is not maintainable. The High Court quashed the complaint by holding that "the amount has been specifically mentioned in the first notice and, thereafter, the complainant himself has postponed the matter and issued the second notice on 25.01.2010 and the complaint filed on the same cause of action was not maintainable.

Decision: Appeal allowed.

Reason:

The issue involved whether the prosecution based upon second or successive dishonour of the cheque is permissible or not, is no longer res integra. In Sadanandan's case [(1998) 6 SCC 514] it was held that while second and successive presentation of the cheque is legally permissible so long as such presentation is within the period of six months or the validity of the cheque whichever is earlier, the second or subsequent dishonour of the cheque would not entitle the holder/payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. The correctness of the decision in Sadanandan's case was doubted and referred to the larger bench.

Three-Judge Bench of this Court in MSR Leathers v. S. Palaniappan & Anr 2013 ((1) SCC 177 held that there is nothing in the provisions of Section 138 of the Act that forbids the holder of the Cheque to make successive presentation of the cheque and institute the criminal complaint based on the second or successive dishonour of the cheque on its presentation.

In the present case as pointed out earlier that cheques were presented twice and notices were issued on 31.08.2009 and 25.01.2010. Applying the ratio of MSR Leathers (supra) the complaint filed based on the second statutory notice is not barred and the High Court, in our view, ought not to have quashed the criminal complaint and the impugned judgment is liable to be set aside.

The Complaint CC No. 4029 of 2010 before the Court of XVIII, Metropolitan Magistrate at Saidapet, Chennai is restored to the file of the Trial Court and the Trial Court shall proceed with the matter in accordance with law after affording sufficient opportunity to both the parties.

29.01.2019	**UNION OF INDIA vs. KHAITAN HOLDINGS (MAURITIUS) LTD. & ORS**	**DELHI HIGH COURT**

Arbitration under bilateral investment treaties – BIT between India and Mauritius – Investment in India by Mauritius entity – Dispute – Arbitration proceedings initiated under BIT by investor – Government of India sought anti-arbitration injunction – Whether grantable – Held, No.

Brief facts:

Arbitration as a means for resolution of disputes is well entrenched in most judicial systems. In the context of commercial arbitration, there are two types - domestic arbitration and international commercial arbitration. In all these disputes, minimum judicial interference in the conduct of arbitral proceedings is the norm. There is yet another species of arbitration which is the subject matter of the present case i.e., Arbitral proceedings under Bilateral Investment Treaties. While traditional arbitrations arise out of commercial contracts entered into between individuals and companies, arbitrations under BITs arise out of agreements signed between two sovereign nations. Under these agreements, each of the States, signatory to the Agreement agrees to provide

Fair and Equitable Treatment to investors from the other State, as also extend protection against arbitrary, discriminatory and unfair practices. The investments made by investors of the State are to be safeguarded against any expropriation and remedies are also provided for adjudication of disputes through international dispute settlement mechanisms. The dispute settlement mechanisms can be triggered both by the aggrieved State as also an aggrieved investor from a State which is party to the Agreement, against the other State. Interference by domestic courts in arbitral proceedings that may be commenced under BITs is permissible but only in `compelling circumstances, in `rare cases. Courts are hesitant to interfere in the arbitral process once the Tribunal is constituted and is seized of the dispute.

The Union of India seeks an anti-arbitration injunction against the arbitral proceedings initiated by Defendant No. 1 - M/s Khaitan Holdings (Mauritius) Ltd. a Mauritius based company, under the Agreement entered into between the Republic of India and the Republic of Mauritius for the Promotion and Protection of Investments (hereinafter "BIT agreement").

Decision: Injunction refused.

Reason:

The genesis of the dispute, which has been encapsulated in the notice invoking arbitration is the judgement of the Supreme Court in CPIL (supra) of the Supreme Court by which the Supreme Court cancelled the licences granted to various companies including Loop Telecom. The judgment of the Supreme Court resulted in fresh recommendations being made by the Telecom Regulatory Authority of India, and thereafter an auction being conducted for allocation of the spectrum and award of licenses.

It can be seen that in the era of BIT agreements, even judgements of Courts could trigger investment disputes under the BITs resulting in enormous claims being raised against the Government. This is so because under public international law which primarily governs BIT agreements, the Articles of State Responsibility specifically provide that the conduct of any organ of the State can be called to question. The grounds on which the Republic of India seeks an anti-arbitration injunction are inter alia as under:

- That Khaitan Holdings is not a genuine investor due to the clear link and control by Sh. Ishwari Prasad Khaitan and Smt.Kiran Khaitan of both Khaitan Holdings (Mauritius) and Loop Telecom;
- That the BIT cannot be invoked by an entity, though incorporated in Mauritius, but is actually controlled by Indian citizens;
- That there has been no expropriation as due process has been followed and the decision to cancel the licences was rendered by the Supreme Court of India in public interest;
- That the entire foreign investment, being through the automatic route, was subject to Indian laws under the UASL;
- That Loop Telecom has already availed of its remedies against the cancellation of its licences under Indian law and hence rights under the BIT stand waived;
- Overlapping nature of the claims raised by Loop Telecom before TDSAT and Defendant no.1 in the arbitral proceedings;

All the above grounds, are those that can be that with and decided by the Arbitral Tribunal. The arbitration having been invoked in 2013 and the Tribunal having been constituted and being seized of the dispute, it is not for this Court to adjudicate on these issues. The above issues ought to be raised by the Republic of India before the Arbitral Tribunal, which under Article 21, would rule upon the same. The proceedings which are already underway cannot be termed as being oppressive, vexatious or an abuse of process at this stage. The prayer for adinterim relief seeking stay of the arbitral proceedings commenced by Khaitan Holdings under the BIT, is accordingly rejected, at this stage.

06.02.2019	**BIR SINGH (APPELLANT) vs. MUKESH KUMAR (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Negotiable Instruments Act,1881 – Section 138 & 139 – Issuance of cheque admitted by drawer – Objection raised that payee filled in the cheque and the cheque was given as security – Trial court and first appellate court convicted the drawer – High Court reversed the decision-whether correct – Held, No.

Brief facts:

The respondent-accused issued a cheque in the name of the appellant towards repayment of a "friendly loan" of Rs.15 lakhs advanced by the appellant-complainant to the respondent accused. On 11-4-2012, the appellant-complainant deposited the said cheque in his bank, but the cheque was returned unpaid with the endorsement "Insufficient Fund". The appellant complainant again presented the cheque to his bank, but it was again returned unpaid with the remark "Insufficient Fund".

The appellant-complainant filed a Criminal Complaint against the respondent-accused, where the Judicial Magistrate convicted the respondent-accused. On appeal by the accused, the Appellate Court upheld the conviction of the respondent accused and confirmed the compensation of Rs.15 lakhs directed to be paid to the appellant- complainant. The sentence of imprisonment was however reduced to six months from one year. The respondent-accused filed a Criminal Revision Petition in the High Court challenging the Judgment and order of the Appellate Court. The appellant- complainant also filed a Criminal Revision Petition challenging the reduction of the sentence from one year to six months.

By a common final Judgment and order, the High Court has reversed the concurrent factual findings of the Trial Court and the Appellate Court and acquitted the respondent, observing, inter alia, that there was fiduciary relationship between the appellant- complainant, an Income Tax practitioner, and the respondent- accused who was his client.

Decision: Appeal allowed.

Reason:

In passing the impugned judgment, the High Court misconstrued Section 139 of Negotiable Instruments Act, 1881 which mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.

[After referring to various judgements] The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act, 1881.

A meaningful reading of the provisions of the Negotiable Instruments Act , 1881 including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, 1881 in the absence of evidence of exercise of undue influence or coercion.

Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant-complainant, it may reasonably be presumed that the cheque was filled in by the appellant-complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent accused of the charge under Section 138 of the Negotiable Instruments Act, 1881.

15.03.2019	**ROHITBHAI J PATEL (APPELLANT) vs. THE STATE OF GUJARAT (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Negotiable Instruments Act, 1881 – Section 138 &139 – Preseumption as to cheque drawn in favour of complainant – Yet trial court put the onus on the complainant to prove the liability – Whether correct – Held, No.

Brief facts:

This appeal is directed against the common judgment and order whereby, the High Court of Gujarat has reversed the respective judgment and orders as passed by the 8th Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Vadodara in 7 criminal cases pertaining to the offence of dishonour of 7 cheques in the sum of Rs. 3 lakhs each, as said to have been drawn by the accused-appellant in favour of the complainant-respondent No. 2. In the impugned judgment and order High Court has disapproved the acquittal of the accused- appellant and, while holding him guilty of the offence under Section 138 of the NI Act, has awarded him the punishment of simple imprisonment for a period of 1 year with fine to the extent of double the amount of cheque (i.e., a sum of Rs. 6 lakhs) with default stipulation of further imprisonment for a period of 1 year in each case; and, out of the amount payable as fine, the complainant-respondent No. 2 is ordered to be compensated to the tune of Rs. 5.5. Lakhs in each case.

Decision: Appeal dismissed.

Reason:

Having given anxious consideration to the rival submissions and having examined the record, we are clearly of the view that as regards conviction of the accused-appellant for the offence under Section 138 of the Negotiable Instruments Act, 1881, the impugned judgment and order dated 08.01.2018 does not call for any interference but, on the facts and in the circumstances of this case, the punishment as awarded by the High Court deserves to be modified.

In the case at hand, even after purportedly drawing the presumption under Section 139 of the Negotiable Instruments Act, 1881, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused

and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/ circumstances which could be of a reasonably probable defence.

Hereinabove, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the Negotiable Instruments Act, 1881. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier cheques in the rains though the office of the complainant being on the 8th floor had also been of irrelevant factors for consideration of a probable defence of the appellant.

On perusing the order of the Trial Court, it is noticed that the Trial Court proceeded to pass the order of acquittal on the mere ground of 'creation of doubt'. We are of the considered view that the Trial Court appears to have proceeded on a misplaced assumption that by mere denial or mere creation of doubt, the appellant had successfully rebutted the presumption as envisaged by Section 139 of the Negotiable Instruments Act, 1881. In the scheme of the Negotiable Instruments Act, 1881, mere creation of doubt is not sufficient.

The result of discussion in the foregoing paragraphs is that the major considerations on which the Trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the Trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the Trial Court and after examining the evidence on record as a whole, found that the findings of the Trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter. For what has been discussed hereinabove, the findings of the High Court convicting the accused- appellant deserves to be, and are, confirmed.

16.04.2019	**BHARAT BROADBAND NETWORK LTD. (APPELLANT) vs. UNITED TELECOMS LTD. (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 – Section 12 – Appointment of arbitrator – Agreement provided for CMD as arbitrator – CMD disqualified and became ineligible to be appointed as arbitrator – Whether such disqualified person can appoint an arbitrator – Held, No.

Brief facts:

The Chairman & Managing Director of the appellant, had the right to appoint the arbitrator as provided in the

arbitration clause in the purchase order dated 30/09/2014 (contract). Since disputes and differences arose between the parties, the respondent, by its letter dated 03.01.2017, invoked the aforesaid arbitration clause. The appellant's Chairman and Managing Director, by a letter dated 17.01.2017, nominated one Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen between the parties.

The Supreme Court, by its judgment in TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377 (rendered on 03.07.2017), held that since a Managing Director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be null and void.

The appellant therefore made an application to the sole arbitrator praying that since he (arbitrator) is de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. The application was rejected and on appeal High court also rejected the appeal stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. Hence the present appeal before the Supreme Court.

Decision: Appeal allowed.

Reason :

From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub- section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such.

Under this provision, any prior agreement to the contrary is wiped out by the non- obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator

may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)

(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule.

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility", i.e., to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

We thus allow the appeals and set aside the impugned judgment. The mandate of Shri Khan having terminated, as he has become de jure unable to perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties.

10.05.2019	**ANJUM HUSSAIN & ORS (APPELLANT) vs. INTELLICITY BUSINESS PARK PVT LTD. & ORS. (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Consumer Protection Act,1986 – Section 12 – Class action by consumers – Delay in handing over possession of office/flats – All buyers filed a joint complaint before the NC – NC dismissed the case as not maintainable as class action – Whether correct – Held, No.

Brief facts:

The Appellant No.1 had booked an office space admeasuring about 440 sq. ft. in a project consisting of residential units, shops and offices launched by the respondent. The Builder – Buyer Agreement was executed between the Appellant No.1 and the respondent on 02.12.2013, where under the respondent was to deliver possession of the office unit within four years. Similar such Agreements were entered between the appellant nos.2 to 44 and the respondent in respect of various units from the same project.

Since the respondent had failed to honour its commitments of delivering possession in four years and as the project was still at the stage of excavation, consumer complaint Case No.2241 of 2018 was filed, as class action, by the appellants 1 to 44 seeking refund of the amounts paid by them to the respondent along with interest and compensation. The National Commission vide the impugned judgement/order concluded that the case could not be accepted as class action and dismissed the same. The dismissal of the case as class action is questioned in this appeal.

Decision: Appeal allowed.

Reason:

According to the National Commission, though all the appellants had a common grievance that the respondent had not delivered possession of the respective units booked by them and thus the respondent was deficient in rendering service, it was not shown how many of the allottees had booked the shops/commercial units solely for the purchase of earning their livelihood by way of self-employment. In Chairman, Tamil Nadu Housing Board, Madras v. T. N.Ganapathy (1990) 1 SCC 608 it was held by this Court that the persons who may be represented in a Suit under Order 1 Rule 8 of Civil Procedure Code need not have the same cause of action and all that is required for application of said provision is that the persons concerned must have common interest or common grievance. What is required is sameness of interest. Very same issue was dealt with by Full Bench of the National Commission in Ambrish Kumar Shukla and Ors. v. Ferrous Infrastructure Pvt. Ltd. [Consumer Case No.97 of 2016, decided on 07.10.2016]. The National Commission relied upon the decision of this Court in T.N. Housing Board (supra)

It was observed by this Court in T.N. Housing Board (supra) that the provision must receive an interpretation which would subserve the object for its enactment. It is in this light that the Full Bench of the National Commission held that oneness of the interest is akin to a common grievance against the same person.

However, the National Commission in the instant case, completely lost sight of the principles so clearly laid down in the decisions referred to above. In our view, the approach in the instant case was totally erroneous.

We, therefore, allow this appeal, set aside the Order under appeal. The application preferred by the appellants is held to be maintainable. Case No.2241 of 2018 is restored to the file of the National Commission and shall be proceeded with in accordance with law.

16.12.2015	**RESERVE BANK OF INDIA (PETITIONERS) vs. JAYANTILAL N. MISTRY (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Right to Information Act, 2005 – Section 8 – Exemptions from disclosure – Informants asked information as to investigation, audit, bad debts, FEMA violations etc. of various banks from RBI – RBI refused to furnish the same on the ground of information obtained from these banks on fiduciary relationship – Whether refusal tenable – Held, No.

Brief facts:

The main issue that arose for the consideration of the Court in these transferred cases was as to whether all the information sought for under the Right to Information Act, 2005 can be denied by the Reserve Bank of India and other Banks to the public at large on the ground of economic interest, commercial confidence, fiduciary relationship with other Bank on the one hand and the public interest on the other. If the answer to above

question is in negative, then up to what extent the information can be provided under the 2005 Act.

The following information were sought by various respondents from the RBI:

- Details of the reports of pertaining to investigation and audit carried out by RBI, details of past 20 years' investigation with respect to cooperative banks.
- Details of the report sent by RBI to the Finance Minister with respect to FEMA violations committed by several commercial banks.
- Details of the inspection reports of apex cooperative banks.
- Details of the loans taken by the industrialists that have not been repaid, and he had asked about the names of the top defaulters who have not repaid their loans to public sector banks.
- Details of the show cause notices and fines imposed by the RBI on various banks. RBI had refused to provide the requested information on the ground that they are exempted from disclosure, and the applicants moved the CIC and got orders in favour of them which were being challenged by the RBI in various High courts. Ultimately all these appeals were transferred to the Supreme Court and the Supreme Court had decided the cases by passing a common order.

Decision: Appeals dismissed.

Reason:

We have extensively heard all the counsels appearing for the petitioner Banks and respondents and examined the law and the facts.

The information sought for by the respondents from the petitioner-Bank have been denied mainly on the ground that such information is exempted from disclosure under section 8 of the RTI Act.

Learned counsel appearing for the petitioner-Bank mainly relied upon Section 8(1) (e) of the RTI Act taking the stand that the Reserve Bank of India having fiduciary relationship with the other banks and that there is no reason to disclose such information as no larger public interest warrants such disclosure. The primary question therefore, is, whether the Reserve Bank of India has rightly refused to disclose information on the ground of its fiduciary relationship with the banks. [Court examined in detail the term 'fiduciary relationship' from various angles]

In the instant case, the RBI does not place itself in a fiduciary relationship with the Financial institutions (though, in word it puts itself to be in that position) because, the reports of the inspections, statements of the bank, information related to the business obtained by the RBI are not under the pretext of confidence or trust. In this case neither the RBI nor the Banks act in the interest of each other. By attaching an additional "fiduciary" label to the statutory duty, the Regulatory authorities have intentionally or unintentionally created an in terrorem effect.

RBI is a statutory body set up by the RBI Act as India's Central Bank. It is a statutory regulatory authority to oversee the functioning of the banks and the country's banking sector. RBI has been given powers to issue any direction to the banks in public interest, in the interest of banking policy and to secure proper management of a banking company. It has several other far- reaching statutory powers.

RBI is supposed to uphold public interest and not the interest of individual banks. RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty bound to comply with the provisions of the RTI Act and disclose the information sought by the respondents herein.

The baseless and unsubstantiated argument of the RBI that the disclosure would hurt the economic interest of the country is totally misconceived. In the impugned order, the CIC has given several reasons to state why the

disclosure of the information sought by the respondents would hugely serve public interest, and non-disclosure would be significantly detrimental to public interest and not in the economic interest of India. RBI's argument that if people, who are sovereign, are made aware of the irregularities being committed by the banks then the country's economic security would be endangered, is not only absurd but is equally misconceived and baseless.

In the present case, we have to weigh between the public interest and fiduciary relationship (which is being shared between the RBI and the Banks). Since, RTI Act is enacted to empower the common people, the test to determine limits of Section 8 of RTI Act is whether giving information to the general public would be detrimental to the economic interests of the country? To what extent the public should be allowed to get information?

In the context of above questions, it had long since come to our attention that the Public Information Officers (PIO) under the guise of one of the exceptions given under Section 8 of RTI Act, have evaded the general public from getting their hands on the rightful information that they are entitled to.

And in this case the RBI and the Banks have sidestepped the General public's demand to give the requisite information on the pretext of "Fiduciary relationship" and "Economic Interest". This attitude of the RBI will only attract more suspicion and disbelief in them. RBI as a regulatory authority should work to make the Banks accountable to their actions.

Even if we were to consider that RBI and the Financial Institutions shared a "Fiduciary Relationship", Section 2(f) would still make the information shared between them to be accessible by the public. The facts reveal that Banks are trying to cover up their underhand actions, they are even more liable to be subjected to public scrutiny. We have surmised that many Financial Institutions have resorted to such acts which are neither clean nor transparent. The RBI in association with them has been trying to cover up their acts from public scrutiny. It is the responsibility of the RBI to take rigid action against those Banks which have been practicing disreputable business practices.

The ideal of 'Government by the people' makes it necessary that people have access to information on matters of public concern. The free flow of information about affairs of Government paves way for debate in public policy and fosters accountability in Government. It creates a condition for 'open governance' which is a foundation of democracy.

We have, therefore, given our anxious consideration to the matter and came to the conclusion that the Central Information Commissioner has passed the impugned orders giving valid reasons and the said orders, therefore, need no interference by this Court.

There is no merit in all these cases and hence they are dismissed.

16.12.2015	**GAUTAM KUNDU (APPELLANT) vs. MANOJ KUMAR ASSISTANT DIRECTOR, DOE (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Prevention of Money Laundering Act, 2002 read with the Code of Criminal Procedure, 1973 and SEBI Act, 1992 – Offence committed under section 3 of the PMLA – Bail sought under section 439 of the CRPC appellant floating as many as 27 companies – Monies collected through front company routed through these companies – Whether appellant entitled for bail – Held, No.

Brief facts:

This appeal, by special leave, is directed against the judgment and order passed by the High Court of Calcutta, whereby the High Court has rejected appellant's application for bail under Section 439 of the Code of Criminal Procedure, 1973. The appellant was arrested on 25.03.2015 in relation to an offence alleged to have been committed under Section 3 of the Prevention of Money Laundering Act, 2002, (hereinafter referred to as "PMLA"). The appellant is the Chairman of Rose Valley Real Estate Construction Ltd. (hereinafter referred to as the "Rose Valley"), a public company incorporated in the year 1999 and registered under the Companies Act, 1956. Certain non-convertible debentures were issued by the Rose Valley by 'private placement method.'

No advertisements etc. were issued to the public. The said debentures were issued to the employees of the Company and to their friends and associates after fulfilling the formalities for private placement of debentures. Thus, the appellant collected money by issuing secured debentures by way of private placement in compliance with the guidelines issued by the Securities and Exchange Board of India from time to time. Further the appellant had floated as much as 27 companies and routed the monies collected by his front companies through these companies.

Decision: Appeal dismissed.

Reason:

We have heard the learned counsel for the parties. At this stage we refrained ourselves from deciding the questions tried to be raised at this stage since it is nothing but a bail application. We cannot forget that this case is relating to "Money Laundering" which we feel is a serious threat to the national economy and national interest. We cannot brush aside the fact that the schemes have been prepared in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequence to the members of the society.

We note that admittedly the complaint is filed against the appellant on the allegations of committing the offence punishable under Section 4 of the PMLA. The contention raised on behalf of the appellant that no offence under Section 24 of the SEBI Act is made out against the appellant, which is a scheduled offence under the PMLA, needs to be considered from the materials collected during the investigation by the respondents. There is no order as yet passed by a competent court of law, holding that no offence is made out against the appellant under Section 24 of the SEBI Act and it would be noteworthy that a criminal revision praying for quashing the proceedings initiated against the appellant under Section 24 of SEBI Act is still pending for hearing before the High Court. We have noted that Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. As mentioned earlier, Section 45 of the PMLA imposes two conditions for grant of bail, specified under the said Act. We have not missed the proviso to Section 45 of the said Act which indicates that the legislature has carved out an exception for grant of bail by a Special Court when any person is under the age of 16 years or is a woman or is a sick or infirm. Therefore, there is no doubt that the conditions laid down under Section 45A of the PMLA, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of bail to any person accused of committing offence punishable under Section 4 of the PMLA, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure.

We cannot brush aside the fact that the appellant floated as many as 27 companies to allure the investors to invest in their different companies on a promise of high returns and funds were collected from the public at large which were subsequently laundered in associated companies of Rose Valley Group and were used for purchasing moveable and immoveable properties. We have further noted that the High Court at the time of refusing the bail application, duly considered this fact and further considered the statement of the Assistant General Manager of RBI, Kolkata, seizure list, statements of directors of Rose Valley, statements of officer bearers of Rose Valley, statements of debenture trustees of Rose Valley, statements of debenture holders of Rose Valley, statements of AGM of Accounts of Rose Valley and statements of Regional Managers of Rose Valley for formation of opinion whether the appellant is involved in the offence of money laundering. In these circumstances, we do not find that the High Court has exercised its discretion capriciously or arbitrarily in the facts and circumstances of this case. We further note that the High Court has called for all the relevant papers and duly taken note of that and thereafter after satisfying its conscience, refused the bail. Therefore, we do not find that the High Court has committed any wrong in refusing bail in the given circumstances. Accordingly, we do not find any reason to interfere with the impugned order so passed by the High Court and the bail, as prayed before us, challenging the said order is refused. Consequently the appeal is dismissed.

17.12.2015	KOTAK MAHINDRA BANK LTD. (APPELLANT) vs. ANUJ KUMAR TYAGI (RESPONDENT)	DELHI HIGH COURT

Limitation Act, 1963 – Section 3 read with articles 55 and 113 – Grant of vehicle loan – Borrower failing to pay the EMIs – Suit filed by the bank – Trial court dismissed the suit as time barred without appreciating articles 55 and 113 – Whether the rejection of suit tenable – Held, No.

Brief facts:

The respondent had approached ICICI Bank Ltd. in July, 2007, for grant of credit facility of Rs.3.28 lacs to purchase a TATA INDICA Vehicle, which was granted. As per the loan agreement, the respondent was required to repay the sum borrowed, in 59 Equated Monthly Instalments (EMIs), amounting to Rs. 7544/- each. The first due date, as stipulated in the loan agreement, was 10.08.2007, with the date of maturity indicated as 10.06.2012. The repayment clause contained in the loan agreement provided that the due date would be the tenth day of each successive month. Additional security in the form of four post-dated cheques, was also given. The respondent also hypothecated the subject vehicle in favour of ICICI Bank Ltd., by executing an unattested deed of hypothecation. Furthermore, an irrevocable power of attorney was also executed in favour of ICICI Bank Ltd.

It appears that the loan account became irregular, as the respondent failed to adhere to the financial discipline in the payment of the EMIs. Since, the respondent, failed to regularize the account, a loan recall-cum- demand notice dated 26.06.2012 was issued to him, which was posted on 29.06.2012. By virtue of the said recallcum-demand notice, the loan agreement was terminated and the respondent was called upon to repay the entire outstanding amount, and handover possession of the subject vehicle. As, the respondent, failed to oblige, a suit for recovery was instituted against him. It is pertinent to note, that in the interregnum, ICICI Bank Ltd. had assigned the loan to an entity by the name of Asset Reconstruction Company (India) Ltd., which in turn, assigned the loan account, pertaining to the respondent vide assignment deed dated 31.12.2009, to the appellant herein.

The learned ADJ had, on a perusal of the statement of accounts (Ex. PW1/9) filed by the appellant, which is dated 31.10.2009, as per which the last transaction with the respondent took place on 11.08.2008, concluded that since, the suit was filed on 20.07.2012, it was "hopelessly" barred by limitation. Hence the present appeal.

Decision: Appeal allowed.

Reason:

To my mind, Article 55 could have possibly been made applicable, to this case as well, as the loan agreement had a tenure extending from 10.08.2007 till 10.06.2012, but for one aspect of the matter which I have adverted to in the following paragraph. In so far as Article 55 is concerned, the fact that that the respondent failed to adhere to the schedule of repayment, would not deprive the right of the appellant to treat each breach as a fresh cause of action. The last breach, quite clearly, in the instant case, would have occurred only in May-June, 2012, assuming the last instalment was to be adjusted by virtue of the respondent having paid an initial amount of Rs. 7544/- as an advance. The suit, admittedly, was instituted on 20.07.2012.

Having said so, there is, as stated above, another aspect of the matter, as regards this case, which is that, under the loan agreement, the appellant, in terms of clause 48, is conferred with the power, in an event of a default. Quite clearly, in terms of clause 48, the appellant had discretion to decide when to trigger the recall of loan upon occurrence of an event of default. The fact that EMIs were to be paid over a period spanning from 10.08.2007 till 10.06.2012, gave the appellant, under clause 48 the right to treat any of the defaulted EMI's (that is, after the due date for its payment had passed) as an event of default. Once, such an event of default occurred, the appellant under clause 48 could set in motion the process for recall of the loan. The commencement of the period of limitation, would thus be triggered, once, the said notice was issued, which in turn would relate to the defaulted EMI.

In the instant case, as noticed above, the recall-cum-demand notice dated 26.06.2012 was dispatched to the respondent, on 29.06.2012. Quite clearly, the period of limitation, would, relate back to last defaulted EMI as, vide the aforementioned notice the appellant gave a final opportunity to the respondent to repay the amount, which was due and payable on the date of notice. The right to sue would occur, in my opinion, each time when, there is a default in payment of an EMI on its due date. The appellant in terms of clause 48 is, however, at liberty to take a decision to treat the non-payment of a particular EMI, as an event of default. The period of limitation would, though, commence from the date of the last defaulted EMI, which is made the subject matter of the notice and not from the date of the notice itself. Therefore, in such a situation, Article 113 of the 1963 Act would become applicable as against Article 55.

The trial court while dismissing the suit has not alluded to any specific Article of the 1963 Act. Recourse has been taken by the trial court to Section 3 of the 1963 Act, which inter alia, only empowers a court to dismiss a suit which is barred by limitation even if limitation is not set up as a defence. The section by itself could not have helped the trial court in coming to the conclusion as to what should be the period of limitation in a case such as this. Furthermore, the reference to Article 37 in the written statement is also of no relevance as the appellant did not sue either on a promissory note or a bond.

Having regard to the above, the appeal is allowed and, consequently, the impugned judgement is set aside.

25.01.2016	**MAHANIVESH OILS & FOODS PVT LTD. (PETITIONER) vs. DIRECTORATE OF ENFORCEMENT (RESPONDENT)**	**DELHI HIGH COURT**

Prevention of Money Laundering Act, 2005 – Section 5 – Proceeds of crime – Property purchased before the enforcement of the Act attachment of property – Whether tenable – Held, No.

Brief facts:

On 08.05.2009, an FIR was lodged by the CBI on a written complaint made by NAFED wherein it was alleged that Mr. Homi Rajvansh - the Additional Managing Director of NAFED, had hatched a conspiracy, in connivance with the directors of M/s M.K. Agri International Ltd. (hereafter 'MKAIL'), for making wrongful gains by executing Memoranda of Understanding (MOUs) with MKAIL on behalf of NAFED for import of raw sugar and selling the same by entering into three High Seas Sale (HSS) Agreements with M/s M.K. International Ltd. (hereafter 'MIL'), a sister concern of MKAIL, without charging/recovering any cost for the commodity.

MIL on 10.02.2005, through its director - Mr. M.K. Agarwal issued cheques for an amount aggregating to Rs.1.5 crores in favour of its two holding companies namely, M/s Duoroyale Enterprises Ltd. and M/s Sri Radhey Trading Pvt. Ltd. Subsequently, both the said companies issued two cheques each amounting to Rs.75 lacs in favour of M/s Mahanivesh Oils & Foods Pvt. Ltd., the petitioner company, where Smt. Alka Rajvansh - wife of Mr. Homi Rajvansh was a Director. On 16.02.2005 and 17.02.2005, M/s Mahanivesh Oils and Foods Pvt. Ltd., issued two cheques of Rs. 1,32,00,00/- and Rs. 10,81,000/- respectively in favour of M/s Uppal Agencies Pvt. Ltd. for purchase of the ground floor and basement of the property situated at E-14/3, Vasant Vihar, New Delhi (hereafter 'the said property').

It is alleged that Smt. Alka Rajvansh used the funds received from M/s Duoroyale Enterprises Ltd. and M/s Sri Radhey Trading Pvt Ltd. for purchasing the abovementioned property pursuant to a sale deed dated 18.03.2005 executed by Shri B.K. Uppal in favour of the petitioner company.

The property was provisionally attached by the enforcement directorate under the provisions of the Prevention of Money Laundering Act, 2005. Petitioner challenged this attachment before the High Court.

Decision: Petition allowed.

Reason:

It is not disputed that the property sought to be attached under the Act was purchased on 18.03.2005 i.e. prior

to 01.07.2005 that is, prior to the Act coming into force. In the circumstances, the principal controversy to be addressed is whether any proceedings under the Act could lie in respect of the said asset. In the present case, the impugned order has been made under Section 5(1) of the Act. A conjoint reading of Section 5(1) read with Section 2(u) of the Act clearly indicates that the power to attach is only with respect to the property derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of such property.

The occurrence of a scheduled offence is the substratal condition for giving rise to any proceeds of crime and consequently, the application of Section 5(1) of the Act. A commission of a scheduled offence is the fundamental pre-condition for any proceeding under the Act as without a scheduled offence being committed, the question of proceeds of crime coming into existence does not arise. In view of the above, the contention that the Act is completely independent of the principal crime (scheduled offence) giving rise to proceeds of crime is unmerited. It is necessary to bear in mind that the substratal subject of the Act is to prevent money-laundering and confiscate the proceeds of crime. In that perspective, there is an inextricable link between the Act and the occurrence of a crime. It cannot be disputed that the offence of money-laundering is a separate offence under section 3 of the Act, which is punishable under Section 4 of the Act. However as stated earlier, the offence of money-laundering relates to the proceeds of crime, the genesis of which is a scheduled offence. In the aforesaid circumstances, before initiation of any proceeding under Section 5 of the Act, it would be necessary for the concerned authorities to identify the scheduled crime. The First Proviso to Section 5 also indicates that no order of attachment shall be made unless in relation to a scheduled offence a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person authorised to investigate the scheduled offence before a Magistrate or Court for taking cognizance of the scheduled offence. Thus, in cases where the scheduled offence is itself negated, the fundamental premise of continuing any proceedings under the Act also vanishes. Such cases where it is conclusively held that commission of a scheduled offence is not established and such decision has attained finality pose no difficulty; in such cases, the proceedings under the Act would fail.

The central issue in the present case is not on whether the scheduled offence was committed, but whether the attachment under Section 5 of the Act can be sustained where the principal offence as well as the offence of using its proceeds is alleged to have been committed prior to the Act coming into force. The Act is a penal statute and, therefore, can have no retrospective or retroactive operation. Article 20(1) of the Constitution of India expressly forbids that no person can be convicted of any offence except for the violation of a law in force at the time of the commission of the act charged as an offence. Further, no person can be inflicted a penalty greater than what could have been inflicted under the law at the time when the offence was committed. Clearly, no proceedings under the Act can be initiated or sustained in respect of an offence, which has been committed prior to the Act coming into force. However, the subject matter of the Act is not a scheduled offence but the offence of money-laundering. Strictly speaking, it cannot be contended that the Act has a retrospective operation because it now enacts that laundering of proceeds of crime committed earlier as an offence.

The next contention to be considered is whether in the given facts and circumstances, any offence or money-laundering had been made out to warrant an issuance of the impugned order. It is alleged that on 10 the February, 2005, MIL through its Director issued cheques aggregating Rs.1.5 crores in favour of its holding companies, namely, M/s Duoroyale Enterprises Ltd. and M/s Shri Radhey Trading Pvt. Ltd. and these companies in turn issued two cheques of Rs.75 lacs each in favour of the petitioner. It is suggested that these amounts were proceeds of crime received by the petitioner as a result of a criminal activity and bulk of these funds were utilized by the petitioner for paying the consideration for acquiring the property in question. It was argued that all actions of integrating the money by purchase of immovable property would fall within the definition of 'money- laundering'. In this respect it is relevant to note that the sale deed in respect of the property was executed on 18.03.2005. Thus, even if the allegations made by the respondent are assumed to be correct, the proceeds of crime had been used by the petitioner for acquisition of the property much prior to the Act coming into force. The process of activity of utilising the proceeds of crime, if any, thus, stood concluded prior to the Act

coming into force. Even if it is assumed that the funds received from M/s Duoroyale Enterprises Ltd. and M/s Shri Radhey Trading Pvt. Ltd. were proceeds of crime and were properties involved in money-laundering, such funds had come into possession of the petitioner prior to the Act coming into force. Thus, funds were already projected as untainted funds unconnected with the crime for which Mr. Homi Rajvansh and other persons are accused. The funds had, thus, been laundered at a time when money-laundering was not an offence and proceedings under the Act cannot be initiated.

In the present case, the respondent could not point out any material to counter the petitioner's contention that there was no material on record, which could possibly lead to a belief that the petitioner is likely to transfer or conceal the property in any manner. As indicated earlier, the concerned officer must have a reason to believe on the basis of material in his possession that the property sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings for confiscation of their property under the Act.

Although, the impugned order records that the concerned officer has reason to believe that the property in question is likely to be concealed, transferred or dealt with in a manner, which may result in frustrating the proceedings relating to confiscation of the said proceeds of crime, there is no reference to any fact or material in the impugned order which could lead to this inference. A mere mechanical recording that the property is likely to be concealed, transferred or dealt with would not meet the requirements of Section 5(1) of the Act. Consequently, the impugned order is likely to be set aside. In view of the above, the petition is allowed and the impugned order is set aside.

20.01.2016	**SANDEEP GUPTA (PETITIONER) vs. PUNJAB NATIONAL BANK & ORS (RESPONDENTS)**	**DELHI HIGH COURT**

Indian Partnership Act, 1932 – Section 32 – Retiring partner's liability petitioner provided guarantee to the respondent bank – Upon retirement he sought to withdraw his guarantee – Reconstitution agreement upon which the petitioner retired and new partners inducted did not provide for the release of the guarantee – Whether guarantee could be released – Held, No.

Brief facts:

The petitioner, upon ceasing to be a partner of respondent no.2 partnership firm viz. M/s Allied Fibre Industries, seeks mandamus to the respondent no.1 Punjab National Bank to release the title deeds of the property of the petitioner and to discharge the petitioner from the guarantee furnished by the petitioner, (as the then partner of the respondent no.2) for repayment of the dues of the respondent no.2 to the respondent no.1 Bank.

In this regard it is pertinent that the petitioner had, before instituting the present petition, filed a suit against the respondents no. 3 & 4 claiming specific performance of the agreement contained in the deed of reconstitution of partnership to have the security furnished by the petitioner substituted in which the respondent no.1 Bank is also a party to the said suit.

Decision: Petition dismissed.

Reason:

The said suit was admittedly instituted prior to the institution of this petition. The petition is not maintainable on this ground alone. The petitioner cannot maintain a petition under Article 226 of the Constitution of India for the relief for which the petitioner, prior to instituting the writ petition, has already availed of the relief under the civil law.

Supreme Court in *Jai Singh Vs. Union of India (1977)1 SCC 1* held that the appellant therein having filed a suit in which the same question as the subject matter in the writ petition was agitated could not be permitted to pursue two parallel remedies in respect of the same matter at the same time. Similarly in *Bombay Metropolitan Region Development Authority, Bombay Vs. Gokak Patel Volkart Ltd. (1995) 1 SCC 642* finding that the writ petitioner had

availed of the alternative statutory remedy it was held that the writ petition should not have been entertained. Yet again in *S.J.S Business Enterprises (P) Ltd Vs. State of Bihar (2004) 7 SCC 166* it was held that if a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. This rule was held to be based on public policy. Reference in this regard can also be made to *K.S. Rashid and Son Vs. Income Tax Investigation Commission AIR 1954 SC 207, Madura Coats Limited Vs. Union of India (UOI) 112(2004) DLT622, Lal Harsh Deo Narain Singh Vs. State of U.P. MANU/UP/1143/2004, Major Jasbinder Singh Bala S/o Sri Bachan Singh Bala Vs. IInd Additional District Judge MANU/UP/1679/2005 and D.D Shah and Brothers Vs. The Union of India (UOI) MANU/RH/0268/2004.* Even otherwise, the respondent no.1 Bank which is the trustee of public monies cannot be left high and dry by granting the relief of releasing the security of the outgoing partners without the continuing / new partners substituting the said security. The petitioner prior to signing the deed of reconstitution of firm ought to have ensured that the security furnished by him is released, if that was the agreement with the respondents No.3 & 4.

13.01.2016	**TODAY HOTELS (NEW DELHI) PVT LTD. (APPELLANT) vs. INTECTURE INDIA DESIGNS PVT LTD. (RESPONDENT)**	**DELHI HIGH COURT**

Arbitration and Conciliation Act, 1996 – Section 8 – Application to refer to arbitration dismissed – Whether appeal lies against it – Held, No.

Brief facts:

The appellant/defendant has filed the present appeal impugning the order dated 21.07.2015 whereby IA No. 14371/2015 filed by the appellant under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) has been dismissed.

Decision: Appeal dismissed.

Reason:

The main question that arises for determination in the present case is whether an appeal would lie from an order passed under Section 8 of the Act allowing or refusing to allow an application under Section 8 of the Act?

[After elaborately referring to various judgements] we are in complete agreement with the view taken by the various division benches of this court and also by the full bench of the Bombay High Court in Conros Steels Pvt. Ltd v. Lu Qin (Hong Kong) Company Ltd. AIR 2015 Bom 106 (FB). The sequitur of the same is that an order passed under Section 8 is an order passed by the judicial authority/forum/court by drawing its power from section 8 of the Act and since the order is passed by drawing the power from Section 8 of the Act, the right to file an appeal being a creature of statute has also to be found in the Act. If the Act does not provide for an appeal or specifically prohibits an appeal from an order passed under Section 8, then no appeal would lie under the Act. Since the order is passed in exercise of powers conferred by the act, reliance cannot be placed for filing an appeal under section 10 of the Delhi High Court Act, 1966 or under the Letters Patent. Since Section 37 does not permit filing of an appeal from an order passed under Section 8, no appeal would lie from such an order under the Act.

In view of the above, we hold that the present appeal impugning the order rejecting the application under Section 8 of the Act, is not maintainable and is accordingly dismissed leaving the parties to bear their own costs.

07.01.2016	**LAKHMI CHAND (APPELLANT) vs. RELIANCE GENERAL INSURANCE (RESPONDENT)**	**SUPREME COURT OF INDIA**

Consumer Protection Act,1986 – Section 23 – Revision by National Commission – Accident caused due to the rash driving of the offending vehicle – Damaged vehicle was carrying excess passenger – National Commission rejected the compensation on the ground of violating the insurance contract terms – Whether correct – Held, No.

Brief facts:

The appellant was the owner of a Tata Motors goods carrying vehicle and the vehicle was insured with the respondent- Company. The risk covered in this policy was to the tune of Rs.2,21,153/-. The said vehicle met with an accident on account of rash and negligent driving of the offending vehicle bearing registration no. UP-75-J 9860. In this regard, an FIR No.66 of 2010 dated 11.02.2010 was registered with the jurisdictional Police Station. The appellant incurred expenses amounting to Rs.1,64,033/- for the repair of his vehicle and the Surveyor appointed by the respondent assessed the damage caused to the said vehicle at Rs.90,000/-. The appellant had preferred a claim for a sum of Rs.1,64,033/- with supporting bills, which was rejected by the respondent.

Aggrieved of rejection of the claim of the appellant by the respondent- Company, he filed Complaint before the District Forum, which allowed the claim. Aggrieved of the order of the District Forum, the respondent Company preferred an appeal before the State Commission urging various grounds. The State Commission allowed the appeal. The said judgment passed by the State Commission was challenged by the appellant before the National Commission, which dismissed the petition on the ground that the appellant had violated the terms of the insurance contract. Review petition was also dismissed.

Decision: Petition allowed.

Reason:

In our considered view, the concurrent findings recorded by the National Commission in the impugned judgment and order are erroneous in law for the following reasons.

It is an admitted fact that the accident of the vehicle of the appellant was caused on account of rash and negligent driving of the offending vehicle bearing registration no. UP-75-J9860. An FIR No. 66 of 2010 dated 11.02.2010 was registered against the driver of the said vehicle for the offences referred to *supra*. The vehicle of the appellant was badly damaged in the accident and it is an undisputed fact that the report of Surveyor assessed the loss at Rs.90,000/-, but the actual amount incurred by the appellant on the repair of his vehicle was Rs.1,64,033/-. The said claim was arbitrarily rejected by the respondent-Company on the ground that the damage caused to the vehicle did not fall within the scope and purview of the insurance policy, as there was a contravention of terms and conditions of the policy of the vehicle.

The National Commission upheld the order of dismissal of the complaint of the appellant passed by the State Commission. The National Commission however, did not consider the judgment of this Court in the case of

B.V. Nagaraju v. Oriental Insurance Co. Ltd Divisional Officer, Hassan, IV 2010 CPJ 315 (SC). In that case, the insurance company had taken the defence that the vehicle in question was carrying more passengers than the permitted capacity in terms of the policy at the time of the accident. The said plea of the insurance company was rejected. This Court held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle.

In the instant case, the respondent-Company has not produced any evidence on record to prove that the accident occurred on account of the overloading of passengers in the goods carrying vehicle. Further, as has been held in the case of B.V. Nagaraju *(supra)* that for the insurer to avoid his liability, the breach of the policy must be so fundamental in nature that it brings the contract to an end. In the instant case, it is undisputed that the accident was in fact caused on account of the rash and negligent driving of the offending vehicle by its driver, against whom a criminal case vide FIR no. 66 of 2010 was registered for the offences referred to supra under the provisions of the IPC. These facts have not been taken into consideration by either the State Commission or National Commission while exercising their jurisdiction and setting aside the order of the District Forum. Therefore, the judgment and order of the National Commission dated 26.04.2013 passed in the Revision Petition No. 2032 of 2012 is liable to be set aside, as the said findings recorded in the judgment are erroneous in law.

Accordingly, we allow these appeals and restore the judgment and order of District Forum. Further, we award a sum of Rs.25,000/- towards the cost of the litigation as the respondent-Company has unnecessarily litigated the matter up to this Court despite the clear pronouncement of law laid down by this Court on the question with regard to the violation of terms and conditions of the policy and burden of proof is on the insurer to prove the fact of such alleged breach of terms and conditions by the insured.

27.01.2016	**INDIAN MACHINERY COMPANY (APPELLANT) vs. ANSAL HOUSING & CONSTRUCTION LTD. (RESPONDENT)**	**SUPREME COURT OF INDIA**

Consumer Protection Act, 1986 – First complaint dismissed due to the default of non-prosecution second complaint filed but rejected as not maintainable – Whether correct – Held,No.

Brief facts:

We have heard learned counsel for the parties. The only question that has arisen in this appeal is whether a second complaint to the District Forum under the Consumer Protection Act, 1986 is maintainable when the first complaint was dismissed for default or non- prosecution. The National Commission has taken the view in the impugned order that the second complaint would not be maintainable.

Decision: Appeal allowed.

Reason:

Our attention has been drawn to a decision of this Court in New India Assurance Co Ltd v. R. Srinivasan [(2000) 3 SCC 242] wherein this precise question had arisen as mentioned in paragraph 5 of this decision. It is mentioned in that paragraph that the only question is that in view of the dismissal of the first complaint filed by the respondent therein, a second complaint on the same facts and cause of action would not lie and it ought to have been dismissed as not maintainable.

While dealing with this issue, this Court held in paragraph 16 as follows:

"This Rule [Rule 9(6) of the Tamil Nadu Consumer Protection Rules, 1988] is in identical terms with sub-rule

(8) of Rule 4 and sub-rule (8) of Rule 8. Under this sub-rule, the appeal filed before the State Commission against the order of the District Forum, can be dismissed in default or the State Commission may in its discretion dispose of it on merits. Similar power has been given to the National Commission under Rule 15(6) of the Rules made by the Central Government under Section 30(1) of the Act. These Rules do not provide that if a complaint is dismissed in default by the District Forum under Rule 4(8) or by the State Commission under Rule 8(8) of the Rules, a second complaint would not lie. Thus, there is no provision parallel to the provision contained in Order 9 Rule 9(1) CPC which contains a prohibition that if a suit is dismissed in default of the plaintiff under Order 9 Rule 8, a second suit on the same cause of action would not lie. That being so, the rule of prohibition contained in Order 9 Rule 9(1) CPC cannot be extended to the proceedings before the District Forum or the State Commission. The fact that the case was not decided on merits and was dismissed in default of non-appearance of the complainant cannot be overlooked and, therefore, it would be permissible to file a second complaint explaining why the earlier complaint could not be pursued and was dismissed in default."

We have also not been shown any rule similar to Order IX, Rule 9(1) of the Code of Civil Procedure, 1908. That being so, and in view of the decision rendered by this Court, with which we have no reason to disagree, we are of the opinion that the second complaint filed by the appellant was maintainable on the facts of this case. Under the circumstances, we set aside the order passed by the National Commission and remit the matter back to the National Commission for adjudicating the disputes on merits.

23.05.2016	**EITZEN BULK A/S (APPELLANT) vs. ASHAPURA MINECHEM LTD. & ANR (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 – Seat of arbitration was London and governing law of the contract was English law – Foreign award – Execution thereof in India – Whether Indian courts have jurisdiction to entertain the challenge to the execution of foreign award – Held, No.

Brief facts:

The dispute in these appeals, arises out of the Contract of Affreightment dated 18.1.2008 (hereinafter referred as `the Contract'). Eitzen Bulk A/S of Denmark (hereinafter referred to as 'Eitzen') entered into the contract with Ashapura Minechem Limited of Mumbai (hereinafter referred to as 'Ashapura') as charterers for shipment of bauxite from India to China. The Charter party contained an Arbitration Clause under which the seat of arbitration was London and the governing law was English law.

Disputes having arisen between the parties, the matter was referred to Arbitration by a sole Arbitrator. The Arbitration was held in London according to English Law. Ashapura Minechem was held liable and directed to pay a sum of 36,306,104 US$ together with compound interest at the rate of 3.75 % per annum. In addition they were directed to pay 74,135 US$ together with compound interest at the rate of 3.75% per annum and another sum of 90,233.66 Pounds together with compound interest at the rate of 2.5% per annum vide Award of the Sole Arbitrator dated 26.5.2009.

When Eitzen sought to enforce the award in India, Ashpura moved Gujarat High court and Bombay high court for the stay of the execution of award on the ground that Part 1 of Indian Arbitration and Conciliation Act, 1996 is not excluded. Gujarat High Court stayed the execution while Bombay High court refused to stay the proceedings holding that Part 1 of Indian Arbitration and Conciliation Act, 1996 excludes Indian courts to interfere in the execution.

We thus have, on the one hand, the decision of the Gujarat High Court holding that a Court in India has jurisdiction under Section 34 to decide objections raised in respect of a Foreign Award because Part I of the Arbitration Act is not excluded from operation in respect of a Foreign Award and on the other, a decision of the Bombay High Court holding that Part I is excluded from operation in case of a Foreign Award and thereupon directing enforcement of the Award.

The decisions of the Gujarat High Court are questioned by Eitzen by way of SLP (C) Nos.2210-2212/2011. The decisions of the Bombay High Court are questioned by Ashapura by way of SLP (C) Nos.7562- 7563/2016. Interim order dated 05.10.2011 passed by the High Court of Judicature at Bombay in Notice of Motion No. 3975 of 2009 in Arbitration Petition No. 561 of 2009 is under challenge in appeal arising out of SLP (C) No. 3959 of 2012. Decision: Bombay High Court's decision upheld. Reason: Thus, the main question on which contentions were advanced by the learned counsel for the parties is whether Part I of the Arbitration Act is excluded from its operation in case of a Foreign Award where the Arbitration is not held in India and is governed by foreign law.

Clause 28, which is the Arbitration Clause in the Contract, clearly stipulates that any dispute under the Contract "is to be settled and referred to Arbitration in London". It further stipulates that English Law to apply. The parties have thus clearly intended that the Arbitration will be conducted in accordance with English Law and the seat of the Arbitration will be at London.

The question is whether the above stipulations show the intention of the parties to expressly or impliedly exclude the provisions of Part I to the Arbitration, which was to be held outside India, i.e., in London. We think that the clause evinces such an intention by providing that the English Law will apply to the Arbitration. The clause expressly provides that Indian Law or any other law will not apply by positing that English Law will apply. The intention is that English Law will apply to the resolution of any dispute arising under the law. This means that English Law will apply to the conduct of the Arbitration. It must also follow that any objection to the conduct of the Arbitration or the Award will also be governed by English Law. Clearly, this implies that the challenge to the Award must be in accordance with English Law. There is thus an express exclusion of the applicability of Part I to the instant Arbitration by Clause 28. In fact, Clause 28 deals with not only the seat of Arbitration but also provides that there shall be two Arbitrators, one appointed by the charterers and one by

the owners and they shall appoint an Umpire, in case there is no agreement. In this context, it may be noted that the Indian Arbitration and Conciliation Act, 1996 makes no provision for Umpires and the intention is clearly to refer to an Umpire contemplated by Section 21 of the English Arbitration Act, 1996. It is thus clear that the intention is that the Arbitration should be conducted under the English law, i.e. the English Arbitration Act, 1996. It may also be noted that Sections 67, 68 and 69 of the English Arbitration Act provide for challenge to an Award on grounds stated therein. The intention is thus clearly to exclude the applicability of Part I to the instant Arbitration proceedings. This is a case where two factors exclude the operation of Part I of the Arbitration Act. Firstly, the seat of Arbitration which is in London and secondly the clause that English Law will apply. In fact, such a situation has been held to exclude the applicability of Part I in a case where a similar clause governed the Arbitration. In this clause 28 in the present case must be intended to have a similar effect that is to exclude the applicability of Part I of the Indian Arbitration and Conciliation Act since the parties have chosen London as the seat of Arbitration and further provided that the Arbitration shall be governed by English Law. In this case the losing side has relentlessly resorted to apparent remedies for stalling the execution of the Award and in fact even attempted to prevent Arbitration. This case has become typical of cases where even the fruits of Arbitration are interminably delayed. Even though it has been settled law for quite some time that Part I is excluded where parties choose that the seat of Arbitration is outside India and the Arbitration should be governed by the law of a foreign country.

We are thus of the view that by Clause 28, the parties chose to exclude the application of Part I to the Arbitration proceedings between them by choosing London as the venue for Arbitration and by making English law applicable to Arbitration, as observed earlier. It is too well settled by now that where the parties choose a juridical seat of Arbitration outside India and provide that the law which governs Arbitration will be a law other than Indian law, part I of the Act would not have any application and, therefore, the award debtor would not be entitled to challenge the award by raising objections under Section 34 before a Court in India. A Court in India could not have jurisdiction to entertain such objections under Section 34 in such a case.

08.11.2016	**ROTOMAC ELECTRICALS LTD. (APPELLANT) vs. UNION OFINDIA & ANR (RESPONDENTS)**	**DELHI HIGH COURT**

Foreign Trade (Development and Regulation) Act, 1992 – Advance licence – Export obligations – Failure to discharge – Penalty proceedings – Failure to produce documents – Penalty imposed – Whether tenable – Held, yes.

Brief facts:

The appellant/writ petitioner was granted an advance licence dated 22.12.1999 under Duty Exemption Scheme under the Foreign Trade (Development and Regulation) Act, 1992 (for short 'FTDR Act'). As per the conditions of the licence, the appellant was required to complete the export obligation of Rs.1,07,58,600/- as Free On Board (FOB) value within a period of 18 months from the date of the issue of advance licence. The appellant failed to fulfil this obligation and the penal proceedings were initiated against it and penalty was imposed. The appellant challenged the imposition of the penalty.

Decision: Appeal dismissed.

Reason:

I have examined the documents and gone through the facts of the case. The appellant was granted various opportunities of personal hearing as detailed in above paras to produce requisite evidence of fulfilment of export obligation but the appellant has failed to do so. From the documents (only photocopies) submitted by the firm with their letter dated 03.09.2014 and also with their appeal, it is observed that Part-2 of DEEC Book has been not logged by Customs. They have not been able to produce shipping bills showing authorization No/ File No. Further, it is observed that appellant has not produced Duplicate/Bank Certificate copy of BRC. They were repeatedly advised to provide the documents required as per Policy/Procedure but they failed to do so.

From the above, it is clear that the appellant did not have the requisite documents required to prove that they have fulfilled export obligation in respect of advance licence No.0131276 dated 22.12.1999.

As rightly held by the learned Single Judge, such finding of fact recorded by the statutory authorities regarding the failure of the appellant to furnish the documents to establish the fulfilment of the export obligation warrants no interference by this Court in exercise of the writ jurisdiction under Article 226 of the Constitution of India. We have observed that the dispute was not with regard to the interpretation of clause 4.12 as to whether the exports that had taken place even before the grant of advance licence can be considered or not, but the issue was whether the appellant could produce authenticated documents to prove the fulfilment of export obligation as required under the terms and conditions of the advance licence. A categorical finding was recorded by the respondent Nos.1 & 2 that the appellant/writ petitioner failed to produce. Therefore, the respondents cannot be said to have committed any error in imposing the penalty in exercise of the powers conferred by Section 11(2) of FTDR Act, 1992.

We do not find any substance even in the contention that the show cause notices being silent about the proposed levy of penalty, it is not open to the respondents to *invoke* Section 11(2) of FTDR Act, 1992. On a perusal of the show cause notices, we found that the petitioner was put on notice that it failed to submit the documents to prove the fulfilment of export obligation. It is also relevant to note that the show cause notice dated 01.12.2009 was in fact issued under Section 14 of the FTDR Act proposing to take action under Section 11(2) for non-fulfilment of export obligation against the advance licence dated 22.12.1999. Hence, the allegation that the show cause notices were silent about the action proposed has no factual basis. Therefore, the decisions cited on behalf of the appellant, i.e., Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd. (2006) 7 SCC 592; Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd. (2007) 8 SCC 89 and Commissioner of Central Excise v. Gas Authority of India Limited(2007) 15 SCC 91 are not relevant for adjudicating the case on hand.

The contention that the Directors of the appellant company should not have been made liable also deserves no consideration since none of the Directors approached this Court. For the aforesaid reasons, the appeal is devoid of merit and the same is accordingly dismissed.

14.12.2016	**GREAVES COTTON LTD. (APPELLANT) vs. UNITED MACHINERY & APPLIANCES (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 – Section 8 – Civil suit filed by plaintiff against defendant – Defendant initially sought time to file written statement thereafter defendant filed an application seeking reference to arbitration – Trial court rejected the application – Whether correct – Held, No.

Brief facts :

Appellant Greaves Cotton are manufacturers of, inter alia, diesel engines and Respondent United Machinery and Appliances are manufacturers of diesel generator sets. An agreement containing arbitration clause was executed between them for supply of diesel engines by the appellant to the respondent for using the same in the diesel gensets. The plaintiff-respondent filed civil suit seeking money decree towards the loss and damages suffered by it on account of alleged breach of contract on the part of defendant- appellant. After receiving notice from the court, the appellant moved an application seeking extension of time for eight weeks to file written statement and also invoked the arbitration clause contained in the agreement. Thereafter, the appellant moved application under Section 5 read with Section 8 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act"), in the suit seeking reference of the disputes between the parties forming the subject-matter of the suit, for arbitration, which was rejected by the Court on the ground that the appellant has, by moving application for extension of time to file written statement, waived its right to seek arbitration. Hence, this appeal through special leave.

Decision: Appeal allowed.

Reason:

The issue before us for consideration is whether filing of an application for extension of time to file written statement before a judicial authority constitutes – 'submitting first statement on the substance of the dispute' or not. In view of the law laid down by this Court, in Manna Lal Kedia& Ors. v. State of Bihar & Ors. AIR 2000 Pat 91; Rashtriya Ispat Nigam Ltd & Anr v. Verma Transport Co (2006) 7 SCC 275 and in Booz Allen and Hamilton Inc. v. SBI Homes Finance Ltd & Ors. (2011) 5 SCC 532, we find it difficult to agree with the High Court that in the present case merely moving an application seeking further time of eight weeks to file the written statement would amount to making first statement on the substance of the dispute. In our opinion, filing of an application without reply to the allegations of the plaint does not constitute first statement on the substance of the dispute. It does not appear from the language of sub- section (1) of Section 8 of the 1996 Act that the Legislature intended to include such a step like moving simple application of seeking extension of time to file written statement as first statement on the substance of the dispute. Therefore, in the facts and circumstances of the present case, as already narrated above, we are unable to hold that the appellant, by moving an application for extension of time of eight weeks to file written statement, has waived right to object to the jurisdiction of judicial authority.

From the order impugned, it also reflects that before disposing of application under Section 8 of the 1996 Act the High Court has not looked into questions as to whether there is an agreement between the parties; whether disputes which are subject-matter of the suit fall within the scope of arbitration; and whether the reliefs sought in the suit are those that can be adjudicated and granted in arbitration. In view of the above, we think it just and proper to request the High Court to decide the application afresh in the light of law laid down by this Court in para 19 of the judgment in Booz Allen and Hamilton (supra) except the point, which has already been answered in the present case by us. Accordingly the appeal is allowed.

12.01.2017	**THOUGHTWORKS INC (PETITIONER) vs. SUPER SOFTWAREPVT LTD & ANR (RESPONDENT)**	**DELHI HIGH COURT**

Arbitration and Conciliation Act, 1996 – Section 34 – Appellant's registered trademark – Infringement thereof by the respondent in its domain name arbitrator failed to consider certain valid issues in the award – Award passed against the appellant – Whether appeal to be allowed – Held, Yes.

Brief facts:

The Petitioner is engaged in the business of IT consulting, software development services and sale of proprietary software under its coined trademark/tradename "ThoughtWorks" since 1993. The Petitioner has registered its trademark ThoughtWorks in India in 2001 under class 9.

In 2015, the Petitioner became aware that the domain name "Thoughtworks.in" was registered by Respondent No. 1 when one of the analysts of the Petitioner accessed the website of Respondent No. 1 mistaking it to be the Petitioner's website. Immediately the Petitioner filed a complaint against Respondent No. 1 before NIXI under the ".In Domain Dispute Resolution Policy ("INDRP")" and the Procedure Rules of NIXI. The Respondent contested the above complaint. The arbitrator passed an award against the petitioner, against which the present appeal has been filed.

Decision: Petition allowed.

Reason:

Indeed, the learned Arbitrator does not appear to have drawn the attention of the Petitioner to the three different addresses appearing in the petition. However, the logical sequitur would be to seek the Petitioner's clarification. For some reason, the learned Arbitrator failed to do so. Not permitting a party to clarify the factual aspect might itself lead to a grave error that is fatal to the Award in terms of what could be seen as a procedural lapse. The learned Arbitrator also appears to have made a mistake about the trademark registration not having been produced. As pointed out by the Petitioner, it was annexed to the complaint itself as Annexure F.

The Petitioner was able to show that no sooner than he came to know of the above domain name, it took prompt action by filing a complaint with NIXI. More importantly, the learned Arbitrator appears to have come to an erroneous conclusion that the trademark "ThoughtWorks" did not belong to the Petitioner. Again, no opportunity was afforded to the Petitioner. The impugned domain name contains only the Petitioner's trademark and yet no finding was returned on whether there was any similarity. The decision in Stephen Koenig v. Arbitrator, National Internet Exchange of India & Anr 186 (2012) DLT 43, which was subsequently upheld by the Division Bench of this Court because of the fact that a mere delay in lodging the complaint would not disentitle the aggrieved party from proceeding against the 'squatter'.

The Court is satisfied that in the present case, the learned Arbitrator failed to apply his mind to the facts on record. Indeed, a copy of the trademark registration certificate of the Petitioner was enclosed with the complaint and yet the learned Arbitrator failed to have noticed this fact. In any event, the complaint itself contained details of its various registrations. If there was any doubt, the learned Arbitrator ought to have sought a clarification from the Petitioner on this aspect as well. Importantly, no finding was returned on whether the use of the domain name by Respondent No. 1 would lead to confusion and deception. With the domain name taking up the entire name of the Petitioner, there could be no doubt that the use of such domain name by the Respondent would be deceptively confusing and erroneously indicate a connection of Respondent No. 1 with the Petitioner when there is none.

For all of the aforementioned reasons, the Court is satisfied that the impugned Award is opposed to the fundamental policy of India as it has numerous glaring errors which appear on the face of the Award. Consequently, the Court sets aside the impugned Award and allows the petition but, in the circumstances, with no order as to costs.

14.02.2017	**FALCON PROGRESS LTD (DECREE HOLDER) vs. SARA INTERNATIONAL LTD. (JUDGMENT DEBTOR)**	**DELHI HIGH COURT**

Arbitration and Conciliation Act, 1996 – Execution of foreign award challenge as to validity of the contract – Whether tenable – Held, No.

Brief facts:

The above captioned petition has been filed by Falcon Progress Limited (hereafter 'FPL'), a company registered under the laws of Hong Kong, for enforcement of the foreign award dated 22.11.2012 as corrected by the award dated 21.12.2012 (hereafter 'the impugned award'). The impugned award was rendered by the sole arbitrator pursuant to arbitration proceedings conducted under the rules of Singapore International Arbitration Centre (SIAC) in respect of disputes between FPL and Sara International Ltd. (hereafter 'Sara'), the Judgment Debtor.

Sara has filed the present application under Section 48 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') inter alia praying that enforcement of the impugned award be declined.

Decision: Objections dismissed.

Reason:

The principal question to be considered is whether there was a concluded contract between the parties. The undisputed facts are that on 24.04.2009 at 03:33 p.m., Ms. Daisy Liu of FPL sent an e- mail to Mr. Gill of Sara attaching therewith a final version of the agreement for signing. The e-mail clearly stated: "Attached please fi nd the final version of the contract for signing. Please kindly send us the signed contract for counter-signing today with thanks". In response to the said mail, Mr. Gill of Sara sent an e-mail on 24.04.2009 at 6:23 p.m. attaching a signed copy of the agreement. Mr. Gill clearly stated: "Please find enclosed herewith signed contract. Kindly let us have the counter signed & stamped copy". Admittedly, the signed agreement was attached with the said mail. Thereafter, Ms. Daisy Liu sent another mail at 6:47 p.m. attaching a counter signed scanned copy of the agreement which was earlier signed and sent by Sara. The said mail, inter alia, reads as under:-

"Attached please fi nd the co-signed contract. We'll send you the LC format early next week. Please kindly nominate vessel asap so that we can determine the LC quantity and amount."

It is not disputed that the agreement attached with the mail of FPL was the same agreement which was subsequently signed on behalf of Sara and, thereafter, counter-signed on behalf of FPL. In the circumstances, the contention that the parties had only agreed to agree and there was no concluded contract between the parties is unsustainable. The Arbitral Tribunal had also considered the aforesaid contention and rejected the same.

A plain reading of the agreement indicates that all essential terms had been agreed to between the parties. The contention that since FPL had requested Sara to indicate the name of the vessel and the quantity for opening of the LC, the signed agreement attached with the mail could not be considered as a concluded contract, is unsustainable. FPL's request for nomination of the vessel and for informing the quantity of goods being shipped is not inconsistent with the terms of the agreement. Although, it is correct that FPL had agreed to open LC in favour of Sara within a period of seven days from signing of the contract to cover the entire value of shipment; the same is consistent with FPL's request to Sara to intimate the quantities to be shipped as well as the nominated vessel. In the present case, it is not disputed that the agreement attached with the emails referred hereinabove contained an arbitration clause and, therefore, the contention that there is no arbitration agreement between the parties is also devoid of any merits.

The next issue to be considered is whether the impugned award falls foul of the fundamental policy of Indian law inasmuch as the Arbitral Tribunal had awarded damages in favour of FPL. The finding of the Arbitral Tribunal that Sara had breached the agreement cannot be assailed in these proceedings. The said finding is final and binding. The only issue advanced was that award of damages without sufficient proof of loss would fall foul of the fundamental policy of Indian law.

Both the parties were ad idem that in case of breach of agreement, the damages to be awarded were to be measured in terms of Section 51(3) of the Sale of Goods Act, 1979 (UK). The controversies raised by Sara included the determination of the market value and the relevant date in reference to which the market value was to be determined. However, it is not disputed that the parties had agreed on a list of market prices on various dates which were drawn from Umetal Figures. On the basis of the said list, the Arbitral Tribunal determined the market value of the ore by making due adjustments including on account of moisture content. It is relevant to note that computation of the difference between the market value and the contracted value is not in dispute. No contentions have been advanced in this court assailing the aforesaid calculation. The only contention advanced is that since FPL had not procured the goods in question from another source at a higher value, no damages could be awarded to FPL. It was earnestly contended that FPL was a trader and, therefore, would have suffered actual loss only if it had further transacted the goods or had procured the goods at a higher price. The aforesaid contention is also unmerited. A trader is not required to show that it has procured the goods at a higher price in order to claim damages. It is sufficient for a trader to show that the market value of the goods promised to it had increased. It is well settled that the difference in the contracted value and the market value of the goods which the seller has failed to deliver represents the amount that the buyer must obtain to put itself in the position, it would have been if the agreement was duly performed by the seller. Thus, FPL is entitled to the difference between the market price and the contracted value of the goods as representing the damages actually suffered by FPL. The fact that the goods at the contracted value were not delivered to the trader would itself indicate that it had suffered a loss of drop in value. In view of the above, the application is dismissed.

25.05.2017	**COSMO FERRITES LTD. (PETITIONER) vs. PRAGYA ELECTRONICS PVT. LTD. & ORS. (RESPONDENTS)**	**DELHI HIGH COURT**

Arbitration and Conciliation Act, 1996 – Section 31(7) (a) – Interest on award arbitrator refused to allow interest on awarded sum – Whether correct – Held, No.

Brief facts:

CFL entered into a non-exclusive distributorship agreement dated 01.04.2005 (hereafter 'the Agreement") with PEPL, respondent herein for the supply of soft ferrites. Subsequently, the parties entered into annual agreements for the years 2007, 2008 and 2009. In terms of the Agreement, PEPL placed purchase orders on CFL for supply of goods, which in turn were sold by PEPL to its customers.

Dispute arose as to the payments and the issue was referred to arbitration. Although, the arbitral tribunal found that CFL was entitled to recover the aforesaid amount, it rejected CFL's claim for interest at the rate of 12.25% p.a. on the said awarded sum.

Decision: Appeal allowed.

Reason:

The principal issue to be addressed is whether the decision of the arbitral tribunal to reject CFL's claim for interest is sustainable. It is trite law that the arbitral tribunal cannot ignore the terms of the agreement between the parties. Section 28(3) of the Act mandates that the arbitral tribunal must decide in accordance with the contract between the parties. (See: Indian Hume Pipe Company Limited v. State of Rajasthan: (2009) 10 SCC 187). In the present case, there is no dispute that the Agreement expressly provided for interest on delayed payments. The arbitral tribunal has not found the aforesaid clause to be invalid or inapplicable. The arbitral tribunal has also not indicated any reason as to why the aforesaid clause ought to be ignored. The arbitral tribunal is bound to make award in terms of the Agreement between the parties and there is no indication as to why the arbitral tribunal has rejected CFL's claim for interest. In the case of State of Haryana & Ors. v. S. L. Arora & Co (2010) 3 SCC 690, the Supreme Court had expressly held as under:-

"24.2 The authority of the Arbitral Tribunals to award interest under Section 31(7) (a) is subject to the contract between the parties and the contract will prevail over the provisions of Section 31(7) (a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the Arbitral Tribunal will have to grant or refuse interest, strictly in accordance with the contract. The Arbitral Tribunals cannot ignore the contract between the parties, while dealing with or awarding pre- award interest. Where the contract does not prohibit award of interest, and where the arbitral award is for payment of money, the arbitral tribunal can award interest in accordance with Section 31(7)(a) of the Act, subject to any term regarding interest in the contract."

The aforesaid decision was overruled by the Supreme Court in its later decision in Hyder Consulting (UK) Ltd. v. Governor, State of Orissa: (2015) 2 SCC 189, albeit, only to the extent that interest under Section 31(7) (b) of the Act would also be payable on any interest included in the sum awarded under Section 31(7) (a) of the Act. However, the view that contractual stipulations as to interest cannot be ignored by the arbitral tribunal is good law and the decision of the Supreme Court in S. L. Arora (supra) continues to be a binding precedent.

Having stated the above, it is also necessary to observe that the arbitral tribunal would still have the discretion to award interest in cases where the contract is silent. However, such discretion would have to be exercised objectively keeping in view, the facts of the case. In cases where the contract expressly provides that interest would be payable on sums withheld, the arbitral tribunal would be bound to award the same unless there are good reasons to not to do so.

In the present case, the impugned award does not indicate any reason as to why CFL's claim for interest has been rejected. This Court is hard pressed to find any discernible reason from the facts and circumstances, as discussed in the impugned award, as to why interest on the amount awarded has been denied to CFL. The arbitral tribunal has also ignored the provisions of the Agreement, which expressly entitles CFL to claim interest not exceeding the rate of 14% p.a. for any delay in payment. In view of the above, the petition is liable to be allowed and the impugned award is liable to be set aside to the extent of rejection of CFL's claim for interest at

the rate of 12.25% p.a. from the date of invoices till the date of the impugned award. In view of the above, the impugned award is set aside to the extent as indicated above. The petition is, accordingly, disposed of.

07.06.2017	**DELHI METRO RAIL CORPORATION LTD. (APPELLANT) vs. DELHI AIRPORT METRO EXPRESS PVT. LTD. (RESPONDENT)**	**DELHI HIGH COURT**

Arbitration and conciliation Act, 1966 – Award in favour of respondent – Single judge directs deposit of Rs.65 crores with the bank of Respondent to cover interest charges – Whether tenable – Held, Yes.

Brief facts:

Disputes arose between the parties in respect of the contract relating to the airport metro line. The Arbitral Tribunal has rendered an Award in favour of the respondent in the sum of Rs.4670 crores including interest till the date of the Award. The appellant DMRC, moved the High court against the award.

In the order dated 30.05.2017 (hereinafter referred to as "the impugned order") the learned Single Judge has directed the respondent/appellant herein to pay a sum of Rs.60 crores directly to Axis Bank who is stated to be the lead lending bank to the petitioner (before learned Single Judge and respondent herein) to protect the rights of the appellant herein, the respondent has been directed to furnish an unconditional bank guarantee to the extent of Rs. 65 crores which would cover the factor of interest at the rate of 12% per annum should the appellant herein succeed. The appellant challenged this order before the Division Bench.

Decision: Appeal dismissed.

Reason:

We have heard the learned counsel for the parties. We find no force in the submission of learned counsel for the appellant that the present petition under Section 9 of the Act is premature. The submission of the petitioners is premised in the language of Section 36 which stipulates that only after the expiry of time for making an application to set aside the arbitral award under Section 34 has expired, the award is deemed to be a decree of the Court. According to the learned counsel for the appellant, there is no decree as on date. This submission is not acceptable in view of the express language of Section 9 itself. From the aforegoing, it is clear that the power vested in the Court may be exercised when the proceedings before the Arbitrator are either "contemplated", "pending" or even "completed". The present case is one under the third category and the Court has the power to order interim measures after the passing of the award, but before its enforcement in accordance with Section 36 of the Act. Hence, the Court was clearly vested with the power to grant interim measures prior to the award becoming a deemed decree under Section 36 of the Act. We may notice that the order dated 30.05.2017 is only an interim order and all the issues sought to be raised by the parties have been kept open to be considered by the learned Single Judge on the next date of hearing as is evident upon reading of the order dated 30.05.2017. We find no grounds to interfere in the impugned order passed by the learned Single Judge, firstly, for the reason that order dated 30.05.2017 is an interim order by which the appellant herein has been directed to deposit Rs.60 crores out of an award in favour of the respondent in the sum of Rs.4670 crores; secondly, for the amount to be deposited, the respondent has been directed to provide the bank guarantee of Rs.65 crores which would cover the interest on Rs.60 crores to be deposited by the appellant herein; and thirdly, this amount is to be paid directly to the Axis Bank keeping in view the large sums of interest to be paid by the respondent (Rs.65 lakh per day/Rs.20 crores per month) and also for the reason that all the grounds sought to be urged have been kept open to be decided by the learned Single Judge. Accordingly, the present appeal as well as the application is dismissed.

02.06.2017	**ESSAR PROJECTS (INDIA) LTD. (PETITIONER) vs. INDIAN OIL CORPORATION LTD. & ANR. (RESPONDENTS)**	**DELHI HIGH COURT**

Arbitration and Conciliation Act, 1996 – Dispute between the parties – Respondent was about to encash

the bank guarantees given by petitioner – Whether respondent could be restrained from encashing the guarantees – Held, No.

Brief facts:

By the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner inter alia prays for restraining the respondents from encashing bank guarantees no.160004IBGA00036 and 16000IBGA00037 dated 28.03.2016.

Decision: Petition dismissed.

Reason:

The only ground urged before this Court is that special equities exist in favour of the petitioner entitling it to an injunction against the respondents on the grounds that extensions of time were granted by the respondent no.1, the amount due from the petitioner has not been computed and that on the contrary, IOC owes about 900 crores to the petitioner therein.

The scope of interference by courts in the invocation of the bank guarantees is no longer res integra. It has been repeatedly held that, especially in cases of unconditional bank guarantees, the court should not interfere unless the petitioner is able to establish fraud of egregious nature or is able to plead special equities. I need not burden my opinion with numerous judicial pronouncements, suffice it to reproduce the relevant paragraphs of a judgment of this very Court in CWHEC-HCIL (JV) v. Calcutta Haldia Port Road Co. Ltd. & Ors., ILR (2008) 1 Del 353.

The first question which arises for consideration is whether the two bank guarantees which are identical in nature are unconditional or not. Reading of the terms of the bank guarantee, more particularly the clauses extracted in paragraph 20 aforegoing, leave no room for doubt that the petitioner had provided unconditional bank guarantees to the respondent no.1.

As regards, the submission that the respondent no.1 has acted as an arbiter in its own cause and decided the quantum of damages unilaterally, the question, in my view, stands fully answered in the case of Hindustan Steelworks Construction Ltd. v. Tarapore & Co. and Another, (1996) 5 SCC 34. In the case, the appellant had granted a contract for construction of civil works in a steel plant to the contractor, which despite extensions was unable to complete the project within the stipulated time and the appellant rescinded the contract. As per the terms of the contract, the appellant assessed the loss/damages and invoked the bank guarantees. The contractor rushed before the Trial Court praying for an injunction restraining the appellant from invoking the bank guarantees to no avail and then approached the Andhra Pradesh High Court alleging that since the bank guarantees were given for securing due performance, the same would be encashable only after the arbitrators decide the factum of breach as well as the damage suffered. The High Court reversed the decision of the Trial Court finding that the liability to pay damages would arise only after it is established that there is a breach of contract and same could be ascertained by the arbitrator. This did not find favour with the Apex Court, which allowed the appeals by observing as under:

"We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/ Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter- claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant

from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees."

Even the other grounds urged by the learned senior counsel for the petitioner fail to establish a case of special equities. The attribution of the guilt for the delay and the consequent or other claims of the petitioner can be adjudicated before the arbitral tribunal. Further, the respondent no.1 being an instrumentality of the state, there is no danger of the petitioner being unable to recover any amounts it claims should the same be awarded to it in the arbitral proceedings. I may also note that similar grounds pertaining to outstanding bills, amounts and attribution of blame for delay in execution of project were raised before this Court in CWHEC-HCIL (JV) and were rejected (paragraphs 2-4, 19, 41 and 44).

In the present case, the petitioner has not been able to establish any special equities in claim or counter claim on behalf of the petitioner against a ground to stay the bank guarantee which is an independent document. Therefore, I find no grounds to stay the invocation of the two bank guarantees.

15.11.2016	**ANANTHESH BHAKTA (APPELLANTS) vs. NAYANA S. BHAKTA & ORS. RESPONDENTS)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1966 – Disputes between partners unregistered partnership – Partnership deed as well as retirement deed provided for arbitration – Whether arbitration proceedings could be refused on the ground that partnership is unregistered – Held, No.

Brief facts:

Facts are complicated and elaborate. Suffice to state that disputes arose between the partners of an unregistered partnership firm and a suit was filed to resolve the dispute, in which the defendants have filed an application seeking to refer the dispute to arbitration as the partnership deed as well as the retirement deed contained arbitration clause.

Decision: Appeal dismissed.

Reason:

After considering the submissions of learned counsel for the parties and perusing the records, the court framed the following three issues and answered them accordingly.

(1) Whether non-filing of either original or certified copy of retirement deed and partnership deed along with application I.A.No. IV dated 09.05.2014 entailed dismissal of the application as per section 8(2) of 1996 Act.

In the present case as noted above, the original Retirement Deed and Partnership Deed were filed by the defendants on 12th May and it is only after filing of original deeds that Court proceeded to decide the application I.A.No. IV. In the present case it is relevant to note the Retirement Deed and Partnership Deed have also been relied by the plaintiffs. Hence, the argument of plaintiffs that defendants' application I.A.No. IV was not accompanied by original deeds, hence, liable to be rejected, cannot be accepted. We are thus of the view that the appellants submission that the application of defendants under Section 8 was liable to be rejected, cannot be accepted.

(2) Whether the fact that all the parties to the suit being not parties to the retirement deed/partnership deed, the Court was not entitled to make the reference relying on arbitration agreement. The plaintiffs admittedly are parties to the arbitration agreement as noted above. It does not lie in their mouth to contend that since one of the defendants whom they have impleaded was not party to the arbitration agreement, no reference can be made to the arbitrator. In the facts of the present case, it cannot be said that merely because one of the defendants i.e. defendant no. 6 was not party to the arbitration agreement, the dispute between the parties which essentially relates to the benefits arising out of Retirement Deed and Partnership deed cannot be referred.

Learned District Judge has noted that defendant no.6 has not inherited any share either in Partnership deed or in the schedule property and hence there is no question of bifurcation of either cause of action or parties. We fully endorse the above view taken by Learned District Judge.

(3) Whether dispute pertaining to unregistered partnership deed cannot be referred to an arbitration despite there being arbitration agreement in the deed of retirement/partnership deed. The submission by the petitioner is that partnership being an unregistered partnership, no reference can be made to the arbitration. In the present case there is no dispute between the parties that both Retirement deed and Partnership deed contain an arbitration clause. In Retirement deed which had been signed by retiring partners, continuing partners and concurring partners, following was stated in clause 8:

"...In case of any dispute or difference arising between the parties, regarding the interpretation of the contents of this Deed of Retirement or any other matter or transactions touching the said retirement, it shall be referred to an arbitration under the provisions of the Arbitration & Conciliation Act, 1996."

When the partners and those who claim through partners agreed to get the dispute settled by arbitration, it is not open for the appellants to contend that partnership being unregistered partnership, the dispute cannot be referred.

The petitioners have not been able to show any statutory provision either in 1996 Act or in any other statute from which it can be said that dispute concerning unregistered partnership deed cannot be referred to arbitration. We thus do not find any substance in the third submission of the appellant.

In the result, we do not find any merit in this appeal which is accordingly dismissed.

14.07.2017	**NEWGEN SPECIALTY PLASTIC LTD. (APPELLANT) vs. INTEC CAPITAL LTD. (APPELLANT)**	**DELHI HIGH COURT**

Arbitration and conciliation Act, 1996 – Section 37 – Ex parte award – Liability to repay the loan proved by evidence – Whether the award could be interfered – Held, No.

Brief facts:

The appellant/objector had obtained a loan of Rs.3 crores from the respondent for purchase of equipment for its business. Appellant also tendered a collateral security for a sum of Rs.90,00,000/-. Since the appellant failed to pay the monthly instalments on time, hence there arose dues of Rs.2,80,25,074/-, and to recover which claim the respondent/lender invoked arbitration proceedings.

Appellant/applicant appeared in the arbitration proceedings on some dates but thereafter failed to appear and hence was proceeded ex-parte and the impugned award was passed decreeing the recovery of the amount along with interest but subject to adjustment to be granted to the appellant with respect to the collateral amount of Rs.90,00,000/-

Appellant challenged the impugned award by filing objections before the court below under Section 34 of the Act, and which have been dismissed by the impugned judgment, hence the present appeal.

Decision : Appeal dismissed.

Reason :

Once, it is established by the respondent by leading evidence that appellant had taken a loan, that there was default in re- payment of the loan amount as there was default of the payment of monthly instalments, i.e. the respondent proved its claim in the arbitration proceedings, the impugned award dated 11.2.2016 could not have been interfered with by the court below under Section 34 of the Act. The court below could not have interfered with such an award not only because a court hearing objections does not sit as an appellate court to re-apprise the evidence as also findings of facts and conclusions, but also because even if the court below

hearing objections was a civil court, yet the impugned award even as a decree could not have been set aside as the Respondent's entitlement was proved for recovery of the amount taken as loan (but not repaid) with the agreed rate of interest.

Learned counsel for the appellant firstly argued that it was the duty of the respondent/lender first to adjust the amount due by sale of hypothecated equipment, however when I put a query to counsel for the appellant that whether the appellant had returned the machinery to the respondent, it is conceded that the machinery/ equipment purchased by the appellant, by utilization of the loan granted, have not being returned to the respondent.

Learned counsel for the appellant then argued that the respondent is liable to adjust the security amount, and to which there is no dispute, because, arbitrator as per the impugned award while granting relief as per para 8 directed recovery of the amount due only after adjustment of the amount of Rs.90,00,000/-.

Though, learned counsel for the appellant argued that the amount of Rs.90,00,000/- had to bear interest, however, this plea could only have been taken before this Court if the appellant had taken such a plea in the arbitration proceedings, and substantiated the same, but once the appellant chooses to remain ex-parte in the arbitration proceedings, a plea on merits which is not raised before the arbitration proceedings cannot be raised before the court hearing objections under Section 34 of the Act and much less this appellate court having appeal against the dismissal of objections.

Accordingly, this Court cannot adjudicate the issues on merits which were not addressed in the arbitration proceedings. In view of the above discussion, there is no merit in the appeal and the same is hereby dismissed.

19.06.2017	**KANCHAN UDYOG LTD. (APPELLANT) vs. UNITEDSPIRITS LTD . (RESPONDENT)**	**SUPREME COURT OF INDIA**

Indian contract Act,1872 – Section 73 – Damages towards loss of anticipated profits – Bottling contract – Termination thereof by brand owner – Bottler filed suit claiming damages for loss of anticipated profits – Trial court decreed the suit while High Court reversed it – Whether the plaintiff is entitled damages for loss of anticipated profits – Held, No.

Brief facts :

The appellant entered into an agreement with the respondent for establishment of a non-alcoholic beverages bottling plant. The concentrate (Essence), for preparation of the non-alcoholic beverage, was to be supplied by the respondent. The beverage was to be sold in specified districts of West Bengal, as provided for in the marketing agreement.

The bottler's agreement was terminated by the respondent. Commercial production at the plant ceased and the suit was instituted by the appellant in 1990. The learned Single Judge decreed the Suit, awarding damages towards loss of anticipated profits, and towards costs for installation of the plant, after deducting Rs.9.05 lakhs payable by the appellant to the respondent as consultancy charges. The respondent was held liable to pay to the appellant a sum of Rs.4,24,33,000/- with interest @ 10% from the date of suit till payment. The Division Bench in appeal reversed the decree, and dismissed the Suit. Hence the present appeal to the Supreme Court.

Decision : Appeal dismissed.

Reason :

In the facts of the present case, it cannot be held that the breach alone was the cause for loss of anticipated profits, much less was it the primary or dominant reason. The appellate court has adequately discussed the appellant's letter dated 04.07.1987 thanking the respondent for its advertising support. During the year 1986-87, the respondent spent Rs. 2,05,13,376.14 for advertising purposes evident from its balance sheet. Similarly, in 1987-88, it spent Rs. 1,65,87,158.73 towards advertisement and sale promotions. On the contrary, for the

year ending 31.03.1987, the appellant spent Rs.6,68,856.00 towards advertisement and in the year 1987-88 it spent only Rs.39,288.00. The fact that it was unable to pay for the concentrates seeking deferred payment, acknowledgement on 09.05.1988 that it would continue to suffer loss for the next six years upto 1992-93 seeking long term credit for five years for supply of concentrates and its acknowledgement in letter dated 27.04.1987 that due to "many factors already discussed with you we have not been able to run the factory and the sales of our product have not picked up in the market", and not to press for payment of consultancy fees, failure to deploy adequate manpower as per its own projections demonstrates the poor financial condition of the appellant as the prime reason for its inability to run the plant and earn profits. As against a value of Rs.4,26,685.19 of raw materials in 1989, the appellant had an over draft of Rs.13,89,000.00. It had a credit entry of Rs.5,135.00 only in July, 1988 in its account with the State Bank of India. The current account with the Union Bank of India reflected a balance of Rs.1,28,619.25 on 28.03.1989. The Bank balance on 31.03.1989 reflected from its balance sheet was only Rs.43,345.38, and its loss as reflected in the balance sheet on 31.03.1987 was Rs.18,47,018.11. In the facts of the present case, it cannot be held that the breach by the respondent was the cause, much less the dominant cause for loss of anticipated profits by the appellant.

The appellate court with reference to evidence has adequately discussed that the appellant failed to take steps to mitigate it losses under the Explanation to Section 73 of the Act. We find no reason to come to any different conclusion from the materials on record. If concentrates were available from M/s. VEC, the appellant had to offer an explanation why it stopped lifting the same after having done so for nearly a year, and could have continued with the business otherwise and earned profits. It could also have taken steps to sell the unit after its closure in May, 1989 rather than to do so belatedly in 1996. No reasonable steps had been displayed as taken by the appellant for utilisation of its bottling plant by negotiations with others in the business. Nothing had been demonstrated of the injury that would have been caused to it thereby.

That leaves the question with regard to reliance loss and the expectation loss. Whether the two could be maintainable simultaneously or were mutually exclusive? In Pullock & Mulla, 14th Edition, Volume II, page 1174, the primary object for protection of expectation interest, has been described as to put the innocent party in the position which he would have occupied had the contract been performed. The general aim of the law being to protect the innocent party's defeated financial expectation and compensate him for his loss of bargain, subject to the rules of causation and remoteness. The purpose of protection of reliance interest is to put the plaintiff in the position in which he would have been if the contract had never been made. The loss may include expenses incurred in preparation by the innocent party's own performance, expenses incurred after the breach or even pre-contract expenditure but subject to remoteness.

In view of the conclusion, that the appellant was not entitled to any expectation loss towards anticipated profits, for reasons discussed, any grant of reliance loss would tantamount to giving a benefit to it for what was essentially its own lapses. There are no allegations of any deficiency in the plant. Contrary to its claim of Rs.2.52 crores towards cost of the plant, the learned Single Judge awarded Rs.1.60 crores without any discussion for the basis of the same. Though the appellant had preferred a cross appeal, it did not press the same.

The aforesaid discussion leads to the inevitable conclusion that the appellant had failed to establish its claim that the breach by the respondent was the cause for loss of anticipated profits, that the profitability projection in its loan application was a reasonable basis for award of damages towards loss of anticipated profits. The appellant had failed to abide by its own obligations under Exhibit 'C' and lacked adequate infrastructure, finances and manpower to run its business. It also failed to take reasonable steps to mitigate its losses. The appeal lacks merit and is dismissed.

10.10.2017	**M/S DURO FELGUERA S.A (PETITIONER) vs.GANGAVARAM PORT LIMITED (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 – Five different contracts and one MoU – Each contract contained arbitration clause – Whether single arbitration tribunal could be appointed to resolve all the disputes arose in these six contracts – Held, No.

Brief Facts:

The Respondent GPL intended to expand its facilities in the Port with respect to Bulk Material Handling Systems. This included Engineering, Design, Procurement of Materials, Manufacturing, Supply, Erection, Testing and Commissioning of Bulk Material Handling Systems, as well as all other associated works and integration of the same with the existing coal handling systems etc. After post-bid negotiations, the petitioner Duro Felguera and its subsidiary (FGI) were considered by GPL and Duro Felguera and FGI were selected as "the Contractors" for the work.

After discussion between the parties, the main contract i.e. Original Package No. 4 TD was divided into five different and separate Packages.Separate Letters of Award for five different Packages were issued to M/s Duro Felguera, S.A. and the Indian Subsidiary-FGI for the above said work respectively.

Each of the Packages has special conditions of contract as well as general conditions of contract. Each one of the Contract/Agreement for works under split-up Packages contains an arbitration clause namely sub- clause 20.6. Duro Felguera had also entered into a Corporate Guarantee dated 17.03.2012 guaranteeing due performance of all the works awarded to Duro Felguera and FGI. The said Corporate Guarantee had its own arbitration clause namely clause (8).

In addition, Duro Felguera and FGI have executed a tripartite Memorandum of Understanding with GPL. In the said MoU, Duro Felguera and FGI have agreed to carry out the works as per the priority of documents listed therein.

Dispute arose between the parties. GPL contended that all the five contracts are composite contract and one arbitration tribunal should be appointed. On the other hand, Petitioner contended that all five contracts are separate contracts and different arbitration tribunals should be appointed.

Decision : Different arbitration tribunals appointed.

Reason :

The learned Senior Counsel for GPL relied upon *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc. & Ors.* (2013) 1 SCC 641, to contend that where various agreements constitute a composite transaction, court can refer disputes to arbitration if all ancillary agreements are relatable to principal agreement and performance of one agreement is so intrinsically interlinked with other agreements. Even though Chloro Controls has considered the doctrine of "composite reference", "composite performance" etc., ratio of Chloro Controls may not be applicable to the case in hand. In Chloro Controls, the arbitration clause in the principal agreement i.e. clause (30) required that any dispute or difference arising under or in connection with the principal (mother) agreement, which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with Rules of ICC. The words thereon "under and in connection with" in the principal agreement was very wide to make it more comprehensive. In that background, the performance of all other agreements by respective parties including third parties/ non- signatories had to fall in line with the principal agreement. In such factual background, it was held that all agreements pertaining to the entire disputes are to be settled by a "composite reference".

The case in hand stands entirely on different footing. As discussed earlier, all five different Packages as well as the Corporate Guarantee have separate arbitration clauses and they do not depend on the terms and conditions of the Original Package No.4 TD nor on the MoU, which is intended to have clarity in execution of the work.

Duro Felguera being a foreign company, for each of the disputes arising under New Package No.4 and Corporate Guarantee, International Commercial Arbitration Tribunal are to be constituted. M/s. Duro Felguera has nominated Mr. Justice D.R. Deshmukh (Former Judge of Chhattisgarh High Court) as their arbitrator. Gangavaram Port Limited (GPL) has nominated Mr. Justice M.N. Rao (Former Chief Justice of Himachal Pradesh High Court). Along with the above two arbitrators Mr. Justice R.M. Lodha, Former Chief Justice of India is appointed as the Presiding Arbitrator of the International Commercial Arbitral Tribunal.

Package No.6 (Rs.208,66,53,657/-); Package No.7 (Rs.59,14,65,706/-); Package No.8 (Rs.9,94,38,635/-); and Package No.9 (Rs.29,52,85, 558/-) have been awarded to the Indian company-FGI. Since the issues arising between the parties are inter-related, the same arbitral tribunal, Justice R.M. Lodha, Former Chief Justice of India, Justice D.R. Deshmukh, Former Judge of Chhattisgarh High Court and Justice M. N. Rao, Former Chief Justice of Himachal Pradesh High Court, shall separately constitute Domestic Arbitral Tribunals for resolving each of the disputes pertaining to Packages No.6, 7, 8 and 9.

12.10.2017	**HIMANGNI ENTERPRISES (APPELLANT) vs. KAMALJEET SINGH AHLUWALIA (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and conciliation Act, 1996 – Section 8 – Tenancy contract – Arbitration clause in the contract – Landlord initiated civil proceedings for eviction – Civil court refused to refer the parties to arbitration – Whether correct – Held, Yes.

Brief facts :

The appellant is the defendant whereas the respondent is the plaintiff in a civil suit out of which this appeal arises. The respondent has filed a civil suit against the appellant in the district Court for eviction and for recovery of unpaid arrears of rent and grant of permanent injunction.

The appellant, on being served with the notice of the civil suit, filed an application under Section 8 of the Arbitration and conciliation Act, 1996 [the Act] on the ground that the suit was founded on the lease deed, which contained an arbitration clause for resolving the dispute arising out of the lease deed between the parties, and when admittedly the disputes had arisen in relation to the suit premises, the same were governed by the terms of the lease deed. The trial court rejected the application. On appeal High court also dismissed the appeal. Hence the present appeal.

Decision : Appeal dismissed.

Reason :

In our considered opinion, the question involved in the appeal remains no longer res integra and stands answered by two decisions of this Court in *Natraj Studios (P) Ltd. v. Navrang Studios & Anr, 1981(1) SCC 523* and *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors., (2011) 5 SCC 532* against the appellant and in favour of the respondent.

So far as Natraj Studio's case (supra) is concerned there also, the landlord had filed a civil suit against the tenant in the Small Causes Court, Bombay claiming therein the tenant's eviction from the leased premises. There also, the tenant was inducted pursuant to "leave and license" agreement executed between the landlord and the tenant. This Court (Three Judge Bench) speaking through Justice O. Chinnappa Reddy rejected the application filed by the tenant under Section 8 of the Act and held, inter alia, that the civil suit filed by the landlord was maintainable. It was held that the disputes of such nature cannot be referred to the arbitrator.

Yet in another case of *Booz Allen & Hamilton Inc.* (supra), this Court (two Judge Bench) speaking through R. V. Raveendran J. laid down the following proposition of law after examining the question as to which cases are arbitrable and which are non-arbitrable:

"36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes." (emphasis supplied)

Keeping in view the law laid down by this Court in aforementioned two decisions and applying the same to

the facts of this case, we have no hesitation to hold that both the Courts below were right in dismissing the appellant's application filed under Section 8 of the Act and thereby were justified in holding that the civil suit filed by the respondent was maintainable for grant of reliefs claimed in the plaint despite parties agreeing to get the disputes arising therefrom to be decided by the arbitrator.

The Delhi Rent Act, which deals with the cases relating to rent and eviction of the premises, is a special Act. Though it contains a provision (Section 3) by virtue of it, the provisions of the Act do not apply to certain premises but that does not mean that the Arbitration Act, ipso facto, would be applicable to such premises conferring jurisdiction on the arbitrator to decide the eviction/rent disputes. In such a situation, the rights of the parties and the demised premises would be governed by the Transfer of Property Act and the civil suit would be triable by the Civil Court and not by the arbitrator. In other words, though by virtue of Section 3 of the Act, the provisions of the Act are not applicable to certain premises but no sooner the exemption is withdrawn or ceased to have its application to a particular premises, the Act becomes applicable to such premises. In this view of the matter, it cannot be contended that the provisions of the Arbitration Act would, therefore, apply to such premises. In view of foregoing discussion, we find no merit in the appeal, which fails and is accordingly dismissed.

05.01.2018	**INNOX WIND LTD. (APPELLANT) vs. THERMOCABLESLTD. (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation act, 1996 – Appointment arbitrator – Purchase orders – Standard terms and conditions containing arbitration clause attached to the purchase orders – Disputes between the parties – whether arbitrator could be appointed – Held, Yes.

Brief facts :

Two purchase orders were issued by the Appellant to the Respondent for supply of cables for their WTGs. According to the Purchase Order, the supply was to be according to the terms mentioned in the order and the Standard Terms and Conditions that were attached thereto. Apart from the other conditions, the Standard Terms and Conditions contain a clause pertaining to dispute resolution. The said clause provides for a dispute to be resolved by a sole arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The material on record indicates that the Respondent accepted all the terms and conditions mentioned in the Purchase Order except the delivery period.

As dispute arose between the parties as to the quality of the cables, Appellant invoked the arbitration clause to resolve the disputes and issued a notice dated proposing the name of a sole arbitrator in terms of the Standard Terms and Conditions. In the absence of any response, the Appellant moved the High Court of Judicature at Allahabad by filing an application under Section 11 (6) of the Act.

The High Court dismissed the said application by holding that an arbitrator cannot be appointed as the Appellant did not prove the existence of an arbitration agreement. Aggrieved, the appellant approached the Supreme Court.

Decision : Appeal allowed.

Reason :

We are of the opinion that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. In M.R. Engineers this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. In view of the development of law after the judgment in M.R. Engineers' case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from Russell on

Arbitration 24th Edition (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in M.R. Engineers' case. We are in agreement with the judgment in M.R. Engineer's case with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.

In the present case, the purchase order was issued by the Appellant in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The Respondent by his letter dated 15.12.2012 confirmed its acceptance of the terms and conditions mentioned in the purchase order except delivery period. The dispute arose after the delivery of the goods. No doubt, there is nothing forthcoming from the pleadings or the submissions made by the parties that the standard form attached to the purchase order is of a trade association or a professional body. However, the Respondent was aware of the standard terms and conditions which were attached to the purchase order. The purchase order is a single contract and general reference to the standard form even if it is not by a trade association or a professional body is sufficient for incorporation of the arbitration clause.

For the aforementioned reasons, the appeal is allowed and the judgment of the High Court is set aside. Justice Sushil Harkauli is appointed as the Arbitrator to adjudicate the dispute between the parties.

23.01.2018	**INDIAN FARMERS FERTILIZER COOPERATIVE LTD. (APPELLANT) vs. M/S.BHADRA PRODUCTS**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 – Arbitrator deciding the issue of limitation – Whether an interim award amenable to challenge under appeal – Held, Yes.

Brief facts :

An interesting question arises as to whether an award delivered by an Arbitrator, which decides the issue of limitation, can be said to be an interim award, and whether such interim award can then be set aside under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

Decision : Appeal allowed.

Reason :

Tested in the light of the statutory provisions and the case law cited above, it is clear that as the learned Arbitrator has disposed of one matter between the parties i.e. the issue of limitation finally, the award dated 23rd July, 2015 is an "interim award" within the meaning of Section 2(1) (c) of the Act and being subsumed within the expression "arbitral award" could, therefore, have been challenged under Section 34 of the Act.

However, Shri Sinha has argued before us that the award dated 23rd July, 2015 being a ruling on the arbitral tribunal's jurisdiction would fall within Section 16 of the Act, and inasmuch as the decision taken on the point of limitation was rejected, the drill of Section 16must be followed in which case all other issues have to be decided first, and it is only after such issues are decided that such an award can be challenged under Section 34 of the Act. Section 16 of the Act lays down what, in arbitration law, is stated to be the Kompetenz-kompetenz principle, viz. that an arbitral tribunal may rule on its own jurisdiction. At one time, the law was that the arbitrator, being a creature of the contract, could not rule on the existence or validity of the arbitration clause contained in the contract. This, however, gave way to the Kompetenz principle which was adopted by the UNCITRAL Model Law.

In our view, therefore, it is clear that the award dated 23 rd July, 2015 is an interim award, which being an arbitral award, can be challenged separately and independently under Section 34 of the Act. We are of the view that such an award, which does not relate to the arbitral tribunal's own jurisdiction under Section 16, does not have to follow the drill of Section 16(5) and (6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award.

Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.

The appeal is, accordingly, allowed and the impugned judgment is set aside. The Section 34 proceedings before the District Judge, Jagatsinghpur may now be decided. There shall, however, be no order as to costs.

14.12.2017	**TOYOTA JIDOSHA KABUSHIKI KAISHA vs. PRIUS AUTO INDUSTRIES LTD & ORS. (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Trademarks Act – Prior use of trademark – Use in a particular territory – What to be established to claim prior user right – Supreme Court explains the law.

Brief facts :

The appellant is the owner of the trademarks 'TOYOTA', 'TOYOTA INNOVA', 'TOYOTA DEVICE' and the mark 'Prius' of which the plaintiff claimed to be a prior user. The dispute between the appellant and respondent with respect to the use of the above trademarks ultimately decided by the Delhi High Court which refrained the respondent to use the trademarks 'TOYOTA INNOVA', 'TOYOTA DEVICE' but allowed to use the trademark 'Prius. Aggrieved by the decision, the appellant had challenged the decision before the Supreme Court.

Decision : Appeal dismissed.

Reason :

At the very outset it must be clarified that in view of the virtual acceptance of the conditional order of injunction with regard to the 'TOYOTA', 'TOYOTA INNOVA' and 'TOYOTA DEVICE MARKS' by the defendants, the truncated scope of the present appeal would be confined to the correctness of the views of the Division Bench of the High Court with regard to the use of the name 'Prius' and specifically whether by use of the said name/ mark to market the automobile spare parts manufactured by them, the defendants are guilty of passing off their products as those of the plaintiff thereby injuring the reputation of the plaintiff in the market.

Indeed, the trade mark 'Prius' had undoubtedly acquired a great deal of goodwill in several other jurisdictions in the world and that too much earlier to the use and registration of the same by the defendants in India. But if the territoriality principle is to govern the matter, and we have already held it should, there must be adequate evidence to show that the plaintiff had acquired a substantial goodwill for its car under the brand name 'Prius' in the Indian market also. The car itself was introduced in the Indian market in the year 2009-2010. The advertisements in automobile magazines, international business magazines; availability of data in information- disseminating portals like Wikipedia and online Britannica dictionary and the information on the internet, even if accepted, will not be a safe basis to hold the existence of the necessary goodwill and reputation of the product in the Indian market at the relevant point of time, particularly having regard to the limited online exposure at that point of time, i.e., in the year 2001.

The news items relating to the launching of the product in Japan isolatedly and singularly in the Economic Times (Issues dated 27.03.1997 and 15.12.1997) also do not firmly establish the acquisition and existence of goodwill and reputation of the brand name in the Indian market. Coupled with the above, the evidence of the plaintiff's witnesses themselves would be suggestive of a very limited sale of the product in the Indian market and virtually the absence of any advertisement of the product in India prior to April, 2001. This, in turn, would show either lack of goodwill in the domestic market or lack of knowledge and information of the product amongst a significant section of the Indian population.

While it may be correct that the population to whom such knowledge or information of the product should be available would be the section of the public dealing with the product as distinguished from the general population, even proof of such knowledge and information within the limited segment of the population is not prominent. All these should lead to us to eventually agree with the conclusion of the Division Bench of the High Court that the brand name of the car Prius had not acquired the degree of goodwill, reputation and the

market or popularity in the Indian market so as to vest in the plaintiff the necessary attributes of the right of a prior user so as to successfully maintain an action of passing off even against the registered owner. In any event the core of the controversy between the parties is really one of appreciation of the evidence of the parties; an exercise that this Court would not undoubtedly repeat unless the view taken by the previous forum is wholly and palpably unacceptable which does not appear to be so in the present premises.

If goodwill or reputation in the particular jurisdiction (in India) is not established by the plaintiff, no other issue really would need any further examination to determine the extent of the plaintiff's right in the action of passing off that it had brought against the defendants in the Delhi High Court. Consequently, even if we are to disagree with the view of the Division Bench of the High Court in accepting the defendant's version of the origin of the mark 'Prius', the eventual conclusion of the Division Bench will, nonetheless, have to be sustained. We cannot help but also to observe that in the present case the plaintiff's delayed approach to the Courts has remained unexplained. Such delay cannot be allowed to work to the prejudice of the defendants who had kept on using its registered mark to market its goods during the inordinately long period of silence maintained by the plaintiff.

For all the aforesaid reasons, we deem it proper to affirm the order(s) of the Appellate Bench of the High Court dated 23.12.2016 and 12.01.2017 and dismiss the appeals filed by the appellant/plaintiff.

14.12.2017	**ROYAL ORCHID HOTELS LTD. (PETITIONER) vs. KAMAT HOTELS (INDIA) LTD & ORS (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Copyrights Act – Earlier registration under class 16 upheld – Later classification under class 42 refused – Facts proved that petitioner was not able to prove that it was the prior user of the logo- High Court held accordingly – Whether requires interference by the Supreme Court – Held, No.

Brief facts :

The petitioner – 'Royal Orchid Hotels Limited' got registration of its trademark 'Royal Orchid' and 'Royal Orchid Hotels' in class 16 sometime in the year 2005 and the dispute, between the parties, with regard to registration of the trademarks 'Royal Orchid' and Royal Orchid Hotels in class 16, therefore, has attained finality in law in favour of the petitioner.

It appears that the petitioner sometime in the year 2004 applied for registration of its aforesaid trademarks in class 42. This was refused by the Deputy Registrar of the Trademarks and ultimately by the High Court also. Aggrieved, this special leave petition has been filed.

Decision : Petition dismissed.

Reason :

A reading of the discussions by the High Court goes to show that the conclusion recorded in the impugned order is based on a detailed consideration of the materials brought on record by both the parties. The conclusion that the petitioner had not demonstrated that it was the first user of the logo/mark and that it is the respondent who is the first user was arrived at on such consideration.

The High Court was also of the view that notwithstanding the class of customers serviced by the parties before it, it cannot be said that the two logos/marks would not give rise to confusion amongst the customers using the Hotels. In this regard, the High Court observed that the view expressed by the IPAB that having regard to the class of customers serviced by the hotels (High Income) there could be no possibility of being misled cannot be accepted as a general proposition and will always depend on individual customers. As the marks/logos were largely similar, the High Court took the view that even on the second question formulated by it the writ petition has to be allowed and the order of the IPAB set aside.

If the High Court on an elaborate consideration of the materials and evidence adduced by the parties before

it had thought it proper to reach a conclusion consistent with the findings of the primary authority i.e. the Deputy Registrar and the reasons for reversal of the view of the primary authority by the IPAB being summary, as noticed, the present petition really turns on the question of appreciation of the evidence on record. Having considered the matter we are of the view that the conclusions reached by the High Court cannot be said to be, in anyway, unreasonable and/or unacceptable. Rather, we are inclined to hold that the view recorded by the High Court is a perfectly possible and justified view of the matter and the conclusion(s) reached can reasonably flow from a balanced consideration of the evidence and materials on record. We will, therefore, not consider the present to be a fit case for interference with the order of the High Court. Accordingly, we dismiss the Special Leave Petition and refuse leave to appeal.

15.02.2018	**SUNDARAM FINANCE LTD. (APPELLANT) vs. ABDUL SAMAD & ORS (RESPONDENTS)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 – Section 42 – Execution of award – Whether it can be filed and executed straightaway in the Court where the assets are located – Held, Yes.

Brief facts :

The divergence of legal opinion of different High Courts on the question as to whether an award under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act') is required to be first filed in the court having jurisdiction over the arbitration proceedings for execution and then to obtain transfer of the decree or whether the award can be straightway filed and executed in the Court where the assets are located is required to be settled in the present appeal.

The Petitioner is the lender and the Respondent is the borrower of a vehicle loan. Upon default of the respondent, the Petitioner instituted arbitration proceedings and award was passed in Petitioner's favour.

The case of the appellant is that the award being enforceable as a decree under Section 36 of the said Act, execution proceedings were filed in the jurisdiction of the courts at Morena, Madhya Pradesh under Section 47 read with Section 151 and Order 21 Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code'). The respondents sought to contest the proceedings inter alia on the ground that the vehicle against which the loan was obtained was stolen.

Decision : Appeal allowed.

Reason :

It is not necessary to go into further details of the proceedings but suffice to say that the trial court vide order dated 20.3.2014 return the execution application on account of lack of jurisdiction to be presented to the court of competent jurisdiction. The effect of the judgment was that the appellant was required to file the execution proceedings first before the court of competent jurisdiction in Tamil Nadu, obtain a transfer of the decree and then only could the proceedings be filed in the trial court at Morena. This view adopted by the trial court was in turn based on the judgment of the Madhya Pradesh High Court and the opinion of the Karnataka High Court while it is pleaded that the view of the Rajasthan High Court and the Delhi High Court were to the contrary. The petitioner did not approach the High Court against the said order of the trial court but straightway approached this Court by filing the Special Leave Petition on the ground that no useful purpose would be served by approaching the Madhya Pradesh High Court in light of the view already expressed by that Court in conflict with the opinions of some other High Courts.

In order to appreciate the controversy, we would first like to deal with the provisions of the said Code and the said Act. The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said code in the same manner as if it were a decree. It is, thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is

passed by the civil court. It is the arbitral tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code.

The line of reasoning supporting the award to be filed in a so-called court of competent jurisdiction and then to obtain a transfer of the decree is primarily based on the jurisdiction clause found in Section 42 of the Act. The aforesaid provision, however, applies with respect to an application being filed in Court under Part I. The jurisdiction is over the arbitral proceedings. The subsequent application arising from that agreement and the arbitral proceedings are to be made in that court alone. However, what has been lost sight of is Section 32 of the said Act, which provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings.

02.05.2018	**ORIENTAL INSURANCE COMPANY LTD. (APPELLANT) vs. NARBHERAM POWER & STEEL PVT LTD. (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 – Insurance policy – Clause stipulating disputed claim would not be referred to arbitration – Insurer repudiating the claim – Whether referable to arbitration – Held, No.

Brief facts :

The respondent had entered into a Fire Industrial all Risk Policy in respect of the factory situated in Orissa. In October 2013, due to cyclone the respondent suffered damages which it estimated at about 4 crores. An intimation was given to the appellant-insurer and it appointed a surveyor which visited the factory premises. A series of correspondences were exchanged between the respondent and the insurer. As ultimately the claim was not settled, the respondent sent a communication intimating the appellant that it had invoked the arbitration agreement and requested it to concur with the name of the arbitrator whom it had nominated. The appellant replied to the said letter repudiating the claim made by the respondent and declined to refer the disputes to arbitration between the parties.

The respondent moved an application before the High Court for the appointment of an arbitrator, which was contested by the appellant insurer and the High Court appointed a retired Judge of the High Court as arbitrator. The said order is under assail by way of special leave in this appeal.

Decision : Appeal allowed.

Reason:

When we carefully read the Clause 13, it is quite limpid that once the insurer disputes the liability under or in respect of the policy, there can be no reference to the arbitrator. It is contained in the second part of the Clause. The third part of the Clause stipulates that before any right of action or suit upon the policy is taken recourse to, prior award of the arbitrator/arbitrators with regard to the amount of loss or damage is a condition precedent. The High Court, as the impugned order would show, has laid emphasis on the second part and, on that basis, opined that the second part and third part do not have harmony and, in fact, sound a discordant note, for the scheme cannot be split into two parts, one to be decided by the arbitration and the other in the suit.

It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there

can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.

In the instant case, Clause 13 categorically lays the postulate that if the insurer has disputed or not accepted the liability, no difference or dispute shall be referred to arbitration. The thrust of the matter is whether the insurer has disputed or not accepted the liability under or in respect of the policy. The rejection of the claim of the respondent made vide letter dated 26.12.2014 ascribing reasons, submits the learned senior counsel for the respondent, does not amount to denial of liability under or in respect of the policy. On a reading of the communication, we think, the disputation squarely comes within Part II of Clause 13.

The said Part of the Clause clearly spells out that the parties have agreed and understood that no differences and disputes shall be preferable to arbitration if the company has disputed or not accepted the liability. The communication ascribes reasons for not accepting the claim at all. It is nothing else but denial of liability by the insurer in toto. It is not a disputation pertaining to quantum. In the present case, we are not concerned with regard to whether the policy was void or not as the same was not raised by the insurer. The insurance-company has, on facts, repudiated the claim by denying to accept the liability on the basis of the aforesaid reasons. No inference can be drawn that there is some kind of dispute with regard to quantification. It is a denial to indemnify the loss as claimed by the respondent. Such a situation, according to us, falls on all fours within the concept of denial of disputes and non-acceptance of liability. It is not one of the arbitration clauses which can be interpreted in a way that denial of a claim would itself amount to dispute and, therefore, it has to be referred to arbitration. The parties are bound by the terms and conditions agreed under the policy and the arbitration clause contained in it. It is not a case where mere allegation of fraud is leaned upon to avoid the arbitration. It is not a situation where a stand is taken that certain claims pertain to excepted matters and are, hence, not arbitrable. The language used in the second part is absolutely categorical and unequivocal inasmuch as it stipulates that it is clearly agreed and understood that no difference or disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The High Court has fallen into grave error by expressing the opinion that there is incongruity between Part II and Part III. The said analysis runs counter to the principles laid down in the three-Judge Bench decision in The Vulcan Insurance Co. Ltd (supra). Therefore, the only remedy which the respondent can take recourse to is to institute a civil suit for mitigation of the grievances. If a civil suit is filed within two months hence, the benefit of Section 14of the Limitation Act, 1963 will enure to its benefit. In view of the aforesaid premised reasons, the appeal is allowed and the order passed by the High Court is set aside.

23.07.2018	**SHYAM SUNDER AGARWAL (APPELLANT) vs. P.NAROTHAM RAO (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act,1996 – Section 7 – Arbitration agreement – Dispute resolution clause in MoU used words "Mediators/Arbitrators", "any breaches" and "decision to be final" – Whether such clause is as arbitration clause/agreement – Held, No.

Brief facts :

The present dispute arises out of a Memorandum of Understanding (MoU)/Agreement executed between the parties for sale and purchase of shares of a Company called M/s Mancherial Cement Company Private Limited of which all the parties are Directors. The bone of contention in the present proceedings is as to whether Clause 12 of the said Agreement can be stated to be an arbitration clause, as in the said clause the word "decision" is used; the word "Mediators/Arbitrators" is used; the expression "any breaches" is used; and the "decision" is to be final and binding on all parties to the said Agreement.

Decision : Appeal dismissed.

Reason :

What emerges on a conspectus of reading of these clauses is that Mr. Sudhakar Rao and Mr. Gone Prakash Rao,

though styled as Mediators/Arbitrators, are without doubt escrow agents who have been appointed to keep certain vital documents in escrow, and to ensure a successful completion of the transaction contained in the MOU. Indeed, the very fact that they have been referred to as "Mediators/Arbitrators" and as "Mediators and Arbitrators" would show that the language used is loose – the idea really is that the two named persons do all things necessary during the implementation of the transaction between the parties to see that the transaction gets successfully completed. This becomes even clearer when Clauses 8 and 11 are seen minutely. Clause 8 expressly declares and confirms "that for successful completion of this transaction in order to avoid any further unforeseen litigations", the two escrow agents have been appointed. Clause 11 further makes it clear that these two gentlemen are escrow agents but shall not handover certain documents till the total transaction is satisfactorily completed.

We agree that Clause 12 has to be read in the light of these Clauses of the MOU, and that, therefore, the expression "decision" used in Clause 12 is only a pro tem decision – namely, that the two escrow agents are to make decisions only during the period of the transaction and not thereafter. He has correctly contended that, to use a well- known latin expression, they are "functus officio" after the transaction gets completed. Further, the "breaches" that are referred to in Clause 12 refer, inter alia, to an undertaking given by the party of the first part which is contained in Clause 10, which, if breached, the escrow agents have necessarily to decide on before going ahead with the transaction. Therefore, when viewed as a whole, it is clear that the two escrow agents are not persons who have to decide disputes that may arise between the parties, whether before or after the transaction is completed, after hearing the parties and observing the principles of natural justice, in order to arrive at their decision. A reading of the MOU as a whole leaves no manner of doubt that the said MOU only invests the two gentlemen named therein with powers as escrow agents to smoothly implement the transaction mentioned in the MOU and not even remotely to decide the disputes between the parties as Arbitrators.

In the present case, it is clear that the wording of the Agreement, as has been held by us above, is clearly inconsistent with the view that the Agreement intended that disputes be decided by arbitration. Indeed, three of the four purchasers did not read Clause 12 as an arbitration clause, but approached the Civil Court instead, strengthening our conclusion that the subsequent conduct of the parties to the Agreement also showed that they understood that Clause 12 was not an arbitration clause in the Agreement.

26.07.2018	**M/S. NANDHINI DELUXE vs. M/S. KARNATAKACOOPERATIVE MILK PRODUCERS FEDERATION LTD.**	**SUPREME COURT OF INDIA**

Trademarks Act, 1999 – Section 11 – Similar tradenames "NANDHINI" and "NANDINI" in the same class but for different products – Whether registration to be rejected – Held, No.

Brief facts :

The dispute pertains to the use of mark 'NANDHINI'. The respondent herein, which is a Cooperative Federation of the Milk Producers of Karnataka, adopted the aforesaid mark 'NANDINI' in the year 1985 and under this brand name it has been producing and selling milk and milk products. It has got registration of this mark as well under Class 29 and Class 30. The appellant herein, on the other hand, is in the business of running restaurants and it adopted the mark 'NANDHINI' for its restaurants in the year 1989 and applied for registration of the said mark in respect of various foodstuff items sold by it in its restaurants.

The mark used by the appellant is objected to by the respondent on the ground that it is deceptively similar to the mark of the respondent and is likely to deceive the public or cause confusion. According to the respondent, the appellant could not use the said mark which now belongs to the respondent inasmuch as because of its long and sustained use by the respondent, the mark 'NANDINI' is held to have acquired a distinctive character and is well-known to the public which associates 'NANDINI' with the respondent organization. Therefore, according to the respondent, it has exclusive right to use the said mark and any imitation thereof by the appellant would lead the public to believe that the foodstuffs sold by the appellant are in fact that of the respondent.

Rejecting these objections the Deputy Registrar granted registration, except for milk and milk products, to the appellant. The appeal filed by the respondent was allowed by the IPAB and on further appeal by the appellant the High court confirmed the order of the IPAB. The appellant challenged the judgement of the High court before the Supreme Court.

Decision : Appeal allowed.

Reason :

The moot question, according to us, is as to whether the appellant is entitled to seek registration of the mark 'NANDHINI' in respect of the goods in which it is dealt with, as noted above. Therefore, the fulcrum of the dispute is as to whether such a registration in favour of the appellant would infringe rights of the respondent. The entire case of the respondent revolves around the submissions that the adaptation of this trade mark by the appellant, which is phonetically similar to that of the respondent, is not a bona fide adaptation and this clever device is adopted to catch upon the goodwill which has been generated by the respondent in respect of trade mark 'NANDINI'. On that premise, the respondent alleges that the proposed trade mark 'NANDHINI' for which the appellant applied for registration is similar trade mark in respect of similar goods and, therefore, it is going to cause deception and confusion in the minds of the users that the goods in which the appellant is trading, in fact, are the goods which belong to the respondent. Precisely, it is this controversy which needs to be addressed in the first instance.

Before we answer as to whether the approach of the IPAB and the High Court in the impugned orders is correct, as contended by the respondent or it needs to be interdicted as submitted by the appellant, some of the relevant facts about which there is no dispute, need to be recapitulated. These are as follows:

(A) Respondent started using trade mark in respect of its products, namely, milk and milk products in the year 1985. As against that, the appellant adopted trade mark 'NANDHINI' in respect of its goods in the year 1989.

(B) Though, the respondent is a prior user, the appellant also had been using this trade mark 'NANDHINI' for 12-13 years before it applied for registration of these trade marks in respect of its products.

(C) The goods of the appellant as well as respondent fall under the same Classes 29 and 30. Notwithstanding the same, the goods of the appellant are different from that of the respondent. Whereas the respondent is producing and selling only milk and milk products the goods of the appellant are fish, meat, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetables, edible oils and fats, salad dressings, preserves etc. and it has given up its claim qua milk and milk products.

(D) Insofar as application for registration of the milk and milk products is concerned, it was not granted by the trade mark registry. In fact, the same was specifically rejected. The appellant was directed to file the affidavit and Form 16 in this behalf to delete the goods 'milk and milk products' which affidavit was filed by the appellant. Further concession is already recorded above.

(E) NANDINI/NANDHINI is a generic, it represents the name of Goddess and a cow in Hindu Mythology. It is not an invented or coined word of the respondent.

(F) The nature and style of the business of the appellant and the respondent are altogether different. Whereas respondent is a Cooperative Federation of Milk Producers of Karnataka and is producing and selling milk and milk products under the mark 'NANDINI', the business of the appellant is that of running restaurants and the registration of mark 'NANDHINI' as sought by the appellant is in respect of various foodstuffs sold by it in its restaurants.

(G) Though there is a phonetic similarity insofar as the words NANDHINI/NANDINI are concerned, the trade mark with logo adopted by the two parties are altogether different. The manner in which the appellant has written NANDHINI as its mark is totally different from the style adopted by the respondent for its mark 'NANDINI'. Further, the appellant has used and added the word 'Deluxe' and, thus, its mark is 'NANDHINI

DELUXE'. It is followed by the words 'the real spice of life'. There is device of lamp with the word 'NANDHINI'. In contrast, the respondent has used only one word, namely, NANDINI which is not prefixed or suffixed by any word. In its mark 'Cow' as a logo is used beneath which the word NANDINI is written, it is encircled by egg shape circle. A bare perusal of the two marks would show that there is hardly any similarity of the appellant's mark with that of the respondent when these marks are seen in totality.

When we examine the matter keeping in mind the aforesaid salient features, it is difficult to sustain the conclusion of the IPAB in its order dated 4th October, 2011 as well in the impugned order of the High Court that the mark adopted by the appellant will cause any confusion in the mind of consumers, what to talk of deception. We do not find that the two marks are deceptively similar.

Applying the aforesaid principles to the instant case, when we find that not only visual appearance of the two marks is different, they even relate to different products. Further, the manner in which they are traded by the appellant and respondent respectively, highlighted above, it is difficult to imagine that an average man of ordinary intelligence would associate the goods of the appellant as that of the respondent.

Trade and Merchandise Act, 1958 is equally applicable as it is unaffected by the Trade Marks Act, 1999 inasmuch as the main object underlying the said principle is that the proprietor of a trade mark cannot enjoy monopoly over the entire class of goods and, particularly, when he is not using the said trade mark in respect of certain goods falling under the same class. In this behalf, we may usefully refer to Section 11 of the Act which prohibits the registration of the mark in respect of the similar goods or different goods but the provisions of this Section do not cover the same class of goods.

We are not persuaded to hold, on the facts of this case, that the appellant has adopted the trade mark to take unfair advantage of the trade mark of the respondent. We also hold that use of 'NANDHINI' by appellant in respect of its different goods would not be detrimental to the purported distinctive character or repute of the trade mark of the respondent. It is to be kept in mind that the appellant had adopted the trade mark in respect of items sold in its restaurants way back in the year 1989 which was soon after the respondent had started using the trade mark 'NANDINI'. There is no document or material produced by the respondent to show that by the year 1989 the respondent had acquired distinctiveness in respect of this trade mark, i.e., within four years of the adoption thereof. It, therefore, appears to be a case of concurrent user of trade mark by the appellant. As a result, the orders of the IPAB and High Court are set aside.

03.08.2018	**DEEPAYAN MOHANTY (PLAINTIFF) vs. CARGILL INDIA PVT LTD.& ORS. (DEFENDANTS)**	**DELHI HIGH COURT**

Indian Contract Act, 1872 – Section 27 – Agreement in restraint of trade – Cash portion of bonus paid but retention portion refused on the ground of joining competitor's business – Whether tenable – Held, No.

Brief facts:

The Plaintiff is the employee of Defendant Company and he was awarded a bonus for the years 2006-07, 20067-08 & 20098-09. The award of the said bonus was split 50-50. 50% comprised a cash award, which was paid to the Plaintiff and 50% was retained as a deferred incentive award. Cash portion was paid to the Plaintiff at the relevant time and the remaining was deferred over a period of three years and was to be given to him with interest. This bonus award contained a forfeiture clause, by which if an employee joins a competitor's business, the withheld bonus would be forfeited.

The Plaintiff resigned from Defendant which was accepted on the same day and he was relieved from duty. The plaintiff joined in a competitor's business. When the Plaintiff approached the Defendants for payment of the balance incentive award, he was informed that he did not comply with the terms and conditions of the incentive award and hence the payment was not liable to be made.

Decision : Suit decreed.

Reason :

The first and foremost question is whether the forfeiture clause is valid and enforceable in law. The forfeiture clause is clear: If a person engages in a competing business/service within the two years period after leaving Cargill, the outstanding amount can be forfeited. It is the settled position, in India at least, that no employer has a right to restrain an employee from taking up competing employment after the term of employment.

Such a clause is invalid and unenforceable as per Section 27 of the Indian Contract Act, 1872. But what Cargill is doing in the present case is not restraining him from pursuing his competing business but refusing to disburse the balance incentive award amount to him since he allegedly engaged in a competing business. Can such a clause be held to be valid and enforceable? The answer to this question depends upon the nature of the sum being withheld. The deferred incentive is an amount which was awarded to an employee as a reward for good performance "during the course of employment". The said amount is awarded in full in favour of the employee. Only the payment is postponed partially and for the postponement of the payment, interest is also paid by Cargill to the employee. Thus, the amount belonging to the employee is being withheld by Cargill. Ideally, the entire amount ought to be disbursed at the time when it was awarded but as a part of Cargill's company policy it is being deferred.

If the deferment is to enforce a clause which is otherwise unenforceable, the forfeiture based on the said clause, is itself illegal. The amount does not belong to Cargill. It belongs to the employee and Cargill is merely making the employee agree to take the amount with interest after the period of two years. That does not mean that under the garb of paying interest, Cargill can forfeit something on the basis of an invalid and unenforceable clause in the agreement. The terms used in the clause, namely, "forfeiture", and "awarded but not yet distributed" clearly show that the amount vests in the employee and only the disbursement is deferred. The fact that interest is being paid on the unpaid incentive amount also shows that the intention of Cargill seems to be merely enforce conditions on employees which cannot otherwise be enforced in law, at least in India.

The condition in an employment contract that an employee cannot engage in competing business after employment for any period is, in restraint of trade, as is clear from a reading of *Percept D'Mark India Pvt. Ltd. v Zaheer Khan, (2006) 4 SCC 227* and *Niranjan Shankar Golikari v. Century Spinning and Manufacturing (1967) 2 SCR 378*.

There is yet another dimension to the forfeiture clause: By the said clause, the company seeks to abrogate money which vests in the employee. This would also be in restraint of trade.

The factum of the award has not been disputed and the conditions of the deferred incentive are also not disputed. The resignation and the acceptance thereof are also not disputed. Under these circumstances, the court is thus not embarking on an adventure which is completely alien to the dispute in hand i.e. the payment of the outstanding deferred incentive amount. The arguments on behalf of Cargill i.e. that the conduct of the Plaintiff raises a triable issue may not be correct inasmuch as the court in this case is not adjudicating the violation of the employment contract or the alleged breach of fiduciary relationship between the Plaintiff and the Defendants. The same would have to be considered and adjudicated in appropriate proceedings if Cargill chooses to file any.

As on date, when the court enquired as to whether the Defendants took any action against the Plaintiff in respect of allegations made by them in the leave to defend application or if they had sought refund of the cash part of the incentive already given to him, the answer was a categorical no. If the cash part of the incentive has not been withdrawn and the amount has vested in the Plaintiff, there can be no reason to withhold disbursement of the same. The forfeiture clause is clearly not enforceable, as it is in restraint of trade.

13.09.2018	**M/S SHRIRAM EPC LIMITED (APPELLANT) vs. RIOGLASS SOLAR SA (RESPONDENT)**	**SUPREME COURT OF INDIA**

Arbitration and Conciliation Act, 1996 read with India Stamp Act, 1889 – Sections 48 & 49 – Enforcement of foreign award – Whether stamp duty on the foreign award has to be paid for enforcement – Held, No.

Brief facts :

The Appellant had suffered a foreign award and the Respondent filed the foreign award in India for execution. The Single Judge of the Madras High Court allowed the execution of this foreign award, overruling the objection of the respondent that no stamp duty has been paid on in in India and hence it could not be enforced under Sections 48 and 49 of the Arbitration and Conciliation Act, 1996 ("1996 Act"). Appeal to the Division bench was also dismissed. Hence, the present appeal before the Supreme Court.

Decision : Appeal dismissed.

Reason :

The main bone of contention in the present appeal is whether the expression "award" would include a foreign award.

On a reading of the aforesaid provisions of the Civil Procedure Code, 1882 and the Indian Arbitration Act, 1899, it becomes clear that the only "award" that is referred to in the Indian Stamp Act, 1899 is an award that is made in the territory of British India provided that such award is not made pursuant to a reference made by an order of the Court in the course of a suit. At this point in time, it is important to note that there were several princely states in India governed by sovereign rulers which had their own laws. Arbitration laws, if any, in the aforesaid princely states, if they were to culminate in awards, would not be "awards" under either the Civil Procedure Code, 1882 or the Indian Arbitration Act, 1899. They would therefore be foreign awards insofar as British India is concerned. An award made in a princely state, or in a foreign country, if enforced by means of a suit in British India, would not be covered by the expression "award" contained in Item 12 of Schedule I of the Indian Stamp Act, 1899. Only awards which are decisions in writing by an arbitrator or umpire, made in British India, on a reference made otherwise than by an order of the Court in the course of a suit would be included.

This position continued even when the Code of Civil Procedure, 1908 contained a Second Schedule, which substituted the arbitration provisions contained in the Code of Civil Procedure, 1882. Here again, under the Second Schedule, parties to a suit may apply for an order of reference to arbitration and an award would follow.

It will thus be seen that "award" under Item 12 of Schedule I of the Indian Stamp Act, 1899 has remained unchanged till date. As has been held by us hereinabove, in 1899, this "award" would refer only to a decision in writing by an arbitrator or umpire in a reference not made by an order of the Court in the course of a suit. This would apply only to such award made at the time in British India, and today, after the amendment of Section 1(2) of the Indian Stamp Act, 1899 by Act 43 of 1955, to awards made in the whole of India except the State of Jammu and Kashmir. This being the case, we are of the view that the expression "award" has never included a foreign award from the very inception till date. Consequently, a foreign award not being includible in Schedule I of the Indian Stamp Act, 1899, is not liable for stamp duty.

21.02.2018	**SONELL CLOCKS AND GIFTS LTD.(APPELLANT) vs. THENEW INDIA ASSURANCE CO. LTD. (RESPONDENT)**	**SUPREME COURT OF INDIA**

Insurance Act read with Appointment of Surveyors Regulations – Claim lodged with delay of about 4 months – Insurer appointed surveyor – Later insurer repudiated the claim – Whether appointment of surveyor operates as waiver against the insurer – Held, No.

Brief facts:

The appellant had taken an Insurance Policy from the respondent (Insurance Company) for a period of one year from 19th July, 2004 to 18th July, 2005, in respect of its building, plant and machinery. Due to torrential rains and floods in the entire area, the water gushed into the factory premises causing damage to the machinery as well as raw material lying therein. This event occurred on 4th August, 2004. Intimation of the loss was given to the respondent after a gap of 3 months 25 days, on 30th November, 2004. Thereafter, the respondent appointed

a surveyor to assess the loss caused due to the flooding of the factory premises. The surveyor after causing inspection submitted its report to the respondent inter alia stating that the claim was not payable on account of the failure of the complainant to comply with the mandate of Clause 6 of the general conditions of the policy. Acting upon the said report, the respondent repudiated the claim.

Decision : Appeal dismissed.

Reason :

The singular question involved in these appeals is whether the respondent (insurer) had waived the condition relating to delay in intimation, by appointing a surveyor.

It is well established position that waiver is an intentional relinquishment of a right. It must involve conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. It is an agreement not to assert a right. To invoke the principle of waiver, the person who is said to have waived must be fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. There must be a specific plea of waiver, much less of abandonment of a right by the opposite party.

In the present case, it is common ground that the letter of repudiation elucidates that the claim of the appellant was rejected on the ground that neither the intimation of the loss had been given to it immediately after the loss nor were the requisite particulars of the loss conveyed within stipulated period and there was breach of terms and conditions of Clause 6 of the general conditions of the policy. Additionally, the surveyor report predicates that it was very difficult to estimate the damages for the reasons mentioned therein and that the claim of the appellant was not payable on account of breach of Clause 6 of the general conditions of the policy. That recommendation commended to the respondent. It has been so incorporated in the letter of repudiation.

The expression "duration" is of some significance which is reflective of the existence or otherwise of the policy itself. In the present case, there is no dispute about the subsistence of the policy but is one of violation of condition No.6 of the policy. Furthermore, in the present case the controversy will have to be answered on the basis of Standard Fire and Special Perils Policy relatable to condition No.6 obligating the insured to give forthwith intimation of the loss to the insurer. The two clauses are materially different and relate to two different and distinct insurance policies. In other words, Clause 5 of the Marine Insurance Policy and Clause 6 of the present policy are incomparable being qualitatively different.

To put it differently, Galada's case (supra) was not a case which considered repudiation based on a premise or a reason similar to condition No.6 of the present policy and a specific plea taken by the insurer in that behalf in the repudiation letter itself. Notably, Clause 5 of the Marine Insurance Policy which was the subject matter in Galada's case (supra) did not have a negative covenant as in this case in the proviso to condition No.6 of the subject policy. The fulfilment of the stipulation in Clause 6 of the general conditions of the policy is the sine qua non to maintain a valid claim under the policy.

In that, the event occurred on 4th August, 2004 but intimation was given to the insurer only on 30th November, 2004 after a gap of around 3 months 25 days. No explanation was offered for such a long gap much less plausible and satisfactory explanation. The stipulation in condition No.6 of the policy to forthwith give notice to the insurer is to facilitate the insurer to make a meaningful investigation into the cause of damage and nature of loss, if any.

Thus, the appointment of a surveyor by the respondent after receipt of intimation of the loss from the appellant, in the context of the present insurance policy, coupled with the 2000 Regulations and in particular an express stand taken in the repudiation letter sent by the respondent to the appellant after consideration of the surveyor's report, it cannot be construed to be a case of waiver on the part of the respondent.

In view of the above, we uphold the conclusion of the Commission that the respondent (insurer) had not waived the condition relating to delay stipulated in Clause 6 of the general 6 conditions of the policy, by appointing a surveyor. Accordingly, these appeals must fail.

10.10.2018	**DREDGING CORPORATION OF INDIA (PETITIONER) vs. MERCATOR LTD (RESPONDENT)**	**DELHI HIGH COURT**

Arbitration and Conciliation Act, 1996 – Appeal – Seat of arbitration London – Venue changed to Delhi with parties' consent – Whether courts in Delhi have jurisdiction – Held, No.

Brief facts :

The respondent has challenged the jurisdiction of this Court to entertain these petitions under Section 34 of the Arbitration and Conciliation Act, 1996. The ground of challenge was that the seat of arbitration in the present petitions was London and therefore, Part-I and Section 34 of the Act will not be applicable to such arbitration proceedings.

The Arbitration Agreement between the parties is contained in Clause 24 of the Time Charter Party Agreement(s) under which the seat of arbitration was fixed at London. However, the parties by agreement agreed to have the venue of arbitration at New Delhi.

Decision : Petition dismissed.

Reason :

A reading of the correspondence exchanged between the parties would clearly show that the parties did not arrive at a consensus for change of 'Seat' of arbitration from London to New Delhi though this was the initial request of the respondent.

I cannot not agree with the submissions made by the counsel for the petitioner that in the above correspondence the use of word 'venue' by the parties has to be construed as 'seat'. In my opinion, the parties were very well aware of the distinction between the 'seat' and 'venue' and therefore, the respondent insisted that while the 'Seat' of arbitration shall remain at London, it is only the 'venue' which can be shifted to New Delhi. The petitioner also agreed to the same as in its opinion the change of 'venue' would not require any amendment to the Charter Party Agreement, while a change in seat would have required such amendment.

Once the Arbitration Agreement was invoked by the respondent, though the petitioner wanted such change, the respondent refused. Thereafter, the parties only agreed to a change of 'venue' of arbitration from London to New Delhi.

This was the consistent understanding of the petitioner itself, not only before the Arbitral Tribunal as recorded in its procedural order referred hereinabove, but also by its conduct of filing a petition under Section 68 of the (English) Arbitration Act, 1996 before the High Court of Justice at London.

Applying the judgment of *Union of India v. Hardy Exploration and Production (India) INC 2018 SCC Online SC 1640* to the facts of the present case, not only clause 24 of the Charter Party Agreement(s) but also the conduct of the parties, gathered from the exchange of correspondence, their conduct before the Arbitral Tribunal as also the conduct subsequent to the passing of the Impugned Award, would lead to a conclusion that the parties agreed on the 'Seat' of arbitration to be at London.

In view of the above, this Court would lack jurisdiction to entertain the present petitions under Section 34 of the Act. The same are accordingly dismissed.

16.10.2018	**GOVT OF N.C.T OF DELHI (PETITIONER) vs. YASIKAN ENTERPRISES PVT. LTD. (RESPONDENT)**	**DELHI HIGH COURT**

Arbitration and Conciliation Act, 1996 – Arbitration agreement – Contract with proprietary concern "Yasikan Enterprise" – Arbitration invoked by "Yasikan Enterprise Pvt Ltd" a company of the proprietor – Whether tenable – Held, No. Brief facts :

The appellant called a tender for providing sanitation and scavenger services inside and outside the building including reception services from designated places for the Delhi Sachivalaya/Secretariat, I.P. Estate, New Delhi. One M/s Yasikan Enterprises - a sole proprietary concern of Shri Jagdish Kumar submitted his offer and the work was awarded to him.

When dispute arose between the Parties, M/s. Yasikan Enterprises Pvt. Ltd the same was referred to a sole arbitrator and an award was passed against the appellant. The appellant challenged the award mainly on the ground that the arbitration agreement was with the proprietor of Yasikan Enterprises and not with Yasikan Enterprises Pvt Ltd.

Decision : Petition allowed.

Reason :

The first submission of the Petitioner is that there was no arbitration clause with the company M/s Yasikan Enterprises Pvt. Ltd. The contract was awarded to the firm M/s Yasikan Enterprises, which was a sole proprietary concern. Accordingly in the absence of an arbitration agreement, the arbitration proceedings are void ab initio and the award is liable to be set aside.

The Respondent, on this issue, submits that the reference having been made by the Lieutenant Governor on the request of M/s Yasikan Enterprises Pvt. Ltd., the same does not deserve to be set aside.

As per Section 7 of the Act, every arbitration agreement has to be in writing between the parties. It also has to be signed by the parties. In the present case, there is no arbitration agreement signed between the Petitioner and M/s Yasikan Enterprises Pvt. Ltd. The company was not awarded the contract. The offer was submitted by M/s Yasikan Enterprises as a sole proprietary firm. It was signed by Mr. Jagdish Kumar as the sole proprietor.

The company being a distinct legal entity from the sole proprietorship, the arbitration clause, does not apply devolve upon the company. Moreover, the arbitration clause is an independent clause which is not assignable. This is clear from a reading of *Delhi Iron and Steel Company Limited v. U.P. Electricity Board & Another (2002) 61 DRJ 280*.

"17. So far as the arbitration clause is concerned it was held that this contract is personal in its character and incapable of assignment on that ground. However it is a settled law that an arbitration clause does not take away the right of a party of a contract to assign it if it is otherwise assignable.

18. While distinguishing between two clauses of assignment the Supreme Court observed that a right of obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. In other words, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

19. As observed above the petitioner had the liability to perform all contracts of Victor Cables and all benefits arising therefrom and liabilities thereunder in all or in any form. It does not mean that he had also the obligation to get the dispute settled by way of arbitration as agreed by Victor Cables. These are two different and distinguished liabilities. The former is assignable where the latter is not. Thus the undertaking by the petitioner that "all contracts of Victor Cables Corporation and all benefits arising therefrom and liabilities thereunder in all or in any form shall be of the petitioner" was in the form of discharging all the liabilities of the Victor Cables and there was nothing personal about such contracts whereas clause of arbitration was personal in its character and was even otherwise incapable of assignment.

20. In view of the foregoing reasons the unilateral reference of the alleged disputes to the respondent No. 2 and unilateral appointment of respondent No.2 as arbitrator are hereby held illegal and inoperative and set aside. Petition is allowed."

Thus, the reference to arbitration was contrary to law. The award is liable to be set aside on this sole ground. However, this Court is also examining the matter on merits. After examining the merits the award was set aside on merits also.

25.10.2018	TRUSTEE, JACOBITE SYRIAN CATHEDRAL & ANR vs. JIPPU VARKEY [NCDRC] REVISION	NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Consumer Protection Act, 1985 – Cathedral collecting money for permitting to construct family tomb-tomb destroyed – Whether deficiency of services liable for compensation – Held, No.

Brief facts :

The case of the complainant, who is a Christian by faith, is that the petitioners, who are the Trustees of Jacobite Syrian Cathedral collected a sum of Rs.1001/- from him 31.12.1984, for granting permission to construct a family tomb in the cemetery of the said Cathedral. The family tomb was allegedly constructed by the complainant / respondent and even the mortals of his father were placed in the said tomb when he expired in the year 2004. It is alleged by the complainant that the said tomb was destroyed by the petitioners. Being aggrieved from the destruction of the tomb and claiming to be a consumer of the petitioners, the complainant approached the concerned District Forum by way of a consumer complaint, seeking reconstruction of the tomb and compensation.

The District Forum vide its order dated 31.10.2014 directed that the complainant would have every right to reconstruct the family tomb at its own cost and the petitioners were liable to extend necessary help and support to him for the said reconstruction in the cemetery of the Church.

Being aggrieved from the order passed by the District Forum, both the parties preferred separate appeals before the concerned State Commission. Vide impugned order dated 05.4.2018, the State Commission directed the petitioners to reconstruct the tomb in the cemetery of the Cathedral at their own expenses and also pay a sum of Rs.25,000/- as compensation to the complainant. Being aggrieved from the order passed by the State Commission the petitioner is before this Commission by way of the present revision petition.

Decision : Petition dismissed.

Reason :

The term 'consumer' has been defined in Section 2(1) (d) of the Consumer Protection Act and means a person who either purchases goods or avails services for a consideration. The question which arises for consideration is as to whether the complainant can be said to have hired or availed the services of the Cathedral or its Trustees, by allegedly paying Rs. 1001/- to them, for obtaining permission for construction of a family tomb in the cemetery of the Cathedral .

In my opinion, the grant of permission for construction of a family tomb in the cemetery of Cathredel does not amount to rendering services within the meaning of Section 2(1) (o) of the Consumer Protection Act. At best, it is a permission granted by a religious organization to one of its devotees. Even if some amount is charged by the religious organization from the devotees for granting the requisite permission that would not amount to rendering services as is understood in the context of the Consumer Protection Act. A devotee availing such a facility from the religious organization to which he belongs cannot be said to be a consumer in terms of the Consumer Protection Act. Therefore, a consumer complaint for redressal of the grievance of the complainant was clearly not maintainable. The view taken by the fora below in this regard cannot be sustained and is liable to be set aside.

For the reasons stated hereinabove, the impugned orders are set aside and the complaint is consequently dismissed, with liberty to the complainant to avail such other remedy as may be open to him in law, including approaching a Civil Court for the redressal of his grievances.

Facts of the Case

Railway authorities enter into an agreement with Amit Service Ltd., a service providing company to engage workers for cleaning the railway platforms in a region. As per the agreement, the Service provider has to engage

certain number of workers daily. The agreement can be renewed every year on mutual agreement on terms. After a few years, the agreement is terminated. Amit Services Ltd. also terminates the employment of those workers. The workers raised an industrial dispute against Railway authorities as well as Amit Services Ltd. for reinstatement claiming that their work is perennial in nature under Railway authorities and they worked consistently in Railways though under the constant supervision of Amit Services Ltd. They also substantiate their claim on the ground that Railways have engaged the services of Amit Services Ltd. without any licence required under the Contract Labour (Regulation and Abolition) act, 1970 and therefore they are direct employees of Railways.

Fact in Issue/Questions for Consideration

Based on the above facts, following are the questions for the adjudication or consideration:

1) Whether the workers are employees of Railways?

2) Whether Railways have to reinstate them?

Suggestive Solution

The facts of the case are similar to facts in the case of Airports Authority of India vs. A S Yadav & Ors. (Del)

decided on 28.11.2019. Based on that decision, the questions can be answered as under:

1) The workers have been employed only by Amit Services Ltd for a specific type of work under Railways. The contract by Railways was only with Amit Services Ltd and who will do the work is the decision of Amit Services Ltd as long as the work is performed as per the contract. If Railways do not have any licence to employ contract labour, it may be actionable against Railways under the Contract Labour (Regulation and Abolition) Act, 1970 but it does not automatically make these workers direct employees of the Railways. Therefore, the workers are not direct employees of railways.

2) For the above reasons, the question of Railways reinstating the workers does not arise. It is up to Amit Services Ltd. to compensate the workers based on any existing agreement with them or to give them employment somewhere else.

09.09.2021	**DELHI AIRPORT METRO EXPRESS PVT. LTD. APPELLANT(S) vs. DELHI METRO RAIL CORPORATION LTD.**	**SUPMREME COURT**

Contravention of a Statute Not Linked To Public Policy or Public Interest Cannot Be a Ground to Set Aside an Arbitral Award

Judgement:

In the above case Honble Supreme Court observed that patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration

of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

Section 34 (2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

05.03.2021	**SUBORNO BOSE (APPELLANT) vs. ENFORCEMENT DIRECTORATE & ANR. (RESPONDENT)**	**SUPREME COURT OF INDIA, CIVIL APPEAL NO. 6267 OF 2020**

Brief Fact:

A show cause notice dated 19.5.2004 was issued to the appellant, stating that the adjudicating authority under Foreign Exchange Management Act was satisfied that there was a prima facie contravention of Section 10(6) of the FEMA Act read with Sections 46 and 47 of the said Act and paragraphs A10 and A11 (Current Account Transaction) of the Foreign Exchange Manual 2003-04 in the complaint filed against the company named M/s. Zoom Enterprises Limited (for short, "the Company") of which, the appellant was the Managing Director.

The appellant filed his reply to the said show cause notice on 10.6.2004, inter alia, contending that the Company had purchased 2 Nos. of Water Cooled Screw Chiller Unit Model and other accessories for a cost of 374000 FRF from Carrier S.A. of France and Air Handling and Fan Coil Unit for US$ 35766 from Carrier Corporation, Syracuse, New York. The import was done under Export Promotion Capital Goods (EPCG) Licence under Open General Licence (OGL). The goods were imported, but kept in warehouse, as the Company, which at the relevant time was under another person and others, failed to take steps to get the goods released. The appellant took over the project only in July, 2002 and afterwards, he spent nearly 5 crores of rupees for the project work. Due to financial constraints, in February, 2003, a request was made to Tourism Finance Corporation of India Limited (TFCI) for sanction of a bank guarantee of Rs.40,00,000/(Rupees forty lakhs only) to get the shipment in question cleared from the Customs Department, but for the reasons beyond the control of the Company and the appellant in particular, the shipment could not be cleared. A request was made to the Customs authority to help the Company to get the goods cleared, in case the clearing agent is unable to take necessary steps on their behalf. In the end, a request was made in the reply to grant more time to get the goods cleared and to submit the Bill of Entry (Exchange Control Copy) with the authorised dealer.

The adjudicating authority concluded that the noticee Company and the appellant had violated the provisions of the FEMA Act. The Company, as well as, the appellant carried the matter in appeal before appellate authority. The appellate authority vide order dated

13.6.2005 dismissed both the appeals and was pleased to uphold the decision of the adjudicating authority.

Being aggrieved, the Company, as well as the appellant carried the matter before the High Court. Both appeals were dismissed by the High Court vide its judgment and observed thus: "After hearing the learned Counsel for the parties and after going through the materials on record placed before us, we are of the opinion that the violation which has been done by the appellant/petitioner, cannot be stated to be a technical violation and it is well settled law that contravention of the said Act or Foreign Exchange Regulation Act, 1973 has created a strict liability. The violation of these two Acts would come within the meaning of economic offence and cannot be treated as technical offence.

Hence, in our considered opinion, after initial committal and/or contravention of Section 10(6) of the said Act, the violation continues till the time, compliance is made. Therefore, we hold that taking over the charge of the appellate company in the year 2002, cannot absolve the appellant from the liability and, in our considered opinion, the appellant company correctly held as guilty on the face of the continuance of the offence.

Hence, we are of the considered opinion that the Learned Tribunal correctly came to the conclusion and we do not find that there is any reason whatsoever to interfere with the order so passed by the Learned Tribunal. Accordingly, both the appeals are dismissed. For the reasons stated hereinabove, both the appeals are disposed of."

Against the decision of the High Court, the Company, as well as the appellant preferred separate special leave petitions before Supreme Court.

Judgement:

Hon'ble Supreme Court inter-alia observed that the High Court has opined that the contravention referred to in Section 10(6) by its very nature is a continuing offence. We agree with that view. It is indisputable that the penalty provided for such contravention is on account of civil obligation under the FEMA Act or the rules or regulations or direction or order made thereunder. If the delinquency is a civil obligation, the defaulter is obligated to make efforts by payment of the penalty imposed for such contravention. So long as the imported goods remained uncleared and obligation provided under the rules and regulations to submit Bill of Entry was not discharged, the contravention would continue to operate until corrective steps were taken by the Company and the persons in charge of the affairs of the Company.

It is not the case of the appellant that he is not an officer or a person in charge of and responsible to the Company for the conduct of the business of the Company, as well as, the Company on or after 22.10.2001. Considering the fact that the appellant admittedly became aware of the contravention yet failed to take corrective measures until the action to impose penalty for such contravention was initiated, he cannot be permitted to invoke the only defence available in terms of proviso to subsection (1) of Section 42 of the FEMA Act that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. In the reply filed to the showcause notice by the appellant, no such specific plea has been taken.

To sum up, we hold that no error has been committed by the adjudicating authority in finding that the appellant was also liable to be proceeded with for the contravention by the Company of which he became the Managing Director and for penalty therefor as prescribed for the contravention of Section 10(6) read with Sections 46 and 47 of the FEMA Act read with paragraphs A10 and A11 (Current Account Transaction) of the Foreign Exchange Manual 200304. The first appellate authority and the High Court justly affirmed the view so taken by the adjudicating authority.

4

INSOLVENCY LAW

26/07/2021	**Orator Marketing Pvt. Ltd(Appellant)** **vs.** **Samtex Desinz Pvt. Ltd(Respondent)**	**Supreme Court of India,** **Civil Appeal No. 2231 of 2021**

Insolvency and Bankruptcy Code, 2016- Section 7- interest free loan given to corporate debtor- non-payment thereoflender filing CIRP application- NCLT & NCLAT dismisses the application on the ground that it is an interest free loan, and the applicant is not a financial creditor- whether correct-Held, No

Brief facts:

The Original Lender, advanced a term loan of Rs.1.60 crores to the Corporate Debtor for a period of two years, to enable the Corporate Debtor to meet its working capital requirement. The Original Lender has assigned the outstanding loan to the Appellant. According to the Appellant the loan was due to be repaid by the Corporate Debtor in full within 01.02.2020. The Appellant claims that the Corporate Debtor made some payments, but Rs.1.56 crores still remain outstanding. The Appellant filed a Petition under Section 7 of the IBC in the NCLT for initiation of the Corporate Resolution Process. NCLT dismissed the petition with the finding that the Appellant is not a financial creditor of the Respondent. On appeal, NCLAT also concurred with the judgement of the NCLT. Hence the present appeal before the Supreme Court. The short question involved in this Appeal is, whether a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is not a Financial Creditor, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the IBC.

Decision & Reason: Appeal allowed.

The judgment and order of the NCLAT, affirming the judgment and order of the Adjudicating Authority (NCLT) and dismissing the appeal is patently flawed. Both the NCLAT and NCLT have misconstrued the definition of 'financial debt' in Section 5(8) of the IBC, by reading the same in isolation and out of context.

When a question arises as to the meaning of a certain provision in a statute, the provision has to be read in its context. The statute has to be read as a whole. The previous state of the law, the general scope and ambit of the statute and the mischief that it was intended to remedy are relevant factors.

The definition of 'financial debt' in Section 5(8) of the IBC has been quoted above. Section 5(8) defines 'financial debt' to mean "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause (f) of Section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing.

Furthermore, sub-clauses (a) to (i) of Sub-section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive.

At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor.

'Default' means non-payment of debt in whole or part when the debt has become due and payable, and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and

operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

The appeal is, therefore, allowed. The judgment and order impugned is, accordingly, set aside. The order of the Adjudicating Authority, dismissing the petition of the Appellant under Section 7 of the IBC is also set aside. The petition under Section 7 stands revived and may be decided afresh, in accordance with law and in the light of the findings above.

13/05/2021	**India Resurgence Arc Pvt Ltd v. (Appellant)** **vs.** **Amit Metaliks Ltd & Anr (Respondent)**	**Supreme Court of India,** **Civil Appeal No. 1700 of 2021**

Insolvency and Bankruptcy Act,2016- approval of resolution plan by CoC – exercise of commercial wisdom by CoC- discretion of adjudicating authority- whether correct- Held, Yes.

Brief Facts:

The appellant challenged the resolution plan in the corporate insolvency resolution process concerning the corporate debtor VSP Udyog Private Limited (respondent No. 2 herein), as submitted by the resolution applicant Amit Metaliks Limited (respondent No. 1 herein). NCLT approved the resolution plan and the NCLAT confirmed it. Hence, the appellant seeks to question the order passed by the National Company Law Appellate Tribunal by way of this appeal.

Decision: Dismissed.

Reason

Having heard the learned counsel and having perused the material placed on record, we are clearly of the view that this appeal remains totally bereft of substance and does not merit admission.

The requirements of law, particularly in regard to the contentions sought to be urged on behalf of the appellant, are referable to the provisions contained in Section 30 of the Code dealing with the processes relating to submission of a resolution plan, its mandatory contents, its consideration and approval by the Committee of Creditors, and its submission to the Adjudicating Authority for approval.

As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority.

It needs hardly any elaboration that financial proposal in the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.

The NCLAT was, therefore, right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

In regard to the question of fair and equitable treatment, though the Adjudicating Authority as also the Appellate Authority have returned concurrent findings in favour of the resolution plan yet, to satisfy ourselves, we have gone through the financial proposal in the resolution plan. What we find is that the proposal for payment to all the secured financial creditors (all of them ought to be carrying security interest with them) is equitable and the proposal for payment to the appellant is at par with the percentage of payment proposed for other secured financial creditors. No case of denial of fair and equitable treatment or disregard of priority is made out.

The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance. Thus, what amount is to be paid to different classes or sub- classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

In Jaypee Kensington(supra), this Court repeatedly made it clear that a dissenting financial creditor would be receiving the payment of the amount as per his entitlement; and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It has never been laid down that if a dissenting financial creditor is having a security available with him, he would be entitled to enforce the entire of security interest or to receive the entire value of the security available with him. It is but obvious that his dealing with the security interest, if occasion so arise, would be conditioned by the extent of value receivable by him.

The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived.

The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further exposited in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.

It needs hardly any emphasis that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximisation of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced. For what has been discussed hereinabove, this appeal fails and stands dismissed.

22/04/2021	**Sandeep Khaitan (Appellant)** **vs.** **JSVM Plywood Industries Ltd (Respondent)**	**Supreme Court of India,** **Criminal Appeal No.447 OF 2021**

Section 14 of the Insolvency and Bankruptcy Code,2016 read with section 482 of the CrPC- CIRP- operation of frozen bank account was allowed to be operated- whether correct-Held, No.

Brief facts:

The appeal is directed against order dated 04.02.2021 passed by the Hon'ble High Court of Guwahati. In the impugned order, the High Court has allowed an interlocutory application filed by the Respondent No. 1 to allow it to operate its bank account maintained with the ICICI Bank Bhubaneswar and to unfreeze the bank account of its creditors over which the lien has been created and the accounts frozen pursuant to the lodging of an FIR by the appellant before us. It was made subject to conditions.

Decision: Appeal allowed.

Reason:

The provisions of the IBC contemplate resolution of the insolvency if possible, in the first instance and should it not be possible, the winding up of the Corporate Debtor. The role of the insolvency professional is neatly carved out. From the date of admission of application and the appointment of Interim Resolution Professional, the management of the affairs of the Corporate Debtor is to vest in the Interim Resolution Professional. With such appointment, the powers of the Board of Directors or the partners of the Corporate Debtor as the case may be to stand suspended. Section 17 further declares that the powers of the Board of Directors or partners are to be exercised by the Interim Resolution Professional. The financial institutions are to act on the instructions of the Interim Resolution Professional. Section 14 is emphatic, subject to the provisions of sub section (2) and (3). The impact of the moratorium includes prohibition of transferring, encumbering, alienating or disposing of by the Corporate Debtor of any of its assets.

We have to also in this context bear in mind that the High Court appears to have, in passing the impugned order, which is an interim order for that matter, overlooked the salutary limits on its power under Section 482. The power under Section 482 may not be available to the Court to countenance the breach of a statuary provision. The words 'to secure the ends of justice' in Section 482 cannot mean to overlook the undermining of a statutory dictate, which in this case is the provisions of Section 14, and Section 17 of the IBC.

It would appear to us that having regard to the orders passed by the NCLT admitting the application, under Section 7, and also the ordering of moratorium under Section 14 of the IBC and the orders which have been passed by the tribunal otherwise, the impugned order of the High Court resulting in the Respondent No. 1 being allowed to operate the account without making good the amount of Rs 32.50 lakhs to be placed in the account of the Corporate Debtor cannot be sustained. The Learned Counsel for the Appellant has also no objection in the Respondent No. 1 being allowed to operate its account subject to it remitting an amount of Rs. 32.50 lakhs into the account of the Corporate Debtor. In such circumstances, Appeal is allowed.

The Impugned order is modified as follows: i. The Respondent No.1 is allowed to operate its account subject to it to first remitting into the account of the Corporate Debtor, the amount of Rs 32.50 lakhs which stood paid to it by the management of the Corporate Debtor. The assets of the Corporate Debtor shall be managed strictly in terms of the provisions of the IBC. The Appellant as RP will bear in mind the provision of Section 14 (2A) and the object of IBC. We however make it clear that our order shall not be taken as our pronouncement on the issues arising from the FIR including the petition pending under Section 482 of the Cr.P.C. ii. We also make it clear that the judgment will not stand in the way of the Respondent No.1 pursuing its claim with regard to its entitlement to a sum of Rs.32.50 lakhs and any other sum from the Corporate Debtor or any other person in the appropriate forum and in accordance with law. There will be no order as to costs.

13/01/2021	**Skillstech Services Pvt Ltd(Appellant)** **vs.** **Registrar, National Company Law Tribunal & Anr(Respondent)**	**[DEL] W.P.(C) 474/2021 & CM APPL. 1227/2021** **Prathiba M. Singh, J.**

Insolvency and Bankruptcy Act,2016- section 9- increase in the threshold limit to file complaint before NCLT- Registrar refusing to list the petition – whether tenable-Held, No.

Brief facts:

The present petition has been filed by the Petitioner seeking listing of its petition, under Section 9 of the Insolvency and Bankruptcy Code, 2016, before the appropriate bench of the National Company Law Tribunal (hereinafter, "NCLT").

The case of the Petitioner was that the Registrar of the NCLT has failed to even list the Petitioner's matter before

the appropriate bench of NCLT, on the ground that the threshold of the pecuniary jurisdiction of the NCLT has now been amended by a notification dated 24th November 2020, from Rs.1 lakh, to Rs.1 crore.

Decision: Allowed.

Reason:

Ld. Counsel the Petitioner, submits that the question as to whether the NCLT has the pecuniary jurisdiction or not, cannot be decided by the Registrar of the NCLT, but in fact the same ought to be looked into and determined by an appropriate bench of the NCLT, after appreciating the fact situation involved. Reliance is placed upon the view of the NCLT, Kochi in IA No. 175/KOB/2020 in IBA/34/KOB/2020 titled M/s Tharakan Web Innovations Pvt. Ltd. v. Cyriac Njavally, wherein the Tribunal has held that if disputes had arisen prior to the outbreak of the pandemic, the said notification may not apply, as the notification cannot be made applicable retrospectively. Ld. Counsel appearing for the Respondent submits that the said judgment of the NCLT, Kochi Bench has been stayed by the Kerala High Court.

This court is of the opinion that the question as to whether the NCLT has jurisdiction to entertain a particular case or not cannot be determined by the Registrar in the administrative capacity. The Registrar would have to place the matter before the appropriate bench of the NCLT, for the said question to be judicially determined. The appropriate bench of the NCLT would have to then, take a considered view as to whether notice is liable to be issued in the matter or not.

The question as to whether the notification dated 24th March 2020 applies to a particular petition that has been filed prior to the said notification or not is also a question to be determined by the Bench of the NCLT and not by the Registrar of the Tribunal.

Accordingly, it is directed that the petition under section 9 of the IBC, moved by the Petitioner before the NCLT, shall be placed by the Registrar, NCLT before an appropriate bench for proceeding further in accordance with law. The listing of the petition is directed to be done within a period of ten days from today. Advance intimation of listing of the said matter shall be given to the Petitioner's counsel by the Registrar.

14/08/2020	**Babulal Vardharji Gurjar (Appellant)** **Vs.** **Veer Gurjar Aluminium Industries Pvt Ltd & Anr (Respondent)**	**Supreme Court of India** **Civil Appeal No. 6347 of 2019** **A.M. Khanwilkar & Dinesh Maheshwari, JJ.**

Insolvency and Bankruptcy Code, 2016- Section 238 A- period of limitation for filing insolvency application whether the period of limitation commences from the date of commencement of the Act, irrespective of the date of default- Held, No.

Brief facts:

This appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 is directed against the judgment and order passed by the National Company Law Appellate Tribunal whereby, the Appellate Tribunal has rejected the contention that the application made by respondent No. 2, seeking initiation of Corporate Insolvency Resolution Process in respect of the debtor company (respondent No. 1 herein), is barred by limitation; and has declined to interfere with the order , passed by the National Company Law Tribunal, for commencement of CIRP as prayed for by the respondent No. 2.

In the impugned order, the Appellate Tribunal has observed that the Code having come into force on 01.12.2016, the application made in the year 2018 is within limitation. The Appellate Tribunal has assigned another reason that mortgage security having been provided by the corporate debtor, the limitation period of twelve years is available for the claim made by the financial creditor as per Article 61 (b) of the Limitation Act, 19638-9 and hence, the application is within limitation.

Decision & Reason:

Having taken note of the rudiments that the Code is a beneficial legislation intended to put the corporate debtor on its feet and it is not a mere money recovery legislation for the creditors; and having also noticed that CIRP is not intended to be adversarial to the corporate debtor but is essentially to protect its interests and that CIRP has its genesis in default on the part of the corporate debtor, we may now examine the operation of law of limitation over the proceedings under the Code.

When Section 238-A of the Code is read with the above-noted consistent decisions of this Court in Innoventive Industries, B.K. Educational Services, Swiss Ribbons, K. Sashidhar, Jignesh Shah, Vashdeo R. Bhojwani, Gaurav Hargovindbhai Dave and Sagar Sharma respectively, the following basics undoubtedly come to the fore:

- that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;
- that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;
- that intention of the Code is not to give a new lease of life to debts which are time-barred;
- that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;
- that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;
- that default referred to in the Code is that of actual nonpayment by the corporate debtor when a debt has become due and payable; and
- that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and
- an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application.

The discussion foregoing leads to the inescapable conclusion that the application made by the respondent No. 2 under Section 7 of the Code in the month of March 2018, seeking initiation of CIRP in respect of the corporate debtor with specific assertion of the date of default as 08.07.2011, is clearly barred by limitation for having been filed much later than the period of three years from the date of default as stated in the application. The NCLT having not examined the question of limitation; the NCLAT having decided the question of limitation on entirely irrelevant considerations; and the attempt on the part of the respondents to save the limitation with reference to the principles of acknowledgment having been found unsustainable, the impugned orders deserve to be set aside and the application filed by the respondent No. 2 deserves to be rejected as being barred by limitation.

18/09/2020	**Sagufa Ahmed(Appellant)** **Vs.** **Upper Assam Plywood Products Pvt. Ltd(Respondent)**	**Supreme Court of India** **Civil Appeal Nos. 3007 & 3008 of 2020** **A.B. Bobde, A.S. Bopanna & V. Ramasubramanian, JJ.**

Insolvency and Bankruptcy Code, 2016- appeal- delay in filing- appeal dismissed- whether correct- Held, Yes.

Brief facts:

Though the appellants admittedly received the certified copy of the order on 19.12.2019, they chose to file the statutory appeal before NCLAT on 20.07.2020. The appeal was filed along with an application for condonation of

delay. By an order dated 04.08.2020, the Appellate Tribunal dismissed the application for condonation of delay on the ground that the Tribunal has no power to condone the delay beyond a period of 45 days. Consequently the appeal was also dismissed. It is against the dismissal of both the application for condonation of delay as well as the appeal, which the appellants have come up with the present appeals.

Decision& Reason:

The contentions raised by the learned counsel for the appellants are twofold namely (i) that the Appellate Tribunal erred in computing the period of limitation from the date of the order of the NCLT, contrary to Section 421(3) of the Companies Act, 2013, and (ii) that the Appellate Tribunal failed to take note of the lockdown as well as the order passed by this Court on 23.03.2020 in Suo Motu Writ Petition (Civil) No.3 of 2020, extending the period of limitation for filing any proceeding with effect from 15.03.2020 until further orders.

From 19.12.2019, the date on which the counsel for the appellants received the copy of the order, the appellants had a period of 45 days to file an appeal. This period expired on 02.02.2020. By virtue of the proviso to Section 421(3), the Appellate Tribunal was empowered to condone the delay up to a period of period of 45 days. This period of 45 days started running from 02.02.2020 and it expired even according to the appellants on 18.03.2020. The appellants did not file the appeal on or before 18.03.2020, but filed it on 20.07.2020. It is relevant to note that the lock down was imposed only on 24.03.2020 and there was no impediment for the appellants to file the appeal on or before 18.03.2020. To overcome this difficulty, the appellants rely upon the order of this Court dated 23.03.2020. This takes us to the second contention of the appellants.

To get over their failure to file an appeal on or before 18.03.2020, the appellants rely upon the order of this Court dated 23.03.2020 in Suo Motu Writ Petition (Civil) No.3 of 2020. But we do not think that the appellants can take refuge under the above order. What was extended by the above order of this Court was only "the period of limitation" and not the period up to which d elay can be condoned in exercise of discretion conferred by the statute. The above order passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is needless to point out that the law of limitation finds its root in two latin maxims, one of which is *Vigilantibus Non Dormientibus Jura Subveniunt* which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.

Therefore, the appellants cannot claim the benefit of the order passed by this Court on 23.03.2020, for enlarging, even the period up to which delay can be condoned. The second contention is thus untenable. Hence the appeals are liable to be dismissed. Accordingly, they are dismissed.

08/09/2020	**SREI Equipment Finance Limited(Appellant)** **Vs.** **Rajeev Anand(Respondent)**	**Supreme Court of India** **Civil Appeal No. 9425 of 2019** **R. F. Nariman, Navin Sinha, & Indira Banerjee, JJ.**

Insolvency and Bankruptcy Code, 2016- section 7- restructuring of old loans by financial creditor- default by corporate debtor- NCLT admitted the petition-NCLAT reversed the order by misreading the documents- whether admission of the petition correct- Held, Yes.

Brief facts:

Appellant-financial creditor had granted two loans to the respondent corporate debtor and later on restructured the loans. As the corporate debtor was in default an application under section 7 of the IBC was filed. NCLT admitted the application but on appeal NCLAT dismissed the application. Against this dismissal the appellant is before the Supreme Court.

Decision & Reason:

A bare reading of the NCLT order shows that it is only after a perusal of the documents, pleadings, and the supplementary affidavit of 03.08.2018, including the counter affidavit in the earlier section 7 application, that the NCLT came to the conclusion that a loan amount remained outstanding. The NCLAT, when it dealt with the NCLT order, wrongly recorded that documents which were already rejected by the adjudicating authority could not have been the basis of the order of admission. The NCLAT also wrongly recorded that there was no further evidence in support of the factthat any amount was outstanding. Further, the NCLAT also held that a 'document' filed in the earlier petition that was dismissed as withdrawn could not have been relied upon by the adjudicating authority. The NCLAT is wrong on all these counts. As has been stated earlier, documents evidencing an outstanding loan amount were produced; a supplementary affidavit dated 03.08.2018 was also relied upon; and the admission made in the counter affidavit that was made in the first round of litigation, can by no means be described as a 'document' in an earlier petition that could not be relied upon. The 'document' was not a pleading by the appellant – it was a counter affidavit by the corporate debtor in which a clear admission of the debt being outstanding was made.

For all these reasons, we set aside the NCLAT order and restore that of the NCLT. The resolution proceedings will continue from the stage at which they were interrupted.

02/11/2020	**Kiran Gupta(Appellant)** **Vs.** **State Bank of India & Anr(Respondent)**	**Supreme Court of India** **W.P. (C) 7230/2020 & CM.APPL. 24414/2020(stay) Hama Kohl & Subramanian Prasad, JJ.**

Section 13 of SARFAESI read with Insolvency and Bankruptcy Code, 2016- CIRP admitted against principal debtor by NCLT- IRP appointed- bank initiated proceedings under the SARFAESI against the guarantor- whether permissible- Held, Yes.

Brief facts:

The short question which arises for consideration in this writ petition is as to whether a bank/financial institution can institute or continue with proceedings against a guarantor under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act'), when proceedings under the Insolvency and Bankruptcy Code 2016 (hereinafter referred to "IB Code") have been initiated against the principal borrower and the same are pending adjudication.

Decision & Reason:

The question as to whether the respondent/Bank can proceed against a guarantor even after initiation of proceedings under the IB Code also stands settled. As correctly pointed out, the said issue is squarely covered by the judgment of the Supreme Court in the Supreme Court in State Bank of India v. V.Ramakrishan & Anr, reported as (2018) 17 SCC 394 (supra).

Paras 20 and 25 of the said decision read as under:-

"20. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said section. A plain reading of the said section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.

25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate

debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him." (Emphasis added) The view expressed by the Supreme Court amply demonstrates that neither Section 14 nor Section 31 of the IB Code place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues. That being the position, the plea taken by the counsel for the petitioner that all proceedings against the petitioner, who is only a guarantor, ought to be stayed under the SARFESI Act during the continuation of the Insolvency Resolution process qua the Principal Borrower, is rejected as meritless. The petitioner cannot escape her liability qua the respondent/Bank in such a manner. The liability of the principal borrower and the Guarantor remain co-extensive and the respondent/Bank is well entitled to initiate proceedings against the petitioner under the SARFESI Act during the continuation of the Insolvency Resolution Process against the Principal Borrower. In view of the above discussion, we do not find any merit in the writ petition, which is accordingly dismissed along with the pending application.

19/11/2020	**Kaledonia Jute & Fibres Pvt Ltd(Appellant)** **vs.** **Axis Nirman & Industries & Ors(Respondent)**	**Supreme Court of India** **Civil Appeal No. 3735 of 2020[@ SLP(C) No.5452 of 2020)** **S.A. Bobde, A.S. Bopanna & V. Ramasubramanian, JJ.**

Insolvency and Bankruptcy Act,2016- Section 7- transfer of winding up petition from High Court to NCLT- Whether any creditor, other than the creditor who filed the winding up petition, can apply-Held, Yes.

Brief facts:

On the winding up petition of M/s Girdhar Trading Co., the 2nd respondent herein, the High Court of Allahabad, passed the winding up order against the first respondent and appointed the Official Liquidator. Thereafter, the 1st respondent paid the entire amount due to the petitioning creditor (the second respondent herein) along with costs. However, the Company Court kept the winding up order in abeyance, directing the Official Liquidator to continue to be in custody of the assets of the Company. While things stood thus, the appellant herein, claiming to be a creditor of the first respondent herein, filed an application before the NCLT, and it moved an application before the company court seeking a transfer of the winding up petition to the NCLT, Allahabad. This application was rejected by the Company Court, on the sole ground that the requirement of Rule 24 had already been complied with and that a windingup order had already been passed. It is against this order of the High court, refusing to transfer the winding up proceedings from the Company Court to the NCLT that the financial creditor has come up with this civil appeal.

Decision & Reason:

The main issues that arise for consideration in this appeal are that (i) what are the circumstances under which a winding up proceeding pending on the file of a High Court could be transferred to the NCLT; and (ii) at whose instance, such transfer could be ordered.

Thus, the proceedings for winding up of a company are actually proceedings in rem to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors. Therefore, the word "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of section 434 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator. The words "party or parties" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 would take within its fold any creditor of the company in liquidation.

The above conclusion can be reached through another method of deductive logic also. If any creditor is aggrieved by any decision of the official liquidator, he is entitled under the 1956 Act to challenge the same before the Company Court. Once he does that, he becomes a party to the proceeding, even by the plain language of the section. Instead of asking a party to adopt such a circuitous route and then take recourse to the 5 th proviso to section 434(1) (c), it would be better to recognise the right of such a party to seek transfer directly.

As observed by this Court in Forech India Limited (supra), the object of IBC will be stultified if parallel proceedings are allowed to go on in different fora. If the Allahabad High Court is allowed to proceed with the winding up and NCLT is allowed to proceed with an enquiry into the application under Section 7 IBC, the entire object of IBC will be thrown to the winds.

Therefore, we are of the considered view that the petitioner herein will come within the definition of the expression "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 of the Companies Act, 2013 and that the petitioner is entitled to seek a transfer of the pending winding up proceedings against the first respondent, to the NCLT. It is important to note that the restriction under Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016 relating to the stage at which a transfer could be ordered, has no application to the case of a transfer covered by the 5 th proviso to clause (c) of subsection (1) of Section 434.

Therefore, the impugned order of the High court rejecting the petition for transfer on the basis of Rule 26 of the Companies (Court) Rules, 1959 is flawed. Therefore, the appeal is allowed, the impugned order is set aside and the proceedings for winding up pending before the Company Court (Allahabad High Court) against the first respondent herein, is ordered to be transferred to the NCLT, to be taken up along with the application of the appellant herein under Section 7 of the IBC. There will be no order as to costs.

16/03/2020	**George Vinci Thomas (Appellant)** **Vs.** **Capedge Consulting Pvt. Ltd. & Ors** **(Respondent)**	**NCLAT** **Company Appeal (AT) (Insol-vency) No. 1395 of 2019** **A.I.S. Cheema, V. P. Singh & Alok Srivastava**

The Insolvency and Bankruptcy Code, 2016 – Section 9 – Existing dispute – Request for certain information relating to the debt by corporate debtor to operational creditor no information supplied – Whether constitutes an existing dispute – Held, No.

Brief facts:

The Operational Creditor (Respondent No.1 herein) was engaged the Corporate Debtor (Respondent No.2 herein) in November, 2015 to render assistance in resolving issues related to huge losses suffered by it. The 'Operational Creditor' entered into four consultancy agreements with the 'Corporate Debtor'. It was claimed that the 'debt' arose on account of dues of supply of services rendered. The Corporate Debtor appeared before the Adjudicating Authority and the case put up by the 'Corporate Debtor' is that the service of 'Operational Creditor' were indeed taken by the 'Corporate Debtor' by way of the agreements which are claimed to be executed, but that there was an existing dispute. The NCLT admitted the application filed by the operational creditor. Against this order, the present appeal has been filed.

Decision: Appeal dismissed.

Reason:

We have gone through the Impugned Order which read as under:- "18. The Corporate Debtor had placed reliance on the letter dated 21st January, 2018 written by them to hold that there is an existence of dispute. However, on perusal of the email communication, we found that the corporate debtor is merely asking for further information on the services rendered by the operational creditor for each of the invoices raised. Can this be considered as pre-existing dispute is the moot questions? 20. Thereby, on perusal of records, it is clear that the Respondent Corporate Debtor has not raised any dispute relating to debt nor raised any dispute relating to quality of service of goods. They merely sought information regarding the services provided, which cannot be termed as pre-existing dispute or plausible dispute. Further, the cheque bounce case of Telsa Marketing Pvt. Ltd. is not between the 'Operational Creditor' and the 'Corporate Debtor' but between some other parties which cannot be taken into consideration in the instant case." We find ourselves in the agreement with the Adjudicating Authority for these and other reasons recorded and we do not find that the 'Corporate Debtor' is able to show "dispute" with regard to quality of services rendered and thus we do not find any reason to interfere in the Impugned Order. There is no substance in the appeal, the appeal is accordingly dismissed. No costs.

18/11/2019	**Anand Rao Korada Resolution Professional (Appellant) Vs. M/S Varsha Fabrics (P) Ltd. (Respondent)**	**Supreme Court** **Civil Appeal Nos. 8800 &8801 of2019 @ SLP (C) Nos. 23349 & 23350 of 2019** **Indu Malhotra & R. SubashReddy, JJ.**

Insolvency and Bankruptcy Act, 2016 – Moratorium fixed – High Court orders sale of certain properties of the corporate debtor in writ proceedings – Whether tenable – Held, No.

Brief facts:

In the writ petitions filed by the workers Union, the High Court passed order directing the labour commissioner to determine the dues to the workers and accordingly labour commissioner quantified the same and certain properties of the corporate debtor was put on auction sale. Meanwhile, one financial creditor initiated corporate insolvency proceedings against the corporate debtor and the NCLT fixed the moratorium. The sale of the properties was to be made during the period of moratorium and the resolution professional challenged the orders of the High Court.

The Appellant – Resolution Professional filed the present Civil Appeals to challenge the Interim Orders dated 14.08.2019 and 05.09.2019 passed by the Odisha High Court in W.P. (Civil) No. 7939/2011 on the ground that since the CIRP against Respondent No. 4 had commenced, the proceedings before the High Court in W.P. (Civil) No. 7939/2011 ought to be stayed.

Decision: Appeal allowed.

Reason:

Section 238 of the IBC gives an overriding effect to the IBC over all other laws. The provisions of the IBC vest exclusive jurisdiction on the NCLT and the NCLAT to deal with all issues pertaining to the insolvency process of a corporate debtor, and the mode and manner of disposal of its assets.

In view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the Corporate Debtor – Respondent No. 4 herein, once the proceedings under the IBC had commenced, and an Order declaring moratorium was passed by the NCLT. The High Court passed the impugned Interim Orders dated 14.08.2019 and 05.09.2019 after the CIRP had commenced in this case. The moratorium having been declared by the NCLT on 04.06.2019, the High Court was not justified in passing the Orders dated 14.08.2019 and 05.09.2019 for carrying out auction of the assets of the Respondent No. 4–Company i.e. the Corporate

Debtor before the NCLT. The subject matter of the auction proceedings before the High Court is a vast chunk of land admeasuring about 330 acres, including Railway lines and buildings.

If the assets of the Respondent No. 4-Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders. As a consequence, we set aside the impugned Interim Orders dated 14.08.2019 and 05.09.2019 passed by the Odisha High Court, as parallel proceedings with respect to the main issue cannot take place in the High Court. The sale or liquidation of the assets of Respondent No. 4 will now be governed by the provisions of the IBC.

It is open for Respondent No. 13 – Hirakud Workers' Union to file an application under Regulation 9 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 for payment of arrears, salaries and other dues before the competent authority.

04/10/2019	**Duncans Industries Ltd (Appellant)**	**Supreme Court**
	vs.	**Civil Appeal No. 5120 of 2019**
	A.J. Agrochem (Respondent)	**Arun Misra, M.R. Shah &B.R.Gavai, JJ.**

Sections 7,9 and 283 of the Insolvency and Bankruptcy Code, 2016 read with section 16E and 16G of the Tea Act,1953 – Takeover of tea gardens of corporate debtor by the Central Government under Tea Act – Operational creditor filing application under the IBC – Whether maintainable – Held, Yes.

Brief facts:

The appellant Corporate Debtor is a company which owns and manages 14 tea gardens. Out of which, the Central Government has taken over the control of 7 tea gardens under the Tea Act, 1953. The respondent is an operational creditor of the appellant, used to supply pesticides, insecticides, herbicides etc. to the appellant.

The respondent initiated the proceedings against the appellant corporate debtor before the NCLT under Section 9 of the IBC. NCLT dismissed the application as not maintainable as the consent of the Central Government was not obtained. However, the appeal preferred by the operational creditor was allowed by the NCLAT. Hence the present appeal by the corporate debtor.

Decision: Appeal dismissed.

Reason:

The short question which is posed for consideration of this Court is whether before initiation of the proceedings under Section 9 of the IBC, a consent of the Central Government as provided under Section 16G (1) (c) of the Tea Act, 1953 is required and/or whether in absence of any such consent of the Central Government the proceedings initiated by the respondent operational creditor under Section 9 of the IBC would be maintainable or not?

In the present case the Division Bench of the High Court of Calcutta has permitted the appellant corporate debtor to continue with the management of the said tea estates. Therefore, in the facts and circumstances of the case, and more particularly when, despite the notification under Section 16E of the Tea Act, the appellant corporate debtor is continued to be in management and control of the tea gardens/units and are running the tea gardens as if the notification dated under Section 16E has not been issued, Section 16G of the Tea Act, more particularly Section 16G (1) (c), shall not be applicable at all.

Now, so far as the main issue is concerned, at the outset, it is required to be noted that the IBC is a complete Code in itself. Section 16G (1) (c) of the Tea Act refers to the proceeding for winding up of such company or for the appointment of receiver in respect thereof. Therefore, as such, the proceedings under Section 9 of the IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only. The winding up/ liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails. Therefore, the entire "corporate insolvency resolution process" as such cannot be equated with "winding up proceedings".

Therefore, considering Section 238 of the IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of the IBC shall have an overriding effect over the Tea Act, 1953. Any other view would frustrate the object and purpose of the IBC. If the submission on behalf of the appellant that before initiation of proceedings under Section 9 of the IBC, the consent of the Central Government as provided under Section 16G (1) (c) of the Tea Act is to be obtained, in that case, the main object and purpose of the IBC, namely, to complete the "corporate insolvency resolution process" in a time bound manner, shall be frustrated. The sum and substance of the above discussion would be that the provisions of the IBC would have an overriding effect over the Tea Act, 1953 and that no prior consent of the Central Government before initiation of the proceedings under Section 7 or Section 9 of the IBC would be required and even without such consent of the Central Government, the insolvency proceedings under Section 7 or Section 9 of the IBC initiated by the operational creditor shall be maintainable.

In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed.

21/08/2019	**Excel Metal Processors Ltd (Appellant)** **vs.** **Benteler Trading International GMBH & Anr. (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 782 of 2019** **S. J. Mukhopadhaya, A.I.S.** **Cheema & Kanthi Narahari**

Insolvency and Bankruptcy Code, 2016 – Operational creditor a German company – Corporate debtor an Indian company agreement provides for the jurisdiction of German courts whether it can file the petition before the NCLT – Held, Yes.

Brief facts:

The Respondent, a German Company ('Operational Creditor') filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short the 'I&B Code') against Excel Metal Processors Private Limited ('Corporate Debtor') alleging that the 'Corporate Debtor' committed default in making the payment to an extent of US $1,258,219.42 inclusive of interest @ 15% per annum. The Adjudicating Authority (National Company Law Tribunal), admitted the application. The Appellant has challenged the said order.

Decision: Appeal dismissed.

Reason:

The Appellant referred to the Agreement reached between the parties and submitted that as per the Agreement and as the Office of the Respondent is in Germany, any suit or case is maintainable only in the Court at Germany. No case can be filed in any Court in India. Therefore, the Appellant has raised the question of jurisdiction of the National Company Law Tribunal, Mumbai Bench in entertaining the application under Section 9 of the I&B Code. However, we are not inclined to accept the aforesaid statement as it is now settled and decided by this Appellate Tribunal in Binani Industries Ltd v. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No.82 of 2018 etc. decided on 14th November, 2018 wherein it was held that 'Corporate Insolvency Resolution Process'/ insolvency proceedings is not a 'suit' or a 'litigation' or a 'money claim' for any litigation; No one is selling or buying the 'Corporate Debtor' a 'Resolution Plan'; It is not an auction; it is not a recovery, which is an individual effort by the creditor to recover the dues through a process that had debtor and creditor on opposite sides; and it is not liquidation. The object is mere to get resolution brought about, so that the Company do not default on dues.

Pursuant to Section 408 of the Companies Act, 2013, the National Company Law Tribunal has been constituted in different States. In terms of the said provision, the Central Government has notified and vested the power on respective National Company Law Tribunals to deal with the matter within its territory, where the registered

Offices of the Companies are situated. As per Section 60(1) of the I&B Code, "The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located". As admittedly, the Registered Office of the 'Corporate Debtor' is situated in Mumbai, we hold that the National Company Law Tribunal, Mumbai Bench has the jurisdiction to entertain an application under Section 9 of the I&B Code and the Appellant cannot derive advantage of the terms of the Agreement reached between the parties.

Next, it was pointed out that the 'Corporate Debtor' was not served with the Demand Notice in terms of Section 8(1) of the I&B Code.

However, from the record we find that Demand Notice under Section 8(1) of the I&B Code was issued by the Respondent - 'Operational Creditor' on 6th March, 2018 demanding the repayment of US $971,412.98 plus ancillary obligations @ 15 % p.a. amounting to US $286.804.44 and despite receiving of the said Demand Notice, the 'Corporate Debtor' had not replied, nor repaid the outstanding dues. The Adjudicating Authority has as such not accepted such plea based on record.

In spite of the same, we gave option to the Appellant to suggest whether the Appellant or the 'Corporate Debtor' would agree to repay the debt as payable to the 'Operational Creditor', but it is informed that the 'Corporate Debtor' or the Appellant is not in a position to do so.

For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 25th June, 2019 and in absence of any merit, the Appeal is accordingly dismissed. No cost.

23/07/2019	**Ahluwalia Contracts (India) Ltd (Appellant)** **vs.** **Raheja Developers Ltd (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 703 of 2018** **S.J. Mukhopadhaya, A.I.S.** **Cheema & Kanthi Narahari**

Insolvency and Bankruptcy Act, 2016 – Operational creditor sent demand notice to corporate debtor – Corporate debtor initiated arbitration proceedings after the receipt of demand notice operational creditor filed petition before NCLT – Petition rejected on the ground that arbitration proceeding is pending – Whether correct Held, No.

Brief facts:

The Appellant Operational Creditor filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against the Respondent Corporate Debtor. The Adjudicating Authority, by impugned order, after discussing the case on merit, rejected the application on the ground that the claim of the Appellant falls within the ambit of 'disputed claim'. It is pertinent to notice that the Respondent initiated arbitration proceedings only after the receipt of demand notice from the appellant. The Adjudicating Authority also observed that the arbitration proceedings in respect of the same cause of action has been initiated.

Decision: Appeal allowed.

Reason:

In an application under Section 9, it is always open to the Corporate Debtor to point out pre-existence of dispute. It is to be shown that the dispute was raised prior to the issuance of demand notice under Section 8(1). In Mobilox Innovations Pvt. Ltd v. Kirusa Software (P) Ltd, (2017) 1 SCC Online SC 353, the Hon'ble Supreme Court held that the 'existence of the dispute' and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice.

From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid 'operational debt', the application under Section 9 cannot be rejected and is required to be admitted.

From the aforesaid findings, it is clear that 'claim' means a right to payment even if it is disputed. Therefore, merely the 'Corporate Debtor' has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute, in absence of any evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.

In the present case, it is not in dispute that the arbitration proceeding was initiated by the Respondent after about one month from the date of issuance of demand notice under Section 8(1). Therefore, the 'Corporate Debtor' cannot rely on arbitration proceeding to suggest a pre-existing dispute. There is nothing on the record to suggest that the 'Corporate Debtor' raised any pre-existing dispute relating to quality of work performed by Appellant. The ground of delay in execution of work cannot be noticed to deny admission of application under Section 9, the 'Corporate Debtor' having allowed the Appellant to execute the work and certified all the bills.

The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by Hon'ble Supreme Court in Innoventive Industries Ltd. v. ICICI Bank and Anr (2018) 1 SCC 407 wherein it is observed that "claim means a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4)."

The Adjudicating Authority also failed to appreciate that the arbitration proceeding was initiated on 24th May, 2018 i.e. much after the issuance of the demand notice under Section 8(1) on 28th April, 2018 thereby wrongly held that an arbitration proceeding is pending. 24. From the record as we find that the Respondent has defaulted to pay more than Rs. 1 Lakh and in absence of any pre-existing dispute, and the record being complete, we hold that the application under Section 9 preferred by the Appellant was fit to be admitted.

For the reasons aforesaid, we set aside the impugned judgment dated 19th September, 2018 and remit the case to the Adjudicating Authority for admitting the application under Section 9 after notice to the 'Corporate Debtor' to enable the 'Corporate Debtor' to settle the matter prior to the admission.

18/07/2019	**SSMP Industries Ltd (Appellant)** **vs.** **PerkanFood Processors Pvt. Ltd (Respondent)**	**Delhi High Court** **[DEL] CS (COMM) 470/2016** **Prathibha M Singh, J.**

Insolvency and Bankruptcy Code, 2016 – Section 14 – Moratorium on legal proceedings – Plaintiff corporate debtor under IBC proceedings defendant operational creditor filed counter claim – Whether the counter claim should be stayed-Held, No.

Brief facts:

An interesting issue has arisen in this matter in respect of the interpretation of Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter the "Code"). The Plaintiff has filed the present suit seeking recovery of Rs.1, 61, 47,336.44. The Defendant has filed its written statement/counter claim in which it avers that it is, in fact, entitled to recover a sum of Rs. 59,51,548/- and no amount is due and payable by it to the Plaintiff. The Plaintiff Company has since gone into insolvency and a Resolution Professional has been appointed. The question has arisen as to whether the adjudication of the counter claim would be liable to be stayed in view of Section 14 of the Code.

Decision: Counter claim need not be stayed.

Reason:

The claim of the Plaintiff is much higher i.e. a sum of Rs.1, 61, 47,336.44, than what is claimed by the Defendant. The transaction between the parties would require to be adjudicated on the basis of correspondence and the agreement, which have been placed on record. This Court would have to first determine the question as to whether any amount at all is payable to the Plaintiff. Even if the counter claim is decreed fully and the claim of the Plaintiff is also allowed, the Plaintiff would, in fact, be entitled to recover and not the Defendant. The possible outcome of the suit and the counter claim is in the realm of uncertainty. The question as to the amount that would be liable to be paid by either party to the other is not something that can be predicted at this point. The entitlement of the Defendant to the amount claimed from the Plaintiff is also not concrete and settled. There is no doubt that adjudication of the plaint and counter claim are interlinked with each other.

A ld. Single Judge of this Court in Power Grid Corporation of India v. Jyoti Structures Ltd., (2018) 246 DLT 485 has held that embargo of Section 14(1)(a) of the Code would not apply in all circumstances. A perusal of the judgment shows that until and unless the proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor, it would not be prohibited under Section 14(1) (a) of the Code.

In Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd & Anr. [Company Appeal (AT) (Insolvency) No. 285/2018 Decided on 3rd August, 2018], the NCLAT has, in similar circumstances, held that until and unless the counter claim is itself determined, the claim and the counter claim deserve to be heard together and there is no bar on the same in the Code.

The Court has considered the plaint and the written statement/ counter claim. The adjudication of the plaint, defences in the written statement and the amounts claimed in the counter claim would have to be considered as a whole in order to determine as to whether the suit or the counter claim would be liable to be decreed. A counter claim would be in the nature of a suit against the Plaintiff which in this case is the `corporate debtor'. Under Section 14(1) (a) of the Code, strictly speaking, a counter claim would be covered by the moratorium which bars `the institution of suits or continuation of pending suits or proceedings against the corporate debtor". A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor i.e., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims but the counter claim would be barred under Section 14(1) (a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims.

The nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. The proceedings before NCLT are summary in nature and the RP does not conduct a trial. The RP merely determines what payment can be made towards the claims raised, subject to availability of funds. The NCLT/RP cannot be burdened with the task of entertaining claims of the Defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the Defendant is in fact entitled to any amounts, if determined by the NCLT, prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. Under these circumstances, this court is of the opinion that the Plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum. At this point, till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be stayed under Section 14 of the Code. The suit and the counter claim would proceed to trial before this Court.

19/12/2018	**Lalit Mishra & Ors (Appellant) vs. SharonBio Medicine Ltd. & Ors. (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 164 of 2018** **S.J. Mukhopadhaya &Bansi Lal Bhat**

Insolvency and Bankruptcy Code, 2016 – Resolution plan – Personal guarantor claimed his subrogation right – Whether tenable – Held, No.

Brief facts:

The Appellants are the promoters of 'Sharon Bio Medicine Ltd.'- ('Corporate Debtor'). In the appeal they have challenged the order passed by the National Company Law Tribunal [NCLT], whereby and where under, the 'Resolution Plan' submitted by the 3rd Respondent- 'Successful Resolution Applicant' has been approved.

The Appellants have challenged the order of approval of the 'Resolution Plan' on two counts namely –(i) The Appellants, promoters were the shareholders and for them no amount has been provided under the 'Resolution Plan'; and (ii) Some of the Appellants, promoters are also 'personal guarantors' who have been discriminated.

Decision: Appeal dismissed. Reason:

The restructuring of the financial debt as part of the 'Resolution Plan' approved by the Adjudicating Authority under the 'I&B Code' does not envisage complete discharge of the liability of personal guarantors of the 'Corporate Debtor'. This will be evident from Clause 12 of Section 5 of the 'Resolution Plan' which deals with 'treatment of security'. Therein it is mentioned that all securities/ collaterals/ margin money/ fixed deposit with lien provided by the Company shall be deemed to be released immediately on Effective Date. It is subsequently mentioned that the personal guarantee provided by the existing promoters of the Company, shall result in no liability towards the 'Company' or the 'Resolution Applicants'. This 'treatment of security' and with regard to personal guarantee provided by the existing promoters of the Company is alleged to be in violation of Section 140 and Section 133 of the 'Indian Contract Act'.

However, the aforesaid submissions cannot be accepted, as on approval of the 'Resolution Plan', the claim of the entire stakeholders stand cleared and the 'Personal Guarantor' thereafter cannot claim that they have been discriminated. All the stakeholders have already been cleared by the 3rd Respondent- 'Successful Resolution Applicant'. It was open to them to say that the personal guarantee will not result into any liability towards the 'Company' or the 'Resolution Applicant'.

It was not the intention of the legislature to benefit the 'Personal Guarantors' by excluding exercise of legal remedies available in law by the creditors, to recover legitimate dues by enforcing the personal guarantees, which are independent contracts. It is a settled position of law that the liabilities of guarantors is co-extensive with the borrower.

This Appellate Tribunal held that the resolution under the 'I&B Code' is not a recovery suit. The object of the 'I&B Code' is, inter alia, maximization of the value of the assets of the 'Corporate Debtor', then to balance all the creditors and make availability of credit and for promotion of entrepreneurship of the 'Corporate Debtor'. While considering the 'Resolution Plan', the creditors focus on resolution of the borrower 'Corporate Debtor', in line with the spirit of the 'I&B Code'.

The present appeal has been preferred by the promoters, who are responsible for having contributed to the insolvency of the 'Corporate Debtor'. The 'I&B Code' prohibits the promoters from gaining, directly or indirectly, control of the 'Corporate Debtor', or benefiting from the 'Corporate Insolvency Resolution Process' or its outcome. The 'I&B Code' seeks to protect creditors of the 'Corporate Debtor' by preventing promoters from rewarding themselves at the expense of creditors and undermining the insolvency processes.

For the aforesaid reasons, it will be evident from the 'I&B Code' that the powers of the promoters as the members of the Board of Directors of the 'Corporate Debtor' are suspended. The voting right of the shareholders, including promoter shareholders, are suspended and shareholders' approval is deemed to have been granted for implementation of the 'Resolution Plan' as apparent from explanation to Section 30(2)(f) of the 'I&B Code'. The promoters, being 'related parties' of the 'Corporate Debtor', have no right of representation, participation or voting in a meeting of the 'Committee of Creditors'.

Admittedly, the shareholders and promoters are not the creditors and thereby the 'Resolution Plan' cannot balance the maximization of the value of the assets of the 'Corporate Debtor' at par with the 'Financial Creditors' or 'Operational Creditors' or 'Secured Creditors' or 'Unsecured Creditors'. They are also ineligible to submit the 'Resolution Plan' to again control or takeover the management of the 'Corporate Debtor'.

In the aforesaid background, if no amount is given to the promoters/ shareholders and the other equity shareholders who are not the promoters have been separately treated by providing certain amount in their favour, the Appellant cannot claim to have been discriminated.

22/01/2019	**Forech India Ltd. (Appellant) vs. Edelweiss Assets Reconstruction Co Ltd & Anr (Respondent)**	**Supreme Court** **Civil Appeal No. 818 of 2018 R F Nariman & Navin Sinha, JJ**

Insolvency and Bankruptcy Code, 2016 – Section 7&11 – Financial creditor filed an insolvency petition against the corporate debtor – Appellant objecting to the admission on the ground of continuance of winding up petition under the old Act – Objection rejected – Whether correct – Held, Yes.

Brief facts:

The present matter arises from an Operational Creditor's appeal to continue with a winding up petition that has been filed by the said creditor way back in 2014. The facts relevant for disposal of this appeal are as follows:-

A winding up petition, being No. 42 of 2014, was filed by the present appellant before the High Court of Delhi on 10.01.2014, against Respondent No. 2-Company, in which notice had been served, as is recorded by an order of the High Court of Delhi. Further orders which have been pointed out to the Court have gone on to state that there is a debt or liability which is, in fact, admitted.

It transpires that another operational creditor, viz., SKF India Ltd. had filed an application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (in short 'the Code'), against Respondent No. 2, which was allowed to be withdrawn so that the aforesaid operational creditor could go to the High Court in a winding up petition which would then be heard along with the Company Petition No. 42/2014.

Meanwhile, Respondent No. 1, being a financial creditor of the self- same corporate debtor, moved the National Company Law Tribunal (NCLT) in an insolvency petition filed under Section 7 of the Code sometime in May/ June 2017. This petition was admitted on 07.08.2017. Against the aforesaid order, an appeal was filed by the appellant herein which was dismissed by the Appellate Tribunal, in which Section 11 of the Code was referred to, and it was held by the Appellate Tribunal that since there was no winding up order by the High Court, the financial creditor's petition would be maintainable, as a result of which the appellant's appeal has been dismissed.

Decision: Appeal disposed of with direction.

Reason:

The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that

parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgment which is contained in Jaipur Metals & Electricals Employees Organization vs. Jaipur Metals & Electricals Ltd. & Ors. being a judgment by a Division Bench of this Court dated 12.12.2018.

Section 11 is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.

Though, we are not interfering with the Appellate Tribunal's order dismissing the appeal, we grant liberty to the appellant before us to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code.

25/01/2019	**Swiss Ribbons Pvt Ltd. (Appellant)** **vs.** **Union Of India (Respondent)**	**Supreme Court** **Writ Petition (Civil) No. 99 of 2018 with batch of petitions** **R F Nariman & Navin Sinha, JJ**

Insolvency and Bankruptcy Code, 2016 – Whether constitutionally valid – Held, yes. Brief facts:

The present petitions assail the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 ["Insolvency Code" or "Code"]. Since we are deciding only questions relating to the constitutional validity of the Code, we are not going into the individual facts of any case.

Decision: Constitutional validity upheld.

Reason:

The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.

We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have

been disposed of by the Adjudicating Authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. Eighty cases have since been resolved by resolution plans being accepted. Of these eighty cases, the liquidation value of sixty- three such cases is INR 29,788.07 crores. However, the amount realized from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, the Reserve Bank of India has come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016- 2017, to INR 9161.09 crores in 2017-2018, and to INR 13195.20 crores for the first six months of 2018-2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR

14530.47 crores in 2016-2017, to INR 18469.25 crores in 2017- 2018, and to INR 18798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter‘s paradise is lost. In its place, the economy‘s rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs.

18/02/2019	**Shalini Publicity Creative Pvt. Ltd. (Appellant) vs. Dena Bank (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 153 of 2019** **S.J. Mukhopadhaya &Bansi Lal Bhat**

Insolvency and Bankruptcy Code,2016 – Section 7 – Default in repayment of loan by corporate debtor – OTS proposal failed financial creditor filed petition – NCLT admitted the petition whether correct – Held, Yes.

Brief facts:

Appellant Corporate Debtor is aggrieved of the impugned order passed by the Adjudicating Authority (NCLT), Mumbai Bench by virtue whereof application of Respondent – Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) has been admitted, moratorium slapped and Interim Resolution Professional appointed with certain directions. Before the Adjudicating Authority the Financial Creditor alleged default on the part of the Corporate Debtor in repayment of facilities granted to the Corporate Debtor to the extent of Rs.28,15,26,092/-.The Financial Creditor relied upon the ‘sanction letter’ dated 26th December, 2015 in terms whereof facilities comprising of cash credit, term loan and bank guarantee accumulated at Rs.14,69,00,000/- were granted to the Corporate Debtor, repayment whereof was secured by various security documents. Financial Creditor also relied upon the ‘statement of accounts’ substantiating its claim with regard to the amount in respect whereof default was alleged.

Decision: Appeal dismissed.

Reason:

The Adjudicating Authority taking note of the fact that the One Time Settlement (OTS) proposal made by the Corporate Debtor had been rejected by the Financial Creditor and that the ‘debt’ and ‘default’ was established, proceeded to admit the application thereby initiating Corporate Insolvency Resolution Process against the Corporate Debtor. Learned counsel for the Appellant tried to make a vain attempt to assail the impugned order raising the issue of limitation. In the first place be it seen that no such plea was raised before the Adjudicating Authority. That apart, under Article 137 of the Limitation Act, the right to sue accrues when a default occurs. The period of three years, as envisaged under aforesaid Article, would therefore have to be reckoned from the date of default unless there is a continuing cause of action. It emanates from record that the Financial Creditor relied upon various security documents connected with the sanction of loan facilities. In addition thereto reliance was

also placed on notice issued under Section 13(2) of SARFAESI Act, 2002 demanding a sum of Rs.16, 31, 06,448/- as on 17th February, 2016.

Once the debt was acknowledged on 26th February, 2015 and the suit for recovery was filed before the Debts Recovery Tribunal-3, Mumbai on 19th October, 2016, the claim cannot be held to be barred by limitation. Even otherwise, the objection in regard to the claim being barred by limitation has to be determined during the Corporate Insolvency Resolution Process only. Triggering of Corporate Insolvency Resolution Process on grounds of default of a debt that's payable in law or in fact is different from admission or rejection of a claim of a creditor during such process.

Section 7 of I&B Code providing for initiation of Corporate Insolvency Resolution Process by Financial Creditor came into force on 1st December, 2016. Remedy by way of triggering of insolvency resolution process on the ground of default committed qua the financial debt was admittedly not available to a Financial Creditor prior to such date. It is not disputed by learned counsel for the Appellant that the application under Section 7 of I&B Code came to be filed by the Financial Creditor on 12th October, 2018. The triggering of Corporate Insolvency Resolution Process, therefore,` cannot be said to be beyond limitation, more so as there has been acknowledgement of debt on 26th February, 2015 and remedy for initiation of Corporate Insolvency Resolution Process in terms of Section 7 of I&B Code was not available prior to 1st December, 2016. That apart, there has been continuing cause of action as OA 1194 of 2016 filed by the Financial Creditor against the Corporate Debtor before the Debts Recovery Tribunal, Mumbai on 19th October, 2016 is still pending adjudication.

Learned counsel for the Appellant made feeble attempt to contend that the debt acknowledgement letter dated 26th February, 2015 was manipulated and fictitious and same could not be made a basis for either reckoning the period of limitation or for entertaining claim. In absence of such plea having been raised before the Adjudicating Authority besides no complaint alleging forgery, fabrication/ fudging of record being lodged, this argument must be rejected with the contempt that it deserves. On one hand the Appellant was seeking restructuring of loan in terms of RBI Guidelines seeking more time for One Time Settlement (OTS) but on the other hand alleges fabrication and manipulation. What prompted the Corporate Debtor to seek restructuring of loan through One Time Settlement is explainable on no hypothesis other than the one that the Corporate Debtor had committed default qua the outstanding amount which was payable.

For the foregoing reasons, I am of the considered opinion that the appeal is devoid of any merit. The appeal is accordingly dismissed.

11/02/2019	**Coal India Ltd. (Appellant) vs. Gulf Coil Lubricants India Ltd & Anr (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 807 of 2018** **S.J. Mukhopadhaya &Bansi Lal Bhat**

Insolvency and Bankruptcy Code, 2016 – Section 9 – Petition filed by operational creditor admitted – NCLT overlooked the fact of the payment of principal amount under a settlement – Whether correct – Held, No.

Brief facts:

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) was filed by Operational Creditor) for initiation of the 'Corporate Insolvency Resolution Process' against corporate debtor. The said application has been admitted by impugned order by the Adjudicating Authority (NCLT). While passing the impugned order, the Adjudicating authority had overlooked the factum that the principal amount has been paid and settled and no interest was required to be paid. The present appeal has been preferred by the corporate Debtor.

Decision: Appeal allowed.

Reason:

Learned counsel of the Operational Creditor accepts that the principal amount was paid prior to the admission of the application under Section 9 and interest has been paid and matter has been settled by agreement dated 26th January, 2019. It is submitted that such settlement has already been made prior to the constitution of the 'Committee of Creditors'.

In the case of Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors. – Writ Petition (Civil) No. 99 of 2018**,** the Hon'ble Supreme Court observed as follows:

"52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case."

In effect, order (s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and the 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional' for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

26/04/2019	**Affinity Finance Services Pvt Ltd.** **(Appellant) vs. Kiev Finance Ltd (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No.171/2019** **Bansi Lal Bhat & Balvinder Singh**

Insolvency and Bankruptcy Code, 2016 – Corporate insolvency proceedings – Liquidation order passed – Recall rejected – Whether refusal to recall the liquidation order correct – Held, Yes. Brief facts

The appellant, operational creditor, filed petition under Section 9 of the Insolvency & Bankruptcy Code, 2016 seeking initiation of corporate insolvency resolution process against the Respondent, Corporate Debtor for committing default in paying of its debt. The petition was admitted by the Adjudicating Authority and Interim Resolution Professional was appointed and Committee of Creditors came to be constituted. Subsequently appointment of IRP was confirmed as Resolution Professional. The COC had as many as six meetings but did not receive any resolution plan during the period of 180 days.

Resolution Professional approached the Adjudicating Authority for liquidation of the Corporate Debtor. The Adjudicating Authority passed the liquidation order qua the corporate debtor and the Resolution Professional was appointed as Liquidator.

However, subsequently an application appears to have been filed by the Liquidator seeking recall of the liquidation order, which was dismissed on the ground that the order of liquidation of corporate debtor passed by it could not be subjected to review or revocation. It was also noticed by the Adjudicating Authority that

corporate debtor could be sold as an ongoing concern during the liquidation process. The application seeking review was also accordingly dismissed. Hence the present appeal.

Decision: Appeal dismissed.

Reason:

After hearing learned counsel for the appellant for a while we find no merit in the instant appeal. Admittedly no resolution applicant came forward with a resolution plan during the corporate insolvency resolution process and the Resolution Professional was left with no option but to seek an order of liquidation from the Adjudicating Authority. Learned Adjudicating Authority also did not have any option but to pass order for liquidation of the corporate debtor. Even if it is accepted that any resolution applicant did intend to submit a resolution plan before the order of liquidation was passed, same could be evaluated for considering its feasibility, viability and financial matrix only during the period of Insolvency Resolution Process. The Resolution Professional, in terms of Section 30(3) is required to present to the COC for its approval such resolution plans which confirm the conditions referred to in sub-section (2) of Section 30. It is only thereafter that feasibility and viability of such resolution plan is considered by the COC and the resolution plan is subjected to vote. All this has not been done. In fact review was sought on the ground that the proposed resolution applicant intended to file a resolution plan which in fact could not be evaluated and subjected to scrutiny for determining its viability and feasibility by the COC unless the same had been submitted within the prescribed time frame. This, coupled with the fact that the order of liquidation goes un-assailed, did not justify recalling of the order of liquidation at the instance of appellant, operational creditor, who claims to be sole member of COC. The impugned order declining to recall the liquidation order does not suffer from any legal infirmity and we do not find any justifiable ground to interfere.

The Adjudicating Authority has rightly pointed out in the impugned order that even during the liquidation process corporate debtor can be sold as an ongoing concern. That should allay the apprehension of the appellant, if any, with regard to fair value of the Assets of the Corporate Debtor. For the aforesaid reasons, the appeal is dismissed.

30/04/2019	**JK Jute Mill Mazdoor Morcha (Appellant) vs. Juggilal Kamlapat Jute Mills Ltd & ORS (Respondent)**	**Supreme Court** **Civil Appeal No.20978 of 2017** **R.F. Nariman & Vineet Saran, JJ**

Insolvency and Bankruptcy Code, 2016 – Whether trade union is an 'operational creditor' when representing the interests of the workmen – Held, Yes.

Brief facts

The present appeal raises an important question as to whether a trade union could be said to be an operational creditor for the purpose of the Insolvency and Bankruptcy Code, 2016 ["Code"]. The facts of the present case reveal a long-drawn saga of a jute mill being closed and reopened several times until finally, it has been closed for good on 07.03.2014. Proceedings were pending under the Sick Industrial Companies (Special Provisions) Act, 1985. On 14.03.2017, the appellant issued a demand notice on behalf of roughly 3000 workers under Section 8 of the Code for outstanding dues of workers. This was replied to by respondent No.1 on 31.03.2017. The National Company Law Tribunal ["NCLT"], on 28.04.2017, after describing all the antecedent facts including suits that have been filed by respondent No.1 and referring to pending writ petitions in the High Court of Delhi, ultimately held that a trade union not being covered as an operational creditor, the petition would have to be dismissed. By the impugned order dated 12.09.2017, the National Company Law Appellate Tribunal ["NCLAT"] did likewise and dismissed the appeal filed by the appellant before us, stating that each worker may file an individual application before the NCLT.

Decision: Appeal allowed.

Reason

On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of "person" under Sections 3(23) of the Code. This being so, it is clear that an "operational debt", meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly. Further, a registered trade union recognised by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which inter alia is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

Even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. We must never forget that procedure is the handmaid of justice, and is meant to serve justice.

The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union would come within the definition of "person" under Section 3(23) of the Code. Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all. For all these reasons, we allow the appeal and set aside the judgment of the NCLAT. The matter is now remanded to the NCLAT who will decide the appeal on merits expeditiously as this matter has been pending for quite some time. The appeal is allowed accordingly.

11/06/2019	**Pranami Trading Pvt Ltd. (Appellant) vs. Kieon Developers Pvt. Ltd (Respondent)**	**NCLAT** **Company Appeal (AT) (INS) No. 96 of 2019** **S.J. Mukhopadhaya, A.I.S.** **Cheema & Kanthi Narahari**

Insolvency and Bankruptcy Code, 2016 – Section 238 – Application of Limitation Act to proceedings – Petition of operational creditor rejected by NCLT on the ground of limitation – Whether correct – Held, No.

Brief facts:

The Appellant had filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the NCLT against the Respondent which came to be rejected on the ground of limitation.

The Appellant had booked a flat with the Respondent on 16th May 2012 and paid an amount of Rs.60 Lakhs and

the allotment letter was issued to the Appellant. Subsequently, on 16.07.2012, an MOU (Annexure – D - Page – 42) was executed between the Appellant and Respondent and both the parties cancelled the booking on terms and conditions as laid down in the MOU. The Respondent agreed to pay the Appellant the amount of Rs.60 Lakhs within 18 months from the date of receipt of the boking amount, i.e. on or before 15th November 2013. In addition, Respondent agreed to pay Rs.8, 10,000/- every six months to the Appellant till entire booking amount was duly paid. Other conditions were also incorporated. According to the Appellant, in furtherance to the MOU and undertaking, the Respondent paid Rs.3, 24,000/- each on 16.11.2012 and 15.05.2013. Even Respondent had issued some cheques for refund of the amount but on 6th January 2014, wrote letter to the Appellant that the cheques are to be replaced. When the Appellant presented two cheques, the same bounced. The Appellant claimed that no interest had been paid on the booking amount, i.e. the principal amount of Rs.60 Lakhs after 15th May 2013 and the principal amount had also not been repaid.

The Appellant wanted to invoke second condition of the MOU with regard to the allotment of the flat, but Respondent did not comply and created third party rights which led to the Appellant filing L.C. Suit No. 954 of 2014. In the written statement dated 21st July 2017, Respondent claimed that it was a pure loan transaction and accepted that the Respondent had received the money. The Appellant claims that on 16.07.2018, it filed

Section 7 proceeding before the Adjudicating Authority, but it was wrongly dismissed on the ground of limitation.

The Impugned Order shows that the Adjudicating Authority took into consideration the Application filed under Section 7 and the Affidavit filed by the Corporate Debtor claiming that the amount concerned was barred by limitation. The date of default was stated to be 21.07.2017 which was date of the written statement in the Suit. The Adjudicating Authority observed that written statement filed in the Suit did not amount to acknowledgement of the debt and could not reset the limitation. Consequently, the Application was rejected.

Decision: Appeal allowed.

Reason:

Admittedly, the Appellant had paid Rs.60 Lakhs and allotment letter was issued on 16th May 2012. The Memorandum of Understanding (Annexure – D) shows that the parties mutually agreed to cancel the booking on the "terms and conditions arrived at between the two parties" as mentioned in the documents.

It appears that the Appellant received some amounts which now Appellant classifies as towards the "interest" component and thereafter, neither the principal nor interest, which was recurring, was paid and the Appellant invoked the third para of the Terms and Conditions. The Appellant –Plaintiff filed Suit (Annexure – F) seeking Decree of the flat and in the written statement dated 21.07.2017 (Annexure G – Page 73), the Respondent – Defendant accepted that the respondent had received consideration amount from the Plaintiff as per the statement and claimed that it was a loan transaction.

Thus, the provisions of the Limitation Act shall apply "as far as may be" [s.238 of IBC]. Although the Adjudicating Authority has observed that admission in the written statement will not amount to acknowledgement, we need not deliberate to settle that issue looking to the Term – 1 of the MOU which we have reproduced above. In the transaction, the term clearly shows liability of Rs.8, 10,000/- getting created every 6 months for the Respondent to pay the Appellant "till the entire booking amount has not been repaid". When the entire booking amount has not been paid, this component keeps getting attracted and liability invoked and when Section 7 Application was filed, the amount due and outstanding was clearly more than Rs.1 Lakh and thus, in our view, the Application under Section 7 could not have been rejected as time barred. There was a debt which was due, and the default was of more than Rs.1 Lakh and therefore, it was sufficient to trigger Section 7 proceeding.

Neither the parties nor the Impugned Order shows that there was any other defect in the Section 7 Application which had been moved so as to say that the Application was not complete. In that view of the matter, the Application filed before NCLT deserves to be admitted. For reasons mentioned, the Appeal is allowed. We remit back the matter to the Adjudicating Authority.

22/04/2016	**Axis Bank (Appellant) vs. Sbs Organics Pvt. Ltd & Anr (Respondent)**	**Supreme Court** **Civil Appeal No. 4379 of 2016(Arising out of SLP (C) No. 13861/2015)** **Kurian Joseph &** **Rohinton Fali Nariman, JJ**

SARFASEI Act – Appeal before DRAT – Pre-deposit of 50% of contended sum – Appeal withdrawn – Borrower claimed the refund of the pre-deposit sum – Bank contended it cannot be refunded – Whether the claim of the borrower tenable – Held, Yes.

Brief facts:

An appeal under Section 18 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act') before the Debt Recovery Appellate Tribunal (hereinafter referred to as 'DRAT') can be entertained only if the borrower deposits fifty per cent of the amount in terms of the order passed by the Debt Recovery Tribunal (hereinafter referred to as 'DRT') under Section 17 of the Act or fifty per cent of the amount due from the borrower as claimed by the secured creditor, whichever is less. The Appellate Tribunal may reduce the amount to twenty five per cent. What is the fate of such deposit on the disposal of the appeal is the question arising for consideration in this case. Being a pure legal issue, it may not be necessary for us to refer to the factual position in detail. The first respondent, being a borrower and aggrieved by the steps taken by the secured creditor, filed Securitisation Application No. 152 of 2010 before the Debt Recovery Tribunal, Ahmedabad. Though, initially an interim relief was granted, the same was vacated by order dated 20.01.2011. Therefore, the first respondent moved the Debt Recovery Appellate Tribunal, Mumbai under Section 18 of the SARFAESI Act. In terms of the proviso under Section 18, the first respondent made a deposit of Rs.50 lakhs before the Appellate Tribunal. During the pendency of the appeal before the DRAT, Securitisation Application itself came to be finally disposed of before the Debt Recovery Tribunal at Ahmedabad, setting aside the sale. Realising that the appeal did not survive thereafter, the first respondent sought permission to withdraw the same and also for refund of the deposit of Rs. 50 lakhs. Permission was granted, however, making it subject to the disposal of the appeal. As the appeal itself was being withdrawn, the first respondent moved the High Court of Gujarat at Ahmedabad by way of Writ Petition (Special Civil Application), aggrieved by the observation that the withdrawal would be subject to the result of the appeal. The same was disposed of by order dated 05.03.2015 by the learned Single Judge, setting aside the said condition and permitting the first respondent herein to withdraw the amount unconditionally. Aggrieved, the appellant-Bank filed an intra-Court appeal. That appeal was dismissed by order dated 01.04.2015 by a Division Bench, and thus aggrieved, the Bank has come up in appeal before the Supreme Court.

Decision: Appeal dismissed.

Reason:

Any person aggrieved by the order of the DRT under Section 17 of the SARFAESI Act, is entitled to prefer an appeal along with the prescribed fee within the permitted period of 30 days. For 'preferring' an appeal, a fee is prescribed, whereas for the Tribunal to 'entertain' the appeal, the aggrieved person has to make a deposit of fifty per cent of the amount of debt due from him as claimed by the secured creditors or determined by the DRT, whichever is less. This amount can, at the discretion of the Tribunal, in appropriate cases, for recorded reasons, be reduced to twenty- five per cent of the debt.

In the case before us, the first respondent had in fact sought withdrawal of the appeal, since the appellant had already proceeded against the secured assets by the time the appeal came up for consideration on merits. There is neither any order of appropriation during the pendency of the appeal nor any attachment on the pre- deposit. Therefore, the deposit made by the first respondent is liable to be returned to the first respondent. Though for

different reasons as well, we endorse the view taken by the High Court. Thus, there is no merit in the appeal. It is accordingly dismissed. We make it clear that the dismissal of the appeal is without prejudice to the liberty available to the appellant to take appropriate steps under Section 13(10) of the SARFAESI Act read with Rule 11 of the Security Interest (Enforcement) Rules, 2002.

25/11/2016	**Uco Bank & Anr (Appellant) vs. Dipak Debbarma & Ors (Respondent)**	**Supreme Court** **Civil Appeal No. 11247 of 2016 (arising out of S.L.P. (C) No.36973 of 2012) With Civil Appeal No.11250 of 2016 (arising out of S.L.P. (C) No.33671 of 2016)** **Ranjan Gogoi & Abhay Manohar Sapre, JJ**

SARFAESI Act, 2002 read with Tripura Land Revenue and land Reform Act, 1960 – Enforcement of security interest – Sale of mortgaged assets of the borrower by the bank – Whether prohibited by the provisions of the Tripura Act – Held, No.

Brief facts:

The writ petition out of which these appeals have arisen was instituted before the Agartala Bench of the Gauhati High Court. The writ petitioners, who are the respondents herein, are members of Scheduled Tribe(s) of the State of Tripura. They had contended that the Sale Notification dated 26.06.2012 issued by the appellant Bank under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act of 2002") was in infraction of Section 187 of the Tripura Land Revenue and Land Reforms Act, 1960 (hereinafter referred to as the "Tripura Act of 1960") as under the Tripura Act there is a legislative embargo on the sale of mortgaged properties by the bank to any person who is not a member of a scheduled tribe. The auction purchasers in the present case happened to be the persons who are not members of any scheduled tribe.

The High Court by the impugned order answered the writ petition in favour of the respondents/writ petitioners on the ground that the Tripura Act of 1960 being included in the Ninth Schedule to the Constitution and, therefore, enjoying the protection of Section 31-B of the Constitution, would prevail over the Act of 2002 so as to invalidate the sale Notification dated 26.06.2012, the same being contrary to the provisions of Section 187 of the Tripura Act of 1960.

Decision: Appeal allowed.

Reason:

It will not require much appreciation or scrutiny to come to the conclusion that the High Court was wholly incorrect in answering the writ petition and striking down the sale Notification dated 26.06.2012 on the above basis. Article 31-B of the Constitution, on the very face of the language contained therein, is self-explanatory and provides protection/immunity to a legislation from challenge on the ground that it violates any of the provisions of Part III of the Constitution. Inclusion of the Tripura Act of 1960 in the Ninth Schedule by itself, would, therefore, not confer immunity to the said legislation from being overridden by the provisions of a Parliamentary statute. This is a question, therefore, that this Court will have to deal with notwithstanding the fact that the proceedings before the High Court did not proceed on the aforesaid basis.

In the present case the conflict between the Central and the State Act is on account of an apparent overstepping by the provisions of the State Act dealing with land reform into an area of banking covered by the Central Act. The test, therefore, would be to find out as to which is the dominant legislation having regard the area of encroachment. The provisions of the Act of 2002 enable the bank to take possession of any property where a security interest has been created in its favour. Specifically, Section 13 of the 2002 Act enables the bank to take possession of and sell such property to any person to realise its dues. The purchaser of such property acquires a clear title to the property sold, subject to compliance with the requirements prescribed.

Section 187 of the Tripura Act of 1960, on the other hand, prohibits the bank from transferring the property which has been mortgaged by a member of a scheduled tribe to any person other than a member of a scheduled tribe. This is a clear restriction on what is permitted by the Act of 2002 for the realisation of amounts due to the bank. The Act of 2002 is relatable to the Entry of banking which is included in List I of the Seventh Schedule. Sale of mortgaged property by a bank is an inseparable and integral part of the business of banking. The object of the State Act, as already noted, is an attempt to consolidate the land revenue law in the State and also to provide measures of agrarian reforms. The field of encroachment made by the State legislature is in the area of banking. So long there did not exist any parallel Central Act dealing with sale of secured assets and referable to Entry 45 of List I, the State Act, including Section 187, operated validly. However, the moment Parliament stepped in by enacting such a law traceable to Entry 45 and dealing exclusively with activities relating to sale of secured assets, the State law, to the extent that it is inconsistent with the Act of 2002, must give way. The dominant legislation being the Parliamentary legislation, the provisions of the Tripura Act of 1960, pro tanto, (Section 187) would be invalid. It is the provisions of the Act of 2002, which do not contain any embargo on the category of persons to whom mortgaged property can be sold by the bank for realisation of its dues that will prevail over the provisions contained in Section 187 of the Tripura Act of 1960.

The decision of this Court in Central Bank of India v. State of Kerala & Ors (2009) 4 SCC 94 , holding that the provisions of the Bombay Sales Tax Act, 1959 and the Kerala General Sales Tax Act, 1963 providing for a first charge on the property of the person liable to pay sales tax, in favour of the State, is not inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions, Act 1993 (for short the "DRT Act") and also the Act of 2002 must be understood by noticing the absence of any specific provision in either of the Central enactments containing a similar/parallel provision of a first charge in favour of the bank. The judgment of this Court holding the State enactments to be valid and the Central enactments not to have any overriding effect, proceeds on the said basis i.e. absence of any provision creating a first charge in favour of the bank in either of the Central enactments.

16/12/2016	**State Bank Of India (Appellant) vs. Santosh Gupta & Anr (Respondent)**	**Supreme Court** **Civil Appeal Nos. 12237-12238of 2016 [Arising Out Of SLP (C) Nos.30884-30885 of 2015] along with batch of appeals.** **Kurian Joseph & Rohinton Fali Nariman, JJ**

SARFAESI Act read with constitution of India and constitution of Jammu & Kashmir – Whether provisions of SARFAESI Act are applicable to the State of J&K – Held, Yes – Whether Constitution of India is superior to the Constitution of J&K – Held, yes.

Brief facts:

The Constitution of India is a mosaic drawn from the experience of nations worldwide. The federal structure of this Constitution is largely reflected in Part XI which is largely drawn from the Government of India Act, 1935. The State of Jammu & Kashmir is a part of this federal structure. Due to historical reasons, it is a State which is accorded special treatment within the framework of the Constitution of India. This case is all about the State of Jammu & Kashmir *vis`- a-vis`* the Union of India, in so far as legislative relations between the two are concerned.

The present appeals arise out of a judgment dated 16.7.2015 passed by the High Court of Jammu & Kashmir at Jammu, in which it has been held that various key provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI") were outside the legislative competence of Parliament, as they would collide with Section 140 of the Transfer of Property Act of Jammu & Kashmir, 1920. The said Act has been held to be inapplicable to banks such as the State Bank of India which are all India banks. The bone of contention in the present appeals is whether SARFAESI in its application to the State of Jammu & Kashmir would be held to be within the legislative competence of Parliament.

Decision: Appeals allowed.

Reason:

It is interesting to note that the State of Jammu & Kashmir, though a state within the meaning of Article 1 of the Constitution of India, has been accorded a special status from the very beginning because of certain events that took place at the time that the erstwhile Ruler of Jammu & Kashmir acceded to the Indian Union.

Applying the doctrine of pith and substance to SARFAESI, it is clear that in pith and substance the entire Act is preferable to Entry 45 List I read with Entry 95 List I in that it deals with recovery of debts due to banks and financial institutions, *inter alia* through facilitating securitization and reconstruction of financial assets of banks and financial institutions, and sets up a machinery in order to enforce the provisions of the Act. In pith and substance, SARFAESI does not deal with "transfer of property". In fact, in so far as banks and financial institutions are concerned, it deals with recovery of debts owing to such banks and financial institutions and certain measures which can be taken outside of the court process to enforce such recovery. Under Section 13(4) of SARFAESI Act, apart from recourse to taking possession of secured assets of the borrower and assigning or selling them in order to realise their debts, the banks can also take over the management of the business of the borrower, and/ or appoint any person as manager to manage secured assets, the possession of which has been taken over by the secured creditor. Banks as secured creditors may also require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or payable to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt. It is thus clear that the transfer of property, by way of sale or assignment, is only one of several measures of recovery of a secured debt owing to a bank and this being the case, it is clear that SARFAESI Act, as a whole, cannot possibly be said to be in pith and substance, an Act relatable to the subject matter "transfer of property".

At this juncture it is necessary to point out that insofar as the State of Jammu & Kashmir is concerned, Sections 17A and 18B of SARFAESI Act, which apply to the State of Jammu & Kashmir, substituted 'District Judge' and the 'High Court' for the 'Debts Recovery Tribunal' and the 'Appellate Tribunal' respectively. It is thus clear on a reading of these judgments that SARFAESI Act, as a whole would be referable to Entries 45 and 95 of List I. We must remember the admonition given by this Court in A.S. Krishna & Ors v. State of Madras, 1957 SCR 399, that it is not correct to first dissect an Act into various parts and then refer those parts to different Entries in the legislative Lists. It is clear therefore that the entire Act, including Sections 17A and 18B, would in pith and substance be referable to Entries 45 and 95 of List I, and that therefore the Act as a whole would necessarily operate in the State of Jammu & Kashmir.

The judgment of the High Court is wholly incorrect in referring to Entry 11A of the Concurrent List. First and foremost, as has been noted by us above, the Entry is not extended to the State of Jammu & Kashmir. From this, the counsel for the respondents sought to contend that Parliament would, therefore, have no power under the Concurrent List to legislate on the subject matter "Administration of Justice". Under Section 5 of the Jammu & Kashmir Constitution, we have seen that "Administration of Justice" would come into play only when Entries 45 and 95 of List 1 are not attracted. Even if this were not so, we have seen in the two judgments cited hereinabove, the expression "administration of justice" is general and must give way to the special laws that are enacted under Entry 95 List I when coupled with another Entry in the same List – in this case Entry 45 List

I. It is rather disturbing to note that various parts of the judgment speak of the absolute sovereign power of the State of Jammu & Kashmir. It is necessary to reiterate that Section 3 of the Constitution of Jammu & Kashmir, which was framed by a Constituent Assembly elected on the basis of universal adult franchise, makes a ringing declaration that the State of Jammu & Kashmir is and shall be an integral part of the Union of India.

It is to be noted that the opening paragraph of the Constitution of India, namely "WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens…" has been wholly omitted in the Constitution of Jammu & Kashmir.

There is no reference to sovereignty. Neither is there any use of the expression "citizen" while referring to its people. The people of Jammu & Kashmir for whom special rights are provided in the Constitution are referred

to as "permanent residents" under Part III of the Constitution of Jammu & Kashmir. Above all, the Constitution of Jammu & Kashmir has been made to further define the existing relationship of the State with the Union of India as an integral part thereof.

It is thus clear that the State of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India. It is therefore wholly incorrect to describe it as being sovereign in the sense of its residents constituting a separate and distinct class in themselves. The residents of Jammu & Kashmir, we need to remind the High Court, are first and foremost citizens of India. Again it is wholly incorrect to refer to Entry 11A of List 3 and to state that since it is not extended to the State of Jammu & Kashmir, Parliament would have no legislative competence to enact Sections 17A and 18B of SARFAESI Act. There are at least three errors in this conclusion. First and foremost, it is not possible to dissect the provisions of SARFAESI Act and attach them to different Entries under different Lists. As has been held by us, the whole of SARFAESI Act is referable to Entry 45 and 95 of List I. Secondly, what has been missed by the impugned judgment is that Entry 95 List I is a source of legislative power for Parliament for conferring power and jurisdiction on the District Court and the High Court respectively in respect of matters contained in SARFAESI Act. And third, the subject "Administration of Justice" is only general and can be referred to only if Entry 95 List I read with Entry 45 List I are not attracted. Most importantly, even if it is found that Section 140 of the Jammu & Kashmir Transfer of Property Act entitles only certain persons to purchase properties in the State of Jammu & Kashmir, yet, as has been held hereinabove, Rule 8(5) proviso which recognizes this provision, has been brushed aside. In any case an attempt has first to be made to harmonise Section 140 of the Jammu & Kashmir Transfer of Property Act with SARFAESI Act, and if such harmonization is impossible, it is clear that by virtue of Article 246 read with Section 5 of the Jammu & Kashmir Constitution, Section 140 of the Jammu & Kashmir Transfer of Property Act has to give way to SARFAESI Act, and not the other way around.

We fail to understand how Article 35A carries the matter any further. This Article only states that the conferring on permanent residents of Jammu & Kashmir special rights and privileges regarding the acquisition of immovable property in the State cannot be challenged on the ground that it is inconsistent with the fundamental rights chapter of the Indian Constitution. The conferring of such rights and privileges as mentioned in Section 140 of the Jammu & Kashmir Transfer of Property Act is not the subject matter of challenge on the ground that it violates any fundamental right of the Constitution of India. Furthermore, in view of Rule 8(5) proviso, such rights are expressly preserved.

We therefore set aside the judgment of the High Court. As a result, notices issued by banks in terms of Section 13 and other coercive methods taken under the said Section are valid and can be proceeded with further. The appeals are accordingly allowed with no order as to costs.

16/01/2017	**Chunnu Fashions & Ors (Appellant) vs. Edelweiss Asset Reconstruction Co Ltd (Respondent)**	**Delhi High Court [DEL] W.P(C).No. 10589/2016 Indira Banerjee & Anil Kumar Chawla, JJ**

SARFAESI Act, 2002 – Sections 17 & 18 – Borrower filed appeal before DRAT against the attachment order of the secured creditor – Appeal admitted with condition of pre-deposit – Borrower failed to pay the pre-deposit amount appeal dismissed by DRAT – Whether correct – Held, Yes.

Brief facts:

This writ petition is directed against an order, passed by the Debt Recovery Appellate Tribunal (DRAT), in Appeal No.6015/2015, whereby the DRAT dismissed an appeal against an order of the Debt Recovery Tribunal, under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to as the SARFAESI Act, on the ground of non- compliance with an earlier direction issued on 13.10.2015 to the petitioner for deposit of 25% of the amount directed to be paid by the order under appeal.

Decision: Petition dismissed.

Reason:

Under Section 21 of the 1993 Debt Recovery Act, an appeal is not to be entertained by the Appellate Tribunal, unless the person preferring the appeal has deposited 75% of the amount of the debt due from him as determined by the Tribunal under Section 19. In terms of the proviso, the Appellate Tribunal may for reasons to be recorded in writing waive or reduce the amount to be deposited under the said section. Unlike Section 18 of the 1993 Debt Recovery Act, Section 18 of the SARFAESI Act does not permit full waiver.

In Narain Chandra Ghose v. UCO Bank & Ors (2011) 4 SCC 548, the Supreme Court held that the condition of pre-deposit for entertainment of an appeal being mandatory under Section 18 of the SARFAESI Act, an appeal cannot be entertained, unless the condition precedent of deposit is fulfilled. The Court also held that the condition of pre-deposit being mandatory, complete waiver of pre-deposit is beyond the provisions of the Act.

The learned DRAT has reduced the required pre-deposit of 25%, which is the minimum amount required to be deposited in view of the third proviso to Section 18 of the SARFAESI Act. In view of the verdict of the Supreme Court in Narain Chandra Ghose (supra) and the mandatory requirement of the third proviso to Section 18 of the SARFAESI Act, the writ petition cannot be entertained and the same is dismissed. All the pending applications are also dismissed.

21/09/2017	**Mobilox Innovations Pvt Ltd. (Appellant) vs. Kirusa Software Pvt Ltd (Respondent)**	**SUPREME COURT** **Civil Appeal No. 9405 of 2017** **R.F. Nariman, J & S.K.Kaul, JJ**

Insolvency and Bankruptcy Code, 2016 – Section 8 – Operational debt – Term 'existence of dispute' – Meaning thereof – Explained by the Supreme Court.

Brief facts :

The present appeal raises questions as to the triggering of the Insolvency and Bankruptcy Code, 2016 when it comes to operational debts owed to operational creditors.

The appellant was engaged by Star TV for conducting tele-voting for the "Nach Baliye" program on Star TV. The appellant in turn subcontracted the work to the respondent. The respondent provided the requisite services and raised monthly invoices and also followed up with the appellant for payment of pending invoices. It is also important to note that a non-disclosure agreement ("NDA") was executed between the parties.

More than a month after execution of the aforesaid agreement, the appellant, wrote to the respondent that they were withholding payments against invoices raised by the respondent, as the respondent had disclosed on their webpage that they had worked for the "Nach Baliye" program run by Star TV, and had thus breached the NDA.

Respondent filed an application with the NCLT under Sections 8 and 9 of the new Code stating that an operational debt of Rs.20,08,202.55 was owed by the Appellant. NCLT dismissed the application on the ground that the appellant had disputed the claim of debt alleged by the respondent. On appeal NCALT remanded the case back to NCLT. Appellant challenged the order of the NCALT before the Supreme Court.

Decision : Appeal allowed.

Reason :

The adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid

operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

It is now important to construe Section 8 of the Code. The operational creditors are those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in respect of repayment of dues arising under any law for the time being in force and payable to the Government or to a local authority. This has to be contrasted with financial debts that may be owed to financial creditors, which was the subject matter of the judgment delivered by this Court on 31.8.2017 in Innoventive Industries Ltd. v. ICICI Bank & Anr. (Civil Appeal Nos.8337-8338 of 2017). In this judgment, we had held that the adjudicating authority under Section 7 of the Code has to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor within 14 days. The corporate debtor is entitled to point out to the adjudicating authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim, is not due i.e. it is not payable in law or in fact.

This Court then went on to state:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

It is settled law that the expression "and" may be read as "or" in order to further the object of the statute and/or to avoid an anomalous situation. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist?

It is important to notice that Section 255 read with the Eleventh Schedule of the Code has amended Section 271 of the Companies Act, 2013 so that a company being unable to pay its debts is no longer a ground for winding up a company. The old law contained in Madhusudan (supra) has, therefore, disappeared with the disappearance

of this ground in Section 271 of the Companies Act.

We have already noticed that in the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined "dispute" as meaning a "bona fide suit or arbitration proceedings…" In its present avatar, Section 5(6) excludes the expression "bona fide" which is of significance. Therefore, it is difficult to import the expression "bona fide" into Section 8(2)(a) in order to judge whether a dispute exists or not.

It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defence as vague, got-up and motivated to evade liability.

19/09/2017	**Surendra Trading Company (Appellant) vs. Juggilal Kamlapat Jute Mills Co Ltd (Respondent)**	**Supreme Court** **Civil Appeal No. 8400 of 2017** **A.K. Sikri & Ashok Bhushan, JJ**

Insolvency and Bankruptcy Code, 2016 – Proviso to section 9(5) – 7 days' time limit to remove defects in the application – Whether directory – Held Yes.

Brief facts :

The crux of the issue was that the appellant operational creditor filed an application before the NCLT under sections 8 and 9 of the Insolvency and Bankruptcy Code 2016 (the Code) against the respondent corporate debtor. The NCLT observed certain deficiencies in the application and directed the appellant to remove the same within 7 days as provided under section 9. The appellant removed the defects but after the expiry of 7 days. The NCLT dismissed the application. On appeal, the NCALT held that the appellant should have cured the defects within 7 days as the provision was mandatory. This is being challenged in the present appeal.

The core issue involved in the appeal was whether the 7 days prescribed in the section is mandatory or directory.

Decision : Appeal allowed.

Reason :

We make it clear at the outset that since we are dealing with the substantial issue as to whether seven days period provided for removing the defects is mandatory or not, it is not necessary to touch upon these mundane aspects. Instead, it would be better to concentrate on the substance of the matter.

As mentioned above, insofar as prescription of fourteen days within which the adjudicating authority has to pass an order under sub-section (5) of Section 9 for admitting or rejecting the application is concerned, the NCLAT has held that the same cannot be treated as mandatory. Though this view is not under challenge (and rightly so), discussion in the impugned order on this aspect has definite bearing on the other question, with which this Court is concerned. Therefore, we deem it apposite to discuss the rationale which is provided by the NCLAT itself in arriving at the aforesaid conclusion insofar as first aspect is concerned.

It is pointed out by the NCLAT that where an application is not disposed of or an order is not passed within a period specified in the Code, in such cases the adjudicating authority may record the reasons for not doing so within the period so specified and may request the President of the NCLAT for extension of time, who may, after taking into account the reasons so recorded, extend the period specified in the Code, but not exceeding ten days, as provided in Section 64(1) of the Code. The NCLAT has thereafter scanned through the scheme of the Code by pointing out various steps of the insolvency resolution process and the time limits prescribed therefor.

It is of relevance to mention here that the corporate insolvency resolution process can be initiated by the financial creditor under Section 7 of the Code, by the operational creditor under Section 9 of the Code and by a corporate applicant under Section 10 of the Code. There is a slight difference in these provisions insofar as criteria for admission or rejection of the applications filed under respective provisions is concerned. However, it is pertinent to note that after the admission of the insolvency resolution process, the procedure to deal with these applications, whether filed by the financial creditor or operational creditor or corporate applicant, is the same.

The aforesaid statutory scheme laying down time limits sends a clear message, as rightly held by the NCLAT also, that time is the essence of the Code. Notwithstanding this salutary theme and spirit behind the Code, the NCLAT has concluded that as far as fourteen days' time provided to the adjudicating authority for admitting or rejecting the application for initiation of insolvency resolution process is concerned, this period is not mandatory. For arriving at such a conclusion, the NCLAT has discussed the law laid down by this Court in some judgments.

The NCLAT has also held that fourteen days period is to be calculated 'from the date of receipt of application'. The NCLAT has clarified that date of receipt of application cannot be treated to be the date of filing of the application. Since the Registry is required to find out whether the application is in proper form and accompanied with such fee as may be prescribed, it will take some time in examining the application and, therefore, fourteen days period granted to the adjudicating authority under the aforesaid provisions would be from the date when such an application is presented before the adjudicating authority, i.e. the date on which it is listed for admission/ order.

After analysing the provision of fourteen days' time within which the adjudicating authority is to pass the order, the NCLAT immediately jumped to another conclusion, viz. the period of seven days mentioned in proviso to sub-section (5) of Section 9 for removing the defect is mandatory.

We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid

and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application.

Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the application from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the latter alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.

Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown,

only then it would entertain the application on merits, otherwise it will have right to dismiss the application. The aforesaid process indicated by us can find support from the judgment of this Court in *Kailash v. Nanhku & Ors., (2005) 4 SCC 480.*

In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds proviso to sub-section (5) of Section 7 or proviso to sub-section (5) of Section 9 or proviso to sub-section (4) of Section 10 to remove the defects within seven days as mandatory and on failure applications to be rejected, is set aside.

31/08/2017	**Innoventive Industries Ltd (Appellant) vs. ICICI & ANR (Respondent)**	**Supreme Court** **Civil Appeal Nos. 8337-8338 of2017** **R.F.Nariman & S.K.Kaul, JJ**

Insolvency and Bankruptcy Code, 2016 – Corporate debtor entered into CDR with 19 financial creditors – One financial creditor (respondent) invoked the provisions the Code – Application filed before the NCLT – Objections raised as to the applicability of the Code qua the Maharashtra Act and that the debt is not due under the CDR agreement – Objections rejected – Application admitted – NCALT dismissed the appeal – Whether contentions of the appellant are tenable – Held, No.

Brief facts :

The appellant is a multi-product company catering to applications in diverse sectors. It had borrowed from various financial institutions including the respondent herein. A corporate debt restructure plan (CDR) was framed between 19 lenders and the appellant in 2014 and master restructuring agreement (MRA), by which funds were to be infused by the creditors, and certain obligations were to be met by the debtors. The aforesaid restructuring plan was implementable over a period of 2 years.

Ultimately, an application was made on 07/12/ 2016 by ICICI Bank Ltd., in which it was stated that the appellant being a defaulter within the meaning of the Code, the insolvency resolution process ought to be set in motion. To this application, a reply was filed by means of an interim application on behalf of the appellant, in which the appellant claimed that there was no debt legally due in as much as vide two notifications issued under the Maharashtra Relief Undertakings (Special Provisions Act), 1958 (hereinafter referred to as the Maharashtra Act), all liabilities of the appellant, except certain liabilities with which we are not concerned, and remedies for enforcement thereof were temporarily suspended for a period up to 18/07/2017.

It may be added that this was the only point raised on behalf of the appellant in order to stave off the admission of the ICICI Bank application made before the NCLT.

On 16/01/2017, a second application was filed by the appellant in which a different plea was taken. This time, the appellant pleaded that owing to non-release of funds under the MRA, the appellant was unable to pay back its debts as envisaged. Further, it repaid only some amounts to five lenders, who, according to the appellant, complied with their obligations under the MRA. In the aforesaid circumstances, it was pleaded that no default was committed by it.

The NCLT held that the Code would prevail against the Maharashtra Act and held that the Parliamentary statute would prevail over the State statute and this being so, it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared. Appeal made to the NCALT was also dismissed. Hence the present appeal.

Decision : Appeal dismissed.

Reason:

Having heard learned counsel for both the parties, we find substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the appellant is not maintainable. According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone.

Having heard both the learned counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law.

Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.

Both the Tribunal and the Appellate Tribunal refused to go into the other contentions of the Appellant viz. that under the MRA, it was because the creditors did not disburse the amounts thereunder that the appellant was not able to pay its dues. We are of the view that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It

is only as an after- thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before us that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.

The appeals, accordingly, stand dismissed. There shall, however, be no order as to costs.

21/09/2017	**M.D. Frozen Foods Exports Pvt. Ltd. (Appellant) vs. Hero Fincorp LTD (Respondent)**	**Supreme Court** **Civil Appeal No. 15147 of 2017 (Arising out of SLP(C) No.19559 of 2017)** **R.F. Nariman & S.K. Kaul, JJ**

Section 13 of the SARFESI Act read with Arbitration and Conciliation Act,1996 – Default in payment by borrower – lender invoked arbitration – Meanwhile lender became financial institution by virtue of notification – Therefore lender instituted proceeding under SARFESI Act also – Whether tenable – Held, Yes.

Brief facts :

The appellants borrowed monies for their business against security of immovable properties by the creation of an equitable mortgage by deposit of title documents (seven such properties). The financial discipline was not adhered to, apparently almost from the inception, and the account of the appellants became a 'Non-Performing Asset' ('NPA').

The lender referred the dispute of non-payment to arbitration on 16/11/2016. Before this referral, on 05/08/2016 the SARFESI act was amended and the lender was considered to be a financial institution and thus became eligible to invoke the provisions of SARFESI Act.

The lender, accordingly, issued demand notices under section 13 of the SARFESI Act, though the arbitration proceedings were going on. Further, in the arbitration proceedings lender got interim stay and the appellant was refrained from dealing with the mortgaged properties.

The appellant challenged the notices issued under the SAEFESI Act before the High court, which dismissed the petition. Hence the present appeal.

Decision : Appeal dismissed with costs.

Reason :

A perusal of the impugned order and the submissions made by learned counsel for the parties have thrown up the following legal issues for determination:

A. Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously?

B. Whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent?

C. A linked question to question (ii), whether the lender can invoke the SARFAESI Act provision where its notification as financial institution under Section 2(1)(m) has been issued after the account became an NPA under Section 2 (1) (o) of the said Act?

We now proceed to examine each of the three questions of law framed:

Question A:

The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative. That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act.

The discussion in the impugned order refers to a judgment of the Full Bench of the Delhi High Court opining that an arbitration is an alternative to the RDDB Act. In that context, the learned Single Judge has rightly held that this Full Bench judgment does not, in any manner, help the appellants but, in fact, supports the case of the respondent.

We are, thus, unequivocally of the view that SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand.

Questions B & C

The SARFAESI Act certainly did not apply retrospectively from the date when it came into force. The question is whether, the Act being applicable to the respondent at a subsequent date and thereby allowing the respondent to utilize its provisions with regards to a past debt, would make any difference to this principle. We are of the view that the answer to the same is in the negative. The Act applies to all the claims which would be alive at the time when it was brought into force. Thus, qua the respondent or other NBFCs, it would be applicable similarly from the date when it was so made applicable to them.

Similarly, the date on which a debt is declared as an NPA would again have no impact. We are, thus, of the view that the provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent. We are, thus, of the view that the appeal is completely devoid of merit, and is only an endeavour to prolong the ultimate "date of judgment" for the appellants to meet their obligations.

24/10/2017	**International Asset Reconstruction Company Of India Ltd. (Appellant) vs. Official Liquidator Of Aldrich Pharmaceuticals Ltd & Ors (Respondent)**	**Supreme Court** **Civil Appeal No.16962 of2017 (Arising out of SLP (C) No.25815 of 2013) WithCivil Appeal No. 16963 of 2017(Arising out of SLP (C) No. 29534 of 2014)** **Ranjan Gogoi, A.M. Sapre &Navin Sinha, JJ**

Recovery of Debts and Bankruptcy Act, 1993 read with Limitation Act,1963 – Proceeding before the Recovery Officer of the Tribunal – Order of the RO – Appeal filed after 30 days – Whether the delay could be condoned – Held, No.

Brief facts :

A common question of law arising for consideration in both appeals is whether Section 5 of the Limitation Act, 1963 (hereinafter referred to as "the Limitation Act"), can be invoked to condone the prescribed period of 30 days, under Section 30(1) of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred as the "RDB Act"), for preferring an appeal before the Tribunal, against an order of the Recovery officer.

In view of the pure question of law involved, the facts of the case need not be elucidated. Suffice to observe that pursuant to a recovery certificate issued by the Tribunal under Section 19(22) of the RDB Act, the Recovery officer passed necessary orders under Section 28 of the Act. An appeal was preferred by the aggrieved against the same before the Tribunal, beyond the prescribed period of 30 days. It was held that Section 5 of the Limitation Act not being applicable to proceedings under Section 30 of the Act, the delay beyond the prescribed period could not be condoned.

Decision: Appeal dismissed.

Reason :

Section 5 of the Limitation Act provides that the appeal or application, with the exception of Order XXI, CPC may be admitted after the prescribed period, if the applicant satisfies the court that he has sufficient cause for not preferring the application within time. The pre-requisite, therefore, is the pendency of a proceeding before a court. The proceedings under the Act being before a statutory Tribunal, it cannot be placed at par with proceedings before a court. The Tribunal shall therefore have no powers to condone delay, unless expressly conferred by the Statute creating it.

In *Sakuru vs. Tanaji, (1985) 3 SCC 590,* it was observed that:

"3…that the provisions of the Limitation Act, 1963 apply only to proceedings in 'courts' and not to appeals or applications before bodies other than courts such as quasi-judicial Tribunals or executive authorities, notwithstanding the fact the such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him. But even in such a situation the relevant special statute may contain an express provision conferring on the appellate authority, such as the Collector, the power to extend the prescribed period of limitation on sufficient cause being shown by laying down that the provisions of Section 5 of the Limitation Act shall be applicable to such proceedings. Hence it becomes necessary to examine whether the Act contains any such provision entitling the Collector to invoke the provisions of Section 5 of the Limitation Act for condonation of the delay in the filing of the appeal…"

An "application" is defined under Section 2(b) of the RDB Act as one made under Section 19 of the Act. The latter provision in Chapter IV, deals with institution of original recovery proceedings before a Tribunal. An appeal lies against the order of the Tribunal under Section 20, before the Appellate Tribunal within 45 days, which may be condoned for sufficient cause under the proviso to Section 20(3) of the Act. The Tribunal issues a recovery certificate under Section 19(22) to the Recovery officer who then proceeds under Chapter V for recovery of the certificate amount in the manner prescribed. A person aggrieved by an order of the Recovery officer can prefer an appeal before the Tribunal under Rule 4, by an application in the prescribed Form III. Rule 2(c) defines an "application" to include a memo of appeal under Section 30(1). The appeal is to be preferred before the Tribunal, as distinct from the appellate tribunal, within 30 days. Section 24 of the RDB Act, therefore, manifestly makes the provisions of the Limitation Act applicable only to such an original "application" made under Section 19 only. The definition of an "application" under Rule 2(c) cannot be extended to read it in conjunction with Section 2(b) of the Act extending the meaning thereof beyond what the Act provides for and then make Section 24 of the RDB Act applicable to an appeal under Section 30(1) of the Act. Any such interpretation shall be completely contrary to the legislative intent, extending the Rules beyond what the Act provides for and limits. Had the intention been otherwise, nothing prevented the Legislature from providing so specifically.

The RDB Act is a special law. The proceedings are before a statutory Tribunal. The scheme of the Act manifestly provides that the Legislature has provided for application of the Limitation Act to original proceedings before the Tribunal under Section 19 only. The appellate tribunal has been conferred the power to condone delay beyond 45 days under Section 20(3) of the Act. The proceedings before the Recovery officer are not before a Tribunal. Section 24 is limited in its application to proceedings before the Tribunal originating under Section 19 only. The exclusion of any provision for extension of time by the Tribunal in preferring an appeal under Section 30 of the Act makes it manifest that the legislative intent for exclusion was express. The application of Section 5 of the Limitation Act by resort to Section 29(2) of the Limitation Act, 1963 therefore does not arise. The prescribed period of 30 days under Section 30(1) of the RDB Act for preferring an appeal against the order of the Recovery officer therefore cannot be condoned by application of Section 5 of the Limitation Act. The appeals lack merit and are dismissed.

27/03/2018	**Machhar Polymer Pvt Ltd (Appellant) vs. SABRE Helmets Pvt Ltd (Respondent)**	**NCLAT** **Appeal (AT) (Insolvency) No. 276 of 2017** **S.J. Mukhopadhaya &Bansi Lal Bhat**

Insolvency and Bankruptcy Code, 2016 – Section 9 – Application by operational creditor – Rejected as time barred – Whether correct – Held, No.

Brief facts :

This appeal has been preferred by the Appellant 'Operational Creditor' against the order passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, whereby and where under the application preferred by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been rejected on the ground that the application is barred by limitation.

Decision : Appeal allowed.

Reason :

Learned counsel for the Appellant rightly pointed out that the impugned order is against the decision of this Appellate Tribunal in *M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd.—Company Appeal (AT) (Insolvency) No. 47 of 2017*. In the said case, this Appellate Tribunal observed and held as follows:

"*68. In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.*

69. If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. Where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.

70. Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant."

For the reasons aforesaid, the impugned order is set aside. The case is remitted to the Adjudicating Authority, Mumbai Bench to consider the application under Section 9 of the 'I&B Code' preferred by the Appellant after notice to the 'Corporate Debtor'. If the application is complete, the Adjudicating Authority will admit it. On the other hand, if there is any defect, the Appellant may be allowed time to remove the defects.

27/03/2018	**Neeta Chemicals (I) Pvt. Ltd (Appellant) vs.** **State Bank Of India (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 174 of 2017** **S.J. Mukhopadhaya & Bansi Lal Bhat**

Insolvency and Bankruptcy Code, 2016 – Section 10 – Application by corporate applicant – No liquidation/ winding up proceedings pending against the corporate applicant – Rejected on the ground of suppression of facts – On appeal remanded back to NCLT for fresh adjudication.

Brief facts :

The Corporate Applicant filed an application under section 10 of the I&B Code. On notice and hearing the 'Financial Creditor' (State Bank of India), the Adjudicating Authority dismissed the application with cost by impugned order.

Decision : Appeal allowed.

Reason :

It was submitted that the Appellant has grossly understated the outstanding amount owed to the Respondent in the Form 6, while the Appellant has admitted an amount of Rs. 324 crores as on 15th June, 2017. In fact, the Appellant owed more than the admitted amount as far back as 31st October, 2016 when

the demand notice was issued by the Respondent. It was submitted that the outstanding liability amount had increased to Rs. 329,71,74,696/- as evidenced from the notice issued on 3rd August, 2017 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act").

The Appellant has highlighted the facts relating to SARFAESI proceedings and action taken thereunder. It is also stated that the Appellant has already filed a suit under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) in S.A. No. 240 of 2017 challenging the securitization proceedings initiated by the Respondent ('Financial Creditor').

Similar issue fell for consideration before this Appellate Tribunal in *M/s. Unigreen Global Private Limited Vs. Punjab National Bank & Ors. Company Appeal (AT) (Insolvency) No. 81 of 2017 [decided on 01/12/2017]*, wherein this Appellate Tribunal, after taking into consideration the provisions of Section 10 of the 'I&B Code' and other relevant provisions, held and observed the principle as to when the application could be rejected by the Adjudicating Authority.

It is not the case of the 'Financial Creditor' (State Bank of India) that a winding up proceeding under the Companies Act or liquidation proceeding under the 'I&B Code' has been initiated against the 'Corporate Debtor'. Therefore, the 'Corporate Applicant' is eligible to file application under Section 10 of the 'I&B Code', if there is a debt and default.

Further, as we find that the Adjudicating Authority has noticed the extraneous factors unrelated to the Resolution Process not required to be disclosed in terms of Section 10 or Form 6, we hold that the Adjudicating Authority erred in rejecting the application on the ground of suppression of facts.

There is nothing on record to suggest that the 'Corporate Applicant' has suppressed any fact or has not come with the clean hands. The Adjudicating Authority has also not held that the application has been filed by the Corporate Applicant "fraudulently" or "with malicious intent" for any purpose other than for the resolution process or liquidation or that the voluntary liquidation proceedings have been initiated with the intent to defraud any person. In the absence of any such grounds recorded by the Adjudicating Authority, the impugned order cannot be upheld.

For the reasons aforesaid, the impugned order is set aside. The case is remitted back to the Adjudicating Authority for admission of the application under Section 10, if the application is otherwise complete. In case it is incomplete, the Adjudicating Authority will grant time to the appellant to remove the defects.

19/03/2018	**ITC Ltd. (Appellant) vs. Blue Coast Hotels Ltd (Respondent)**	**Supreme Court** **Civil Appeal Nos. 2928-2930 of 2018 [Arising out of SLP (C)Nos. 10215-10217/2016]** **S.A. Bobde & L. Nageswara Rao, JJ**

SARFESI Act – Section 13 – Enforcement of security interest – Default by borrower – Secured creditor took symbolic possession of borrower's property – Property sold in auction by secured creditor – Whether valid – Held, Yes.

Brief facts :

Respondent is the debtor (borrower) who availed loan of Rs.150 crores from secured creditor IFCI and mortgaged its hotel property as security interest. As the borrower failed to repay the loan, the secured creditor enforced the security interest of the borrower.

After issuing a demand notice under section 13(4) of the SARFESI Act, the secured creditor took symbolic possession of the hotel property. Thereafter the secured creditor initiated recovery proceedings in DRT and sold the hotel property in public auction. The luxury hotel of the borrower was purchased by the Petitioner (auction purchaser).

The borrower challenged the recovery proceedings before the High Court which held the entire proceedings for recovery and sale of the Goa Hotel to be illegal being in violation of the Act.

Decision : Appeal allowed.

Reason :

In this case, the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. The transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by Section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. Thus, the entire interest in the property not having been passed on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act.

The High Court in its judgment renders a finding that there was in fact fraud and collusion between the creditor and the auction purchaser. According to the High Court, since the measures were taken in breach of all laws, the inference of manipulation and collusion cannot be ruled out.

We fail to see how such a finding of manipulation and collusion is sustainable on account of breach of law in the present case. A risk of this kind taken up by an intending purchaser cannot lead to an inference of collusion. Mainly, the finding is based on the fact that the sale is a collusion because the auction purchaser was aware that a dispute between the parties was pending and still went ahead and made a bid for the property. It is not unusual in the sale of immovable properties to come across difficulties in finding suitable buyers for the property. We find that the property was eventually sold on the fourth auction, and all the auctions were duly advertised.

Another fact on the basis of which the High Court has observed an inference of collusion is that the property was sold and the sale was confirmed in favour of ITC Ltd. though a statement was made in the morning of 23.02.2015 before the DRT that the sale would not be confirmed till the order is passed. This seems to be recorded in the order of the DRT. However, what is overlooked is the fact that in the statement on behalf of the creditor, the creditor only agreed to not confirm the sale till 3 pm. In the absence of any finding as to what actually transpired, it is not possible for us to infer manipulation and collusion on this account. There is no dispute that the property was actually purchased by ITC Ltd in pursuance of a public auction and that the entire amount of sale consideration has been deposited by it.

We have anxiously considered the entire matter and find that the undisputed facts of the case are that a loan was taken by the debtor which was not paid, the debtor did not respond to a notice of demand and made a representation which was not replied to in writing by the creditor. The creditor, however, considered the proposals for repayment of the loan as contained in the representation in the course of negotiations which continued for a considerable amount of time. Several opportunities were in fact availed of by the debtor for the repayment of the loan after the proceedings were initiated by the secured creditor. The debtor failed to discharge its liabilities and eventually undertook that if the debtor fails to discharge the debt, the creditor would be entitled to take realize the secured assets.

As held, we are of the view that non-compliance of sub-section (3A) of Section 13 cannot be of any avail to the debtor whose conduct has been merely to seek time and not repay the loan as promised on several occasions. Therefore, the debtor is not entitled for the discretionary equitable relief under Articles 226 and 136 of the Constitution of India in the present case.

We accordingly, set aside the impugned judgment of the High Court and direct the debtor and its agents to handover possession of the mortgaged properties to the auction purchaser within a period of six months from the date of this judgment along with the relevant accounts.

19/04/2018	**J.P. Engineers Pvt. Ltd (Appellant) vs. Murti Udyog Ltd (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 321 of 2017** **S.J. Mukhopadhaya & Bansi Lal Bhat**

Insolvency and Bankruptcy Code, 2016 – Sections 9 – Corporate debtor disputed the debt and also filed civil suit against the operational creditor – Whether this is existence of dispute – Held, Yes.

Brief facts :

This appeal has been preferred by the Appellant against the order dated 8th November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, New Delhi, whereby and where under the application preferred by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been rejected on the ground that the Respondent has raised dispute with sufficient particulars.

Appellant issued the demand notice under sub-section (1) of Section 8 on 13th June, 2017. Thereafter, the amount having not paid, the application under Section 9 of the 'I&B Code' was filed on 13th September, 2017. The Respondent thereafter filed suit on 12th December, 2017 i.e. much after filing of the application under Section 9 of the 'I&B Code'. The adjudication authority dismissed the application holding that there is an 'existence of dispute'.

Decision : Appeal dismissed.

Reason:

The Respondents have filed reply and further affidavit and taken plea that the amount as was due was already paid to the Appellant by cheques, the details of which were brought to the notice of the Adjudicating Authority. However, such submission has been disputed by the Appellant. According to the Appellant, the Chartered Accountant has certified that the amount has not been paid.

Admittedly, there is no 'existence of dispute' relating to supply of goods or its quality as were supplied by the Appellant. Therefore, it cannot be stated that there is an 'existence of dispute'. However, what we find that the Respondent has disputed the debt as has been claimed by the Appellant. According to them, they have already paid and satisfied the claim amount by making payment through cheques.

The scheme of the 'I&B Code' fell for consideration before the Hon'ble Supreme Court in Innovative Industries Ltd v.ICICI Bank & Anr, (2018) 1 SCC 407, wherein the Hon'ble Supreme Court taking into consideration the provisions of the Code held that the 'Corporate Debtor' is entitled to point out that default has not occurred in a sense that the 'debt', which also may include a disputed claim, is not due.

In the present case, the Adjudicating Authority having noticed that the Respondent has satisfied with the evidence that there is no default on the part of the Respondent and the 'debt' is not due, we find no ground to interfere with the finding of the Adjudicating Authority. The appeal is accordingly dismissed. No cost.

26/03/2018	**Prowess International Pvt. Ltd. (Appellant) vs. Action Ispat & Power Pvt. Ltd (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 223 of 2017** **S.J. Mukhopadhaya & Bansi Lal Bhat**

Insolvency and Bankruptcy Code, 2016 – Section 61 – Appeal – Limitation period to file – Appellant filed appeal after six months of the passing of the order – Whether delay condonable – Held, No. Brief facts:

The appellant preferred the appeal against the judgment passed by the Adjudicating Authority rejecting the application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code"), after delay of more than six months without any application for condonation of delay. When it was pointed out, the Appellant preferred an application for condonation of delay and taken plea that there is a delay of only two days.

Decision : Appeal dismissed.

Reason:

From the record, we find that the Appellant has not explained as to what action the Appellant had taken between 15th March, 2017 and 18th August, 2017 i.e. between the Day of Judgment and the day the application for certified copy was filed.

Learned counsel for the Appellant submitted that the copy of the impugned order was not forwarded to the Appellant. However, it is accepted that the impugned order was passed on 15th March, 2017 in presence of the counsel for the Appellant.

It is desirable to refer the relevant provisions under which appeals can be preferred before this Appellate Tribunal. Against an order passed by the Tribunal under Companies Act, an appeal is maintainable under Section 421 of the Companies Act, 2013. If an appeal is preferred under Section 421 of the Companies Act, 2013, the Appellate Tribunal counts the period of limitation from the date on which a copy of the order is made available by the Tribunal in terms of sub-section (3) of Section 421 of the Companies Act, 2013.

However, for preferring appeal under Section 61 of the 'I&B Code' against an order passed by the 'Adjudicating Authority' provision for counting the period of limitation is different. As per the aforesaid provision, the appeal is required to be filed within thirty-days, means within thirty-days from the date of knowledge of the order against which appeal is preferred.

In the present case, as Appellant had knowledge of the impugned order as on the date of pronouncement of the said order i.e. 15th March, 2017. It is not the case of the Appellant that its Lawyer has not informed of the order passed by the Adjudicating Authority. The ground as taken in the application for condonation of delay being not satisfactory, it is fit to be rejected.

20/07/2018	**Indian Bank (Appellant) vs. K. Pappireddiyar (Respondent)**	**Supreme Court** **Civil Appeal No. 6641 of 2018 (Arising out of SLP(C) No. 29268 of 2016)** **Dipak Misra, A. M. Khanwilkar & D. Y. Chandrachud, JJ**

SARFAESI ACT – Enforcement of security interest – Agricultural land – No finding of fact – Whether exempt from the provisions of the Act – Held, No.

Brief facts :

The Division Bench of the High Court of Judicature at Madras has held that the proceedings initiated by the appellant under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (the SARFAESI Act) are a nullity. The basis of this conclusion is that the Act does not apply to agricultural land. In consequence, the High Court has held that a security interest in agricultural land cannot be enforced.

Decision : Appeal allowed.

Reason :

The statutory dictionary in Section 2 does not contain a definition of the expression "agricultural land". Whether a particular piece of land is agricultural in nature is a question of fact. The classification of land in the revenue

records as agricultural is not dispositive or conclusive of the question whether the SARFAESI Act does or does not apply. Whether a parcel of land is agricultural must be deduced as a matter of fact from the nature of the land, the use to which it was being put on the date of the creation of the security interest and the purpose for which it was set apart.

The Division Bench of the Madras High Court has failed to adjudicate on the basic issue as to whether the land in respect of which the security interest was created, was agricultural in nature. The DRT rejected the objection of the debtor that the land was agricultural. In appeal, the DRAT reversed that finding. Apart from referring to the position in law, the impugned judgment of the High Court contains no discussion of the material which was relied upon by the parties in support of their respective cases; the Bank urging that the land was not agricultural while the debtor urged that it was. Both having regard to the two-judge Bench decision in Blue Coast Hotels Limited and as explained above, the question as to whether the land is agricultural has to be determined on the basis of the totality of facts and circumstances including the nature and character of the land, the use to which it was put and the purpose and intent of the parties on the date on which the security interest was created. In the absence of a specific finding, we are of the view that it would be appropriate and proper to set aside the judgment of the High Court and to remit the proceedings for being considered afresh.

14/08/2018]	**K. Krishna (Appellant) vs. Vijay Nirman Company Pvt. Ltd (Respondent)**	**Supreme Court** **Civil Appeals No. 21824 and21825 of 2017** **R.F. Nariman & Indu Malhotra, JJ**

Insolvency and Bankruptcy Code, 2016 read with the Arbitration and Conciliation Act, 1996 – Operational debt – Arbitration award in favour of operational creditor – Corporate debtor challenged the award – Insolvency petition filed against corporate debtor based on the award as admitted debt – NCLT and NCLAT entertained the application – Whether tenable-Held, No.

Brief facts :

The present appeals raise an important question as to whether the Insolvency and Bankruptcy Code, 2016 ("the Code") can be invoked in respect of an operational debt where an Arbitral Award has been passed against the operational debtor, which has not yet been finally adjudicated upon.

Vijay Nirman Company Pvt. Ltd. (the Respondent) entered into a sub-Contract Agreement with one M/s Ksheerabad Constructions Pvt. Ltd. ('KCPL') to undertake road construction work. During the course of the project, disputes and differences arose between the parties and the same were referred to an Arbitral Tribunal, which delivered its Award in favour of the respondent. KCPL challenged the award, in appeal, under section 34 of the Arbitration and Conciliation Act, 1996. Meanwhile, Respondent sent a demand notice under the I&B Code and also initiated insolvency proceedings against KCPL. In reply to the notice KCPL claimed that there is a dispute and the award has been challenged, adjudication of which is pending. NCLT as well as NCLAT admitted the insolvency petition stating that challenge of award could not be considered to be 'existence of dispute' under the I& B Code. This is under challenge in the present appeals.

Decision : Appeals allowed.

Reason :

A reading of Section 9(5) (ii) (d) would show that an application under Section 8 must be rejected if notice of a dispute has been received by the operational creditor. In the present case, it is clear on facts that the entire basis for the notice under Section 8 of the Code is the fact that an Arbitral Award was passed on 21.07.2017 against the Appellant. As has been pointed out by us, this clearly appears from the gist of the case that was filed along with the insolvency petition. The fact that the reply of 16.02.2017 to the notice given under Section 8 was within 10 days, and raised the existence of a dispute, also cannot be doubted.

Our recent judgment in Mobilox Innovations (supra) throws considerable light on the issue at hand. Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the Arbitral Award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the Award. Such a case would clearly come within para 38 of Mobilox Innovations (supra), being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of Rs. two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist.

We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.

We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.

We may hasten to add that there may also be other cases where a Section 34 petition may have been instituted in the wrong court, as a result of which the petitioner may claim the application of Section 14 of the Limitation Act to get over the bar of limitation laid down in Section 34(3) of the Arbitration Act. In such cases also, it is obvious that the insolvency process cannot be put into operation without an adjudication on the applicability of Section 14 of the Limitation Act. For all these reasons, we are of the view that the judgment of the Appellate Tribunal needs to be set aside and is therefore reversed.

23/10/2018	**Transmission Corporation Of AndhraPradesh Ltd. (Appellant) vs. Equipment Conductors & Cables (Respondent)(Respondent)**	**Supreme Court** **Civil Appeal No. 9597 of 2018** **A.K. Sikri Ashok Bhushan, JJ**

Insolvency and Bankruptcy Code, 2016 – Time barred claim rejected by arbitral council – Operational creditor filed petition before NCLT – Corporate debtor refuted the claim – Dismissed by NCLT – On appeal allowed by NCLAT – Whether sustainable – Held, No.

Brief facts :

Respondent took two set of claims before the Arbitral Council viz claims with respect to invoices 1-53 and claims with respect to invoices 54-82. Insofar as claim under Invoice Nos. 1-53 is concerned, the same was specifically rejected by the Arbitral Council on the ground that it had become time barred. The respondent challenged the said part of the award of the Arbitral Council, but was not successful. On the basis of certain observations made by the High Court of Punjab and Haryana in its decision dated January 29, 2016, the respondent attempted to recover the amount by filing execution petition before the Civil Court, Hyderabad. However, that attempt of the respondent was also unsuccessful inasmuch as the High Court of Judicature at Hyderabad categorically held that since that particular amount was not payable under the award, execution was not maintainable. After failing to recover the amount in the aforesaid manner, the respondent issued notice to the appellant under Section 8 of the IBC treating itself as the operational creditor and appellant as the corporate debtor. The

appellant specifically refuted this claim. In spite thereof, application under Section 9 was filed before the NCLT, Hyderabad which was dismissed by it vide order dated April 09, 2018. It is in appeal against the said order, the NCLAT has now passed the impugned order.

Decision : Appeal allowed.

Reason :

Though, in the first brush, it appears that matter is still at the stage of admission and the aforesaid order is an interim order, a careful reading thereof would clearly bring out that the NCLAT perceives that the appellant herein owes money to the respondent and for this reason a chance is given to the appellant to settle the claim of the respondent, otherwise order would be passed initiating Corporate Insolvency Resolution Process (for short, 'CIRP'). According to the appellant, no amount is payable and the order in question is causing serious prejudice to the appellant which is asked to settle the purported claim, failing which, to face insolvency proceedings. It may also be recorded at this stage itself that the appeal pending before NCLAT is filed by the respondent herein which is against the Orders dated April 09, 2018 passed by the National Company Law Tribunal (for short, 'NCLT'), Hyderabad. By the said order, the NCLT has dismissed the petition filed by the respondent herein under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC'). To put it briefly at this stage, the NCLT, after detailed deliberations, has come to the conclusion that the Company

Petition filed by the respondent was not maintainable as the claims which were preferred by the respondent against the appellant and on the basis of which respondent asserts that it has to receive monies from the appellant are not tenable and in any case these are not disputed claims. This assertion is based on the fact that these very claims of the respondent were subject matter of arbitration and the award was passed rejecting these claims as time barred. Moreover, the company petition itself suffers various fundamental defects. On that basis, NCLT held that there is a valid dispute, rather no dispute as issue in question was substantially dealt with by various courts as mentioned in the order passed by NCLT.

The NCLAT has not discussed the merits of the case and also not stated how the amount is payable to the respondent in spite of the aforesaid events which were noted by the NCLT as well. Notwithstanding, it has given wielded threat to the appellant by giving a one chance, 'to settle the claim with the appellant (respondent herein), failing which this Appellate Tribunal may pass appropriate orders on merit'. It has also stated that though the matter is posted for admission on the next date, the appeal would be disposed of at the stage of admission itself. There is a clear message in the aforesaid order directing the appellant to pay the amount to the respondent, failing which CIRP shall be initiated against the appellant.

The only argument advanced by learned counsel for the respondent before this Court was that the High Court of Punjab and Haryana while setting aside the remand order passed by the Additional District Judge did not hold that Invoice Nos. 1-57 are time barred. Therefore, the respondent had a valid claim under those invoices.

This argument cannot be countenanced. As of today, there is no award of the Arbitral Council with respect to invoices at Sl. Nos. 1-57. There is no order of any other court as well qua these invoices. In fact, Arbitral Council specifically rejected the claim of the respondent as time barred.

It is pertinent to mention that respondent had moved an application before the Arbitral Council for determination of amount to be paid by the appellant. However, this application was specifically dismissed by the Arbitral Council as not maintainable.

In a recent judgment of this Court in *Mobilox Innovations Pvt Ltd v. Kirusa Software Private Limited (2018) 1 SCC 353*, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The aforesaid principle squarely applied to the present case.

As a result, we allow this appeal and set aside the impugned order dated September 04, 2018 passed by the NCLAT. In a normal course, the matter should have been remanded back to the NCLAT for deciding the appeal

of the respondent herein filed before the NCLAT, on merits. However, as this Court has gone into merits and found that order of the NCLT is justified, no purpose would be served in remanding the case back to the NCLAT. Consequence would be to dismiss the Company Appeal (80) (Insolvency) No. 366 of 2018 and miscellaneous applications filed by the respondent before the NCLAT. No order as to costs.

05/11/2018	**Rajesh Arora (Appellant) vs. Sanjay Kumar Jaiswal (Respondent)**	**NCLAT** **Company Appeal (AT) (Insolvency) No. 634 of 2018** **S.J. Mukhopadhaya & A.I.S. Cheema**

Insolvency and Bankruptcy Code, 2016 – Section 9 – Application admitted without issuing notice to corporate debtor – Whether correct – Held, No.

Brief facts :

This appeal has been filed by a shareholder of M/s Amira Pure Foods Pt. Ltd ('Corporate Debtor') against the order of the NCLLT which had admitted the application under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short I&BC) preferred by Ex-employee Respondent ('Operational Creditor').

Decision : Appeal allowed.

Reason :

The Appellant submits that the application under Section 9 of I&BC was admitted without any notice to the 'Corporate Debtor'. The Adjudicating Authority had not given any notice before admitting the case and the impugned order had been passed in violation of rules of Natural Justice. It is also stated that the parties have settled the matter and a draft for Rest. 2, 88,000/- has been handed over to the 'Operational Creditor' towards rest of the amount in terms of settlement.

The Respondent has not disputed the fact that the impugned order was passed by the Adjudicating Authority without any notice to the 'Corporate Debtor'. This is also clear from the impugned order.

Admittedly, impugned order was passed by the Adjudicating Authority without notice to the 'Corporate Debtor' in violation of rules of Natural Justice, we set aside the impugned order. The matter having been settled between the parties, we are not remitting the matter back to the Adjudicating Authority.

In effect, order(s) passed by the Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing account, and all other order(s) passed by the Adjudicating Authority pursuant to impugned order and action, taken by the 'Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I & B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor (Company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

5

COMPETITION LAW

14/07/2021	**Meru Travel Solutions Pvt. Ltd(Appellant)** **vs.** **Uber India Systems Pvt. Ltd. & Ors(Respondent)**	**Competition Commission of India**

Competition Axt,2002- section 4- radio taxi services- below cost pricing by Uber- whether abuse of dominance-Held, No.

Brief facts:

Meru, the Informant, is engaged in the radio taxi service business in India to provide radio taxi services under the brand names 'Meru', 'Meru Genie' and 'Meru Flexi' in 21 major cities across India including Delhi NCR. It started operations in India in the year 2007, with self-owned cars but since 2012, it has started offering its services through aggregation model as well. OPs Uber Group entered the Indian radio taxi services market in 2013 and started its operations in Delhi-NCR in December 2013, wherein it offered services under three different brands namely 'Uber Black', 'Uber X' and 'UberGo'. The main grievance of the Informant is with regard to the alleged below cost pricing adopted by Uber. The Informant has alleged that the said allegation can be looked into both under Section 3(4) as well as Section 4 of the Act. Reliance has been placed on the prima facie order passed in Delhi Vyapar Mahasangh case as well as interim order passed in the MMT case.

Decision & Reason:

Based on the foregoing discussion, the Commission finds the relevant market in the present case to be 'market for radio taxi services in Delhi- NCR'.

In digital economy markets, network effects play a pivotal role. Network effects depend heavily on number of players/ participants joining the network on each side of two-sided or multi-sided markets e.g. in case of radio taxi/cab aggregators, the network effects depend upon the drivers and riders joining the network. More riders mean more demand scattered across a geographic region owing to higher density of riders, leading to more ride requests on a particular platform as compared to its competitor, which in turn lead to the requirement of more drivers to serve such riders. More drivers improve the service (in terms of pickup time and geographical coverage) for riders, thus attracting more riders which in turn attracts more drivers. Such increased number of rides through limited platforms also generate efficiencies through higher utilization rate and lesser idle time for cabs/taxies.

It has been the constant endeavour of the Commission to promote competition in the market and to ensure efficient competitive markets. Such endeavour shall not be perceived to ensure a particular number of competitors. What is of significance is the strength of competitive constraints faced by players in a relevant market. To quote from an earlier decision 'as long as there is competition in and for the market satisfying these outcomes, regulatory intervention is not warranted to either protect the existing players or to increase the number of players in the market. Towards that end, Competition and competition law is not about counting the number of firms in a particular relevant market to determine whether or not that market is competitive.' Further, 'every market is unique with a unique number of players that are determined organically by competitive forces. There can be no sacrosanct number of firms that ensures the presence or absence of competition. There can be markets which may not be competitive even with large number of players and equally possibly there can be markets which can work perfectly well with fewer players, constraining the conduct of each other. What is significant is that the existing firms are effective enough to constrain the behaviour of one another so as to dissuade independent abusive conduct by any of them.'

In view of the foregoing, Uber is not found to be dominant in the relevant market. In the absence of dominance of Uber, examination of abuse or any analysis of pricing strategy by Uber is not warranted under the provisions of the Act.

This platform-based model, though distinct, competes with the asset-owned model where cabs are owned by the radio taxi operators. While the radio taxi companies operating under the asset-owned model own the taxis attached to them, the cab aggregators like Uber and Ola heavily rely on their network of driver partners with their own cars to provide ride services to the consumers/riders.

The digital market economy players rely on the strength of the network effects to generate efficiencies. Network effects in cab aggregators market depends upon the number of drivers and riders joining the network. As highlighted earlier, more riders mean more demand, leading to more ride requests on a particular platform as compared to its competitor, requiring more drivers to serve such riders. More drivers improve the geographical coverage and reduces the waiting time/ pickup time for riders, thus attracting more riders which in turn would attract/require more drivers. Thus, ceteris paribus, a cab-aggregator platform having a larger network will be able to allocate more ride requests to the drivers and offer more efficient rides to the riders/consumers in terms of lesser waiting time and lower prices. It has been submitted by Uber that its incentives were aimed at building a strong network and achieving a minimum viable scale to generate efficiencies.

During the initial stages, the focus of all platform operators, including the cab aggregators, is on developing and growing the network size. Depending upon the network externalities offered by each side, platforms design the pricing structure so as to make 'joining' the network and 'staying committed' to it, attractive to both sides. In cab aggregators' market, this was exhibited by discounts and incentives offered to riders and drivers, respectively. However, as the network grows and reaches a critical mass providing immense cross-side network benefits to the platform participants, the need to offer discounts/ incentives gets obviated. The data collected by the DG during investigation also depicts that the average margin per trip, which is essentially based on the gross billed amount collected from the customers (riders) less the amount spent by Uber on discounts and incentives, had become positive from October-2017 onwards (except in May, 2018). Thus, Uber has been earning positive margin per trip in Delhi NCR market since October 2017, which kept on increasing and went up to a range of Rs.0-50 per trip in March, 2019.

Meru has alleged that these discounts and incentives are funded by deep pockets and are not a result of efficiency. However, the present example of cab aggregators market is more of a case of penetrative pricing strategies for creation of a network. Given that Uber operates in a competitive market, having competitive constraints from an equally strong player i.e. Ola who has also been allegedly deploying similar pricing strategies, it seems to be a compelling business strategy to induce loyalty by offering incentives to drivers. This in itself becomes a competitive strategy in the early stages of network creation. Unlike players operating under the asset-owned model like Meru, the pure cab aggregators do not have fixed fleet of cabs or drivers working for them. In order to create a fleet of cabs that attach themselves on the platform simulating a fleet model, these incentives in the early stages are essential to attract cab-owning drivers.

In view of the foregoing discussion and on a collective assessment of various facts and evidence, the Commission thus, does not find merit in the argument of Meru that the incentives and rating mechanism adopted by Uber for its driver partners has led to any AAEC in the market.

22/06/2021	**Kshitiz Arya & Anr (Appellant)** **vs.** **Google Llc & Ors (Respondent)**	**Competition Commission of India**

Competition Axt,2002- section 3 & 4- android based smart phones and television devices- pre-installation of google app play store – restrictions on OEMs not to manufacture other forked android devices- whether abuse of dominance: Held, yes.

Brief Facts:

The Informants, stated to be consumers of the android based smart-phones and smart television devices. The Informant has alleged that Google has imposed several restrictions, as summarized below:

Bundling its two different products, i.e. its app store (Play Store) to the operating system developed by it for television devices, i.e. Android TV. All Android TV based smart TV devices are alleged to come pre-installed with Google's app store, i.e. Play Store for smart TVs.

Android Compatibility Commitments (ACC) formerly referred to as the Anti-fragmentation Agreements (AFA) stipulate and prevent OEMs from manufacturing/ distributing/ selling any other smart television or mobile devices which operate on a competing forked Android operating system. Thus, the developers of such forked Android operating system are denied market access resulting in violation of Section 4(2)(c) of the Act.

Google's Play Store is not available on other licensable operating system as Google does not make available its app store to any TV operating on a forked Android operating system to prevent competition in these distinct relevant markets. This in turn also results in denial of market access which is alleged to be another violation of Section 4(2)(c) of the Act.

OEMs which have entered into the ACC/AFAs with Google, are restrained from developing their own operating system based on 'forked android' for televisions. This has been stated to have not only created a barrier to entry into the market but actively resulted in limiting further research and scientific/ technical development of forked Android based Operating Systems. Further, as per the Informants, such restriction on the OEMs tantamount to imposition of supplementary obligations and have no connection or nexus with the licensing of OS or Google Mobile Services (GMS) for smart device.

The obligations, by virtue of the ACC/ AFA, restrict freedom of action of OEMs with regard to the whole of their device portfolio (smart mobile devices, televisions, etc.), and not just the devices on which the Play Store or Android TV OS is pre-installed. Thus, the Informants have alleged that these obligations can in no manner be conceived as connected to agreement for licensing of Android OS or app store for TV.

In addition to allegations under Section 4 of the Act, the Informants have averred that the agreements entered into by the OPs are in the nature of agreements as contemplated by Section 3(4) of the Act. These agreements are causing/ have caused an appreciable adverse effect on competition and therefore, are in contravention of Section 3(1) of the Act.

Decision: Investigation by DG ordered.

Reason:

However, as already noted, prima facie app stores in smart TV ecosystems are an important consideration for both OEMs as well as users and therefore, they appear to be a must have app. Further, it appears that all the Android TV based smart TVs come with pre-installed Play Store for Android TV. As already stated, Google occupies most significant position in the relevant market for licensable smart TV OS. Therefore, based on the aforesaid observations, prima facie it appears that Google has a dominant position in the relevant market for licensable smart TV device operating systems in India and the market for app store for Android smart TV operating systems in India.

Based on the information submitted by Google, it is noted that Google enters into two agreements with Android TV licensees i.e. Television App Distribution Agreement (TADA) and Android Compatibility Commitment (ACC), which, in conjunction essentially entail the following restrictions (a) In order to be able to preinstall Google's proprietary apps, device manufacturers have to commit to comply with the ACC for all devices based on Android manufactured/distributed/sold by them; and b) In order to be able to preinstall any proprietary app of Google, e.g. Play Store, device manufacturers will have to preinstall the entire suite of Google apps.

It appears that the obligations imposed by ACC restricts OEMs from dealing in Android Forks as OEMs commit that (i) All devices based on Android that Company manufactures, distributes, or markets will be Android Compatible Devices; (ii).All Androidbased software that Company develops, distributes, or markets will be designed to run on Android Compatible Devices, and (iii). Company may not distribute or market an SDK based on Android to third parties or participate in the development of such as SDK. Company remains free to develop an SDK based on Android for its own internal use.

Google, in its submissions, has asserted that licensing of Android operating system is not conditional upon signing of either of the two agreements i.e. TADA and ACC as both are optional. In this regard, the Commission is of the prima facie opinion that Google's app store, i.e. Play Store is prima facie noted as a 'must have' app, in the absence of which the marketability of Android devices may get restricted. Since, the license to pre-install Play Store is dependent on execution of TADA and ACC between Google and OEMs, therefore, these agreements become de facto compulsory.

In this backdrop, the Commission is of the prima facie opinion that by making pre-installation of Google's proprietary apps (particularly Play Store) conditional upon signing of ACC for all android devices manufactured/ distributed/marketed by device manufacturers, Google has reduced the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of Android i.e. Android forks, and thereby limited technical or scientific development relating to goods or services to the prejudice of consumers in contravention of Section 4(2)(b) of the Act. Further, ACC prevents OEMs from manufacturing/ distributing/ selling any other device which operate on a competing forked Android operating system. Therefore, given the dominance of Google in the relevant markets and pronounced network effects, by virtue of this restriction, developers of such forked Android operating system are denied market access resulting in violation of Section 4(2)(c) of the Act.

In relation to ACC, Google has inter alia contended that by requiring a minimum level of baseline compatibility, the ACC facilitates competition between Android TV and longerestablished players in the connected TV sector to the benefit of Indian consumers. Further, ACC's compatibility requirement makes content providers more willing to certify their content for use on Android TV since they can be assured that their content will work as intended across all certified Android TV devices. The Commission is of the view that such pleas of Google can be appropriately examined during the investigative stage based on examination of device manufacturers and application developers.

In relation to the mandatory preinstallation of the all the Google Applications under TADA, it is observed that the device manufacturers who sign this agreement cannot pick and choose from amongst the Google Applications for preinstallation. In essence, this entails compulsory tying of 'must have' Google apps (such as Play Store), which the device manufacturers would like to have on their devices, with other apps where other credible alternatives may be available. The Commission is of the prima facie opinion that mandatory preinstallation of all the Google Applications under TADA amounts to imposition of unfair condition on the smart TV device manufacturers and thereby in contravention of Section 4(2)(a)(i) of the Act. It also amounts to prima facie leveraging of Google's dominance in Play Store to protect the relevant markets such as online video hosting services offered by YouTube, etc. in contravention of Section 4(2) (e) of the Act. All these aspects warrant a detailed investigation.

In view of the foregoing, the Commission directs the Director General ('DG') to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the date of receipt of this order.

20/05/2021	**CP Cell, Directorate General Ordnance Service (Appellant)** **vs.** **Sankeshwar Synthetics Pvt. Ltd (Respondent)**	**Competition Commission of India**

Competition Act, 2002- section 3- bid rigging- two bids of identical value- whether cartelisation established-Held, No.

Brief Facts:

The Informant in the present case had issued RFP for procurement of under pant Woollen for 9, 95,073 pairs. The Informant has stated that out of 12 firms which participated, only 7 firms could qualify for opening of commercial bids. The Informant submits that post-opening of commercial bids, it was observed that the rate quoted by two firms may have been quoted after collusion. The Informant has stated that it is opined that firms have colluded and quoted same rate, it gives an impression that the rates offered are through cartelisation.

Decision: Dismissed.

Reason:

The Commission notes that the bid rigging is defined in explanation under Section 3(3)(d) of the Act as, any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. The Commission observes that bid rigging or collusive bidding in a tender can be done by unscrupulous bidders in myriad ways, including clandestine arrangements to submit identical bid or deciding inter se as to who shall submit lowest bid amongst them or who shall refrain from submitting a bid and even includes designation of bid winners in advance on rotational basis/ geographical basis or on customer allocation basis. Any such agreement is clearly in contravention of Section 3(3)(d) read with Section 3(1) of the Act.

The Commission notes that in the additional information it came to light that the case was retendered by Informant based on its assessment that two L-1 firms quoted identical rates which was deemed as cartelisation. As per the additional information, the tender was retracted on 16.09.2020 and retendered on 12.11.2020. The Commission observes upon consideration of the minutes of the meeting of Technical Evaluation Committee that the procurer has raised this suspicion of bid-rigging only based on identical rates. Further, such bid has been negotiated with other firms and the procurer has found 5 firms willing to supply the order at the reduced rate of Rs. 127.90/-.

Additionally, it is seen that only two tenders were floated in last 5 years for procurement of woollen underpants. The earlier tender was floated on 02.07.2017 for procurement of 16,54,618 pairs of underpants woollen wherein 23 firms had participated. From list of 23 firms participated in earlier tender, the Commission notes that OPs in the present case had also participated in that tender. The OP-2 in the present matter, had in the previous tender submitted a bid of Rs. 142.40 and was the L4 bidder, and OP-1 had also participated, but did not attain any ranking. However, in the present tender both these firms have submitted the bid price of Rs. 127.90 which is much lower than the rate at which the previous tender was awarded. Further, 5 other firms were found willing to supply the order at reduced rate of Rs. 127.90/-. However, the tender was cancelled, and the procurer retendered for the supply of the item.

Based on information available at the disposal, the Commission notes that other than mere existence of an identical L-1 rate there is no other evidence to buttress the allegations of collusion or suggest any inter se relationship between the Opposite Parties. The Commission observes that the mere existence of price parallelism or identical prices is not per se sufficient to hold the parties liable for act of manipulation of bids/ bid rigging. The Commission holds that price parallelism has to be accompanied by some plus factor in order to substantiate the presence of 'collusion'/ or 'any agreement' on part of the bidders which still stands unsubstantiated even after seeking additional information. Thus, the Commission observes that the information available at present is insufficient to proceed forward with this matter.

3/06/2021	**Confederation Of Professional Baseball Softball Clubs (Appellant)** **vs.** **Amateur Baseball Federation Of India (Respondent)**	**Competition Commission of India**

Competition Act,2003- section 4- abuse of dominance -tournaments conducted by unrecognised bodies- OP restriction players from participating in the tournaments organised- whether abuse of dominance- Held, Yes.

Brief facts:

The Informant was primarily aggrieved of the communications sent by ABFI to its affiliated State Baseball Associations whereby and whereunder they have been requested not to entertain unrecognized bodies and not to allow State level players to participate in any of the tournaments organized by them. The communication also threatens that strict action will be taken against the players who participate in such tournaments. This is alleged to be an abusive conduct by ABFI in contravention of the provisions of Section 4 of the Act.

Decision: Investigation ordered.

Reason:

On the issue of dominance of OP in the afore-delineated relevant market, the Commission notes from the submissions of OP itself that it is recognised as a National Sports Federation by the Ministry of Youth Affairs and Sports, Government of India and is primarily working for the general promotion of baseball and the players. It is also stated by OP in its reply that ABFI is affiliated to Baseball Federation of Asia, which is a continental level body and also to World Baseball and Softball Confederation, which is an International organization. ABFI is stated to have 26 affiliated State Associations across the country in 6 different zones. is an apex body in the country for promotion and development of baseball game recognized by Ministry of Youth Affairs & Sports, Government of India and Indian Olympic Association. Apart from conducting zonal, national and international baseball tournaments in India, ABFI is admittedly entrusted with the task of selecting Indian Baseball Team to participate in the international events.

In view of such admitted apex position of ABFI in the baseball ecosystem coupled with linkages/ affiliations with continental and international organizations, it is axiomatic that ABFI plays a decisive role in the governance of this sport discipline in the country. Accordingly, the Commission is of prima facie opinion that ABFI is in a dominant position in the 'market for organization of baseball leagues/events/ tournaments in India'.

As regards the alleged abusive conduct, the Commission notes that ABFI by issuing communication dated 07.01.2021 to its affiliated State Baseball Associations requesting them not to entertain the unrecognised bodies and further by requesting them not to allow their respective State players to participate in any of the tournaments organised by such unrecognised bodies, has violated the provisions of Section 4(2)(c) of the Act as it results in denial of market access to other federations. Also, such conduct results in limiting and restricting the provision of services and market therefor, in contravention of the provisions of Section 4(2)(b)(i) of the Act. It is pertinent to mention that ABFI has acknowledged in its response that it has sent the communication dated 07.02.2021 to its affiliated State Associations.

The Commission also notes that the communication dated 07.02.2021 has further warned of strict action against the players who participate in the tournaments organised by bodies which are not 'recognised' by ABFI. Such conduct imposes an unfair condition upon the players and thereby falls foul of the provisions of Section 4(2)(a)(i) of the Act besides stultifying the very objective of promoting the cause of baseball in India, which a National Sports Federation is obligated to discharge.

In view of the foregoing, the Commission is of the prima facie opinion that ABFI has violated the provisions of Section 4 of the Act through its impugned conduct and the matter warrants investigation. Further, though the

Informant has alleged contravention of the provisions of Section 4 of the Act only, yet looking at the decisions taken and communicated by ABFI, the Commission is of the opinion that the impugned conduct may also be examined by the DG within the framework of Section 3 of the Act, as highlighted previously in this order, as the impugned acts of ABFI in communicating its decision vide letter dated 07.01.2021 prima facie seem to limit or control provision of services, and thereby stand captured within the framework of Section 3(1) read with Section 3(3) of the Act. Resultantly, the Commission directs the DG to cause an investigation to be made into the matter.

15/12/2020	**Samir Agrawal (Appellant)** **Vs.** **Competition Commission of India & Ors (Respondents),**	**Supreme Court of India** **Civil Appeal No. 3100 of 2020**

Supreme Court of India Dismissed the Allegation of Cartelisation and Anti-Competitive Practices by Cab Aggregator Ola & Uber & analysed the provisions of the Competition Act as well as the 2009 Regulations and settled the unsettled: Who can approach the CCI?

Brief Facts

Informant who describes himself as an independent practitioner of the law. The Appellant/Informant, by an Information filed on 13.08.2018 ["the Information"], sought that the Competition Commission of India ["CCI"] initiate an inquiry, under section 26(2) of the Competition Act, 2002 ["the Act"], into the alleged anti-competitive conduct of ANI Technologies Pvt. Ltd. ["Ola"], and Uber India Systems Pvt. Ltd., Uber B.V. and Uber Technologies Inc. [together referred to as "Uber"], alleging that they entered into price-fixing agreements in contravention of section 3(1) read with section 3(3)(a) of the Act, and engaged in resale price maintenance in contravention of section 3(1) read with section 3(4)(e) of the Act. According to the Informant, Uber and Ola provide radio taxi services and essentially operate as platforms through mobile applications ["apps"] which allow riders and drivers, that is, two sides of the platform, to interact. A trip's fare is calculated by an algorithm based on many factors. The apps that are downloaded facilitate payment of the fare by various modes.

The Informant alleged that due to algorithmic pricing, neither are riders able to negotiate fares with individual drivers for rides that are booked through the apps, nor are the drivers able to offer any discounts. Thus, the pricing algorithm takes away the freedom of riders and drivers to choose the best price on the basis of competition, as both have to accept the price set by the pricing algorithm. As per the terms and conditions agreed upon between Ola and Uber with their respective drivers, despite the fact that the drivers are independent entities who are not employees or agents of Ola or Uber, the driver is bound to accept the trip fare reflected in the app at the end of the trip, without having any discretion insofar as the same is concerned. The drivers receive their share of the fare only after the deduction of a commission by Ola and Uber for the services offered to the rider. Therefore, the Informant alleged that the pricing algorithm used by Ola and Uber artificially manipulates supply and demand, guaranteeing higher fares to drivers who would otherwise compete against one and another. Cooperation between drivers, through the Ola and Uber apps, results in concerted action under section 3(3) (a) read with section 3(1) of the Act. Thus, the Informant submitted that the Ola and Uber apps function akin to a trade association, facilitating the operation of a cartel. Further, since Ola and Uber have greater bargaining power than riders in the determination of price, they are able to implement price discrimination, whereby riders are charged on the basis of their willingness to pay and as a result, artificially inflated fares are paid. Various other averments *qua* resale price maintenance were also made, alleging a contravention of section 3(4) (e) of the Act.

Judgement:

Hon'ble Supreme Court analysed the provisions of the Competition Act as well as the 2009 Regulations and

settled the unsettled: Who can approach the CCI? In this case Supreme Court in para 13, 14, 15, 16 and 17 observed that;

"A reading of the provisions of the Act and the 2009 Regulations would show that "any person" may provide information to the CCI, which may then act upon it in accordance with the provisions of the Act. In this regard, the definition of "person" in section 2(l) of the Act, set out hereinabove, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of "consumer" in section 2(f) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.

A look at section 19(1) of the Act would show that the Act originally provided for the "receipt of a complaint" from any person, consumer or their association, or trade association. This expression was then substituted with the expression "receipt of any information in such manner and" by the 2007 Amendment. This substitution is not without significance. Whereas, a *complaint* could be filed only from a person who was aggrieved by a particular action, *information* may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings *in rem* which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion, is also laid down in section 19(1) of the Act. Further, even while exercising *suo motu* powers, the CCI may receive information from any person and not merely from a person who is aggrieved by the conduct that is alleged to have occurred. This also follows from a reading of section 35 of the Act, in which the earlier expression "complainant or defendant" has been substituted by the expression, "person or an enterprise," setting out that the informant may appear either in person, or through one or more agents, before the CCI to present the information that he has gathered.

Section 45 of the Act is a deterrent against persons who provide information to the CCI, *mala fide* or recklessly, inasmuch as false statements and omissions of material facts are punishable with a penalty which may extend to the hefty amount of rupees one crore, with the CCI being empowered to pass other such orders as it deems fit. This, and the judicious use of heavy costs being imposed when the information supplied is either frivolous or *mala fide*, can keep in check what is described as the growing tendency of persons being "set up" by rivals in the trade.

The 2009 Regulations also point in the same direction inasmuch as regulation 10, which has been set out hereinabove, does not require the informant to state how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Also, regulation 25 shows that public interest must be foremost in the consideration of the CCI when an application is made to it in writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings. What is also extremely important is regulation 35, by which the CCI must maintain confidentiality of the identity of an informant on a request made to it in writing, so that such informant be free from harassment by persons involved in contravening the Act.

This being the case, it is difficult to agree with the impugned judgment of the NCLAT in its narrow construction of section 19 of the Act, which therefore stands set aside."

Further, Hon'ble Supreme Court of India observed in para 22 and 23 that " obviously, when the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act.

Coming now to the merits, we have already set out the concurrent findings of fact of the CCI and the NCLAT, wherein it has been found that Ola and Uber do not facilitate cartelization or anti-competitive practices between drivers, who are independent individuals, who act independently of each other, so as to attract the application of section 3 of the Act, as has been held by both the CCI and the NCLAT. We, therefore, see no reason to interfere with these findings. Resultantly, the appeal is disposed of in terms of this judgment."

20/01/2021	**Thupili Raveendra Babu (Appellant)** **vs** **Bar Council Of India & Ors (Respondents)**	**Competition Commission of India[CCI] Case No. 50 of 2020**

Section 4 of the Competition Act, 2002 read with the Advocates Act, 1961- Bar Council of India Rules-legal education-age restriction for pursuing legal education whether BCI is an enterprise-Held, No. Whether the complaint is maintainable-Held, No.

Brief facts:

The instant information was filed by the Informant alleging contravention of provisions of Section 4 of the Act by Bar Council of India and its office bearers, collectively referred to as 'Opposite Parties'. The informant was 52 years old and could not pursue legal education post his retirement. As per the BCI Rules, candidates belonging to General category who have attained the age of more than 30 years, are barred from pursuing legal education. The allegations were based on this age restriction, The BCI has allegedly imposed maximum age restrictions upon the new entrants to enter into the legal education and thus, created indirect barriers to the new entrants in the profession of legal service. The impugned Clause 28 [in he rules] has been incorporated by the BCI in contravention of Section 4 of the Act by 'misusing its dominant position'. By having done so, the BCI has also allegedly indulged in colourable exercise of power. The Informant has further alleged that the members of the BCI, by way of aforementioned Clause 28, conspired to reduce the competition to its electors and created indirect barriers in the profession of legal service. He has also alleged that the members of the BCI who are managing the affairs of the BCI are misusing the dominant position enjoyed by the BCI in controlling the legal education in India.

Decision: Dismissed.

Reason:

The Commission has carefully perused the information, the documents filed by the Informant and the information available in public domain. The Commission notes that the Informant has alleged contravention of the provisions of Section 4 of the Act, primarily, against the BCI. However, in order to appreciate the facts in the matter, it is imperative to examine the status of the BCI as an enterprise within the contours of the provisions of Section 2(h) of the Act before proceeding further with regard to the allegations raised in the information. Thus, the primary question which falls for consideration is that whether BCI is an 'enterprise' within the meaning of Section 2(h) of the Act. The term 'enterprise' has been defined under Section 2(h) of the Act, inter alia, as a person or a department of the Government, engaged in any activity relating to provision of any kind of services. In the present matter, the Commission notes that the BCI is a statutory body established under Section 4 of the Advocates Act, 1961. Section 7 of the said Act lays down the functions of the BCI which includes promotion of legal education in India and to lay down standards of such education in consultation with the Universities in India and the State Bar councils. Further, Section 49 of the Advocates Act, 1961 empowers the BCI to make rules for discharging its functions under the said Act such as prescribing qualifications and disqualifications for membership of a Bar Council, minimum qualifications required for admission to a course of degree in law in any recognised university, prescribing the standards of legal education for the universities in India, etc. Thus, it is noted that the BCI appears to carry out functions which are regulatory in nature in respect of the legal profession. It is noted that that in Case No. 39 of 2014, In re: Dilip Modwil and Insurance Regulatory and Development Authority (IRDA), decided on 12.09.2014, the Commission had the occasion to examine the status of IRDAI as an 'enterprise' under the Act. The Commission had observed that any entity can qualify within the definition of the term 'enterprise' if it is engaged in any activity which is relatable to the economic and commercial activities specified therein. It was further observed that regulatory functions discharged by a body are not per se amenable to the jurisdiction of the Commission. In the present matter, when the BCI appears to be

discharging its regulatory functions, it cannot be said to be an 'enterprise' within the meaning of Section 2(h) of the Act and consequently, the allegations made in relation to discharge of such functions which appears to be non-economic in nature, may not merit an examination within the provisions of Section 4 of the Act. In view of the foregoing, the Commission is of the opinion that there exists no prima facie case under the provisions of Section 4 of the Act and the information filed is directed to be closed forthwith against the Opposite Parties under Section 26(2) of the Act. Consequently, no case for grant for relief(s) as sought under Section 33 of the Act arises and the same is also rejected.

05.06.20	**Cartelisation in Industrial and Automotive Bearings-SuoMotu Case**	**Competition Commission of India**

Cartelisation in Industrial and Automotive Bearings

Regulatory Provisions of the Case

Provisions of Competition Act, 2002

Section 3(1)–Anti Competitive Agreements causing or likely to cause Appreciable Adverse Effect on Competition

Section 3(3)(a)–Anti Competitive Agreements- Agreement directly or indirectly determines purchase/sale prices

Section 26(1) -Procedure for inquiry- Prima facie opinion for causing an investigation

Section 46 - Power to impose lesser penalty

Competition Commission of India (Lesser Penalty) Regulations, 2009 ('LPR')-

Regulation 5 - Procedure for granting lesser penalty.

Facts of the Case:

This case was initiated by the Commission suo motu, pursuant to receipt of an application dated 26.06.2017 under Section 46 of the Competition Act, 2002 (the 'Act') read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('LPR') filed on behalf of FAG Bearings India Ltd. (now, Schaeffler India Ltd.). ('Schaeffler').

The case was initiated on the basis of a lesser penalty application received by the CCI under the provisions of Section 46 of the Act by Schaeffler. In the said application, it was disclosed that Schaeffler, along with four other companies, namely ABC Bearings Limited ('ABC Bearings'), National Engineering Industries Ltd. ('NEIL'), SKF India Ltd. ('SKF') and Tata Steel Ltd., Bearing Division ('Tata Bearing'), was involved in cartelisation in the domestic industrial and automotive bearings market from 2009 to 2014

The Commission passed an order dated 17.08.2017 under Section 26(1) of the Act, forming a prima facie view of contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act by the abovementioned companies and hence, referred the matter to the Director General for investigation.

During pendency of investigation, NEIL approached CCI by filing a lesser penalty application. The DG found cartelisation amongst the four companies namely NEIL, Schaeffler, SKF and Tata Bearing in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

The DG conducted a detailed investigation and found cartelisation amongst NEI, Schaeffler, Tata and SKF during the period from November 2009 to January 2011. The DG did not, however, find any evidence against Timken. The DG concluded that the competitors met and shared confidential information with an intent to achieve higher profits.

Pursuant to submission of the investigation report of the DG, the CCI allowed all the parties to submit responses and appear before it for oral arguments. The CCI, based on the investigation report and arguments of the parties, concluded that NEI, Schaeffler, Tata and SKF attended two in-person meetings and had telephonic conversations on various occasions to determine the prices of the bearings being sold to the original equipment manufacturers.

The CCI held that the individuals, who attended two meetings with competitors, when confronted by the DG, admitted having attended them. As such, the CCI found this evidence to be enough to establish a cartel under the Competition Act. The CCI finally concluded that once agreements are established under Section 3(3) of the Competition Act, it would be presumed to have caused an Appreciable Adverse Effect on Competition (AAEC) within India.

Decision

On 05.06.2020, after taking cognizance of the evidence collected by the DG, and of the lesser penalty applications filed by Schaeffler and NEIL, the CCI concluded that the four Bearings manufacturers namely NEI, Schaeffler, SKF and Tata Bearing, had indulged in cartelisation, in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

Considering all relevant factors, in terms of Section 27(a) of the Act, the CCI directed NEIL, Schaeffler, SKF and Tata Bearing, and their respective officials who were found liable in terms of Section 48 of the Act, to cease and desist in future from indulging into practices which have been found to be in contravention of the provisions of the Act

Sources Referred: *https://www.cci.gov.in/sites/default/files/Newsletter_document/FairPlayVol33.pdf*

08.05.2020	**Travel Agents Association of India** **vs.** **Department ofExpenditure, Ministry of Finance and Ors**	**Competition Commission of India**

The CCI held that the engagement of a travel agency by a Government department is not in the nature of an agreement which relates to any economic activity. Accordingly, there was no 'agreement' under the Act

Regulatory Provisions relating to the Case

Provisions of Competition Act, 2002

Section 3(1) of the Act – Anti-Competitive Agreements causing or likely to cause Appreciable Adverse Effect on Competition

Section 3(4) of the Act – Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services causes or is likely to cause an appreciable adverse effect on competition in India.

Section 19(1) of the Act – Inquiry into certain agreements and dominant position of enterprise

Facts of the case:

In the present case, an information has been filed by Travel Agents Association of India ("TAAI/Informant"), under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the "Act") against Department of Expenditure, Government of India ("DOE/Opposite Party-1"), Balmer Lawrie & Co. Ltd. ("Balmer Lawrie/Opposite Party-2") and Ashok Travels and Tours ("Ashok Travels/Opposite Party-3") alleging contravention of the provisions of Sections 3(4) and 3(1)of the Act.

TAAI, company incorporated under the Companies Act, 1956, is an association of travel agents with the primary objective to protect the interests of the travel and tourism industry and promote its orderly growth and development. To further this objective, TAAI liaisons with the Ministry of Tourism, Government of India.

DOE is the nodal department of the Ministry of Finance in the Central Government which oversees the public financial management system and matters connected or incidental to the finances of the Government of India.

Balmer Lawrie is a Government Company under the Ministry of Petroleum and Natural Gas, Government of India. Balmer Lawrie is stated to be one of the two exclusive travel agents which has been approved by DOE. Ashok Travels is one of the divisions of the India Tourism Development Corporation, a Government of India undertaking. Ashok Travels is stated to be one of the largest travel and tour operators in India providing other travel related services. Ashok Travels is the other travel agent approved by DOE.

On 24.03.2006, an office memorandum bearing No. 19024/1/E.IV/2005 was issued by DOE on the subject of "Guidelines on Air Travel on Official Tours- Purchase of Air Ticket from Authorised Agents" by which, it was stipulated that while utilizing air transport and the services of travel agents for booking air tickets, Government employees have to exclusively utilize the services of either Balmer Lawrie or Ashok Travels to the exclusion of other travel agents across the nation ("Office Memorandum 1").

It has been stated that restricting the choice of government employees was opposed by the government employees and instances of many government employees using the services of private travel agents for booking of air tickets for official travels came to notice of DOE. They also received a large number of proposals from various administrative ministries of several PSUs and departments of the Government of India for grant of ex post facto relaxation in the guidelines issued for air travel and official tours vide Office Memorandum 1.

It was alleged that by granting exclusive rights to Balmer Lawrie and Ashok Travels through Office Memorandums and subsequent circulars, the DOE had foreclosed competition in the market for travel agent services for booking air tickets in India and has restricted choice of Government and public sector employees to only Balmer Lawrie and Ashok Travels.

The Commission observed that DOE's principal activities appeared to be in realm of policy making and interface with various ministries and not commercial in nature. Accordingly, DOE cannot be regarded as an 'enterprise' in terms of Section 2(h) of the Act especially in relation to circulars which are impugned, which is nothing but manifestation of government policy. in relation to its availing of particular services as a consumer.

The Commission also noted that there does not seem to be any vertical relationship between DOE and Balmer Lawrie and Ashok Travels as DOE does not fall in any level of production chain in a market. Lastly, the Commission also observed that Office Memorandums and subsequent circulars are not in the nature of agreement pertaining to an economic activity but are internal administrative decision of the Government to deal with a particular agency in the matter of securing air tickets.

Such policy decisions of the Government emanating through circulars cannot be termed as an 'agreement' under the provisions of the Act and consequently, are not the kind of 'agreement' envisaged under Section 3(1) of the Act.

Decision

Accordingly, the Commission held that as there was no vertical agreement between DOE, Balmer Lawrie and Ashok Travels under Section 3(4) of the Act and no case of contravention of provisions of the Act is made out under Section 3(4) of the Act, the matter may be closed.

14.05.2020	RH Agro Private Limited vs. State Bank of India and Ors	Competition Commission of India

CCI observes that a bank acting as per the remedies available to it under the SARFAESI Act for recovery cannot be termed as a dominant entity when it acts in accordance with provision thereof as it is acting in recovery of its funds/money in order to mitigate losses in such transaction (where account has been declared NPA).

Regulatory Provisions relating to the Case

Provisions of Competition Act, 2002

Section 3 – Anti Competitive Agreements

Section 4 – Abuse of Dominant Position

Section 19(1) of the Act – Inquiry into certain agreements and dominant position of enterprise

The present information has been filed by M/s. R.H. Agro Overseas Pvt. Ltd. ('Informant') through its authorized Director under Section 19(1)(a) of the Competition Act, 2002 ('Act') against State Bank of India ('SBI' 'OP- 1'), M/s. Patanjali Ayurveda ('Patanjali'/'OP-2'), M/s. International Trader ('International Trader'/'OP-3') alleging contravention of the provisions of Section 3 and 4 of the Act.

Collusive Arrangement

An Information was filed alleging that the State Bank of India ('SBI'), M/s Patanjali Ayurveda Group and International Traders had entered into a collusive arrangement under Section 3 of the Act, in respect of the e-auction conducted by SBI, to recover the outstanding dues from the Informant.

Abuse of dominance

An allegation was also made that SBI and its officials were abusing their dominant position under Section 4 of the Act. As regards allegations under Section 3 of the Act, any agreement/ understanding/practice between businesses is scrutinized in respect of entities 'engaged in identical or similar trade of goods or provision of services'.

In this case, SBI, together with Patanjali Ayurveda (bidder) & M/s International Traders (bidder) could not be said to be similarly placed or involved in the same line of business or horizontally placed so as to fall within Section 3(3) of the Act.

Even otherwise, the conduct of a secured creditor in effecting sale of an asset secured to it, through an auction process could not be examined under the provision of Section 3(3)(d) of the Act. Regarding the allegation of violation of Section 4 of the Competition Act, 2002, the CCI observed that a bank acting under the provisions of the SARFAESI Act ('Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002') attempting to recover the outstanding amount in the event of default by the borrower/ guarantor could not be termed as a dominant entity. **It is also noted that auction of primary security by a secured debtor for realization of funds cannot be said to be a transaction done in ordinary course of business. The sale of security of an account declared NPA is a remedy available to a secured creditor under the provisions of SARFAESI Act.**

The Commission observed further that a bank acting as per the remedies available under the SARFAESI Act for recovery could not be termed as a dominant entity when it acts in accordance with provision thereof as it is acting in recovery of its funds/money in order to mitigate losses in such transaction (where account has been declared NPA).

Accordingly, on 14.05.2020, the Commission found no prima facie case as an auction/transaction initiated by a bank/ financial institutions as a secured creditor for the purpose of recovery in terms of provisions of the SARFAESI Act would not amount to violation of the provisions of the Competition Act, 2002.

05.12.2018	**Competition Commission of India vs Bharti Airtel Limited and Others**	**Competition Commission of India**

The Scope of the Powers of the Competition Commission of India (CCI) under the Competition Act, 2002 pertaining to telecom sector i.e. in respect of the companies in telecom industry providing telecom

services vis-a-vis the Scope of the Powers of Telecom Regulatory Authority of India (TRAI) under the TRAI Act, 1997.

Supreme Court held that the Competition Act is a special statute and if there is anti-competitive conduct it is within the exclusive domain of the CCI to examine and rule upon it. Even if TRAI finds anti-competitive conduct, its powers would be limited to the action under the TRAI Act alone.

Section 26(1) of the Competition Act is administrative in nature and further that it was merely a primafacie opinion directing the Director General to carry the investigation, the High Court would not be competent to adjudge the validity of such an order on merits.

Brief Facts:

(i) Reliance Jio Infocomm Limited ('RJIL') has filed information under Section 19(1) of the Competition Act, 2002 before the Competition Commission of India ('CCI') alleging anti- competitive agreement/ cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited (Incumbent Dominant Operators) (hereinafter referred to as the 'IDOs'). These cases were registered by the CCI.

(ii) As per Section 26 of the Competition Act, on receipt of such an information, the CCI has to form an opinion as to whether there exists a prima facie case or not. If it is of the opinion that there exists a prima facie case, the CCI directs the Director General to cause an investigation to be made into the matter. Apart from the IDOs, certain allegations were also made against the Cellular Operators Association of India (for short, 'COAI').

(iii) The CCI issued notice to these parties and after hearing the RJIL, the aforesaid cellular companies and COAI, it passed a common order dated April 21, 2017 in all these cases (by clubbing them together) holding a view that prima facie case exists and an investigation is warranted into the matter. It, accordingly, directed the Director General to cause investigation in the case.

Payer before the Bombay High Court: Writ petitions came to be filed by the Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and COAI respectively before the Bombay High Court and prayed for ***quashing of the aforesaid order*** and consequential action/proceedings on the ground that the ***CCI did not have any jurisdiction to deal with such a matter***.

Judgement of Hon'ble Bombay High Court: The matter was heard and vide judgment dated September 21, 2017 the High Court has allowed these writ petitions and quashed/set aside the order dated April 21, 2017 passed by the CCI and consequently notices issued by the Director General of the CCI have also been quashed. The Bombay High Court in the impugned judgment has, thus, *inter- alia*, held as under:

(i) The Competition Commission of India (CCI) had no jurisdiction in view of the Telecom Regulatory Authority of India Act, 1997 and the authorities and regulations made thereunder;

(ii) The CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality;

(iii) The order dated 21.04.2017 passed under section 26(1) of the Competition Act was not an administrative direction, but rather a quasi-judicial one that finally decided the rights of parties and caused serious adverse consequences, because a detailed hearing had been given and many materials had been tendered in the courts of the hearings;

Appeal before Supreme Court of India: Reliance Jio Infocomm Limited ('RJIL') is not happy with the aforesaid outcome. Even the Competition Commission of India (CCI) feels aggrieved. CCI has impugned this decision by filing four special leave petitions before Supreme Court of India, while the other one has been filed by the RJIL.

Hon'ble Supreme Court of India observations: *Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a*

particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that ***the jurisdiction of the CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the 'comity' between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained.***

We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by the CCI to investigate an alleged cartel does not impinge upon TRAI's jurisdiction to regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to 'regulatory capture' and, therefore, the CCI is competent to exercise its jurisdiction from the stand point of the Competition Act. However, having taken note of the skillful exercise which the TRAI is supposed to carry out, such a comment vis-a-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February, 2007***, a sectoral regulator, may not have an overall view of the economy as a whole, which the CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out.***

At the same time, since we are upholding the order of the High Court on the aspect that the CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality, i.e. only after the TRAI returns its findings on the jurisdictional aspects which are mentioned above by us, the ultimate direction given by the High Court quashing the order passed by the CCI is not liable to be interfered with as such an exercise carried out by the CCI was premature.

Source:

(1) Competition Commission of India vs Bharti Airtel Ltd on 5 December, 2018**,** Civil Appeal N0(S). 11843 OF 2018, (Arising out of SLP (C) NO. 35574 OF 2017)

02.01.2020	**Karnataka Film Chamber & Commerce and otherassociations vs. Competition Commission of India**	**Karnataka High Court**

No writ of prohibition can be issued against statutory commission from exercising its jurisdiction.[1]

Regulatory Provisions relating to the Case

Provisions of Competition Act, 2002

Section 3 – Anti Competitive Agreements

Writ of prohibition cannot be passed against statutory commission, viz., CCI , when Competition Act, 2002 is in force Writ petitions (W.P. No. 39479 – 82/ 2012) were filed in Hon'ble Karnataka High Court by Karnataka Film Chamber & Commerce and other associations.

The subject matter of the petition was orders passed by the Commission in case numbers 25/2010, 41/2010,

1. *Source: https://www.cci.gov.in/sites/default/files/Newsletter_document/FairPlayVol32.pdf*

45/2010, 47/2010 and 48/2010, wherein Commission had found the acts and conducts of Karnataka Film Chamber & Commerce and other associations to be in contravention of the provisions of Section 3 of the Competition Act, 2002.

The petitioners had prayed for issuing writ of prohibition or any other appropriate writ or direction and prohibit the Commission from exercising its jurisdiction under the Competition Act, 2002. Hon'ble Karnataka High Court, in its order dated 02.01.2020 ruled that it is an undisputed fact that the Competition Act is in force. Hence, no writ of prohibition can be issued against statutory commission from exercising its jurisdiction, and the writ petitions were accordingly dismissed.

12.03.2020	**Uttarakhand Agricultural Produce Marketing Board Vs. CCI & Ors.**	**NCLAT**

Appeal against CCI orders not maintainable if the orders are not passed under sections specifically enumerated in Section 53A of the Competition Act, 2002.

Regulatory Provisions relating to the Case

Provisions of Competition Act, 2002

Section 4 – Abuse of Dominant Position

Section 53A – Establishment of Appellate Tribunal

Section 53B- Appeal to Appellate Tribunal

CCI had ordered investigation into the alleged arbitrary procurement of IMFL brands by Uttarakhand Agricultural Produce Marketing Board (UAPMB), Garhwal Mandal Vikas Nigam Ltd. (GMVNL), Kumaun Mandal Vikas Nigam Ltd. (KMVNL) thereby contravening the provisions of Section 4 of the Act. The DG noted that UAPMB being the sole procurer of alcoholic beverages in the State of Uttarakhand, having 100 percent market share and having undisputed dominance, deliberately ignored the relevance of different brands of alcoholic beverages.

Thus, the DG found UAPMB to have contravened the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act. However, no finding of contravention was given against GMVNL & KMVNL. CCI vide impugned order dated 30.08.2018, after detailed discussion, issued a show cause notice to GMVNL & KMVNL as to why their conduct should not be held to be in contravention of Section 4 of the Act. Aggrieved by the same, an appeal was filed before the NCLAT.

Hon'ble NCLAT vide judgment dated 12.03.2020 in Uttarakhand Agricultural Produce Marketing Board Vs. CCI & Ors. held that it is clear from the impugned order that CCI issued show cause notice to GMVNL & KMVNL to show cause as to why their conduct should not be held to be in contravention of the provisions of Section 4(2)(b)

(i) and 4(2)(c) read with Section 4(1) of the Act. No specific finding had been given by the CCI against UAPMB.

Further, the NCLAT observed that it was also clarified by the CCI in its order that nothing stated therein shall tantamount to a final expression of opinion on the merits of the case and the final view would be taken after considering the replies and arguments of the parties and the material on record. It was held by NCLAT that the impugned order did not amount to passing of an order under Section 27 of the Act and thereby the appeal under Section 53B read with Section 53A was not maintainable.

17.07.2019	**CADD Systems and Services Pvt. Ltd. vs CCI**	**Delhi High Court**

The absence of a Judicial Member did not preclude CCI from performing its adjudicatory function until such time the Judicial Member was appointed by the Central Government

Regulatory Provisions relating to the Case

Provisions of Competition Act, 2002

Section 15 –Vacancy, etc. not to invalidate proceedings of Commission

2. Source : https://www.cci.gov.in/sites/default/files/Newsletter_document/FairPlayVol32.pdf

Competition Commission of India ('CCI') ordered investigation into alleged cartelization in a tender floated by Pune Municipal Corporation ('PMC') for conducting trees census within the PMC jurisdiction area, using GIS and GPS Technology.

CCI, passed two separate orders where vide first order the final hearing in the case was adjourned and vide the subsequent order, after hearing the detailed arguments, the matter was reserved for judgment. The said two orders were challenged before the Hon'ble High court of Delhi on the ground that these orders were passed in absence of a Judicial Member and therefore, were in contravention of the law laid down by the Division Bench of this Court in the judgment dated 10.04.2019 in Mahindra & Mahindra Ltd. & Ors v. CCI &Anr.; W.P.(C) 11467 of 2018 whereby the CCI and Central Government were directed to ensure the presence and participation of a Judicial Member at all times while passing adjudicatory orders by the CCI and that these orders being adjudicatory in nature required the presence of a Judicial Member to be mandatory as per the law.

However, Delhi High Court vide judgment dated 17.07.2019 in CADD Systems and Services Pvt. Ltd. vs CCI held that the absence of a Judicial Member did not preclude CCI from performing its adjudicatory function until such time the Judicial Member was appointed by the Central Government. It was also noted by the court that no act or proceedings of CCI would be invalid by reason of any vacancy or any defect in its constitution by virtue of the provisions of Section 15 of the Act.

15.01.2019	**Competition Commission of India Vs. JCB India Ltd. and Ors**	**Supreme Court**

Authorization for search includes authorization of seizure as well.

Regulatory Provisions relating to the Case

Provisions of Competition Act, 2002

Section 41- Director General to investigate contravention

41. (1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission under subsection of section 36.

Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 195), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

Facts of the Case

CCI ordered an investigation into an alleged abuse of dominant position by JCB. Pursuant to the same, dawn raid was carried out by the DG in the JCB premises and all incriminating documents, hard drives and laptops found by the inspecting team during the course of the "dawn raid" were seized.

A writ petition before the Delhi High Court was filed for setting aside of the search and seizure conducted by the DG. The Single Judge Bench of Delhi High Court, vide order dated 02nd June 2016 stayed the investigation restraining DG from acting on the seized material for any purpose whatsoever till the next date of hearing.

CCI filed an SLP in the Supreme Court against the order of the Delhi High Court. The Supreme Court in its judgment dated 15th Janaury 2019 in CCI vs JCB observed that the **provisions of Section 240A of the Companies Act, 1956 do not merely relate to an authorization for a search but extend to the authorization of a seizure as well. Unless the seizure were to be authorized, a mere search by itself will not be sufficient for the purposes of investigation. By virtue of Section 240A read with Section 41(3) of the Competition Act, DG was authorised to conduct search and seizures**.

The Apex court vacated the stay stating that the blanket restraint which had been imposed by the Delhi High Court on the DG from acting on the seized material for any purpose whatsoever was not warranted. The appeal was allowed and the transferred matters were remitted back to the Delhi High Court to be decided in the writ petitions pending before Delhi High Court.

15.01.2019	**Rajasthan Cylinders & Containers Ltd. and Ors. Vs. Respondent: Competition Commission of India and Ors.**	**Delhi High Court**

Failure to comply with the orders or directions would lead to criminal prosecution

Regulatory Provisions relating to the Case

Provisions of Competition Act, 2002

Sections 27- Orders by Commission after inquiry into agreements or abuse of dominant position

Section 28- Division of enterprise enjoying dominant position

Section 31- Orders of Commission on certain combinations

Section 32- Acts taking place outside India but having an effect on competition in India

Section 33- Power to issue interim orders]

Section 42 – Contravention of orders of Commission

Section 42A- Compensation in case of contravention of orders of Commission

Section 43- Penalty for failure to comply with directions of Commission and Director General

Section 43A- Power to impose penalty for non-furnishing of information on combinations

CCI issued notices to Rajasthan Cylinders & Containers Ltd. and Shri Jose C. Mundadan in three separate cases, however, both of them failed to comply with the said notices. Pursuant to the same, penalties were imposed upon them.

Failure to deposit the penalties as imposed by the CCI under Section 43 of the Act upon Rajasthan Cylinders & Containers Ltd. and Shri Jose C. Mundadan led to initiation of criminal prosecution against them under Section 42 (3) before the CMM. Same were challenged before the Delhi High Court on the grounds that Section 42(3) cannot be invoked for non-payment of penalty imposed under Section 43 of the Act and that criminal action under Section 42(3) in cases wherein penalty has been imposed under section 43 of the Act, would lead to double jeopardy.

The Delhi High Court in its judgment dated 29th March 2019 in M/s Rajasthan Cylinders and Containers Ltd. vs CCI while dismissing the three applications vide a common judgment observed that the use of comma (,) in Section 42(3), indicates that a cause of action for criminal complaint to be filed in the court of CMM arises in two possible situations, viz.,

(i) there has been a failure on the part of a person to "comply with the orders or directions" issued to him under the law or

(ii) on account of failure to pay fine imposed for non-compliance with orders or directions of the CCI under specified provisions (i.e., Sections 27, 28, 31, 32, 33, 42A and 43A).

It was observed that the word 'Commission' has been conspicuously missing in Section 42(3), the clause which provides for the offence. Thus, Section 42(3) has to be given wider connotation as the legislature clearly intended to cover the failure to comply with the "orders or directions issued", irrespective of whether they had been issued by the Commission or by DG.

Further, while rejecting the plea of double jeopardy, it was held that the penalty under Section 43 as imposed by CCI in exercise of its powers, is civil in nature and the criminal complaint alleging offence under Section 42(3) is an additional element of failure to comply further with the said direction. Even otherwise, the criminal action was held not violative of Article 20(2).

6

COMPETITION LAW

SWOT ANALYSIS : THE FULCRUM OF STRATEGIC DECISION MAKING

Introduction

All businesses have goals that involve creating a sustainable competitive advantage over their competitors. This requires companies to develop effective business strategies that exploit their operational advantages over competitors, while minimizing their disadvantages. SWOT Analysis is very important tool for starting of new projects, ensuring their proper progress by monitoring their stages of development and implementing changes in the project, whenever required. This tool allows multidimensional analysis of the current subject's conditions of a business organisation as well as internal (usually controllable) and external (usually uncontrollable or difficult to control) factors to maximize the benefits minimize negative consequences of certain actions and, the most importantly to ascertain that whether the objective is attainable or not. An effective strategic development procedure that links internal organizational strengths and weaknesses, with external opportunities and threats, is SWOT (strengths, weaknesses, opportunities, and threats) analysis.

SWOT Analysis is a technique which helps to gain insight into the past and find solutions for sake of current or future blemish, useful for an existing company as well as a new plan. SWOT analysis helps to reduce weaknesses, while maximizing strong sides of the company.

Strategic planning and Decision making – How SWOT works

A SWOT analysis is a useful tool for brainstorming, strategic planning and decision making. Strategic decision-making is the process of charting a course of action based on long-term goals and a longer term vision. Strategic decision making aligns short-term objectives with long-term goals, and a mission that defines the company's bigger picture of the purpose of its existence. Short term goals are expressed in quantifiable milestones that assist in gauging the success and in ensuring adherence to the organisation's vision.

It is to be noted that SWOT analysis does not cover the entire business, so management should be cautious at the time of strategic decision making. To be successful, businesses must utilize their strengths, improve upon their weaknesses, and guard against their external threats and residual, internal vulnerabilities. Simultaneously, companies need to evaluate their external environment to identify and exploit new opportunities before their competitors. The brief components of SWOT analysis are as under:

Building on Strengths

The first step in conducting a SWOT analysis involves identifying the strengths a company possesses relative to its competitors. Strengths come from the knowledge, abilities, and resources available to the firm that gives it a comparative advantage in the industry. The capability to obtain resources, the quality of those resources, and the effective and efficient allocation of resources plays a pivotal role in creating a competitive advantage. Moreover, a company's ability to adapt to environmental changes in order to maintain sustainable growth, and to create or penetrate new markets can be its potential strengths. Some of the major strengths are excellent sales staff with strong knowledge of existing products, good relationship with customers, good internal communications, successful marketing strategies, and reputation for innovation etc.

Minimising Weaknesses

Second, a business needs to identify the vulnerabilities within its organization that competitors could exploit. Weaknesses are any limitation or deficiency in the firm's resources and competencies that could hinder its performance. Common sources of a company's weaknesses include ineffective management, insufficient resources, inefficient processes, and obsolete technology, high rental costs, obsolete market research data, Cash flow problems, holding too much stock, poor record keeping etc.

Seizing Opportunities

The third step requires a business to determine potential opportunities to be pursued in the industry. There may be plentiful business opportunities in an industry that may call for pondering over the opportunities by the management of a company while evaluating their effectiveness. A company must clearly define the type of goods or services it proposed to offer, the targeted market for the goods or services, resources and other facilities needed for production of goods or services, projected returns and the magnitude of risk involved. Potential opportunities can result from identifying an overlooked market segment, changing industry regulations, advancements in technology, and improvements in buyer or supplier relations, loyal customers, high customer demand of the company's product etc. Moreover, a business can exploit the weaknesses of the competitors by targeting and attacking their frail positions to gain market share.

Counteracting Threats

Finally, every SWOT analysis requires a business to identify its potential threats. Any situation that puts a company in an unfavourable position or impedes its efficient operations can be classified as a threat. To adequately identify these situations, the organization needs to evaluate its industry's macro-environment and assess the industry's social, economic, political, technological, natural, and international segments. For instance, changes in consumer preferences or advancements in technology can render a product or service obsolete. Additionally, economic and regulatory changes or the exhaustion of natural resources can make production infeasible. Global competitors are entering in to the company's market which tends to increase competition in domestic market.

Objectives of SWOT Analysis

- To make a summary analysis of external and internal factors.
- To prepare strategic options with reference to the risks and problems to be addressed.
- To conduct a sales forecast in agreement with market conditions and study the capabilities of the company in general.
- To identify key items for the management of the organization, which involves establishing priorities for actions which in turn helps in strategic decision making.
- Thoroughly diagnose the company: strengthen the positive points, improvement areas and growth opportunities etc.
- Internal environment (Strengths and Weaknesses) – the integration and standardization of processes, the elimination of inefficiencies and focus on the core aspects of the business.
- External environment (Opportunities and Threats) – to have reliable and trustworthy data, to receive information quickly to support management in strategic decision making and to reduce errors.

The SWOT analysis is one of the most popular tool for defining an organisation's strategic action. The beauty of SWOT is its internal scrutiny of the organisation's capabilities, followed by environmental scanning to identify appropriate opportunities and threats. However, it has its flaws:

- No straightforward methodology has been proposed to identify strengths and weaknesses.
- There is no indication of causality among the strengths and weaknesses, nor are they ranked into any hierarchy.
- The SWOT analysis is typically a one-time event lacking mechanisms for acting upon and monitoring the changes in strengths and weaknesses over the longer term.

Case Study

Gujarat Cooperative Milk Marketing Federation Ltd. (GCMMF) is India's largest food product marketing

organisation. It is the apex organisation of the Diary Cooperatives of Gujarat popularly known as AMUL which aims to provide remunerative returns to the farmers and also serve the interest of consumers by providing quality products. AMUL is considered as one of the most well recognized and iconic brands in the country. It operates through 61 sales offices and has a network of 10000 dealers and 10 lakh retailers. Its product range comprises milk, milk powder, health beverages, ghee, butter, cheese, Pizza Cheese, Ice cream, Paneer, chocolates and traditional Indian sweets etc.

Based on the above information, do the SWOT analysis of AMUL?

SWOT Analysis of a Renowned Dairy Business - AMUL

Following is the SWOT analysis of AMUL, a strong and dominant brand in the dairy business.

Investment in Technology; Market Share, Production Capacity, Quality, Brand value, LargeConsumer Base Strength	High Operational Costs, Lack of success inportfolio expansion, legal issues Weakness
High Milk Consumption, Global Expansion,Product Portfolio Expansion Opportunities	Increasing Competition, growing trends ofveganism Threats

Strengths of AMUL

Investment in Technology

Amul has experienced exponential growth in the last few decades. The company is continually investing in adaptive and revolutionary technologies within the dairy industry.

Market Share

Amul has transformed itself into the market leader of milk and dairy products in the country. Amul has expanded its ice cream product and business portfolio by opening standalone Amul ice cream stores all over the country.

Production Capacity

Amul is one of the largest manufacturers of milk and dairy products in the world. The company is managed by the Gujarat Co-operative Milk Marketing Federation Limited, which is a dairy producers cooperative which supplies the company with almost 18 million liters of milk daily.

Quality

One of the primary reasons for Amul being one of the most trusted brands in Indian and having a strong and loyal consumer base is its quality. Amul has never faced any significant issues pertaining to its quality within the Indian market. The company has also maintained transparency concerning its quality control practices.

Strong Brand Value

Amul is one of the most recognizable and valuable brands in India. The Amul girl, the company's mascot which features on its advertisements is one of the oldest and most iconic brand mascots which Amul uses even today.

Large Consumer Base

The company has a large consumer base which spreads across the urban and rural regions of the country.

This wide-reaching consumer base has allowed the company to maintain distinct leverage over its competitors

Weaknesses of AMUL

High Operational Cost

Amul has a high operational cost due to its massive size and complex structure. This can become problematic for the company if the company experiences fall in demand.

The company also heavily depends on the dairy unions and communities for its supply of milk. As the needs of the dairy community are changing with them demanding higher prices for their produce. These issues can add up to the operational cost of the company and lower its profit margins.

Lack of Success in Certain Areas of Portfolio Expansion

Amul has expanded its product portfolio to add products such as butter, ghee, buttermilk, flavored milk, ice cream, chocolates, cheese, creams, sweets and more.

However, not every product of Amul within its portfolio has same amount of success.

Frequent Legal Issues

The company has faced legal issues in the recent past wherein Amul chose to advertise its products while disparaging the brand and products of its rivals. This caused the company a lot of embarrassment and has also contributed to tarnishing the public image of the company.

Opportunities for AMUL

High per capita Milk consumption

India is a high milk consuming nation with milk and dairy products being an essential component of the Indian diet. India has 130 crore population which is only increasing. This growth in population and high milk consumption opens up opportunities for AMUL to expand its production capacities and acquire new consumers.

International Expansion

AMUL can serve global markets. The brand can expand into overseas markets such as the Middle-East and the Asian markets by aggressively targeting Indian expats living in these countries.

Expansion of Product Portfolio

AMUL can invest in research and development or adopt a mergers and acquisition strategy to expand its product line. AMUL has an extensive distribution network which can be used to sell its new products into the market, and the substantial brand value and trust of the consumers will also enable easier acceptance from the consumers.

Threats for AMUL

Increasing Competition

AMUL is facing increasing competition in milk and dairy products sector from brands such as Mother Dairy, Kwality Ltd, HUL and other local players. AMUL is also facing increasing competition within the ice cream market from Kwality Walls, Baskin Robins, Havmor, London Dairy and other domestic brands.

Growing trend of Veganism in India

Many people in India are turning towards veganism, which implies that these people do not consume dairy or dairy products. This can impact the demand for Amul's milk and dairy products if the popularity of veganism increases and spreads across different parts of the country.

Findings of SWOT Analysis of AMUL

As per the SWOT analysis of AMUL, the company can easily identify and analyse the internal and external factor which help it to take the strategic decisions. The company can achieve a dominant global position by maintaining its quality standards, investing in advertising and promotions and localizing products as per the taste of the international markets. Thus, it has the opportunity to go 'Glocal', i.e. *think globally but act locally*.

What are the quick tips, you will suggest for a successful SWOT analysis?

Following are the tips for a successful SWOT analysis

- Keep SWOT short and simple, but remember to include important details. For example, if the staff in an organisation is a strength, include specific details, such as specific skills and experience possessed by the concerned staff members, as well as why they are strengths and how they can help to meet the goals of the organisation.
- When SWOT analysis is completed, prioritise the results by listing them in order of the most significant factors that affect the business to the least.
- Obtain multiple perspectives for those SWOT analysis that have been given a final shape and implemented; Ask for input from various stakeholders like employees, suppliers, customers and partners.
- Apply SWOT analysis to a specific issue, rather than to the entire business. Then after conduct separate SWOT analysis on individual issues and combine them.
- Look at where business is now and think about where it might be in the future.
- Consider the competitors and have a realistic assessment of the organisation's competitive strength in the industry.
- Think about the factors that are essential to the success of an organisation and the products or any other services, like superior after sale services, free delivery, warranty / guarantee etc. an organisation can offer customers that may exert an impact on the competitors, in order to have a competitive advantage. It is essential to take into consideration the factors relating to competitive advantage while conducting the SWOT analysis.
- Use goals and objectives from overall business plan in SWOT analysis.

Conclusion

The business world is highly competitive, traditional industries are getting shocked by the rise of the technology businesses, thousands of start-ups blooming every day while thousands of businesses withering every day. The key to the survival of the business is the strategy an organisation adopts and implements.

SWOT analysis helps the organisation to specify the objectives of the business venture or project and identifying the internal and external factors that are favourable and unfavourable to achieve that objectives. Identification of **SWOT** is important because they may be of immense assistance in chalking out the business plan to meet the objectives of the business.

The significance of SWOT analysis is that it provides a good way for companies to examine both positive and negative attributes within a single analysis, determining how best to compete in the market at large. SWOT assists the management to map out the best possible opportunity well in advance which helps business to begin planning to deliver a quality solution and to make a marketing plan.

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FUNCTIONAL LEVEL STRATEGIES –AN EFFECTIVE TOOL TO ACHIEVE ORGANIZATIONAL GOALS

Introduction

In a highly competitive business environment and unattainable economic situation managers are increasingly seeking for strategies, approaches to accomplish, improve and sustain organizational performance and competitive advantage. Strategy and its formulation play a vital part in the firm's management process. The strategy gives the direction that a business has in mind and which way they want to achieve their goals. Amongst the many strategies implemented in firms, competitive strategy has been proven as an essential tool globally for any business to remain in the competitive market environment and become stronger. Competitive strategy means consciously choosing to carry out activities differently or to perform different activities than competitors to survey a unique mix of value.

Present business environment is characterized by high levels of competition, dynamism and technological sophistication. This is especially challenging to organizational managers since they have to design and implement strategies that can achieve and sustain competitive advantages. Consequently, the topic functional level strategy plays a pivotal role as organizations aim at gaining industry leadership.

Case Study

In 2017, a chain of coffee retailer, closed a decade of astounding financial performance. Sales had increased from $700 million to $8 billion and net profits from $40 million to $600 million. In 2017, The Company' was earning a return on invested capital of 25 %, which was impressive by any measure, and the company was forecasted to continue growing earnings and maintain high profits through to the end of the decade. How did this come about?

Thirty years ago Company was a single store in its local Market selling premium roasted coffee. Today it is a global roaster and retailer of coffee with more than 12,000 retail stores, some 3,000 of which are to be found in 40 countries outside its Home Country. The Company set out on its current course in the 1980s when the company's director of marketing, Srinivas Santharaman, came back from a trip to Italy enchanted with the Italian coffeehouse experience. Srinivas Santharaman, who later became CEO, persuaded the company's owners to experiment with the coffeehouse format – and the Coffee House experience was born.

Santharaman basic insight was that people lacked a "third place" between home and work where they could have their own personal time out, meet with friends, relax, and have a sense of gathering. The business model that evolved out of this was to sell the company's own premium roasted coffee, along with freshly brewed espresso-style coffee beverages, a variety of pastries, coffee accessories, teas, and other products, in a coffeehouse setting. The company devoted, and continues to devote, considerable attention to the design of its stores, so as to create a relaxed, informal and comfortable atmosphere.

Underlying this approach was a belief that Santharaman was selling far more than coffee— it was selling an experience. The premium price that the Company charged for its coffee reflected this fact.

From the outset, Santharaman also focused on providing superior customer service in stores. Reasoning that motivated employees provide the best customer service, Company executives developed employee hiring and training programs that were the best in the restaurant industry. Today, all Company's employees are required to attend training classes that teach them not only how to make a good cup of coffee, but also the service oriented

values of the company. Beyond this, Company provided progressive compensation policies that gave even part-time employees stock option grants and medical benefits – a very innovative approach in an industry where most employees are part time, earn minimum wage, and have no benefits.

Unlike many restaurant chains, which expanded very rapidly through franchising arrangement once they have established a basic formula that appears to work, Santharaman believed that Company needed to own its stores. Although, it has experimented with franchising arrangements in some countries, and some situations its home country such as at airports, the company still prefers to own its own stores wherever possible.

This formula met with spectacular success in the Country, where Company went from obscurity to one of the best known brands in the country in a decade. As it grew, Company found that it was generating an enormous volume of repeat business.

Today the average customer comes into a Company' store around 20 times a month. The customers themselves are a fairly well- healed group – their average income is about $85,000.

As the company grew, it started to develop a very sophisticated location strategy. Detailed demographic analysis was used to identify the best locations for Company's stores. The company expanded rapidly to capture as many premium locations as possible before imitators. Astounding many observers, Company would even sometimes locate stores on opposite corners of the same busy street— so that it could capture traffic going different directions down the street.

By 2005 with almost 700 stores across the Country, Starbucks began exploring foreign opportunities. First stop was Japan, where Starbucks proved that the basic value proposition could be applied to a different cultural setting (there are now 600 stores in Japan). Next, Companys embarked upon a rapid development strategy in Asia and Europe. By 2011, the magazine *Bigdemandchannel* named Company one of the ten most impactful global brands, a position it has held ever since. But this is only the beginning. In late 2016, with 12,000 stores in operation, the company announced that its long term goal was to have 40,000 stores worldwide. Looking forward, it expects 50% of all new store openings to be outside of its Home Country.

Case Discussion Questions

1. What functional strategies help the company to achieve superior financial performance?
2. Identify the resources, capabilities, and distinctive competencies of Company?
3. How do Company's resources, capabilities, and distinctive competencies translate into superior financial performance?
4. Why do you think Company prefers to own its own stores wherever possible?
5. How secure is Company competitive advantage?

USING AIMS AND OBJECTIVES TO CREATE A BUSINESS STRATEGY : A KELLOGG'S CASE STUDY

INTRODUCTION

When preparing a strategy for success, a business needs to be clear about what it wants to achieve. It needs to know how it is going to turn its desires into reality in the face of intense competition. Setting clear and specific aims and objectives is vital for a business to compete. However, a business must also be aware of why it is different to others in the same market. This case study looks at the combination of these elements and shows how Kellogg's prepared a successful strategy by setting aims and objectives linked to its unique brand.

Branding

One of the most powerful tools that organisations use is branding. A brand is a name, design, symbol or major feature that helps to identify one or more products from a business or organisation.

The reason that branding is powerful is that the moment a consumer recognises a brand, the brand itself instantly provides a lot of information to that consumer. This helps them to make quicker and better decisions about what products or services to buy.

Product positioning

Managing a brand is part of a process called product positioning. The positioning of a product is a process where the various attributes and qualities of a brand are emphasised to consumers. When consumers see the brand, they distinguish the brand from other products and brands because of these attributes and qualities.

Focused on Kellogg's, this case study looks at how aims and objectives have been used to create a strategy which gives Kellogg's a unique position in the minds of its consumers.

THE MARKET

The value of the UK cereals market is around £1.1 billion per year. Kellogg's has a 42% market shareof the value of the UK's breakfast cereal market. The company has developed a range of products for the segments within this market, targeted at all age groups over three years old. This includes 39 brands of cereals as well as different types of cereal bars. Consumers of cereal products perceive Kellogg's to be a high quality manufacturer.

As the market leader, Kellogg's has a distinct premium position within the market. This means that it has the confidence of its consumers.

Developing an aim for a business

Today, making the decision to eat a healthy balanced diet is very important for many consumers. More than ever before people want a lifestyle in which the food they eat and the activities they take part in contribute equally to keeping them healthy.

Research undertaken for Kellogg's, as well as comprehensive news coverage and growing public awareness, helped its decision-takers to understand the concerns of its consumers. In order to meet these concerns, managers realised it was essential that Kellogg's was part of the debate about health and lifestyle. It needed to promote the message 'Get the Balance Right'.

Decision-takers also wanted to demonstrate Corporate Responsibility (CR). This means that they wanted to develop the business responsibly and in a way that was sensitive to all of Kellogg's consumers' needs, particularly with regard to health issues. This is more than the law relating to food issues requires. It shows how Kellogg's informs and supports its consumers fully about lifestyle issues.

Any action within a large organisation needs to support a business direction. This direction is shown in the form of a broad statement of intent or aim, which everybody in the organisation can follow. An aim also helps those outside the organisation to understand the beliefs and principles of that business. Kellogg's aim was to reinforce the importance of a balanced lifestyle so its consumers understand how a balanced diet and exercise can improve their lives.

CREATING BUSINESS OBJECTIVES

Having set an aim, managers make plans which include the right actions. These ensure that the aim is met. For an aim to be successful, it must be supported by specific business objectives that can be measured.

Each of the objectives set for Kellogg's was designed to contribute to a specified aim. Kellogg's objectives were to:

- encourage and support physical activity among all sectors of the population.
- use resources to sponsor activities and run physical activity focused community programmes for its consumers and the public in general.

- increase the association between Kellogg's and physical activity.
- use the cereal packs to communicate the 'balance' message to consumers.
- introduce food labelling that would enable consumers to make decisions about the right balance of food.

SMART objectives

Well-constructed objectives are SMART objectives. They must be:

- Specific
- Measurable
- Achievable or Agreed
- Realistic
- Time-related.

Each of the objectives set by Kellogg's was clear, specific and measurable. This meant Kellogg's would know whether each objective had been achieved. The objectives were considered to be achievable and were communicated to all staff. This made sure that all staff agreed to follow certain actions to achieve the stated aims. The objectives were set over a realistic time-period of three years. By setting these objectives Kellogg's set a direction that would take the business to where it wanted to be three years into the future.

STRATEGY

Having created an aim and set objectives, Kellogg's put in place a process of planning to develop a strategy and a series of actions. These activities were designed to meet the stated aim and range of business objectives.

Supporting improved food labelling

In the area of food labelling, Kellogg's introduced the Kellogg's GDAs to its packaging, showing the recommended Guideline Daily Amounts. These GDAs allow consumers to understand what amount of the recommended daily levels of nutrients is in a serving of Kellogg's food.

Working with a group of other major manufacturers, Kellogg's introduced a new format in May 2006, with GDAs clearly identified on brand products and packages. These GDAs have been adopted by other manufacturers and retailers such as Tesco.

Sponsoring swimming programmes

For many years Kellogg's has been working to encourage people to take part in more physical activity. The company started working with the Amateur Swimming Association (ASA) as far back as 1997, with whom it set some longer term objectives. More than twelve million people in the UK swim regularly.

Swimming is inclusive as it is something that whole families can do together and it is also a life-long skill. The ASA tries to ensure that 'everyone has the opportunity to enjoy swimming as part of a healthy lifestyle'. As a lead body for swimming, the ASA has been a good organisation for Kellogg's to work with, as its objectives match closely those of the company.

Kellogg's became the main sponsor of swimming in Britain. This ensured that Kellogg's sponsorship reached all swimming associations so that swimmers receive the best possible support. Kellogg's sponsors the ASA Awards Scheme with more than 1.8 million awards presented to swimmers each year. This relationship with the ASA has helped Kellogg's contribute in a recognisable way to how individuals achieve an active healthy balanced lifestyle. This reinforces its brand position.

Promoting exercise

Working with the ASA helped Kellogg's set up links with a number of other bodies and partners. For example, Sustrans is the UK's leading sustainable transport organisation. Sustrans looks at the different ways that individuals can meet their transport needs in a way that reduces environmental impact. It is the co-ordinator of the National Cycle Network.

This provides more than 10,000 miles of walking and cycle routes on traffic-free paths throughout the UK. To meet its business objective of encouraging and supporting physical activity Kellogg's is developing a promotion for a free cyclometer which will be advertised on television in 2007.

Walking is one of the easiest ways for people to look after themselves and improve their health. To encourage people to walk more often, Kellogg's has supplied a free pedometer through an offer on All-Bran so that individuals can measure their daily steps.

During 2006 more than 675,000 pedometers were claimed by consumers. From a research sample of 970 consumers, around 70% said they used the pedometer to help them walk further. Kellogg's Corn Flakes Great Walk 2005 raised more than £1 million pounds for charity on its way from John O'Groats, through Ireland and on to Land's End. In 2004, 630,000 people took part in the Special K 10,000 Step Challenge.

Kellogg's in the community

Kellogg's has also delivered a wide range of community programmes over the last 20 years. For example, the Kellogg's Active Living Fund encourages voluntary groups to run physical activity projects for their members. The fund helps organisations like the St John's Centre in Old Trafford which runs keep-fit classes, badminton and table tennis.

Since 1998 Kellogg's has invested more than £500,000 to help national learning charity ContinYou to develop nationwide breakfast club initiatives. These include start-up grants for new clubs, the Breakfast Club Plus website, the Kellogg's National Breakfast Club Awards and the Breakfast Movers essential guide.

Breakfast clubs are important in schools because they improve attendance and punctuality. They help to ensure that children are fed and ready to learn when the bell goes. Kellogg's promotes breakfast via these clubs, not Kellogg's breakfast cereals. Together Kellogg's and ContinYou have set up hundreds of breakfast clubs across the UK, serving well over 500,000 breakfasts each year.

COMMUNICATING THE STRATEGY

Effective communication is vital for any strategy to be successful. Kellogg's success is due to how well it communicated its objectives to consumers to help them consider how to 'Get the Balance Right'. It developed different forms of communication to convey the message 'eat to be fit' to all its customers.

External communication

External communication takes place between an organisation and the outside world. As a large organisation, Kellogg's uses many different forms of communication with its customers.

For example, it uses the cartoon characters of Jack & Aimee to communicate a message that emphasises the need to 'Get the Balance Right'. By using Jack & Aimee, Kellogg's is able to advise parents and children about the importance of exercise. These characters can be found on the back of cereal packets. The company has also produced a series of leaflets for its customers on topics such as eating for health and calcium for strong bones. These are available on its website.

Internal communication

Internal communication takes place within an organisation. Kellogg's uses many different ways to communicate with its employees. For example, Kellogg's produces a house magazine which is distributed to everybody working for Kellogg. The magazine includes articles on issues such as getting the balance of food and exercise

right. It also highlights the work that Kellogg's has undertaken within sport and the community. To encourage its employees to do more walking, Kellogg's supplied each of its staff with a pedometer. Such activities have helped Kellogg's employees to understand the business objectives and why the business has created them. It also shows clearly what it has done to achieve them.

CONCLUSION

Research undertaken by Kellogg's as part of the 2005 Family Health Study emphasised that a balanced diet as well as regular exercise were essential for good all round health and wellbeing. Kellogg's is demonstrating good corporate responsibility by promoting and communicating this message whenever it can and by investing money in the appropriate activities. This was the broad aim. To achieve this aim, Kellogg's set out measurable objectives. It developed a business strategy that engaged Kellogg's in a series of activities and relationships with other organisations. The key was not just to create a message about a balanced lifestyle for its consumers. It was also to set up activities that helped them achieve this lifestyle.

This case study illustrates how consumers, given the right information, have made informed choices about food and living healthily.

CASE STUDY – MCDONALD'S CORPORATION MICHAEL PORTER FIVE FORCES MODEL

Objective:

The objective of this case is to understand the application of competitive forces prevailing in the burger market.

Introduction:

McDonald's Corporation expands internationally through strategies that account for the external factors in the industry environment, as identifiable through a Five Forces analysis of the business. Michael E. Porter's Five Forces Analysis model provides valuable information to support strategic management, especially in addressing relevant issues in the external environment of the business. These issues are based on external factors that represent the degree of competitive rivalry in the industry, the bargaining power of customers or buyers, the bargaining power of suppliers, the threat of substitution, and the threat of new entrants.

Application of Porter's Five Forces Model

In this Five Forces analysis of McDonald's, the forces are mainly within the fast food restaurant industry. As the leading restaurant chain business in the world, the company is an example of effective strategic management, especially in dealing with competition in different markets worldwide. This status shows that McDonald's strategic direction is appropriate to the external factors, such as the ones identified in this Five Forces analysis.

In addressing the external factors determined in this Five Forces analysis, McDonald's Corporation ensures that its strategies are appropriate to combat external forces. The company faces pressure from various competitors, including large multinational firms and small local businesses. McDonald's Corporation's generic strategy and intensive growth strategies satisfy business needs in competing against such firms as Burger King, Wendy's, Subway, and Dunkin' Donuts, as well as food and beverage businesses like Starbucks Coffee Company.

In this Five Forces analysis, McDonald's experiences the effects of external factors at varying intensities, based on the variations among markets around the world. For example, the U.S. market presents a competitive landscape different from that of the European market. The company must implement strategies to meet these external factors and minimize their negative impacts. Considering the combination of market conditions, this Porter's Five Forces analysis of McDonald's establishes the following intensities of the five forces:

1. Competitive rivalry or competition – High
2. Bargaining power of buyers or customers – High

3. Bargaining power of suppliers – Low
4. Threat of substitutes or substitution – High
5. Threat of new entrants or new entry – Moderate

Competitive Rivalry or Competition with McDonald's (High)

McDonald's faces tough competition because the fast food restaurant market is saturated. This element of the Porter's Five Forces analysis model tackles the effects of competing firms in the industry environment. In McDonald's case, the strong force of competitive rivalry is based on the following external factors:

- High number of firms – Strong Force
- High aggressiveness of firms – Strong Force
- Low switching costs – Strong Force

The fast food restaurant industry has many firms of various sizes, such as global chains like McDonald's and local mom-and-pop fast food restaurants. This external factor strengthens the force of rivalry in the industry. Also, the Five Forces analysis model considers firm aggressiveness a factor that influences competition. In this business case, most medium and large firms aggressively market their products. This factor increases the intensity of competitive rivalry that McDonald's Corporation experiences. In addition, low switching costs make it easy for consumers to transfer to other restaurants, such as Wendy's and Burger King. This external factor adds to the force of competition. Thus, this element of the Five Forces analysis of McDonald's shows that competition is among the most significant external forces for consideration in the strategic management of the business.

Bargaining Power of McDonald's Customers/Buyers (High)

McDonald's must address the power of customers on business performance. This element of the Five Forces analysis deals with the influence and demands of consumers, and how their decisions impact businesses. In McDonald's case, the following are the external factors that contribute to the strong bargaining power of buyers:

- Low switching costs – Strong Force
- Large number of providers – Strong Force
- High availability of substitutes – Strong Force

The ease of changing from one restaurant to another (low switching costs) enables consumers to easily impose their demands on McDonald's. In the Five Forces analysis model, this external factor strengthens the bargaining power of customers. In relation, because of market saturation, consumers can choose from many fast food restaurants other than McDonald's. This condition makes the bargaining power of buyers a strong force in affecting the company's external environment. Moreover, the availability of substitutes is relevant in this external analysis. In this case, the availability of many substitutes adds to the bargaining power of customers. For example, substitutes include food kiosks and outlets, and artisanal bakeries, as well as microwave meals and foods that one could cook at home. Based on this element of Porter's Five Forces analysis, it is crucial to develop strategies to increase customer loyalty, especially in the face of the sociocultural trends outlined in the PESTEL/PESTLE analysis of McDonald's Corporation.

Bargaining Power of McDonald's Suppliers (Low)

Suppliers influence McDonald's in terms of the company's production capacity based on the availability of raw materials. This element of the Five Forces analysis model shows the impact of suppliers on firms and the fast food restaurant industry environment. In McDonald's case, the weak bargaining power of suppliers is based on the following external factors:

- Large number of suppliers – Weak Force

- Low forward vertical integration of suppliers – Weak Force
- High overall supply – Weak Force

The large population of suppliers weakens the effect of individual suppliers on McDonald's Corporation. This weakness is partly based on the lack of strong regional and global alliances among suppliers. In relation, most of McDonald's suppliers are not vertically integrated. This means that they do not control the distribution network that transports their products to firms like McDonald's. In Porter's Five Forces analysis model, such low vertical integration weakens the bargaining power of suppliers. Also, the relative abundance of materials like flour and meat reduces individual suppliers' influence on the company. Thus, this element of the Five Forces analysis shows that external factors combine to create the weak supplier power, which is a minimal issue in strategic management. McDonald's corporate social responsibility strategy and stakeholder management approaches help in addressing this force from suppliers.

Threat of Substitutes or Substitution (High)

Substitutes are a significant concern for McDonald's Corporation. This element of Porter's Five Forces analysis model deals with the potential effects of substitutes on firm growth. In McDonald's case, the following external factors make the threat of substitution a strong force:

- High substitute availability – Strong Force
- Low switching costs – Strong Force
- High performance-to-cost ratio of substitutes – Strong Force

There are many substitutes to McDonald's products, such as products from artisanal food producers and local bakeries. Also, consumers can cook their food at home. In the Five Forces analysis model, this external factor contributes to the strength of the threat of substitution in the fast food service industry. In addition, it is easy to shift from McDonald's to substitutes because of the low switching costs. For example, shifting from the company to substitutes typically involves insignificant or minimal disadvantages, such as slightly higher costs per meal in some cases, or additional time consumption for food preparation. Moreover, substitutes are competitive in terms of quality and customer satisfaction (high performance-to-cost ratio). In this element of the Five Forces analysis of McDonald's Corporation, external factors make substitutes a major strategic issue that requires approaches like product quality improvement. In relation, the company's efforts include encouraging people to eat in fast food restaurants instead of resorting to substitutes. Such efforts are evident in McDonald's corporate mission and vision statements.

Threat of New Entrants or New Entry (Moderate)

New entrants can impact McDonald's market share and financial performance. This element of the Five Forces analysis refers to the effects of new players on existing firms. In McDonald's case, the moderate threat of new entry is based on the following external factors:

- Low switching costs – Strong Force
- Highly variable capital cost – Moderate Force
- High cost of brand development – Weak Force

The low switching costs allow consumers to easily move from McDonald's toward new fast food restaurant companies. In Porter's Five Forces analysis model, this external factor strengthens the threat of new entrants. Also, variable capital costs of establishing a new restaurant empowers new businesses to enter the global fast food restaurant industry. For example, small restaurant businesses involve low capital costs compared to major corporations in the market. This external factor leads to the moderate threat of new entry against McDonald's. On the other hand, it is expensive to build a strong brand in the industry. Many small and medium businesses lack the resources to create a strong brand to match the McDonald's brand. Thus, the external factors in this element of the Five Forces analysis shows that the threat of new entrants is a considerable but not the most important strategic issue.

Recommendations:

The results of this Five Forces analysis show that McDonald's Corporation needs to prioritize the strategic issues related to competition, consumers, and substitutes, all of which exert a strong force on the company and its external environment. The other forces (the bargaining power of suppliers and the threat of new entrants) are also significant to the business, although to a lower extent. In this regard, a recommendation is to strengthen the business by building on the strengths of the business. The company's managers must focus on reducing the effects of competitors and substitutes on revenues and market share. Studying the McDonald's marketing mix or 4Ps partly supports such effort. Also, it is recommended that McDonald's make its product innovation process more aggressive. While the food service industry is saturated with aggressive firms, new products can attract new customers and retain more customers. In relation, based on this Porter's Five Forces analysis, McDonald's can implement higher quality standards to address the forces of competition and substitution.

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7

INTERPRETATION OF LAW

29/01/2020	**State Of M.P. & Anr. (Appellant) vs. M.P. Transport Workers Federation (Respondent)**	**Supreme Court** **Civil Appeal No.4658/2009** **Sanjay Kishan Kaul,** **K.M. Joseph**

Offences under Industrial & labour laws – State law took away the jurisdiction of criminal courts and entrusted the same to labour courts – after some time the State reversed this process – Whether tenable – Held, Yes.

Brief facts:

The Labour Bar Association, Satna and M.P. Transport Workers Federation sought to assail the provisions of the Madhya Pradesh Labour Laws (Amendment) and Misc. Provisions Act, 2002 (for short 'the Amendment') enforced by Notification dated 5.8.2005 as ultra vires the provisions of Article 14 of the Constitution. The history to the dispute is that the power to try offences under labour laws was conferred on the Labour Courts vide Madhya Pradesh Amendment Act No.43 of 1981, as against the regular criminal Courts. That process was sought to be reversed by the Amendment which was assailed. The rationale was stated to be that the Labour Courts were already burdened and thus, did not have time to adjudicate even the disputes arising out of the Industrial Disputes Act, 1947 and the M.P. Industrial Relations Act, 1960. On the other hand, the parties assailing the said Amendment canvassed that the object of shifting the trial of criminal cases relating to labour disputes to Labour Courts had been conferred by Legislation for promoting industrial harmony. In terms of an elaborate judgment of over fifty pages this Amendment was struck down primarily on the ground that Article 21 gave a right for speedy justice and the Amendment in a way took away this right of speedy justice.

Decision: Appeals allowed.

Reason:

We may note the fact that such criminal offences relating to labour laws of almost 16 statutes were being tried by the criminal Courts till 1981. Thus, the experiment of assigning these cases to the Labour Courts was carried from that year till 2002. The matters were transferred to the criminal Courts as a sequitur to the Amendment of 2002, till the said Amendment was struck down by the impugned order dated 01.08.2008. We have to be conscious of the fact that we are debating the legality of a Legislation which has passed the muster of the elected Legislative Assembly and has received the assent of the President of India. The scope of challenge to such a Legislation is within a limited domain i.e. on the twin test of (i) lack of Legislative competence and (ii) violation of any of Fundamental Rights guaranteed in Part III of the Constitution of India. This principle of law has been repeatedly emphasized by this Court in Greater Bombay Co-operative Bank Ltd. v. United Yarn Tex (P) Ltd (2007) 6 SCC 236. In the facts of the present case, there is no doubt about the Legislative competence and thus, it is only the second aspect which has to be examined. The impugned judgment seeks to bring the challenge within the window of Article 21 of the Constitution of India, under the right to speedy trial. Actually what has been done is that the cases which ought to have been tried by the regular criminal Courts were sought to be transferred to the Labour Courts by the Amendment of 1981 and only that process was sought to be reversed by the impugned Amendment of 2002. Thus, in the wisdom of the Legislature, the process would be better served by maintaining the regular criminal Courts as a forum for adjudication of such disputes which have a criminal aspect, relating to the identical 16 labour law statutes. It is not the function of this Court to test the wisdom of the Legislature and substitute its mind with the same, as has been reiterated in the cases of State of Andhra Pradesh & Ors. v. McDowell & Co. & Ors. 1996) 3 SCC 709. & Mylapore Club v. State of Tamil Nadu (2005) 12 SCC 752. It is for the Legislature to weigh this aspect as to what would be the appropriate method for providing expeditious justice to the common man – an aspect which would be common both to the wisdom of the Legislature and of the judiciary. The process as evolved shows that the system, as it is, is working in the

criminal Courts for the last more than a decade and no grievance has been made about the same. The absence of any representation on behalf of the respondent(s) further gives credence to this reasoning. We are of the view that it is really not possible to sustain the impugned order which is accordingly set aside and the provisions of Madhya Pradesh Labour Laws (Amendment) & Misc. Provisions Act, 2002 are upheld.

24/09/2019	**Nevada Properties Pvt Ltd (Appellant) vss. The State Of Maharashtra (Respondent)**	**Supreme Court** **Criminal Appeal No.1481 of 2019 [@ S L P (CRL) No. 1513 of 2011]** **Ranjan Gogoi, Deepak Gupta & Sanjeeev Khanna, JJ**

Criminal Procedure Code, 1973 – section 102 – police officer's power of seizure – whether extends to immovable property Held, No.

Brief facts:

Section 102 of the Cr.P.C. provides for power of police officer to seize certain property. Whether the term 'any property' includes immovable property also was answered affirmatively by some High courts and negatively by some. A Division Bench of Supreme Court , vide order dated November 18, 2014, noticing that the issues that arise have far reaching and serious consequences, had referred the aforesaid appeals to be heard by a Bench of at least three Judges. After obtaining appropriate directions from Hon'ble the Chief Justice, these appeals have been listed before the present Bench.

Decision & Reason:

Having held and elucidated on the power of the Criminal Court, we find good ground and reason to hold that the expression 'any property' appearing in Section 102 of the Code would not include immovable property. We would elucidate and explain. Section 102 postulates seizure of the property. Immovable property cannot, in its strict sense, be seized, though documents of title, etc. relating to immovable property can be seized, taken into custody and produced. Immovable property can be attached and also locked/sealed. It could be argued that the word 'seize' would include such action of attachment and sealing. Seizure of immovable property in this sense and manner would in law require dispossession of the person in occupation/possession of the immovable property, unless there are no claimants, which would be rare.

Language of Section 102 of the Code does not support the interpretation that the police officer has the power to dispossess a person in occupation and take possession of an immovable property in order to seize it. In the absence of the Legislature conferring this express or implied power under Section 102 of the Code to the police officer, we would hesitate and not hold that this power should be inferred and is implicit in the power to effect seizure. Equally important, for the purpose of interpretation is the scope and object of Section 102 of the Code, which is to help and assist investigation and to enable the police officer to collect and collate evidence to be produced to prove the charge complained of and set up in the charge sheet.

The Section is a part of the provisions concerning investigation undertaken by the police officer. After the charge sheet is filed, the prosecution leads and produces evidence to secure conviction. Section 102 is not, per se, an enabling provision by which the police officer acts to seize the property to do justice and to hand over the property to a person whom the police officer feels is the rightful and true owner. This is clear from the objective behind Section 102, use of the words in the Section and the scope and ambit of the power conferred on the Criminal Court vide Sections 451 to 459 of the Code. The expression 'circumstances which create suspicion of the commission of any offence' in Section 102 does not refer to a firm opinion or an adjudication/finding by a police officer to ascertain whether or not 'any property' is required to be seized.

The word 'suspicion' is a weaker and a broader expression than 'reasonable belief' or 'satisfaction'. The police officer is an investigator and not an adjudicator or a decision maker. This is the reason why the Ordinance was

enacted to deal with attachment of money and immovable properties in cases of scheduled offences. In case and if we allow the police officer to 'seize' immovable property on a mere 'suspicion of the commission of any , it would mean and imply giving a drastic and extreme power to dispossess etc. to the police officer on a mere conjecture and surmise, that is, on suspicion, which has hitherto not been exercised.

We have hardly come across any case where immovable property was seized vide an attachment order that was treated as a seizure order by police officer under Section 102 of the Code. The reason is obvious. Disputes relating to title, possession, etc., of immovable property are civil disputes which have to be decided and adjudicated in Civil Courts. We must discourage and stall any attempt to convert civil disputes into criminal cases to put pressure on the other side. Thus, it will not be proper to hold that Section 102 of the Code empowers a police officer to seize immovable property, land, plots, residential houses, streets or similar properties. Given the nature of criminal litigation, such seizure of an immovable property by the police officer in the form of an attachment and dispossession would not facilitate investigator to collect evidence/material to be produced during inquiry and trial.

As far as possession of the immovable property is concerned, specific provisions in the form of Sections 145 and 146 of the Code can be invoked as per and in accordance with law. Section 102 of the Code is not a general provision which enables and authorises the police officer to seize immovable property for being able to be produced in the Criminal Court during trial. This, however, would not bar or prohibit the police officer from seizing documents/ papers of title relating to immovable property, as it is distinct and different from seizure of immovable property. Disputes and matters relating to the physical and legal possession and title of the property must be adjudicated upon by a Civil Court. In view of the aforesaid discussion, the Reference is answered by holding that the power of a police officer under Section 102 of the Code to seize any property, which may be found under circumstances that create suspicion of the commission of any offence, would not include the power to attach, seize and seal an immovable property.

27/10/2019	**Intertek India Pvt Ltd (Appellant) vs. Priyanka Mohan (Respondent)**	**Delhi High Court** **C.R.P. No. 215 of 2019 Sanjeev Sachdeva, J**

Civil Procedure Code, 1908 – Suit for declaration and damages-termination of employee – Employer moved application for rejection of suit-whether sustainable-Held, No.

Brief facts:

Respondent/Plaintiff is an ex-employee of the Petitioner/ defendant and was employed as a Business Development Manager with the petitioner-company. Her services were terminated and being aggrieved, she filed the subject suit, inter-alia, claiming a declaration that termination of her services was null and void and further sought a decree of damages on account of mental harassment, loss of reputation, etc. Petitioner/ Defendant filed application under Order 7 Rule 11 (d) of the CPC contending that the contract of services being a terminable contract, no suit would lie for re-instatement of services. The trial court by the impugned order dismissed the application. Hence the present petition before the High Court.

Decision: Petition dismissed.

Reason:

I am unable to accept the contention of learned counsel for the petitioner. Respondent had filed the subject Suit claiming that termination is illegal. In paragraph 1 of the plaint respondent had described herself as an ex-employee which indicates that respondent had accepted that she is no longer in services. The respondent throughout the plaint has made averment that her services were terminated illegally. Reference in particular may be had to paragraphs 1, 24 and 27 where she has categorically stated that the notice of termination is illegal.

No doubt, the expression 'null and void' would imply non-est, however, if prayer (a) were to be interpreted in the manner in which learned counsel for the petitioner contends, the same would imply that the termination is nonest and respondent/plaintiff continues in services, but that is not what the Respondents seeks.

IN A meaningful reading of the Plaint shows that the respondent has not sought any re-instatement in service but had claimed that the termination is illegal and hence null and void. Learned counsel for the respondent before the trial court categorically stated that the respondent did not seek any re- instatement. Even if prayer (a), as framed, could not be granted, respondent could claim damages etc. for wrongful termination in case respondent is able to establish that the termination is illegal or contrary to any settled principles and that is what the respondent has sought in prayers (b) to (d).

In case the contentions of learned counsel for the petitioner were to be accepted, then respondent/plaintiff would be left remediless. On the one hand, as an employee, she cannot claim the relief of reinstatement and on the other hand as the employee she is stated to be barred from claiming any damages. That can never be the intention of the law.

Further contention of the learned counsel for the petitioner is that trial court has erred in holding that all reliefs, claimed by the respondent are maintainable and as such prejudice is likely to be caused to the petitioner at the final stage. The apprehension expressed by learned counsel for the petitioner is misplaced. The advocate for the respondent has very categorically made a statement, as is recorded by the Trial Court, that respondent has not sought a contract for personal service, i.e., re-employment in the petitioner company. In view of the above, I find no merit in the petition. The petition is accordingly dismissed.

07/08/2019	**Ravinder Kaur Grewal (Appellant) vs. Manjit Kaur (Respondent)**	**Supreme Court** **Civil Appeal No.7764 of 2014 with connected appeal** **Arun Mishra & S. Abdul Nazeer, JJ**

Limitation Act, 1963 – Article 65 – Adverse possession – Whether can be used by a plaintiff in a title suit Held, Yes.

Brief facts:

The question of law involved in the present matters is quite significant. Whether a person claiming the title by virtue of adverse possession can maintain a suit under Article 65 of Limitation Act, 1963 (for short, "the Act") for declaration of title and for a permanent injunction seeking the protection of his possession thereby restraining the defendant from interfering in the possession or for restoration of possession in case of illegal dispossession by a defendant whose title has been extinguished by virtue of the plaintiff remaining in the adverse possession or in case of dispossession by some other person? In other words, whether Article 65 of the Act only enables a person to set up a plea of adverse possession as a shield as a defendant and such a plea cannot be used as a sword by a plaintiff to protect the possession of immovable property or to recover it in case of dispossession. Whether he is remediless in such a case? In case a person has perfected his title based on adverse possession and property is sold by the owner after the extinguishment of his title, what is the remedy of a person to avoid sale and interference in possession or for its restoration in case of dispossession?

Decision: Suit can be filed on the basis of adverse possession.

Reason:

We are not inclined to accept the submission that there is no conferral of right by adverse possession. Section 27 of Limitation Act, 1963 provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished. The concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor, which has been extinguished and not more than that. For a person to sue for possession

would indicate that right has accrued to him in presenti to obtain it, not in futuro. Any property in Section 27 would include corporeal or incorporeal property. Article 65 deals with immovable property.

We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/ owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant under Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.

When we consider the law of adverse possession as has developed vis-à-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In Such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession.

30/07/2019	**Anil Khadkiwala (Appellant) vs. The State Govt. of NCT of Delhi (Respondent)**	**Supreme Court** **Criminal Appeal No(s).1157 of 2019 [@ SLP (Crl.) No. 2663 of 2017]** **Ashok Bhushan & Navin Sinha, JJ**

Criminal Procedure Code – Section 482 – Quashing of complaint – Whether more than one applications could be filed-Held, Yes.

Brief facts:

The application preferred by the appellant under Section 482, Cr.P.C. to quash the summons issued in complaint case no.3403/1/2015 was dismissed by the High Court opining that since the earlier Crl. M.C. No.877 of 2005 for the same relief had already been dismissed, the second application was not maintainable. Respondent no.2 filed a complaint against the appellant who was the Director of M/s. ETI Projects Ltd., the Company in question. It was alleged that the accused person had issued cheques dated 15.02.2001 and 28.02.2001, which were dishonoured upon presentation. The appellant had preferred Crl.M.P. No.1459 of 2005 for quashing the same. He took the defence, without any proof that he had already resigned from the Company on 20.12.2000, which was accepted by the Board of Directors on 20.01.2001. The application was dismissed on 18.09.2007 after noticing the plea of resignation, solely on the ground that the cheques were issued under the signature of the appellant.

The appellant then preferred a fresh application under Section 482 giving rise to the present proceedings. The High Court noticing the reliance on Form 32 issued by the Registrar of Companies, under the Companies Act, 1956, in proof of resignation by the appellant prior to the issuance of the cheques, issued notice, leading to the impugned order of dismissal subsequently.

Decision: Appeal allowed.

Reason:

Learned counsel for the appellant submitted that there was no bar to the maintainability of a second application under Section 482, Cr.P.C. in the peculiar facts and circumstances of the case, relying on Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Mohan Singh and Ors., AIR 1975 SC 1002.

Learned counsel for respondent no.2 relied upon order dated 06.05.2019 of this Court in Atul Shukla vs. The State of Madhya Pradesh and another (Criminal Appeal No.837 of 2019) to contend that such an application was not maintainable. The cheques being post-dated, the appellant cannot escape its answerability.

We have considered the respective submissions on behalf of the parties and are of the opinion that the appeal deserves to be allowed for the reasons enumerated hereinafter.

The complaint filed by respondent no.2 alleges issuance of the cheques by the appellant as Director on 15.02.2001 and 28.02.2001. The appellant in his reply dated 31.08.2001, to the statutory notice, had denied answerability in view of his resignation on 20.01.2001. This fact does not find mention in the complaint. There is no allegation in the complaint that the cheques were post-dated. Even otherwise, the appellant had taken a specific objection in his earlier application under Section 482, Cr.P.C. that he had resigned from the Company on 20.01.2001 and it had been accepted. From the tenor of the order of the High Court on the earlier occasion it does not appear that Form 32 issued to the Registrar of Companies was brought on record in support of the resignation. The High Court dismissed the quashing application without considering the contention of the appellant that he had resigned from the post of the Director of the Company prior to the issuance of the cheques. The High Court in the fresh application under Section 482, Cr.P.C. Initially was therefore satisfied to issue notice in the matter after noticing the Form 32 certificate. Naturally there was a difference between the earlier application and the subsequent one, inasmuch as the statutory Form 32 did not fall for consideration by the Court earlier. The factum of resignation is not in dispute between the parties. The subsequent application, strictly speaking, therefore cannot be said to a repeat application squarely on the same facts and circumstances.

The Company, of which the appellant was a Director, is a party respondent in the complaint. The interests of the complainant are therefore adequately protected. In the entirety of the facts and circumstances of the case, we are unable to hold that the second application for quashing of the complaint was not maintainable merely because of the dismissal of the earlier application. The impugned order of the High Court is set aside. The appeal is allowed and the proceeding.

01/11/2018	**Thomas Chacko (Appellant) vs. The Chief Manager, Bank Of India & Ors (Respondent)**	**Kerala High Court** **[KER] OP (DRT) No. 45 of 2018** **Dama Seshadri Naidu, J**

Constitution of India – Article 227 – Supervisory powers of the High court – DRT having seat at Ernakulum – DRAT having seat at Chennai – matter emanating from Ernakulum – Whether High Court of Kerala has jurisdiction to direct DRAT at Chennai – Held, Yes.

Brief Facts:

A wary purchaser of a secured asset is caught in the litigious cross fi re between the borrowers and the banker. Spent his money, burnt his fingers (as he claims), and now wants to salvage the situation. The purchaser wants to withdraw from the sale and get his money back. But he faces uncertainty. After suffering an adverse order before the DRT, the Bank has filed an appeal before the DRAT, Chennai. And its disposal assumes importance for the purchaser to press his claim for refund. He wants the Appellate Tribunal to dispose of the appeal early. Now the question is, Can this Court, in Kerala, assume supervisory jurisdiction over the Appellate Tribunal in Chennai, Tamil Nadu?

A question of territorial jurisdiction must be resolved.

Decision: Petition allowed.

Reason:

Plainly read, Article 227 confers on every High Court superintendence over all courts and tribunals throughout the "territories" over which the High Court exercises its jurisdiction. Then, should we reckon "territories" in the literal, geographical sense or in the figurative, legal sense as fiction.

In Ambica Industries v. Commissioner of Central Exercise (2007) 6 SCC 769, the appellant carried on business at Lucknow. A dispute involving the appellant, however, arose before the CESTAT, New Delhi. The Tribunal exercises its jurisdiction over the cases from the State of Uttar Pradesh, National Capital Territory of Delhi, and the State of Maharashtra. Against the Tribunal's order, the appellant filed an appeal under Section 35G of the Central Excise Act before the Delhi High Court. A Division Bench held that it had no territorial jurisdiction; it dismissed the appeal. So the matter reached the Supreme Court.

In the above factual backdrop, Ambica Industries has held that as for Article 227 of the Constitution of India, as also Clause (2) of Article 226, the High Court exercises its discretionary jurisdiction over the orders passed by the Subordinate Courts within its territorial jurisdiction. And even if any part of the cause of action has arisen within its territory that will suffice. But this principle cannot be applied, holds Ambica Industries, when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State. Then, "the High Court situated in the State where the first court is located" should be the proper forum.

Without much ado, I may hold that Ambica Industries's assertion clinches the issue: when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State, then the High Court in the State where the first court is located should be the proper forum. Indeed, here the first or the primary forum is the DRT, Ernakulum. So this Court can eminently exercise its supervisory jurisdiction over the DRAT, Chennai. Here, the petitioner wants a direction to the Appellate Tribunal to dispose of the appeal early.

That said, this Court cannot be oblivious to the docket pressure the Appellate Tribunal faces. Nor can it set impracticable deadlines, for adjudication is not akin to answering a multiple-choice question paper. It is much more. A back-breaking, brain-racking exercise.

So I queried with the learned Central Government Counsel about the Appellate Tribunal's convenience and the feasibility of an early disposal. He has, presumably on instructions, submitted that the Appellate Tribunal will dispose of the AIR (SR) No.460 of 2017 in three months' time.

Under these circumstances, I hold that the DRAT, Chennai, will dispose of the AIR (SR) No.460 of 2017 expeditiously in three months.

14/02/2019	**Cement Workers Mandal (Appellant) vs. Global Cements Ltd (HMP Cements Ltd) & ORS (Respondent)**	**Supreme Court** **Civil Appeal No. 5360 of 2010** **A M Sapre & DineshMaheshwari, JJ**

Constitution of India – Article 226 – Writ jurisdiction of High court – A Kolkatta based company had a cement unit in Porbandar in Gujarat – Unit became sick and wages were not paid – Labour court passed award in favour of workers – Lender in Kolkata attached company's properties and sold in public auction – Workers filed writ before Gujarat High Court seeking deposit of 50% of their dues by the lender – Single judge overruled the jurisdiction issue in favour of workers while division bench allowed the objection – Whether correct – Held, No.

Brief facts:

Respondent Company having its registered office at Calcutta, have a cement factory at Porbandar in the State of Gujarat. The appellant is a Union of workers. These workers (as many as 500), were working, at all relevant time, in the cement factory of respondent at Porbandar. Respondent, however, closed the cement factory somewhere in the year 1998 for myriad reasons without paying the wages to its workers.

A dispute, therefore, arose between the appellant Union and Respondent Company (employer) regarding the non-payment of outstanding wages payable to the workers. The Labour Court directed Respondent Company to pay a sum of Rs.81, 50,744/ with a cost of Rs.50,000/ to the workers. This was followed by issuance of recovery certificate dated 04.09.2000 for Rs.60, 35,379/ by the Collector, Junagadh as arrears of land revenue. The said certificate, however, has remained unexecuted.

Meanwhile, Respondent Bank had initiated recovery proceedings against Respondent Company, for the recovery of loan before the Debt Recovery Tribunal (for short "the DRT) at Calcutta, which was allowed. The DRT also appointed one Receiver to take appropriate steps in this regard. The Receiver informed the appellant- Union accordingly.

The appellant Union filed a petition (Special Civil Application No.12212 of 2004) in the High Court of Gujarat, inter-alia, praying therein to direct the respondent Bank to deposit the 50% amount of the sale proceeds of the Porbandar H.M.P. Cement with the District Collector, Porbandar, and the District Collector be directed to pay by account payee cheque to each of the workmen proportionately towards the part payment of the legal dues to the individual workman concerned.

The respondents raised an objection that the High court of Gujarat has no territorial jurisdiction inasmuch as no part of the cause of action in relation to the subject matter of the SCA has arisen in the State of Gujarat. The Single Judge overruled the preliminary objection and held that the Gujarat High Court has the territorial jurisdiction to entertain the SCA. On appeal by the Respondent Company, the Division Bench set aside the order of the Single Judge and dismissed the SCA. The Division Bench held that the Gujarat High Court has no territorial jurisdiction to entertain the SCA in question because no part of the cause of action has accrued to file such petition (SCA) in the Gujarat High Court.

It is against this order of the Division Bench, the Union (petitioner in SCA) felt aggrieved and has filed the present appeal in this Court after obtaining the special leave to appeal.

Decision: Appeal allowed.

Reason:

The short question, which arises for consideration in this appeal, is whether the Division Bench was justified in holding that the SCA filed by the appellant was not maintainable for want of territorial jurisdiction of the Gujarat High Court.

Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned order of the Division Bench restore the order of the Single Judge.

In our considered opinion, the Division Bench erred in not noticing Article 226(2) of the Constitution of India while deciding the question arising in this case. In other words, the question as to whether the Gujarat High Court has territorial jurisdiction to entertain the appellant›s petition (SCA) or not, should have been decided keeping in view the provisions of Article 226(2) of the Constitution read with Section 20 of the Code of Civil Procedure, 1908 (for short, "CPC").

Article 226(2) of the Constitution, in clear terms, empowers the High Court (let us say "A" High Court) to entertain the writ petition if the cause of action to file such writ petition against the respondents of the said writ petition has arisen wholly or in part within the territorial jurisdiction of "A" High Court.

Clause (2) further empowers a High Court to issue any order, directions or writ as provided in clause (1) of Article 226 of the Constitution in such writ petition notwithstanding that seat of such Government or the Authority or the residence of such person against whom the writ petition is filed does not fall within the territories of the "A" High Court but falls in the territories of the "B" High Court.

Coming to the facts of this case, we find from the averments of the petition(SCA) that firstly, Respondent Company has its factory at Porbandar, which is a part of State of Gujarat; Second, the Labour Court, Junagadh,

which is also a part of State of Gujarat, entertained the dispute between the appellant Union and respondent Company and passed a recovery order; and Third, one of the reliefs claimed in the petition(SCA) pertains to non-payment of outstanding wages payable to the workers by respondent Company.

In the light of these three reasons, we are of the view that the part of the cause of action as contemplated in Article 226 (2) of the Constitution has arisen within the territorial jurisdiction of the Gujarat High Court for filing the petition(SCA) to claim appropriate reliefs in relation to such dispute against respondent No.1Company.

In our considered opinion, the expression "the cause of action, wholly or in part, arises" occurring in Article 226(2) of the Constitution has to be read in the context of Section 20(c) of CPC which deals with filing of the suit within the local limits of the jurisdiction of the Civil Courts.

In the light of the foregoing discussion, we are of the view that the appellant›s petition(SCA) was maintainable in the Gujarat High Court inasmuch as the part of the cause of action to file such petition did accrue to the appellant herein (petitioner) within the territorial jurisdiction of the Gujarat High Court. In these circumstances, the SCA was required to be decided on merits by the Gujarat High Court.

In view of the foregoing discussion, the appeal succeeds and is hereby allowed.

11/01/2016	**M/S Sciemed Overseas Inc (Appellant) vs. BOC India Limited & ORS (Respondent)**	**Supreme Court** **Special Leave Petition (C) No. 29125 of 2008** **Madan B. Lokur & R.K. Agrawal, JJ**

Petitioner filed false affidavit in judicial proceedings – High court imposed cost of Rs.10 lakhs – Whether correct – Held, Yes.

Brief facts:

The facts are complicated. Suffice to mention that the appellant was the successful bidder in a work contract which was challenged by the respondent. In the proceedings, the appellant filed an affidavit to the effect that nearly 85% of the work had been completed. However, the High court found the statement made in the affidavit to be false after causing an inspection by an advocate. Then the High court imposed a cost of Rs.10 lacs on the appellant for filing a false affidavit.

Decision: Appeal dismissed.

Reason:

The only question for our consideration is whether the High Court was correct in imposing costs of Rs. 10 lakhs on the petitioner for filing a false or misleading affidavit in this Court. In our opinion, the imposition of costs, although somewhat steep, was fully justified given that the High Court also held that the contract in favour of the petitioner was awarded improperly and was of a commercial nature, the last two findings not being under challenge.

A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This 'trend' is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair. While impugning the order passed by the High Court, it was submitted by Sciemed that in fact the statement made in the affidavit filed in this Court was not a false statement but was bona fide and not a deliberate attempt to mislead this Court. It was also submitted that the allegedly false or misleading statement had no impact on the decision taken by this Court and should, therefore, be ignored. We are unable to accept either contention raised.

The correctness of the statement made by Sciemed was examined threadbare not only by the learned Single Judge but also by the Division Bench and it was found that a considerable amount of work had still to be

completed by Sciemed and it was not as if the work was nearing completion as represented to this Court. Additionally, the Report independently given by the learned advocate appointed to make an assessment, also clearly indicated that a considerable amount of work had still to be performed by Sciemed. The Report was not ex parte but was carefully prepared after an inspection of the site and discussing the matter with Shailendra Prasad Singh the proprietor of Sciemed and an engineer of Sciemed as well as officers from the RIMS.

In the first instance, the work order was issued to Sciemed on 25th July, 2007 but this was not disclosed to the High Court when it disposed of W.P. (C) No.4203 of 2007 on 31st July, 2007. Had the factual position been disclosed to the High Court, perhaps the outcome of the writ petition filed by BOC would have been different and the issue might not have even travelled up to this Court. Furthermore, apparently to ensure that work order goes through, a false or misleading statement was made before this Court on affidavit when the matter was taken up on 14th March, 2008 to the effect that the work was nearing completion. It is not possible to accept the view canvassed by learned counsel that the false or misleading statement had no impact on the decision rendered by this Court on 14th March, 2008. We cannot hypothesize on what transpired in the proceedings before this Court nor can we imagine what could or could not have weighed with this Court when it rendered its decision on 14th March, 2008. The fact of the matter is that a false or misleading statement was made before this Court and that by itself is enough to invite an adverse reaction. In Muthu Karuppan v. Parithi Ilamvazhuthi (2001) 5 SCC 289 this Court expressed the view that the filing of a false affidavit should be effectively curbed with a strong hand. It is true that the observation was made in the context of contempt of Court proceedings, but the view expressed must be generally endorsed to preserve the purity of judicial proceedings. This is what was said: "Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of "deliberate falsehood" on a matter is a reasonable foundation for the charge." On the material before us and the material considered by the High Court, we are satisfied that the imposition of costs by the High Court was justified. We find no reason to interfere with the impugned judgment and order. The petition is dismissed.

14/01/2016	**Villayati Ram Mittal (P) Ltd (Appellant) vs. Shambhavi Contractors Pvt Ltd (Respondent)**	**Delhi High Court** **[DEL] I.A. No.5595/2009 in CS (OS) No. 2192 of 2008** **Valmiki J. Mehta, J**

Code of Civil Procedure, 1908 – Section 10 – Defendant filed suit against plaintiff in Shimla for recovery and injunction – Plaintiff filed suit against defendant in Delhi for recovery based on the sub contract – Whether both the suit are based on same cause of action so that the later suit can be stayed – Held, No.

Brief facts:

This is an application under Section 10 of CPC filed by the defendant in the suit for stay of the present suit on the ground that between the parties a suit involving the same issues is pending in the High Court of Shimla.

The suit filed in Shimla is a suit for recovery of moneys by the present defendant against the present plaintiff for work done. In the suit filed at Shimla, the reliefs which are prayed by the present defendant are recovery of Rs.45,54,924/-, damages and injunction. A reference to the present suit shows that the suit is for a recovery of Rs.3.25 crores on account of the sub contract, pertaining to enhanced costs and escalation claimed by the plaintiff from the defendant on account of defendant failing to perform its contractual obligations.

Decision: Application dismissed.

Reason:

The law with respect to Section 10 CPC is well settled and which is that a later suit between the same parties cannot proceed to trial if issues involved in the later suit are already a subject matter of issues in the previously instituted litigation. Of course, it is not necessary that each and every issue arising in the earlier litigation and

the later litigation must be identical, and what is really required is that the main issues or the substantial issues which arise and would be decided in the earlier suit would be the same as the issues in the later suit. Putting it in another words, one of the principles which has been laid down for applicability of Section 10 CPC is that the decision in the first suit will operate as res judicata for the issues in the later suit. Also if parties to the earlier suit are different then the later suit cannot be stayed under Section 10 CPC, though this aspect is not relevant in this case as the parties to the present suit are not different than the parties to the earlier suit i.e. there are no parties to this suit who are not parties to the earlier suit.

On these principles, let us examine as to whether the present suit can be stayed and which is filed after around two months of the suit which is filed by the defendant in the High Court of Shimla.

The suit filed in Shimla is a suit for recovery of moneys by the present defendant against the present plaintiff for work done. Between the parties in the present suit there was a sub-contract with the defendant as a sub-contractee on account of the plaintiff having been granted a contract for construction of a military hospital in Shimla by the Union of India. Disputes and difference have arisen between the parties with respect to this sub-contract. In the earlier suit the present defendant as the plaintiff has also sought reliefs effectively for specific performance for continuing with the contract.

A reading of the relief clauses and the cause of action of the earlier suit filed by the defendant at Shimla shows that the defendant is claiming recovery of moneys for the work done and that in the earlier suit injunctions are sought which are in the nature of seeking specific performance of the sub-contract. In the suit at Shimla, this Court is informed, that the pleadings are complete and suit has been set down for trial.

A reference to the present suit shows that the suit is for a recovery of Rs.3.25 crores no doubt on account of the sub contract, however, the aspect which differentiates the present suit from the suit filed at Shimla is that the present suit basically seeks recovery of amounts from the defendant under a different head that the defendant is pleaded to have failed to perform its obligations under the contract which resulted in the plaintiff having been caused escalation in costs and expenditure for completion of the project of the hospital in Shimla whereas the suit in Shimla is based on the cause of action of value of work done by the present defendant for the plaintiff and amounts for which work done is claimed in the Shimla suit.

It bears note that once the issue with respect to most claims of the plaintiff in the present suit for recovery of Rs.3.25 crores pertains to enhanced costs and escalation claimed by the plaintiff from the defendant on account of defendant failing to perform its contractual obligations, and that is not an issue in the previously instituted suit at Shimla, the decision in the previously instituted suit at Shimla will not operate as res judicata with respect to issues in the present suit pertaining to the claim of the plaintiff for recovery of moneys of the damages on account of higher costs and escalation.

In view of the above, since the major part of the present suit claim falls outside the subject matter of the scope of the previously instituted suit at Shimla, and consequently there is no identity of the main claim and the issues of the present suit with the previously instituted suit at Shimla, this application under Section 10 CPC will not lie and is accordingly dismissed.

30/03/2016	**Savelife Foundation & Anr (Appellant) vs. Union Of India & Anr (Respondent)**	**Supreme Court** **Writ Petition (C) No. 235 of 2012** **V. Gopala Gowda & Arun Mishra, JJ**

Right to live – Victims of road accident – Good Samaritan law – SC approves the guidelines and makes it law

Brief facts:

The petition has been filed under Article 32 of the Constitution of India in public interest for the development of supportive legal framework to protect Samaritans i.e. bystanders and passers-by who render the help to the

victims of road accidents. These individuals can play a significant role in order to save lives of the victims by either immediately rushing them to the hospital or providing immediate lifesaving first aid.

Accident cases require fastest care and rescue which could be provided by those closest to the scene of the accident. Bystanders' clear support is essential to enhance the chances of survival of victim in the 'Golden

Hour' i.e. the first hour of the injury. As per the WHO India Recommendations, 50% of the victims die in the first 15 minutes due to serious cardiovascular or nervous system injuries and the rest can be saved through by providing basic life support during the 'Golden Hour'. Right to life is enshrined under Article 21 which includes right to safety of persons while travelling on the road and the immediate medical assistance as a necessary corollary is required to be provided and also adequate legal protection and prevention from harassment to good Samaritans.

The people have the notion that touching the body could lend them liable for police interrogation. Passer-by plays safe and chose to wait for the police to arrive whereas injured gradually bleeds to death. People are reluctant to come forward for help despite, desperate attempts to get help from passer-by, by and large they turn blind eyes to the person in distress. Sometimes those who help are rebuked due to ignorance by the others on touching the scene. In the case of a convoy even when there are several vehicles in the convoy, people wait for the ambulance to arrive and also for the concerned police help. There are several desisting factors which are required to be taken care of such as fear of legal consequences if once action is ineffective or harmful to victim, fear of involvement in subsequent prolonged investigation and visit to the police station. There is need to evolve the system by promptly providing effective care system with certain ethical and legal principles. It is absolutely necessary that Good Samaritans feel empowered to act without fear of adverse consequence. There is need to provide certain incentives to Good Samaritans. There is also dire need to enact a Good Samaritan Law in the country since there is a felt need of legislation for affording protection to Good Samaritans. The Ministry of Road Transport and Highways has issued a notification containing guidelines on 12.5.2015 for protection of good Samaritans and a further Notification has been issued on 21.1.2016 framing standard operating procedures. It has been mentioned in the affidavit filed by Ministry of Road Transport and Highways, Government of India that in the absence of any statutory backing, it is felt that it will be difficult to enforce these guidelines issued on 12.5.2015 and standard operating procedures as notified on 21.1.2016.

Prayer has been made on the part of the Ministry of Road Transport and Highways of Government of India that the guidelines notified on 12.5.2015 and the standard operating procedure notified on 21.1.2016 may be declared to be enforceable by this Court so that it is binding on all the States and Union Territories until the Union Government enacts a law to this effect.

Decision: Guidelines enforced.

Reason:

After referring to various judgements and elaborately discussing on the power of the judiciary to lay down laws the Supreme Court held as under: In view of the aforesaid discussion, it is apparent that guidelines and directions can be issued by this Court including a command for compliance of guidelines and standard operating procedure issued by Government of India, Ministry of Road Transport and Highways, till such time as the legislature steps in to substitute them by proper legislation. This Court can issue such directions under Article 32 read with Article 142 to implement and enforce the guidelines which are necessary for protection of rights under Article 21 read with Article 14 of the Constitution of India so as to provide immediate help to the victims of the accident and at the same time to provide protection to Good Samaritans. The guidelines will have the force of law under Article 141. By virtue of Article 144, it is the duty of all authorities – judicial and civil – in the territory of India to act in aid of this Court by implementing them.

We have carefully gone through the notification dated 12.5.2015. However, as per the guidelines contained in para 13, the 'acknowledgement' if so desired by Good Samaritans, has to be issued as may be prescribed in a standard format by the State Government. In our opinion, till such time the format is prescribed, there

should be no vacuum hence we direct that acknowledgement be issued on official letter-pad etc. and in the interregnum period, if so desired by Good Samaritan, mentioning the name of Samaritan, address, time, date, place of occurrence and confirming that the injured person was brought by the said Samaritan.

We have also gone through the notification dated 21.1.2016 with respect to the examination of Good Samaritan by the Police as contained in para 2(vii) which we modify and be read in the following manner : "The affidavit of Good Samaritan if filed, shall be treated as complete statement by the Police official while conducting the investigation. In case statement is to be recorded, complete statement shall be recorded in a single examination." Remaining guidelines in the notifications dated 12.5.2015 and 21.1.2016 are approved and it is ordered that guidelines with aforesaid modifications made by us be complied with by the Union Territories and all the functionaries of the State Governments as law laid down by this Court under Article 32 read with Article 142 of the Constitution of India and the same be treated as binding as per the mandate of Article 141.

We also direct that the court should not normally insist on appearance of Good Samaritans as that causes delay, expenses and inconvenience. The concerned court should exercise the power to appoint the Commission for examination of Good Samaritans in accordance with the provisions contained in section 284 of the Code of Criminal Procedure, 1973 suo motu or on an application moved for that purpose, unless for the reasons to be recorded personal presence of Good Samaritan in court is considered necessary.

19/04/2016	**Ramesh Rajagopal (Appellant) vs. DeviPolymers Pvt. Ltd (Respondent)**	**Supreme Court** **Criminal Appeal No. 133 of 2016 (Arising out of SLP(Crl) No. 2554 of 2011)** **S. A. Bobde & Amitava Roy, JJ**

Company having 3 different units – Consultancy business headed by director – Development of separate website for consultancy business of the company – Prosecution of director under IPC and IT Act – Whether tenable – Held,No.

Brief facts:

The appellant is a Director in Devi Polymers Private Limited ["DPPL"].DPPL has three Units – A, B and C. Unit 'C' is being headed by the appellant. It is not disputed that the Unit 'C' primarily renders consultancy services. However, all the three Units are units of one entity i.e. DPPL.

In the course of business, the appellant thought of improving the consultancy services and apparently contacted consultants, who apparently advised the creation of a separate entity known as Devi Consultancy Services and accordingly, in the web page that was created by the consultant, this name occurred. The invoices raised by the consultants were paid from the funds of DPPL, as advised by the appellant. It is significant that no amount has been paid or received by Unit C separately, independently of DDPL.

The relationship being strained between the respondent and the appellant, who are relatives, several proceedings seem to have been initiated in the Company Law Board. However, in the course of disputes and the pending proceedings, the respondent initiated the instant criminal complaint against the appellant. The appellant was prosecuted by the respondent under Sections 409, 468 and 471 of the Indian Penal Code (in short 'the IPC') read with Sections 65 and 66 of the Information Technology Act, 2000 read with Section 120(b) of the IPC.

Decision: Appeal allowed.

Reason:

Having given our anxious consideration to the dispute, we find that none of the aforesaid circumstances can lead to an inference of commission of an offence under the IPC at any rate none of the offence alleged. As far as the website is concerned, though undoubtedly, Devi Consultancy Services (DCS) is mentioned, it is made clear in the website itself that DCS is a part of DPPL which is apparent from a link, in the website itself, where they are

shown as DPPL as the main Company and DCS as a sister Company. Similarly, in the website of DPPL, which was moved by the consultant, there is a link which shows that DCS is a sister concern and it is stated that viewers may visit that site. The address of DCS is shown to be the same address as that of DDPL. We are satisfied that there is no attempt whatsoever to project the DCS as a concern or a Company which is independent and separate from DDPL, to which both the parties belong. In any case it is not possible to view the act as an act of forgery.

It might have been possible to attribute some criminal intent to the projection of the Unit-C as DCS in the website, if as a result of such projection, the appellant had received any amounts separate from the DDPL, but a perusal of the complaint shows that this is not so. Not a single rupee has been received by the appellant in his own name or even separately in the name of Unit-C, which he is heading. All amounts have been received by DDPL. It is not possible to view the contents of the website showing the DCS as a concern which is separate from DDPL in view of the contents of the website described above. Moreover, it is not possible to impute any intent to cause damage or injury or to enter into any express or implied contract or any intent to commit fraud in the making of the said website. The appellant has not committed any act which fits the above description. Admittedly, he has not received a single rupee nor has he entered into any contract in his own name on the basis of the above website.

In the absence of any act in pursuance of the website by which he has deceived any person fraudulently or dishonestly, induced any one to deliver any property to any person, we find that it is not possible to attribute any intention of cheating which is a necessary ingredient for the offence under Section 468. We find that the allegations that the appellant is guilty of an offence under the aforesaid section are inherently improbable and there is not sufficient ground of proceedings against the accused. The proceedings have been initiated against the appellant as a part of an ongoing dispute between the parties and seem to be due to a private and personal grudge.

As regards the commission of offences under the Information Technology Act, 2000 the allegations are that the appellant had, with fraudulent and dishonest intention on the website of DCS i.e. www.devidcs.com that the former is a sister concern of Devi Polymers. Further, that this amounts to creating false electronic record. In view of the finding above we find that no offence is made out under Section 66 of the I.T. Act, read with Section 43. The appellant was a Director of DDPL and nothing is brought on record to show that he did not have any authority to access the computer system or the computer network of the company. That apart there is nothing on record to show the commission of offence under Section 65 of the I.T. Act, since the allegation is not that any computer source code has been concealed, destroyed or altered. We have already observed that the acts of the appellant did not have any dishonest intention while considering the allegations in respect of the other offences. In the circumstances, no case is made out under Sections 65 and 66 of the I.T. Act, 2000.

We find that the criminal proceedings initiated by the respondent constitute an abuse of process of Court and it is necessary to meet the ends of justice to quash the prosecution against the appellant.

31/05/2016	**Reserve Bank of India (Appellant) vs. Onicra Credit Information Co Ltd (Respondent)**	**Delhi High Court** **LPA 370/2016** **Badar Durrez Ahmed &Sanjeev Sachdeva, JJ**

Credit Information Companies (Regulations) Act, 2005 – Section 5(3) – Determination of number of credit information agencies – Whether determination is mandatory before granting certificate of registration– Held, No.

Brief facts:

The appellant (RBI) under Section 5(2) of the Credit Information Companies (Regulations) Act, 2005 (hereinafter referred to as 'the said Act') rejected the application of the respondent for a Certificate of Registration as a Credit Information Company. The appellate authority also rejected the appeal of the respondent. The respondent filed the writ petition challenging the above two orders.

The learned Single Judge, by virtue of the impugned judgment, after hearing counsel for the parties, disposed of the petition, by directing the respondent to file a fresh application and the appellant to determine the number of credit information companies under section 5(3) of the Act. RBI challenged this direction before the Division Bench.

Decision: Partly allowed.

Reason:

According to the learned counsel for the appellant, the impugned judgment is contrary to the statutory provisions of the said Act. In particular, the grievance is that the direction given to the appellant to consider the application of the respondent without there being any determination under Section 5(3) of the said Act and without using the same as a ground for rejecting the said application, is contrary to the scheme of the Act. According to the learned counsel for the appellant, the appellant is required to first determine the total number of Credit Information Companies which may be granted Certificates of Registration under Section 5(3) of the said Act and it is only thereafter that the application of the respondent can be considered.

This argument was also raised before the learned Single Judge and, in our view, the learned Single Judge has rightly repelled the same. This is so because there is no mandate under Section 5(3) requiring the Reserve Bank of India to prescribe the total number of Credit Information Companies. That is a discretion which has been given to the Reserve Bank of India and the same is evidenced by the use of the word "may". The use of the word "may" is not always determinative of whether a provision is mandatory or discretionary. But, in the present context, we read Section 5(3) as a discretion which has been vested in the Reserve Bank of India.

The point that is to be considered is whether an application can be moved by a prospective registrant under Section 4(1) and the same has to be considered by the Reserve Bank of India on the principles stipulated in Section 5(1) and Section 5(2) thereof? As long as there is no maximum number of Credit Information Companies stipulated and there do not exist that number of companies, any prospective Credit Information Company can move an application under Section 4(1) of the said Act and the same has to be disposed of in accordance with law. However, there is also no bar on the Reserve Bank of India in simultaneously considering the application and also determining the total number of Credit Information Companies which may be granted a certificate under Section 5(3) when an application by a prospective Credit Information Company is moved under Section 4(1) of the said Act.

In view of this interpretation to the said provision, we feel that the impugned directions given in paragraph 20 of the impugned judgment only needs to be tweaked. The only change that would be necessary, in our view, would be a change in direction No. (iv). Instead of the existing (iv), the following (iv) be substituted:-

"(iv) The respondent RBI can simultaneously while considering the application of the respondent, if it so deems necessary, also enter upon a determination under Section 5(3) of the said Act." The appeal is partly allowed to the aforesaid extent.

30/09/ 2016	**Jet Airways (India) Ltd. (Appellant) vs. Dhanuka Laboratories Ltd (Respondent)**	**Delhi High Court** **RSA No.295/2016** **Valmiki J Mehta, J**

Carriage By air Act, 1972 – Liability thereunder – Carrier fails to deliver the consignment – Goods appeared to have been stolen – Carrier fails to lead evidence – Whether carrier is liable for the loss – Held, Yes.

Brief facts:

The appellant/defendant is a carrier of goods. Respondent/ plaintiff received an order from a buyer in Bangladesh, which was executed by the respondent/plaintiff by shipping the goods by air through the appellant/defendant. The goods on being handed over to the appellant/defendant for transportation were thereafter further transferred by the appellant/defendant to its agent for carriage/transportation viz M/s Biman Bangladesh

Airlines. The goods did not reach the consignee of the Airway bill and M/s Biman Bangladesh Airlines issued a short landing letter. The respondent/plaintiff thereafter filed the subject suit. The respondent/plaintiff led evidence in support of its case by proving the value of the goods transported as also the wilful misconduct/ misappropriation of goods by the appellant/defendant through its agent carrier, but the appellant/defendant has led no evidence whatsoever in the trial court. Therefore the suit had to be and was decided only as per the evidence which was led by the respondent/plaintiff. The trial court decreed the suit and in the first appeal the judgement of the trial court was confirmed. The singular issue to be decided in this second appeal is as to whether the liability of the appellant/ defendant is limited as per Rule 22 of the Rules under the Carriage by Air Act, 1972 or whether the appellant/ defendant cannot get benefit of this Rule 22 of limited liability because the appellant/defendant is guilty of wilful misconduct as provided in Rule 25 of the said Rules and which provision overrides the provision of Rule 22.

Decision: Appeal dismissed.

Reason:

It is settled law that benefit of the provision of the limited liability of a carrier such as the appellant/ defendant under Rule 22 is subject to Rule 25 and which states that the benefit of limited liability cannot be given to a carrier in case the carrier is found guilty of wilful misconduct or conduct equivalent to wilful misconduct. A statement by respondent/plaintiff that goods have been misappropriated is not only a case of wilful misconduct but such act is even more than the case of wilful misconduct, and it is this case of the respondent/plaintiff which was proved that on account of the goods not having been traced and thus in fact the goods have been misappropriated. Obviously, misappropriation cannot be by a legal entity such as the appellant/defendant or its agent airline company, but by its employees or agents who have been dealing with the goods. There are judgments of various courts which hold that once goods are not traced and there is an averment of the same being misappropriated, the case then falls under Rule 25 that there is wilful misconduct or conduct equivalent to wilful misconduct. One such judgment of this Court is in the case of Vij Sales Corporation v. Lufthansa, German Airlines AIR 2000 Del 220. Of course, whether or not there is wilful misconduct would depend on facts of each case with, of course the onus being really on the carrier such as the appellant/defendant who is in control and possession of the goods to show that there is no wilful misconduct because a consignor such as the respondent/ plaintiff can only step into the witness box and state so in the examination-in-chief. It is also required to be noted that similar principle with respect to strict liability of a carrier exists under the Carriers Act, 1865 and therefore onus is really upon the appellant/defendant/carrier to show that there is no wilful misconduct. The judgment under the Carriers Act holding strict liability of the carrier is the judgment of the Supreme Court in the case of Nath Bros. Exim International Ltd. v. BEST Roadways Ltd. (2000) 4 SCC 553 and which specifies the strict liability of a carrier and how a carrier cannot take benefit of a clause of limited liability.

In my opinion, once the appellant/defendant has admittedly led no evidence whatsoever, and the respondent/ plaintiff has led evidence proving the value of the goods and the case as set up in the plaint, the appellant/ defendant cannot be said to have discharged the onus upon it that there was no wilful misconduct or misappropriation as was the case of the respondent/plaintiff. Without leading evidence and merely by cross-examination of the witnesses of the respondent/plaintiff/shipper/consignor, a carrier cannot say that it has discharged its onus of proof because onus of proof is discharged by leading positive evidence, with the aspect that positive evidence also ordinarily does not absolve a carrier because liability of a carrier is a strict liability equal to that of an insurer.

Therefore, once the present case is laid out by the respondent/ plaintiff as per the plaint as a case falling as a case of wilful misconduct or equivalent to wilful misconduct i.e. misappropriation of goods, the case will have to be decided as per Rule 25 and not Rule 22 as argued on behalf of the appellant/defendant.

08/11/2016	**Bhupinder Singh Bawa (Appellant) vs. Asha Devi (Respondent)**	**Supreme Court** **Civil Appeal No. 9941 of 2014 [(2016) 10 SCC 209]** **Shiva Kirti Singh & R. Banumathi, JJ**

Delhi Rent Control Act, 1954 – Eviction of tenant – Bonafide requirement of the landlord – Landlord has several other properties – Whether eviction could be denied on this ground – Held, No.

Brief facts:

The suit scheduled premises comprises of two big rooms and one small room. Appellant/tenant was inducted as tenant in the suit scheduled premises by the erstwhile owner of the premises. Subsequently, the respondent/ landlady acquired the premises under a registered sale deed. The respondent sought eviction of the appellant from the suit premises on the ground of bona fide requirement that her son required the premises for running his separate business of sanitary and hardware products as the suit premises has a prime location for the said business.

The appellant controverted the claim of bona fide requirement set up by the respondent on various grounds including that there are several other properties available for the respondent landlord to give to her son for his business.

On a proper appreciation of facts and evidences available on record, the Additional Rent Controller passed an eviction order in favour of the respondent which was upheld by the High Court. Hence the present appeal by the appellant tenant.

Decision: Appeal dismissed.

Reason:

Both the courts below have allowed the eviction petition filed by the respondent against the appellant on the ground of bona fide requirement under Section 14(1) (e) of Delhi Rent Control Act, 1958 by recording concurrent findings. First and foremost, the landlord tenant relationship between the parties is not in dispute. The only dispute relates to bona fide requirement of the respondent for business of her son and availability/ non-availability of alternative suitable accommodation.

The concurrent findings recorded by the courts below are as follows: Firstly, It was held that the fact that respondent's son is engaged as Director in the family company M/s. Jaishree Granites Pvt. Ltd. and earns a salary of Rs.50,000/- cannot be an impediment to his running a separate business of sanitary and hardware.

The courts held that the The writ petition is allowed in terms of the directions in the preceding paragraph even while upholding the liability to pay capital gains tax. No costs. law does not provide that if a landlord/landlady requires the premises for running business of his/her young son who is an MBA, and is already engaged in some other business, he is acting malafidely and thus, no relief should be granted to him/her. Secondly, the courts below considered the suitability of every alternative accommodation suggested by the appellant which can preferably be occupied by the respondent's son for running his business.

The appellant had suggested alternative premises. The courts found that the properties in the name of family company, M/s. Jaishree Granites Pvt. Ltd. viz. Property nos. 43, 44, 45 and 46 situated at Block-A-1, W.H.S. Kirti Nagar, New Delhi and Property No. D- 12, Rajouri Garden, Ring Road, New Delhi were not located in a market area and thus, they were unsuitable for occupation especially when other suitable premises was available in the market area.

The property No. 285-B which was owned by the husband of the respondent was found already in occupation as a retail outlet for marble and granite run by the husband of the respondent. The courts considered the allegation of the appellant that property No. 285-B is owned by the respondent and not by her husband. The

appellant had produced a copy of Income Tax Returns of the respondent for establishing his claim. However, the High Court rejected the said claim on finding that the alphabet 'B' appearing after number 285 under the head of rental incomes was wrongly written in the Income Tax Return of the respondent. Moreover, the High Court found that the appellant had himself stated in his pleadings that property no. 285-B belonged to the husband of the respondent and not to the respondent. Also, with regard to property No. A-2/53 at Kirti Nagar which is also owned by the husband of the respondent, the courts found that it is being used by M/s. Jaishree Granites Pvt. Ltd. as godown for the stock of the marble and granite.

So far as property bearing No. D-201, Mansarovar Garden, New Delhi is concerned, the appellant made a case that the entire property including the ground floor of property No. D-201 was available to the respondent which could have been suitably used for running her son's business as it was located on the main road and in a market area also. The courts noted that the appellant has admitted in his crossexamination that the first floor and second floor of the property No. D-201 is in occupation of brother-in- law (Devar) of the respondent who is carrying on his business in the said premises. The court also noted that in his cross examination, the appellant has suggested that if not on the first or second floor, respondent's son can occupy the basement of property No. D-201. Having so noted, the High Court has observed that the appellant impliedly admitting that the husband of the respondent is not the owner of the ground floor of property No. D-201. The courts also noted that the appellant has not specifically pleaded in his written submissions that the ground floor of property No. D-201 is owned by the husband of the respondent. In such facts and circumstances, the courts recorded concurrent finding of fact that ground floor of property No. D-201 does not belong to husband of the respondent and thus the question of its suitability as an alternate accommodation does not arise in the present case.

In light of the above, Additional Rent Controller and the High Court rightly concluded that no alternative premise was lying vacant for running business of respondent's son. The High Court rightly relied on the ratio of Anil Bajaj & Anr v. Vinod Ahuja 2014 (6) SCALE 572 to hold that it is perfectly open to the landlord to choose a more suitable premises for carrying on the business by her son and that the respondent cannot be dictated by the appellant as to from which shop her son should start the business from.

The concurrent findings recorded by the courts below are based on evidence and materials on record, we do not find any infirmity warranting interference with the impugned judgment.

11/01/2017	**Innovative Tech Pack Ltd. (Appellant) vs. Special Director Of Enforcement (Respondent)**	**DELHI HIGH COURT** **[Criminal Appeal. No.952/2012)** **Mukta Gupta**

FERA, 1973 – Prosecution of directors for non-filing of exchange control copy of the bill of entry to substantiate the outward remittances against import of materials – Proceedings initiated after lapse of 6 years – Whether sustainable – Held, No.

Brief facts:

Show cause notice was issued, under FERA, to the appellant alleging that though foreign exchange was remitted in four imports however, the appellant failed to submit exchange control copy of Bill of Entry for confirmation of having imported the material for which the amount was remitted, thus he had violated Section 8 (3) and Section 8(4) of the FERA read with Chapter 7A.20 (i) of the Exchange Control Manual, 1995. Out of the nine imports alleged, the Adjudicating Authority was satisfied with six and as no bill of entry was by the appellant for three remittances, a penalty of Rs.15 lakhs was levied on the appellant.

Aggrieved by the order of the Adjudicating Authority, the appellant preferred an appeal before the Appellate Tribunal wherein though pre- deposit penalty was dispensed with however, the appeal was dismissed. Hence the present appeal.

Decision: Appeal allowed.

Reason:

Thus the Courts have repeatedly held that in quasi criminal proceedings the penalty should not be imposed merely because it is lawful to impose the penalty. Whether penalty should be imposed or not is a matter of discretion to be exercised judicially and on consideration of all the relevant circumstances. Further simpliciter from the non-compliance of placing on record no inference can be drawn that the foreign remittance was not used for the purpose of import. It is trite law that to impose a penal liability compliance should be sought within a reasonable time and a person cannot be penalised for not retaining the documents for a period of 13 years. During the course of the present appeal, exchange copy of Bill of Entry qua transaction at Sr. No. 2 has already been placed however, despite best efforts the appellant could not locate the exchange copies of Bills of Entry qua other two transactions.

In view of the belated show cause notice being served on the appellant, the defence of the appellant that it was not in possession of the copies of Bill of Entry for the two transactions is plausible. It cannot be held that the respondent has proved its allegation beyond reasonable doubt and the copies of the Bills of Lading probablise that the remittances were utilised for import. Consequently, the impugned orders passed by the Appellate Tribunal and the Adjudicating Authority are set aside.

03/02/2017	**MGR Industries Association & Anr (Appellant) vs. State of UP & Ors (Respondent)**	**Supreme Court** **Civil Appeal No. 1362 of 2017 (Arising out of SLP(C) No. 25529 of 2014)** **Ranjan Gogoi & Ashok Bhushan, JJ**

Section 12A of the U.P. Industrial Area Development Act, 1976 read with article 243Q of the constitution of India – Industrial area not notified panchayat levied tax – Whether tenable – Held, Yes.

Brief facts:

Appellant No.1 is an Industries Association whose members are running small industries in Hapur. Zila Panchayat, Hapur initiated proceedings for realisation of tax for members of the appellant Association which was objected to byway of a representation, before the State Government, on the ground that it is an industrial area under the U.P. Industrial Area Development Act, 1976 (the Act) and therefore no panchayat tax could be recovered from them. On the contrary, the State Government held that although the area has been declared as industrial area under the Act, but no notification having been issued as industrial township within the meaning of Article 243- Q (1) proviso of the Constitution, the Zila Panchayat/Nagar Panchayat is entitled to realise tax and appellants cannot claim exemption from taxation by local authority. Aggrieved by the above order of the State Government, appellants challenged the decision before the High Court under a writ, which was dismissed by upholding the decision of the State Government. Aggrieved by the judgment of the High Court, the appellants have filed this appeal.

Decision: Appeal dismissed.

Reason:

In the case before us, it has not been pleaded that any notification referable to proviso to Article 243(Q) (1) has yet been issued. It shall also be relevant to refer the judgment of this Court in Saij Gram Panchayat v. State of Gujarat and others, 1999 (2) SCC 366, where this Court had occasion to consider the proviso to Article 243- Q sub-clause (1) in the context of Gujarat Industrial Development Act, 1962. After insertion of Part IX-A in the Constitution, the Gujarat Municipalities Act, 1962 was also amended by adding Section 264-A. It was provided under Section 264-A that notified area means an urban area or part thereof specified to be an industrial township area under the proviso to Article 243-Q(1) of the Constitution of India. Paragraphs 10 and 11 of the judgment are extracted below:

"10. The Gujarat Municipalities Act, 1962 was amended on 20- 8-1993 in view of the insertion of Part IX-A in

the Constitution. Section 264-A was substantially amended. It now provided: "264-A. For the purpose of this chapter, notified area means an urban area or part thereof specified to be an industrial township area under the proviso to clause (1) to Article 243-Q of the Constitution of India."

Thus, as a result of this amendment in the Gujarat Municipalities Act, as industrial area under the Gujarat Industrial Development Act, which is notified under Section 16 of the Gujarat Industrial Development Act, would become a notified area under the new Section 264-A of the Gujarat Municipalities Act and would mean an industrial township area under the proviso to clause (1) of Article 243-Q of the Constitution of India.

11. On 7-9-1993, the Government of Gujarat issued a notification under Section 16 of the Gujarat Industrial Development Act declaring Kalol Industrial Area as a notified area under Section 264-A of the Gujarat Municipalities Act. By another notification of the same date 7-9-1993, the Government of Gujarat excluded the notified area from Saij Gram Panchayat under Section 9(2) of the Gujarat Panchayats Act, 1961."

Thus, for treating industrial area as Industrial Township notification under proviso to Article 243-Q (1) was contemplated which the statutory scheme under the 1976 Act is also. In view of the foregoing discussion, we are of the view that it was rightly held by the High Court that exemption under Article 12-A of the 1976 Act was not available in the facts of the above case. The appellants were not entitled for the reliefs claimed in the writ petition. In the result, the appeal is dismissed.

23/01/2017	**D.M. Oriental Insurance Co. Ltd. (Appellant) vs. Swapna Nayak & Ors (Respondent)**	**Supreme Court** **Civil Appeal No. 3862 of 2013 with Civil Appeal Nos. 3863- 3864 of 2013** **J. Chelameswar & Abhay Manohar Sapre, JJ**

Accident compensation- tribunal allowed compensation for victims – High court reduced the same – Appeal to Supreme Court – Insurer sought further reduction in compensation while complainant asked for enhancement – Whether allowable – Held, No.

Brief facts:

Mathurananda Nayak, a resident of U.S.A., and his mother Jita Nayak along with two others while coming from Cuttack collided with a truck. As a result of the said accident, Mathurananda Nayak, Jita Nayak along with driver of the car sustained injuries and later succumbed to the injuries on the same day.

The legal heirs of Mathurananda Nayak and Jita Naik filed two separate claim applications before the Tribunal. By a common Award the Tribunal allowed the applications. For the death of Mathurananda Naik the Tribunal awarded a total sum of Rs.4,36,95,740/- to the claimants and for the death of Jita Naik awarded a sum of Rs.1,29,500/- with interest at the rate of 7.5% p.a.

The Insurance Company challenged the award before the High Court and the claimants also challenged the award before the High Court for enhancement of compensation amount awarded to them by the Tribunal. By impugned common judgment, the High Court reduced the compensation to Rs.3,75,00,000/-.

Challenging the said judgment of the High Court, the Insurance Company has filed C.A. No. 3862 of 2013 seeking further reduction in the award of compensation whereas the claimants have filed C.A. Nos. 3863-3864 of 2013 seeking enhancement in the compensation.

Decision: Appeals dismissed.

Reason:

Having heard the learned counsel for the appellant (Insurance Company) and on perusal of the entire record of the case, we have formed an opinion to dismiss both the appeals and, in consequence, are inclined to uphold the order of the High Court which, in our view, does not call for any interference.

On perusal of the decisions cited at the bar and further having regard to the totality of the facts and circumstances of the case and the concurrent findings of two courts and on material issues such as the determination of annual income of the deceased, his age, the number of dependents etc., we do not find any good ground to interfere in the impugned order. In our view, such findings, apart from being concurrent, cannot be said to be, in any way, arbitrary and nor they result in awarding a bonanza or a windfall to the claimants so as to call for further reduction in the compensation awarded by the High Court.

In other words, in our view, what has been eventually awarded to the claimants by the High Court appears to be just and reasonable compensation within the meaning of Section 166 of the Act and there does not appear any good ground for further enhancement under any of the heads including under the head of future prospects as claimed by the claimants in their appeal and nor any case is made out for further reduction by applying the lesser multiplier or to make further deduction in the salary component of the deceased as claimed by the Insurance Company. When we find that under one head, reasonable amount has been awarded and under another head, nothing has been awarded though it should have been so awarded and at the same time, we notice that eventual figure of the award of compensation payable to the claimants appears to be just and reasonable then in such eventuality, we do not consider it proper to interfere in such award in our appellate jurisdiction under Article 136 of the Constitution. In other words, if by applying the tests and guidelines, we find that overall award of compensation is just and fair, then, in our view, such award deserves to be upheld in claimants' favour. We find it to be so in the facts of this case having taken note of all relevant facts and circumstances of the case.

In the light of foregoing discussion, we find no merit in the appeals, i.e., the appeal filed by the Insurance Company seeking further reduction in the compensation and the appeals filed by the claimants seeking enhancement in the compensation and accordingly dismiss the appeals and, in consequence, uphold the order of the High Court calling no interference therein.

07/03/2017	**Faridabad Complex Administration (Appellant) vs. Iron Master India (P) LTD (Respondent)**	**Supreme Court** **Civil Appeal No. 1182 of 2007** **R.K. Agrawal & Abhay Manohar Sapre, JJ**

First appellate court allowed the suit – Second appeal before the High Court – Dismissed in liminie on the ground that no substantial question of law is involved – Whether tenable – Held, No.

Brief facts:

The respondent filed a civil suit seeking permanent injunction against the appellant restraining them from recovering the House Tax for the years 1991-92, 1992-93 and 1993-94 from the respondent on their properties. The appellant also sought a declaration that demand raised by the appellant calling upon the respondent to pay the House Tax on their properties is illegal. The Trial Court dismissed the Suit. On appeal, the Additional District Judge set aside the judgment and decree of the Trial Court and decreed the respondent's suit against the appellant. Felt aggrieved, the appellant (defendant) filed second appeal before the High Court wherein the appellant had proposed several substantial questions of law arising in the case. The High Court, however, dismissed the second appeal in limine by impugned judgment/order holding that the second appeal does not involve any substantial question of law. It is against this judgment, the appellant (defendant) has filed this appeal.

Decision: Appeal allowed.

Reason:

Having heard learned senior counsel for the respondent and on perusal of the record of the case, we are inclined to allow the appeal and remand the case to the High Court for deciding the second appeal afresh on merits in accordance with law. We do not agree with the reasoning and the conclusion arrived at by the High Court in the impugned order. In our considered view, the appeal did involve the substantial question of law and, therefore,

the High Court should have admitted the appeal by first framing proper substantial questions of law arising in the case, issued notice to the respondent for its final hearing as provided under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") and disposed it of on merits.

As a matter of fact, having regard to the nature of controversy involved in the suit and the issues arising in the case, the questions raised in the second appeal did constitute substantial questions of law within the meaning of Section 100 of the Code. Indeed, in our considered view, the questions, viz., whether the suit seeking a declaration that the demand of House Tax raised under the Act is maintainable, whether such suit is barred and, if so, by virtue of which provision of the Act, whether plaintiff has any alternative statutory remedy available under the Act for adjudication of his grievance and, if so, which is that remedy, and lastly, whether the plaintiff has properly valued the suit and, if so, whether they have paid the proper Court fees on the reliefs claimed in the suit were legal questions arising in the appeal and involved jurisdictional issues requiring adjudication on merits in accordance with law. The High Court unfortunately did not examine any of these issues much less in its proper perspective in the light of relevant provisions of the Act governing the controversy.

The High Court thus, in our view, committed jurisdictional error when it dismissed the second appeal in limine. We cannot countenance the approach of the High Court. In view of foregoing discussion, the appeal succeeds and is allowed. The impugned order is set aside. The case is now remanded to the High Court for deciding the appeal on merits in accordance with law.

01/03/2017	**JSW Infrastructure Limited & Anr (Appellant) vs. Kakinada Seaports Limited & Ors (Respondent)**	**Supreme Court** **Civil Appeal No. 3422 of 2017 (Arising out of SLP(C)No.23241 of 2016)** **Madan B. Lokur &Deepak Gupta, JJ**

Awarding contract to operate berth – Successful bidder was already operating a berth in the port – High court cancelled the award – Whether correct – Held, No.

Brief facts:

Out of the four who participated in the bid process by submitting RFQ, only two parties, i.e., the first consortium and the second consortium submitted the RFP to Paradip Port Trust. The bid quoted by the first consortium of the appellants JSW Infrastructure Limited and South West Port Limited was 31.70% as against 28.70% bid quoted by the second consortium comprising of M/s Kakinada Seaports Limited, M/s Bothra Shipping Service Pvt. Ltd.,M/s MBG Commodities Pvt. Ltd. Since the first consortium were the highest bidders their proposal was recommended for acceptance by the tender committee of the Paradip Port Trust on 26.02.2016. At this stage, on 27.02.16 the second consortium submitted objections to the consideration of the application of the first consortium on the ground that in terms of the Policy Clause against creation of monopoly the appellants were not entitled to take part in this entire bidding process since they were already operating one berth for dry cargo.

Aggrieved by this action, the second consortium filed a writ petition before the Orissa High Court. The submission of unsuccessful bidders was that since the first consortium was already operating a berth for dry cargo it could not have submitted its application to bid for the berth in question which is also admittedly meant for dry cargo. It was contended that as per the policy quoted above, if a private operator is operating a berth he cannot be allowed to bid for the next berth for handling the same cargo in the same port. This contention of the original writ petitioners was accepted by the Orissa High Court which interpreted the Policy clause by holding that the word "next" in the Clause indicated that a private operator cannot take part or bid for next successive berth for the same cargo. The High Court, therefore, held that the application for the first consortium JSW Infrastructure Limited, was wrongly considered and consequently set aside the award of Letter of Award in favour of the first consortium and further directed that the Paradip Port Trust may either accept the single remaining bid of the second consortium of Respondent Nos. 1-3 after negotiating the price which should not be less than the price offered by the consortium of JSW Infrastructure, or it may invite fresh bids for the berth in question. Aggrieved

by the judgment of the High Court the first consortium and the Paradip Sea Port have filed the two appeals.

Decision: Appeal allowed.

Reason:

On a bare reading of the Policy Clause some weightage and meaning has to be given not only to the word "next" as done by the High Court but also to the words "only one private operator" appearing in the opening part of the Clause. The words "only one private operator" cannot be treated as surplusage. The entire clause has to be read as a whole in the context of the purpose of the policy which is to avoid and restrict monopoly. In our opinion, this Clause will apply only when there is one single private operator in a port. If this single private operator is operating a berth, dealing with one specific cargo then alone will he not be allowed to bid for next berth for handling the same specific cargo. The High Court erred in interpreting the clause only in the context of the word "next" and ignored the opening part of the Clause which clearly indicates that the Clause is only applicable when there is only one private berth operator. It appears to us that the intention is that when a port is started, if the first berth for a specific cargo is awarded in favour of one private operator then he cannot be permitted to bid for the next berth for the same type of cargo. However, once there are more than one private operators operating in the port then any one of them can be permitted to bid even for successive berths. In the present case, as pointed out above there already 5 private operators other than the first consortium.

Strong reliance has been placed on behalf of the second consortium on the judgment rendered in APM Terminals B.V. v. Union of India & Another (2011) 6 SCC 756 . We are of the considered view that the said judgment cannot be applied to the present case because in that case this court considered the clauses of the contract. The policy which was applicable in APM Terminal, was not the policy of 2010 but the policy of 2007, the wording of which is totally different. True it is, that in the said judgment reference has also been made to the new policy but that was not specifically dealt with by the Court, and the matter was decided on an interpretation of the terms of the contract and the policy of 2007.

In view of the above discussion we are clearly of the view that the High Court erred in interpreting the Clause in the manner which it is done. As explained above, the Clause will apply only when there is single private operator operating a single berth. Once there are more than one private operators then the Clause will not apply. The decision taken by Paradip Port Trust could not be termed to be arbitrary, perverse or mala fide. Therefore, the High Court was not justified in setting aside the same. In this view of the matter, both the Civil Appeals are allowed. The Judgment of the High Court is set aside and the writ petition filed by the second consortium before the High Court is dismissed.

30/03/2017	**The Maharashtra State Cooperative Housing Finance Corporation Ltd (Appellant) vs. Prabhakar Sitaram Bhadange (Respondent)**	**Supreme Court** **Civil Appeal No. 1488 of 2017** **A.K. Sikri & R.K. Agrawal, JJ**

Cooperative Societies law – Jurisdiction of cooperative court – Dispute between employee and society – Whether cooperative court has jurisdiction to try – Held, No.

Brief facts:

The appellant, Maharashtra State Cooperative Housing Finance Corporation Limited (hereinafter referred to as the 'Corporation'), is a cooperative society registered under the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as the 'Act'). The respondent had joined the services in the appellant Corporation in the year 1975 as an Inspector. He was promoted to the post of Branch Manager (Class-I) in the year 2000. For certain acts of misconduct allegedly committed by the respondent, he was put under suspension vide orders dated July 11, 2003. Thereafter, a charge-sheet was served upon him and the departmental inquiry conducted, which resulted in dismissal order dated April 28, 2006 passed by the Corporation, dismissing the respondent from service. His departmental appeal having dismissed, the respondent approached the Cooperative Court at

Aurangabad, which is set up under the Act, on April 19, 2007 challenging the orders of dismissal from service as well as the order rejecting the departmental appeal by filing Dispute No. 61 of 2007. On receiving the notice in the said dispute petition, the Corporation filed an application for rejection of the petition of the respondent on the ground that the Cooperative Court set up under the Act did not have the jurisdiction to entertain and decide the service dispute between the employer and the employee, inasmuch as the dispute in question did not touch upon the business of the society and was not covered by the provisions of Section 91 of the Act. The Cooperative Court dismissed the said application holding that it had the requisite jurisdiction to decide the dispute. Order of the Cooperative Court was challenged by the appellant before the Cooperative Appellate Court in the form of an appeal. This appeal was dismissed confirming the orders of the Cooperative Court. Further challenge was laid by the appellant by filing a writ petition before the High Court of Judicature at Bombay, Aurangabad Bench. This writ petition has also been dismissed vide judgment dated January 21, 2014. Present appeal assails the said judgment of the High Court.

Decision: Appeal allowed.

Reason:

The issue that needs to be decided is as to whether the Cooperative Court established under the Act has the requisite jurisdiction to decide 'service dispute' between a cooperative society established under the Act and its employees. A reading of the provisions of Section 91 would show that there are two essential requirements for conferment of exclusive jurisdiction on the Cooperative Court which need to be satisfied:

(i) the first requirement is that disputes should be 'disputes touching' the constitution of the society or elections or committee or its officers or conduct of general meetings or management of society, or business of the society; and

(ii) the second requirement is that such a dispute is to be referred to the Cooperative Court by 'enumerated persons' as specified under sub- section (1) of Section 91.

When we read the provision in the aforesaid manner, we arrive at a firm conclusion that service dispute between the employees of such cooperative society and the management of the society are not covered by the aforesaid provision. The context in which the word 'officers' is used is altogether different, namely, election of the committee or its officers. Thus, the word 'officers' has reference to elections. It is in the same hue expression 'officer' occurs second time as well.

It was, however, argued by the learned counsel for the respondent that disputes touching the 'management or business of a society' would include the dispute between the management of the society and its employees.

There are plethora of judgments of this Court holding that the expression 'business of the society' would not cover the service matters of employer and employee. In Coop. Central Bank Ltd. v. Addl. Industrial Tribunal (1969) 2 SCC 43, this Court held that the expression 'touching the business of the society' would not cover the disputes pertaining to alteration of conditions of service of workman.

We now advert to the question as to whether such a dispute can be treated as dispute relating to 'management of the society'. On this aspect as well, there is a direct judgment of this Court in Gujarat State Cooperative Land Development Bank Ltd. v. P.R. Mankad & Ors (1979) 3 SCC 123 wherein the expression 'management of the society' was clearly explained. It, thus, clearly follows that the dispute raised by the respondent is not covered within the meaning of Section 91 of the Act and, therefore, the Cooperative Court does not have the jurisdiction to entertain the claim filed by the respondent.

As a result, this appeal is allowed, the order of the High Court is set aside and the Division Bench judgment, on which reliance is placed by the High Court in the impugned judgment, is overruled. As a consequence, it is held that the petition filed by the respondent before the Cooperative Court is not maintainable. It would, however, be open to the respondent to file a civil suit. Needless to mention, in such a civil suit filed by the respondent, he would be at liberty to file application under Section 14 of the Limitation Act, 1963 in order to save the limitation.

29/03/2017	**M.C. Mehta (Appellant) vs. Union of India & Ors (Respondent)**	**Supreme Court** **I.A.No. 487/2017, I.A. No. 491/2017, I.A. No. 494/2017, I.A. No. 489/2017, I.A. No. 495/2017 in Writ Petition(Civil) No.13029/1985** **Madan B. Lokur & Deepak Gupta, JJ**

Pollution control – Supreme Court bans registration of BV III stage vehicles further directions. Brief facts:

The seminal issue in these applications is whether the sale and registration and therefore the commercial interests of manufacturers and dealers of such vehicles that do not meet the Bharat Stage-IV (for short 'BS-IV') emission standards as on 1st April, 2017 takes primacy over the health hazard due to increased air pollution of millions of our country men and women. The answer is quite obvious.

Decision: Directions given.

Reason:

The controversy relates to the sale and registration (on and after 1st April, 2017) of such vehicles lying in stock with the manufacturers and dealers that meet the Bharat Stage III emission standards (for short BS-III standards) but do not meet the BS-IV emission standards.

Briefly, according to the manufacturers, they are entitled to manufacture such vehicles till 31st March, 2017 and they have done so. In so doing, they say that they have not violated any prohibition or any law. Hence, the sale and registration of such vehicles on and from 1st April, 2017 ought not to be prohibited. They say that they will not be manufacturing any vehicle that does not comply with the BS-IV emission standards from and after 1st April, 2017 and therefore the only issue is the sale and registration of the existing stock of such vehicles that comply with BS-III emission standards. They say that they may be given reasonable time to dispose of the existing stock of such vehicles. On the other hand, according to the learned Amicus, permitting such vehicles to be sold or registered on or after 1st April, 2017 would constitute a health hazard to millions of our country men and women by adding to the air pollution levels in the country (which are already quite alarming). It is her submission that the manufacturers of such vehicles were fully aware, way back in 2010, that all vehicles would have to convert to BS-IV fuel on and from 1st April, 2017 and therefore, they had more than enough time to stop the production of BS-III compliant vehicles and switch over to the manufacture of BS-IV compliant vehicles. In fact, the major manufacturer of 4 wheeler vehicles, Maruti Suzuki had completely switched over to the manufacture of BSIV compliant vehicles a few years ago. However, for reasons best known to manufacturers of such vehicles and entirely at their peril, they did not make a complete switch (though a partial switch has been made) even though they had the technology and technical know-how to do so. Therefore, keeping the larger public interest in mind and the potential health hazard to millions of our country men and women due to increased air pollution, there is no justification for any of the manufacturers not shifting to the manufacture of BS-IV compliant vehicles well before 1st April, 2017.

It has been brought to our notice that on 5th January, 2016 the learned Solicitor General on behalf of the Government of India had submitted before this Court that requisite quality fuel for BS-IV compliant vehicles would be available (all over the country) with effect from 1st April, 2017.[1] This was confirmed and reiterated by the learned Solicitor General during the course of hearing and he stated that now from 1st April, 2017 requisite quality fuel for BS-IV compliant vehicles would be available all over the country. He also pointed out that the refineries of the Government of India had incurred an expenditure of about Rs.30,000 crores for producing requisite fuel for BS-IV compliant vehicles.

On balance, in our opinion, the submission of the learned Amicus deserves to be accepted keeping in mind the potential health hazard of such vehicles being introduced on the road affecting millions of our people in the country. The number of such vehicles may be small compared to the overall number of vehicles in the country

but the health of the people is far, far more important than the commercial interests of the manufacturers or the loss that they are likely to suffer in respect of the so-called small number of such vehicles. The manufacturers of such vehicles were fully aware that eventually from 1st April, 2017 they would be required to manufacture only BS-IV compliant vehicles but for reasons that are not clear, they chose to sit back and declined to take sufficient pro-active steps.

Accordingly, for detailed reasons that will follow, we direct that:

(a) On and from 1st April, 2017 such vehicles that are not BSIV compliant shall not be sold in India by any manufacturer or dealer, that is to say that such vehicles whether two wheeler, three wheeler, four wheeler or commercial vehicles will not be sold in India by any manufacturer or dealer on and from 1st April, 2017.

(b) All the vehicle registering authorities under the Motor Vehicles Act, 1988 are prohibited for registering such vehicles on and from 1st April, 2017 that do not meet BS-IV emission standards, except on proof that such a vehicle has already been sold on or before 31st March, 2017.

09/05/2017	**Consortium Of Titagarh Firema Adler S.P.A. Titagarh Wagons Ltd. (Appellant) vs. Nagpur Metro Rail Corporation Ltd (Respondent)**	**Supreme Court** **Civil Appeal Nos. 1353-1354 OF2017 arising out of S.L.P. (C) Nos. 35104-35105 OF 2016.** **Dipak Misra & Amitava Roy, JJ**

Holding Company bids on the experience of its subsidiaries – Whether consideration of the bid by the owner is correct – Held, Yes.

Brief facts:

Nagpur Metro Rail Corporation Ltd., the 1st respondent herein, issued a Notice Inviting TendeHr (NIT) on 25.01.2016 for the work of design, manufacture, supply, testing, commissioning of 69 passenger rolling stock (Electrical Multiple Units) and training of personnel at Nagpur Metro Rail Project. The said project is being funded by KfW Development Bank, Germany. As per the clause ITS 35.8 at all stages of bid evaluation and contract, award would have to be subject to no-objection from KfW Development Bank. In response to the said NIT, three bidders submitted their bids. One was found technically disqualified and thus, only the appellant and the respondent No. 2 remained in contest. Appellant quoted Rs.852 crores while Respondent No.2 quoted Rs.851 crores. Contract was awarded to Respondent No.2. Appellant challenged this award of contract before the High Court, which eventually dismissed the Writ Petition.

Decision: Appeal dismissed.

Reason:

What is urged before this Court is that the respondent No. 2 could not have been regarded as a single entity and, in any case, it could not have claimed the experience of its subsidiaries because no consortium or joint venture with its subsidiaries was formed.

We have to see, how the 1st respondent has perceived the offer of the respondent No. 2 in the backdrop of the tender conditions. It is not in dispute that the project in question has been funded by KfW Development Bank, Germany and as per Clause ITB 35.8, it is necessary at all stages of bid evaluation and contract award has to be subject to no-objection from KfW Development Bank. Emphasis has been laid on the approach of the High Court which has taken note of the fact that the respondent No. 2 had been awarded the tender by the Delhi Metro Rail Corporation. It has also been highlighted that the papers relating to the financial bid along with report were forwarded to KfW which gave its no objection. Be it noted, the appellants have been quite critical about the acceptance of the offer and the 1st respondent has given a number of reasons to justify the same. As indicated earlier, we are only concerned with the eligibility criteria and not with the fiscal aspect.

Respondent No. 2, as is evident, is a company owned by the People's Republic of China and, therefore, it comes within the ambit of Clause 4.1 of the bid document as a Government owned entity. We have already reproduced

the said clause in earlier part of the judgment. As perceived by the 1st respondent, a single entity can bid for itself and it can consist of its constituents which are wholly owned subsidiaries and they may have experience in relation to the project. That apart, as is understood by the said respondent, where the singular or unified entity claims that as a consequence of merger, all the subsidiaries form a homogenous pool under its immediate control in respect of rights, liabilities, assets and obligations, the integrity of the singular entity as owning such rights, assets and liabilities cannot be ignored and must be given effect. While judging the eligibility criteria of the second respondent, the 1st respondent has scanned Article164 of the Articles of Association of the respondent No. 2 which are submitted along with the bid from which it is evincible that the Board of Directors of the respondent No. 2 has been entrusted with the authority and responsibility to discharge all necessary and essential decisions and functions for the subsidiaries as well. According to the 1st respondent, the term "Government owned entity" would include a government owned entity and its subsidiaries and there can be no matter of doubt that the identity of the entities as belonging to the Government when established can be treated as a Government owned entity and the experience claimed by the parent of the subsidiaries can be taken into consideration.

With regard to the satisfaction of the 1st respondent, it has been highlighted before us that the said respondent had thoroughly examined the bid documents and satisfied itself about of the capability, experience and expertise of the respondent No. 2 and there has been a thorough analysis of the technical qualification of the respondent No. 2 by the independent General Consultant and the reports of the Appraisal and Tender Committee of the 1st respondent and also the no-objection has been received from KfW Development Bank, Germany which is funding the entire project.

As is noticeable, there is material on record that the respondent No. 2, a Government company, is the owner of the subsidiaries companies and subsidiaries companies have experience. The 1st respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the concerned Committee and the financing bank. We are disposed to think that the concept of "Government owned entity" cannot be conferred a narrow construction. It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a consortium. In the obtaining fact situation, the interpretation placed by the 1st respondent in the absence of any kind of perversity, bias or mala fide should not be interfered with in exercise of power of judicial review. Decision taken by the 1st respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court.

Resultantly, the appeals, being devoid of merit, are dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

28/04/2017	**Maharishi Markandeshwar Medical College & Hospital (Appellant) vs. State of Himachal Pradesh & Ors (Respondent)**	**Supreme Court** **Civil Appeal No. 5198 of 2017 (Arising out of SLP (Civil) No. 9837 of 2017)** **Dipak Misra, A.M. Khanwilkar & Mohan M. Shantanagoudar, JJ**

(Regulation of Admission and Fixation of Fee) Act, 2006 read with Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010 – Whether a medical college affiliated to a private university under the 2010 Act is required to obtain affiliation with Government university under the 2006 Act- Held, No.

Brief facts:

This appeal emanates from the judgment of the High Court of Himachal Pradesh at Shimla dated 20.12.2016, passed in CWP No.4773 of 2015. The High Court dismissed the writ petition filed by the Appellants challenging the validity of Sections 3(6), 3(6a) and 3(6b) of the Himachal Pradesh Private Medical Educational Institutions

(Regulation of Admission and Fixation of Fee) Act, 2006 (for short "2006 Act") as amended vide amendment Act No.24 of 2015.

Appellant No.1 is an unaided private medical college established by the Appellant No.3 - University Trust as a constituent of the Appellant No.2 - University. The Appellant No.2 - University has been established under the Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010 (for short "2010 Act"). Before the said Act was enacted, on the basis of the Essentiality Certificate issued under Section 4(2) of the 2006 Act, the Appellant No.3 - University Trust established the medical college as a constituent unit of the proposed private University and made necessary investments in that regard.

In 2012 the Appellant No.2 - University requested the Principal Secretary (Health) to the Government of Himachal Pradesh for grant of an "Essentiality Certificate" to establish a new medical college at Kumarhatti, Solan "under" the Appellant No.2 – University.

The State Government, in exercise of its powers under Section 3(3) of the 2006 Act, issued a notification on 14.08.2013, regarding admission procedure and fee structure for admission to MBBS Course in the Appellant No.1 - College. The new law required the appellant No.1 College to seek affiliation with Himachal Pradesh University at Shimla.

Decision: Appeal allowed.

Reason:

After considering the rival submissions, we are in agreement with the Appellants that the High Court has not touched upon the core issue relating to the autonomy of the Appellant No. 2 – University including its authority to start a constituent medical college, as prescribed by the 2010 Act. Admittedly, the Appellant No. 2 – University has been established under the 2010 Act. In the present case, it has been asserted that the Appellant No. 1 – College is a constituent of the Appellant No. 2 – University. In such a situation, it is unfathomable that the requirement of taking affiliation from another University (Himachal Pradesh University) established under a separate State Legislation, can and ought to be insisted upon. If insisted, it would, inevitably, entail in making an inroad into the autonomy of the Appellant No. 2 – University. True it is that Section 7 of the 2010 Act does not empower the Appellant No. 2 – University to affiliate or otherwise admit to its privileges any other institution. But that will have no application to the case on hand. For, the Appellant No. 1 - College is none other than a constituent college of Appellant No. 2 – University itself. The Medical Council of India as well as the Union Government have, therefore, justly stated that it was not necessary for the Appellant No.1 - College to take affiliation from the Himachal Pradesh University.

A priori, we have no hesitation in taking the view that the amended provisions, in particular Section 3(6a), would impinge upon the autonomy of an independent University established under a separate State Legislation. Further, the field of affiliation is governed by the State legislation under which the respective Universities have been established. The power of granting affiliation to colleges under the control of the concerned University, must vest with the respective University to which the college will be affiliated. That power of granting affiliation, by the University concerned, therefore, cannot be whittled down by the 2006 Act or amendments made thereto. Understood thus, the amended provisions of Section 3 (6a) of the 2006 Act, cannot be sustained as the same are unreasonable, irrational and in conflict with the special State Legislation under which the Appellant No. 2 – University has been established, namely the 2010 Act. We shall now examine the possibility of reading down the impugned provision in Section 3 (6a) of the Act so as to save it from being unconstitutional. The expression "Private Medical Educational Institution" includes a Private Medical Educational Institution established by or affiliated to a private University. We find force in the argument of the Appellants that the definition of Private Medical Educational Institution, as amended, can be extended to the Appellants in relation to other matters governed by the 2006 Act, except the mandate of requiring the Appellant No. 1 - College (a constituent college of the Appellant No. 2 – University) to take affiliation from the Himachal Pradesh University. That requirement springs from Section 3 (6a). Indisputably, there is no other private medical University in the State except the Appellant No. 2 - University. Therefore, we explored the possibility of omitting the words "Himachal Pradesh"

from the amended Section 3 (6a) to save the whole of that provision from being invalid, as was contended. However, we find that if the words "Himachal Pradesh" alone were to be struck down, the remaining Section 3 (6a) may create some confusion. It would then mean that Private Medical Institutions in the State must take affiliation from the "concerned" University. To wit, Himachal Pradesh University or the Appellant No. 2 – University, as the case may be. In other words, the concerned University can exercise power to affiliate a private medical institution set up in the State. However, the Appellant No. 2 is not authorised to affiliate a private medical college (not its constituent) by virtue of Section 7 of the 2010 Act, which prohibits the Appellant No. 2 – University from affiliating or otherwise extending to its privileges any other institution. Therefore, the appropriate course to avoid any confusion is to strike down Section 3(6a) of the 2006 Act, as amended.

As noted earlier, since the Appellant No. 1 – College is a constituent of the Appellant No. 2 – University, the question of compelling it to take affiliation from another University (Himachal Pradesh University) cannot be countenanced.

The impugned judgment of the High Court of Himachal Pradesh dated 20.12.2016 in CWP No.4773 of 2015 is set aside. We also strike down Section 3(6a) of the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006, being irrational, unreasonable, ultra vires and unconstitutional.

18/07/2017	**Glaxo Smithkline Pharmaceutical Ltd (Appellant) vs. Union Of India (Respondent)**	**Supreme Court** **Civil Appeal No.6178 of 2009** **R. F Nariman & S.K.Kaul, JJ**

Brief facts:

The appellant manufacturer claimed exemption as provided under paragraph 28 of the Drugs (Prices Control) Order, 1987, read with exemption notification dated 28th February, 1992. The respondent UOI refused to grant exemption on the ground that the sale price of the drug manufactured by the appellant was higher than the controlled price. After crossing all the departmental and courts, the issue landed before the Supreme Court.

Decision: Appeal allowed.

Reason:

The appellant, has placed great emphasis on the fact that both paragraph 28 as well as the exemption order, read with the Central Government Guidelines of 14th February, 1989, lead to only one conclusion that it is "manufacture" and not sale that is relevant.

The sheet anchor of appellant's case is a judgment delivered by this Hon'ble Court in Union of India v. Ranbaxy Laboratories Ltd & Ors, (2008) 7 SCC 502 in which the self-same problem arose before this Court under pari materia provisions of the DPCO of 1995. This Court has unequivocally held in favour of the construction suggested by Shri Ganesh, namely that all manufacturers of exempted goods, upto the last date of exemption, would be entitled, at any subsequent point of time, to charge a price which is not controlled by the DPCO.

The Union of India, has tried to support the High Court's judgment, and has referred us to Guideline No. (viii) of the Central Government Guidelines, and paragraph 16(3) of the DPCO of 1987. According to UOI, a subsequent judgment of this Court in Glaxosmithkline Pharmaceuticals Ltdv. Union of India &Ors (2014) 2 SCC 753 has correctly distinguished the earlier judgment in Ranbaxy's case, and would therefore, squarely cover the present facts.

Having heard learned counsel for the parties, the point with which we are concerned is in a very narrow compass. If paragraph 28, which is set out hereinabove is perused, it is clear that the exemption relates to drug manufacturing units or classes of such units. The very exemption order which has also been set out by us (supra) again refers only to bulk drugs and formulations based thereupon which are "manufactured" by the company. Further, a reading of the guidelines of 1989 also makes it clear that the exemption only relates to manufacture and has no reference to sale whatsoever.

We are of the view that the matter is no longer res-integra. In Ranbaxy's case, the relevant exemption provision under the DPCO of 1995, referred to in paragraph 19 of the judgment, is almost a verbatim reproduction of the earlier exemption provision i.e. paragraph No.28 of the DPCO of 1987, with which we are directly concerned. Even the exemption notification mentioned in paragraph 20 of the aforesaid judgment, like the exemption notification in the present case, refers only to bulk drugs and formulations "manufactured" by the company.

Not to be deterred by the plain language of the aforesaid judgment, Shri Mukherjee referred us to a later judgment in the Glaxosmithkline case, referred to hereinabove.The issue in that case concerns a price notification issued under the later DPCO of 1995.

It can be seen that the issue that arose in the Glaxosmithkline case was completely different from the issue that arose in Ranbaxy's case and the present case. Ranbaxy's case and the present case are directly concerned only with an exemption notification, and not a notification for fixation of price. Also, what is relevant for an exemption notification is the manufacture of drugs, whereas what is relevant for a price fixation notification relates to sale and not manufacture. Obviously, therefore, the Glaxo-smithkline decision would have no relevance to the facts of the present case.

17/08/2017	**Apollo Tyres Ltd. (Appellant) vs. Pioneer Trading (Respondent)**	**Delhi High Court** **CS (OS) 2802/2015** **Vipin Sanghi, J**

Designs Act – Tread pattern of truck tyre – Whether entitled to copyright protection – Held, Yes.

Brief facts :

The Plaintiff manufactures truck tyre Endurance LD 10.00 R20, with a peculiar tread patters over which it had claimed proprietary rights. The defendant also manufactures truck tyre HI FLY with similar tread pattern of the Plaintiff.

Plaintiff filed a suit against the Defendant for infringement of its proprietary rights and an interim injunction was granted in favour of the Plaintiff. Defendant moved an application to vacate the stay.

Decision : Interim stay confirmed.

Reason :

I have set out hereinabove the manner in which the tyres of the plaintiff and the other manufacturers are displayed in the course of marketing, advertisement etc. They clearly show that the tread patterns are utilized by the manufacturers including by the plaintiff, in respect of its tyre in question, as a source identifier, i.e. as a trademark.

No doubt, the tread pattern adopted by the plaintiff in respect of its tyre also serves the purpose which the treads on any tyre serve. However, if the same function can be achieved through numerous different forms of tread patterns, then the defence of functionality must fail. It was essential for the defendant to, at least, prima facie, establish that the tread pattern of the plaintiff was the only mode/ option, or one of the only few options, which was possible to achieve the functional requirements of the tyre. The position which emerges on a perusal of the documents placed on record by the plaintiff is that there are innumerable different and unique tread patterns in existence, adopted by different manufacturers of tyres, which achieve the same objective.

It cannot be said that the unique tread pattern adopted by the plaintiff is attributable only to the technical result, namely, of providing grip and stability to the vehicle on which the tyre of the plaintiff is used. The same function can be performed by any other tyre with a different tread pattern.

The manner in which the tyres of different manufacturers are advertised and marketed leaves no manner of doubt that the tread pattern on the tyre of the manufacturer is prominently displayed, apart from the brand name of the manufacturer. It is also not uncommon to see the customer - interested in buying a tyre, being shown the

tyres by the vendor with the tread pattern in a vertical position i.e. by showing the "face" of the tyre, such that the tread pattern is the first thing that strikes and appeals to the eye of the customer. It is also not uncommon to see that even when tyres are wrapped in covering, the vendor removes the covering while displaying his tyres to the customers. Pertinently, the defendant does not display its tyres in question under the brand "HI FLY" in a wrapped condition in its advertisements. The defendant is displaying its tyre in question under the brand "HI FLY" in an unwrapped condition, and prominently showing the tread pattern on the tyre. This itself shows that the wrapping of the tyre does not inhibit the display and marketing of the tyre, by prominently displaying the tread pattern on the tyres.

Thus the submission that the tread pattern adopted by the plaintiff is functional and, therefore, not capable of protection, cannot be accepted. This submission is rejected.

The tread pattern on a tyre, in my view, is such a prominent feature - and is so prominently displayed and advertised, that the added matter, namely the brand name on the sides of the tyre, is not sufficient to distinguish the goods of the defendant from those of the plaintiff. Similarly, the inclusion of the tyre-tube and flap in the plaintiffs tyre, and only the flap along with the tyre in the defendants tyre - minus the tube, is not sufficient to distinguish the plaintiff's tyre from that of the defendants. It is not in dispute that both tyres of the plaintiff and the defendant in question are tyres meant for trucks. Therefore, some change of specifications between the two is of no consequence, when it comes to the aspect of confusion in the mind of the customer. I may also observe that the customers of the truck tyres, by and large, are semi-literate middle class truck owners, operators and drivers, from whom it is difficult to expect a detailed examination, threadbare, of all the differences in the tyres of the plaintiff and that of the defendant before the purchase of the tyre is made.

In view of the aforesaid, I am inclined to confirm the injunction granted in favour of the plaintiff till the disposal of the suit. Accordingly, the plaintiff's application, i.e. I.A. No. 19350/2015 is allowed and the ex- parte ad interim order of injunction dated 15.09.2015 is confirmed till the disposal of the suit.

05/10/2017	**Meters And Instruments Pvt. Ltd & ANR (Appellant) vs. Kanchan Mehta (Respondent)**	**Supreme Court** **Criminal Appeal No. 1731-33 of 2017** **A.K. Goel & U.U. Lalit, JJa**

Negotiable Instruments Act – Section 138 – Dishonour of cheque – Compounding of offence – Principles explained and guidelines laid down.

Brief facts :

These appeals have been preferred against the order of the High Court of Punjab and Haryana where the High Court rejected the prayer of the appellants for compounding the offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act) on payment of the cheque amount and in the alternative for exemption from personal appearance.

Decision : Appeal disposed of.

Reason :

The Supreme Court elaborately examined the scheme of the Act and held as under. From the above discussion following aspects emerge:

Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the accused. If e-mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant . If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily.

It will be open to the High Courts to consider and lay down category of cases where proceedings or part thereof can be conducted online by designated courts or otherwise. The High Courts may also consider issuing any further updated directions for dealing with Section 138 cases in the light of judgments of this Court. The appeals are disposed of. It will be open to the appellants to move the Trial Court afresh for any further order in the light of this judgment.

06/12/2017	**Atma Ram Properties Pvt Ltd. (Appellant) vs. The Oriental Insurance Co. Ltd (Respondent)**	**Supreme Court** **Civil Appeal No.20913 of 2017 (Arising out of S.L.P. (Civil) No.17117 of 2016)** **J. Chelameswar & S. Abdul Nazeer, JJ**

NDMC Act, 1994 read with Delhi Rent Control Act, 1958 – Collection of property tax as arrears of rent – Non-payment of property tax by tenant – Eviction sought by landlord under Rent Act – Whether tenant could be evicted as failure to pay rent – Held, No.

Brief facts :

This appeal involves an important question of law as to whether property tax recoverable from the tenant under Section 67(3) of the New Delhi Municipal Council Act, 1994 (for short 'NDMC Act') as arrears of rent by the landlord/owner can be considered to be forming part of the rent for the purpose of seeking eviction or ejectment of such tenant who defaults in payment of such recoverable tax as rent and when the rent including recoverable tax in respect of the tenanted premises exceeds Rs.3500/- per month, thereby losing protection of the Delhi Rent Control Act, 1958 (for short 'Rent Act').

Decision : Appeal dismissed**.**

Reason :

The issue which arises for consideration in the present matter is regarding the interplay of Section 67(3) of the NDMC Act vis-à-vis Section 7(2) of the Rent Act. Under Section 67(3) the landlord has been given the right to recover the house tax from the tenant as if the same were rent whereas under Section 7(2) of the Rent Act, there is a specific bar to recover any tax as rent from the tenant.

The object of the Rent Act is to provide protection to tenants who under common law, including Transfer of Property Act could be evicted from the premises let out to them at any time by the landlord on the termination of their tenancy. It restricts the right of the landlord to evict the tenant at their will. It is a special law in relation to landlord and tenant issue. Therefore, the Rent Act has to prevail insofar as landlord and tenant issue is concerned.

Therefore, we are of the view that though the Rent Act is an earlier Act when compared to the NDMC Act, it is a special enactment with regard to the matter in issue and has a non-obstante clause. The NDMC Act is not a special enactment insofar as landlord-tenant issue is concerned and it contains Section 411 which provides that other laws not to be disregarded. Section 67(3) of the NDMC Act merely gives a right to recover the tax in respect of the premises as rent. It does not override the Rent Act insofar as obviating the effect of Section 7(2) of the Rent Act. In our opinion, the tax recoverable from the tenant under Section 67(3) of the NDMC Act as arrears of rent by the appellant cannot be considered to be forming part of the rent for the purpose of seeking eviction/ ejectment of the respondent who defaults in payment of such recoverable tax as rent.

06/12/2017	**Canara Bank & Anr (Appellant) vs. Lalit Popli (Thriugh Lrs) (Respondent)**	**Supreme Court** **Civil Appeal No. 9666 of 2010 Arun Mishra & M M Shantanagoudar, JJ**

Disciplinary action – Bank clerk fraudulently withdrew money from customer's account – Dismissed from service – Retirement benefits withheld by bank and adjusted against the loss caused – Net amount paid to him – Whether correct – Held, Yes.

Brief facts :

The respondent who was a clerk, and two other persons i.e. manager and special assistant, all are bank employees, were found guilty of fraudulently withdrawing an amount of Rs.1,07,000/- from the saving account

of a customer. The manager and special assistant were censured for their negligence and some recovery were made from them while the respondent was dismissed from service.

The respondent's appeal challenging the order of dismissal was allowed by learned Single Judge against which the appellant – Bank filed an appeal against the said order. During the pendency of the appeal, bank withheld an amount of Rs.74,180.09, payable to the respondent, which included the gratuity and provident fund(employer's contribution) and to keep the same in a fixed deposit with a view to adjust the said amount towards any loss caused to the bank by the respondent. Appeal was allowed by the Division Bench of the High Court and the order of dismissal was restored.

Thereafter, the bank adjusted Rs. 1,07,000/- out of Rs. 1,08,923/- (the maturity value of Rs. 74,180.09), towards loss caused to the bank by the respondent and remaining amount of Rs. 1,923/- was released in favour of the respondent.

Being aggrieved by such action of the bank, the respondent approached the High Court, which allowed the writ. The order of the learned Single Judge is affirmed by the Division Bench, which is impugned before this Court in this appeal.

Decision : Appeal allowed.

Reason :

This Court in the first round of litigation by its judgment dated 18.02.2003 had given a categorical finding that it was the respondent who committed forgery which ultimately led to the loss caused to the bank. Thus, his case stood on a different footing from the other three employees. Since the amount recovered from the other three employees, who were imposed penalty of 'censure', is refunded to them, the bank had to recover the amount of loss caused to it from the person who was the author of the forgery.

Looking to the material on record, we find that the other three officials were held to be negligent in their duty and as held by this Court in its judgment dated 18.02.2003, that it was the respondent, who committed forgery of the signature of the account holder, consequent upon which the bank had suffered loss to the tune of Rs.1,07,000/- Therefore, the bank has taken an equitable decision to recover the entire amount from the respondent and to refund the amount already recovered from the other three officials, because they were only found to be negligent in their duty.

Rule 12 of the Canara Bank Employees' Gratuity Fund Rules (for short, 'Gratuity Rules'), Clause 19 of the Canara Bank Staff Provident Fund Regulations, 1994 (for short, Provident Fund Regulations) and Rule 3(4) of Chapter VIII of the General Conduct Rules, governing the services of the employees fully support the action taken by the bank against the respondent in withholding the amount of gratuity and employer's contribution towards provident fund.

Special Rules relating to gratuity, mentioned supra, makes it amply clear that the employee who has been dismissed for his misconduct and if such misconduct has caused financial loss to the bank, he shall not be eligible to receive the gratuity to the extent of financial loss caused to the bank. So also, Clause 19 of the Provident Fund Regulations permits the bank to deduct the payment of provident fund to the extent of financial loss caused to the bank from the bank's contribution. Both the aforementioned Clauses are plain and simple. They are unambiguous. Since Rule 12 of the Gratuity Rules and Clause 19 of the Provident Fund Regulations permit the bank to withhold gratuity and deduct the bank's contribution towards provident fund, in such matters, the bank was justified in recovering the amount of financial loss sustained by it, which was caused by the respondent, from out of the gratuity and employer's contribution towards provident fund payable to the respondent/employee.

Thus, in our considered opinion, the High Court was not justified in setting aside the decision of the bank to recover the amount of loss sustained by it from the respondent, particularly when the bank is empowered to do so, as discussed supra. Accordingly, the instant appeal is allowed.

05/12/2017	**B Sunitha (Appellant) vs. State of Telangana & B Anr (Respondent)**	**Supreme Court** **Criminal Appeal No. 2068 of 2017 (Arising out of SLP (Crl.) No.10700 of 2015)** **A K Goel & U U Lalit, JJ**

Negotiable Instruments Act, 1881 – Advocate obtaining blank fee cheque from client – Later fills up and presented into the bank – Cheque dishonoured – Complaint filed – Accused sought quashing of proceeding on th ground that there was no enforceable debt – High Court declined to quash the proceeding – Whether correct – Held, No.

Brief facts :

This appeal has been preferred against the order of the High Court of Judicature at Hyderabad Court which declined to quash the proceedings initiated against the appellant under Section 138 of the Negotiable Instruments Act, 1881('the Act').

The proceedings were initiated by the respondent who is an advocate in whose favour the appellant executed a cheque allegedly towards his fee. The same was dishonoured. The stand of the appellant is that Section 138 of the Act is not attracted as there was no legally enforceable debt. The appellant having already paid a sum of Rs.10 lakhs towards fee, the cheque was taken from the appellant by way of abuse of position and the transaction was void under Section 23 of the Indian Contract Act, 1872 ('Contract Act'). Claim for fee based on percentage of the decretal amount was unethical. It was submitted that the appellant, as a client, being in fiduciary relationship, burden to prove that the fee was reasonable and had been voluntarily agreed to be paid was on the Advocate. The Advocate by using his professional position could not be allowed to exploit a client by taking signatures on a cheque and no presumption of enforceable debt arises, especially when no account maintained in regular course of business was furnished.

Decision : Appeal allowed.

Reason :

The main contention raised on behalf of the appellant is that charging percentage of decretal amount by an advocate is hit by Section 23 of the Contract Act being against professional ethics and public policy, the cheque issued by the appellant could not be treated as being in discharge of any liability by the appellant. No presumption arose in favour of the respondent that the cheque represented legally enforceable debt. In any case, such presumption stood rebutted by settled law that claim towards Advocate's fee based on percentage of result of litigation was illegal. Signing of the cheque was by way of exploitation of fiduciary relationship of Advocate and the client.

Thus, mere issuance of cheque by the client may not debar him from contesting the liability. If liability is disputed, the advocate has to independently prove the contract. Claim based on percentage of subject matter in litigation cannot be the basis of a complaint under Section 138 of the Act.

In view of the above, the claim of the respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed.

We may note that after the hearing was concluded, learned counsel for Respondent No.2 mentioned the matter to the effect that Respondent No.2 wanted to withdraw the complaint. An e-mail to this effect was also handed over to Court. The same has been kept on the record. However, we did not permit this prayer. Having committed a serious professional misconduct, the respondent No.2 could not be allowed to avoid the adverse consequences which he may suffer for his professional misconduct. The issue of professional misconduct may be dealt with at appropriate forum.

Thus, while proceedings against the appellant will stand quashed, the issue of professional misconduct is left to be dealt with at the appropriate forum.

28/03/2018	**Asian Resurfacing of Road Agency Pvt. Ltd & Anr (Appellant) vs. Central Bureau Of Investigation (Respondent)**	**Supreme Court** **Criminal Appeal Nos. 1375-1376 of 2013 with batch of appeals.** **A.K.Goel, Navin Sinha & R.F. Nariman, JJ**

Principles of granting stay of lower court proceedings – Should not exceed a period of 6 months – Extension of stay should be by way of a speaking order – Supreme Court lays down new guidelines.

Brief facts :

Facts are immaterial to appreciate the ratio of this case. Whenever charges are framed, the same is challenged before the High Court and stay used to be granted and the proceedings in the trial court used to remain stayed for quite a long period. In this case the Hon'ble Supreme Court examined the law extensively and laid down the rule as to the grant of stay and its operation both in criminal as well as in civil proceedings.

Decision : Appeals disposed of.

Reason :

Though the question referred relates to the issue whether order framing charges is an interlocutory order, we have considered further question as to the approach to be adopted by the High Court in dealing with the challenge to the order framing charge.

Thus, even though in dealing with different situations, seemingly conflicting observations may have been made while holding that the order framing charge was interlocutory order and was not liable to be interfered with under Section 397(2) or even under Section 482 Cr.P.C. Order framing charge may not be held to be purely a interlocutory order and can in a given situation be interfered with under Section 397(2) Cr.P.C. or 482 Cr.P.C. or Article 227 of the Constitution which is a constitutional provision but the power of the High Court to interfere with an order framing charge and to grant stay is to be exercised only in an exceptional situation.

We have thus no hesitation in concluding that the High Court has jurisdiction in appropriate case to consider the challenge against an order framing charge and also to grant stay but how such power is to be exercised and when stay ought to be granted needs to be considered further.

It is well accepted that delay in a criminal trial, particularly in the Prevention of Corruption Act cases, has deleterious effect on the administration of justice in which the society has a vital interest. Delay in trials affects the faith in Rule of Law and efficacy of the legal system. It affects social welfare and development. Even in civil or tax cases it has been laid down that power to grant stay has to be exercised with restraint. Mere prima facie case is not enough. Party seeking stay must be put to terms and stay should not be incentive to delay. The order granting stay must show application of mind. The power to grant stay is coupled with accountability.

Wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned and concluded within two-three months.

In view of above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the

stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.

Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 Cr.P.C. or Article 227 of the Constitution.

However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to re-appreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period.

Though no mandatory time limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated.

25/04/2018	**Shiv Singh (Appellant) vs. State of Himachal Pradesh & Ors (Respondent)**	**Supreme Court** **Civil Appeal No.4414 of 2018 [Arising out of SLP (C) No.7981 of 2017]** **R.K. Agrawal & A. M. Sapre, JJ**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Land acquisition – Objections not considered-whether the award is tenable – Held, No.

Brief facts :

The dispute in this case relates to acquisition of the land belonging to the appellants which is sought to be acquired under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the Act").

By notification dated 08.12.2015 issued under Section 11 of the Act, the State of Himachal Pradesh sought to acquire the appellants' land measuring around 1-00-49 Hectares along with the lands of other landowners. The acquisition was for public purpose, namely, "construction of road from Bus Stand Ruhil to Upper Ruhil via Kuper". The appellants (writ petitioners) had filed their objections to the proposed acquisition on 05.01.2016 well within the time prescribed under Section 15 of the Act. Without considering the objections the collector passed the award and the High Court had confirmed the same. Hence the present appeal to the Supreme Court.

Decision : Appeal allowed.

Reason :

Under the scheme of the Act, once the objections are filed by the affected landowners, the same are required to be decided by the Collector under Section 15(2) of the Act after affording an opportunity of being heard to the landowners, who submitted their objections and after making further inquiry, as the Collector may think necessary, he is required to submit his report to the appropriate Government for appropriate action in the acquisition in question.

In this case, we find that the Collector neither gave any opportunity to the appellants as contemplated under Section 15(2) of the Act and nor submitted any report as provided under Section 15(2) of the Act to the Government so as to enable the Government to take appropriate decision. In other words, we find that there is non-compliance of Section 15(2) of the Act by the Collector. In our view, it is mandatory on the part of the Collector to comply with the procedure prescribed under Section 15(2) of the Act so as to make the acquisition proceedings legal and in conformity with the provisions of the Act.

The aforementioned aspect of the case does not appear to have been taken note of by the High Court, resulting in dismissal of the appellants' writ petition requiring interference by this Court.

It is for this reason and without going into any other issue arising in the case, we are inclined to allow the appeal, set aside the impugned judgment and allow the appellants' writ petition in part.

We hereby direct the respondent No.2 herein (Collector, Winter Field, Shimla-3 HP) to decide the objections filed by the appellants on 05.01.2016 keeping in view the requirements of Section 15(2) of the Act and pass appropriate orders.

20/09/2018	**State of Maharashtra (Appellant) vs. Sayyed Hassan Sayyed Subhan (Respondent)**	**Supreme Court** **Criminal Appeal No.1195 of 2018 [Arising out of Special Leave Petition (Criminal) No.4475 of 2016] with batch of appeals** **S. A. Bobde & L.Nageshwar Rao, JJ**

Food and Safety Standards Act, 2006 read with Indian Penal Code, 1860 – Offences under food Act – whether prosecution under IPC could be initiated – Held, Yes.

Brief facts :

First Information Reports (FIRs) were registered for transportation and sale of Gutka/Pan Masala for offences punishable under Sections 26 and 30 of the Food and Safety Standards Act, 2006 (hereinafter referred to as the 'FSS Act') and Sections 188, 272, 273 and 328 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). The Respondents in the above appeals filed Criminal Writ Petitions and Criminal Applications in the High Court of Bombay for quashing the FIRs. The High Court quashed the criminal proceedings, initiated under the IPC, against the Respondents and declared that the Food Safety Officers can proceed against the Respondents under the provisions of Chapter X of the FSS Act. Aggrieved thereby, the State of Maharashtra is before us.

Decision : Appeals allowed.

Reason :

There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence [T.S. Baliah v. T.S.Rengachari– (1969) 3 SCR 65]. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time, an offence under any other law [State of Bihar v. Murad Ali Khan – (1988) 4 SCC 655.

In State of Rajasthan v. Hat Singh (2003) 2 SCC 152] this Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the Respondent therein for offences under the Mines and Minerals (Development and Regulation) Act 1957 and Indian Penal Code, this Court in State (NCT of Delhi) v. Sanjay (2014) 9 SCC 772 held that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the IPC merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point.

Regarding the second point as to whether offences under Section 188, 272, 273 and 328 have been made out against the Respondents, we have considered the submissions made by the learned Additional Solicitor General for the State of Maharashtra and the learned Senior Counsel appearing for the Respondents. Without going into

details of the submissions made, we find that points that were not argued before the High Court were raised by both sides. We suggested to the parties that the matters have to be considered afresh by the High

Court by permitting both sides to raise all contentions which were canvassed before us. There was no serious objection by both sides to the remand of the matters back to the High Court. The only request made by the learned Senior Counsel for the Respondents is that no coercive action should be taken against the Respondents during the pendency of Criminal Writ Petitions and the Criminal Applications before the High Court. We remand the matters to the High Court to consider the Criminal Writ Petitions and Criminal Applications afresh in respect of the second point framed.

23/07/2021	**Prakash Gupta (Appellant) vs. SEBI (Respondent)**	**Supreme Court of India** **Criminal Appeal No 569 of 2021 [@ SLP (Crl) No. 4728 of 2019]**

Consent of SEBI is not required for compounding of offences under SEBI Act. However, views of SEBI should be considered. Supreme Court issues guidelines for compounding.

Brief facts:

The appellant is being prosecuted for an offence under Section 24(1) of the Securities and Exchange Board of India Act, 1992 ("SEBI Act"). The appellant sought the compounding of the offence under Section 24A. The Trial Court rejected the application, upholding the objection of the SEBI that the offence could not be compounded without its consent. Single Judge of the High Court of Delhi upheld the order of the Trial Judge in revision. The High Court has held that the trial has reached the stage of final arguments and the application for compounding cannot be allowed without SEBI's consent. The reasons of the High Court are extracted below:

"6. Compounding at the initial stage has to be encouraged, but not at the final stage. The object of the SEBI Act has to be kept in mind. A stable and orderly functioning of the securities market has to be ensured. It will not be in the interest of justice to discharge the accused at the final stage of the proceedings by allowing the application for compounding without the consent of SEBI Act as it will defeat the objective of the SEBI Act. Though the Adjudicating Officer has found that the alleged violation committed by petitioner has not resulted in any loss to the investors, but this by itself would not justify discharge of accused at the fag end of trial. After considering the Supreme Court's decision in Meters and Instruments Private. Limited (Supra), and the view expressed by High Court of Bombay in N.H. Securities Ltd. (Supra) as well as the facts and circumstances of this case, I find no justification to allow petitioner's application under Section 24A of the SEBI Act, 1992."

This view of the High Court has been called into question in these proceedings.

Desicion: Impleadment and interventions allowed.

Reason:

Hon'ble Supreme Court observed that legislative sanction for compounding of offences is based upon two contrasting principles:

First , that private parties should be allowed to settle a dispute between them at any stage (with or without the permission of the Court , depending on the offence), even of a criminal nature, if proper restitution has been made to the aggrieved party; and second, that, however, this should not extend to situations where the offence committed is of a public nature, even when it may have directly affected the aggrieved party. The first of these principles is crucial so as to allow for amicable resolution of disputes between parties without the adversarial role of Courts, and also to ease the burden of cases coming before the Courts. However, the second principle is equally

Important because even an offence committed against a private party may affect the fabric of society at large.

Non-prosecution of such an offence may affect the limits of conduct which is acceptable in the society. The Courts play an important role in setting these limits through their adjudication and by prescribing punishment in proportion to how far away from these limits was the offence which was committed. As such, in deciding on whether to compound an offence, a Court does not just have to understand its effect on the parties before it but also consider the effect it will have on the public. Hence, societal interest in the prosecution of crime which has a wider social dimension must be borne in mind.

In the present case, it is evident that Section 24A does not stipulate that the consent of SEBI is necessary for the SAT or the Court before which such proceedings are pending to compound an offence. Where Parliament intended that a recommendation by SEBI is necessary, it has made specific provisions in that regard in the same statute. Section 24B provides a useful contrast. Section 24B(1) empowers the Union Government on the recommendation of SEBI, if it is satisfied a person who has violated the Act or the Rules or Regulations has made a full and true disclosure in respect of the alleged violation , to grant an immunity from prosecution for an offence subject to such conditions as it may impose. The second proviso clarifies that the recommendation of SEBI would not be binding upon the Union Government. In other words, Section 24B has provided for the exercise of powers by the Central Government to grant immunity from prosecution on the recommendation of SEBI. In contrast, Section 24A is conspicuously silent in regard to the consent of SEBI before the SAT or, as the case may be, the Court before which the proceeding is pending can exercise the power. Hence, it is clear that SEBI's consent cannot be mandatory before SAT or the Court before which the proceeding is pending, for exercising the power of compounding under Section 24A.

Guidelines for Compounding under Section 24A

Section 24A only provides the SAT or the Court before which proceedings are pending with the power to compound the offences, without providing any guideline as to when should this take place. Hence, we deem it necessary to elucidate upon some guidelines which SAT or such Courts must take into account while adjudicating an application under Section 24A:

(i) They should consider the factors enumerated in SEBI's circular dated 20 April 2007 and the accompanying FAQs, while deciding whether to allow an application for a consent order or an application for compounding. These factors, which are non-exhaustive, are:

"Following factors, which are only indicative, may be taken into consideration for the purpose of passing Consent Orders and also in the context of compounding of offences under the respective statute:

1. Whether violation is intentional.
2. Party's conduct in the investigation and disclosure of full facts.
3. Gravity of charge i.e. charge like fraud, market manipulation or insider trading.
4. History of non-compliance. Good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past.
5. Whether there were circumstances beyond the control of the party.
6. Violation is technical and/or minor in nature and whether violation warrants penalty.
7. Consideration of the amount of investors' harm or party's gain.
8. Processes which have been introduced since the violation to minimize future violations/lapses.
9. Compliance schedule proposed by the party.
10. Economic benefits accruing to a party from delayed or avoided compliance.

11. Conditions where necessary to deter future noncompliance by the same or another party.
12. Satisfaction of claim of investors regarding payment of money due to them or delivery of securities to them.
13. Compliance of the civil enforcement action by the accused.
14. Party has undergone any other regulatory enforcement action for the same violation.
15. Any other factors necessary in the facts and circumstances of the case."

(ii) According to the circular dated 20 April 2007 and the accompanying FAQs, an accused while filing their application for compounding has to also submit a copy to SEBI, so it can be placed before the HPAC. The recommendation of the HPAC is then filed before the SAT or the Court, as the case may be. As such, the SAT or the Court must give due deference to such opinion. As mentioned above, the opinion of HPAC and SEBI indicates their position on the effect of non-prosecution on maintainability of market structures. Hence, the SAT or the Court must have cogent reasons to differ from the opinion provided and should only do so when it believes the reasons provided by SEBI/HPAC are mala fide or manifestly arbitrary;

(iii) The SAT or Court should ensure that the proceedings under Section 24A do not mirror a proceeding for quashing the criminal complaint under Section 482 of the CrPC, thereby providing the accused a second bite at the cherry. The principle behind compounding, as noted before in this judgment, is that the aggrieved party has been restituted by the accused and it consents to end the dispute. Since the aggrieved party is not present before the SAT or the Court and most of the offences are of a public character, it should be circumspect in its role. In the generality of instances, it should rely on the SEBI's opinion as to whether such restitution has taken place; and

(iv) Finally, the SAT or the Court should consider whether the offence committed by the party submitting the application under Section 24A is private in nature, or it is of a public character, the non-prosecution of which will affect others at large. As such, the latter should not be compounded, even if restitution has taken place.

Case Study

The AS Limited (Appellant) and the KS Limited (1st Respondent) entered into a Memorandum of Understanding (MOU) under which the Appellant was to sell the property to the 1st Respondent. However, the Appellant sold the property to the 2nd Respondent, instead to the 1st Respondent.

Therefore, the 1st Respondent filed civil suits against the Appellant and the 2nd Respondent for interim relief sought interim injunction against the Appellant to part with the property. The trial court granted injunction and the High Court affirmed it on the ground that the MOU was a concluded contract between the Appellant and 1st Respondent. Appellant challenged the impugned order of the High Court before the Supreme Court.

Decide whether injunction granted by High Court is valid.

Case Study

Kishore was arrested for murder of four persons with whom he had financial dealings. He was convicted and death sentence was awarded to him by Sessions Court which was confirmed by High Court. He has appealed to Supreme Court and the appeal is pending. During his confinement in jail he has written his auto biography mentioning his close connection with many Government officials and Police authorities. He has given this book to his wife with the knowledge of jail authorities and in the presence of his advocate desiring that it should be published. The publisher makes a public announcement about the future release of the work. When the officials who were

implicated in the book became aware of this, they put extreme pressure on Kishore not to publish the same on the pretext that the matters contained in it were false. The person who intended to publish and the authorities who were implicated (falsely according to them) moved the court for an order to restrain the publication.

Decide whether Government can restrain publication of defamatory but true material?

Case Study

Mr. Suresh was accused of taking bribe during his service. He was prosecuted before Lok Ayukta. The charges could not be proved. He was then acquitted by the Lok Ayukta. In the meantime, the employer of Mr. Suresh initiated domestic inquiry proceedings against Suresh. He was found guilty and dismissed from service. Suresh now challenges the decision of the employer on the ground that he has been acquitted by a criminal court and cannot now be dismissed.

Once a criminal court decides, does a departmental inquiry have any legal credibility? Discuss.

8

GOVERNANCE ISSUES

CASE STUDY - 1

Dr. Sen, an industrial chemist with 15 years of experience, has recently been appointed to the post of Chief Executive Officer (CEO) of Pharma Ltd., a listed company. He has previously been employed in the company as Research Director. In preparation for his new assignment he has been trying to get to grips with the concept of corporate governance and all that it entails.

The board of Pharma Ltd. comprises of total ten directors (including one women director), six non-executive directors and five were considered independent. The board is responsible for overseeing strategy, approving major corporate initiatives and reviewing performance. There are three board committees - the Audit Committee, Remuneration Committee and Investors Grievance Committees. However, there is no Nomination Committee.

As the Company Secretary and Compliance Officer of Pharma Ltd, he is seeking your assistance to clarify

some issues of concern.

You have been asked to prepare a brief report in which you:

(a) Provide Dr. Sen with a robust definition of corporate governance and a brief explanation of what you understand corporate governance to be.

(b) Comment on the board composition of Pharma Ltd. with respect to the Companies Act, 2013 and SEBI LODR Regulations, 2015. Also comment whether Dr. Sen should be Chairman of the Company.

(c) Explain whether Nomination Committee is mandatory under Companies Act, 2013 and what should be the role of Nomination Committee.

Suggested Solution- Case Study-1

(a) Corporate Governance has a broad scope. It includes both social and institutional aspects. Corporate Governance encourages a trustworthy, moral, as well as ethical environment. In other words, the heart of corporate governance is transparency, disclosure, accountability and integrity. It is to be borne in mind that mere legislation does not ensure good governance. Good governance flows from ethical business practices even when there is no legislation.

Good corporate governance promotes investor confidence, which is crucial to the ability of entities listed to compete for capital. Good corporate governance is is essential to develop added value to the stakeholders as it ensures transparency which ensures strong and balanced economic development. This also ensures that the interests of all shareholders (majority as well as minority shareholders) are safeguarded. It ensures that all shareholders fully exercise their rights and that the organization fully recognizes their rights.

Some other good definitions are given hereunder for better understanding:-"Corporate Governance is the application of best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility for sustainable development of all stakeholders."

The Institute of Company Secretaries of India

"Corporate Governance is concerned with the way corporate entities are governed, as distinct from the way business within those companies are managed. Corporate governance addresses the issues facing Board of Directors, such as the interaction with top management and relationships with the owners and others interested in the affairs of the company".

Robert Ian (Bob) Tricker

(b) **Board Composition:** Section 149(1) of the Companies Act 2013 provides that every company shall have a Board of Directors consisting of individuals as directors and shall have—

- A minimum number of three directors in the case of a public company,

- Atleast two directors in the case of a private company, and
- Atleast one director in the case of a One Person Company; and
- A maximum of fifteen directors provided that a company may appoint more than fifteen directors after passing a special resolution.

Section 149(4) provides that every public listed company shall have at- least one third of total number of directors as independent directors.

Regulation 17(1)(a) of SEBI LODR Regulations, 2015 provides that Board of directors shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty per cent of the board of directors shall comprise of non-executive directors.

The board of Pharma Ltd. comprises of total ten directors, six non-executive directors and five were considered independent. The total number of directors is more than the minimum required directors and at- least one third of total number of directors are independent directors.

Also as per SEBI Regulations, more than fifty per cent of the board of directors comprises of non- executive directors and one women director. Therefore, the board composition of Pharma ltd. is optimum as per the laws and regulations.

Separation of Chairman and CEO: First proviso to Section 203(1) of the Companies Act, 2013 provides for the separation of role of Chairman and Chief Executive Officer subject to conditions thereunder. It specifies that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,–

(a) the articles of such a company provide otherwise;

(b) the company does not carry multiple businesses:

Regulation 17(1B) of SEBI (LODR) Regulations, 2015 provides that effect from April 1, 2020, the top 500 listed entities shall ensure that the Chairperson of the board of such listed entity shall -

(a) be a non-executive director;

(b) not be related to the Managing Director or the Chief Executive Officer as per the definition of the term "relative" defined under the Companies Act, 2013:

Also, it is perceived that separating the roles of chairman and chief executive officer (CEO) increases the effectiveness of a company's board. It is the board's and chairman's job to monitor and evaluate a company's performance. A CEO, on the other hand, represents the management team. If the two roles are performed by the same person, then there is less accountability. A clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/CEO promotes balance of power. The benefits of separation of roles of Chairman and CEO can be:

- **Director Communication**: A separate chairman provides a more effective channel for the board to express its views on management
- **Guidance**: A separate chairman can provide the CEO with guidance and feedback on his/her performance
- **Shareholders' interest**: The chairman can focus on shareholder interests, while the CEO manages the company
- **Governance**: A separate chairman allows the board to more effectively fulfill its regulatory requirements
- **Long-Term Outlook**: Separating the position allows the chairman to focus on the long-term strategy while the CEO focuses on short-term profitability

- **Succession Planning**: A separate chairman can more effectively concentrate on corporate succession plans.

Therefore, on the basis of above mentioned laws and regulations and the potential benefits of separating Chairman and CEO, Dr. Sen should not be made Chairman of the Company as he is already CEO of the Company.

(c) Yes, it is mandatory under the Companies Act, 2013 to constitute the Nomination and Remuneration Committee. Section 178(1) of the Act read with rule 6 of the Companies (Meetings of the Board and its Powers) Rules, 2014 and Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that the board of directors of following classes of companies is required to constitute a Nomination and Remuneration Committee of the Board-

- every listed public companies;
- All public companies with a paid up capital of 10 crore rupees or more;
- All public companies having turnover of 100 crore rupees or more;
- All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.

Since Pharma Ltd. Is a listed company, it is mandatory to the Nomination and Remuneration Committee which shall perform following functions:

- Identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance [Section 178(2)]
- Formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. [Section 178(3)]

CASE STUDY - 2

In the year 2014, Chief Executive Mr. Roy of Sunny Ltd, a global internet communications company, announced an excellent set of results. Mr. Roy announced that, compared to 2013, sales had increased by 50%, profits by 100% and total assets by 80%. The dividend was to be doubled from the previous year.

Three months later, Mr. Roy called a press conference to announce a restatement of the 2014 results. He said this was necessary because of some 'regrettable accounting errors'. He also disclosed that in fact the figures for 2014 were increases of 10% for sales, 20% for profits and 15% for total assets. The proposed dividend would now only be a modest 10% more than last year.

Later that month, the company announced that following an internal investigation, there would be further restatements, all dramatically downwards, for the years 2012 and 2013. This caused another mass selling of shares of Sunny Ltd resulting in a final share value the following day of $1. This represented a loss of shareholder value of $12 billion from the peak share price.

Mr. Roy resigned and SEBI ordered an investigation into what had happened at Sunny Ltd. The shares were suspended by the stock exchange. A month later, Sunny Ltd. was declared bankrupt. Nothing was paid out to shareholders whilst suppliers received a fraction of the amounts due to them.

The Chief Executive confessed to having orchestrated an accounting fraud for several years. He admitted to manipulating the firm's accounts to report profits that were more than 10 times the actual figures and reported a cash balance of US$1 billion that was non-existent. Sunny Ltd. has also committed systemic fraud in its

worldwide regulatory filings. For a multinational company with the illustrious Board and significant foreign and institutional shareholding, one would expect corporate governance of highest order; however, the reality was different.

Based on the above fact, answer the following:

(a) Is the given case an example of intentional fraud by the top executive of the Company? Can such frauds be reported under the Companies Act 2013? What are the penalties for not reporting of frauds under Companies Act 2013?

(b) Can independent directors be held liable for frauds perpetrated by or with the support of the top management? Critically examine.

(c) A number of directors resigned from the company after the fraud became public. Examine the role directors could have played to protect shareholders' interests?

(d) What is the role of audit committee in fraud risk oversight? Draft some questions which the audit committee consider to effectively manage fraud risks.

Suggested Solution- Case Study-2

(a) Yes, above case is an example of intentional fraud by the top executives of the Company. Since the Chief Executive himself confessed to having orchestrated an accounting fraud for several years. He admitted to manipulating the firm's accounts to report profits that were more than 10 times the actual figures and reported a cash balance of US$1 billion that was non-existent.

Fraud is a deliberate action to deceive another person with the intention of gaining some things. Fraud can loosely be defined as "any behavior by which one person intends to gain a dishonest advantage over another". In other words, fraud is an act or omission which is intended to cause wrongful gain to one person and wrongful loss to the other, either by way of concealment of facts or otherwise.

Section 25 of the Indian Penal Code, 1860 defines the word, "Fraudulently", which means, a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

The Companies Act 2013 has also explained fraud. Explantion to Section 447 defines "fraud", which reads as under: "fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

Reporting of fraud under the Companies Act, 2013: Frauds by executives in the company can be reported under the Act under the Section 143(12) of the Companies Act, 2013 which requires the statutory auditors or cost accountant or company secretary in practice to report to the Central Government about the fraud/suspected fraud committed against the company by the officers or employees of the company. It includes only fraud by officers or employees of the company and does not include fraud by third parties such as vendors and customers.

Consequence of non-compliance: Sub-section 15 of section 143 states that if any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.

(b) Schedule IV of the Companies Act 2013 provides that the independent directors shall have certain duties like-

- seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company;

- participate constructively and actively in the committees of the Board in which they are chairpersons or members;
- where they have concerns about the running of the company or a proposed action, ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting;
- keep themselves well informed about the company and the external environment in which it operates;
- not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;
- ascertain and ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use;
- report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;
- ["act within their authority"], assist in protecting the legitimate interests of the company, shareholders and its employees etc.

So, it is expected from independent directors that they perform duties properly. However, Section 149(12) of the Companies Act 2013 provides that an independent director and a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Regulation 25(5) of SEBI (LODR) regulations, 2015 provides that an independent director shall be held liable, only in respect of such acts of omission or commission by the listed entity which had occurred with his knowledge, attributable through processes of board of directors, and with his consent or connivance or where he had not acted diligently with respect to the provisions contained in these regulations.

(c) A director is "bound to take such precautions and show such diligence in their office as a prudent man of business would exercise in the management of his own affairs." The Duties and Responsibilities can be broadly classified into two categories:

- The duties, liabilities and responsibilities which promotes corporate governance through the sincerest efforts of directors in efficient management and swift resolution of critical corporate issues and sincere and mature decision making to avoid unnecessary risks to the corporate entity and its shareholders.
- Keeping the interests of company and its stakeholders ahead of personal interests.

The following duties of the directors have been provided under Section 166 of the Companies Act, 2013 and apply to all types of directors-

- A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

- A director of a company shall not assign his office and any assignment so made shall be void.
- If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Clearly, the fraud could not have been gone un-noticed, if the directors have discharged their duties diligently. Directors certainly could have played a major role in highlighting the discrepancies in the financial statements long before declaring the company bankrupt and could have protected the shareholders' interests.

(d) The audit committee must be equipped to assess, monitor and influence the tone at the top to aim at enforcing a zero-tolerance approach to fraud. The audit committee should be sensitive to the various business pressures on management – to meet earnings estimates and budget targets, meeting incentive compensation targets, hiding bad news, etc. – and how small adjustments can trigger bigger problems. The audit committee's objective should be to ensure that arrangements are in place for the receipt and proportionate independent investigation of alleged or suspected fraudulent actions and for appropriate follow-up action.

Some of the Symptoms of potential fraud are –

- Overly complex and / or opaque corporate structures.
- Overly dominant senior executives with unfettered powers and highly leveraged reward schemes.
- Frequent changes in finance, other key personnel or auditors.
- Implausible explanations as to surpluses, or projections those are "too good to be true".
- Organisations significantly outperforming the competition.
- Aggressive accounting policies and frequent changes thereto.

Key questions for audit committees to consider:

- Is management taking sufficient responsibility for the fight against fraud and misappropriation?
- Is the tone from the top unequivocal in insisting on an anti-fraud culture throughout the organisation?
- Do record-keeping policies and procedures minimise the risk of fraud?
- Are appropriate diagnostic assessments of fraud risks performed and updated periodically?
- Are all significant fraud risks properly included in the enterprise risk management approach, linked to relevant internal controls and monitored?
- Do codes of conduct contain adequate, user-friendly and up-to-date behavioural guidelines in respect of fraud and other misconduct?
- Are they adopted across the organisation and do they apply evenly to business partners and subcontractors?
- What is the level of assurance gained related to the effectiveness of anti-fraud controls by management, internal and/or external audit and is it appropriate in the circumstances?
- Are anti-fraud controls designed to detect or prevent financial reporting fraud from the early stage (i.e. before small adjustments snowball into bigger issues)?
- Are fraud-tracking and -monitoring systems and fraud response plans in place and are they fit for purpose?
- Do staff members at all levels have appropriate skills to identify the signs of fraud and do they receive fraud awareness training relevant to their role?

CASE STUDY – 3

You are the company secretary of a listed food manufacturing company. Your chairman informs you that he has been asked to meet with two major shareholders of the company. These are institutional investors who together own about 6% of the company's equity shares. Both of them have stated publicly their policy of socially responsible investment and the purpose of the meeting will be to discuss social and environmental issues and the company's policy on corporate social responsibility.

As a company secretary you are required to write a briefing note for the chairman including a discussion of the following issues:

(a) Role of institutional investors in good corporate governance.

(b) The socially responsible investment principles for institutional investors and the ways in which institutional investors may pursue a socially responsible investment strategy.

Suggested Solution- Case Study-3

(a) Institutional investors are those financial institutions which accept funds from other parties for investment by the institution in its own name but on their clients/beneficiaries behalf. The different kinds of institutional investors are banks, development financial institutions, insurance companies, mutual funds, foreign institutional investor, provident funds and proposed private fund managers. They are now significant players in the global economy.

Institutional investors are entrusted with funds from the public and most of the household income is with these institutional investors. They are safe keepers of public money and act in a fiduciary capacity. They are obligated to take decisions which best serve the companies' interests and steer the company to function in an ethical manner.

There is a mutual relationship between institutional investors and the good corporate governance of a company. The corporate governance practices followed by a company are very important to determine the number of institutional investors who would like to invest in the firm and the extent to which they would like to invest.

Most governance sensitive institutional investors would like to invest in firms which already have their governance mechanisms in place. Institutions with corporate governance mechanisms in place are better to invest in as this would mean decreased monitoring costs. The institutional investors would not have to play a proactive role in monitoring the practices followed by the company.

(b) The Institutional investors generally follow the given six Principles for Responsible Investment

- Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.
- Principle 2: We will be active owners and incorporate ESG issues into ownership policies and practices.
- Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which they invest.
- Principle 4: We will promote acceptance and implementation of the Principles within the investment industry.
- Principle 5: We will work together to enhance effectiveness in implementing the Principles.
- Principle 6: We will each report on their activities and progress towards implementing the Principles. Institutional Investors activities may include
- Monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration.
- Engagement in purposeful dialogue with companies on major issues.

- Decision-making on matters such as allocating assets, awarding investment mandates, designing investment strategies, and buying or selling specific securities.
- They set the tone for stewardship and may influence behavioural changes that lead to better stewardship by asset managers and companies.
- Asset managers, with day-to-day responsibility for managing investments, are well positioned to influence companies' long-term performance through stewardship.

CASE STUDY – 4

A multinational manufacturing company Alpha Ltd. had developed a complex governance structure to hide its fraudulent accounting activities. Each department had its own Finance unit which would report to a central Finance team headed by the CFO. Each unit was unaware of the performance of other departments. The top management consisted of a few professionals and family members. Also all top executives were allotted large quantities of shares to ensure that they had incentives to take actions that would help boost the stock price.

Alpha Ltd. had a whistleblower policy supervised by the Audit Committee. Ms. Xia, a senior qualified accountant working in the company had approached the finance director with her concerns about the financial statements but she failed to get the answers she needed and had threatened to tell the press. When her threat came to the attention of the board, she was intimidated to keep quiet.

Another employee had written to an independent director stating that the books of the firm had been manipulated. Although this letter was circulated among the board, no action was taken. The audit committee also failed to take any action.

Later that year, the fraud became public and the company was declared bankrupt eroding the shareholders value and interest.

Based on the above fact, answer the following:

(a) Explain the role of audit committee for effective oversight of matters pertaining to whistleblower complaints?

(b) What are the challenges of effective implementation of a whistleblower policy in a company such as Alpha Ltd.?

(c) As a Company Secretary provide some pointers for audit committee to consider regarding whistle blowing possibilities in the Company.

Suggested Solution- Case Study-4

(a) While the ultimate responsibility of vigil mechanism is with the board as a whole, audit committees are tasked with the principal oversight of whistle-blowing systems, with the direct responsibility for antifraud efforts generally residing with management including internal audit. Whistle-blowing procedures are a major line of defence against fraud and audit committees should ensure such procedures are effective. By focusing on whistle-blowing channels and considering it within the context of the organisation's overall approach to enterprise risk management – the audit committee can help strengthen internal controls, financial reporting and corporate governance.

The audit committee must be properly informed and actively engaged in overseeing the process while avoiding taking on the role or responsibilities of management. To this end, it should seek input from the legal counsel, internal and/ or external audit.

The audit committee should seek to ensure that management has considered all risks that are likely to have a significant financial, reputational or regulatory impact on the organisation. For any such risks, a rigorous assessment of the relevant internal controls – including their ability to detect or prevent fraud

– should be made. Effective monitoring of these internal controls and periodic re-assessments of their effectiveness are key elements to stay abreast, together with management's active engagement in the process. The audit committee should consider whether effective fraud awareness programmes are in place, updated as appropriate and effectively communicated to all employees.

(b) Some of the barriers to effective whistle blowing are-

- Operational like is the whistle blowing process fully embedded within the organisation? Do all staff members know what to do, what to look for? Do the hotlines and reporting lines actually work?
- Emotional and cultural barriers like Whistle blowers are commonly viewed as snitches, sneaks, grasses and gossips. This perception can make it difficult to blow the whistle even though individuals recognise that it is good for the company, employees, shareholders and other stakeholders.
- Potential whistle blowers often fear reporting incidents to management. Areas such as legal protection, fear of trouble and potential dismissal all play a part when an individual is considering whistle blowing.

(c) Some pointers for audit committee to consider regarding whistle blowing possibilities in the Company-

- Are whistle-blowing policies and procedures documented and communicated across the organisation?
- Does the whistle-blowing policy ensure that it is both safe and acceptable for employees to raise concerns about wrongdoing?
- Were the whistle-blowing procedures arrived at through a consultative process? Do management and employees "buy into" the process? Are success stories publicised?
- Are concerns raised by employees responded to within a reasonable time frame?
- Are procedures in place to ensure that all reasonable steps are taken to prevent the victimisation of whistleblowers and to keep the identity of whistle- blowers confidential?
- Has a dedicated person been identified to whom confidential concerns can be disclosed? Does this person have the authority and statute to act if concerns are not raised with, or properly dealt with, by line management and other responsible individuals?
- Does management understand how to act if a concern is raised? Do they understand that employees (and others) have the right to blow the whistle?
- Has consideration been given to the use of an independent advice centre as part of the whistle-blowing procedures?
- In cases where no instances are being reported though the whistle-blowing channel did management reassess the effectiveness of the procedures?

CASE STUDY – 5

Hotsun Company is a medium-sized listed company. Mr. Mohan is a wealthy business entrepreneur and the original founder of the company. He owns 28% of the ordinary shares and is the major shareholder, but he is no longer a member of the board of directors, having resigned several years ago when the company obtained its stock market quotation.

Although he is no longer a director, Mohan continues to show considerable interest in the business affairs of the company. Recently he has been demanding that the board should consult him on issues of business strategy and dividend policy. He also believes that at least two non-executive directors should resign because they contribute nothing of value to the board. Two members of the board agree, and argue that Mohan should be consulted regularly on important issues, given his success in leading the company in the past. However, the majority of the board members are hostile and resent Mohan's continual interference.

After a recent argument with the chairman, Mohan has threatened to sue members of the board for gross

dereliction of their duties as directors. He has also demanded the resignation of a board member who is the owner of a property company that has just sold a property to Hotsun Company at a price that Mohan considers excessive. The chairman was unaware of this matter.

Required

As company secretary, prepare a report for the chairman advising him about

(a) the powers of the board under the Companies Act, 2013

(b) the appropriate measures for dealing with Mohan and responsibility of the board towards Mohan.

(c) the provisions of RPT considering the allegations made by Mohan.

Suggested Solution- Case Study-5

(a) **Powers of the Board:** As per Section 179(3) read with Rule 8 of Companies (Meetings of Board and its Powers) Rules, 2014, the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—

- to make calls on shareholders in respect of money unpaid on their shares;
- to authorise buy-back of securities under section 68;
- to issue securities, including debentures, whether in or outside India;
- to borrow monies;
- to invest the funds of the company;
- to grant loans or give guarantee or provide security in respect of loans;
- to approve financial statement and the Board's report;
- to diversify the business of the company;
- to approve amalgamation, merger or reconstruction;
- to take over a company or acquire a controlling or substantial stake in another company;
- to make political contributions;
- to appoint or remove key managerial personnel (KMP);
- to appoint internal auditors and secretarial auditor.

(b) Mr. Mohan was one of the founder directors of the Company and a major shareholder of the company holding 28% of the shares. A responsible business acts with care and loyalty towards its shareholders and in good faith for the best interests of the corporation. Business therefore has a responsibility to:

- Apply professional and diligent management in order to secure fair, sustainable and competitive returns on shareholder investments.
- Disclose relevant information to shareholders, subject only to legal requirements and competitive constraints.
- Conserve, protect, and increase shareholder wealth.
- Respect shareholder views, complaints, and formal resolutions.

(c) According to Section 2(76) of Companies Act 2013, "related party", with reference to a company, means –

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager is a member or director;

(v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. (2%) of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act: Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is –

- a holding, subsidiary or an associate company of such company; or
- a subsidiary of a holding company to which it is also a subsidiary;

Section 188 (1) of the Companies Act 2013 deals with the related party transactions with respect to:

- Sale, purchase or supply of any goods or materials
- Selling or otherwise disposing of, or buying, property of any kind
- Leasing of property of any kind
- Availing or rendering of any services
- Appointment of any agent for purchase or sale of goods, materials, services or property
- Related party's appointment to any office or place of profit in the company, its subsidiary company or associate company, and
- Underwriting the subscription of any securities or derivatives thereof, of the company.

Also, Section 188(1) of the Companies Act 2013 provides that a company shall enter into any contract or arrangement with a related party with respect to Related party transactions only with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to certain conditions as prescribed under Rule 15 of the Companies (Meetings of board and its Powers) Rules, 2014.

Here, one of the board members had sold his property to Hotsun Ltd. at a price which Mohan considers excessive. The board member is related party as per Section 2(76) of Companies Act 2013 and selling property of any kind is a related party transaction as per Section 188 (1) of the Companies Act 2013.

The law in India does not prohibit RPTs. Instead, the law puts into place a system of checks and balances, such as requirements for approval from the board of directors/shareholders, timely disclosures and prior statutory approvals, to ensure that the transactions are conducted within appropriate boundaries. RPTs are required to be managed transparently, so as not to impose a heavy burden on a company's resources, affect the optimum allocation of resources, distort competition or siphon off public resources.

Therefore, if the related party transaction has taken place with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to certain conditions as prescribed under Rule 15 of the Companies (Meetings of board and its Powers) Rules, 2014, then it is allowed as per the laws and regulations and the allegations of Mr. Mohan will not hold much significance.

CASE STUDY – 6

You are the Company Secretary of a large Indian multinational company operating in the energy sector. Your company has operations in 25 different countries, some of which are developing economies, and it has raised debt finance, as well as equity finance, in 15 of these countries. You are aware that there have been protests from environmental lobby groups in several areas regarding oil pipelines. There have also been demonstrations about the impact of operations on local communities.

Your company has an internal audit committee, an audit committee, and a reasonably well-developed system of internal control system. However, the board has decided that perhaps it should form a new committee, a 'risk committee', which will deal with risk management and internal control specifically.

Accordingly, the board has asked you to prepare a briefing paper which summarises following-

(a) the main risks facing the business at present and the relative importance of managing these risks to the business.

(b) legal provisions and role and functions of risk management committee.

(c) draft a risk management policy for the company.

Suggested Solution - Case Study – 6

(a) Various financial risk and non-financial risk are present in any situations which need to be managed and understood. The risk which has some direct financial impact on the entity is treated as financial risk. This risk may be Market risk, Credit risk, and Liquidity risk, Operational Risk, Legal Risk and Country Risk. The following chart depicts some of the various types of financial risks. This type of risks do not usually have direct and immediate financial impact on the business, but the consequences are very serious and later do have significant financial impact if these risks are not controlled at the initial stage. This type of risk may include, Business/Industry & Service Risk, Strategic Risk, Compliance Risk, Industry Fraud Risk, Reputation Risk, Transaction risk, Disaster Risk.

- *Business risk:* This is risk arising from the possibility of unexpected developments in the business environment for oil companies. There is a business risk arising from potential variations in the price of oil. This creates huge difficulties for oil companies. When oil prices fall to a very low level, it may be difficult to operate at a profit. The variations in price were linked to the condition of the global economy and the demand for oil.
- *Environmental risk:* Oil companies face environmental risk, which is the risk of changes in environmental conditions that could affect the company. An obvious risk is the limit to the supply of oil and gas as natural resources, and the problems of finding new sources of supply. There are also risks from environmental pollution in the extraction and movement of oil, which could expose the company to heavy fines.
- *Combination of business risk and environmental risk:* Climate change is bringing a demand for renewable sources of energy. Multinational oil companies are aware of this, and are investing in green technology. This will create major business opportunities in the future, but there is also the risk that a competitor will be more successful in developing products and technologies based on renewable energy. The combination of business risk and environmental risks are therefore possibly the biggest risks facing the company.
- *Health and safety risk and legal risk:* The risks from failure to comply with health and safety requirements. Injuries to employees or the general public from accidents at processing plants could result in high penalties.
- *Political risk:* Oil companies operate in many countries where the government may be unstable, or where the government is challenged by rebel groups. There is a risk of government action against companies, for example, the risk of nationalisation or part-nationalisation, or by political groups or local populations opposed to central government. At least one offshore oil platform of a major multinational has been attacked by regional "bandits".
- *Financial risks:* The company operates in 25 countries and has raised finance in 15 countries (an unusually large number of countries). It operates globally, and presumably has raised money in a variety of different currencies. It is therefore exposed to a variety of financial risks. These are risks of

losses or threats to the stability of the business from unexpected changes in financial conditions, such as major changes in interest rates or foreign exchange rates.

- plays vital role in strategic planning. It is an integral part of project management. An effective risk management plan focuses on identifying and assessing possible risks. Some of the key advantages of having risk management are as under:
- Risk Management in the long run always results in significant cost savings and prevents wastage of time and effort in firefighting. It develops robust contingency planning.
- It can help plan and prepare for the opportunities that unravel during the course of a project or business.
- Risk Management improves strategic and business planning. It reduces costs by limiting legal action or preventing breakages.
- It establishes improved reliability among the stake holders leading to an enhanced reputation.
- Sound Risk Management practices reassure key stakeholders throughout the organization.

(b) **Risk Management committee:** Regulation 21 of the SEBI (LODR) 2015 deals with the Risk Management Committee and provides as under:

(1) The board of directors shall constitute a Risk Management Committee.

(2) The majority of members of Risk Management Committee shall consist of members of the board of directors.

(3) The Chairperson of the Risk management committee shall be a member of the board of directors and senior executives of the listed entity may be members of the committee.

(3A) The risk management committee shall meet at least once in a year.

(4) The board of directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit (such function shall specifically cover cyber security).

(5) The provisions of this regulation shall be applicable to top 500 listed entities, determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

(c) **Model Risk Management Policy:** A risk management policy serves two main purposes: to identify, reduce and prevent undesirable incidents or outcomes and to review past incidents and implement changes to prevent or reduce future incidents. A risk management policy should include the following sections:

- Risk management and internal control objectives (governance)
- Statement of the attitude of the organisation to risk (risk strategy)
- Description of the risk aware culture or control environment
- Level and nature of risk that is acceptable (risk appetite)
- Risk management organisation and arrangements (risk architecture)
- Details of procedures for risk recognition and ranking (risk assessment)
- List of documentation for analysing and reporting risk (risk protocols)
- Risk mitigation requirements and control mechanisms (risk response)
- Allocation of risk management roles and responsibilities
- Risk management training topics and priorities
- Criteria for monitoring and benchmarking of risks
- Allocation of appropriate resources to risk management

- Risk activities and risk priorities for the coming year

CASE STUDY – 7

A company Surya Ltd. has been mis-reporting its financial statements since more than 10 years which none of the stakeholders noticed for years. When the situation of the Company went from bad to worse and it had no option but to declare it bankrupt, the company issued a press statement that there is disparity between actual and reported results due to accounting errors.

The first question from shareholders of the Company was why the auditors had not spotted and corrected the fundamental accounting errors?

The auditor of the Company, WNC partnership (one of the largest audit firm in the country), had compromised its independence by a large audit fee and also consultancy income worth several times the audit fee. Because Surya Ltd. was such an important client for WNC, it had knowingly signed off inaccurate accounts in order to protect the management of the Company. The investigation also found a number of significant internal control deficiencies including no effective management oversight of the external reporting process and a disregard of the relevant accounting standards.

Based on the above fact, answer the following:

(a) Does the case highlight importance of independence of auditors? Explain provision under the Companies Act 2013 which promotes independence of auditors.

(b) Can such situations be voided with the provision of rotation of auditors? Critically examine

(c) NFRA constituted under the Companies Act 2013 has been vested with powers for action against the auditors. Explain powers and functions of NFRA.

Suggested Solution - Case Study – 7

(a) Yes, the given case very much highlights the importance of independence of directors. If directors had been independent and not under the influence of the client they would have performed their duties more diligently rather than signing inaccurate accounts statements.

Section 141 of the Companies Act 2013 provides that to maintain independence of the auditors the following cannot be appointed Auditors -

1. An officer or employee of the company.
2. A person who is partner or who in the employment, of an officer or employee of the company.
3. A person who or his relative or partner
   - Who is holding any security or interest in the company or the subsidiary or the holding? Anyway latest can hold security or interest in the company of the face value which should not exceed Rupees 1 lakh.
   - Who has indebted to the company or a subsidiary to hold and Associate Company is subsidiary or such holding company.
   - Who has provided the guarantee for any security in the connection with if the indebtness of any third person of the company arises.
4. "A person or a firm who (whether directly or indirectly) has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company".
5. A person whose relative is a director or is in the employment of the company as a director or any other key managerial post.

6. A person who is in full time employment elsewhere or a person or a partner of a firm holding employment as its auditor, if such person or partner is at the date of such appointment, holding appointment as auditor of more than 20 companies.
7. A person who has been convicted by the court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction.
8. Any person whose subsidiary or associate company or any other form of entity is engaged as on the date of appointment in consulting and specialized services as provided in Section 144 (auditors not to render certain services).

Auditor's Remuneration and Non- Audit Services: Though Companies Act, 2013 does not specify any restrictions on auditor's remuneration it should be reasonable, adequate but not excess, keeping the scope of the audit and auditors capabilities in mind. Excess Remuneration is an incentive to retain the client and reduces their objectivity. Non – audit services may affect the independence of the auditor hence the following are prohibited under Section 144.

- accounting and book keeping services;
- internal audit;
- design and implementation of any financial information system;
- actuarial services;
- investment advisory services;
- investment banking services;
- rendering of outsourced financial services;
- management services; and
- any other kind of services as may be prescribed.

Oversight of Auditors: To ensure independence and effectiveness of statutory auditors, the audit committee will review and monitor the auditor's independence, the audit scope and process, and performance of the audit team and accordingly recommend appointment, remuneration and terms of appointment of auditors of the company.

(b) Another important issue highlighted by the case is rotation of auditors. If the auditors have been changed after 4- 5 years, they would have different opinion on the financial statements. Since same auditors were continuing for a long time, the company was able to mis-report financial statement for more than 10 yrs. A mandatory audit rotation rule which sets a limit on the maximum number of years an audit firm can audit a given company's financial statements is a means to preserve auditor independence and possibly to increase investors' confidence in financial reports.

Mandatory audit firm rotation is defined in the Sarbanes-Oxley (SOX) Act as the imposition of a limit on the period of years during which an accounting firm may be the auditor of record. Mandatory audit firm rotation is often discussed as a potential way to improve audit quality – typically gaining attention when public confidence in the audit function has been eroded by events such as corporate scandals or audit failures.

When the same auditors continue in the same company for years and years, it results in a close relationship between management and auditors which increases the chances of fraud. Section 139(2) read with Rule 5 of the Companies (Audit and Auditors) Rules, 2014 provides that no listed company or a company belonging to the following classes of companies excluding one person companies and small companies:-

I. all unlisted public companies having paid up share capital of rupees 10 crore or more; II ı all private limited companies having paid up share capital of rupees 20 crore or more;

III. all companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crore or more shall appoint or re-appoint –

- an individual as auditor for more than one term of five consecutive years; and
- an audit firm as auditor for more than two terms of five consecutive years.

Also, an individual auditor who has completed his term of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term. An audit firm which has completed two terms of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term. Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

(c) Since auditors are guilty of signing false accounts statement, there should be some authority to take action against defaulting auditors. The National Financial Reporting Authority (NFRA) is an independent regulator established under Section 132 of the Companies Act, 2013 to oversee the auditing profession. It is similar to the Public Company Accounting Oversight Body set by in the USA by the Sarbanes Oxley Act 2002. NFRA has the investigative and disciplinary powers. NFRA can:

- investigate either suo moto or on the reference made to it by Central Government into the matters of professional or other misconduct, committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949.
- impose penalties of not less than 1 lakh which may extend to five times of the fees received, in case of individuals professionals and of not less than 10 lakhs which may extend to ten times of the fees received, in case of professional firms; if the misconduct is proved.
- debarring the member or the firm from engaging himself or itself from practice as the member of the Institute of Chartered Accountant of India for a minimum period of six months which may extend to a period of 10 years.
- NFRA has also been vested with the same powers as are vested in civil courts under the Code of Civil Procedure, 1908 while trying a suit, relating to:
- discovery and production of books of account and other documents, as may be specified by the National Financial Reporting Authority;
- summoning, enforcing the attendance of persons and examination them on oath;
- issuing commissions for the examination of witnesses or documents;
- inspection of any books, registers and other documents of any person to whom NFRA has summoned, enforced the attendance and examined on oath;

It is also being provided in section 132 of the Act that no other institute or body shall initiate or continue any proceedings in such matters of misconduct where the NFRA has initiated an investigation under this section. However, any person aggrieved by any order of the NFRA may appeal before the Appellate Authority constituted for this purpose.

The NFRA have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of **chartered accountants.** And no other institute or body shall commence or continue any proceedings in such matters of delinquency or misconduct where the National Financial Reporting Authority has initiated an investigation.

CASE STUDY - 8

Ms. Jaya is a director of finance for a charitable organisation. Aspiring to improve standards, she has worked hard to introduce tighter internal systems and to enhance inter-departmental relationships, and this has helped mould the finance staff into a more effective and dedicated team.

Two years ago she recruited a deputy, Dev, who, while technically competent, has increasingly sapped her own job satisfaction. Some of her longer-serving staff has commented informally to her that they find it irritating how Dev often seems unwilling to share information without being pressed. Some volunteers and staff have also told her that his attitude to them has made them consider resigning. However, no staff has formally complained or yet left the organisation.

There is tension between herself and Dev. He seems to resent any suggestions that she offers and to be incapable of receiving even mild criticism without taking offence. He has implied, several times, that he feels he is being unfairly harassed and bullied.

Jaya has discussed this situation informally with the chief executive. Although she has found Dev sometimes awkward and defensive, and she knows that another director also considers him somewhat abrasive, she has identified nothing that would warrant disciplinary action. Dev informs Jaya that he has been shortlisted for director of finance at another charity and he believes he is a strong candidate.

Quietly, Jaya feel elated at the prospect that he might be leaving. The following day she receives a letter from Dev's prospective new employer. (Dev has offered her name as referee without seeking her agreement.) The letter asks questions concerning the ability of the candidate to work in teams, to motivate volunteers and to accept advice.

For several reasons, Jaya would very much like Dev to be offered the position with the other charity. However, she is concerned that an honest response to the enquiries would jeopardise his chances of success, as such a response can only be negative.

Based on the above fact, answer the following:

(a) Discuss and highlight the key issues regarding the inherent ethical dilemmas.

(b) Discuss the fundamental ethical principles and the dilemma of Jaya?

(c) Briefly explain the course of action Jaya can take.

Suggested Solution - Case Study - 8

(a) The ethical dilemma consideration takes us into the grey zone of business and professional life, where things are no longer black or white and where ethics has its vital role today. A dilemma is a situation that requires a choice between equally balanced arguments or a predicament that seemingly defies a satisfactory solution.

An ethical dilemma is a moral situation in which a choice has to be made between two equally undesirable alternatives. Dilemmas may arise out of various sources of behaviour or attitude, as for instance, it may arise out of failure of personal character, conflict of personal values and organizational goals, organizational goals versus social values, etc. A business dilemma exists when an organizational decision maker faces a choice between two or more options that will have various impacts on the organization's profitability and competitiveness; and its stakeholders. In situations of this kind, one must act out of prudence to take a better decision.

Some of the key issues regarding the inherent ethical dilemmas in business are –

Fundamental Ethical Issues: The most fundamental or essential ethical issues that businesses must face are integrity and trust. A basic understanding of integrity includes the idea of conducting business affairs with honesty and a commitment to treating every customer fairly. When customers think a company is

exhibiting an unwavering commitment to ethical business practices, a high level of trust can develop between the business and the people it seeks to serve.

Diversity and the Respectful Workplace: An ethical response to diversity begins with recruiting a diverse workforce, enforces equal opportunity in all training programs and is fulfilled when every employee is able to enjoy a respectful workplace environment that values their contributions. Maximizing the value of each employees' contribution is a key element in your business's success.

Decision-Making Issues: A useful method for exploring ethical dilemmas and identifying ethical courses of action includes collecting the facts, evaluating any alternative actions, making a decision, testing the decision for fairness and reflecting on the outcome. Ethical decision-making processes should center on protecting employee and customer rights, making sure all business operations are fair and just, protecting the common good, and making sure the individual values and beliefs of workers are protected.

Compliance and Governance Issues: Businesses are expected to fully comply with environmental laws, federal and state safety regulations, fiscal and monetary reporting statutes and all applicable civil rights laws.

(b) The four fundamental ethical principles are-

- **The Principle of Respect for autonomy:** Autonomy is Latin for "self-rule" We have an obligation to respect the autonomy of other persons, which is to respect the decisions made by other people concerning their own lives. This is also called the principle of human dignity. It gives us a negative duty not to interfere with the decisions of competent adults, and a positive duty to empower others for whom we're responsible.
- **The Principle of Beneficence:** We have an obligation to bring about good in all our actions. We must take positive steps to prevent harm. However, adopting this corollary principle frequently places us in direct conflict with respecting the autonomy of other persons.
- **The Principle of nonmaleficence:** We have an obligation not to harm others: "First, do no harm. Corollary principle: Where harm cannot be avoided, we are obligated to minimize the harm we do. Corollary principle: Don't increase the risk of harm to others. Corollary principle: It is wrong to waste resources that could be used for good. Each action must produce more good than harm.
- **The Principle of justice:** We have an obligation to provide others with whatever they are owed or deserve. In public life, we have an obligation to treat all people equally, fairly, and impartially. Corollary principle: Impose no unfair burdens.

Jaya should think of her actions in terms of the fundamental ethical principles given above and provide her feedback accordingly.

(c) The course of action available for Jaya is described below –

(i) **Analyse the available options:** List the alternative courses of action available.

(ii) **Consider the consequences:** Think carefully about the range of positive and negative consequences associated with each of the different paths of action available.

- Who/what will be helped by what is done?
- Who/what will be hurt?
- What kinds of benefits and harms are involved and what are their relative values?
- What are the short-term and long-term implications?

(iii) **Analyse the actions:** Actions should be analysed in a different perspective i.e. viewing the action per se disregard the consequences, concentrating instead on the actions and looking for that option which seems problematic. How do the options measure up against moral principles like honesty,

fairness, equality, and recognition of social and environmental vulnerability? In the case you are considering, is there a way to see one principle as more important than the others?

(iv) **Make decision and act with commitment:** Now, both parts of analysis should be brought together and a conscious and informed decision should be made. Once the decision is made, act on the decision assuming responsibility for it.

(v) **Evaluate the system:** Think about the circumstances which led to the dilemma with the intention of identifying and removing the conditions that allowed it to arise.

CASE STUDY - 9

Flora Garments is a large clothes retailer and exporter in India. Its business strategy is based around vigorous cost leadership and it prides itself on selling fashionable garments for men, women and children at very low prices compared to its main rivals. For many years, it has achieved this cost leadership through carefully sourcing its garments from countries where labour is cheaper and where workplace regulation is less.

As a company with a complex international supply chain, the board of Flora Garments regularly reviews its risks. It has long understood that three risks are of particular concern to the Flora Garments shareholders: exchange rate risk, supply risk and international political risk. Each one is carefully monitored and the board receives regular briefings on each, with the board believing that any of them could be a potential source of substantial loss to the shareholders.

For the past decade or so, Flora Garments has bought in a substantial proportion of its supplies from Country X, a relatively poor developing country known for its low labour costs and weak regulatory controls. Last year, 65% of Flora Garments's supplies came from this one country alone. Country X has a reputation for corruption, including government officials, although its workforce is known to be hard-working and reliable. Most employees in Country X's garment industry are employed on 'zero hours' contracts, meaning that they are employed by the hour as they are needed and released with no pay when demand from customers like Flora Garments is lower.

Half of Flora Garments' purchases from Country X are from Gloria Company, a longstanding supplier to Flora Garments. Owned by the Fusilli brothers, Gloria outgrew its previous factory and wished to build a new manufacturing facility in Country X for which permission from the local government authority was required. In order to gain the best location for the new factory and to hasten the planning process, the Fusilli brothers paid a substantial bribe to local government officials.

The Fusilli brothers at Gloria felt under great pressure from Flora Garments to keep their prices low and so they sought to reduce overall expenditure including capital investments. Because the enforcement of building regulations was weak in Country X, the officials responsible for building quality enforcement were bribed to provide a weak level of inspection when construction began, thereby allowing the brothers to avoid the normal Country X building regulations.

In order to save costs, inferior building materials were used which would result in a lower total capital outlay as well as a faster completion time. In order to maximise usable floor space, the brothers were also able to have the new building completed without the necessary number of escape doors or staff facilities. In each case, bribes were paid to officials to achieve the outcomes the Fusilli brothers wanted. Once manufacturing began in the new building, high demand from Flora Garments meant that Gloria was able to increase employment in the facility. Although, according to Country X building regulations, the floor area could legally accommodate a maximum of 500 employees, over 1,500 were often working in the building in order to fulfil orders from overseas customers including Flora Garments. After only two years of normal operation, the new Gloria building collapsed with the loss of over 1,000 lives. Collapsing slowly at first, the number of people killed or injured was made much worse by the shortage of escape exits and the large number of people in the building. As news of the tragedy was broadcast around the world, commentators reported that the weakness in the building was due to the 'obsession with cheap clothes'.

Flora Garments was severely criticised in the local as well as international platform for being part of the cause, with many saying that if retailers pushing too hard for low prices, was one consequence of that. In response, Flora Garments' public relations department said that it entered into legal contracts with Gloria in order to provide its customers with exceptional value for money. Flora Garments said that it was appalled and disgusted that Gloria had acted corruptly and that the Flora Garments board was completely unaware of the weaknesses and safety breaches in the collapsed building.

Jessica, who was also the leader of a national pressure group 'Protect workers' rights' (PWR) lobbying the Country X government for better working conditions and health and safety practices for workers in the country questioned whether multinational companies such as Flora Garments should be allowed to exert so much economic pressure on companies based in developing countries. Jessica also wrote a letter to the board of Flora Garments, stating that Flora Garments was an unethical company because it supplied a market in its home country which was obsessed with cheap clothes. As long as its customers bought clothes for a cheap price, she believed that no-one at Flora Garments cared about how they were produced. She said that large international companies such as Flora Garments needed to recognise they had accountabilities to many beyond their shareholders and they also had a wider fiduciary duty in the public interest.

The defective Gloria factory in Country X, she argued, would not have existed without demand from Flora Garments, and so Flora Garments had to recognise that it should account for its actions and recognise its fiduciary duties to its supply chain as well as its shareholders. At the same time as events in Country X unfolded, the business journalists reporting on the events and Flora Garments' alleged complicity in the tragedy also became aware of a new innovation in business reporting called integrated reporting, an initiative of the International Integrated Reporting Council (IIRC).

The board of Flora Garments discussed the issues raised by the well-publicised discussion of Jessica's open letter and the comments from business journalists about integrated reporting. The board was, in principle, a supporter of the integrated reporting initiative and thought it would be useful to explain its position on a range of issues in a press release.

Required:

(a) How this case has affected reputation of Flora Garments? Provide some suggestions for reputation risk management to the company.

(b) Draft a statement for the board of Flora Garments explaining the role of Flora Garments's as a 'corporate citizen' given its international supply chain.

(c) Explain the concept of sustainable development to Flora Garments and also state the principles provided by the National Guidelines on Responsible Business Conduct (NGRBC), 2019

(d) Describe the basic framework of integrated reporting, and the potential benefits to Flora Garments' reporting on different capital types.

Suggested Solution - Case Study - 9

(a) Reputation Risk as the risk arising from negative perception on the part of customers, counterparties, shareholders, investors, debt-holders, market analysts, other relevant parties or regulators that can adversely affect a bank's ability to maintain existing, or establish new, business relationships and continued access to sources of funding (eg. through the interbank or securitization markets).

Reputational risk is multidimensional and reflects the perception of other market participants. Furthermore, it exists throughout the organisation and exposure to reputational risk is essentially a function of the adequacy of the bank's internal risk management processes, as well as the manner and efficiency with which management responds to external influences on bank-related transactions.

The reputation of Flora Garments was badly damaged after the incident of building collapsed. Flora

Garments was severely criticised in the local as well as international platform for being part of the cause, with many saying that if retailers pushing too hard for low prices, was one consequence of that.

Jessica, who was also the leader of a national pressure group 'Protect workers' rights' (PWR) lobbying in the Country X government for better working conditions and health and safety practices for workers in the country questioned whether multinational companies such as Flora Garments should be allowed to exert so much economic pressure on companies based in developing countries. She also wrote a letter to the board of Flora Garments, stating that Flora Garments was an unethical company because it supplied a market in its home country which was obsessed with cheap clothes. Flora Garments' loss of reputation may have long lasting damages like:

- It destroys the Brand Value
- Steep downtrend in share value.
- Ruined of Strategic Relationship
- Regulatory relationship is damaged which leads to stringent norms.
- Recruitment to fetch qualified staff as well the retention of the old employees becomes difficult. Some of the suggestions for effectively managing the reputation risk include following-
- Integration of risk while formulating business strategy.
- Effective board oversight.
- Image building through effective communication.
- Promoting compliance culture to have good governance.
- Persistently following up the Corporate Values.
- Due care, interaction and feedback from the stakeholders.
- Strong internal checks and controls
- Peer review and evaluating the company's performance.
- Quality report/ newsletter publications
- Cultural alignments

(b) Corporate citizenship is a commitment to improve community well-being through voluntary business practices and contribution of corporate resources leading to sustainable growth. Corporate responsibility is achieved when a business adapts CSR well aligned to its business goals and meets or exceeds, the ethical, legal, commercial and public expectations that society has of business.

The term corporate citizenship implies the behaviour, which would maximize a company's positive impact and minimize the negative impact on its social and physical environment. It means moving from supply driven to more demand led strategies; keeping in mind the welfare of all stakeholders; more participatory approaches to working with communities; balancing the economic cost and `benefits with the social; and finally dealing with processes rather than structures. The ultimate goal is to establish dynamic relationship between the community, business and philanthropic activities so as to complement and supplement each other. Corporate citizenship is being adopted by more companies who have come to understand the importance of the ethical treatment of stakeholders.

As a good corporate citizen, Flora Garments is required to focus on the following key aspects:

- Absolute Value Creation for the Society
- Ethical Corporate Practices
- Worth of the Earth through Environmental Protection
- Equitable Business Practices

- Corporate Social Responsibility
- Innovate new technology/process/system to achieve eco-efficiency
- Creating Market for All
- Switching over from the Stakeholders Dialogue to holistic Partnership
- Compliance of Statutes
- Effective supply chain management

(c) Sustainable development is a broad concept that balances the need for economic growth with environmental protection and social equity. It is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations. Sustainable development is a broad concept and it combines economics, social justice, environmental science and management, business management, politics and law.

The goal of sustainable development is to maintain economic growth without environment destruction. Sustainable Development indicates development that meets the needs of the present generation without compromising with the ability of the future generations to meet their needs. The principle behind it is to foster such development through technological and social activities which meets the needs of the current generations, but at the same time ensures that the needs of the future generation are not impaired. For example, natural energy resources, like Coal and Petroleum etc., should be prudently used avoiding wastage so that the future generation can inherit these energy resources for their survival also.

The contribution of sustainable development to corporate sustainability is twofold. First, it helps set out the areas that companies should focus on: environmental, social, and economic performance. Secondly, it provides a common societal goal for corporations, governments, and civil society to work towards ecological, social, and economic sustainability. However, sustainable development by itself does not provide the necessary arguments for why companies should care about these issues. Those arguments come from corporate social responsibility and stakeholder theory.

Corporate sustainability encompasses strategies and practices that aim at meeting the needs of the stakeholders today while seeking to protect, support and enhance the human and natural resources that will be needed in the future.

(d) Integrated reporting is a new approach to corporate reporting which is rapidly gaining international recognition. Integrated reporting is founded on integrated thinking, which helps demonstrate interconnectivity of strategy, strategic objectives, performance, risk and incentives and helps to identify sources of value creation. Integrated reporting is a concept that has been created to better articulate the broader range of measures that contribute to long-term value and the role, organisations play in society. Central to this is the proposition that value is increasingly shaped by factors additional to financial performance, such as reliance on the environment, social reputation, human capital skills and others. This value creation concept is the backbone of integrated reporting.

In addition to financial capital, integrated reporting examines five additional capitals that should guide an organisation's decision-making and long-term success — its value creation in the broadest sense. While integrated reports benefit a broad range of stakeholders, they're principally aimed at long-term investors. Integrated reporting starts from the position that any value created as a result of a sustainable strategy – regardless of whether it becomes a tangible or intangible asset — will translate, at least partially, into performance. Market value will therefore be impacted.

Integrated Reporting is one step ahead of sustainability reporting and its set to become the way companies report their annual financial and sustainability information together in one report. The aim of an integrated report is to clearly and concisely tell the organization's stakeholders about the company and its strategy

and risks, linking its financial and sustainability performance in a way that gives stakeholders a holistic view of the organization and its future prospects.

Conceptually, integrated reporting would build on the existing financial reporting model to present additional information about a company's strategy, governance, and performance. It is aimed at providing a complete picture of a company, including how it demonstrates stewardship and how it creates and sustains value.

The primary purpose of an integrated report is to explain to providers of financial capital how an organisation creates value over time. An integrated report benefits all stakeholders interested in an organisation's ability to create value over time, including employees, customers, suppliers, business partners, local communities, legislators, regulators and policy-makers.

International Integrated Reporting Framework (IIRC) has developed an International Integrated Reporting Framework to establish Guiding Principles and Content Elements that govern the overall content of an integrated report, and to explain the fundamental concepts that underpin them.

Benefits of integrated reporting to Flora Garments on different capital types:

As a business owner or manager, securing your customers', suppliers', finance providers', and other external stakeholders' trust is paramount. Using trust in the business is built by succinctly highlighting what drives value. Through integrated thinking, Flora Garments can build a better, more concrete understanding of the factors that determine its ability to create value over the short, medium, and long term.

Integrated Reporting uses the term "capitals" and a multi-capital model to recognize the fact that value is not stored in financial capital alone, but in all sorts of capitals. Just like financial capital, when these other capitals are properly understood and managed, they can continue to release value over time, while simultaneously growing in their capacity to continue to drive value in the future. Integrated reporting identifies these other capitals as manufactured, intellectual, human, social and relationship, and natural.

- *Financial capital* – the equity, debts, and grants available to Flora Garments to be used in the provision of goods or services.
- *Manufactured capital* – the tangible goods and infrastructure that Flora Garments owns, leases, or has access to that are used in the provision of goods or services.
- *Intellectual capital* – the knowledge, intellectual property, systems, and processes that Flora Garments has at its disposal that provide it with a competitive advantage and positively affect its future earning potential.
- *Human capital* – the skills, experience, and motivation that employees and management in Flora Garments possess that provide the foundation for future development and growth.
- *Social and relationship capital* – Flora Garments' brands and reputation, including its relationships with the community in which it operates, its customers, and business partners and others in its value chain, such as various government agencies.
- *Natural capital* – Flora Garments' access to environmental resources that it can use to provide a return and/or that it affects through its activities or the goods and services it creates.

CASE STUDY – 10

Growmart, a grocery and general merchandise store and the global retailer has more than 5000 retail units in 20 different countries. In 2017, Growmart was caught using child labour in a developing country X-Land. At the end of year, media made public the news that Growmart was using child labour at two factories in X-Land. Children aged 10-14 years old were found to be working in the factories for less than $50 a month making products of the Growmart brand for export. The company had zero tolerance policy for underage workers and

ceased business with the two factories immediately and alleged that despite its effort to inspect all factories, it is difficult to enforce its own corporate code of conduct with thousands of subcontractors around the world.

Now, on the basis of advice from an NGO from country X-Land that if Growmart cuts business with these factories, many workers could be laid off for lack of production, suppliers will hide abuses and workers will not tell the truth to auditors in order not to lose their jobs; Growmart resumed operations with two factories after giving warning that if underage workers were found or the company did not make corrections, the factory would be permanently banned from Growmart's production. Growmart has a strict corporate code of conduct in the industry but according to investigations Growmart is not able to enforce its code in developing countries.

Thus, Growmart changed its zero tolerance child labour policy due to NGO advice. Now, instead of immediately cutting business relationships with suppliers hiring up to two underage workers, they receive a warning and are obliged to take corrective measures for the next audit. Only when the supplier has hired more than two underage workers and has not corrected the situation does Growmart permanently terminate business relationships. This new policy was adopted in order assure that suppliers report the reality of working conditions.

Also, Growmart requires its suppliers who produce toys in China to sign up to the ICTI CARE Process. The ICTI CARE Process was created by the international toy industry to achieve a safe and human working environment for toy factory workers worldwide. In addition, Growmart conducts internal validation audits by Growmart's Ethical Sourcing team. These validation audits ensure that the ICTI CARE process is properly implemented and that it meets Growmart's Standards for Suppliers.

Growmart has updated policies against discrimination. Its GRI Report emphasizes gender equality, a diverse workforce and appointing women to top management positions. The report even dedicates a separate paragraph on 'Empowering women at Growmart'.

Based on the above case:

(a) Explain the concept of CSR and why successful companies like Growmart should adopt CSR in its strategy of growth?

(b) Explain triple bottom line approach of CSR.

(c) Highlight the factors which affect CSR with the examples from the given case.

Suggested Solution - Case Study - 10

(a) Business entity is expected to undertake those activities, which are essential for betterment of the society. Every aspect of business has a social dimension. Corporate Social Responsibility means open and transparent business practices that are based on ethical values and respect for employees, communities and the environment. It is designed to deliver sustainable value to society at large as well as to shareholders.

Corporate Social Responsibility is nothing but what an organisation does, to positively influence the society in which it exists. It could take the form of community relationship, volunteer assistance programmes, special scholarships, preservation of cultural heritage and beautification of cities. The philosophy is basically to return to the society what it has taken from it, in the course of its quest for creation of wealth. With the understanding that businesses play a key role of job and wealth creation in society, CSR is generally understood to be the way a company achieves a balance or integration of economic, environmental, and social imperatives while at the same time addressing shareholder and stakeholder expectations.

CSR is generally accepted as applying to firms wherever they operate in the domestic and global economy. The way businesses engage/involve the shareholders, employees, customers, suppliers, Governments, non-Governmental organizations, international organizations, and other stakeholders is usually a key feature of the concept. While an organisation's compliance with laws and regulations on social, environmental and economic objectives set the official level of CSR performance, it is often understood as involving the private sector commitments and activities that extend beyond this foundation of compliance with laws.

Essentially, Corporate Social Responsibility is an inter-disciplinary subject in nature and encompasses in its fold:

- Social, economic, ethical and moral responsibility of companies and managers,
- Compliance with legal and voluntary requirements for business and professional practice,
- Challenges posed by needs of the economy and socially disadvantaged groups, and
- Management of corporate responsibility activities.

Even successful companies like Growmart should incorporate CSR because it is very important strategy as wherever possible, consumers want to buy products from companies they trust; suppliers want to form business partnerships with companies they can rely on; employees want to work for companies they respect; and NGOs, increasingly, want to work together with companies seeking feasible solutions and innovations in areas of common concern.

Growmart's reputation had gone down because of employing child labour. The company adopted CSR approach towards the issue and gave warning to the supplier instead of immediately cutting business relationships with suppliers. Thus, CSR is a tool in the hands of corporate like Growmart to enhance the market penetration of their products, enhance its relation with stakeholders. CSR activities carried out by the enterprises affects all the stakeholders, thus making good business sense, the reason being contribution to the bottom line. The social responsibility of business can be integrated into the business purpose so as to build a positive synergy between the two.

- CSR creates a favourable public image, which attracts customers.
- It builds up a positive image encouraging social involvement of employees, which in turn develops a sense of loyalty towards the organization, helping in creating a dedicated workforce proud of its company.
- Society gains through better neighborhoods and employment opportunities, while the organisation benefits from a better community, which is the main source of its workforce and the consumer of its products.
- The company's social involvement discourages excessive regulation or intervention from the Government or statutory bodies, and hence gives greater freedom and flexibility in decision- making.
- The good public image secured by one organisation by their social responsiveness encourages other organizations in the neighborhood or in the professional group to adapt themselves to achieve their social responsiveness.
- The atmosphere of social responsiveness encourages co-operative attitude between groups of companies. One company can advise or solve social problems that other organizations could not solve.

(b) Triple Bottom Line (TBL) is based on the premise that business entities have more to do than make just profits for the owners of the capital, only bottom line people understand. "People, Planet and Profit" is used to succinctly describe the triple bottom lines. **"People"** (Human Capital) pertains to fair and beneficial business practices toward labor and the community and region in which a corporation conducts its business. **"Planet"** (Natural Capital) refers to sustainable environmental practices. It is the lasting economic impact the organization has on its economic environment A TBL company endeavors to benefit the natural order as much as possible or at the least do no harm and curtails environmental impact. **"Profit"** is the bottom line shared by all commerce. The need to apply the concept of TBL is caused due to –

- Increased consumer sensitivity to corporate social behaviour
- Growing demands for transparency from shareholders/stakeholders
- Increased environmental regulation

- Legal costs of compliances and defaults
- Concerns over global warming
- Increased social awareness
- Awareness about and willingness for respecting human rights
- Media's attention to social issues
- Growing corporate participation in social upliftment

While profitability is a pure economic bottom line, social and environmental bottom lines are semi or non-economic in nature so far as revenue generation is concerned but it has certainly a positive impact on long term value that an enterprise commands. But discharge of social responsibilities by corporates is a subjective matter as it cannot be measured with reasonable accuracy.

The current generation people are well aware of what goes on around them. People today know a lot about environment, how it affects them, how things we do affects the environment in turn. For the aware and conscientious consumers today, it is important that they buy products that do not harm the environment. They only like to deal with companies that believe and do things for the greater good of planet earth.

(c) Many factors influence CSR activities of companies:

- Globalization – Growmart was a global company and supplier's activities in some other developing part of the world made it to change its policy and work together with suppliers. Thus, focus on cross-border trade, multinational enterprises and global supply chains is increasingly raising CSR concerns related to human resource management practices, environmental protection, and health and safety, among other things.
- Governments and intergovernmental bodies, such as the United Nations, the Organisation for Economic Co-operation and Development and the International Labour Organization have developed compacts, declarations, guidelines, principles and other instruments that outline social norms for acceptable conduct. In the given case advise of NGO was important factor in changing the CSR policy of Growmart.
- Advances in communications technology, such as the Internet, cellular phones and personal digital assistants, are making it easier to track corporate activities and disseminate information about them. Non-governmental organizations now regularly draw attention through their websites to business practices they view as problematic.
- Consumers and investors are showing increasing interest in supporting responsible business practices and are demanding more information on how companies are addressing risks and opportunities related to social and environmental issues.
- Numerous serious and high-profile breaches of corporate ethics have contributed to elevated public mistrust of corporations and highlighted the need for improved corporate governance, transparency, accountability and ethical standards.
- Citizens in many countries are making it clear that corporations should meet standards of social and environmental care, no matter where they operate.
- There is increasing awareness of the limits of government legislative and regulatory initiatives to effectively capture all the issues that corporate social responsibility addresses.
- Businesses are recognizing that adopting an effective approach to CSR can reduce risk of business disruptions, open up new opportunities, and enhance brand and company reputation.

CASE STUDY – 11

Ms. Sania, a fund manager at institutional investor - Investo House, was reviewing the annual report of one of the major companies in her portfolio. The company, Sunway Ltd, had recently undergone a number of board changes as a result of a lack of confidence in its management from its major institutional investors of which Investo House was one.

The problems started two years ago when a new chairman at Sunway Ltd started to pursue what the institutional investors regarded as very risky strategies whilst at the same time failing to comply with a stock market requirement on the number of non-executive directors on the board.

Sania rang Sunway Ltd's investor relations department to ask why it still was not in compliance with the requirements relating to non-executive directors. Also when she asked how its board committees could be made up with an insufficient number of nonexecutive directors, the investor relations manager said he didn't know and that Sania should contact the chairman directly. She was also told that there was no longer a risk committee because the chairman saw no need for one.

Sania telephoned the chairman of Sunway Ltd. She began by reminding him that Investo House was one of Sunway Ltd's main shareholders and currently owned 17% of the company. She went on to explain that she had concerns over the governance of Sunway Ltd's and that she would like him to explain his noncompliance with some of the requirements of SEBI LODR Regulations, 2015 and also why he was pursuing strategies viewed by many investors as very risky.

The chairman reminded Sania that Sunway Ltd had outperformed its sector in terms of earnings per share in both years since he had become chairman and that rather than questioning him, she should trust him to run the company as he saw fit. He thanked Investo House for its support and hung up the phone.

Required:

(a) Explain what an 'agency cost' is and discuss the problems that might increase agency costs for Investo House in the case of Sunway Ltd.

(b) Describe, with reference to the case, the conditions under which it might be appropriate for an institutional investor to intervene in a company whose shares it holds.

(c) Evaluate the contribution that a risk committee made up of non-executive directors could make to Sania's confidence in the management of Sunway Ltd.

Suggested Solution - Case Study - 11

(a) **Definition of agency costs:** Agency costs arise from the need of principals (here shareholders) to monitor the activities of agents (here the board, particularly the chairman). This means that principals need to find out what the agent is doing, which may be difficult because they may not have as much information about what is going on as the agent does. Principals also need to introduce mechanisms to control the agent over and above normal analysis. Both finding out and introducing mechanisms will incur costs that can be viewed in terms of money spent, resources consumed or time taken.

Problems with agency costs in Sunway Ltd.

- **Attitudes to risk**: The first reason for increased agency costs is that the company's attitude to risk is a major area of concern on which Investo House requires more information, since the risk appetite appears significantly greater than what would normally be expected in this sector.
- **Unwillingness of chairman to be monitored**: Agency costs will certainly increase because he is unwilling to supply any information about the reasons for his policies, certainly indicating arrogance and also a lack of willingness to accept accountability. This means that Investo will have to find out from other sources, for example any nonexecutive directors who are on the board. Alternatively

they may contact other investors and take steps to put more pressure on Chairman, for example by threatening to requisition an extraordinary general meeting.

- **Inadequacy of existing mechanisms**: Agency costs will also increase because existing mechanisms for communicating concerns appear to be inadequate. There are insufficient non- executive directors on the board to exert pressure on the Chairman. There is no risk management committee to monitor risks. The investor relations department is insufficiently informed and unhelpful. The Chairman has abruptly dismissed the one-off phone call. Because of the seriousness of the concerns, ideally there should be regular meetings between Chairman and the major shareholders, requiring preparation from both parties and increasing agency costs.

(b) The conditions under which it might be appropriate for an institutional investor to intervene in a company whose shares it holds are-

- Institutional shareholders may intervene if they perceive that management's policies could lead to a fall in the value of the company and hence the value of their shares.
- There could be concerns over strategic decisions over products, markets or investments or over operational performance. Although they can in theory sell their shares, in practice it may be difficult to offload a significant shareholding without its value falling.
- Institutional investors may intervene because they feel management cannot be trusted like in the case Chairman has done away a key component of the control system (the risk committee) without good reason.
- Institutional investors may take steps if they feel that there is insufficient influence being exercised by nonexecutive directors over executive management.
- Intervention would be justified if there were serious concerns about control systems.
- Even if there is no question of dishonesty, there may be intervention if institutional investors feel that management is failing to address their legitimate viewpoints.

(c) **Importance of Risk Management Committee**: Risk committees are considered to be good practice in most worldwide governance regimes; particularly in situations like this where there are doubts about the attitudes of executive management. A risk committee staffed by non-executive directors can provide an independent viewpoint on Sunway Ltd.'s overall response to risk; a significant presence of non- executive directors, as required by governance guidelines, would be able to challenge Chairman's attitudes.

- The committee can pressurize the board to determine what constitutes acceptable levels of risk to reduce the incidence and impact on the business.
- Once the board has defined acceptable risk levels, the committee should monitor whether Sunway Ltd. is remaining within those levels, and whether earnings are sufficient given the levels of risks that are being borne.
- There should be a regular system of reports to the risk management committee covering areas known to be of high risk, also one-off reports covering conditions and events likely to arise in the near future. This should facilitate the monitoring of risk.
- The committee should monitor the effectiveness of the risk management systems, focusing particularly on executive management attitudes towards risk and the overall control environment and culture.
- A risk management committee can judge whether there is an emphasis on effective management or whether insufficient attention is being given to risk management due to the pursuit of high returns.

01.12.2015	**POONA EMPLOYEES UNION (Appellant) vs. FORCE MOTORS LIMITED & ANR (Respondent)**	**Supreme Court** **Civil Appeal Nos. 10130-10131 of 2010** **V. Gopala Gowda & Amitava Roy, JJ.**

Trade Union Act, 1926 – Section 19 – Recognition of trade union – Appellant union claiming to command 85% of the workforce of the company sought recognition – Existing union BKS and the company opposed – Industrial court granted recognition without appreciating the facts properly – Whether recognition to be accorded to the appellant union – Held, No.

Brief facts:

The Company, Force Motors Limited, earlier named as Bajaj Tempo Limited, has its office at Akurdi, Pune. The respondent No. 2- union i.e. Bhartiya Kamgar Sena ("the BKS") is the recognized union of the company. The appellant union in its bid to be adjudged as the recognized union in place of BKS, filed an application on 6.9.2003 before the Industrial Court, Pune, as required under the provision of the Act. It insisted that almost all the employees members of BKS had meanwhile tendered their resignation, and had expressed their desire to discontinue their membership therewith. It claimed that majority of the employees had become its members, so much so that in the month of January, 2003, it had in its fold 1973 employees members. Claiming that it was a union registered under the Trade Unions Act, 1926 (for short, hereinafter to be referred to as "1926 Act") on 20.7.1986 with a valid certificate to that effect, it asserted that with the exodus of the employees members from BKS to its ranks, it had the holding of 85% of the total employees of the company.

The company resisted the application by pleading, amongst others, that the appellant union was not duly registered under the 1926 Act. It denied as well that it did have, at that point of time, 30% membership of the employees of the company and that it did comply with the imperatives of Section 19 of the Act. Dismissing the appellant union's claim of majority membership to be a bogey, it refuted its claim of having larger membership of the employees of the company compared to BKS.

BKS, as well, joined the fray in similar lines with the company. Apart from reiterating that the appellant union was not duly registered under the 1926 Act and thus it had no locus standi to claim the status of a recognized union, it categorically controverted its clam of holding 30% membership of the company as compared to it (BKS). The Industrial Court allowed the application of the appellant union but on appeal the High court reversed the decision of the Industrial court. Hence the present appeal.

Decision: Appeal dismissed.

Reason:

We have extended our anxious consideration to the rival pleadings and the arguments based thereon. The documents available on record have also received our attention.

On a conjoint reading of the provisions of the Trade Unions Act, it is abundantly and predominantly clear that the exercise of examining an application of a union in an undertaking seeking the status of recognized union whether by replacing an existing recognized union or not, is neither a routine ritual nor an idle formality. Not only the applicant- union has to be eligible to apply as per the prescriptions with regard to the extent of membership it has to command for the relevant period, its application has to be bona fide in the interest of the employees and it must not have indulged in any activity of instigating, aiding or assisting, the commencement or continuation of a strike during the said period. The detailed procedure in both the eventualities, as contemplated in Sections 12 and 14 of the Act, enjoins a participating enquiry to verily ascertain the membership pattern of the rival unions, and also the existence or otherwise of the disqualifying factors as stipulated by the Act.

Section 9(2) of the Act, to reiterate, makes it incumbent on the Investigating Officer to assist the Industrial Court in matters of verification of membership of unions and also to assist the Industrial and Labour Courts investigating into the complaints relating to the unfair labour practice. Axiomatically, thus the enquiry to be undertaken by the Industrial Court, has to strictly comport to the prescripts of the relevant provisions and cannot be repugnant to the letter and spirit thereof. Indubitably, the burden would be on the applicant union to decisively establish its eligibility and suitability for being conferred the status of a recognized union to be adjudged by the legislatively enjoined parameters. Though the enquiry envisages participation of the rival union(s), employers and employees, having regard to the ultimate objective of installing a representative union to secure genuine, effective and collective negotiations, catering to industrial cohesion, harmony and growth, no compromise or relaxation in the rigours of the requirements of the enquiry can either be contemplated or countenanced.

The factual conspectus, albeit, not wholly identical herein, the fact remains that though it had been undertaken by the appellant union that if permitted to file its affidavits, the same would not be utilized to decide the issue of membership and was endorsed as well by the Industrial Court, its decision would clearly reveal that the contents of the affidavits not only had been taken note of by it but also relied upon along with the other materials on record, to eventually hold that the appellant union held in its ranks, the majority membership of the employees of the undertaking. To this extent, we are constrained to hold that the approach of the Industrial Court in deciding the issue of membership cannot be sustained being in derogation of the letter, spirit and objectives of the procedure prescribed by the Act to determine the issue of majority of membership for the purpose of identifying the recognized union of an industrial establishment. To recall, the common averment made in the 1556 affidavits filed by the appellant union is that the employees concerned had resigned from BKS on 12.12.2002 as it did not defend the interest of the workers and had functioned as per the directions of the company. It was further affirmed that the deponent did not pay union subscription to BKS since last year and that he/she had instead accepted the membership of the appellant union i.e. Puna Employees Union on 12.12.2002 and that concludes to be its member on the date of the execution of the affidavit. It was stated further that in view of the resignation of the deponent and others, BKS did not have majority of the membership since 1.1.2003 and that thus its recognition be revoked.

Adverting to the evidence, dehors the affidavits, suffice it to state that the report of the Investigating Officer clearly reveals that the contribution collected from the members of the appellant union had not been deposited in its bank account. This finding, to reiterate, is based on a scrutiny of the original records of the appellant union. Though the then President of the appellant union, in his testimony claimed that the membership fee had been duly deposited in the bank, he conceded that no complaint had been made against the Investigating Officer for incorporating a finding contrary thereto. No overwhelming evidence was also produced to counter this finding. This witness admitted as well that the accounts of the appellant union were not being audited by a Chartered Accountant, appointed by the Government which per se is also in repudiation of the mandate of Section 19(iv) of the Act. This witness in course of the cross- examination was also confronted with the annual return submitted by the union for the period January to December, 2003 in which he admitted that the columns No. 10, 13, 15 and 17 of the prescribed form had been left blank.

Not only, in the comprehension of this Court, the report of the Investigating Officer based on a scrutiny of all relevant records of the appellant union including the list of employees, membership receipt book, register of membership, cash book, bank pass books etc. does not as such admit of any doubt about its credibility, even some of the affiants, in their cross-examinations, on their affidavits filed in support of the claim of membership of the appellant union, had stated that they had affirmed the same because they were promised by the appellant union that their deducted wages for the go-slow tactics would be reimbursed. Though the respondents have nursed a remonstrance that the permission granted by the Industrial Court to cross-examine only 100 of the affiants out of 1556 deponents did denude them of a valuable right of defence, in our estimate, nothing much turns thereon. To reiterate, these affidavits could not have been, in the facts and circumstances of the case, and more particularly in view of the undertaking given by the appellant union and also the order to that effect by the Industrial Court that the same would not be used to decide the issue of membership, acted upon for this

purpose. It had throughout been in the understanding of all concerned that the contents of the affidavits would be used only for relevant and ancillary purpose but divorced from the issue of membership. The Industrial Court however, in concluding that the appellant union did have more than 30% of the membership of the total employees, took cognizance of these affidavits and relied on the same. The contents of the affidavits, referred to hereinabove, which are identical and in a format are to the effect that the deponents had not paid subscription to the BKS for the last two years and that they had accepted the membership of appellant union on 20.12.2002 and that BKS does not have majority of the membership since 1.1.2003. These affidavits taken on their face value, irrefutably testified on the aspect of membership of the two unions and though the Industrial Court did endeavour to construe the same for the purpose of ascertaining the intention of the affiants to support the appellant union, it indeed had a decisive bearing on its ultimate conclusion of its majority membership.

In the facts of the present case, in our estimate, the analysis and evaluation of the materials on record as undertaken cannot be denounced as illogical, irrational or uncalled-for and the view recorded in the impugned judgment and order is one permissible on the basis thereof.

We have perused the impugned judgment and order. In the above presiding backdrop of facts and law, we are of the unhesitant opinion that the view taken by High Court is plausible and rational being based on a logical analysis of the materials on record and the law applicable does not merit any interference at our end. Having regard to the paramount objectives of the Act and in the interest of industrial orderliness, stability, peace and overall wellbeing as well, we find no persuasive reason to intervene at this distant point of time. The appeals fail and are, accordingly, dismissed. No costs.

02.01.2019	**MANAGEMENT OF THE BARARA COOPERATIVE MARKETING-CUM PROCESSING SOCIETY LTD.** **(Appellant) vs. WORKMAN PRATAP SINGH (Respondent)**	**Supreme Court** **Civil Appeal No. 7 of 2019** **[Arising out of SLP © No. 17975 of 2014]** **A.M. Sapre & InduMalhotra, JJ.**

Industrial Disputes Act, 1947 – Section 25H – Workman accepted the compensation in lieu of his right of reinstatement in service – Later workman seeking reemployment – Whether tenable – Held, No.

Brief facts:

This appeal is directed against the final judgment and order passed by the High Court of Punjab & Haryana whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the judgment passed by the Single Judge of the High Court by which the respondent herein was ordered to be reinstated into service with back wages.

Decision: Appeal allowed.

Reason:

In our considered opinion, there was no case made out by the respondent (workman) seeking re-employment in the appellant's services on the basis of Section 25 (H) of the ID Act.

In the first place, the respondent having accepted the compensation awarded to him in lieu of his right of reinstatement in service, the said issue had finally come to an end; and Second, Section 25 (H) of the ID Act had no application to the case at hand.

In order to attract the provisions of Section 25(H) of the ID Act, it must be proved by the workman that firstly, he was the "retrenched employee" and secondly, his ex-employer has decided to fill up the vacancies in their set up and, therefore, he is entitled to claim preference over those persons, who have applied against such vacancies for a job while seeking reemployment in the services.

The case at hand is a case where the respondent›s termination was held illegal and, in consequence thereof, he was awarded lump sum compensation of Rs.12, 500/ in full and final satisfaction. It is not in dispute that the respondent also accepted the compensation. This was, therefore, not a case of a retrenchment of the respondent from service as contemplated under Section 25(H) of the ID Act.

That apart and more importantly, the respondent was not entitled to invoke the provisions of Section 25 (H) of the ID Act and seek re employment by citing the case of another employee (Peon) who was already in employment and whose services were only regularized by the appellant on the basis of his service record in terms of the Rules. In our view, the regularization of an employee already in service does not give any right to retrenched employee so as to enable him to invoke Section 25 (H) of the ID Act for claiming re employment in the services. The reason is that by such act the employer do not offer any fresh employment to any person to fill any vacancy in their set up but they simply regularize the services of an employee already in service. Such act does not amount to filling any vacancy.

In our view, there lies a distinction between the expression 'employment' and 'regularization of the service". The expression 'employment' signifies a fresh employment to fill the vacancies whereas the expression 'regularization of the service' signifies that the employee, who is already in service, his services are regularized as per service regulations.

In our view, the Labour Court was, therefore, justified in answering the reference in appellant›s favour and against the respondent by rightly holding that Section 25(H) of the ID Act had no application to the facts of this case whereas the High Court (Single Judge and Division Bench) was not right in allowing the respondent's prayer by directing the appellant to give him reemployment on the post of Peon.

In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. Impugned order is set aside and the award of the Labour Court is restored.

01.06.2019	**EMPLOYEES STATE INSURANCE CORPORATION (Appellant) vs. VENUS ALLOY PVT. LTD. (Respondent)**	**Supreme Court Civil Appeal No. 1464 of 2019 [Arising out of SLP © No. 12812 of 2015 A M Sapre & DineshMaheshwari, JJ.**

ESI Act, 1948 – Section 2 – Director – Whether an employee – Held, Yes. Brief facts:

The short question calling for determination in this appeal is as to whether the Directors of respondent-Company, who are receiving remuneration, come within the purview of "employee" under sub-section (9) of Section 2 of the Employees' State Insurance Act, 1948 ('the ESI Act')?

Decision: Appeal allowed

Reason:

In the case of Employees' State Insurance Corporation v. Apex Engineering Pvt. Ltd. 1997 (77) F.L.R. 878, the Board of Directors of respondent-Company resolved to elect one of its Directors as Managing Director of the Company and to grant him annual remuneration of Rs. 12,000/- for rendering services as Managing Director. The question was as to whether the said Managing Director was an "employee" within the meaning of Section 2(9) of the ESI Act? Though the High Court and the ESI Court had answered this question against the Corporation, but this Court allowed the appeal and, inter alia, held that the Managing Director, even when to be treated as principal employer, could also be an employee and could carry such dual capacity.

We are clearly of the view that what has been observed and held by this Court in Apex Engineering (supra), in relation to the Managing Director of a Company, applies with greater force in relation to a Director of the

Company, if he is paid the remuneration for discharge of the duties entrusted to him.

It is noticed that in the present case, the appellant-Corporation in its impugned order dated 06.04.2005 specifically asserted that the Directors of the Company were paid remuneration at the rate of Rs. 3,000/- p.m. and they were falling within the definition of "employee" under the ESI Act and hence, contribution was payable in regard to the amount paid to them. Interestingly, even while seeking to challenge the aforesaid order dated 06.04.2005 by way of proceedings under Section 75 of the ESI Act, the respondent-Company chose not to lead any evidence before the Court. Hence, there was nothing on record to displace the facts asserted on behalf of the appellant-Corporation in its order dated 06.04.2005; rather the factual assertions in the said order remained uncontroverted. The order dated 06.04.2005 had been questioned by the respondent-Company only on the contention that the Directors do not fall within the category of "employee" but no attempt was made to show as to how and why the remuneration paid to its Directors would not fall within the purview of "wages" as per the meaning assigned by subsection (22) of Section 2 of the ESI Act?

The ESI Court cursorily attempted to distinguish the decision of this Court in Apex Engineering (supra) only with reference to the fact that therein, the amount was being received by the Managing Director. The High Court, on the other hand, overlooked the said decision of this Court and relied only on the decisions of the Bombay High Court though the propositions in the referred decisions of the Bombay High Court stood effectively overruled by the decision in Apex Engineering (supra) where this Court held in no uncertain terms that the High Court was in error in taking the view that the Managing Director of the Company was not an employee within the meaning of Section 2 (9) of the ESI Act. The said decision directly applies to the present case and we have no hesitation in concluding that the High Court in the present case has been in error in assuming that the Director of a Company, who had been receiving remuneration for discharge of duties assigned to him, may not fall within the definition of an employee for the purpose of the ESI Act. There had been no reason to interfere with the order dated 06.04.2005 as issued by the appellant- Corporation.

19.02.2019	**DELHI TRANSPORT CORPORATION (Appellant) vs. SATNARAIN (Respondent)**	**Delhi High Court W.P © 2405 of 2017Rekha Palli, J.**

Industrial dispute – Conductor dismissed from service – Labour court directed to reinstate him with service continuity and consequential benefits – Employer reinstated the workman but did not pay the benefits – Whether tenable – Held, No.

Brief facts:

The respondent who was working as a Conductor in the DTC, was issued a charge-sheet alleging that he had failed to deposit the wage bill for the cash received by him. The respondent was thereafter removed from service based on the findings of a domestic inquiry held against him. Upon the respondent raising an industrial dispute, a reference was made to the learned Labour Court regarding the validity of the respondent's termination. The learned Labour Court, after considering the material produced on record, passed an Award directing reinstatement of the respondent with continuity of service and all other consequential benefits, excluding back wages.

After the dismissal of the petitioner's writ petition, the respondent was reinstated in service on 13.12.2014, without being granted any benefits for the period from 06.09.2010, i.e., the date of publication of the Award, till his reinstatement, thereby compelling the respondent to move the Labour Court seeking release of wages from the period from 6th September, 2010 to 12th December, 2014 along with interest. The said application was allowed by the learned Labour Court vide its impugned order. The present writ petition has been filed by the petitioner/ DTC impugning the above said order.

Decision: Petition dismissed.

Reason:

I have heard the learned counsel for the parties and with their assistance, perused the record. In my view, even though the learned counsel for the petitioner has raised two contentions, the same are inter-related. The only question which really needs to be determined by this Court is as to whether the petitioner having filed a writ petition, thereby preventing the respondent from joining service, can the petitioner still deprive the respondent of the wages for the said period during which he was very much willing and ready to join back his duties.

In my view, once an employee is prevented from joining duties not because of his fault/inaction but because of the employer not permitting him to join duties, he would be certainly entitled to get the benefit for the said period. Once the petitioner's writ petition was dismissed, it is evident that this Court did not find any infirmity in the impugned Award directing the petitioner's reinstatement. In these circumstances, it would be most unjust to deprive the respondent of the benefits under the Award which has ultimately been upheld by this Court. There is no merit in the petitioner's contention that merely because this Court, while dismissing the writ petition, did not pass any specific order directing payment of wages for the said to the respondent for the period that the petition remained pending, the respondent would not be entitled to wages for the period during which he has admittedly not worked. The aforesaid contention overlooks the fact that this Court, while dismissing the writ petition, found no infirmity in the impugned Award where under the respondent was entitled to be reinstated and therefore, once it is evident that the respondent was denied reinstatement only because the petitioner chose to file a misconceived writ petition, he cannot be denied the benefit for the period he was willing to re-join his duties but could not for no fault of his own.

I also do not find any merit in the petitioner's submission that as there was no predetermination of the amount towards wages for the period from 06.09.2010 till 12.12.2014, the learned labour Court could not have entertained the application under Section 33(C)(2) of the Act. In my view, once the amount of wages to which the respondent would have been eligible had he been reinstated in terms of the Award, is not in dispute, it cannot be said that the amount being claimed by the respondent under the Application, was not quantifiable and therefore, I find no reason as to why the application was filed was not maintainable.

For the aforesaid reasons, I find absolutely no perversity or infirmity in the impugned order. The writ petition being meritless, is dismissed along with pending application.

14.02.2019	**CENTRAL BOARD OF TRUSTEES (Appellant) vs. STANDING CONFERENCE OF PUBLIC ENTERPRISES (Respondent)**	**Delhi High Court** **W.P © No. 1663 of2017** **Rekha Palli, J.**

Employees Provident funds and miscellaneous Provisions Act,1952 – Section 7A – Scope of enquiry – Employees employed through contractors – Liability of principal employer – No examination of contractors during the enquiry – Whether determination of liability tenable – Held, No.

Brief facts:

The petitioner initiated proceedings [through the concerned PF commissioner] under Section 7-A of the Act against the respondent for determination of the provident fund dues payable by the respondent towards the employees engaged through by its contractors. Without examining the contractors, the PF commissioner determined the contribution dues and directed the respondent to deposit the contribution for workers of the contractors also. On appeal this order was set aside and remanded back to the PF commissioner to decide the issue after making proper enquiry and examining the witness of the contractors. The petitioner challenged this judgement of the appellate tribunal.

Decision: Petition dismissed.

Reason:

I have heard the learned counsel for the parties at length and with their assistance, perused the records.

The issue in the present case is as to whether merely because it is the duty of the principal employer to comply with the provisions of the Act, even qua the employees employed through its contractors, can the competent authority while conducting an inquiry under the provisions of Section 7-A of the Act, simply claim the amount from the principal employer without even making at least a bona fide attempt to determine the contributions made by the contractors and thereafter determine the shortfall, if any, required to be deposited by the principal employer.

The facts of the present case reveal that the petitioner, had initiated proceedings under the Act after an inordinate delay of twelve years which in itself would have made it very difficult for the respondent to obtain the requisite information from its contractors and in these circumstances, in my view, there was no reason as to why the petitioner ought not to resort to its statutory powers under Section 7-A of the Act to enforce the presence of the contractors in order to make a proper assessment of the dues which were payable by the respondent towards the employees engaged through the contractors. Even though the petitioner may be under no obligation to approach the contractors engaged by the respondent, but once a specific request for summoning the contractors, was made by the respondent, the petitioner by issuing summons to the contractors on a solitary occasion and by recording the statement of the sole contractor i.e. M/s A.P.Bansal & Company, who had appeared before the Enforcement Officer, had merely offered lip service to its statutory duty under Section 7-A of the Act by not making any bona fide efforts to enforce the presence of the other contractors. Merely because it is the respondent's duty to ensure compliance with the provisions of the Act in respect of the employees engaged through the Contractors also, cannot absolve the petitioner/organization of its statutory duty to carry out an enquiry as envisaged under the Act. There is a reason as to why section 7A of the Act gives such vide powers to the Provident Fund Commissioner while making an inquiry under the Act and the reason obviously is to ensure that a proper and just assessment is made by collecting all available evidence.

Thus, the question would not only be as to whether the principal employer produces relevant material but it would also be whether the provident fund commissioner who is the statutory authority, has exercised the powers vested in him to collect the relevant evidence before determining the payable amount.

I have also considered the decisions relied on by the petitioner. These decisions, however, do not deal with the issue arising in the present petition which pertains to the scope of the statutory enquiry, required to be conducted before passing an assessment order. On the other hand, the decision relied upon the respondent, deals with exactly the same question as arising in the present case wherein while dealing with a somewhat similar fact situation.

In the light of the aforesaid decision of the Supreme Court in Food Corporation of India v. The Provident Fund Commissioner& Ors. 1990 (60) F.L.R. 15, that there can be no doubt about the fact that it was incumbent upon the petitioner while making an inquiry in accordance with Section 7A of the Act to take all possible steps as set out in the Act to make a correct and proper assessment of the dues. It needs no reiteration that while making such an inquiry, the Commissioner has ample powers not only to summon any witness but also has powers to enforce the attendance of any person or summon him on oath. In these circumstances, once the tribunal found that the petitioner, had not taken adequate steps to summon all the contractors, by enforcing their attendance and that too in a case where the petitioner had initiated proceedings after an inordinate delay of twelve years, which in itself would have made it very difficult for the respondent to obtain information from its erstwhile contractors as also the fact that the assessment order itself is made on the basis of ad hoc calculations, I find absolutely no infirmity in the order of the tribunal directing the petitioner to summon all the contractors and then carry out the requisite assessment.

28.02.2019	**THE REGIONAL PROVIDENT FUND COMMISSIONER (Appellant) vs. VIVEKANANDA VIDYAMANDIR & ORS (Respondent)**	**Supreme Court** **Civil Appeal No. 6221 of 2011 connected with batch of appeals** **Arun Misra & NavinSinha, JJ.**

EPF Act – Definition of basic wages – Special allowances – Whether becoming part of basic wages – Held, Yes.

Brief facts:

The appellants with the exception of Civil Appeal No. 6221 of 2011, are establishments covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"). The appeals raise a common question of law, if the special allowances paid by an establishment to its employees would fall within the expression "basic wages" under Section 2(b)(ii) read with Section 6 of the Act for computation of deduction towards Provident Fund. The appeals have therefore been heard together and are being disposed by a common order.

Decision: Department's appeal allowed and appeals of establishments dismissed.

Reason:

Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The aforesaid provisions fell for detailed consideration by this Court in Bridge and Roof Co. (India) Ltd. v. Union of India, (1963) 3 SCR 978 when it was observed as follows:

"8. Then we come to clause (ii). It excludes dearness allowance, house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", S.6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s.6 which lays down that contribution shall be 61/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in S.6. It seems that the basis of inclusion in S.6 and exclusion in clause(ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under S.6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance

and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in S.6; but house rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of «basic wages», even though the basis of payment of house rent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from «basic wages». Similarly, commission or any other similar allowance is excluded from the definition of «basic wages» for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in S.6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by S.6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through S.6."

Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "basic wages" was considered in Muir Mills Co. Ltd., Kanpur Vs. Its Workmen, AIR 1960 SC 985 observing:

"11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"…"

The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4 SCC 37, it was observed as follows:

"10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance."

That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8 SCC 90.

Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

Resultantly, Civil Appeal No. 6221 of 2011 is allowed. Civil Appeal Nos. 396566 of 2013, Civil Appeal Nos. 396768 of 2013, Civil Appeal Nos. 396970 of 2013 and Transfer Case (C) No.19 of 2019 are dismissed.

26.03.2019	**MODERN TRANSPORTATION CONSULTATION SERVICES PVT. LTD. & ANR. (Appellant) vs. C.P.F. COMMISSIONER (Respondent)**	**Supreme Court** **Civil Appeal No. 7698 of 2009** **A M Sapre & D Maheshwari, JJ.**

EPF Act – Section 2(f) – Excluded employee – Employees retiring from Railways – Withdrawing their accumulated contribution – Joined another establishment – Whether to be treated as excluded employee –ld, o.

Brief facts:

The basic question arising for determination in this appeal is as to whether the retired employees of Railways, who had withdrawn all the superannuation benefits, including full amount of accumulations in their provident fund accounts, are to be treated as "excluded employees" in terms of Paragraph 2(f) of the Scheme of 1952? If to be treated as "excluded employees", the said retired employees of Railways, on being re-employed by the appellants, may not be required to join the Fund created under the said Scheme of 1952 and consequently, the appellants may not be obliged to make any contribution in that regard.

Decision: Appeal dismissed.

Reason:

It is not a matter of much debate in this case that the appellants otherwise answer to the description of "employer" under the Act of 1952 and their establishment is covered thereunder. The basic contention urged in this matter on behalf of the appellants is that the persons engaged by them had been the members of General Provident Fund while working as the employees of Railways and had withdrawn the full amount of accumulations in GPF and are, therefore, to be treated as "excluded employees". This contention has fundamental shortcomings as pointed out infra.

The crucial aspect to be considered in this matter is as to whether the definition of "excluded employees" in Paragraph 2(f) as also the stipulation in Paragraphs 26 and 69 of the Scheme of 1952 refer to any provident

fund or only to the Fund under the Scheme of 1952? As noticed above, in the setup and structure of the Act of 1952, specific distinction is maintained between the Fund, which is created by the Central Government under Section 5(1) of the Act and any other provident fund, which is created by an employer. Significantly, clause (f) of Paragraph 2 of the Scheme of 1952 refers to "the Fund" and not to "any Fund"; and Paragraphs 26 and 69 also refer to "the Fund" and not to "any Fund". The determiner "the", as occurring in Paragraph 2(f) as also Paragraph 69 before the expression "Fund" makes it clear that the reference therein is only to the Fund which is created under the Scheme of 1952 and it is not a general reference to any Fund. The requirement of joining the Fund under Paragraph 26 ibid. is also of joining that Fund which is created under the Scheme of 1952. In other words, obviously and undoubtedly, the Fund referred to in Paragraphs 2(f), 26 and 69 of the Scheme of 1952 is that Fund, which is created under the Scheme of 1952 and the reference is not to any other Fund. Thus, to be covered under the expression "excluded employee" by virtue of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) ibid., the employee must be such who was a member of the Fund established under the Scheme of 1952 and who had withdrawn full amount of his accumulations in the said Fund on retirement from service after attaining the age of 55 years.

On the plain interpretation aforesaid, we have not an iota of doubt that the retired Railway employees, who had withdrawn their accumulations in General Provident Fund or any other Fund of which they were members, could not have been treated as "excluded employees" for the purpose of the Scheme of 1952 for the reason that such a withdrawal had not been from the Fund established under the Scheme of 1952. In fact, there was no occasion for them to make any withdrawal from the Fund established under the Scheme of 1952 because they were never the members of the said Fund. In other words, the employees in question were not answering to the requirements of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) of the Scheme of 1952 and hence, were not the "excluded employees". The Division Bench of the High Court has rightly rejected the contention of appellants that every employee, who had withdrawn full amount from any provident fund, should be treated as an "excluded employee". In our view, the answer by the Division Bench of the High Court is in accord with law and deserves to be approved.

To summarise, in the framework and setup of the Scheme of 1952, the concept remains plain and clear that if a person is member of the Fund created thereunder i.e., under the Scheme of 1952 and withdraws all his accumulations therein, he may not be obliged to be a member of the same Fund under the Scheme of 1952 over again and could be treated as an "excluded employees". However, such is not the relaxation granted in relation to an employee who was earlier a member of any other Fund but later on joins such an establishment where he would be entitled to membership of the Fund created under the Scheme of 1952. This framework of the provisions and stipulations appears to be best serving the interest of employees, while providing them with continued financial security. Therefore, we find no reason to take any view different than the one taken by the Division Bench of the High Court in this case.

28.03.2018	**DELHI TRANSPORT CORPORATION (Appellant) vs. JASBIR SINGH (Respondent)**	**Supreme Court** **W.P © No. 3451 of 2017** **Vipin Sanghi & Rekha Palli, JJ.**

Employee dismissed for causing accident – Admitted his guilt and paid compensation in the criminal court – Tribunal directing reinstatement with 50% back wages – Whether correct as to reinstatement – Held, Yes. Whether correct as to 50% back wages – Held, No.

Brief facts:

The respondent was appointed as a driver and while he was on probation, he was involved in an accident. The petitioner Delhi Transport Corporation (DTC) assails the order passed by the Central Administrative Tribunal,

which has allowed the Original Application preferred by the respondent and set aside the show cause notice, termination order, and the appellate orders. The Tribunal has directed reinstatement of the respondent with 50 % back wages.

Decision: Appeal partially allowed.

Reason:

Having heard learned counsels, we are of the view that the direction issued by the Tribunal for payment of Rs. 50% back wages were not justified in the facts and circumstances of the case. The respondent was also responsible for the state in which he found himself. While on probation, he was involved in an accident and he went ahead and confessed before the Court with regard to his guilt. He also compounded the offence under by depositing a fine of Rs. 50,000/-. The aforesaid being the position and considering the fact that the respondent had not actually served - post his termination, in our view, there is no justification in directing payment of 50% back wages.

To that extent, the impugned order is set aside. We direct the petitioner to reinstate the respondent positively within two weeks. In case, this direction is not complied with, the respondent shall be entitled to wages from the last date fixed for his reinstatement.

23.04.2019	**GLOBE GROUND INDIA EMPLOYEES UNION (Appellant) vs. LUFTHANSA GERMAN AIRLINES & ANR (Respondent)**	**Supreme Court** **Civil Appeal Nos. 4076- 4077 of 2019 [Arising out of S.L.P © Nos. 25341-42 of 2017** **R. Banumathi & R. S.Reddy, JJ.**

Industrial Disputes Act,1947 – Section 10 – Employees of subsidiary company raised dispute over retrenchment – Impleadment of the holding company sought – Whether permissible – Held, No.

Brief facts:

Globe Ground India Private Ltd. [Respondent No.2 herein] is subsidiary of Lufthansa German Airlines [Respondent 1 herein]. Appellant is the employees union representing the employees of Respondent No.2.

The appellant raised the industrial dispute which was referred by the Central Government to Industrial Tribunal- cum-Labour Court. In the proceedings the appellant sought to implead the respondent No.1 also as it was the holding company of respondent No.2. The impleadment application was allowed by the Tribunal, which was on appeal reversed by the High Court. Hence the present appeal before the Supreme Court seeking the impleadment of the respondent No.1 holding company in the industrial reference made against the subsidiary Respondent No.2 Company.

Decision: Appeal dismissed.

Reason:

Having heard learned counsel on both sides, we have perused the material placed on record. The only question which is required to be considered is whether, the first respondent – Lufthansa German Airlines is to be impleaded as a party respondent or not, in adjudication proceedings to answer the reference referred by the Central Government to the Industrial Tribunal-cum-Labour Court vide order dated 4.2.2010. From a reading of the reference, which is referred to Industrial Tribunal, it is clear that the reference which is required to be answered by the Industrial Tribunal is that, whether the action of the Management of M/s Globe Ground India (Pvt.) Limited, in closing down their establishment on 15.12.2009 and retrenching the services of 106 workmen is justified and legal. At this stage, it is apt to refer to Section 10 of the Industrial Disputes Act. It is clear from the above said section, whenever, the appropriate Government refers the points of dispute for adjudication, the

Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points only and matters incidental thereto.

Whenever, an application is filed in the adjudication proceedings, either before the Industrial Tribunal in a reference made under the Industrial Disputes Act, 1947 or any other legal proceedings, for impleadment of a party who is not a party to the proceedings, what is required to be considered is whether such party which is sought to be impleaded is either necessary or proper party to decide the lis. The expressions "necessary" or "proper" parties have been considered time and again and explained in several decisions. The two expressions have separate and different connotations. It is fairly well settled that necessary party, is one without whom no order can be made effectively. Similarly, a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings.

Reverting back to the facts of the case on hand it is clear that the first respondent had a subsidiary, namely, Globe Ground Deutschland GmbH, which was holding 51% shares along with 49% shares held by the Bird Group in the second respondent company. Further, it is clear that the Bird Group had floated another company, Bird Worldwide Flight Services Ltd. to provide ground handling and ancillary services which started from the month of January, 2009. It is the allegation of the appellant's union that even after the formation of a new company, such new company is utilizing same equipment and vehicles belonging to the second respondent. It is also the allegation of the appellant that after the formation of the new company, it has retained most of the employees, except the trade union activists. The appellant workers' union does not seek employment of the alleged retrenched workers in the first respondent.

Further, we are of the view that even in a subsidiary company which is an independent corporate entity, if any other company is holding shares, by itself is no ground to order impleadment of parent company per se. In the case at hand, it is clear that the second respondent itself is a company in which the subsidiary of the first respondent, namely, Globe Ground Deutschland GmbH, was holding 51% shares and 49% shares were held by the Bird Group. As per the case of the appellant, the Bird Group has floated another company and started handling services from the month of January, 2009 by uitlizing the same equipments and vehicles belonging to the second respondent. Further, having regard to limited scope of adjudication, to answer the reference, which is circumscribed by Section 10(4) of the Industrial Dispute Act, 1947, we are of the view that the first respondent is neither necessary nor proper party, to answer the reference by the Industrial Court. Further, we do not find any error in the order passed by the learned Single Judge or in the order of the Division Bench passed by the High Court of Delhi in the impugned judgment, so as to interfere with such reasoned and concurrent findings recorded by the courts. Thus, these civil appeals are devoid of merits and the same are accordingly dismissed, with no order as to costs.

26.04.2019	**THE STATE BANK OF INDIA & ORS. (Appellant) vs. P. SOUPRAMANIANE (Respondent)**	**Supreme Court** **Civil Appeal No. 7011 of 2009** **L. Nageshwar Rao & M.R.Shah, JJ.**

Banking service – Messenger – Convicted for assault and later discharged on probation – Dismissed from service for moral turpitude – Whether tenable – Held, No. What is moral turpitude-explained.

Brief facts

The Respondent who was working as a Messenger in the State Bank of India at Puducherry was discharged from service by an order dated 15.05.1986 on the ground of his conviction by a criminal court for an offence involving moral turpitude. The respondent was convicted for the offence committed under section 324 of the IPC [assault] and sentence of 3 months imprisonment was given. The appellate court released him under section

360 of the CrPC on probation on the ground that the Respondent was employed as a Messenger in a Bank and any sentence of imprisonment would affect his career.

The appeal filed by the Respondent against the order of discharge was dismissed and the Staff Union took up the cause of the Respondent and made a representation on his behalf which was also rejected. Challenging the aforementioned orders, the Respondent filed a Writ Petition in the High Court of Judicature at Madras which was dismissed by a learned Single Judge. Aggrieved thereby, the Respondent filed a Writ Appeal which was allowed by the Division Bench of the Madras High Court. The order of discharge of the Respondent from service was set aside and the Appellants were directed to reinstate the Respondent. The Appellants were directed to pay 1/4th of the salary from the date of discharge till the date of reinstatement as back wages. Now the appellant bank is before the Supreme Court.

Decision: Appeal dismissed.

Reason:

We do not agree with the reasons given by the High Court for setting aside the order of discharge and directing the reinstatement of the Respondent in service. A showcause notice was issued to the Respondent in which it was categorically mentioned that the Respondent cannot continue in service after his conviction in a criminal case involving moral turpitude in view of Section 10(1) (b) (i) of the Banking Regulation Act, 1949. After considering the explanation of the Respondent, an order of discharge was passed. The High Court is not right in holding that no reasons had been given by the bank for discontinuing the Respondent from service. The High Court committed an error in holding that the order of discharge should be set aside on the ground that the provision of law under which the Respondent was discharged was not mentioned in the order. Yet another reason given by the High Court for interference with the order of discharge is that the criminal court released the Respondent on probation only to permit him to continue in service. The release under probation does not entitle an employee to claim a right to continue in service. In fact the employer is under an obligation to discontinue the services of an employee convicted of an offence involving moral turpitude. The observations made by a criminal court are not binding on the employer who has the liberty of dealing with his employees suitably.

Though we do not agree with the reasons given by the High Court for setting aside the order of discharge of the Respondent from service, it is necessary to examine whether Section 10 (1) (b) (i) of Banking Regulation Act is applicable to the facts of the case. Conviction for an offence involving moral turpitude disqualifies a person from continuing in service in a bank. The conundrum that arises in this case is whether the conviction of the Respondent under Section 324 IPC can be said to be for an offence involving moral turpitude.

There can be no manner of doubt about certain offences which can straightaway be termed as involving moral turpitude e.g. offences under the Prevention of Corruption of Act, NDPS Act, etc. The question that arises for our consideration in this case is whether an offence involving bodily injury can be categorized as a crime involving moral turpitude. In this case, we are concerned with an assault. It is very difficult to state that every assault is not an offence involving moral turpitude. A simple assault is different from an aggravated assault. All cases of assault or simple hurt cannot be categorized as crimes involving moral turpitude. On the other hand, the use of a dangerous weapon which can cause the death of the victim may result in an offence involving moral turpitude. In the instant case, there was no motive for the Respondent to cause the death of the victims. The criminal courts below found that the injuries caused to the victims were simple in nature. On an overall consideration of the facts of this case, we are of the opinion that the crime committed by the Respondent does not involve moral turpitude. As the Respondent is not guilty of an offence involving moral turpitude, he is not liable to be discharged from service.

For the aforementioned reasons, we affirm the judgment of the High Court. The Appeal is dismissed accordingly.

16.04.2019	**REGIONAL MANAGER, U.P.S.R.T.C. & ANR (Appellant) vs.** **MASLAHUDDIN (DEAD) (Respondent)**	**Supreme Court** **Civil Appeal No. 3959 of 2019 [Arising out of SLP © No. 29305 of 2008] with connected appeals.** **L. Nageshwar Rao & M.R. Shah, JJ.**

Superannuation of employees – Initially employed in category D – Retirement age 60 years – Subsequently placed in category C with retrospective effect – Retirement age 58 years – Accordingly retired at 58 years – Employees claimed they are entitled service up to 60 years – Whether tenable – Held, No.

Brief facts:

As common question of law and facts arise in these appeals, as such, arising out of the impugned judgment and order passed by the High Court, all these appeals are being disposed of by this common judgment and order.

Respondents were appointed as drivers by the appellant Corporation and placed them under category D, for which the retirement age is 60 years. During the course of their service their pay scale have been revised and due to this they have been placed under category C, for which the retirement age is 58 years. The appellant retired them at the age of 58 years and the respondents raised a dispute over this and the labour court as well as the High Court held that the respondents' retirement age should be 60. Hence the present appeal of the appellant Corporation.

Decision: Appeals allowed.

Reason:

We have heard the learned counsel appearing on behalf of the respective parties at length. The issue in the present appeals is in a very narrow compass. The short question which is posed for consideration by this Court is whether the respective respondents Drivers would fall in Group "D" or Group "C"?

It is required to be noted that all those employees who were getting the salary less then Rs.200/ would fall in Group "D" category. As per the Rules prevailing at the relevant time, the employees getting salary more than Rs.200/ would fall in Group "A", "B" or "C" as per the classification and those who would not fall in either Group "A", "B" or "C" category, they would fall in Group "D" category. As per the Rules prevailing at the relevant time, the age of superannuation of Group "D" employees was 60 years and for the others, i.e. Group "A", "B" and "C", the age of retirement was 58 years.

It appears, (from the affidavit of the appellant), that at the time when the respective respondents Drivers were appointed, they were in the pay scale of Rs.185/- and under the normal circumstances they would fall in Group "D" category and therefore their age of superannuation would be 60 years. However, in the year 1982 the pay scale of all the employees of the Corporation was revised, including the Drivers, and the pay scale of the Drivers of the Corporation was revised to Rs.335/- from Rs.200/-. That the pay scale of the respondents was also revised to Rs.335/ w.e.f. the date of their initial appointment and they were also paid the arrears from the date of their initial appointment till August, 1981. That, in the year 1984, it was resolved to fix the age of superannuation of the Drivers and Conductors as 58 years and place them in Group "C". In the year 1985, the Board of Directors resolved that the classification of posts of all the employees would be revised in view of the recommendations of the Second Pay Commission and that the pay scale of the Drivers and Conductors was again revised to Rs. 335/- and above and that they would be placed in Group "C". That the above resolution was notified on 10.06.1985 and it was also clarified that the revision in classification will be applicable while determining the age of retirement of the employees.

There is no further counter on behalf of the respondents to the rejoinder filed on behalf of the appellant Corporation.

Therefore, the averments in the rejoinder on behalf of the appellant Corporation had gone uncontroverted.

In view of the above, both the Labour Court as well as the High Court have committed a grave error in holding that the respective respondents Drivers were in Group "D" category and that their age of superannuation would be 60 years. As the pay scale of the respective respondents Drivers was revised to Rs.335 with retrospective effect and in fact they were paid the arrears also, thereafter it was not open for the respondents Drivers to contend that as per their original pay scale, their salary was less than Rs.200/-, they would be in Group "D" category. Once having taken the advantage of the revised pay scale retrospectively and that their pay scale was revised to Rs. 335 /- with retrospective effect and they were paid the arrears which the respective respondents accepted, in that case, they would fall in Group "C" category and, therefore, considering the Rules, their age of superannuation would be 58 years and not 60 years, as contended on behalf of the respective respondents Drivers. Therefore, the appellant Corporation rightly retired/superannuated the respective respondent Drivers on completion of 58 years of age.

In view of the above and the reasons stated above, all these appeals succeed and the impugned common judgment and order passed by the High Court is hereby quashed and set aside. In the facts and circumstance of the case, there will be no order as to costs.

15.01.2016	**EMPLOYEE STATE INSURANCE CORPORATION (Appellant) vs. BATRA HOSPITAL & MEDICAL RESEARCH CENTRE & ORS (Respondent)**	**Delhi High Court** **CRL.M.C No. 3213 of 2013** **Suresh Kait, J.**

ESI Act – Section 85 – Inspection of establishment – Respondent establishment was not covered under the Act-respondent establishment refused to produce records for inspection – Whether could be prosecuted – Held,No.

Brief facts:

The officials of the petitioner visited the establishment of the respondent for inspection of the records. However, respondent establishment has not provided the records. Since, the respondent did not provide the record, therefore, petitioner filed complaint against the respondent. The complaint was dismissed and the respondent was discharged. The order of the trial court is assailed in the present petition.

Decision: Petition dismissed.

Reason:

The Supreme Court in *Srinivasa Rice Mills v ESI Corporation (2007) 1 SCC 705* while dealing with identical issue observed as under:-

"17. Admittedly, the rice mills are situated within the Narsimhapuram area. The appointed day therefor was 1-8-2000. The factories of Appellants were inspected prior to that date. Prior to that date, therefore, Appellants were not bound to comply with the provisions of the Act. They could appoint employees at their own sweet will. But the period wherefor the provisions of the Act would be applicable is 12 months preceding the said date, viz., from 1-8-1999 to 31-7- 2000. Compliance of the requirements of the statutes on the part of the employer, however, would begin from the appointed day, viz., 1-8-2000. 20. The scheme of the Act does not suggest that all the employees would come within the purview of the said Act. Those employees who draw wages as is defined in Section 2(22) of the Act would be the employees who would be covered thereunder. As noticed hereinbefore, inspection of the factories was carried out prior to the date of coming into force of the Act. Such inspections, thus, could have been carried out only in terms of the provisions contained in Section 45 of the Act, which

could mean that the Inspector would be appointed for the purpose of the Act. He is authorized under the Act to enquire into the correctness of any of the particulars stated in any return referred to in Section 44 or for the purpose of ascertaining whether any of the provisions has been complied with. It is, therefore, evident that any action taken prior to or in furtherance of a report made on an inspection, prior to coming into force of the Act, would be *ultra virus* Section 45(2) of the Act. Once the inspection is held to be illegal, Respondent could not have taken any statutory action for imposition of penalty."

It is admitted fact that respondent establishment came under the provisions of the said Act only with effect from 01.04.2011 and before that the said establishment was not covered under the said Act. It is not in dispute the petitioner issued the notice on 26.12.2007 to the hospital and not to any particular department. Therefore, the respondent is not liable to be prosecuted under the provisions of the said Act. The petitioner itself is not clear whether the respondent hospital is maintaining equipment maintenance department or not and that the records sought to be produced by the official of the respondent pertained to such department only or with respect to entire hospital. Admittedly, respondent was not covered under the said Act in the year 2007, therefore, learned Trial Court has rightly rejected the case of the petitioner and discharged the respondent.

16.02.2016	**NANDRAM (Appellant) vs. GARWARE POLYSTER LTD. (Respondent)**	**Supreme Court** **Civil Appeal No. 1409of 2016 [Arising out of SLP © No. 33917 of 2011** **Kurian Joseph & Rohinton Fali Nariman,JJ.**

Industrial Disputes Act, 1954 – Company having registered office at Aurangabad – Workman appointed in Aurangabad and later transferred to Pondicherry – Pondicherry establishment closed – Workman was terminated – Workman raised dispute and filed complaint at Aurangabad – Rejected on the ground of lack of jurisdiction – Whether correct – Held, No.

Brief facts:

The appellant was employed by the respondent initially as Boiler Attendant in the year 1983 in the Company in Aurangabad. Thereafter he was promoted as Junior Supervisor in the year 1987 and worked in the Aurangabad plant only. In the year 1995, he was again promoted as Senior Supervisor and continued in Aurangabad.

However, by proceedings dated 21.10.2000, the appellant was transferred to Silvasa in Gujarat. By another order dated 20.12.2001 he was transferred from Silvasa to Pondicherry. While so, by proceeding dated 12.04.2005, appellant was terminated from service w.e.f. 15.04.2005 on account of closure of the establishment at Pondicherry. It is not in dispute that the registered office of the Company is in Aurangabad and the decision to close the establishment at Pondicherry was taken by the Company at Aurangabad.

Aggrieved by the termination, appellant moved the Labour Court at Aurangabad in complaint ULP No.56 of 2005. Despite the objection taken by the respondent that the Labour Court lacked jurisdiction, the Court held in favour of the complainant.

Aggrieved, the respondent-Company took up the matter before the Industrial Court at Aurangabad in revision. The Industrial Court at Aurangabad vide order dated 04.07.2009 set aside the order passed by the Labour Court and dismissed the complaint of the appellant holding that the Labour Court at Aurangabad did not have territorial jurisdiction to entertain the complaint of the appellant, since the termination took place at Pondicherry. The appellant moved the High Court of Judicature of Bombay at Aurangabad in Writ Petition No. 4968 of 2009. The High Court by judgment dated 07.06.2011 affirmed the view taken by the Industrial Court and held that the situs of employment of the appellant being Pondicherry, the Labour Court at Aurangabad did not have territorial jurisdiction to go into the complaint filed by the appellant. Thus aggrieved, the appellant is before this Court.

Decision: Appeal allowed.

Reason:

In the background of the factual matrix, the undisputed position is that the appellant was employed by the Company in Aurangabad, he was only transferred to Pondicherry, the decision to close down the unit at Pondicherry was taken by the Company at Aurangabad and consequent upon that decision only the appellant was terminated. Therefore, it cannot be said that there is no cause of action at all in Aurangabad. The decision to terminate the appellant having been taken at Aurangabad necessarily part of the cause of action has arisen at Aurangabad. We have no quarrel that Labour Court, Pondicherry is within its jurisdiction to consider the case of the appellant, since he has been terminated while he was working at Pondicherry. But that does not mean that Labour Court in Aurangabad within whose jurisdiction the Management is situated and where the Management has taken the decision to close down the unit at Pondicherry and pursuant to which the appellant was terminated from service also does not have the jurisdiction. In the facts of this case both the Labour Courts have the jurisdiction to deal with the matter. Hence, the Labour Court at Aurangabad is well within its jurisdiction to consider the complaint filed by the appellant. Therefore, we set aside the order passed by the High Court and the Industrial Court at Aurangabad and restore the order passed by the Labour Court, Aurangabad though for different reasons. The Labour Court shall consider the complaint on merits and pass final orders within six months from today. The parties are directed to appear before the Labour Court on 08.03.2016.

04.02.2016	**JAYA BISWAL & ORS (Appellant) vs. BRANCH MANAGER, IFFCO TOKIO GENERAL INSURANCE COMPANY LTD & ANR (Respondent)**	**Supreme Court** **Civil Appeal No. 869 of 2016 [Arising out of S.L.P © No. 1903 of2015** **V. Gopala Gowda & Uday Umesh Lalit, JJ.**

Employees Compensation Act, 1923 – Truck driver died due to accident while on proceeding to deliver the goods on the way – Whether accident arose in the course of employment – Held, yes.

Brief facts:

The present appeal arises out of the impugned judgment and order dated 13.08.2014 passed in F.A.O. No. 472 of 2013 by the High Court of Orissa at Cuttack, wherein the learned single Judge

reduced the amount of compensation awarded to the appellants by the learned Commissioner for Employees' Compensation from Rs.10,75,253/ – to Rs.6,00,000/ – and also waived the award of 50% penalty with interest.

The elder son of appellant Nos. 1 and 2 worked as a truck driver with one Bikram Keshari Patnaik (respondent no. 2 herein). On 19.07.2011, he met with an accident while on his way to deliver wheat bags in the truck from Berhampur, Orissa to Paralakhemundi, Andhra Pradesh. He sustained severe injuries on the back of his head and died on the spot.

The appellants filed Employee's Compensation petition before the Commissioner, who allowed a compensation of Rs. 10,75,253/-. Aggrieved by the same, the Insurance Company filed an appeal under Section 30 of the E.C. Act before the High Court of Orissa at Cuttack. The learned single Judge allowed the appeal and set aside the award passed by the learned Commissioner and reduced the compensation to Rs.6,00,000/-.

The present appeal has been filed by the appellants challenging the correctness of impugned judgment and order passed by the High Court.

Decision: Appeal allowed.

Reason:

We have heard the learned counsel appearing on behalf of both the parties. We are unable to agree with the contentions advanced by the learned counsel appearing on behalf of the respondent Insurance Company.

The E.C. Act is a welfare legislation enacted to secure compensation to the poor workmen who suffer from injuries at their place of work. This becomes clear from a perusal of the preamble of the Act which reads as under: "An Act to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident." This further becomes clear from a perusal of the Statement of Objects and Reasons, which reads as under: "……The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible, from hardship arising from accidents.

An additional advantage of legislation of this type is that by increasing the importance for the employer of adequate safety devices, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection. Further, the encouragement given to employers to provide adequate medical treatment for their workmen should mitigate the effects to such accidents as do occur. The benefits so conferred on the workman added to the increased sense of security which he will enjoy, should render industrial life more attractive and thus increase the available supply of labour. At the same time, a corresponding increase in the efficiency of the average workman may be expected." (Emphasis laid by this Court) Thus, the E.C. Act is a social welfare legislation meant to benefit the workers and their dependents in case of death of workman due to accident caused during and in the course of employment should be construed as such.

In order to succeed, it has to be proved by the employee that (1) there was an accident, (2) the accident had a causal connection with the employment and (3) the accident must have been suffered in course of employment. The learned counsel appearing on behalf of the appellants has also rightly placed reliance on the decision of this Court in the case of Mackinnon Mackenzie (supra). In the facts of the instant case, the deceased was on his way to deliver goods during the course of employment when he met with the accident. The act to get back onto the moving truck was just an attempt to regain control of the truck, which given the situation, any reasonable person would have tried to do so. The accident, thus, fairly and squarely arose out of and in the course of his employment.

The next contention which needs to be dispelled is that the appellants are not entitled to any compensation because the deceased died as a result of his own negligence. We are unable to agree with the same. Section 3 of the E.C. Act does not create any exception of the kind, which permits the employer to avoid his liability if there was negligence on part of the workman. The E.C. Act does not envisage a situation where the compensation payable to an injured or deceased workman can be reduced on account of contributory negligence. It has been held by various High Courts that mere negligence does not disentitle a workman to compensation.

While no negligence on part of the deceased has been made out from the facts of the instant case as he was merely trying his best to stop the truck from moving unmanned, even if there were negligence on his part, it would not disentitle his dependents from claiming compensation under the Act. Thus, what becomes clear from the preceding discussion is that the deceased died in an accident which arose in and during the course of employment.

In the light of the well-reasoned and elaborate order of award of compensation, the High Court could not have reduced the compensation amount by more than half by merely mentioning that it is in the 'interest of justice'. It was upon the High Court to explain how exactly depriving the poor appellants, who have already lost their elder son, of the rightful compensation would serve the ends of justice.

Since neither of the parties produced any document on record to prove the exact amount of wages being earned by the deceased at the time of the accident, to arrive at the amount of wages, the learned Commissioner took into consideration the fact that the deceased was a highly skilled workman and would often be required to undertake long journeys outside the state in the line of duty, especially considering the fact that the vehicle in question had a registered National Route Permit.

In view of the foregoing, the judgment and order of the High Court suffers from gross infirmity as it has been passed not only in ignorance of the decisions of this Court referred to supra, but also the provisions of the E.C. Act and therefore, the same is liable to be set aside and accordingly set aside.

Appeal is accordingly allowed. The respondent-Insurance Company is directed to deposit the amount within six weeks from today with the Employees Compensation Commissioner. On such deposit, he shall disperse the same to the appellants..

10.03.2016	**ESIC (Appellant) vs. A.K. ABDUL SAMAD & ANR (Respondent)**	**Supreme Court** **Criminal Appeal Nos. 1065-1066 of 2005** **Dipak Misra & Shiva Kirti Singh, JJ.**

Employees State Insurance Corporation Act – Section 85 – Prosecution- punishment of 6 months imprisonment and a fine of Rs.5,000/- whether the quantum of the fine could be reduced – Held, No.

Brief facts:

The case arises out of criminal proceedings initiated by the appellant Corporation under Section 85 of the Act for conviction and punishment of the respondents for failure to pay contributions required by the Act. Both the respondents faced trial before the Special Court for Economic Offences, Bangalore and were found guilty and were inflicted with imprisonment till rising of the Court and fine of Rs.1000/-. According to appellant, the fine amount could not have been reduced and ought to have been Rs.5000/- as per mandate of law. Hence the Corporation preferred Revision Petitions before the High Court of Karnataka at Bangalore. By the impugned judgment and order under appeal dated 09th January 2004, the Division Bench of the High Court dismissed Criminal Revision Petition. Therefore, the appellant corporation challenged the above impugned judgement in this appeal.

Decision: Appeal allowed.

Reason:

The question of law deserving adjudication in these appeals arises out of Section 85(a) (i) (b) of the Employees' State Insurance Corporation Act (for brevity, 'the Act'). The aforesaid statutory provision prescribes punishment for a particular offence as imprisonment which shall not be less than six months and the convict shall also be liable to fine of five thousand rupees. The proviso however empowers the court that it may, "for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term." The question to be answered is whether the court has been given judicial discretion only to reduce the sentence of imprisonment for any term lesser than six months or whether it also has discretion to levy no fine or a fine of less than five thousand rupees.

As noticed earlier, the interpretation given by Patna High Court in the case of Tetar Gope v. Ganauri Gope AIR 1968 Pat 287, on which learned counsel for the respondents has placed reliance has already been over-ruled by this Court in the case of Zunjarrao Bhikaji Nagarkar v. Union of India (1999) 7 SCC 409. The remaining judgment in the case of Sebastian @ Kunju v. State of Kerala 1992 Cri LJ 3642 also arose out of conviction under Section 302 of the IPC. In paragraph 11 of that judgment, the Kerala High Court has placed reliance upon judgment of Patna High Court in the case of Tetar Gope (supra). In our considered view, the clause "shall also be liable to fine", in the context of Indian Penal Code may be capable of being treated as directory and thus conferring on the court a discretion to impose sentence of fine also in addition to imprisonment although such discretion stands somewhat impaired as per the view taken by this Court in the case of Zunjarrao Bhikaji Nagarkar (supra). But clearly no minimum fine is prescribed for the offences under the IPC nor that Act was enacted with the special

purpose of preventing economic offences as was the case in Chern Taong Shang v.

S.D. Baijal (1988) 1 SCC 507. The object of creating offence and penalty under the Employees' State Insurance Act, 1948 is clearly to create deterrence against violation of provisions of the Act which are beneficial for the employees. Non-payment of contributions is an economic offence and therefore the Legislature has not only fixed a minimum term of imprisonment but also a fixed amount of fine of five thousand rupees under Section 85(a) (i) (b) of the Act. There is no discretion of awarding less than the specified fee, under the main provision. It is only the proviso which is in the nature of an exception where under the court is vested with discretion limited to imposition of imprisonment for a lesser term. Conspicuously, no words are found in the proviso for imposing a lesser fine than that of five thousand rupees. In such a situation the intention of the Legislature is clear and brooks no interpretation. The law is well settled that when the wordings of the Stature are clear, no interpretation is required unless there is a requirement of saving the provisions from vice of unconstitutionality or absurdity. Neither of the twin situations is attracted herein.

Hence the question is answered in favour of the appellant and it is held that the amount of fine has to be Rupees five thousand and the courts have no discretion to reduce the same once the offence has been established. The discretion as per proviso is confined only in respect of term of imprisonment. Accordingly the appeals are allowed. The respondents shall now be required to pay a fine of Rupees five thousand. If they have already paid the earlier imposed fine of Rs.1000/-, they shall pay the balance or otherwise the entire fine of Rs.5000/- within six weeks and in default the fine shall be realised expeditiously in accordance with law by taking recourse to all the available machinery.

29.02.2016	**ROYAL WESTERN INDIA TURF CLUB LTD (Appellant) vs. E.S.I.C & ORS (Respondent)**	**Supreme Court** **Civil Appeal No. 49 of2006** **V. Gopala Gowda &Arun Mishra, JJ.**

Employees State Insurance Act, 1948 – Section 2(9) – Casual workers engaged by race club – Whether they are covered under the scheme – Held, Yes.

Brief facts:

The questions involved for decision in these appeals are whether casual workers are covered under definition of employee as defined in Section 2(9) of the Employees State Insurance Act, 1948 (hereinafter referred to as 'ESI Act') and pertaining to period for which Turf Club is liable to pay from 1978-79 or from 1987.

Decision: Appeal dismissed.

Reason:

First we take up the question whether casual employees are covered within the purview of ESI Act. The definition of "employee" is very wide. A person who is employed for wages in the factory or establishment on any work of, or incidental or preliminary to or connected with the work is covered. The definition brings various types of employees within its ken. The Act is a welfare legislation and is required to be interpreted so as to ensure extension of benefits to the employees and not to deprive them of the same which are available under the Act.

A bare reading of the provisions of Sections 2(22) and 2(23) dealing with wages and wage period makes it clear that it would cover the "casual employees" employed for a few days on a work of perennial nature and wages as defined in section 2(22) and wage period as defined in section 2(23) does not exclude the wages payable to casual workers. They cannot be deprived of the beneficial provisions of the Act.

This Court in Regional Director, Employees' State Insurance Corporation, Madras v. South India Flour Mills

(P) Ltd, AIR 1986 SC 1686 has held that Section 39(4) and Section 42(3) clearly envisage the case of casual employees. In other words, it is the intention of the Legislature that the casual employees should also be brought within the purview of the Act.

09.08.2016	**TAMILNADU TERMINATED FULL TIME TEMPORARY LICEMPLOYEES ASSOCIATION (Appellant) vs. S.K. ROY, THE CHAIRMAN, LIC (Respondent)**	**Supreme Court** **Contemt Petition © No. 459 of 2015 in Civil Appeal No. 6950 of 2009 along with batch of review petitions.** **V. Gopala Gowda & C.Nagappan, JJ.**

LIC directed to pay backwages and compensation to all badly workmen whose services were terminated in 1988.

Brief facts:

These Review Petitions arise from the impugned judgment and order dated 18.03.2015 passed by this Court in Civil Appeal No. 6950 of 2009 and connected appeals, whereby it was held that the Award passed by Central

Government Industrial Tribunal, New Delhi (CGIT) in I.D. No. 27 of 1991 is legal and valid and the same be restored and implemented by the Life Insurance Corporation of India (hereinafter referred to as the "LIC") by absorbing the concerned workmen in the permanent posts. It was further held that the Corporation would be liable to pay all consequential benefits including monetary benefits taking into consideration the revised pay scale in the cases of those workmen who had attained the age of superannuation. Decision: Impugned judgment modified.

Reason:

The learned Attorney General further submits that as on 31.03.2015, LIC had 55,427 Class III employees and 5,190 Class IV employees. If LIC is directed to consider the absorption of the workmen to the advertisement, then the number of Class III employees will increase by 11.14% and Class IV employees by 56.65% and the same will affect the employee's ratio in addition to the increase in its financial burden and that the same will be contrary to the interests of the policyholders. The learned Attorney General estimates the financial liability for implementing the order of this Court at approximately Rs.7087 crores, with the annual liability at around Rs.728 crores per year and that this will be a huge financial burden for LIC to bear. On the other hand, the learned counsel appearing on behalf of the respondents-workers submit that it becomes clear from a perusal of the Review Petitions filed by LIC that it is trying to re-agitate the case on merits. For the limited purpose of modifying the relief granted in the Civil Appeal only with regard to the Back wages, we directed Mr. Ashok Panigrahi, the learned counsel appearing on behalf of the review petitioner-LIC to submit a document containing the pay scales indicating the basic pay and other emoluments payable to the concerned workmen. The same were furnished with the periodic revisions in the years 1992, 1997, 2002, 2007 and 2012, without furnishing the other component figures which would be the gross salary of the different classes of workmen in the present dispute. These periodic revisions of pay of basic salary, along with other component figures comprising the gross salary including Dearness Allowance, House Rent Allowance etc. etc., as applicable, must be accounted for while computing the amount due to the workmen towards the back wages. The temporary and badli workers of LIC, who are entitled for regularisation as permanent workmen in terms of the impugned judgment and order dated 18.03.2015 passed by this Court, by applying the terms and conditions of the modified award dated 26.08.1988 passed by Justice Jamdar, are held to be entitled to full back wages as well. However, keeping in mind the immense financial burden this would cause to LIC, we deem it fit to modify the relief only with regard to the back wages payable and therefore, we award 50% of the back wages with consequential benefits. The back wages must be calculated on the basis of the gross salary of the workmen, applicable as on the date as per the periodical revisions of pay scale as stated supra. The computation must be made from the date of entitlement of the workmen involved in these cases, that is, their absorption, till the age of superannuation, if any concerned workman has attained the age of superannuation as per the regulations of the review petitioner-LIC, as applicable to the concerned workman. With the above modifications to the judgment and order sought

to be reviewed, these review petitions are disposed of in the terms as indicated above. Since the judgment and order is passed in favour of workmen and their dispute is being litigated for nearly twenty five years, the directions contained in the judgment and order dated 18.03.2015 with the above modifications shall be complied with by the review petitioner-LIC within eight weeks of the receipt of the copy of this order.

08.08.2016	**PEPSU ROADWAYS TRANSPORT CORPORATION (Appellant) vs. S.K. SHARMA & ORS (Respondent)**	**Supreme Court** **Civil Appeal No. 4703of 2009** **Shiva Kirti Singh & R. Banumathi, JJ.**

Transfer of employees from PEPSU roadways PEPSU corporation – Workmen retired after taking all retiral benefits in 1991 – Pension scheme revised in 1992 – Retired workmen claimed benefits under the pension scheme also – Whether tenable – Held, No. Brief facts:

The respondents who were the employees of PEPSU Roadways were transferred to PEPSU Road Transport Corporation (hereinafter referred to as the 'Corporation'), due to the take-over of PEPSU Roadways by the corporation, on the prevailing terms and conditions till the approval of new terms and conditions by the Corporation.

The respondents got promotions etc. and continued to serve the Corporation till they all retired between 1989 and 1991. Much after the retirement of the respondents, the Corporation framed PRTC Employees Pension/ Gratuity and General Provident Fund Regulations, 1992 (hereinafter described as 'Regulations of 1992'). Under these Regulations, for the first time pension was introduced in the Corporation. Soon after the enforcement of Regulations of 1992 the respondents who had already received their retiral benefits, filed a writ petition claiming that they continued to be employees of the State in the department of PEPSU Roadways till PEPSU State was reorganized and from 01.11.1956, the date of reorganization they became employees of State of Punjab with right to pension as available to Government servants. The Single Judge allowed the writ petition on the premise that the respondents had simply been transferred from the parent department to serve in the Corporation and therefore they continued to be Government servants because there was no order passed for their absorption in the Corporation. The Letters Patent Appeal preferred by the appellants was dismissed by the judgment and order dated 24.04.2006 which is under challenge in this appeal.

Decision: Appeal allowed.

Reason:

The main controversy in this case is whether the claim of the respondents, a group of twenty one employees of PEPSU Roadways that in spite of transfer of that department to the Corporation they continue to be actually Government servants and therefore entitled to retiral benefits instead of CPF is acceptable or not. In this controversy, a judgment of this Court though rendered in slightly different factual matrix is substantially relevant and helpful. In D.R. Gurushantappa v. Abdul Khuddus Anwar & Ors (1996) 3 SCC 325, an issue arose in the context of election of the Mysore Legislative Assembly as to whether the respondent was holding office of profit under the Government. The respondent no. 1 of that case was initially a Government servant but subsequently the Government concern where he was working was taken over by a company registered under the Indian Companies Act, 1956. The shares of the company were fully owned by the Government but after the Government undertaking was taken over by the company, the employees were no longer governed by the Mysore Civil Services Regulations, their conditions of service came to be determined by the standing orders of the company. The first contention against respondent no. 1 was that since he was initially a Government servant, even after the concern was taken over by the company he would continue to be in the service of the Government. While dealing with this issue in paragraph 3, this Court rejected the contention in the following words: "3. So far as the first point is concerned, reliance is placed primarily on the circumstance that, when the concern was taken over by the Company from the Government there were no specific agreements terminating the Government service of Respondent 1, or bringing into existence a relationship of master and servant between

the Company and Respondent 1. That circumstance, by itself, cannot lead to the conclusion that Respondent 1 continued to be in government service. When the undertaking was taken over by the Company as a going concern, the employees working in the undertaking were also taken over and since, in law, the Company has to be treated as an entity distinct and separate from the Government, the employees, as a result of the transfer of the undertaking, became employees of the Company and ceased to be employees of the Government." In the facts of the case, we have no hesitation to hold that the High Court erred in allowing the writ petition and second appeal of the respondents and in dismissing the Letters Patent Appeal of the appellants.

The judgments on which the respondents have relied upon for advancing the submission that they cannot lose the status of a Government servant till they are absorbed in the Corporation after offering an option in favour of such absorption is entirely misconceived and inapplicable in the facts of the present case. The stand of the respondents could have been acceptable had there been no decision of the PEPSU State as evidenced by the letter of Chief Secretary dated 16.10.1956 which finds mention and reiteration by way of admission by the Corporation in order dated 30.11.1956. There can be no such belated challenge to the decision of PEPSU State whereby PEPSU Roadways, one of the departments came into and merged with the Corporation lock, stock and barrel before the merger of PEPSU with Punjab on 01.11.1956. Hence, the provisions of the States Reorganization Act ceased to have any significance in the matter because the respondents ceased to be employees of State Government of PEPSU prior to 01.11.1956. They accepted such merger and alteration of their service conditions without any protest. Since 1957, under the Regulations of the Corporation they participated and contributed to the scheme of CPF and obtained the benefits of retirement from the Corporation between 1985 and 1991 without any protest. The High Court clearly erred in ignoring such conduct of the respondents, the effect of the Chief Secretary's letter dated 16.10.1956 containing decision of PEPSU State and its acceptance by the Corporation reflected by the order dated 30.11.1956. The High Court further erred in relying upon law which is applicable when there is no merger of Government concern with the private concern but only individual employees are transferred on deputation or on Foreign Service to other organizations/ services. The ordinary rules providing for asking of option or issuance of letters of absorption depend upon nature of stipulations which may get attracted to a case of deputation.

There may be similar stipulations in case of merger by transfer. But if there are no such stipulations like in the present case then the transferee concern like the Corporation has no obligation to ask for options and to issue letters of options to individual employees who become employees of the transferee organization simply by virtue of order and action of transfer of the whole concern leading to merger. No doubt in case of any hardship, the affected employees have the option to protest and challenge either the merger itself or any adverse stipulation. However, if the employees choose to accept the transition of their service from one concern to another and acquiesce then after decades and especially after their retirement they cannot be permitted to turn back and challenge the entire developments after a gap of decades. On the basis of laws and facts discussed above, we are constrained to hold that the respondents had accepted to continue as employees of Corporation pursuant to order of merger/ transfer of PEPSU Roadways with effect from 16.10.1956 and on completing their service under the Corporation and reaching the age of retirement they were entitled to receive only the benefits of CPF and gratuity as admissible to them under then prevailing regulations of the Corporation. Since they accepted those retiral benefits there is no relationship left between the Corporation and the respondents and in such a situation further claim against the Corporation that it should treat the respondents to be Government servants and adjust their retiral benefits accordingly was totally untenable and wrongly allowed by the High Court. The impugned judgment of the High Court granting relief to the respondents is therefore set aside. The second appeal and the writ petition of the respondents shall stand dismissed. This appeal is accordingly allowed but the parties are left to bear their own costs.

22.08.2016	**INDUSTRIAL PROMOTION & INVESTMENT CORPORATION OF ORISSA LTD (Appellant) Vs. NEW INDIA ASSURANCE CO. LTD & ANR (Respondent)**	**Supreme Court** **Civil Appeal No. 1130 of 2007** **Anil R. Dave & L. Nageswara Rao, JJ.**

Insurance law – Claim against theft and burglary – No forcible house breaking – Whether compensation is payable – Held, No.

Brief facts:

The Appellant exercising its power under Section 29 of the State Finance Corporation Act, 1951, took over the assets of M/s. Josna Casting Centre Orissa Private Limited, which had been insured with Respondent No. 1 for a sum of Rs. 46,00,000/- under the Miscellaneous Accident Policy, Rs. 60,40,000/- under the Fire Policy and Rs. 46,00,000/- under the Burglary and House Breaking Policy. The seized assets were put to auction by the Appellant, at which point of time it was detected that some parts of the plant and machinery were missing from the factory premises. A claim was lodged with Respondent No. 1 for an amount of Rs. 34,40,650/- under the Burglary and House Breaking Policy. The claim of the Appellant was repudiated by Respondent No. 1 on the ground that the alleged loss did not come within the purview of the insurance policy. The Appellant filed compensation application No. 45 of 2001 under Section 12-B read with Section 36-A of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, which was rejected by the MRTP Commission, New Delhi by its Order dated 17-08- 2005. Aggrieved by the said Order, the Appellant has preferred the present Appeal.

Decision: Appeal dismissed.

Reason:

Having considered the submissions made on both sides, we are of the opinion that there is no error committed by the MRTP Commission in rejecting the Claim of the Appellant. It is clear from the facts of the present case that the Appellant has made out a case of theft without a forcible entry. The case of the Appellant is that forcible entry is not required for a claim to be made under the policy. Following the well- accepted principle that a contract of insurance which is like any other commercial contract should be interpreted strictly, we are of the opinion that the policy covers loss or damage by burglary or house breaking which have been explained as theft following an actual, forcible and violent entry from the premises. A plain reading of the policy would show that a forcible entry should precede the theft, and unless they are proved, the claim cannot be accepted. It is well- settled law that there is no difference between a contract of insurance and any other contract, and that it should be construed strictly without adding or deleting anything from the terms thereof. On applying the said principle, we have no doubt that a forcible entry is required for a claim to be allowed under the policy for burglary/house breaking. This court in General Assurance Society Ltd. v. Chandmull Jain and Anr., reported in [1966] 3 SCR 500 held that there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberima fides, i.e., good faith on the part of the insured and the contract is likely to be construed contra proferentes, i.e., against the company in case of ambiguity or doubt. It was further held in the said judgment that the duty of the Court is to interpret the words in which the contract is expressed by the parties and it is not for the Court to make a new contract, however reasonable. For the aforementioned reasons, we uphold the order of the MRTP Commission and dismiss the Appeal with no order as to costs.

02.08.2016	**ELECTROTHEM (INDIA) LTD (Appellant) vs. PATEL VIPULKUMAR RAMJIBHAI & ORS (Respondent)**	**Supreme Court** **Civil Appeal No. 7222 of 2016 [Arising out of SLP © No. 16860 of 2012** **T.S. Thakur, R. Banumathi & Uday Umesh Lalit, JJ.**

Environment laws- projects – Environment clearance – Clearance certificate issued without holding public hearing – Whether tenable – SC directs of post – Clearance public hearing.

Brief facts:

This appeal challenges the judgment and order dated 11.05.2012 passed by the High Court of Gujarat allowing Special Civil Application No.5986/2010 setting aside the Environmental Clearance dated 27.01.2010 and directing that the operations of the entire plant of the Appellant be stopped and that the operations could be continued only after fresh Environmental Clearance was accorded in its favour by the Ministry of Environment and Forests and Union of India. Environment clearance was accorded to the petitioner without conducting public hearing. The High Court, on a PIL, restrained the petitioner from operating the plant and also ordered to close it down. On appeal to the Supreme Court, the only question for the consideration of the court was whether the Environmental Clearance dated 27.1.2010 can be termed as illegal in the absence of public consultation or public hearing as mandatorily provided by Notifications dated 2006.

Decision: Petition partly allowed.

Reason:

In the affidavit filed on behalf of CPCB it was stated *inter alia* that pursuant to the order dated 22.04.2014 passed by this Court, a joint inspection was carried out as directed and that the industry of the Appellant had complied with most of the recommendations, though there were still certain shortcomings. The facts on record are clear that while granting Environmental Clearance on 20.02.2008, public consultation/public hearing was undertaken on 12.06.2007. As on that date the status of the project was that the capacity of Pig Iron Plant was to be 350 TPD, Power Plant to be 24 MW, the total cost of the project was 90.00 crores and the total Water requirement was 650 MT/Day. The High Court was absolutely right that after expansion the capacity of the plant was to increase three-fold. The tabular chart given in Environmental Clearance dated 27.01.2010 itself shows the tremendous increase in the capacity. Consequently, the pollution load would naturally be of greater order than the one which was contemplated when the earlier public consultation/public hearing was undertaken on 12.08.2007.

Further, the water requirement had also risen from 650 MT/Day to 2165 MT/Day. The increase in pollution load and water requirement were certainly matters where public in general and those living in the vicinity in particular had and continue to have a stake. Public consultation/public hearing is one of the important stages while considering the matter for grant of Environmental Clearance. The minutes of the meetings held on 9-11 February 2009 show that the request of the Appellant for exemption from the requirement of public hearing was accepted by the Committee. The observations of the Committee suggest that there would be no additional land requirement, ground water drawl and certain other features. However the water requirement, which is a community resource, was definitely going to be of greater order in addition to the fact that the expansion of the project would have entailed additional pollution load. It must be stated here that after EIA Notification of 2006 a draft Notification was issued on 09.01.2009 wherein an amendment was suggested in paragraph 7(ii) of EIA Notification dated 14.09.2006 to the effect that in cases of expansion of projects involving enhancement by more than 50% holding of public consultation/public hearing was essential; implying thereby that in cases where expansion was less than 50% public consultation/public hearing could be exempted. Without going into

the question whether public consultation/public hearing could be so exempted, it is relevant to note that this idea in the draft Notification was not accepted, after a Committee constituted to advice in the matter had given its report on 30.10.2009 to the contrary. As a result, the final Notification dated 01.12.2009 did not carry or contain the amendment that was suggested by way of draft Notification. Consequently, no exemption on that count could be given when the Environmental Clearance came to be issued on 27.01.2010. In the case of Lafarge Umiam Mining Private Limited - T.N. Godavarman Thirumulpad Vs. Union of India and Others 2011

(7) SCC 338, public consultation/public hearing was considered and found to be mandatory requirement of the Environmental Clearance process by this Court. In terms of the principles as laid down by this Court in the case of Lafarge (supra), we find that the decision making process in doing away with or in granting exemption from public consultation/public hearing, was not based on correct principles and as such the decision was invalid and improper. At the same time, we cannot lose sight of the fact that in pursuance of Environmental Clearance dated 27.01.2010, the expansion of the project has been undertaken and as reported by CPCB in its affidavit filed on 07.07.2014, most of the recommendations made by CPCB are complied with. In our considered view, the interest of justice would be sub-served if that part of the decision exempting public consultation/ public hearing is set aside and the matter is relegated back to the concerned Authorities to effectuate public consultation/ public hearing. However, since the expansion has been undertaken and the industry has been functioning, we do not deem it appropriate to order closure of the entire plant as directed by the High Court. If the public consultation/public hearing results in a negative mandate against the expansion of the project, the Authorities would do well to direct and ensure scaling down of the activities to the level that was permitted by Environmental Clearance dated 20.02.2008. If public consultation/public hearing reflects in favour of the expansion of the project, Environmental Clearance dated 27.01.2010 would hold good and be fully operative. In other words, at this length of time when the expansion has already been undertaken, in the peculiar facts of this case and in order to meet ends of justice, we deem it appropriate to change the nature of requirement of public consultation/ public hearing from pre- decisional to post-decisional. The public consultation/public hearing shall be organized by the concerned authorities in three months from today. This appeal therefore stands disposed of with the aforesaid modifications. No order as to costs.

23.09.2016	**GEN SECRETARY, COAL WASHERIES WORKERS UNION, DHANBAD (Appellant) vs. EMPLOYERS IN RELATION TO MANAGEMENT OF DUGDA WASHERY OF M/s.BCCL** **(Respondent)**	**Supreme Court** **Civil Appeal No. 9278 of 2014** **T.S. Thakur, A.M. Khanwilkar & D.Y. Chandrachud, JJ.**

Industrial Disputes Act, 1947 – Industrial tribunal awards reinstatement and back wages – High court allows lump sum compensation and rejects reinstatement whether correct – Held, Yes.

Brief facts:

The appellant raised an industrial dispute which was referred to the Central Government Industrial Tribunal at Dhanbad, for adjudication. The Industrial Tribunal vide award dated 17th June 1997, answered

the reference in favour of the appellant and directed the Management to reinstate and regularize the concerned 35 workmen w.e.f. 1st July 1990, with payment of 30% full back wages. The High Court on appeal by the respondent- Management affirmed the view taken by the Tribunal. The respondent carried the matter in appeal by way of Letters Patent Appeal before the Division Bench.

The Division Bench modified the award by refusing the reinstatement and allowing Rs.50,000/- compensation, in addition to whatever has been paid to the workmen. Hence this appeal by workmen.

Decision: Appeal disposed of.

Reason:

It is not in dispute that the Management has paid wages to the workmen in terms of the order passed on an application under Section 17(B) of the Industrial Disputes Act, 1947 during the pendency of proceedings before the High Court. The question is: whether an amount of Rs.50,000/- determined by the Division Bench of the High Court to be paid to the workmen in addition to whatever amount has been paid to them under Section 17(B) of the Industrial Disputes Act, 1947 is adequate.

Considering the arguments of both sides, in our opinion, the Division Bench was right in observing that, in the facts of the present case, an order of reinstatement must be eschewed, being inequitable. The workmen, however, must be compensated in lieu of reinstatement. Applying the principle underlying the decisions of this Court in Ruby General Insurance Co. Ltd. v. P.P. Chopra (1969) 3 SCC 653 and the recent case of Delhi International Airport (P) Ltd. v. Union of India (2011) 12 SCC 449, in our considered opinion, interest of justice would be met by enhancing the amount of compensation in lieu of reinstatement/absorption and regularisation quantified at Rs.1,50,000/-(Rupees One Lakh Fifty Thousand) to each workman. For, the workmen have already received wages from October 2004 to January 2012 in terms of the order under Section 17(B) of the Industrial

Disputes Act, 1947 without any work assigned to them. The respondent paid minimum wages to the concerned workmen during the relevant period as the workmen were not able to produce any document in support of their last drawn wages.

This lump sum compensation amount of Rs.1,50,000/- to each workmen would be in full and final settlement of all the claims of the concerned workmen and substitute the order passed by the Tribunal to that extent, without any further enquiry as to whether the concerned workmen was gainfully employed during the relevant period or not.

The respondent shall deposit the amount payable in terms of this order to the workmen before the Central Government Industrial Tribunal, Dhanbad, within three months from today, failing which, shall be liable to pay interest thereon at the rate of 10% p.a. from today till the amount is deposited or paid to the concerned workmen, whichever is earlier. The Central Government Industrial Tribunal, Dhanbad, shall cause to disburse the amount to the concerned workmen subject to verification.

30.09.2016	**DELHI TRANSPORT CORPORATION (Appellant) vs. RAJENDER KUMAR (Respondent)**	**Delhi High Court** **LPA 250/2016** **Indira Banerjee & V. Kameswar Rao, JJ.**

Dismissal of workman on the ground of unauthorised absenteeism – Whether dismissal tenable – Held, Yes.

Brief facts:

The respondent-Workman was appointed as a sweeper/cleaner with the appellant-Corporation. A charge sheet was issued to the respondent for availing leave without pay for 118 days between the period November 1987 to October 1988. The charge sheet stated that the aforesaid act of the respondent amounted to misconduct within the meaning of para 4(ii) and 19(h) of the Standing Orders governing the conduct of DTC employees. The charge sheet also stated that the respondent's past record would also be taken into account at the time of passing of the order. The past record of the respondent showed that he was punished with stoppage of one increment with cumulative effect on three occasions for availing excessive leave. After holding disciplinary proceedings, the workman was dismissed from services on the ground of absenting without authorised leave. The respondent raised an industrial dispute. The Labour Court passed an Award in favour of the respondent. The appellant challenged the said Award before the High court and the single judge dismissed the appeal. Hence this second appeal under the Letters Patent.

Decision: Appeal allowed.

Reason:

Having heard the learned counsel for the parties, the only question arises for consideration is whether against 118 days leave 41 days was against medical certificates; the submission of the leave application for some period and no leave application for 37 days, and the charge in the charge sheet that the respondent had taken 143 days excessive leave in the year 1986 and 103 days leave in the year 1987 and out of four adverse entries, three adverse entries are about availing of leave without pay, the Labour Court could have interfered with and set aside the penalty of removal imposed on the respondent as upheld by the learned Single Judge.

The position of law is well settled in the case of DTC v. Sardar Singh (2004) 7 SCC 574, the Supreme Court has held that when an employee absents himself from duty, even without sanctioned leave for a very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Orders relates to habitual negligence of duties and lack of interest in the Authority's work. When an employee absents himself from duty without sanctioned leave the Authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and has exhibited lack of interest in the employer's work. Conclusion regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when the same is unauthorized. It also held that an order passed treating absence as leave without pay after passing an order of termination is only for the purpose of maintaining correct record of service. It relied upon its judgment in the case of State of M.P v. Harihar Gopal (1969) 3 SLR 274 (SC).

The charge in the case in hand, is absence without obtaining leave in advance. The plea of the respondent was, the leave he had taken was for his as well as his children's illness. Against 118 days, medical certificates for 41 days was submitted, still 77 days of leave was unaccounted for. It is not the case of the respondent that the leave for those days was taken in advance. This sufficiently reveals that the conduct of the employee is nothing but irresponsible and can hardly be justified and in view of the Standing Orders, unauthorized leave can be treated as misconduct.

On a perusal of para 4 of the Standing Orders, it is clear, that it shows the seriousness attached to habitual absence. Clause (i) shows, there is a requirement for prior permission. Non-observance of clause (i) renders the absence unauthorized.

From the order of the labour court, above, it is noted that the Labour Court has only noted that the medical certificates for the period June 11, 1988 to June 20, 1988; August 10, 1988 to September 12, 1988 and October 1988 were produced. The total period is of 41 days, as has come on record. The Labour Court also notes that, against 37 days, the workman had not submitted any leave application. That apart, the Labour Court notes that for the rest of the period, leave applications were given by the respondent. Mere submitting the leave application would not meet the requirement of para 4 of the Standing Orders. It is the case of the respondent that he had taken leave for his children's illness as well. Assuming that the medical certificates submitted was for his illness, surely for the illness of his children, he could have sought prior permission from the Authorities. In any case, for against 37 days, there was no leave application. Hence, to that extent charge stands proved. In other words, the conclusion of the Labour Court that the charges as framed by the Management are not proved completely before the Court, may not be tenable. Hence, the case of the respondent gets covered under para 4 of the Standing Orders. The past conduct of the respondent, also reveals absence for a very long duration of 143 days (1986), 103 days (1987) and three adverse entries are about availing leave without pay. The circumstances does suggest that the respondent was guilty of the misconduct under para 4 and 19 of the Standing Orders and the case in hand is squarely covered by the law laid down by the Supreme Court in the case of Sardar Singh (supra). Further, the position of law with regard to Section 11A of the Industrial Disputes Act, 1947 is very clear, inasmuch as the Labour Court may interfere with the quantum of punishment awarded by the employer but ordinarily discretion exercised by employer should not be interfered with. It is not a case where the penalty of removal is unjustified. The Labour Court could not have set aside the order of removal.

Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorized. Burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials.

The Tribunal proceeded in all these cases on the basis as if the leave was sanctioned because of the noted leave without pay. Treating as leave without pay is not same as sanctioned or approved leave. It is a case where the Labour Court has failed to follow the law laid down by the Supreme Court the Award is an erroneous exercise of jurisdiction vested in it. Consequently, the learned Single Judge has erred in upholding the order of the Labour Court.

28.09.2016	**M/S SILVER TOUCH ENTERPRISES (Appellant) vs. RADHA SHARMA & ANR (Respondent)**	**Delhi High Court** **FAO 212/2016** **Sunil Gaur, J.**

Employee's Compensation Act, 1923 – Retired workman dies in the employers premises – Commissioner awards compensation – Whether tenable – Held, No.

Brief facts:

The appellant is the employer, who has been directed to pay compensation of Rs.6,67,984/- with interest in proceedings under the Employee's Compensation Act, 1923 while holding that deceased had died during the course of employment. The challenge to the impugned order of 4th March, 2016 in this appeal is on the ground that three months prior to her death, Smt. Laxmi Lachho had resigned and on the day of incident, she had come to appellant's premises to visit her friend and she had died natural death whereas the case of the respondents-claimants is that due to the work pressure, the deceased was under tremendous pressure and because of the excessive stress and strain of her employment, she had died at her work place.

Decision: Remanded for fresh adjudication.

Reason:

Upon hearing and on perusal of the impugned order, I find that even the issues have not been correctly reproduced in the impugned order, what to talk of the findings on the issues. The plea of resignation has not been dealt at all in the impugned order. In the considered opinion of this Court, the impugned order discloses utter non-application of mind and so, it deserves to be set aside with direction to the Commissioner, under The Employee's Compensation Act to permit the parties to lead evidence on the issue of resignation and thereafter return the finding about existence of relationship of employer-employee on the date of incident. Since, it is the case of appellant that deceased had come to the premises of the appellant to meet her friend, therefore, the necessary ingredient of 'accident taking place during the course of employment' has to be considered by the trial court in right perspective, after the evidence is led by the parties.

In view of the aforesaid, the impugned order is hereby set aside and the matter is remanded back to the Commissioner, under the Employee's Compensation Act to proceed further in terms of the directions issued in this judgment.

In view of mandate of Section 25A of the Employee's Compensation Act, 1923, the Commissioner under aforesaid enactment shall make all endeavours to decide the claim petition within the time stipulated in the aforesaid provision. The amount deposited by the appellant be refunded forthwith.

06.12.2016	**JORSINGH GOVIND VANJARI (Appellant) vs. DIVISIONAL CONTROLLER MAHARASHTRA STATE ROAD TRANSPORT CORPORATION (Respondent)**	**Supreme Court** **Civil Appeal No. 11807 of 2016 [Arising out of SLP ©No. 26366 of 2016** **Kurian Joseph & Rohinton Fali Nariman, JJ.**

Industrial Disputes Act, 1947 – Dismissal of workman – Superannuation before the announcement of the award – Labour court awarded all service benefits and 50% of back wages in lieu of reinstatement – High Court modified the award by allowing only 50% of the back wages – Whether tenable – Held, No.

Brief facts:

The appellant, aggrieved by the termination from service, raised an industrial dispute leading to the award in Reference IDA No. 42 of 2007 dated 20.06.2013 of the Labour Court, Jalgaon, Maharashtra.

The Labour Court set aside the dismissal order dated 26.08.2002. However, noticing that the appellant had already crossed the date of superannuation, viz., 31.05.2005, it was ordered that from the date of termination to the date of superannuation, the appellant would be entitled to all service benefits except back wages which were limited to 50 per cent.

The respondent challenged the award before the High Court of Bombay, which modified the award by granting only a one-time compensation of an amount equivalent to 50 per cent of the back wages as awarded by the Labour Court. Thus aggrieved, the appellant is before this Court.

Decision: Appeal allowed.

Reason:

Heard Learned Counsel appearing on both sides. On facts, it is clear that the High Court has gone wrong in holding that the Labour Court did not follow the procedure. It is seen from the award that the management had not sought for an opportunity for leading evidence. And despite granting an opportunity, no evidence was adduced after the Labour Court held that the findings of the inquiry officer were perverse. Therefore, the Labour Court cannot be faulted for answering the Reference in favour of the appellant. The Labour Court, on the available materials on record, found that the termination was unjustified on the basis of a perverse finding entered by the inquiry officer. There was no attempt on the part of the management before the Labour Court to establish otherwise. It appears that the High Court itself has granted compensation since the Court felt that the termination was unjustified and since reinstatement was not possible on account of superannuation. In case, the High Court was of the view that termination was justified, it could not have ordered for payment of any compensation. In order to deny gratuity to an employee, it is not enough that the alleged misconduct of the employee constitutes an offence involving moral turpitude as per the report of the domestic inquiry. There must be termination on account of the alleged misconduct, which constitutes an offence involving moral turpitude.

Thus, viewed from any angle, the judgment of the High Court cannot be sustained. It is hence set aside. The appeal is allowed. The award of the Labour Court is restored. Consequently, the appellant shall be entitled to gratuity in respect of his continuous service from his original appointment till the date of his superannuation.

18.10.2016	**LANCO ANPARA POWER LTD (Appellant) vs. STATE OF UTTAR PRADESH & ORS (Respondent)**	**Supreme Court** **Civil Appeal No. 6223 of 2016 with batch of appeals [(2016) 10 SCC 329)] A.K. Sikri & N.V. Ramana, JJ.**

Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and Buildings And Other Construction Workers Welfare Cess Act, 1996 read with Factories Act, 1948 – Construction of factory building – Whether the provisions of BOCW Act are applicable – Held, Yes.

Brief facts:

These appeals are filed by the appellants challenging the orders passed by different High Courts i.e. High Court of Allahabad, High Court of Orissa, High Court of Madhya Pradesh and High Court of Karnataka. These High Courts, however, are unanimous in their approach and have reached the same conclusion.

In all these cases, appellants were issued show cause notices by the concerned authorities under the provisions of the Building And Other Construction Workers (Regulation of Employment and Conditions of Service) Act,

1996 (hereinafter referred to as 'BOCW Act') and Buildings And Other Construction Workers Welfare Cess Act, 1996 (hereinafter referred to as 'Welfare Cess Act'). They had challenged those notices by filing writ petitions in the High Courts on the ground that the provisions of BOCW Act or Welfare Cess Act were not applicable to them because of the reason that they were registered under the Factories Act, 1948.

It may be mentioned that at the relevant time no manufacturing operation had commenced by the appellants. In fact, all these appellants were in the process of construction of civil works/factory buildings etc. wherein they had planned to set up their factories. As the process of construction of civil works was undertaken by the appellants wherein construction workers were engaged, the respondent authorities took the view that the provisions of the aforesaid Acts which were meant for construction workers became applicable and the appellants were supposed to pay the cess for the welfare of the said workers engaged in the construction work.

The appellants had submitted that Section 2(d) of the BOCW Act which defines 'building or other construction work' specifically states that it does not include any building or construction work to which the provision of the Factories Act, 1948 or the Mines Act, 1952 apply. Since the appellants stood registered under the Factories Act, they were not covered by the definition of building or other construction work as contained in Section 2(d) of the Act and, therefore, said Act was not applicable to them by virtue of Section 1(4) thereof. All the High Courts have negated the aforesaid plea of the appellants on the ground that the appellants would not be covered by the definition of factory defined under Section 2(m) of the Factories Act in the absence of any operations/ manufacturing process and, therefore, mere obtaining a licence under Section 6 of the Factories Act would not suffice and rescue them from their liability to pay cess under the Welfare Cess Act. This is, in nutshell, the subject matter of all these appeals.

Decision: Appeals dismissed.

Reason:

We have bestowed our due and serious consideration to the submissions made of both sides, which these submissions deserve. The central issue is the meaning that is to be assigned to the language of Section 2(d) of the Act, particularly that part which is exclusionary in nature, i.e. which excludes such building and construction work to which the provisions of Factories Act apply.

Keeping in view the objective of the respective Acts, we now deal with the scope and ambit of Section 2(d) of BOCW Act. As noticed above, one of the submissions of the appellants is that literal interpretation needs to be given to the said provision as it categorically excludes those building or construction work to which Factories Act apply. In this very hue, it is argued that as the benefit under the Factories Act are already given to the construction workers who are involved in the construction work, there is no need for covering the construction workers who are engaged in building or construction work of the appellants under BOCW Act or Welfare Cess Act.

On the conjoint reading of the aforesaid provisions [s.2(m) "factory", s.2(k) "manufacturing process" & 2(l) "worker"], it becomes clear that "factory" is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of 'worker' under the Factories Act. On these two aspects there is no cleavage and both parties are at *ad idem*. What follows is that these construction workers are not covered by the provisions of the Factories Act.

Having regard to the above, if the contention of the appellants is accepted, the construction workers engaged in the construction of building undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of BOCW Act and Welfare Cess Act as well. Could this be the intention

while providing the definition of 'building and other construction work' in Section 2(d) of BOCW Act? Clear answer to this has to be in the negative. We now advert to the core issue touching upon the construction of Section 2(d) of the BOCW Act. The argument of the appellants is that language thereof is unambiguous and literal construction is to be accorded to find the legislative intent. To our mind, this submission is of no avail. Section 2(d) of the BOCW Act dealing with the building or construction work is in three parts. In the first part, different activities are mentioned which are to be covered by the said expression, namely, construction, alterations, repairs, maintenance or demolition. Second part of the definition is aimed at those buildings or works in relation to which the aforesaid activities are carried out. The third part of the definition contains exclusion clause by stipulating that it does not include 'any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), applies'. Thus, first part of the definition contains the nature of activity; second part contains the subject matter in relation to which the activity is carried out and third part excludes those building or other construction work to which the provisions of Factories Act or Mines Act apply.

It is not in dispute that construction of the projects of the appellants is covered by the definition of "building or other construction work" as it satisfies first two elements of the definition pointed out above. In order to see whether exclusion clause applies, we need to interpret the words 'but does not include any building or other construction work to which the provisions of the Factories Act apply'. The question is as to whether the

provisions of the Factories Act apply to the construction of building/project of the appellants. We are of the firm opinion that they do not apply. The provisions of the Factories Act would "apply" only when the manufacturing process starts for which the building/project is being constructed and not to the activity of construction of the project. That is how the exclusion clause is to be interpreted and that would be the plain meaning of the said clause. This meaning to the exclusion clause ascribed by us is in tune with the approach adopted by this Court in Organo Chemical Industries v. Union of India, (1979) 4 SCC 573.

The aforesaid meaning attributed to the exclusion clause of the definition is also in consonance with the objective and purpose which is sought to be achieved by the enactment of BOCW Act and Welfare Cess Act. As pointed out above, if the construction of this provision as suggested by the appellants is accepted, the construction workers who are engaged in the construction of buildings/projects will neither get the benefit of the Factories Act nor of BOCW Act/Welfare Cess Act. That could not have been the intention of the Legislature. BOCW Act and Welfare Cess Act are pieces of social security legislation to provide for certain benefits to the construction workers.

Purposive interpretation in a social amelioration legislation is an imperative, irrespective of anything else. How labour legislations are to be interpreted has been stated and restated by this Court time and again. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions.

In taking the aforesaid view, we also agree with the learned counsel for the respondents that 'superior purpose' contained in BOCW Act and Welfare Cess Act has to be kept in mind when two enactments – the Factories Act on the one hand and BOCW Act/ Welfare Cess Act on the other hand, are involved, both of which are welfare legislations. Here the concept of 'felt necessity' would get triggered and as per the Statement of Objects and Reasons contained in BOCW Act, since the purpose of this Act is to take care of a particular necessity i.e. welfare of unorganised labour class involved in construction activity, that needs to be achieved and not to be discarded.

01.03.2017	**THE MANAGEMENT OF STATE BANK OF INDIA (Appellant) Vs. SMITA SHARAD DESHMUKH & ANR (Respondent)**	**Supreme Court Civil Appeal No. 3423 of 2017 [Arising out of SLP © No. 33070/2013 Kurian Joseph & A.M.Khanwilkar, JJ.**

Employee furnishing a forged certificate as to higher qualification – Drawn additional emoluments on the basis of the forged certificate – Management after conducting disciplinary proceedings dismissed the employee - Labour tribunal confirmed the dismissal – High court set aside the dismissal - Whether correct – Held, No.

Brief facts:

The appellant (hereinafter referred to as "the Management") is aggrieved by the impugned judgment of the High Court whereby the first respondent (hereinafter referred to as "the employee") was directed to be reinstated in service with 50 per cent back wages, reversing the order passed by the Industrial Tribunal-cum- Labour Court. The employee, while working with the Management, submitted a certificate purportedly issued by the Indian Institute of Bankers claiming that she had passed the CAIIB Part-II Examination, and on that basis, started drawing additional monetary benefits. The Disciplinary Authority, based on the finding in a domestic enquiry that the certificate was a forged one, dismissed her from service on 01.08.2003. The punishment was upheld by the Appellate Authority vide order dated 10.06.2006. The Industrial Tribunal-cum-Labour Court declined to grant any relief. However, the High Court ordered reinstatement with 50 per cent back wages, and thus aggrieved, the Management has filed the appeal.

Decision: Appal allowed.

Reason:

The only ground on which the High Court interfered with the award was that the Management had not established, by leading evidence, that the employee was aware of the fact that the certificate produced before the Management was forged.

We find it difficult to appreciate the strange stand taken by the High Court. The Labour Court had clearly analysed the entire evidence and had come to the conclusion that the employee was fully aware of the forgery. The Tribunal took note of the fact that she had produced a copy of the postal receipt of dispatching the certificate from the Institute of Bankers in her evidence but failed to explain the source of the postal receipt. It also took note of the fact that the alleged certificate of having passed the examination is dated 04.09.2000. If that be so, there was no occasion for asking for any re-verification of the marks by filing an application dated 08.09.2000. Still further, the Court extensively referred to the reply furnished by the Institute of Bankers and came to the conclusion that the certificate was a forged one.

The evidence led by the employee, as rightly appreciated by the Industrial Tribunal, would clearly show that she had the knowledge that the document she produced was a forged one. Therefore, there was no requirement on the part of the Management to establish whether she had known, at the time of submission of the document, that it was a forged one.

It is a well-settled principle that the High Court will not re-appreciate the evidence but will only see whether there is evidence in support of the impugned conclusion. The court has to take the evidence as it stands and its only limited jurisdiction is to examine, whether on the evidence, the conclusion could have been arrived at.

In the case before us, it is an admitted position that the certificate produced by the employee is a forged one.

It has been categorically found by the Industrial Tribunal, on the basis of evidence, that the employee was fully aware of the fact that the document was a forged one. In such circumstances, there is no basis at all for the stand taken by the High Court that the Management did not establish that the employee had knowledge about the certificate being a forged one.

Though learned counsel for the employee made a persuasive attempt for modification of punishment on the ground of disproportionality, in view of the conduct of the employee which we have referred to above, we are not inclined to take a different view from that taken by the Disciplinary Authority, Appellate Authority and the Industrial Tribunal-cum-Labour Court.

14.09.2017	**ALL ESCORTS EMPLOYEES UNION (Appellant) vs. THE STATE OF HARYANA (Respondent)**	**Supreme Court** **Civil Appeal Nos. 12843- 12844 of 2017 [Arising out of SLP © Nos. 27020-27021 of 2015** **A.K. Sikri & Ashok Bhushan, JJ.**

Trade Union Act – Amendment of membership clause to include workmen working in other industry – Whether permissible – Held, No.

Brief facts:

The appellant-Union was formed way back in the year 1968. It is a registered Trade Union which was representing the employees of Escorts Group of Industries and is duly recognised by the employers as well. Some of the Establishments of Escorts Group were Escorts Ltd., Escorts Yamaha Ltd., Escorts JCB Ltd., Escorts Class Ltd. and Escorts Hospital. It is an undisputed fact that the workmen from all these industries were members of the appellant-Union. As far as Escorts Yamaha Ltd. is concerned, it was a joint venture of Escorts Management and Yamaha Motor Company, Japan. In the year 2001, this company was taken over by Yamaha Motor Company, Japan and its name was changed to Yamaha Motor India Private Limited (hereinafter referred to as the 'Yamaha'). After this separation, the workmen working in Yamaha ceased to be the members of the appellant-Union, in view of Clause 4 of its Constitution which spelled out who could be the members of the Union.

With an intention to take them within its fold again, the appellant-Union amended Clause 4 of its Constitution. This amendment was sent to the Registrar, Trade Union, Haryana for its record and approval. The Registrar, Trade Union did not approve the amendment. Challenging the decision of the Registrar, writ petition was filed in the High Court of Punjab & Haryana, which was also been dismissed by the High Court vide impugned judgment. Hence the present appeal.

Decision: Appeal dismissed.

Reason:

As per Clause 4 as originally stood, only those workmen who were employed in Escorts Group of Industries could become members of the appellant-Union. This Clause also made it clear that the membership of a workman who ceases to be employee of Escorts Group shall automatically be terminated. It was, thus, clear that the appellant-Union wanted only those workmen to be its members who are the employees of the Establishment in question, namely, the Escorts Group. After the hiving off motorcycle manufacturing unit from the Escorts Group and take over thereof by Yamaha, this unit has no common interest with the workers of the Escorts Group. This becomes clear as the workers of the two plants of the said motorcycle unit were taken over by Yamaha vide notice dated June 23, 2001. These workers have thereafter become the workers of Yamaha. Thus, by virtue of original/unamended Clause 4, they no longer remain members of the appellant-Union.

From the definition of Trade Union contained in Section 2(h) of the Act, it becomes apparent that such a Union is formed primarily for the purpose of regulating the relations between workmen and employers (which is the instant case) or it can be between workmen and workmen or between employers and employers. It includes any federation of two or more Trade Unions also though we are not concerned with it. When we keep in mind the aforesaid objective of formation of a Trade Union, namely, regulating the relations between the workmen and its employer, normally such a Union of workmen would be of those workmen who work in a particular Establishment. This gets further strengthened when we peruse the definition of Trade Dispute contained in Section 2(g) of the Act. The Trade Unions of workmen while regulating their relations between the employers would normally have negotiations representing its workmen before the employer and in case those negotiations do not result in amicable settlement or resolution of disputes, such Trade Unions would

raise trade dispute with its employer. Section 6 of the Act mandates a Trade Union to have its Constitution/ Bye-Laws/Rules by incorporation of the provisions contained therein i.e. under Section 6. Clause (e) deals with admission of ordinary members and specifically provides that ordinary members should be those persons who are actually engaged or employed in an industry with which the Trade Union is connected. This provision implicitly confines the membership to those who are the workmen of the industry where they are employed.

The moot question here is as to whether such a Trade Union which primarily has the membership of the worker of particular Establishment or industry can broaden its scope by opening the membership even to those who are not the employees of the Establishment in respect of which the said Trade Union has been formed.

At this juncture, it becomes pertinent to note that the workers of Yamaha have formed their own separate Union, known as Yamaha Motor Employees Union. This Union is duly registered by the Registrar, Trade Union, Kanpur (Uttar Pradesh) having Registration No. 7179. It is this Union which now stands recognised by the Management of Yamaha. In these circumstances, the very purpose in amending Clause 4 in the manner it seeks to do stands frustrated. In any case, Clause 4 was amended in the year 2007 and that amendment has been approved by the Registrar, Trade Union. Therefore, issue of amendment in Clause 4, as carried out in June, 2001, becomes a non-issue.

In view of the aforesaid, it is not necessary to deal with the issue raised in these appeals as the issue does not survive. Thus, leaving the question of law open, these appeals are dismissed.

21.09.2017	**EMPLOYEES STATE INSURANCE CORPORATION (Appellant) vs. MANGALAM PUBLICATIONS (INDIA) PVT. LTD (Respondent)**	**Supreme Court** **Civil Appeal No. 4681 of2009** **Arun Mishra & M M Shantanagoudar, JJ.**

ESI Act – Wages – Interim wages paid to employees – No contribution was made on this – Whether interim wages included in the term 'wages' under the Act – Held, Yes.

Brief facts:

The respondent is an establishment covered by the provisions of the ESI Act, engaged in the business of printing and publishing of a daily Malayalam newspaper called "Mangalam". The premises of the respondent-company was inspected by the Insurance Inspector of the appellant-Corporation on 13.06.2000, wherein it was found that the respondent had not paid any contribution on the interim wages paid by it to its employees during the period from 01.04.1996 to 31.03.2000. The contention of the respondent was that it was not required to pay any contribution on the interim relief paid by it to its employees in view of Central Government's office memorandum dated 19.08.1998. Since the contribution was not paid by the respondent, as mentioned supra, a notice dated 18.07.2000 was issued by the appellant to the respondent to pay contribution of the afore-mentioned amount for the afore-mentioned period.

The demand was unsuccessfully challenged before the ESI court, and was carried on to the High Court, which allowed the appeal of the respondent. Hence the present appeal by the corporation.

Decision: Appeal allowed.

Reason:

A plain reading of the definition of Section 2(22) of the ESI Act makes it amply clear that "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of the employment, expressed or implied, were fulfilled and includes other additional remuneration, if any, paid at intervals not exceeding two months. But payments made on certain contingencies under Clauses (a) to (d) of Section 2(22) of the ESI Act, do not fall within the definition of "wages". The interim relief paid to the employees of the respondent in the matter on hand, as mentioned supra, will definitely not fall within the excluded part of clauses (a) to

(d) of Section 2(22) of the ESI Act, inasmuch as such payment is not travelling allowance or the value of any travelling concession, contribution paid by the employer to any pension fund or provident fund; sum paid to an employee to defray special expenses entailed on him by the nature of his employment; or any gratuity payable on discharge.

The inclusive part and exclusive portion of the definition of "wages" clearly indicate that the expression "wages" has been given wider meaning. As mentioned supra, under the definition, firstly whatever remuneration is paid or payable to an employee under the terms of the contract of the employment, expressed or implied, is "wages". Secondly, whatever payment is made to an employee in respect of any period of authorized leave, lock-out etc. is "wages". Thirdly, other additional remuneration, if any, paid at intervals not exceeding two months is also "wages". Any ambiguous expression, according to us, should be given a beneficent construction in favour of employees by the Court. If the definition of "wages" is read in its entirety including the inclusive part as well as the exclusive portion, it appears that inclusive portion is not intended to be limited only of items mentioned therein, particularly, having regard to the objects and reasons for which the Employees' State Insurance Act is enacted.

The High Court while allowing the appeal filed by the respondent has mainly relied upon the office memorandum dated 19.08.1998 issued by the Department of Public Enterprises, Ministry of Industry, New Delhi, which is not applicable to the facts of this case. The said notification makes it abundantly clear that the instructions contained in the said office memorandum are applicable to Central Public Sector Enterprises (PSES) only. Admittedly, the respondent is a private limited company and hence the instructions contained in office memorandum dated 19.08.1998 are not applicable to the respondent company. In the matter on hand, the appellant claimed ESI contribution only on the amount paid by the respondent as interim relief to its employees, treating the same as "wages" as per Section 2(22) of the ESI Act. The amount paid as interim relief by the respondent to its employees definitely falls within the definition of "wages" as per Section 2(22) of the ESI Act. On the other hand, the High Court has strangely observed that the interim relief paid for the period from 01.04.1996 to 31.03.2000 can only be treated as "ex-gratia payment" paid by the employer to its employees and cannot be treated as "wages" for the purpose of ESI contribution. In our considered opinion, the High Court has ignored to appreciate that the effect of ESI Act enacted by the Parliament cannot be circumvented by the department office memorandum. The High Court has also failed to appreciate that the payment of interim relief/wages emanates from the provisions contained in terms of the settlement, which forms part of the contract of employment and forms the ingredients of "wages" as defined under Section 2(22) of the ESI Act and that the respondent paid interim relief, as per a scheme voluntarily promulgated by it as per the notification dated 20.04.1996, issued by the Government of India, in view of the recommendations of "Manisana' Wage Board, pending revision of rates of wages. It was not an ex-gratia payment.

The interim relief paid by the respondent to its employees is not a "gift" or "inam", but is a part of wages, as defined under Section 2(22) of the ESI Act. In view of the above, we hold that the payment made by way of interim relief to the employees by the respondent for the period from 1.04.1996 to 31.03.2000 comes within the definition of "wages", as contained in Section 2(22) of the ESI Act, and hence the respondent is liable to pay ESI contribution.

10.11.2017	**UTTARAKHAND TRANSPORT CORPORATION & ORS. (Appellant) vs. SUKHVEER SINGH (Respondent)**	**Supreme Court** **Civil Appeal No. 18448 of 2017 [Arising out of SLP © No. 4012 of2017]** **Arun Mishra & L. N. Rao, JJ.**

Industrial Disputes Act – Dismissal of employee – Misappropriation charges – Driver in connivance with conductor allowed passengers to travel without tickets – Whether dismissal is too harsh – Held, No.

Brief facts:

The Respondent was appointed as a driver with the Appellants- Road Transport Corporation in the year 1989. On 27th October, 1995 while driving a vehicle on Karnal-Haridwar route, the Respondent did not stop the vehicle when the inspection team signalled. The inspection team had to follow the vehicle which was stopped six kilometres away from where it was signalled to stop. On verification, it was found that 61 passengers were travelling without a ticket. The Respondent was placed under suspension on 31st October, 1995 and disciplinary proceedings were initiated by issuance of a charge sheet on 3rd November, 1995.

After prolonged disciplinary proceeding and inquiry he Respondent was dismissed from services.

The Respondent challenged the award of the labour court in the High Court, which allowed the writ petition and set aside the dismissal order. The High Court directed that the Respondent should be deemed to be in service with all consequential benefits. Assailing the legality of the said judgment of the High Court, the Appellants have approached this Court.

Decision: Appeal dismissed.

Reason:

It is contended on behalf of the Appellants that the impugned judgment is contrary to the law laid down in *Managing Director ECIL Hyderabad & Ors. v. B. Karunakar & Ors. (1993) 4 SCC 727*. It is further submitted that a copy of the inquiry report was in fact supplied to the Respondent. The other point that was canvassed by the Appellants is that the Respondent neither pleaded nor proved that any prejudice was caused to him by the non-supply of the inquiry report prior to the issuance of show cause notice. The counsel for the Respondent supported the judgment of the High Court by submitting that it was incumbent upon the disciplinary authority to supply the inquiry report prior to the issuance of the show cause notice as per the judgment of this Court in *Managing Director ECIL Hyderabad & Ors. v. B. Karunakar & Ors.* (supra). He also relied upon certain findings in the inquiry report which were in favour of the Respondent. He finally submitted that the punishment of dismissal from service is disproportionate to the delinquency.

The award of the labour court was set aside by the High Court on the sole ground that non-supply of the inquiry report prior to the show cause notice vitiated the disciplinary proceedings. The High Court, in our opinion, committed an error in its interpretation of the judgment in *Managing Director ECIL Hyderabad & Ors. v. B. Karunakar & Ors.* (supra). It is no doubt true that this Court in the said judgment held that a delinquent employee has a right to receive the report of the inquiry officer before the disciplinary authority takes a decision regarding his guilt or innocence. Denial of a reasonable opportunity to the employee by not furnishing the inquiry report before such decision on the charges was found to be in violation of principles of natural justice. In the instant case, the disciplinary authority communicated the report of the inquiry officer to the Respondent along with the show cause notice. There is no dispute that the Respondent submitted his reply to the show cause notice after receiving the report of the inquiry officer. On considering the explanation submitted by the Respondent, the disciplinary authority passed an order of dismissal. Though, it was necessary for the Appellants to have supplied the report of the inquiry officer before issuance of the show cause notice proposing penalty, we find no reason to hold that the Respondent was prejudiced by supply of the inquiry officer's report along with the show cause notice. This is not a case where the delinquent was handicapped due to the inquiry officer's report not being furnished to him at all.

It is clear from the above that mere non-supply of the inquiry report does not automatically warrant re-instatement of the delinquent employee. It is incumbent upon on the delinquent employee to plead and prove that he suffered a serious prejudice due to the non-supply of the inquiry report. We have examined the writ petition filed by the Respondent and we find no pleading regarding any prejudice caused to the Respondent by the non-supply of the inquiry report prior to the issuance of the show cause notice. The Respondent had ample opportunity to submit his version after perusing the report of the inquiry officer. The Respondent utilised the opportunity of placing his response to the inquiry report before the disciplinary authority. The High Court

committed an error in allowing the writ petition filed by the Respondent without examining whether any prejudice was caused to the delinquent employee by the supply of the inquiry officer's report along with the show cause notice. We are satisfied that there was no prejudice caused to the respondent by the supply of the report of the inquiry officer along with the show cause notice. Hence, no useful purpose will be served by a remand to the court below to examine the point of prejudice.

The Respondent contended that the punishment of dismissal is disproportionate to the delinquency. It is submitted that he was working as a driver and the irregularity in issuance of tickets was committed by the conductor. We are in agreement with the findings of the inquiry officer which were accepted by the disciplinary authority and approved by the appellate authority and the labour court that the Respondent had committed the misconduct in collusion with the conductor. It is no more res integra that acts of corruption/misappropriation cannot be condoned, even in cases where the amount involved is meagre. (See - *U.P.SRTC v. Suresh Chand Sharma (2010) 6 SCC 555)*. For the aforementioned reasons, we allow the appeal and set aside the judgment of the High Court. No order as to costs.

12.10.2017	**P. KARUPPAIAH (D) THROUGH LRS. (Appellant) vs. GENERAL MANAGER, THIRIUVALLUVAR TRANSPORT CORPORATION (Respondent)**	**Supreme Court** **Civil Appeal No. 4160 of 2008** **R.K.Agarwal & A M Sapre, JJ.**

Industrial Disputes Act – Dismissal of employee – Reinstatement allowed but back wages was not allowed – Whether entitled for back wages also – Held, No.

Brief facts:

This appeal is filed by the employee against the final judgment and order dated 07.12.2006 passed by the High Court of Judicature at Madras in W.A. No. 1848 of 2000 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and upheld the judgment of 1996 by which the appellant was denied the back wages for the period from 21.07.1994 to 31.08.1999.

The only question involved in the appeal filed by an employee against his employer is whether the appellant is entitled to claim back wages for the period in question, i.e., 21.07.1994 to 31.08.1999?

Decision: Appeal dismissed.

Reason:

Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeal.

The law on the question of award of back wages has taken some shift. It is now ruled in cases that when the dismissal/removal order is set aside/withdrawn by the Courts or otherwise, as the case may be, directing employee's reinstatement in service, the employee does not become entitled to claim back wages as of right unless the order of reinstatement itself in express terms directs payment of back wages and other benefits. (See *M.P. State Electricity Board vs. Jarina Bee, (2003) 6 SCC 141*)

Indeed, the employee in order to claim the relief of back wages along with the relief of reinstatement is required to prove with the aid of evidence that from the date of his dismissal order till the date of his re-joining, he was not gainfully employed anywhere. The employer too has a right to adduce evidence to show otherwise that an employee concerned was gainfully employed during the relevant period and hence not entitled to claim any relief of back wages.

On proving such facts to the satisfaction of the Court, the back wages are accordingly awarded either in full or part or may even be declined as the case may be while passing the order of reinstatement. The Courts have also applied in appropriate cases the principle of "No work-No pay" while declining to award back wages and

confining the relief only to the extent of grant of reinstatement along with grant of some consequential reliefs by awarding some benefits notionally, if any, in exercise of discretionary powers depending upon the facts of each case.

Having seen the record of the case, we are satisfied that there was no evidence brought on record by the appellant (employee) in his writ petition to claim the back wages for the period in question either in full or part. Moreover, we find that the issue in question was raised in writ petition and not before the Industrial or Labour Tribunal where parties could adduce evidence on such question.

Be that as it may, the writ Court and the appellate Court yet examined the question in its writ jurisdiction and finding no merit therein declined to award any back wages. This Court does not find any good ground to interfere in the discretion exercised by the two Courts below and accordingly uphold the orders impugned herein calling no interference.

Indeed, the appellant should feel satisfied that he was able to secure reinstatement in service despite his involvement in a murder case. The appellant should be content with what he has got. In view of foregoing discussion, the appeal fails and is accordingly dismissed.

05.01.2018	**NATIONAL KAMGAR UNION (Appellant) vs. KRAN RADER** **PVT LTD & ORS. (Respondent)**	**Supreme Court** **Civil Appeal No. 20 of 2018 [Arisingout of S.L.P. © No. 18413 of 2015** **R.K.Agarwal & A M Sapre, JJ.**

Industrial Disputes Act, 1947– Closure of undertaking – Tribunal on the basis of evidence held that there were less than 100 workers – High Court affirmed the said finding – Whether requires any interference –Held, No.

Brief facts:

In 1990, respondent No.1 suffered business loss in running the said manufacturing unit and, therefore, decided to close down the said unit permanently. The appellant-Union, felt aggrieved of the closure notice issued by respondent No.1, filed complaint against respondent No.1 in the Industrial Court at Pune in October 1990 being Complaint (ULP) No.544/1990.

In substance, the grievance of the appellant in their complaint was that since respondent No.1 had employed more than 100 workers on an average per working day for preceding 12 months in their manufacturing unit, the provisions of Chapter VB (Section 25-K) of the ID Act and, in turn, all the relevant provisions contained therein were applicable to respondent No.1. Responded denied this and claimed that it had employed less than 100 workers. Industrial tribunal held that respondent had employed more than 100 workers and on appeal the High court held that the respondent had employed less than 100 workers. Appellant union challenged this before the Supreme Court.

Decision: Appeal disposed of.

Reason:

Having heard the learned counsel for the parties at length and on perusal of the record of the case, we find no good ground to interfere in the impugned judgment of the High Court. In other words, the reasoning assigned by the High Court appears to be just and reasonable calling no interference for the reasons mentioned herein below.

The main question, which arises for consideration in this appeal, is only one, viz., how many workers were working in the Unit of respondent No.1 at all relevant time, whether the strength of the workers was above 100 or below 100. In other words, the question, which arises for consideration, is whether the provisions of Section 25-K of Chapter VB of the ID Act were applicable to respondent No. 1-Unit at the relevant time.

In view of the foregoing discussion, we also hold that respondent No.1 had employed 99 workers in their manufacturing Unit at the time of declaring the closure of the Unit in 1990. Since the strength of workers was below 100, it was not necessary for respondent No.1 to ensure compliance of Chapter VB. In other words, in such circumstances, the provisions of Section 25-K had no application to respondent No.1.

This takes us to examine the next question as to how much compensation and under which heads the workers are entitled to receive from respondent No.1 (Company). It was also stated that now hardly 16 workers or so remain unpaid because they did not accept the compensation when offered to them and preferred to prosecute the present litigation.

Learned counsel for respondent No.1 stated that the total compensation paid to every worker in 1990-1991 varies between Rs.1 lakh to Rs.2 lakhs. Taking into consideration the aforementioned background facts and circumstances of the case, we consider it just and proper to award in lump sum a compensation of Rs.2,50,000/- (Rs. Two Lakhs and Fifty Thousand) to each worker who did not accept the compensation.

Let Rs. 2,50,000/- (Rs. Two Lakhs and Fifty Thousand) be paid to each such worker after making proper verification. If any worker is not available for any reason, the amount payable to such worker be paid to his legal representatives or nearest relatives, as the case may be, after making proper verification.

Respondent No.1 will, accordingly, deposit the entire compensation payable to all such workers with details in the Industrial Court, Pune. A notice will then be served to each worker or his legal representatives, as the case may be, by the Industrial Court to enable the workers to withdraw the amount from the Industrial Court.

The amount will be paid to every worker or his nominee as the case may be by the demand draft issued in his/her name or in the name of legal representatives, as the case may be. It will be duly deposited in his/her Bank account to enable him/her to withdraw the same.

The appellant would submit necessary details of each such worker before the Industrial Court. The Industrial Court would ensure compliance of the directions of this Court and complete all formalities within three months from the date of this order. We make it clear that this order is applicable only to those workers who did not accept the compensation from respondent No.1. In other words, those workers who already accepted the compensation will not be entitled to get any benefit of this order.

22.01.2018	**BATRA HOSPITAL EMPLOYEES UNION (Appellant) vs. BATRA HOSPITAL & MEDICAL RESEARCH (Respondent)**	**Delhi High Court** **W.P © No. 5349/2004** **C. Hari Shankar, J.**

Payment of Bonus Act, 1965 – Exemption from coverage – Charitable institution running hospital – Whether entitled for exemption – Held, No.

Brief facts:

The Batra Hospital Employees Union claims, in this petition filed under Articles 226 and 227 of the Constitution of India, to be aggrieved by an award, passed by the Industrial Tribunal-I, Karkardooma (hereinafter referred to "the Tribunal"), which holds that the provisions of the Payment of Bonus Act, 1965 do not apply to the Batra Hospital and Medical Research Centre.

Decision: Petition allowed.

Reason:

Reverting to the determinative tests, to decide whether an establishment is being run "not for the purpose of profit" and is, consequently, entitled to the benefit of Section 32 (V)(c) of the Act, as set out in para 42 supra, if one were to apply the said tests to the respondent-Hospital, it is difficult to accept, at face value, the contention, of the respondent-Hospital, that it could be regarded as established "not for the purpose of profit". It is positively found, by the Tribunal, that profits were, in fact, earned by the respondent- Hospital, but the said aspect has

been discounted on the reasoning that the profits were funnelled back into the respondent-Hospital to enhance its services. As a result thereof, the Tribunal holds that the Hospital had expanded, from a small institution in 1986 to a 312-bedded hospital as on the date of the Award. - which, needless to say, would have further expanded, manifold, over the period of nearly a decade and a half during which this litigation has remained pending before this court. The Tribunal has held in favour of the respondent by relying on the "object of the Trust", as set out in its Bye-laws. Even on this aspect, all that is observed, in para 15 of the impugned Award, is that "one of the object of the trust is setting up of hospitals or other medical institutions for administrating medical relief to needy, carrying out medical and clinical research, grant of medical help to poor which clearly goes to show that the objective for which the society is formed and for which the hospital is established is not for earning profits". The finding, in my view is totally presumptuous in nature. The Tribunal does not disclose how, or why, it presumes that a Trust, which sets up hospitals which, inter alia, provide free treatment to needy patients, is not working "for the purpose of profit". It has to be realised, in this context, that expectation of profit, while running an enterprise, is not a sin. Neither is it immoral to run a hospital on commercial lines. However, earning of such profit would necessarily entail the responsibility of sharing some part of such profit with the employees or workmen, whose effort have significantly contributed towards the earning of the profit. That is all that the Act requires, and it would be ex facie unconscionable, for the enterprise, to shirk the said responsibility.

Ex facie, therefore, the respondent-Hospital cannot be regarded as established "not for the purpose of profit", as required by Section 32(v) (c) of the Act. The impugned Award of the Tribunal, which proceeds on assumptions and presumptions, without considering the material evidence on record, in the form of, inter alia, the witnesses" statements, and the contents of the affidavits filed by them, and, instead, applies tests that find no place in the Act, has necessarily to be characterised as perverse, and cannot sustain on facts or in law.

Resultantly, the impugned Award, of the Tribunal, is quashed and set aside. The respondent-Hospital is declared to be covered by the Payment of Bonus Act, 1965, and not entitled to the benefit of Section 32(v) (c) thereof. The reference, made by the Secretary (Labour), Government of National Capital Territory of Delhi, to the Tribunal, vide Notification No F.26 (66)/2002-Lab./2586-90, dated 1st February 2002, is answered in favour of the petitioner and against the respondent-Hospital. Consequential relief, to the workmen of the respondent-Hospital, who had petitioned the Tribunal, as well as to all other workmen of the respondent-Hospital, shall follow. In case of any default, by the respondent-Hospital, in disbursement thereof, in whole or in part, the workmen are at liberty to move the Tribunal by way of appropriate application(s) which, if moved, shall be decided expeditiously by the Tribunal, in view of the fact that, owing to the pendency of this matter before this court, the workmen of the respondent-Hospital have already been denied their legitimate right for nearly a decade and a half.

13.02.2018	**THAI AIRWAYS INTERNATIONAL LTD (Appellant) vs. GURVINDER SINGH (Respondent)**	**Delhi High Court W.P © 7762 of 2015Vinod Goel, J.**

Payment of Gratuity Act – Section 7 – Controlling authority directing payment of gratuity – Whether could be challenged under writ jurisdiction – Held, No.

Brief facts:

The respondent preferred a claim application before the Controlling Authority for determination of the amount of gratuity payable to him. After hearing both the parties, the Controlling Authority has passed the order which is impugned in this writ petition.

Decision: Petition dismissed.

Reason:

It is clear from the above said provision that, the petitioner, if aggrieved by an order passed under sub-section (4) of Section 7 could prefer an appeal within 60 days from the date of receipt of the order to the appropriate Government or such other authority as has been specified by the Government.

It is trite that when the petitioner is having an alternative effective statutory remedy of appeal, the writ petition under Article 226/227 of the Constitution of India cannot be allowed to be entertained.

In *Transport & Dock Workers Union vs. Mumbai Port Trust 2011 (2) SCC 575,* the Hon'ble Supreme Court held that:-

"14. In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellants by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits."

In the circumstances when the petitioner is having an alternative effective statutory remedy of appeal available against the impugned order passed by the Controlling Authority under Section 7(4) of the Payment of Gratuity Act, 1972 to prefer an appeal to the appropriate Government or such other authorities as may be specified under sub-section (7) of Section 7, the present writ petition cannot be entertained by this Court under Article 226/227 of the Constitution of India.

19.04.2018	**PARADEEP PHOSPHATES LIMITED (Appellant) vs. STATE OF ORISSA & ORS (Respondent)**	**Supreme Court** **Civil Appeal Nos. 3997-3998 of 2018** **(Arising out of Special Leave Petition (C) Nos.35347-35348 of 2016)** **R.K. Agrawal & Abhay Manohar Sapre, JJ.**

Industrial Disputes Act, 1947– Section 9A – Certified standing orders provided retirement age as 58 years – Management enhanced the same to 60 and later reduced to 58 – Whether violates change of working conditions provision – Held, Yes.

Brief facts:

The certified standing orders of the appellant company provided that the retirement age of the workmen would be 58 years of age. In the year 1998, the appellant enhanced the retirement age to 60 years, as a temporary measure, to retain employees and to cut costs. However, in the year 2002 the appellant withdrew the enhancement and restored the retirement age to 58 years.

The trade Union agitated this before the Industrial tribunal contending that the change is in violation of the provisions of section 9A of the Industrial Disputes Act. The Tribunal allowed the claim and on appeal the High court affirmed it. Hence the present appeal before the supreme court by the appellant company.

Decision: Appeal dismissed.

Reason:

We have given our solicitous consideration to the submissions of learned senior counsel for the parties and perused the relevant material placed before us.

The relationship of the employer and employee is of utmost faith and, as a result, it falls under the ambit of fiduciary relationship. In order to regulate such relationship, legislature came up with legislation i.e., the Industrial Disputes Act, 1947. The purpose of the Act is to protect the interest of employees as they are the weaker sections since time immemorial. In order to safeguard the rights of the employees, certain amendments have been made subsequently in the Statute. In 1956, legislature inserted Section 9A of the Act which makes it obligatory on the part of the employer that he is bound to give advance notice to the employee if he intends to change certain things as envisaged under Section 9A of the Act read with Fourth Schedule.

At the first sight of the provision, prima facie, it appears that the employer is bound to give minimum 21 days' notice to the employee if employer intends to change any material terms of service. Section 9A of the Act is a provision in consonance with the Constitutional mandate which assures the protection of principles of natural justice i.e., no one shall be condemned unless heard. For the guidance, legislature prescribed the Fourth Schedule and it is clearly mentioned in Section 9A of the Act that before changing either of the things as envisaged in the Fourth Schedule, prior notice must be given to the employee. In the instant case, the grievance of the Trade Union before the Tribunal was that withdrawal of the age of superannuation i.e., restoration of the age from 60 years to 58 years, amounts to contravention of Clause 8 of the Fourth Schedule, hence, employer was bound to give prior notice which employer cannot escape. Therefore, the action of the employer is bad in law and liable to be set aside which was eventually upheld by the Tribunal and the High Court.

No doubt, the enhancement of the superannuation age was temporary in nature in order to achieve certain objectives and also it is not deniable that yet employees would be governed by the Service Rules and the

Certified Standing Orders which were not amended. However, if we allow the plea of the appellant-Company then it would defeat the object of legislature because legislature could never have intended that employees would be condemned without giving them right of reasonable hearing. Naturally, every employee is under the expectation that before reducing his superannuation age, he would be given a proper chance to be heard. Right to work is a vital right of every employee and in our view, it shall not be taken away without giving reasonable opportunity of being heard otherwise it would be an act of violation of the Constitutional mandate.

Moreover, the contention of the appellant-Company that the object of enhancement of superannuation age was just to save the industries from huge losses, therefore, it does not violate any statutory right of the employees, cannot be sustained in the eyes of law and also it does not give the license to the appellant-Company to act in contravention of law since it is a cannon of law that everyone is expected to act as per the mandate of law.

To sum up, we are of the view that at the very moment when the order of enhancement of superannuation of the employees came into force though temporary in nature, it would amount to privilege to employees since it is a special right granted to them. Hence, any unilateral withdrawal of such privilege amounts to contravention of Section 9A of the Act and such act of the employer is bad in the eyes of law.

11.05.2018	**DTC SECURITY STAFF UNION (REGD). (Appellant) vs. DTC & ANR (Respondent)**	**Supreme Court** **Civil Appeal No. 5005of 2018 (Arising out of SLP(C) No.8039 of 2016)** **Ranjan Gogoi, R.Banumathi & NavinSinha, JJ.**

Industrial Disputes Act, 1947– Public transport corporation – Pay scale of security staff – Should be at par with Delhi police force – Held, No.

Brief facts:

The Appellant sought a Reference on 24.10.1979, under the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') with regard to revision of pay scale of Security Staff up to the rank of Assistant Security Inspector, in the Delhi Transport Corporation (hereinafter referred to as 'the Corporation'). The Industrial Tribunal, by Award dated 22.08.1985 held that Assistant Security Officer, Security Havaldar and Security Guard in the services of the Corporation were entitled to the pay scale of Rs.425700/, Rs.260350/ and Rs.225308/- respectively, with effect from 01.10.1979, at par with their counterparts in the Delhi Police Force. The Corporation challenged the Award unsuccessfully before the Single Judge. The Division Bench set aside the Award, and which is presently assailed.

Decision: Appeal dismissed.

Reason:

We have considered the submissions. There is no material to hold that pay scale of Deputy Security Officer and Security Officer in the Corporation was consciously kept at par with that of the Delhi Police keeping in mind aspects with regard to the qualifications, nature of duties etc. Merely because the pay scale may have been and remained the same, it cannot lead to the conclusion of a conscious parity on the principle of equal pay for equal work so as to make it discriminatory and a ground for grant of parity to Assistant Security Officer, Security Havildar and Security Guard also. The Tribunal ought to have refrained from going to the exercise of fixation of pay scales no sooner than that it was brought to its attention that a Commission constituted for the purpose was examining the same. Though the Tribunal examined the pay scales given to similarly situated security personnel in other organisations, and also the next below post principle in the Corporation itself, ignoring the difference in the methods of recruitment and qualifications for appointment in the two organisations, it primarily based its conclusion to grant parity of pay scale to Assistant Security Officer, Security Havaldar and Security Guard merely for the reason that parity of pay scale existed for the posts of Deputy Security Officer and Security Officer with that of the Delhi Police.

It is not in dispute that the pay scale of the employees of the corporation, including the security cadre, have been revised from time to time in accordance with the recommendations of 4th, 5th, 6th Pay Commission and now the 7th Pay Commission. There is no material on record that the appellant at any time filed any objection or raised issues for grant of appropriate pay scale either before the 4th Pay Commission or the successive Commissions. If the award of the Tribunal is to be implemented today, it will create a highly anomalous position in the Corporation, and c=shall lead to serious complications with regard to the issues of pay scale vis-a-vis recommendations of the Pay Commission and would generate further heartburn and related problems vis-à-vis other employees of the Corporation.

The Government of Delhi, which would have had to bear the financial burden, did not concur with the Board of the Corporation to abide by the e by the Award. The vast difference in the nature of general duties performed by personnel of the police force in contradistinction to that of security personnel discharging limited security duties in the confines of the Corporation hardly needs any emphasis. We find no reason to interfere with the order of the Division Bench.

27.04.2018	**CHENNAI PORT TRUST (Appellant) vs. The Chennai Port Trust Industrial EMPLOYEES CANTEEN WORKERS WELFARE ASSOCIATION & ORS. (Respondent)**	**Supreme Court** **Civil Appeal No. 1381of 2010** **A.M.Sapre & R. K. Agrawal, JJ.**

Industrial Disputes Act, 1947 – Demand for regularisation of canteen employees- whether allowable – Held, Yes.

Brief facts:

The appellant has been in existence for the last many decades and has a large administrative and technical set up to run their multifarious activities on the Port. Large numbers of workers/employees are employed by the Port Trust who work round the clock in shifts to run and maintain the activities of the Port Trust. These Port Trust workers/employees are provided with the facility of canteen. This canteen has employed a large number of employees to run the canteen. The employees working in the canteen have formed an Association known as "Chennai Port Trust Industrial Employees Canteen Workers Welfare Association" (for short called "Association")-respondent No.1 herein.

The Association-respondent No.1 herein filed a writ petition being W.P. No.6872 of 2001 in the High Court at Madras against the appellant herein (Chennai Port Trust) espousing the cause of their members (employees working in the Canteen) and sought a writ of mandamus against the appellant - Chennai Port Trust (respondent No.3 in the writ petition) directing the appellant to treat the employees working in the Canteen to be the regular

employees of the Chennai Port Trust and accordingly pay them all attendant and monetary benefits at par with the regular employees of the Chennai Port Trust.

The Writ Court (Single Judge) allowed the writ petition filed by the Association (respondent No.1 herein) and accordingly issued a writ of mandamus against the appellant (Chennai Port Trust), as prayed by the writ petitioner in their writ petition. In other words, the writ Court granted the reliefs claimed by the writ petitioner in their writ petition [regularisation].

The appellant filed intra court appeal before the Division Bench, which by impugned judgment, dismissed the appeal and upheld the order of the Single Judge, which has given rise to filing of the present appeal.

Decision: Appeal Dismissed.

Reason:

Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeal.

In our considered view, the Writ Court (Single Judge) and the Division Bench were right in their reasoning and the conclusion. The Division Bench, in our opinion, rightly relied upon the decision of this Court in *Indian Petrochemicals Corporation Ltd. & Anr. vs Shramik Sena & Ors (1999) 6 SCC 439* and compared the facts of the above case with that of the case at hand and found great similarities in both for granting relief to the members of the respondent (Association).

The Division Bench in Paras 14 and 15 of the impugned judgment took note of 20 factors of this case, which were found identical to the facts involved in Indian Petrochemical's case (supra) wherein this Court had issued a writ of mandamus against the main employer in relation to such employees working in the canteen run for the benefit of the employer.

We find no fault in the aforementioned findings recorded by the Division Bench as, in our view, these findings were recorded on the basis of undisputed facts and documents on record of the case. That apart, these findings were recorded keeping in view the facts involved and law laid down by this Court in the case of Indian Petrochemicals (supra)

Mere perusal of the decision rendered in the case of Indian Petrochemicals (supra) would go to show that in that case also, somewhat similar question, which is the subject matter of this appeal, had arisen at the instance of the employees working in canteen. This Court (Three Judge Bench) elaborately examined the question and took note of the relevant undisputed facts, which had bearing over the question, granted the reliefs to the employees concerned.

In our considered opinion, the approach and the reasoning of the two Courts below (Writ Court and Division Bench) while deciding the writ petition and the appeal arising out of the writ petition keeping in view the law laid down by this Court in the case of Indian Petrochemicals (supra) is just, proper and legal.

In other words, if on the undisputed facts, this Court has granted benefit to the canteen workers in the case of Indian Petrochemicals (supra) then there is no reason that on the same set of undisputed facts arising in this case, the Court should not grant the benefit to the employees/workers in this case. It is more so when no distinguishable facts are pointed out in this case qua Indian Petrochemical's case (supra).

15.06.2018	**ANSAL PROPERTIES & INDUSTRIES LTD (Appellant)** **vs. NEELAM BHUTANI (Respondent)**	**Delhi High Court** **W.P (Civil) 4149/2015** **Anu Malhotra, J.**

Industrial Disputes Act, 1947 – Section 33(2)- Brief facts:

The petitioner- has assailed the order of the Labour Court, whereby the petitioner herein was directed to reinstate the work woman back on duty along with full back wages and continuity of services within a period

of 30 days from the date of publication of the award failing which it had been directed that the Management would be liable to pay the interest at the rate of 12 per cent per annum till the actual payment - was allowed to the extent that the work woman was held entitled to increment of 10 per cent for every year in her total salary, taking her basic salary to be Rs. 10,850/-; HRA Rs. 2,300/-; conveyance allowance Rs. 1,200/- and medical one month basic salary per annum and LTC to its one month basic salary per annum as part back wages and was further held entitled to interest at the rate of 12 per cent per annum in terms of award from the date 16.06.2010 till the date of actual payment of Rs. 9,73,310/- inasmuch as the management had been directed to comply with the award within a period of 30 days from the publication thereof which had not been so complied with by the Management and apart from the same the Management was also directed to pay a sum of Rs. 20,000/- to the workmen towards the cost of litigation.

Decision: Partly allowed.

Reason:

Thus, reliance placed on behalf of the petitioner/management on the verdict in Municipal Corporation of Delhi v. Ganesh Razak & Anr, (1995) 1 SCC 235 with specific reference to the observations in Para 12 of the said verdict is misplaced in as much as the observations in Para 12 of the said verdict relied upon, whereby appeals therein against the invocation of Section 33C(2) of the Industrial Disputes Act, 1947 have been allowed, it is essential to observe that in that case the claim of the respondents/workmen was to the effect that they were all daily rated/ casual workers and they were seeking wages to be paid to them on the same rate as the regular workers and the said aspect had not earlier been settled by adjudication and recognition by the employer and thus the stage of computation of that benefit could not have been said to have reached and in that particular case, the claim of the workman of equal pay for equal work was disputed and thus without adjudication of the dispute resulting in acceptance of their claim, it was held by the Hon'ble Supreme Court that there could be no occasion for computation of the benefit on that basis to attract Section 33C(2) of the Industrial Disputes Act, 1947.

The verdict of this Court relied upon equally on behalf of the petitioner and on behalf of the respondent in *Piara Lal v. Lt. Governor & Ors, 2001 (1) L.L.N. 235*, makes it apparently clear that the powers under Section 33C(2) of the Industrial Disputes Act, 1947 could have been invoked by the respondent in the facts and circumstances of the instant case to the extent that she claimed increments, DA and revision in pay scales as was granted to other employees from time to time in the category of the respondent and would fall within the ambit of the claims to which the respondent would be entitled to claim having been directed to be reinstated back on duty thus to continue in service along with full back wages vide the award.

Thus, the impugned order, to the extent that it permits the entitlement of full back wages w.e.f. 16.06.2001 onwards, i.e., to the tune of Rs.1,02,713/- and qua increment to the tune of Rs.13,88,711.52/- and the interest at the rate of 12 per cent per annum on the said amount from 16.06.2001 till the date of actual payment of Rs. 1822262.52/- with the cost of litigation to the tune of Rs. 20,000/- to the respondent/ work woman in terms of provisions of Section 11(7) of the Industrial Disputes Act, 1947 is upheld.

However, as regards the claim for LTC for the years 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 qua LTC and Medical reimbursement as granted vide impugned order, without adjudication of the entitlement of the petitioner for reimbursement in relation thereto without it being proved on record as to whether the respondent had undertaken any travel in a particular year for the claim for the LTC and qua the respondent having incurred expenses in availing medical facilities for claiming medical reimbursement, cannot be upheld and is set aside with the matter being remanded to the Labour Commissioner, Delhi to give an opportunity to both the parties to give their calculations in relation to the LTC claims and for medical reimbursements to ascertain as to what is the money due to which the respondent would be entitled to in relation thereto with the request to Labour Commissioner to undertake the necessary exercise within a period of three months from the date of receipt of this order.

31.05.2018	**M/S. G4S FACILITY SERVICES INDIA PVT LTD (Appellant)vs. REGIONAL PROVIDENT FUND COMMISSIONER-I (Respondent)**	**Delhi High Court** **LPA 302/2018** **S. Ravindra Bhat & A.K. Chawla, JJ.**

Employees Provident Fund and Miscellaneous Provisions Act,1952 – Section 7A & 7O – Determination of contributions – Appeal against – Tribunal directed pre-deposit of 50% of the demand – Whether untenable – Held, No.

Brief facts:

The appellant provides security and other related services, through contracts it enters into with institutions and commercial organizations. The EPFC after affording an opportunity of hearing to the petitioner and affording it hearing, passed the final order under Section 7A directing the appellant to pay about Rs.15.40 crore. An appeal against that decision was preferred to the tribunal along with an application seeking waiver of the deposit of the determined demand. After hearing the parties the Tribunal directed admission of the appeal subject to pre-deposit of 50% of the amount assessed within six weeks. The appellant›s writ petition challenging the above order was dismissed by the Single Judge. Hence the present appeal to the Division Bench.

Decision: Petition dismissed.

Reason:

There is a determination, by the EPFC in the present case, that the appellant used to charge amounts including sums on account of provident fund dues payable, but artificially segregate wage calculations, to exclude portions of the wages paid to its workers. These are findings of fact. The appellant disputes them; it urges that the ceiling of Rs. 6500/- mandated by the EPF scheme was not taken into account; that the EPFC considered materials relating to a period other than the notice period and that "wage" is a restrictive statutory concept, under the EPF Act. Each of these appear to have been urged before the tribunal; they were also urged before the single judge. It is after taking note of this argument, that the tribunal granted limited waiver. What the appellant complains however, is that the relief should have been not confined to 50% waiver, but of the whole amount. Now, while it may be justified in so urging, there ought to be exceptional and compelling reasons for an appellate court (in a third guessing jurisdiction, so to speak) exercising appeal powers over a writ court's order (in respect of an interim order of the tribunal) to hold that such determination is unreasonable. In other words, the threshold of interference in appeals over writ determinations of interim orders is necessarily very high.

Keeping in mind the limitations spelt out above, the court nevertheless scrutinized the order of the EPFC. That official not only considered these specific contentions in the light of the materials, but analyzed them in the light of the amounts charged from the appellant's clients, by it. The EPFC found that separate accounts towards wages, HRA, overtime allowances, etc. were not maintained by the appellant and in fact of the total wage, the segregation made was to the extent that house rent allowance (HRA) amounts were shown to be 25% of the total wage. The finding was that a lump-sum figures, which included provident fund contributions, based on total amounts calculated, were charged and recovered from the appellant's clients by it. Given all these factors, this court is of the opinion that the order of the tribunal cannot be characterized as unreasonable or erroneous to such extent as to be interfered with in judicial review.

11.06.2018	**MAHENDRA SINGH (Appellant) vs. DELHI POWER SUPPLY CO. LTD. (Respondent)**	**Delhi High Court** **W.P © 5835/2002** **C. Hari Shankar, J.**

Prevention of Corruption Act – Dismissal of employee on the charges of accepting bribe – Whether the punishment of dismissal is proportionate to the offence – Held, Yes.

Brief facts:

The petitioner seeks, by means of this writ petition, quashing of the dismissal order, whereby, consequent on disciplinary proceedings held against him, Delhi Vidyut Board (hereinafter referred to as "DVB") - the predecessor-Corporation to the present respondent - dismissed him from service. The petitioner appealed, on 3rd July, 2002, to the Member (Tech-I) of the DVB, against the impugned punishment order and, having waited, fruitlessly, for some time, for the appeal to be decided, moved this Court by means of the present writ petition.

The charge, against the petitioner, was of having accepted a bribe, of ₹ 10,000/-, from Mr. Sushil Bansal, threatening him, in the alternative, with disconnection of his electricity supply and issuance of inflated bills regarding electricity consumption by him for earlier periods, as the electricity meter installed at Mr. Bansal's premises was defective.

Decision: Petition dismissed.

Reason:

In these circumstances, drawing an analogy from Section 106 of the Indian Evidence Act, 1872, it was for the petitioner, if at all, to explain the circumstances in which he accepted the said money from Sushil Bansal, outside a juice shop, and the circumstances in which ₹ 5000/- was recovered, from him, by the CBI team. No such explanation, worth its name, has been forthcoming, from the petitioner, at any point of time.

In these circumstances, this Court has necessarily to concur with the conclusion of the IO, and the disciplinary authority that the fact of acceptance of bribe, from Sushil Bansal, by the petitioner, stands established and proved beyond reasonable doubt. The discrepancies regarding the nature of the meter installed at Sushil Bansal's premises, as well as the non-reflection of the "untainted" ₹ 5,000/-, also allegedly recovered from the petitioner, in the Recovery Memo, cannot, as has rightly been observed by the IO, detract from the factum of acceptance, by the petitioner, from Sushil Bansal, of bribe of ₹ 5,000/-, and the recovery of the said amount, by the CBI team.

Coming, then, to the last issue, regarding proportionality of the punishment awarded to the petitioner, it is clear that, in the above circumstances, it cannot be said that the punishment awarded to the petitioner was disproportionate to the misconduct committed by him. Judicial authority exists, in abundance, to the effect that corruption in public service can only be rewarded by dismissal therefrom. It is hardly necessary to burden the present judgement by any specific precedential references; so trite, by now, is this proposition.

The petitioner having been proved to have taken, from Sushil Bansal, bribe of at least ₹ 5,000/-, it is not possible to say that, in dismissing him from service, the disciplinary authority was unduly harsh. In view of the above discussion and findings, this Court must necessarily refuse succour, to the petitioner, from the rigour of the impugned order dated 15th June, 2002, dismissing him from the service of the respondent. Consequently, the writ petition is dismissed.

04.06.2018	**EXECUTIVE ENGINEER, PWD & ORS (Appellant) vs. COMMISSIONER WORKMEN'S COMPENSATION (Respondent)**	**High Court of Jammu & Kashmir** **M.A. No. 187 of 2009** **Sanjeev Kumar, J.**

Workmen's Compensation Act, 1923 – Injury to contract labour – Permanent disablement – Whether principal employer is liable to pay compensation – Held, Yes.

Brief facts:

The respondent No. 2, an iron smith by profession, engaged by respondent No. 3 as labour for construction of road for Appellant, while working with respondent No. 3 sustained grievous injuries in an accident. Respondent

No. 2 was immediately shifted to District Hospital, Doda, where owing to his injuries, his right forearm below elbow was amputated. As a result of these injuries, respondent No. 2 was rendered permanently disabled. He preferred a claim petition before respondent No. 1, which was allowed.

The appellant appealed to the High Court challenging the award passed by respondent No. 1 on the following grounds:–

(a) That in the absence of the privity of contract between the appellant and respondent No. 2, the liability to pay compensation could not have been fastened on the appellant.

(b) That the accident had not occurred during or in the course of employment and, therefore, the appellant was not liable to pay any compensation.

Decision: Appeal dismissed.

Reason:

Having heard learned counsel for the petitioner, I find no substance in the submissions made on behalf of the appellant. Admittedly, respondent No. 3 was working as a contractor with the appellant and was executing the work allotted to him by none other than the appellant. It is also not in dispute that respondent No. 2 was engaged as labourer by respondent No. 3 for execution of the work of the appellant. From the evidence led by the parties before respondent No. 1, it is further evident that the job of repairing the compressor rod was assigned to respondent No. 2 by the Junior Engineer of the appellant and not by respondent No. 3.

Viewed from any angle, the appellant cannot avoid its liability to compensate the respondent No. 2. The appellant being a principal employer was liable to pay the compensation to the respondent No. 2 on account of permanent disablement suffered by him during and in the course of his employment with the appellant. Even on facts, the job of repairing the compressor rod was entrusted to respondent No. 2 by the appellant.

That being the position, the plea of the appellant that there was no privity of contract between the respondent No. 2 and the appellant is misconceived and is noticed to be rejected only. Both the pleas raised by the appellant to challenge the award, therefore, fail. Accordingly, this appeal is dismissed.

04.08.2018	**FEDERATION OF OKHLA INDUSTRIAL ASSOCIATION (REGD) & ORS (Appellant) Vs. Lt. GOVERNOR OF DELHI & ANR (Respondent)**	**Delhi High Court** **W.P. © No. 8125 of 2016 along with batch of petitions** **Gita Mittal & C. HariShankar, JJ.**

Minimum Wages Act, – Section 5 – Power to fix minimum wages – Delhi Government revised minimum wages by notification in 2016 – On appeal revision of minimum wages quashed.

Brief facts:

These petitions challenge the constitutional validity of the Notification bearing no. F.Addl.LC/Lab/MW/2016 dated 3rd of March 2017 published in the Official Gazette on 4th March, 2017, again issued by the respondents, in exercise of power conferred by Section 5(2) of the enactment. By this Notification, minimum rates of wages for all classes of workmen/employees in all scheduled employments stand revised w.e.f. the date of the notification in the official gazette. The challenge rests, inter alia, on the plea of the petitioners that both these notifications are ultra vires the provisions of the enactment itself and that the respondents also violated the principles of natural justice in issuance of the notifications.

Decision: Petitions allowed.

Reason:

After an elaborate analysis of the law and the surrounding circumstances and referring to plethora of case laws, the court, inter-alia, arrived at the following conclusions:

- The purport and object of the Act in fixing the minimum wage rate is clearly to prevent exploitation of labour. The hardship caused to individual employers or their inability to meet the burden of minimum wages or its upward revision, has no relevance.
- The object, intendment and provisions of the Minimum Wages Act, 1948 are clear and unambiguous, and therefore, the applicability of the beneficent rule of interpretation is completely unnecessary.
- Minimum wages have to be more than wages at the subsistence level, have to take into consideration all relevant factors and prescriptions made after due application of mind and must take into consideration the norms and component as approved by the Supreme Court in the Reptakos judgment.
- The appropriate government is required to take into account the report and advice rendered by the Committee/Advisory Board and to apply independent mind and take a balanced decision so far as fixation or revision of minimum wages is concerned. The Government is not bound by the recommendations of the Committee. It is open to the Government to accept (wholly or in part) or to reject the advice of the Board or report of the Committee.
- While there is no absolute prohibition on an employee of the Government being nominated as an independent member of the Committee under Section 5 of the Minimum Wages Act, an objection to such nomination has to be decided on the facts and circumstances of the case. It is only when minimum wages are under consideration for an industry in which the State may be vitally interested as an employer, that it may not be proper to nominate an official to the Committee treating him to be an independent member.
- A defect in composition of the Committee under Section 5 would not per se vitiate either its advice or the decision taken thereon. A defect in the composition of the Committee would vitiate its advice, or the ultimate decision of the Government fixing the minimum wages, only if such illegality or defect has worked to the prejudice to a party, for example where the interest of a particular group of employer or employees has not been represented or has not been taken into consideration.
- The Delhi Metro Rail Corporation is not an employer engaged in scheduled employment in Delhi and it could not have been appointed on the Committee under Section 5 as a representative of the employer.
- Though the eligibility of the officers of the Labour Department or the Director of Economics & Statistics as members of the Committee cannot be faulted, however they failed to conduct themselves dispassionately & did not apply their independent minds. The respondent has appointed the very officials as independent persons on a Committee, which had already taken a view in the matter and made recommendations as members of a Committee in the year 2016, therefore, when appointed for the second time, they were clearly close-minded and proceeded in the matter in a predetermined manner.
- The respondents have denied the statutorily mandated representation to the actual employers in scheduled employments in Delhi which tantamount to non-compliance of Section 9 of the Minimum Wages Act, 1948 and failure on the part of the respondents to constitute a Committee required by law to be constituted.
- It is essential that under Section 5(1) of the MW Act, a Committee "properly constituted" is "genuinely invited" with an open ('receptive') mind to tender advice to the appropriate Government.
- It has to be held that employers in the scheduled employments as well as employees with divergent views stand ousted from the consideration and their interests certainly compromised to their prejudice. This prejudice to the employers and employees would constitute a 'most' substantial ground (Ref : (2008) 5 SCC 428 (para 14), Manipal Academy of Higher Education vs. Provident Fund Commissioner) justifying interference by this court in exercise of jurisdiction under Article 226.
- Clearly the Government of NCT of Delhi was aware of the requirement of law and consciously failed to comport to the same.
- It is not open to a representative to insist on an oral hearing before the Committee appointed under Section 5 or the Advisory Board under Section 7 of the Minimum Wages Act, 1948.

- The fixation of minimum wages in Delhi cannot be faulted simply because they are higher than the rates of minimum wages fixed in surrounding States and Towns.
- The Committee in making its recommendations as well as the respondents in issuing the singular notification for uniform minimum wages for all scheduled employments have completely ignored vital and critical aspects having material bearing on the issue.
- Any change in the prescribed rates of minimum wages, is bound to impact both the industry and the workmen. The respondents were bound to meaningfully comply with the principles of natural justice especially, the principles of fair play and due process. The representatives of the employers, had a legitimate expectation of being heard as the advice of the Committee was to inevitably affect them, which has been denied to them before the decision to revise minimum wages was finalized.
- The constitution of the Committee was completely flawed and its advice was not based on relevant material and suffers from non-application of mind. The Government decision based on such advice is in violation of express statutory provision , principles of natural justice, denied fair representation to the employers well as the employees in fact without any effort even to gather relevant material and information. The non-application of mind by the committee and the respondents, to the relevant material considerations, offends Article 14 of the Constitution of India.

The Notification bearing no. F-13(16)/MW/1/2008/Lab/ 1859 dated 15th September, 2016 issued by the respondents constituting the Minimum Wages Advisory Committee for all scheduled employments is ultra vires Section 5(1) and Section 9 of the Minimum Wages Act, 1948 and is hereby declared invalid and quashed.

14.08.2018	**UNION BANK OF INDIA (Appellant) vs. C.G. AJAY BABU (Respondent)**	**Supreme Court** **Civil Appeal No. 8251 of2018 [Arising out of SLP(Civil) No. 3852 of 2017]** **Kurian Joseph & SanjayKishen Kaul, JJ.**

Payment of Gratuity Act, 1972 – Dismissal from services for misconduct – Forfeiture of gratuity– Whether automatic on dismissal – Held, No.

Brief facts:

Whether forfeiture of gratuity, under The Payment of Gratuity Act, 1972 ('the Act'), is automatic on dismissal from service, is the issue for consideration in this case.

The respondent was an employee of the appellant-Bank. While serving as a Branch Manager, disciplinary proceedings were initiated against him and the respondent was dismissed from service. In the meanwhile, the respondent was issued a show-cause notice as to why the gratuity should not be forfeited on account of proved misconduct involving moral turpitude. His explanation was rejected and the gratuity was forfeited.

The dismissal and forfeiture were the subject matters of challenge before the High Court leading to the impugned judgment by which the Court upheld the dismissal and rejected the forfeiture of gratuity. The division bench also confirmed with the Single Judge. Hence, the bank is before the Supreme Court in appeal.

Decision: Appeal dismissed.

Reason:

Though the learned Counsel for the appellant-Bank has contended that the conduct of the respondent-employee, which leads to the framing of charges in the departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court. Apart

from the disciplinary proceedings initiated by the appellant- Bank, the Bank has not set the criminal law in motion either by registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude. Under sub-Section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction.

In *Jaswant Singh Gill v. Bharat Coking Coal Limited & Ors (2007) 1 SCC 663*, it has been held by this Court that forfeiture of gratuity either wholly or partially is permissible under sub-Section (6) (b) (ii) only in the event that the termination is on account of riotous or disorderly conduct or any other act of violence or on account of an act constituting an offence involving moral turpitude when he is convicted.

In the present case, there is no conviction of the respondent for the misconduct which according to the Bank is an offence involving moral turpitude. Hence, there is no justification for the forfeiture of gratuity on the ground stated in the order dated 20.04.2004 that the "misconduct proved against you amounts to acts involving moral turpitude". At the risk of redundancy, we may state that the requirement of the statute is not the proof of misconduct of acts involving moral turpitude but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law.

That the Act must prevail over the Rules on Payment of Gratuity framed by the employer is also a settled position as per *Jaswant Singh Gill (supra*). Therefore, the appellant cannot take recourse to its own Rules, ignoring the Act, for denying gratuity.

To sum-up, forfeiture of gratuity is not automatic on dismissal from service; it is subject to sub-Sections (5) and (6) of Section 4 of the Payment of Gratuity Act, 1972. Thus, though for different reasons as well, we find no merit in the appeal and it is accordingly dismissed. No costs.

25.09.2018	**COAL INDIA LTD (Appellant) vs. NAVIN KUMAR SINGH (Respondent)**	**Supreme Court** **Civil Appeal Nos. 6491-6492 of 2014** **Dipak Misra, A.M. Khanwilkar & D.Y. Chandrachud, JJ.**

Inter – Company transfer on request – Whether employee loses his service benefit of his transferor company – Held, No.

Brief facts:

These appeals emanate from the judgment and order passed by the Division Bench of the High Court of Jharkhand whereby the High Court upheld the decision of the Single Judge, with minor modifications and declared that the past service of the respondent in the previous company of the appellant could not be forfeited for all purposes in the event of an inter-company transfer on personal grounds at his request. The employer appellant is in appeal against the order.

Decision: Appeals dismissed.

Reason:

On a fair reading of clause 11 of the policy, there is nothing to indicate that the transferee would lose his past service rendered in the parent company for all purposes. The policy of forfeiture of seniority in the parent company, however, is limited to the executives who seek inter-company transfer on personal grounds. That is to ensure that no prejudice is caused to the executives already working in the transferred company. For that reason, the seniority of the executives seeking inter-company transfer on personal request is fixed as if he had entered the concerned Grade on the date of assumption of charge in the transferred company. It has been made explicitly clear that the executive seeking inter- company transfer on personal grounds will lose his past seniority in the Grade. No more and no less.

In the present case, there is no dispute that the respondent had rendered service in E-2 Grade on regular basis in DCC from where he was transferred to CMPDIL, on personal grounds. The service rendered by him in DCC can be and ought to be taken into account for all other purposes, other than for determination of his seniority in E-2 Grade in the new company i.e. CMPDIL. Indeed, his seniority in CMPDIL in E-2 Grade will have to be reckoned from the date of his assumption of charge on 15th May, 1991, but that can have no bearing while determining his eligibility criterion of length of service in E-2 Grade for promotion to E-3 Grade. For determining the eligibility for promotion to E-3 Grade, the service rendered by him in DCC in E-2 Grade with effect from 4th August, 1990, ought to be reckoned. The view so taken by the High Court commends to us. Hence, no fault can be found with the direction given by the High Court to assign notional date of promotion to the respondent in E-3 Grade with effect from 12th November, 1993.

As regards the Office Memorandum dated 5th June, 1985, the same does not militate against the respondent. It is a different matter that it addresses the difficulty expressed about the denial of opportunity of promotion to the executives who opted for inter-company transfer. On a fair reading of this Office Memorandum, it is discernible that the department has clarified the position that if the concerned executive has already completed service for a specified period including the period of service with the old company, would become entitled to be considered for promotion to the higher Grade. If so, not granting similar advantage to the executive who opted for inter-company transfer on personal request and who incidentally enters at number one position in the seniority in the new company would be anomalous. Concededly, what is affected in terms of the policy for inter-company transfer on personal request, is only the seniority position in the new (transferred) company – which would commence from the date of assuming office thereat. By no stretch of imagination, it can affect the length of service in E-2 Grade in the parent company. The two being distinct factors, neither the policy nor the office memorandum would be any impediment for reckoning the period of service rendered by the respondent from August, 1990 in DCC, albeit a case of inter-company transfer on personal request. As a result, these appeals must fail.

CASE 1:

XYZ Bank granted loans of Rs.50 crores to ABC Ltd. The loan remains unpaid after 10 years and is declared a non-performing asset (NPA) in 2019. It is alleged that the Chairman-cum-Managing Director of XYZ bank, Mr. Amit Agarwal had a conflict of interest, as his brother Mr. Sumit Agarwal had business dealings with Chairman of ABC Ltd.

Based on the above case:

a. Explain conflict of interest.

b. Explain who related parties are and what are the duties of directors in relation to related party transactions?

Suggested solution:

a. Conflict of interest is one of the agency problems which arises because of separation of ownership from management and control. The agency problem arises in a situation where an agent (i.e. a director of a company) does not act in the best interests of a principal (i.e. a shareholder). When a principal chooses to act through others and its interest depends on others, it is subject to an agency problem. Corporate Governance actually concerns these agency problems and the way in which shareholders and other stakeholders can effectively exercise influence and exert control over the actions of company managers. In this environment the board of directors has to play an important role in mitigating the potential conflicts of interest.

   According to section 166 of the Companies Act 2013, a director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company. A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making

any undue gain, he shall be liable to pay an amount equal to that gain to the company.

b. As per section 2(76) of the Companies Act 2013 "related party", with reference to a company, means –

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager or his relative is a member or director;

(v) a public company in which a director or manager is a director and holds along with his relatives, more than two per cent. of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any body corporate which is –

(A) a holding, subsidiary or an associate company of such company;

(B) a subsidiary of a holding company to which it is also a subsidiary; or

(C) an investing company or the venture of the company;

Explanation – For the purpose of this clause, " the investing company or the venture of the company" means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

(ix) such other person as may be prescribed.

The term 'relative' is defined under Section 2(77) of the Companies Act, 2013 and Rule 4 of the Companies (Specification of definitions details) Rules, 2014.

Under the companies act 2013 the concept of related party transaction has been covered under section 188.

The provision has following legal requirements:

i. Disclosure by interested directors : Every director of a company who has any direct or indirect interest involved in the contract or arrangement entered into or about to be entered in to must disclose the nature of his concern or interest at the meeting of the board in which such contract or arrangement is discussed.

ii. Board Disclosures: Every related party transaction or a contract or an arrangement shall be disclosed in the board`s report along with the justification for entering into such contract or arrangement.

Thus, in the given case Mr. Sumit Agarwal is the relative of Mr. Amit Agarwal. It was the duty of Mr. Amit Agarwal to make the disclosure of his interest to the Board of directors of the company as per Section 188 of the Companies Act, 2013.

CASE 2

Alok Brothers Ltd, a steel manufacturing company, is likely to be seeking a stock exchange listing in a few years' time. In preparation for this, the directors are seeking to understand certain key recommendations of the corporate governance codes, since they realise that they will have to strengthen their corporate governance arrangements. In particular the directors require information about what the governance reports have achieved in:

(i) Defining the role of non-executive directors

(ii) Improving disclosure in financial accounts

(iii) Strengthening the role of the auditor

(iv) Protecting shareholder interests

Previously also, the directors have received the majority of their income from the company in the form of salary and have decided salary levels amongst themselves. They realise that they will have to establish a remuneration committee but are unsure of its role and what it will need to function effectively. The directors also have worked together well, if informally; there is a lack of formal reporting and control systems both at the board and lower levels of management. There is also currently no internal audit department. The directors are also considering whether it will be worthwhile to employ a consultant to advise on how the company should be controlled, focusing on the controls with which the board will be most valid.

Based on the above case:

(a) Explain the purpose and role of the remuneration committee.

(b) Explain the requirements of Companies Act 2013 in relation to Remuneration Committee. Suggested solution (a):

According to section 178 of the Companies Act 2013, the Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance.

The Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees.

The Nomination and Remuneration Committee shall, while formulating the above policy ensure that –

(i) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;

(ii) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and

(iii) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

This policy shall also be disclosed in the Board's report of the company.

Suggested solution (b):

According to section 178 of the Companies Act 2013, the Board of Directors of every listed company and such other class or classes of companies, as may be prescribed shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one-half shall be independent directors. Provided, that the chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

The Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance.

SAMPLE CASE STUDIES & SUGGESTED SOLUTIONS

CASE STUDY-1

Narmada Limited (The Company) is incorporated as a Private Limited Company under the provision of Companies Act, 1956 with the Registrar of Companies, Gwalior, Madhya Pradesh. The company is having its registered office at Plot No.1, First Floor, West Chamber, Gwalior, Madhya Pradesh. Authorized share capital of the Company is Rs. 5, 00,000/-. The Issued, subscribed and paid up share capital of the Company is Rs. 5,00,000/-. The main objects of the company are construction of building and housing and also educational.

A notice of struck off has been received from Registrar of Companies, Gwalior, Madhya Pradesh by the Narmada Limited. Registrar of Companies, Gwalior, Madhya Pradesh issued a notice on company for non- compliance of provisions of the Companies Act, 2013 in respect of filing of Annual Returns and Financial Statements for years 2014-15 to 2017-18 and subsequently the name of the company was struck off in terms of provision of Section 248(1) of the Companies Act, 2013 read with Rule 7 and Rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. Aggrieved by the order of Registrar of Companies, Gwalior, Madhya Pradesh, Narmada Limited filed an appeal before National Company Law Tribunal (NCLT), Gwalior under Section 252 of the Companies Act, 2013 and submitted that the company was in operation and the business activities were carried out by the company during the period of striking off but the reporting of such activities through Annual Returns and Financial Statement had not been filed with Registrar of Companies due to inadvertence on part of the management.

You are a Practicing Company Secretary and the Company has hired you as a Consultant to advise Narmada Limited on the following, considering the above facts:

(a) What would be the procedure regarding filing of appeal before National Company Law Tribunal (NCLT)?

(b) State the grounds on which Registrar of Companies can remove the name of a company from Register of Companies.

(c) Enumerate the categories of Companies which shall not be removed from the Register of Companies under the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.

Suggested Solution – Case Study-1

(a) *Procedure regarding appeal before National Company Law Tribunal*

- According to Rule 87A of the National Company Law Tribunal Rules, 2016, an appeal under Section 252(1) or an application under Section 252(3) may be filed before the National Company Law Tribunal (NCLT) in Form No. NCLT. 9, with such modifications as may be necessary.
- Following Documents shall be attached with Form No. NCLT.9:
  - Copy of Memorandum and Articles of Association
  - Copy of list of struck off companies issued by ROC
  - Evidence regarding payment of Fee
  - Affidavit Verifying the Petition
  - Memorandum of Appearance
  - Copy of Board Resolution & Vakalatnam
  - Sufficient evidence to prove that it has been in operation during striking off and therefore could not be termed as defunct company
- A copy of the appeal or application, shall be served on the Registrar of Companies and on such other persons as the National Company Law Tribunal may direct, not less than fourteen days before the date fixed for hearing of the appeal or application, as the case may be.
- Upon hearing the appeal or the application or any adjourned hearing thereof, the National Company

Law Tribunal may pass appropriate order, as it deems fit.

- Where the National Company Law Tribunal makes an order restoring the name of a company in the register of companies, the order shall direct that-
  - The appellant or applicant shall deliver a certified copy to the Registrar of Companies within thirty days from the date of the order;
  - On such delivery, the Registrar of Companies do, in his official name and seal, publish the order in the Official Gazette;
  - The appellant or applicant do pay to the Registrar of Companies his costs of, and occasioned by, the appeal or application, unless the Tribunal directs otherwise; and
  - The company shall file pending financial statements and annual returns with the Registrar and comply with the requirements of the Companies Act, 2013 and rules made thereunder within such time as may be directed by the Tribunal.

(b) *Grounds on which Registrar of Companies can remove the name of a company from Register of Companies:*

As per Section 248 of the Companies Act, 2013, where the Registrar has reasonable cause to believe that –

- Company has failed to commence its business within one year of its incorporation
- Company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013
- Subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under Section 10A (1) of the Companies Act, 2013
- Company is not carrying on any business or operations, as revealed after the physical verification carried out under Section 12(9) of the Companies Act, 2013.

(c) *Categories of Companies which shall not be removed from the Register of Companies under the* Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:

According to Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 the following categories of companies shall not be removed from the register of companies:

(i) Listed companies;

(ii) Companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;

(iii) Vanishing companies;

(iv) Companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up or were completed but prosecutions arising out of such inspection or investigation are pending in the Court;

(v) Companies where notices under section 234 of the Companies Act, 1956 or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;

(vi) Companies against which any prosecution for an offence is pending in any court;

(vii) Companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;

(viii) Companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;

(ix) Companies having charges which are pending for satisfaction; and

(x) Companies registered under section 25 of the Companies Act, 1956 or section 8 of the Companies Act, 2013.

CASE STUDY 2

M/s Jooly Private Limited (Corporate Debtor) is a company incorporated on 01.01.2005 under the provisions of Companies Act, 1956, having its registered office at Mumbai. The Authorised Share Capital of the company is Rs. 100, 00, 00,000/- and Paid up Share Capital of the company is Rs. Rs. 99, 00, 00,000/-.

M/s Jemmy Private Limited(Operational Creditor) is a company incorporated on 01.01.2006 under the provisions

of Companies Act, 1956 having its registered office at Kolkata.

M/s Jooly Private Limited approached M/s Jemmy Private Limited for purchase of inputs for his production. It was specifically agreed that upon procuring the inputs by M/s Jooly Private Limited and raising of invoices by M/s Jemmy Private Limited , the entire payment for such invoices shall be made in a timely manner. As per the arrangement, the M/s Jooly Private Limited placed various purchase orders for supply of inputs . M/s Jemmy Private Limited supplied the goods as per the orders placed by M/s Jooly Private Limited and raised invoices against the said supply.

The invoices were duly acknowledged by M/s Jooly Private Limited and an amount as part payments were also made. But thereafter, inspite of various requests made and reminders sent by M/s Jemmy Private Limited, the M/s Jooly Private Limited had neither responded nor repaid the remaining claim.

On failure to pay the outstanding dues by the M/s Jooly Private Limited, the M/s Jemmy Private Limited sent a demand notice dated 01.012019 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the respondent asking them to make the entire outstanding payments of Rs. 10,00,000/- (Rupees Ten Lakhs) inclusive of interest within 15 days from receipt of the notice, failing which the M/s Jemmy Private Limited shall initiate the Corporate Insolvency Resolution process against the M/s Jooly Private Limited.

Despite the demand notice, the M/s Jooly Private Limited did not pay the amount demanded, neither raised any notice of dispute nor replied to the said notice. As a next action M/s Jemmy Private Limited filed an application before National Company Law Tribunal (NCLT), seeking to unfold the process of Corporate Insolvency Resolution Process (CIRP).

Based on the above fact, answer the following:

(a) Who can make application before the Adjudicating Authority on behalf of Operational Creditor and where to file such application to initiate the Corporate Insolvency process in the given case and also state the documents needs to be attached with such application under Insolvency and Bankruptcy Code, 2016.

(b) Who can appoint Interim Resolution Professional in case Resolution Professional is not appointed by the Operational Creditor? State the moratorium as envisaged under the provisions of Section 14(1) to (4) of the Insolvency and Bankruptcy Code, 2016 in relation to the Corporate Debtor.

(c) Enumerate the duties of interim resolution professional during the Corporate Insolvency Resolution Process (CIRP) specified under Section 18 of the Insolvency and Bankruptcy Code, 2016.

Suggested Solution - Case Study-2

(a) As per Section 6 of the Insolvency and Bankruptcy Code, 2016, where any corporate debtor commits a default**,** a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under

Chapter II of the Part II of the Insolvency and Bankruptcy Code, 2016. It may be noted that in terms of Section 5(20) of the Insolvency and Bankruptcy Code, 2016 operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Application to initiate the Corporate Insolvency process may be filed before the Adjudicating Authority. In terms of Section 5(1) of the Insolvency and Bankruptcy Code, 2016, Adjudicating Authority means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

According to Section 9 of the Insolvency and Bankruptcy Code, 2016, Application for initiation of corporate insolvency resolution process by operational creditor shall be filed in such form and manner and accompanied with such fee as may be prescribed. The operational creditor shall, along with the application furnish following documents-

- A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;
- A copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
- Any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(b) Adjudicating Authority (National Company Law Tribunal) appoint Interim Resolution Professional in case Resolution Professional is not appointed by the Operational Creditor.

Section 14 of the Insolvency and Bankruptcy Code, 2016 deals with Moratorium.

Section 14(1) provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Section 14(2) states that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

As per Section 14(3) the provisions of sub-section (1) shall not apply to –

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;

(b) a surety in a contract of guarantee to a corporate debtor.

Section 14(4) provides that the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. It may be noted that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

(c) Section 18 of the Insolvency and Bankruptcy Code, 2016 deals with the duties of interim resolution professional.

The interim resolution professional shall perform the following duties, namely: -

(a) Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to -

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) Constitute committee of creditors;

(d) Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) File information collected with the information utility, if necessary; and

(f) Take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including -

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) To perform such other duties as may be specified by the Board. It may be noted that the term "assets" shall not include the following, namely: -

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

CASE STUDY-3

Kanzra Kysco, a company incorporated and listed in South Korea, is *inter-alia* engaged in the business of manufacturing and sale of steel products, automotive parts and fuel cell systems. Kanzra Kysco present in India through its subsidiaries, i.e. Kanzra Kysco India Private Limited. Kanzra Kysco India Private Limited a company incorporated in India, is engaged in the business of supply/distribution of processed steel sheets to automobile original equipment manufacturers (OEMs), or their vendors.

Kanzra Steel, a company incorporated and listed in South Korea, is an integrated iron and steel mining company *inter-alia* engaged in manufacture and sale of various steel products such as steel bars, steel beams, hot and cold rolled steel and plates. Kanzra Steel's presence in India is largely limited to the supply of certain raw materials to Kanzra Kysco India Private Limited.

Kanzra Kysco and Kanzra Steel contemplates a merger. The proposed combination under Section 5 of the Competition Act, 2002 relates to the merger of Kanzra Kysco into Kanzra Steel as a result of which Kanzra Kysco would cease to exist and Kanzra Steel will be the surviving company. Both Kanzra Kysco and Kanzra Steel belong to the Kanzra Automobiles Group of South Korea.

Based on the above fact, answer the following:

(a) As Company Secretary of Kanzra Kysco India Private Limited, advise the Chairman of your Company, who is seeking your advice, regarding threshold of combination as prescribed under Competition Act, 2002.

(b) Merger notice under Section 6(2) of the Competition Act, 2002 has been received by Competition Commission of India. Assuming yourself as the Chairman of Competition Commission of India, state the factors that need to be considered while determining the above combination whether such merger is likely or not likely to have an appreciable adverse effect on competition in India?

Suggested Solution- Case Study-3

(a) The thresholds for the combined assets/turnover of the parties to a combination prescribed under the Competition Act, 2002 are as follows:

At Enterprise level: The value of combined assets of the combining enterprises exceeds INR 2,000 crores or the combined turnover of the combining enterprise exceeds INR 6,000 crores, in India. In case either or both of the combining enterprises have assets / turnover outside India also, then the combined assets of the combining enterprises value exceeds US$ 1000 million, including at least INR 1000 crores in India, or combined turnover exceeds US$ 3000 million, including at least INR 3000 crores in India.

At Group level: The group to which the combining enterprise whose control, shares, assets or voting rights are being acquired, would belong after the acquisition, or the group to which the combining enterprise remaining after the merger or amalgamation, would belong has either assets of value of more than INR 8000 crores in India or turnover more than INR 24000 crores in India. Where the group has presence in India as well as outside India then the group has assets more than US$ 4 billion including at least INR 1000 crores in India or turnover more than US$ 12 billion including at least INR 3000 crores in India.

The term 'Group' has been explained in the Act. Two enterprises belong to a "Group" if one is in position to exercise at least 26 per cent voting rights or appoint at least 50 per cent of the directors or controls the management or affairs in the other.

The above thresholds are presented in the form of a table below:

	APPLICABLE TO	ASSETS	TURNOVER
In India	Individual Parties	Rs. 2,000 cr.	Rs. 6,000 cr.
	Group	Rs. 8,000 cr.	Rs. 24,000 cr.

	APPLICABLE TO	ASSETS		TURNOVER	
In India and outside		ASSETS		TURNOVER	
		Total	Minimum Indian Component outof Total	Total	Minimum Indian Component out of Total
	Individual parties	US$ 1 bn.	Rs. 1000 cr.	US$ 3 bn.	Rs. 3,000 cr
	Group	US$ 4 bn.	Rs. 1000 cr.	US$ 12 bn.	Rs. 3,000 cr.

The Competition Act, 2002 envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in Section 20(4) of the Competition Act, 2002.

Factors to be considered by the Competition Commission of India while evaluating appreciable adverse effect of Combinations on competition in the relevant market, are as under:

(a) Actual and potential level of competition through imports in the market;

(b) Extent of barriers to entry into the market;

(c) Level of concentration in the market;

(d) Degree of countervailing power in the market;

(e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) Extent of effective competition likely to sustain in a market;

(g) Extent to which substitutes are available or are likely to be available in the market;

(h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) Nature and extent of vertical integration in the market;

(k) Possibility of a failing business;

(l) Nature and extent of innovation;

(m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

CASE STUDY-4

Amez Inc. is an E-commerce entity incorporated as an agency in India under Section 2 (v) (iii) of Foreign Exchange Management Act, 1999(FEMA) owned or controlled by a person who is a resident outside India and conducting the e-commerce business in marketplace based model. As a Practicing Company Secretary, Amez Inc. sought your advise on possibility of Foreign **Direct** Investment on e-commerce sector. Prepare a Policy Paper for Foreign Direct Investment on e-commerce sector, in India.

Suggested Solution- Case Study-4

Foreign Direct Investment (FDI) on e-commerce sector

- 100% FDI under automatic route is permitted in marketplace model of e-commerce and FDI is not permitted in inventory based model of e-commerce.

  It may be noted that:

  E-commerce means buying and selling of goods and services including digital products over digital & electronic network.

  Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

  Market place based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

  E-commerce entity means a company incorporated under the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

- Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.
- Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on Business to Business (B2B) basis.
- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.
- E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.
- An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.
- In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- In marketplace model, any warranty/ guarantee of goods and services sold will be responsibility of the seller.
- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non- discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/

marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For this purposes provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.

- Guidelines on cash and carry wholesale trading of Consolidated FDI Policy Circular 2017 will apply on B2B e-commerce.
- E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.
- E-commerce marketplace entity will be required to furnish a certificate along with a report of statutory auditor to Reserve Bank of India, confirming compliance of above guidelines, by 30th of September of every year for the preceding financial year.
- Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalities, sale of services through e-commerce will be under automatic route.

CASE STUDY-5

Under the scheme of amalgamation, *M/S Pro-Prof* Limited Liability Partnership (*LLP)* is proposing to amalgamate with *M/S Queens Private Limited.* The scheme of amalgamation filed before the National Company Law Tribunal (NCLT) for approval.

In view of the above fact, answer the following:

(a) Whether a Limited Liability Partnership can be allowed by the NCLT to amalgamate with a Private Limited Company under Scheme of Amalgamation? Justify your answer.

(b) Discuss the powers of NCLT to enforce compromise or arrangement of limited liability partnerships as mentioned under Limited Liability Partnership Act, 2008.

Suggested Solution- Case Study-5

(a) Yes, a Limited Liability Partnership may be allowed by the NCLT to amalgamate with a Private Limited Company under Scheme of Amalgamation.

Chapter XII (Section 60 to 62) of the Limited Liability Partnership Act, 2008 deals with compromise, or arrangement of limited liability partnerships. Further, Section 230 to 234 of the Companies Act, 2013 deals with provisions of compromise, or arrangement of companies.

In the matter of Amalgamation between *M/s Real Image LLP (the transferor LLP) with M/s Qube Cinema Technologies Pvt Ltd. (Transferee Company) and Their Respective Partner Shareholders and Creditors (CP/123/CAA/ 2018/TCA/157/CAA/2017)* the National Company Law Tribunal (Single Bench, Chennai) vide its Order delivered on 11th June, 2018 in Para 15 *inter-alia* observed that:

..... "*the legislative intent behind enacting both the LLP Act, 2008 and the Companies Act, 2013 is to facilitate the ease of doing business and create a desirable business atmosphere for companies and LLPs. For this purpose, both the Acts have provided provisions for merger or amalgamation of two or more LLPs and companies."*.....

..... *"If the intention of Parliament is to permit a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Act prohibits a merger of an Indian LLP with an Indian company. Thus, there does not appear any express legal bar to allow/ sanction merger of an Indian LLP with an Indian company."*.....

(b) Section 61 of the Limited Liability Partnership Act, 2008 empowers the National Company Law Tribunal (Tribunal) to enforce compromise or arrangement.

Where the Tribunal makes an order under Section 60 of the Limited Liability Partnership Act, 2008 sanctioning a compromise or an arrangement in respect of a limited liability partnership, it –

(a) shall have power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

If the Tribunal is satisfied that a compromise or an arrangement sanctioned under section 60 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the limited liability partnership, make an order for winding up the limited liability partnership, and such an order shall be deemed to be an order made under section 64 of the Limited Liability Partnership Act, 2008.

CASE STUDY - 6

ABC Limited is a company engaged in the business of cement exports and it is also specialized in the area of Enterprise Resource Planning (ERP) implementation offering their services to domestic and overseas customers.

Enforcement Directorate under Foreign Exchange Management Act (FEMA) carried out the investigation against the ABC Limited. The investigation also centered around the details of the Promoters and their shareholdings; how many subsidiaries companies were formed by the appellants in India and abroad for doing business; details of the share transactions between the promoters of the Company and Non-Resident Indian(NRI) and the details of loans raised by the ABC Limited for their business purpose etc.

The investigation carried out by Enforcement Directorate has clearly made out a case against ABC Limited of violation of Section 8 and Section 42 of Foreign Exchange Management Act as well as Foreign Exchange

Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.

A complaint has been made by the Enforcement Directorate before Special Director. Special Director allowed the complaint and held that ABC Limited has contravened the provisions of FEMA as prayed in the complaint and accordingly imposed a penalty of Rs.5 crores on the Company.

ABC Limited felt aggrieved by the aforementioned order of Special Director and contemplates to file an appeal.

As a Company Secretary of ABC Limited advise the company regarding:

(a) Adjudication and Appeal under Foreign Exchange Management Act, 1999.

(b) Duty of persons to realise foreign exchange due and Manner of Repatriation as well as Period for surrender of realised foreign exchange under Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.

(c) Consequence of contravention of provisions of Foreign Exchange Management Act, 1999 and Rules and Regulation made thereunder by a company.

Suggested Solution- Case Study-6

(a) Chapter V (Section 16 to 35) of the Foreign Exchange Management Act, 1999(FEMA) deals with the provisions of Adjudication and Appeal as under:

Adjudicating Authority

For the purpose of adjudication under Section 13 of FEMA (dealing with Penalties), the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under Section 13, against whom a complaint has been

made. Adjudicating Authority shall not hold an enquiry except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

Appeal to Special Director (Appeals)

Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities. Every appeal shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by prescribed fee.

Appeal to Appellate Tribunal

Central Government or any person aggrieved by an order made by an Adjudicating Authority, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such prescribed.

Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

(b) Duty of persons to realise foreign exchange due:

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Foreign Exchange Management Act, 1999, or the Rules and Regulations made thereunder, or with the general or special permission of the Reserve Bank of India, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

a. that the receipt by him of the whole or part of that foreign exchange is delayed; or

b. that the foreign exchange ceases in whole or in part to be receivable by him. Manner of Repatriation:

(1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

a. sell it to an authorised person in India in exchange for rupees; or

b. retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or

c. use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

(2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Period for surrender of realised foreign exchange:

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person, within the period specified below :-

i. foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;

ii. in all other cases within a period of ninety days from the date of its receipt.

(c) According to Section 42 of the Foreign Exchange Management Act, 1999, where a person committing a contravention of any of the provisions of the Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

It may be noted that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

Where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

For the purposes of section 42 of the Act, "Company" means anybody corporate and includes a firm or other association of individuals; and "director", in relation to a firm, means a partner in the firm.

CASE STUDY - 7

XYZ Limited is a company engaged in real estate and construction business. In order to build a land bank in various parts of India that were likely to see commercial development and anticipating a future upward trend in land prices in various parts India . XYZ Limited hired the services of Mr. Mahesh to assist in the process of acquisition of lands.

XYZ Limited issued a detailed offer letter to Mr. Mahesh for purchase of around 100 acres of land at the maximum price of Rs. 10,00,000/- per acre in different parts of India within a period not exceeding five years. The said offer was accepted by Mr. Mahesh by a letter of acceptance. Upon exchange of offer and acceptance, a legally binding and valid contract came to be force between XYZ Limited and Mr. Mahesh.

Mr. Mahesh received from XYZ Limited a sum of Rs. 1000 Crore as a loan/advance for the purchase of lands as specified in the contract between the parties. Mr. Mahesh purchased various movable and immovable properties with the funds received from XYZ Limited. Since all the funds could not be directly invested in land as required by the contract, investments were made by Mr. Mahesh by himself or through his company in purchase of immovable property, including land, built-up residential and commercial buildings, etc. and Investment in fixed deposits in name of Mr. Mahesh and PQR Limited(95% shareholding by Mr. Mahesh) also investment in movable property including bank balance and few vehicles.

In the meantime Director of Enforcement initiated *suo moto* proceedings under the Prevention of Money Laundering Act, 2002(PMLA) and registered a complaint under Sections 3 and 4 of the PMLA and attached the property of Mr. Mahesh under the Prevention of Money Laundering Act, 2002.

In view of the above, answer the following question:

(a) Discuss the attachment of property involved in money laundering under PMLA

(b) Explain the extent of punishment prescribed under PMLA.

(c) Discuss Appellate Authority establish under PMLA and what is the time limit to file appeal.

(10 Marks Each)

Suggested Solution- Case Study-7

(a) Section 5 of the Prevention of Money Laundering Act, 2002 (PMLA) deals with the provision of attachment of property involved in money laundering.

As per Section 5(1) of the PMLA, Where the Director or any other officer not below the rank of Deputy Director authorised by the Director, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

It may be noted that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country.

Further, notwithstanding anything contained in above , any property of any person may be attached , if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of Section of the PMLA has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately, the non-attachment of the property is likely to frustrate any proceeding under the Act.

For the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under Section 5 of PMLA is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.;

Section 5(2) states that the Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

Section 5(3) provides that every order of attachment made under sub-section(1) shall cease to have effect after the expiry of the period specified in sub-section(1) or on the date of an order made under sub-section (3) of section 8, whichever is earlier.

As per Section 5(4) of PMLA, nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment. It may be noted that person interested, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Section 5(5) states that the Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

(b) Offence of money-Laundering and Punishment for money-Laundering are specified under Section 3 and 4 of the Prevention of Money Laundering Act, 2002 respectively.

Section 3 of the Prevention of Money Laundering Act, 2002 provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

It may be further noted that proceeds of crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.

According to Section 4 of the Prevention of Money Laundering Act, 2002, whoever commits the offence of

money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

It may be noted that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule to the PMLA, shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine.

(c) The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal. Appeal has to be filed within a period of forty-five days from the date of receipt of a copy of the order made by the Adjudicating Authority. Appellate Tribunal may entertain an appeal after the expiry of the period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order. Thus appeal can be filed before High Court on any question of law or fact. High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

CASE STUDY-8

A Corporate Debtor defaulted in the payment to the Operational Creditor, Safe Bank, a foreign bank, amounting to INR 1,000 crore. A certificate was also furnished by the Safe Bank with regards to the non-payment of the outstanding amount by the Corporate Debtor and repeated reminders as to the payment of the debt were made, but such communications could not influence the Debtor to make the payment, pursuant to which a Statutory Notice was sent by the Operational Creditor under Section 433 and 434 of the Companies Act, 1956. The reply to such notice denied the existence of any such outstanding debt on the part of the Debtor.

After, the Insolvency and Bankruptcy Code (the Code) was enacted in 2016, the Operational Creditor furnished a Demand Notice through his lawyer to the Corporate Debtor under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Corporate Debtor replied to the notice saying that there existed no outstanding default on its part and simultaneously, also questioned the validity of the Purchase Agreement. The Debtor also challenged the validity of sending the Demand Notice through his lawyer.

Aggrieved by the action of the Corporate Debtor, the Operational Creditor approached the National Company Law Tribunal (NCLT) and applied for the initiation of the Corporate Insolvency Resolution Process. NCLT rejected the application for initiation of Corporate Insolvency Resolution Process. Operational Creditor aggrieved by the decision of NCLT, preferred an appeal to the National Company Law Tribunal (NCLAT), which also upheld the decision of NCLT.

Subsequently, the Operational Creditor approached the Supreme Court for the redressal of its grievance. In this backdrop, answer the following questions:

(i) Give reasons for the rejection of the application for the initiation of the Corporate Insolvency Resolution Process by NCLT and NCLAT citing relevant provisions of the Code.

(10 marks)

(ii) Discuss whether challenging the validity of the Demand Notice by Corporate Debtor is justified? Discuss with relevant provisions of the Code.

(5 marks)

(iii) The Supreme Court overruled the orders of NCLT and NCLAT and allowed initiation of Corporate Insolvency Resolution Process. Discuss reasons for the same with the help of a decided case law.

(10 marks)

Suggested Solution- Case Study-8

(i) The NCLT rejected the application for initiation of the Corporate Insolvency Resolution Process since it was incomplete as it did not comply with the mandatory requirements of Section 9(3)(c) of the Insolvency and Bankruptcy Code, 2016 which require a certificate from a financial institution with regards to the non-payment of the outstanding amount by the Corporate Debtor. The certificate from the Safe Bank itself was not held to be a certificate from a financial institution as it was a foreign bank which did not fulfill any of the requirements to qualify as a 'financial institution' as per Section 3(14) of the Code. Section 3(14) defines financial institution as under:

"financial institution" means-

(a) a scheduled bank;

(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(c) public financial institution as defined in clause (72) of section 2 of the Companies Act,2013 (18 of 2013); and

(d) such other institution as the Central Government may by notification specify as a financial institution;

NCLAT upheld the NCLT order since the application has to be complete before the initiation of the Corporate Insolvency Resolution Process and that the appellant failed to comply with the mandatory requirement of furnishing a certificate by a financial institution in which the Corporate Debtor has its account with regards that it has failed to pay the outstanding debt. Moreover, it reiterated that the Appellant Bank was not a 'financial institution' as per Section 3(14) of the Code. Also, as it is a mandatory document which acts as an evidence to the existence of default, it has to be necessarily furnished and without it the application is incomplete.

(ii) There was an existence of dispute before the Demand Notice was furnished upon the Corporate Debtor as per Section 8(2)(a) of the Code which was also raised at the time when a reply to the Statutory Notice was furnished under Section 433 and 434 of the Companies Act, 1956 by the Respondent.

Section 8(1) of the Code contains provision relating to Demand Notice, it reads as under:

"An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."

NCLAT noted that "in the present case, as the notice has been given by an advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/ advocate hold any position with or in relation to the appellant company, we hold that the notice issued by the advocate/ lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the Code. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable.

NCLT took cognizance of the Demand Notice which was furnished by the lawyer of the Appellant and noted that such Demand Notice has to be in compliance with Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It was also observed that such Demand Notice was invalid as it has to be furnished as per Form 3 by the Creditor himself or by any authorized person on his behalf and lawyer cannot come under such purview as there was absence of any authority by the Operational Creditor.

(iii) Supreme Court in the matter of *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.* dated December 15, 2017 while deciding upon the aforesaid issues, made the following observations:

(a) Section 9(3)(c) of the Code is directory and not mandatory in nature

The Supreme Court observed that a creative interpretation of Section 9(3)(c) is necessary in the present case as the literal interpretation would be unreasonable and would create hardships for Appellants and other foreign banks in the future. Also, the requirement of certificate as a document is not necessary for substantiating the existence of default as it can be proved by other documents as well. Also, in such cases where such certificates are impossible to furnish, serious inconvenience will be caused to the innocent persons like Appellant when such requirements are not even necessary to further the object of the Code.

Section 9(3)(c) has been since amended to read as under,

"a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [1][by the corporate debtor, if available;]"

(b) A Lawyer can issue a demand notice of an unpaid operational debt on behalf of the operational creditor In this context, the Supreme Court observed that Section 8 of the Code speaks of an operational creditor delivering a demand notice and if the legislature had wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been 'issued' and not 'delivered'. Delivery, therefore, would postulate that such notice could be made by an authorized agent.

The expression 'practise' under Section 30 of the Advocates Act, 1961 providing for the 'Right of advocates to practice' is an expression of extremely wide import, and would include all preparatory steps leading to the filing of an application before a Tribunal.

Court also noted that the non-obstante clause contained in Section 238 of the Code (provisions of the Code overriding other laws) will not override the Advocates Act, 1961 as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

SC also considered the judgment in *Byram Pestonji Gariwala v. Union Bank of India, (1992) 1 SCC 31*. In this judgment, what fell for consideration was Order XXIII Rule 3 of the Code of Civil Procedure, 1908 after its amendment in 1976. It was argued in that case that a compromise in a suit had, under Order XXIII Rule 3, to be in writing and "signed by the parties". It was, therefore, argued that a compromise effected by counsel on behalf of his client would not be effective in law, unless the party himself signed the compromise. This was turned down stating that Courts in India have consistently recognized the traditional role of lawyers and the extent and nature of the implied authority to act on behalf of their clients, which included compromising matters on behalf of their clients. The Court held there is no reason to assume that the legislature intended to curtail such implied authority of counsel.

SC also noted that to insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by *vakalatnama*, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

Therefore, a conjoint reading of Section 30 of the Advocates Act, 1961 and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer is in order.

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1. *Inserted by the Insolvency And Bankruptcy Code (Second Amendment) Act, 2018 dated 17-8-2018*

CASE STUDY – 9

'Taste Bud' was a restaurant located at leased premises in New Delhi. It had a great reputation, award-winning chefs and tastefully designed interiors. Much of its business came from executive lunches and dinners. Following the opening of 'Heavens', another excellent restaurant in the nearby vicinity, trading losses were incurred by Taste Bud and eventually the business became insolvent.

Efforts to either have the rent reduced or to sell the business were unsuccessful. Suppliers of food, bevrages and utilities were unpaid for supplies provided in the previous 45- 60 days, amounting to around Rs.90,000. There were rental arrears for one month amounting to Rs.50,000 towards landlord Mr. Deepak (the landlord had received advance rent for three months, lease deed provided for one-month rent as security and one-month rent as advance).

Taste Bud also had a secured creditor, 'Secure Bank'. The bank indicated that it did not wish to appoint a receiver/ file for insolvency as the accounts were regularly maintained. Taste Bud was managed by Mr. Kapil, as a sole proprietor. He employed a staff of 10 people, including a chef, an assistant chef, six waiters and two house-keeping staff. The salaries due to these employees were paid in half since the past three months.

In light of the above, answer the following questions:

(a) Whether Taste Bud can apply for fresh start process? Give answer with citing reasons.

(b) In priority of payment of debts who will be paid before the wages and unpaid dues of employees of the bankrupt? How the priority is decided under the IBC 2016?

(c) Who can initiate an insolvency resolution process in this case? Give reasons.

(d) In the above situation if a bankruptcy order is passed against Taste Bud, who shall prepare the list of creditors? Mention provisions of IBC 2016 in this regard?

(e) Analyse the effect of Bankruptcy Order on secured creditors under the IBC 2016.

(5 marks each)

Suggested Solution- Case Study-9

(a) No, Taste Bud is ineligible for applying for fresh start process.

Reason : Section 80(2)(c) of the Code provides a Fresh Start Process for individuals under which they will be eligible for a debt waiver of up to INR 35,000. The individual will be eligible for the waiver subject to certain limits prescribed under the Code.

Section 80 of the Insolvency and Bankruptcy Code, 2016 provides that a debtor who is unable to pay his debt and fulfils the conditions as mentioned in sub-section (2) of section 80 shall be entitled to make an application to the Debt Recovery Tribunal (DRT) for a fresh start process for discharge of his qualifying debt.

Section 79(19) of the Code defines the meaning of Qualifying Debt. It means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time but does not includes

- an excluded debt;
- a debt to the extent it is secured; and
- any debt which has been incurred three months prior to the date of the application for fresh start process;

(b) The first priority of payment shall be for the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full. The Workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date and the debts owed to the secured creditors comes after second in priority.

Reason: Section 178(1) of the Insolvency and Bankruptcy Code, 2016 prescribes the priority of payments of debts as under:

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or the State Legislature for the time being in force, in the distribution of the final dividend, the following debts shall be paid in priority to all other debts –

(a) firstly, the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full;

(b) secondly, –

(i) the workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date; and

(ii) debts owed to secured creditors

(c) thirdly, wages and any unpaid dues owed to employees, other than workmen, of the bankrupt for the period of twelve months preceding the bankruptcy commencement date;

(d) fourthly, any amount due to the Central Government and the State Government including the amount to be received on account of Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the bankruptcy commencement date;

(e) lastly, all other debts and dues owed by the bankrupt including unsecured debts.

(c) No one can initiate an insolvency resolution process.

Reason: Here 'Tast Bud' is the sole proprietorship concern and the proprietor is named as Mr Kapil. As mentioned in sub-question (a) above 'Taste Bud' is enligible to initiate the insolvency.

Section 6 of the Insolvency and Bankruptcy Code, 2016 provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner provided under Chapter II of Part II of the Code. However, it is to be mentioned here that the case referred above relates to Individual and not of the CIRP.

(d) Bankruptcy Trustee shall prepare the list of creditors.

Reason: Section 132 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall within fourteen days from the bankruptcy commencement date prepare a list of creditors of the bankrupt on the basis of,

(i) the information disclosed by the bankrupt in the application for bankruptcy filed by the bankrupt under Section 118 of the Insolvency and Bankruptcy Code, 2016 and the statement of affairs filed under Section 125 of the Insolvency and Bankruptcy Code, 2016; and

(ii) claims received by the bankruptcy trustee under sub-Section (2) of Section 130 of the Insolvency and Bankruptcy Code, 2016.

(e) Section 128 of the Insolvency and Bankruptcy Code, 2016 provides that on passing of the bankruptcy order under Section 126 of the Insolvency and Bankruptcy Code, 2016:

a) the estate of the bankrupt shall vest in the bankruptcy trustee as provided under Section 154 of the Insolvency and Bankruptcy Code, 2016;

b) the estate of the bankrupt shall be divided among his creditors;

c) a creditor of the bankrupt indebted in respect of any debt claimed as a bankruptcy debt shall not:

(i) initiate any action against the property of the bankrupt in respect of such debt; or

(ii) commence any suit or other legal proceedings except with the leave of the Adjudicating Authority and on such terms as the Adjudicating Authority may impose.

Subject to the provisions of Section 123 of the Insolvency and Bankruptcy Code, 2016, the bankruptcy order shall not affect the right of any secured creditor to realize or otherwise deal with his security interest in the same manner as he would have been entitled if the bankruptcy order had not been passed: Provided that no secured creditor shall be entitled to any interest in respect of his debt after the bankruptcy commencement date if he does not take any action to realise his security within thirty days from the said date.

CASE STUDY – 10

Disqualification of Director

As on 30th November, 2018, the filing status of the financial statement or annual return of ABC Limited for the last 4 financial year is as under:

Financial Year ended 31st March	Filing of Financial Statement	Filing of AnnualReturn	Date of AGM
2017-18	Not Submitted	Not submitted	25th September, 2018
2016-17	Not submitted	Submitted	5th June, 2017
2015-16	Submitted	Not submitted	30th May, 2016
2014-15	Submitted	Not submitted	25th May, 2015

On the basis of above please advise:

i. Due date of the filing of the Financial Statement and Annual Return for the FY2015-16.

ii. On the basis of the above filing status, whether the directors of the company are being disqualified or not under section 164(2) of the Companies Act, 2013.

iii. Whether the company has made any non-compliance in calling of the AGM.

iv. Consequence to the company for the Non filing of the Financial Statement.

Suggested Solution- Case Study-10

i. Due date of the filing of the Financial Statement and Annual Return for the FY 2015-16.

As per the Section 137 of the Companies Act, 2013, A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within thirty days of the date of annual general meeting.

In the above case the AGM is held on the 30th May, 2016 accordingly, the financial statement of the company should be filed on or before the 29th June, 2016.

As per section 92 of the companies act, 2013 Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting.

In the above case the AGM is held on the 30th May, 2016 accordingly, the financial statement of the company should be filed on or before the 29th July, 2016.

ii. On the basis of the above filing status, whether the directors of the company are being disqualified or not under section 164(2) of the Companies Act, 2013.

As per Section 164 (2) of the Companies Act, 2013, No person who is or has been a director of a company

which –

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.]

As per the above filing status, the company has not filed the financial statement for the FY 2016 -17 and 2017-19 and the Annual return for the FY 2014-15 and 2015-16. Hence, all the Director of the company are disqualified. However, in case any director appointed during the FY 2016-17 and 2017-18 will not be disqualified for appointment or reappointment in any company.

iii. Whether the company has made any non-compliance in calling of the AGM.

As per section 96 of the Companies Act, 2013 every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

From the above table it can be seen that the company has call AGM on 05th June, 2017 and the AGM for the FY 17-18 is called on 25th September, 2018, which is called after the gap of fifteen months which was expired on 05th September, 2018. However, if the company has taken the prior approval of the registrar of companies for extension of the date of the Annual general meeting, the company is in compliance with the law.

iv. Consequence to the company for the Non-filing of the Financial Statement.

As per section 137 of the companies Act, 2013 If a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified therein the company shall be liable to a penalty of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, and the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupee.

The company has not filed the financial statement for the year 2016-17 and 2017-18 and company is liable to pay additional fees as per section 403 and the penalty of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees.

CASE STUDY-11

Acceptance of Deposit by Private Company

The Promoter of the ABC Private Limited (a Start-up Registered company) incorporated on 20th June, 2016 is willing to accept deposit from its members. The shareholding of Mr. A and Mr. B and Mr. C as on the 31st March 2017 is as under:

Mr. A Director of the company holding 4000 shares of Rupees 100 per share Mr. B Friend of Mr. A

Mr. C 3000 Shares of Rupees 100 per share

The Company is not having investment in any Subsidiary Company and Associate Company, the borrowing from the Financial Institutions as on 31st March, 2017 is Rupees 10 Crores.

On the basis of the above information, Please advise on the following:

i. Whether the company can Accept deposit from Mr. A

ii. Whether the company can Accept deposit from Mr. B

iii. Whether the company can Accept deposit from Mr.C?

iv. What will be the maximum limits up to which the deposit can be accepted?

v. Describe the various compliance requirements for the company.

Suggested Solution- Case Study-11

i. Whether the company can Accept deposit from Mr. A

As per the Companies (Acceptance of Deposit) Rules, 2014 any amount received from a person who, at the time of the receipt of the amount, was a director of the company or a relative of the director of the Private Company is exempted under the deposit rules. However in such case the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report.

Hence the company can accept deposit from Mr. A as he is the Director of the company with No limit on the amount of deposit, further he need to give declaration on the same.

ii. Whether the company can accept deposit from Mr. B

No, the Company cannot accept deposit from Mr. B as he is not the director, relative of the directors of the company also he is not the members of the company. The definition of the private company prohibited for any invitation of the public to subscribe for any securities of the company.

iii. Whether the company can accept deposit from Mr. C

Yes, the company can accept deposit from Mr. C as per MCA notification dated 13th June, 2017, the provision the provision of clauses (a) to (e) of sub-section (2) of section 73 shall not apply to following class of private company-

(A) which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account; or

(B) which is a start-up, for five years from the date of its incorporation; or

(C) which fulfils all of the following conditions, namely:-

(a) which is not an associate or a subsidiary company of any other company;

(b) if the borrowings of such a company from banks or financial institutions or anybody corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and

(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

In the above case the company is fits in the various conditions placed in the section for private limited companies for acceptance of deposit. Accordingly, the company can accept deposits from its members up to the one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account.

iv. What will be the maximum limits up to which the deposit can be accepted?

As per rule 3(3) of the Companies (Deposit)Rules, 2014 o No company referred to in sub-section (2) of section 73 shall accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds thirty five per cent of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company.

However maximum limit in respect of deposits to be accepted from members shall not apply to following classes of private companies, namely:-

(i) a private company which is a start-up, for five years from the date of its incorporation;

(ii) a private company which fulfils all of the following conditions, namely:-

(a) which is not an associate or a subsidiary company of any other company;

(b) the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fiffy crore rupees, whichever is less ; and

(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73:

v. Filing requirement:

The companies accepting deposits is required to file the details of monies so accepted to the Registrar in Form DPT-3.

CASE STUDY-12

Notice of Board Meeting

Mr. Sumit, an officer of the Corporate Secretarial Department of the Executive Limited has called the meeting of the members of the board of the director on 25th April, 2019, and served the notice on 17th April, 2019 on email as well as through Registered post, later on Mr. Ashok, one of the directors of the company has challenged the validity of the meeting on the following grounds.

(a) Mr. Sumit was not authorised person to call the meeting.

(b) The Notice was not sent on the letter head of the company.

(c) The Notice is not served as per the statutory requirements.

(d) The notice does not to inform about the facility of the video conferencing being provided by the company. In this back drop answer the following:

i. Whether Mr. Sumit was authorised person to call the meeting? If so give reasons.

ii. Whether it is mandatory to send Notice of the meeting on the letter head of the company?

iii. What are the statutory requirements for serving of notice of board meeting through emails and registered post?

iv. Whether the facility of the video conferencing is mandatorily required to be provided by the company?

Suggested Solution- Case Study-12

i. Mr. Sumit was authorised person to call the meeting.

As a best practice and a measure of good governance, the Director desirous of summoning a Meeting for any purpose should send his requisition in writing to convene such Meeting, along with the agenda proposed by him for discussion at the Meeting, either to –

- the Chairman or in his absence, to the Managing Director or in his absence, to the Whole-time Director, or

- the Company Secretary or in his absence, to any other person authorised by the Board in this regard. "any person authorised by the Board", whether an officer of the company or any person other than the officer of the company, should be clearly identifiable.

It is advised to check whether Mr. Sumit fits under the criteria of the any person authorised by the board.

ii. The Notice was not sent on the letter head of the company.

As per the secretarial standard on the meeting of the Board of Director (SS-1) and guidance note issued Theron, The Notice should preferably be sent on the letter-head of the company. Where it is not sent on the letter-head or where it is sent by e-mail or any other electronic means, there should be specified, whether as a header or footer, the name of the company and complete address of its registered office together with all its particulars such as Corporate Identity Number (CIN) as required under Section 12 of the Act, date of Notice, authority and name and designation of the person who is issuing the Notice, and preferably the phone number of the Company Secretary or any other designated officer of the company who could be contacted by the Directors for any clarifications or arrangements.

iii. The Notice is not served as per the statutory requirements.

In case the company sends the Notice by speed post or by registered post, an additional two days shall be added for the service of Notice.

Addition of two days in case the company sends the Notice by speed post or by registered post is in line with Rule 35(6) of the Companies (Incorporation) Rules, 2014 which provides that in case of delivery of Notice of a Meeting by post, the service shall be deemed to have been effected at the expiration of forty eight hours after the letter containing the same is posted.

However, the requirement of adding two days is applicable only if the Notice is sent to any of the Directors solely by speed post or by registered post and not by facsimile or by e-mail or any other electronic means.

In case the Notice is sent by facsimile or by e-mail or by any other electronic means to the Directors, and it is additionally sent by speed post or by registered post to all or any of the Directors, whether pursuant to their request or otherwise, the additional two days need not be added.

iv. The notice does not inform about the facility of video conferencing being provided by the company.

The Director who desires to participate through Electronic Mode may intimate his intention of such participation at the beginning of the Calendar Year and such declaration shall be valid for one Calendar Year [Clause 3(e) read with Clause 3(d) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014]. The Notice shall also contain the contact number or e-mail address (es) of the Chairman or the Company Secretary or any other person authorised by the Board, to whom the Director shall confirm in this regard. In the absence of an advance communication or confirmation from the Director as above, it shall be assumed that he will attend the Meeting physically.

CASE STUDY-13

Financial Analysis (Capital Budgeting Decisions)

For assessing the two proposals, company's CFO Sridhar looked at some popular methods and compared the two projects.

1. Average Rate of Return (ARR) Method

Accounting rate of return is also called the simple rate of return and is a metric useful in the quick calculation of a company's profitability. ARR is used mainly as a general comparison between multiple projects as it is a very basic look at how a project is doing.

Project A:

Average EAT = (Total EAT / Time Period) = Rs 408/5 Cr. = Rs 81.6 Cr.

Average Investment = Total Investment / 2 = Rs 390 /2 Cr. = Rs. 195 Cr.

ARR = (Average EAT ÷ Average Investment) *100 % = 81.6 / 195 * 100 **= 41.8% Project B:**

Average EAT = (Total EAT / Time Period) = Rs. 451.92 / 5 Cr. = Rs 90.38 Cr.

Average Investment = Total Investment / 2 = Rs 390 /2 Cr. = Rs. 195 Cr.

ARR = (Average EAT ÷ Average Investment) *100 % = 90.38 / 195 * 100 = **46.34%**

Mr. Sridhar observed that both of the projects have very good rate of return and project B is performing better ARR than Project A. Major drawback of this technique is that it does not consider the time value of money, which means that returns taken in during later years may be worth less than those taken in present, and does not consider cash flows, which can be an integral part of maintaining a business. Thus, he must not solely depend on ARR as the method for selecting the project.

Finally, accounting rate of return does not consider the increased risk of long-term projects and the increased variability associated with long periods of time.

2. Pay Back Method

This method indicates the time period required to recover the initial investment outlays of the capital budgeting proposal. The earlier is the sum received, the better it is as per the payback period. (in Rs Crores)

Year	1	2	3	4	5	6
Annual CFAT	Project A	29.8	53.8	125.8	149.8	173.8
	Project B	37.8	52.92	75.6	122.4	163.2
Cumulative CFAT	Project A	29.8	83.6	209.4	359.2	533
	Project B	37.8	90.72	166.32	288.72	451.92

We need to recover our total Investment of Rs. 390 Cr, thus payback period for each project is

1. **Project A:**

CFAT at end of year 4 = 359.2, CFAT at end of year 5 = 533 Therefore, by interpolation, **PB = 4.177 years**

2. **Project B:**

CFAT at end of year 4 = 288.72, CFAT at end of year 5 = 451.92 Therefore, by interpolation, **PB = 4.224 years**

On evaluating on the basis of Payback Method he found that Project A is performing better than project

B. The payback period does not concern itself with the time value of money. In fact, the time value of money is completely disregarded in the payback method, which is calculated by counting the number of years it takes to recover the cash invested.

So before taking the final decision Mr. Sridhar thought of doing more research and analysis. He remembered about the time value of money concept. He realized that to get the true picture of the projects he needs to discount the cash inflows. He now thought of using the internal rate of return

method which is quite popular in the corporate sector to identify the best proposal.

3. Internal Rate of Return (IRR) Method

This method indicates the expected rate of return likely to be provided by the capital budgeting proposal. The project is accepted if the cost of capital is less than the IRR and rejected if it is more than IRR. To calculate IRR, we use an approximate method where we first calculate fake payback period to estimate the likely rate of return and then use Annuity table to find the best match.

Project A

Fake Annuity = (Total CFAT) ÷ (Total Time) = 533 / 5 = Rs. 106.6 Cr.

Fake Payback Period= (Total Investment) ÷ (Fake Annuity) = 390/106.6 = **3.658 years**

Now he found the PVIF close to 4.22 years in the table giving present value of an annuity of One Rupee for 5 years to be between 11 and 12% as shown below.

In Rs Crores

Year	CFAT of Project A	PV factor (8%)	PV factor (11%)	PV factor (12)	PV at 8%	PV at 11%	PV at 12%
1	29.8	0.9259	0.9009	0.8929	27.59	26.84	26.61
2	53.8	0.8573	0.8116	0.7972	46.12	43.66	42.89
3	125.8	0.7938	0.7312	0.7118	99.86	91.98	89.54
4	149.8	0.7350	0.6587	0.6355	110.10	98.67	95.19
5	173.8	0.6806	0.5935	0.5674	118.28	103.15	98.61
				Total Present Value	401.95	364.30	352.84
				Less: Initial Outflow	390.00	390.00	390.00
				Net Present Value	11.95	-25.70	-37.16

He observed that the PVIF of 11% and 12% did not give the results, so he tried with 8%.

Now he used interpolation to find the IRR,

IRR = 8 + (402-390) / [11.95-(-25.7)]*3 = 8.95%

Project B

Fake Annuity = (Total CFAT) ÷ (Total Time) = 451.92 / 5 = Rs. 90.38 Cr.

Fake Payback Period= (Total Investment) ÷ (Fake Annuity) = 390/90.38= **4.315 years**

Similarly, he found the PVIF close to 4.315 years in the table giving present value of an annuity of One Rupee for 5 years to be between 4% and 5% as shown below.

in Rs Crores

Year	CFAT of Project B	PV factor (4%)	PV factor (5%)	PV at 4%	PV at 5%
1	37.8	0.9615	0.9524	36.34	36.00
2	52.92	0.9246	0.9070	48.99	48.00
3	75.6	0.8890	0.8638	67.21	65.30

Year	CFAT of Project B	PV factor (4%)	PV factor (5%)	PV at 4%	PV at 5%
4	122.4	0.8548	0.8227	104.63	100.69
5	163.2	0.8219	0.7835	134.13	127.86
Total Present Value				391.3	377.85
Less: Initial Outflow				390.00	390.00
Net Present Value				1.3	-12.15

Now he used interpolation to find the IRR,

IRR = 4 + (391.3-390)/ [1.3-(-12.15)]*1= 4.096

He observed that project A conclusively outperforms project B in terms of Internal Rate of Return. On having a closer look he found out the reason for project A having higher IRR has to do with higher CFAT on account of full capacity production in the later years. So he was convinced that project A is better and going to convey this to Mr. Khushiram next day, but he thought that the importance of NPV in capital budgeting decisions can't be neglected. Although IRR is an appealing metric to many, it should always be used in conjunction with NPV for a clearer picture of the value represented by a potential project a firm may undertake.

Thus before taking the final call he analyzed the projects using NPV method.

4. Net Present Value (NPV) Method

Determining the value of a project is challenging because there are different ways to measure the value of future cash flows. Because of the time value of money (TVM), money in the present is worth more than the same amount in the future. This is both because of earnings that could potentially be made using the money during the intervening time and because of inflation. In other words, a rupee earned in the future won't be worth as much as one earned in the present.

The discount rate element of the NPV formula is a way to account for this. Companies may often have different ways of identifying the discount rate. He used the discount rate of 10% which was close to the company's expected rate of returns.

Here, **PV = Present Value**

(In Rs. Crore)

Year	CFAT of Project A	CFAT of Project B	PV factor (10%)	PV of CFAT of Project A	PV of CFAT of Project B
1	29.8	37.8	0.91	27.11	34.40
2	53.8	52.92	0.83	44.65	43.92
3	125.8	75.6	0.75	94.35	56.7
4	149.8	122.4	0.68	101.86	83.23
5	173.8	163.2	0.62	107.75	101.18
Total PV of cash inflow				375.72	319.43
Total PV of cash outflow				155.00	3.00
Net PV of Cash Flow				220.72	316.43

Analysis with NPV gave some surprising results, both projects have NPV positive and so both are good projects to invest in. But Project B had significantly higher NPV than Project A, implying that project B is

more profitable. But this was completely opposite of what he got from the IRR method where he got two times higher IRR compare to project B.

Faced with completely opposite result from the two methods he was unsure of which project to recommend. So he decided to study the implications of both the methods that would result in greater future value of the company and came to the below conclusion.

Conclusion

NPV and IRR are both used in the evaluation process for capital expenditure. Net present value (NPV) discounts the stream of expected cash flows associated with a proposed project to their current value, which presents a cash surplus or loss for the project. The internal rate of return (IRR) calculates the percentage rate of return at which those same cash flows will result in a net present value of zero. The two capital budgeting methods have the following differences:

1. The NPV method results in a dollar value that a project will produce, while IRR generates the percentage return that the project is expected to create.
2. The NPV method focuses on project surpluses, while IRR is focused on the breakeven cash flow level of a project.
3. The NPV method presents an outcome that forms the foundation for an investment decision, since it presents a dollar return. The IRR method does not help in making this decision, since its percentage return does not tell the investor how much money will be made.
4. The presumed rate of return for the reinvestment of intermediate cash flows is the firm's cost of capital when NPV is used, while it is the internal rate of return under the IRR method.
5. The NPV method requires the use of a discount rate, which can be difficult to derive, since management might want to adjust it based on perceived risk levels. The IRR method does not have this difficulty, since the rate of return is simply derived from the underlying cash flows.

Due to above reasons, NPV is considered to be a better option for evaluation than IRR. Generally, NPV is the more heavily-used method, but some also use simple methods like Pay Back and ARR.

We will suggest Mr. Sridhar to recommend the project with higher NPV i.e. project B of outsourcing the manufacturing to company's CEO Mr. Khushiram.

CASE STUDY-14

MCL is a public limited company, which has its equity shares listed on both BSE Limited and National Stock Exchange of India Limited. **CPPL** is a part of the promoter group of MCL since it is closely held by certain promoters of MCL. However, currently CPPL neither holds any equity shares in MCL nor has any role in the management of MCL. The 'Promoter and Promoter Group' of MCL collectively hold 65.44% of the total paid-up capital of MCL, as on date. Being a public listed company, MCL has issued a 'Code of practice and procedures for fair disclosure of unpublished price sensitive information (**"UPSI"**) and code of conduct to regulate, monitor and report trading by insiders of MCL (**"CoC"**) in accordance with the SEBI (Prohibition of Insider Trading Regulations), 2015 (**"PIT Regulations"**). CPPL now intends to acquire 50,000 equity shares, constituting 0.06% of the paid-up capital of MCL (**"Proposed Acquisition"**), which is beyond the thresholds stipulated by the board of directors of MCL for trading by designated persons. In view of the above facts, answer the following questions:

a. What category of persons are required to obtain a pre-clearance from the compliance officer of a listed entity prior to trading?

b. Will CCPL be required to obtain a pre-clearance from the compliance officer of MCL for the Proposed Acquisition?

c. Does the compliance officer have discretionary powers under the PIT Regulations to reject a pre- clearance request on any reason it deems fit?

d. Is the compliance officer required to consider certain factors while approving or rejecting an application seeking pre-clearance for a proposed transaction?

e. Is there any provision in the PIT Regulations that provides for the examination of acts of a compliance officer?

Suggested Solution- Case Study-14

The following are the findings of the case as given above:

a. Clause 6 of Schedule B of the PIT Regulations states that pre-clearance is required to be obtained only by 'designated persons' (i.e. employees and connected persons designated as such on the basis of their functional role in the organization) if the value of the proposed trades is above such thresholds as stipulated by the board of directors of the listed company.

b. CCPL will be required to obtain a pre-clearance from the compliance officer of MCL for the Proposed Acquisition only if it is designated as a 'designated person' by the board of directors of MCL, in consultation with the compliance officer.

c. The compliance officer, under the provisions of the PIT Regulations, is entrusted with ensuring adherence to the PIT Regulations and in rejecting a pre-clearance request, the compliance officer is required to ensure compliance in letter and spirit to the PIT Regulations i.e. to ensure that no undue advantage accrues to certain categories of investors on account of their access to UPSI and not for any ulterior motive.

d. The compliance officer is required to approve or reject a request for pre-clearance after necessary assessment as per the PIT Regulations and the Code of Conduct of the company. Clause 7 of Schedule B of the PIT Regulations requires the compliance officer to maintain a list of such securities as a 'restricted list' which is to be used as a basis for approving or rejecting applications for pre-clearance of trades and Clause 8 requires a compliance officer to have regard to whether a declaration (from the applicant seeking pre-clearance to the effect that he is not in possession of UPSI) is reasonably capable of being rendered inaccurate.

e. Regulation 2(1)(c) of the PIT Regulations lays down that the compliance officer acts under the overall supervision of the board of directors of the listed company or the head of the organization (as the case may be). Additionally, Clause 1 of Schedule B of the PIT Regulations requires the compliance officer to report to the board of directors and provide reports to the Chairman of the audit committee/ board of directors. Hence, any act of the compliance officer may be referred to the board of directors and the audit committee for examination with the extant laws and relevant facts of the case.

CASE STUDY-15

Priya Limited (**"Company"**) is an Indian public limited company listed on NSE Limited. The Company was initially promoted by Mr. Suresh, who together with his wife, Mrs. Raina holds 21.15% of the equity share capital of the Company as on date. The total promoter and promoter group holding, as on date, is 64.31% of the shares of the Company. On March 23, 1995, Mr. Suresh entered into a promotional agreement with M/s. Kochi Corporation Limited (**"KCL"**), which provides that both parties shall support each other during the currency of the agreement on all matters coming up before the general meeting of the Company. The shareholding of Mr. Suresh, Mrs. Raina and KCL, as on date, constitutes 29.91% of the equity share capital of the Company. Mr. Suresh and his wife have entered into a shareholders' agreement with M/s. Mumbai Indians under which Mr. Suresh, Mrs. Raina, the Company and M/s. Mumbai Indians undertook to take such actions as may be necessary to give effect to the provisions of, and comply with their obligations under the shareholders' agreement. Further, it was confirmed in the said shareholders' agreement that the director nominated by KCL shall be a promoter

director. Another shareholder, Mr. Rohit Sharma, who is also a director in the Company and holds 4.27% of its equity shares intends to enter into a shareholders' voting agreement (**"Agreement"**) with Mr. Suresh under which both Mr. Suresh and Mr. Rohit Sharma intend to support each other on all matters coming up before the board and general meetings of the Company. Mr. Rohit Sharma is not related to the promoter, Mr. Suresh, and was de-classified as a promoter of the Target Company on May 6, 2012. In view of the above facts, answer the following questions:

a. Would Mr. Suresh, Mrs. Raina and KCL be deemed to be persons acting in concert under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**"SAST Regulations"**)?

b. Would the execution of the Agreement attract Regulation 3(1) of the SAST Regulations which will in effect require Mr. Suresh to make a public announcement of an open offer?

c. Would the execution of the Agreement attract any other provision of the SAST Regulations that would require Mr. Suresh to make a public announcement of an open offer?

Suggested Solution- Case Study-15

The following are the findings of the case as given above:

a. Regulation 2(1)(q) of the SAST Regulations include promoters and members of the promoter group under the category of persons deemed to be persons acting in concert. Since Mr. Suresh, Mrs. Raina and KCL are members of the promoter group, they would be deemed to be persons acting in concert in terms of Regulation 2(1)(q) of the SAST Regulations.

b. Since Mr. Rohit Sharma would be voting with the existing promoters on all matters, he would be deemed to be a person acting in concert with the promoter group, and thus he would become a part of the promoter group. Hence, the promoter and promoter group shareholding would increase from 64.31% to 68.58% of the shares of the Target Company, which is well within the limits specified in Regulation 3(1) of the SAST Regulations (i.e. less than 25% of shares of the target company). Hence, the execution of the Agreement would not attract the provisions of Regulation 3(1) of the SAST Regulations.

c. Since, by virtue of the Agreement, Mr. Rohit Sharma would exercise control with Mr. Suresh and other members of the promoter group, such acquisition of control through the proposed Agreement would attract Regulation 4 of the SAST Regulations. In terms of the same, Mr. Rohit Sharma would be required to make a public announcement of an open offer.

CASE STUDY-16

Opex Limited (**"Company"**) is a public company which has its shares listed on BSE Limited and National Stock Exchange of India Limited. The engineering business of the Opex Group is presently held under the Company and Samaira Engineering Limited (**"SEL"**), a subsidiary of the Company. The equity shares of SEL were listed on Ahmedabad Stock Exchange in May, 1965 and were subsequently delisted in June, 2015, in accordance with Chapter III of the SEBI (Delisting of Equity Shares) Regulations, 2009 (**"Delisting Regulations"**). It is proposed to consolidate the engineering business in a single company, for which, the Company will incorporate a wholly owned subsidiary i.e. New Company (**"New Co."**) and will demerge its engineering undertaking into New Co. It is also proposed to simultaneously either merge SEL into the New Co. or demerge the engineering undertaking of SEL into the New Co. As a reason for the aforesaid demerger, New Co. will issue equity shares to the shareholders of the Company and SEL as a consideration for demerger. In order to implement the identified alternative, the Company, SEL and the New Co. would enter into a scheme of arrangement under Sections 230-232 of the Companies Act, 2013. The equity shares of New Co. are proposed to be listed in accordance with the relevant SEBI laws. In view of the above facts, answer the following questions:

a. Is there any restriction on listing of equity shares that have been delisted by voluntary delisting under Chapter III of the Delisting Regulations?

b. Would the listing of equity shares issued by New Co. to the shareholders of the Company and SEL be permissible under the Delisting Regulations?

c. Is there any restriction on listing of equity shares that have been compulsorily delisted under Chapter V of the Delisting Regulations?

Suggested Solution- Case Study-16

The following are the findings of the case as given above:

a. Regulation 30(1)(a) of the Delisting Regulations, 2009 provides that an application for listing equity shares that have been delisted under Chapter III cannot be made until the expiry of a period of 5 years from the delisting.

b. Since the issuance of equity shares by New Co. are distinct from the equity shares of SEL that were delisted from the Ahmedabad Stock Exchange in 2015, they can be issued under the Delisting Regulations.

c. Regulation 30(1)(b) of the Delisting Regulations provides that an application for listing equity shares that have been delisted under Chapter V cannot be made until the expiry of a period of 10 years from the delisting.

CASE STUDY - 17

Bright Mills Company Ltd (the Company) was closed and opened several times for one reason or another and finally was closed in March, 2014. However, the proceedings were pending under the Sick Industrial Companies (Special Provisions) Act, 1985. The Bright Mill Mazdoor Morcha, (the trade union) a registered trade union on 14.03.2017, issued a demand notice on behalf of roughly 3,000 workers under Section 8 of the Code for outstanding dues of workers. The Company replied to it on 31.03.2017.

The National Company Law Tribunal (NCLT), on 28.04.2017, after considering all the antecedent facts including suits that have been filed by respondent and referring to pending writ petitions in the High Court of Delhi, ultimately held that a trade union not being covered as an operational creditor, the petition would have to be dismissed.

By the impugned order dated 12.09.2017, the National Company Law Appellate Tribunal (NCLAT) did likewise and dismissed the appeal filed by the trade union and stating that each worker may file an individual application before the NCLT.

The NCLAT, by the impugned judgment, refused to go into whether the trade union would come within the definition of "person" under Section 3(23) of the Code. The NCLAT held that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor.

Based on the above, answer the following questions:

(a) Who can be termed as 'Operational creditor' and what is meant by 'Operational debt' under the Insolvency and Bankruptcy Code, 2016? Whether Trade Union can be treated as 'person' under the Code?

(b) Whether you endorse the decision awarded by the NCLT and further affirmed by the NCLAT? Give reasons in support of your answer.

(c) If you disagree with the award given by NCLT/NCLAT, what you will suggest to the Trade Union?

Suggested Solution- Case Study- 17

(a) **Operational Creditor:** In terms of section 5(20) of the Code, 'operational creditor' means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Operational Debt: In terms of section 5(21) of the Code, 'operational debt' means a claim in respect of the

provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Person: Section 3(23) of the Code provides the inclusive definition of the word 'person', which includes:

(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute, and includes a person resident outside India;

Provisions under the Trade Union Act: Before going to answer, whether Trade Union comes under the term 'person' or not, we have to see the definition of the Trade Union as provided in the Trade Union Act, 1926.

Section 2(h) of the Trade Union Act provides that 'Trade Union' means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions.

Further the 'trade dispute' has been defined in section 2(g) of the Trade Union Act, as any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and "workmen" means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises.

On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, 1926 and would therefore fall within the definition of "person" under Sections 3(23) of the Code.

(b) No, we do not endorse the decision awarded by the NCLT/NCLAT for the following reasons:

(a) After having discussed in the (a) above, it is clear that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, 1926 and would therefore fall within the definition of 'person' under Sections 3(23) of the Code.

(b) This being so, it is clear that an 'operational debt', meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly.

(c) A registered trade union recognised by Section 8 of the Trade Unions Act, 1926 makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which *inter alia* is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

(d) NCLAT is not correct in stating that a trade union would not be an operational creditor as no services

are rendered by trade union to corporate debtor. What is clear is that trade union represents its members who are workers, to whom dues may be owed by employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all.

(e) Even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

(c) We are of the opinion based on the above discussions that the Trade Union should make an appeal before the Supreme Court. The above case is based on the recently decided case of the Supreme Court in the matter of *JK Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company Ltd.,* Civil Appeal No. 20978 of 2017, April 30, 2019, which Apex Court held that a registered trade union which is formed for purpose of regulating relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

Senior Advocate appearing on behalf of the appellant took Court through various provisions of the Code and the Trade Unions Act, 1926, and cited a Division Bench judgment of the Bombay High Court in *Sanjay Sadanand Varrier* v. *Power Horse India Pvt. Ltd.*, *[2017] 5 Mah LJ 876* to argue that even literally speaking, the provisions of the Code would lead to the result that a trade union would be an operational creditor within the meaning of the Code. Even otherwise, a purposive interpretation ought to be granted, as has been done in various recent judgments to the provisions of the Code, and that therefore, such an application by a registered trade union filed as an operational creditor would be maintainable.

On the other hand, learned Senior Advocates appearing on behalf of respondent No.1 supported the NCLAT judgment to argue that as no services are rendered by a trade union to the corporate debtor to claim any dues which can be termed as debts, trade unions will not come within the definition of operational creditors. That apart, each claim of each workman is a separate cause of action in law, and therefore, a separate claim for which there are separate dates of default of each debt. This being so, a collective application under the rubric of a registered trade union would not be maintainable.

On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of "person" under Sections 3(23) of the Code. This being so, it is clear that an "operational debt", meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly. Further, a registered trade union recognised by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which *inter alia* is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

The Bombay High Court in *Sanjay Sadanand Varrier* (*supra*), after setting out various provisions of the Trade Unions Act, including Section 15, has held:

"13. As can be seen from the said section, Registered Trade Unions can prosecute or defend any legal proceeding to which the Trade Union or member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any right of the Trade Union as such, or any rights arising out of the relations of any member with his employer or with a person whom the member employs. In fact, the Trade Union can even spend general funds on the conduct of trade disputes on behalf of the Trade Union or any member thereof.

14. On a conjoint reading of the provisions of the Companies Act, 1956 and more particularly sections 434 and 439 as well as the provisions of the Trade Unions Act, 1926, we are clearly of the view that looking to the mandate of sections 13 and 15 of the Trade Unions Act, 1926, there is no doubt in our mind that a Petition for winding up would be maintainable at the instance of the Trade Union. This is for the simple reason that section 15(c) and (d) clearly mandates that the prosecution or defence of any proceeding to which the Trade Union or any member thereof is a party as well as the conduct of trade disputes on behalf of the Trade Union or any member thereof can be done by the Trade Union. This would clearly go to show that the Trade Union, for and on behalf of its members can certainly prefer a winding up Petition as contemplated under section 439 of the said Act. This is for the simple reason that if the workmen have not been paid their wages and/or salary by the Company, they would certainly be a creditor or creditors as contemplated under section 439(1)(b) of the Companies Act, 1956. Section 15 clearly mandates that the Trade Union can take up this cause for and on behalf of its members. Hence, after complying with the provisions of section 434 of the Companies Act, 1956 the Trade Union would certainly be competent to present a winding up Petition."

No doubt, this judgment was in the context of a winding-up petition, but the rationale based upon

Section 15(c) and (d) equally applies to a petition filed under the Code.

However, learned counsel appearing on behalf of respondent No. 1 have cited the judgment reported as *Commissioner of Income Tax (TDS), Kanpur and Anr. v. Canara Bank,* [2018] 9 SCC 322. This judgment dealt with the expression "established by or under a Central, State or Provincial Act" contained in Section 194-A(3)(iii) of the Income Tax Act, 1961. After exhaustively reviewing the case law on the subject, this Court came to the conclusion that the NOIDA authority was established as an authority under the State Act. While dealing with several judgments of this Court, the Court, in paragraphs 20, 24, and 25, followed judgments stating that a company incorporated and registered under the Companies Act cannot be said to be "established" under the Companies Act. The context of Section 3(23) of the Code shows that this judgment has no application to the definition contained in Section 3(23). Here, a "person" includes a company in clause (c), and would include any other entity established under a statute under clause (g). It is clear that clause (g) has to be read *noscitur a sociis* with the previous clauses of Section 3(23). This being the case, entities such as companies, trusts, partnerships, and limited liability partnerships are all entities governed by the Companies Act, the Indian Trusts Act, and the Partnership Act, which are not "established" under those Acts in the sense understood in *Canara Bank* (*supra*) and the judgments followed by it. The context, therefore, in which the phrase "established under a statute" occurs, makes it clear that a trade union, like a company, trust, partnership, or limited liability partnership, when registered under the Trade Union Act, would be "established" under that Act in the sense of being governed by that Act. For this reason, the judgment in *Canara Bank* (*supra*) would not apply to Section 3(23) of the Code.

SC observed, even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. We must never forget that procedure is the handmaid of justice, and is meant to serve justice. This Court, in *Kailash* v. *Nanhku and Ors.* [2005] 4 SCC 480, put it thus:

"28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in *Sushil Kumar Sen* v. *State of Bihar* [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6)

"The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. … Justice is the goal of jurisprudence — processual, as much as substantive."

29. In *State of Punjab* v. *Shamlal Murari* [(1976) 1 SCC 719 : 1976 SCC (L&S) 118] the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that: (SCC p. 720)

"Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

In *Ghanshyam Dass* v. *Dominion of India* [(1984) 3 SCC 46] the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle."

This judgment was followed by the Constitution Bench decision in *Sarah Mathew* v. *Institute of Cardio Vascular Diseases and Ors.*, [2014] 2 SCC 62 [at paragraph 49].

The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union would come within the definition of 'person' under Section 3(23) of the Code. Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all. For all these reasons, we allow the appeal and set aside the judgment of the NCLAT. The matter is now remanded to the NCLAT who will decide the appeal on merits expeditiously as this matter has been pending for quite some time. The appeal is allowed accordingly.

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PROFESSIONAL PROGRAMME

MULTIDISCIPLINARY CASE STUDIES (PAPER 8)

PP-MCS

TEST PAPER

WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable tobe cancelled or terminated. The text of regulation 27 is reproduced below for information:

"27. Suspension and cancellation of examination results or registration.

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as student,or debar him from re-registration as a student, or take such action as may be deemed fit.

PROFESSIONAL PROGRAMME

MULTIDISCIPLINARY CASE STUDIES (PAPER 8)
TEST PAPER

[*This Test Paper is for recapitulate and practice for the students. Students need not to submit responses/ answers to this test paper to the Institute.*]

Time Allowed: 3 Hours ***Maximum Marks: 100***

1. The Board of Guava Ltd, a large manufacturing company, decided to set up an internal control and audit functions. The proposal was to appoint an internal auditor at mid-management level and also to establish a board level internal audit committee made up mainly of non-executive directors. The initiative to do so was driven by a recent period of rapid growth of the organisation.

   The Board decided that the increased size and complexity of its operations created the need for greater control over internal activities and that an internal audit function was a good way forward. The need was highlighted by a recent event where internal quality standards were not enforced, resulting in the stoppage of a production line for several hours. The finance director Mr. Kumar said that there were problems with internal control in a number of areas of the company's operations and that there was a great need for internal audit.

   He said that as the head of the company's accounting and finance function, the new internal auditor should report to him. The reasons for this, he said, were because as an accountant, he was already familiar with auditing procedure and the fact that he already had information on budgets and other 'control' information that the internal auditor would need. It was decided that the new internal auditor need to be a person of some experience and with tough personality not to be intimidated nor diverted by other department heads who might find the internal audits an inconvenience.

   One issue the Board had was whether it would be better to recruit to the position from inside or outside the company. Another issue was over the limits of authority that the internal auditor might be given. It was pointed out that while the board considered the role of internal audit to be very important, it didn't want it to interfere with the activities of other departments to the point where their operational effectiveness was reduced.

   Based on the above case answer the following :

   (a) Discuss the factors that are typically considered when deciding to establish internal audit in an organisation.

   (b) Construct the argument in favour of appointing the new internal auditor from outside the company rather than promoting internally.

   (c) Critically evaluate Mr. Kumar's belief that the internal auditor should report to him as finance director.

   (d) Describe characteristics that might demonstrate an internal auditor's professional objectivity.

   (10 marks each)

2. A well-known beverage company Mysty Ltd. owns 22 brands that generate revenues of over $1 billion per annum with the third highest market value in the beverage industry and ranks in the top 100 Forbes list of 'World's biggest public companies'.

   In 2010, the company spent $3.4 billion marketing and advertising its brands. They represent a kind of promise to its customers – a guarantee that the drinks and snacks are safe, and that the taste of them, that irresistible combination of flavors, will be the same every time. But in another sense the brands are

abstractions. The taste is the rootstock onto which the Company grafts desires ("aspirations," as they say in the branding business) that have nothing to do with the products themselves. This duality in Company's products – part sensory, part aspirational—extends throughout the company's culture and its mission, as defined by its CEO that it is not enough to make things that taste good but the Mysty must be a good company. It must aspire to higher values than the day-to-day business of making and selling soft drinks and snacks. It may be better described as "performance with purpose."

Mysty Ltd. placed first, second and third globally in the savoury snacks, social beverages and nutrition markets respectively; with Company outperforming the organic growth of 3.5% in 2014 where as its chief competitor Tasty Ltd. growth was only 2% growth over the year. Mysty's market share of non-alcoholic beverages in the US has also increased from 26% in 2006 to 28.7%; as well as, being the leader in savoury snacks in the US with a 36.6% market share. Mysty Ltd. possesses distinctive capabilities that give the company a sustained competitive advantage, due to its long-established and strong brand names, competitive distribution and manufacturing processes and vast financial resources.

Required

1. Identify and describe the five forces f Porter with respect to Mysty Ltd.
2. Explain the strategy Mysty Ltd. should adopt to survive and gain competitive advantage.
3. Identify the resources, capabilities, and distinctive competencies of Company?

(4 marks each)

3. Mr. Rahul, deceitfully personates as an owner of any security or interest in ABC Limited. State the penal consequence applicable to Mr. Rahul under the Companies Act, 2013.

(12 marks)

4. ABC Mazdor Sangh a registered Trade Union registered under the Trade Union Act, 1926 filed a application of Corporate Resolution Insolvency Process (CRIP) of XYZ Limited before the National Company Law Tribunal (NCLT). However, NCLT did not admit the application for CRIP stating that ABC Mazdor Sangh is not an Operational Creditor (OC) under the Insolvency & Bankruptcy Code, 2016. Being aggrieved by the order of NCLT, ABC Mazdor Sangh filed an appeal before the National Company Law Appellate Tribunal (NCLAT). NCLAT dismissed the appeal against the order of NCLT stating that each worker may file individual application before the NCLT. Whether the Trade Union i.e. ABC Mazdor Sangh would come within the definition of "person" under the Insolvency & Bankruptcy Code, 2016 and entitled to file application for CRIP? Give reasons in support of your answer.

(12 marks)

5. ABC Limited is one of the authorised dealer of two wheelers of the XYZ Limited for a period of 15 years. The ABC Limited acquired dealership and service centre of the XYZ Limited through a non- exclusive standard form of agreement between the parties ("Dealership Agreement"). The ABC Limited alleged that the XYZ Limited has imposed the restrictive conditions in the said dealership agreement such as prohibiting from dealing in any manner with any competing product, deliberate deduction from dealer's account to fund advertising expenses, restriction regarding the sale of batteries, exclusive arrangements with financers and re-sale price maintenance etc.

   ABC Limited has, inter-alia, prayed before the Competition Commission of India to initiate an inquiry against the XYZ Limited for contravention of the provisions of Sections 3 and 4 of the Competition Act, 2002 and issue an appropriate direction.

   In view of the above, state the factors that are keeping in mind by the Competition Commission of India while determining the abuse dominant position.

(12 marks)

6. The Reserve Bank of India (RBI) is empowered to prohibit, restrict or regulate various types of foreign exchange transactions, including Foreign Direct Investment (FDI), in India by means of necessary Regulations. RBI Regulates foreign investment in India in accordance with Government of India's policy. To promote Foreign Direct Investment (FDI), the Government has put in place an investor- friendly policy, wherein except for a small negative list, most sectors are open for 100% FDI under the Automatic route. Further, the policy on FDI is reviewed on an ongoing basis, to ensure that India remains attractive & investor friendly destination. FDI is prohibited under the Government Route as well as the Automatic Route in the sectors like Atomic Energy, Lottery Business etc.

   Foreign Direct Investment improves forex position of the country, generate employment, increase in production and help in capital formation by bringing fresh capital and also helps in transfer of new technologies, management skills, intellectual property etc. Foreign Investment in various sectors bring international best practices and latest technologies leading to economic growth in the country and providing much needed impetus to manufacturing sector and job creation in India. In line with the policy to provide boost to the manufacturing sector and give impetus to the 'Make in India' initiative, the Government has permitted a manufacturer to sell its product through wholesale and/or retail, including through e-commerce under automatic route.

   With a view to benefit farmers, give impetus to food processing industry and create vast employment opportunities, 100% FDI under Government route for trading, including through e-commerce, has been permitted in respect of food products manufactured and/or produced in India. E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.

   On the basis of the above, answer the following:

   (a) What are the Capital instruments permitted for receiving Foreign Direct Investment (FDI) in an Indian company?

   (b) Discuss the regulatory prescription prescribed under Foreign Direct Investment Policy pertaining to e-Commerce.

   (6 marks each)