CASE DIGEST -SERIES 1

(Case Snippets and Case Studies)

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CASE DIGEST – SERIES 1

(Case Snippets and Case Studies)

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Content

Part A
Case Snippets

COMPANY LAW

1. The National Company Law Appellate Tribunal (NCLAT) has dismissed the claims of grandchildren of late Maharani Gayatri Devi of Jaipur over the ownership of the Jai Mahal hotel, in the matter of ***Jai Mahal Hotels Private Limited Vs. Rajkumar Devraj & ors., Company Appeal (AT) No. 270, 271 and 329 of 2018, dated March 12, 2020.***

2. The National Company Law Appellate Tribunal (NCLAT) held that the auditor cannot be debarred for 5 years under Companies Act, 2013 in the absence of evidence supporting fraudulent intentions, in the matter of ***Mukesh Maneklal Choksi Vs. Union of India and Zen Shaving Limited, Company Appeal (AT) No. 89 of 2019, dated February 17, 2020.***

3. The Bombay High Court has disallowed an interim relief to directors who were disqualified under section 164(2) of the Companies Act 2013 for not filing Financial Statements and Annual Returns which is to be considered as Ministerial Acts of Directors, in the matter of ***Satish Kumar Gupta Vs. Union of India & Anr., W.P. No. - 1224 of 2018, dated February 7, 2020*.**

4. The National Company Law Appellate Tribunal (NCLAT) held that the Company has to register the transfer of 60,000 shares in the name of legal heirs of one of its deceased shareholders which were due to him on right basis as Letter of Administration for succession has been submitted by legal heirs, So Company could not insist for production of affidavit and indemnity bond in the matter of ***DLF Ltd. & Anr. Vs. Satya Bhushan Kaura & Anr., Company Appeal (AT) No. 14 of 2019, dated January 13, 2020.***

5. The National Company Law Appellate Tribunal (NCLAT) has rejected the Central Government's plea to supersede the board of 63 Moons Technologies (formerly known as Financial Technologies (India) Limited) and upheld the NCLT, Chennai bench order against three Directors, Jignesh Prakash Shah, Dewang Sunderraj Neralla and Manjay Prakash Shah and appointment of Government nominees not more than 3 Directors on the board of '63 Moons Technologies Limited' ***in the matter of Anil Chandanmal Singhvi and Ors. Vs. Union of India & Ors., Company Appeal (AT) Nos. 185-186, 187-188, 189-190, 192, 196-197, 198-199, 200-201, 202-203, 204-205, 206-207, 208, 209 of 2018, dated 12th March, 2020.***

6. The National Company Law Appellate Tribunal (NCLAT) directs Unitech Ltd. to repay the amount to its Deposit Holders with Interest ***in the matter of Ateet Bansal and Ors. Vs. Unitech Ltd. Company Appeal (AT) No.216, 218,219 of 2019, dated 25th February, 2020.***

7. The National Company Law Appellate Tribunal (NCLAT) dismissed the claims of appellant on the ground that he failed to prove that his resignation letter is a forged document ***in the matter of Harish Jain Vs. Haveli Restaurant & Resorts Ltd. and Ors. Company Appeal (AT) No. 390 of 2018, dated 26th February, 2020.***

8. The National Company Law Appellate Tribunal (NCLAT) set aside the order of NCLT, Allahabad Bench, and restored the name of appellant company in the register of Companies subject to various conditions of compliances imposed on the company in the matter of ***Shri Madan Lal Food Products Pvt. Ltd. Vs. Union of India and Ors. Company Appeal (AT) No. 414 of 2018, dated 13th January, 2020.***

9. The National Company Law Appellate Tribunal (NCLAT) dismissed the pleas of auditors- Deloitte Haskins & Sells LLP, BSR & Associates LLP and others of debt-ridden company Infrastructure and Financial Services Limited (IL&FS) against the impleadment ***in the matter of Deloitte Haskins & Sells LLP and Ors. Vs. Union of India and Ors. Company Appeal (AT) Nos. 190, 193, 194, 195, 196, 197, 205, 206, 207, 211, 212, 214, 215, 221, 222, 223, 224, 225, 230 and 285 of 2019, dated 04th March, 2020.***

10. The National Company Law Appellate Tribunal (NCLAT) dismissed the claims on the ground that appellant failed to show the ground to implead the other Auditor as party Respondent No. 12 and the reasons to amend the name of Respondent No. 11, they having knowledge of all the facts, Company Petition filed in the year 2015, merely because SFIO is investigating into the matter under Section 212 of the Companies Act, 2013, cannot be a ground to amend the name of the Auditor as Respondent No. 11 nor can be a ground to implead another Auditor as Respondent No. 12 ***in the matter of Focus Energy Limited Vs. Reebok India Limited and Ors. Company Appeal (AT) No. 356 of 2019, dated 12th March, 2020.***

11. The National Company Law Appellate Tribunal (NCLAT) upheld the order passed by the NCLT, New Delhi Bench and dismissed the claims of appellant on the ground that he failed to bring material which could invoke satisfaction of existence of circumstances to initiate action under Section 213 of the Companies Act, 2013 ***in the matter of Pramod Kumar Vs. Pawan Hans Ltd. and Ors., Company Appeal (AT) No. 140 of 2019, dated 12th March, 2020.***

12. The National Company Law Appellate Tribunal (NCLAT) has held that the outstanding amount is towards interest on the delayed payments, for which there was a pre-existing dispute, before issuance of demand notice. The alleged claim amount, towards Interest on loan alone, cannot be termed as an 'Operational Debt' and therefore appellate tribunal is not inclined to interfere with the order passed by the Learned Adjudicating Authority ***in the matter of M/s Steel India Vs. Theme Developers Private Limited, Company Appeal (AT) (Insolvency) No. 1014 of 2019 dated 11th February, 2020.***

13. The National Company Law Appellate Tribunal (NCLAT) set aside the earlier order passed by Competition Commission of India (CCI) and directed CCI to conduct a re-probe against the unfair practice of Flipkart ***in the matter of All India Online Vendors***

Association (AIOVA) Vs. Flipkart India Pvt. Ltd. Flipkart Internet Private Limited and Competition Commission of India Competition Appeal (AT) No. 16 of 2019, dated 04th March, 2020.

14. The National Company Law Appellate Tribunal (NCLAT) dismissed the appeal filed by the Appellants and upholds the Competition Commission of India's findings on indulgence of Appellants- 'Association of Malayalam Movie Artists', 'FEFKA Production Executive's Union', 'FEFKA Director's Union' and 'Film Employees Federation of Kerala' and their office bearers in Anti-Competitive conduct ***in the matter of Association of Malayalam Movie Artists & Ors. Vs. Competition Commission of India and Ors., Competition Appeal (AT) Nos. 05, 08, 09 & 10/2017, dated 13th March, 2020.***

INSOLVENCY LAW

1. The National Company Law Appellate Tribunal (NCLAT) has set aside the order of the NCLT to initiate insolvency proceedings against Flipkart India Private Limited. It is released from the corporate insolvency resolution process. NCLAT directed the Interim Resolution Professional (IRP) appointed by NCLT to handover the records and assets of the company back to its promoters immediately, in the matter of ***Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited and Flipkart India Private Limited, Company Appeal (AT) (Insolvency) No. 1354 of 2019, dated February 24, 2020.***

2. There is an absolute bar to the entertainment of an appeal under Section 18 of the SARFAESI Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. **(*Union Bank of India Vs Rajat Infrastructure Pvt. Ltd. & ors. CIVIL APPEAL NO. 1902 of 2020 (@ Special Leave Petition (Civil) No. 28608 of 2019) March 2, 2020).***

3. Hon'ble Supreme Court of India in the matter of ***Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs Axis Bank Limited Etc. Etc.*** **[Civil Appeal Nos. 8512-8527 of 2019 and other petitions]** judgement dated 26th February, 2020 Para 18, 19 & 20 observed that Section 44 provides for the **consequences of an offending preferential transaction i.e., when the preference is given at a relevant time (Here the expression 'offending' is only to denote the unacceptability of such transaction and not any criminality).** Under Section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending preferential transaction. Amongst others, the Adjudicating Authority may require any property transferred in connection with giving of preference to be vested in the corporate debtor; it may also release or discharge (wholly or in part) any security interest created by the corporate debtor. The consequences of offending

preferential transaction are, obviously, drastic and practically operate towards annulling the effect of such transaction.

However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of Section 43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time". The relevant time is reckoned, as per sub-section (4) of Section 43 of the Code, in two ways: (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by Sections 43 and 44 of the Code, it ought to be a preferential one answering to the requirements of sub-section (2) of Section 43; and the preference ought to have been given at a relevant time, as specified in sub-section (4) of Section 43.

In order to understand and imbibe the provisions concerning preference at a relevant time, it is necessary to notice that as per the charging parts of Section 43 of the Code i.e., sub-sections (4) and (2) thereof, a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clauses (a) and (b) of sub-section (2) coupled with the applicable requirements of either clause (a) or clause (b) of sub-section (4), as the case may be, are satisfied.

On a conspectus of the principles so enunciated, it is clear that although the word 'deemed' is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so.

The analysis foregoing leads to the position that in order to find as to whether a transaction, of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the Code, ordinarily, the following questions shall have to be examined in a given case:

(i) As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?

(ii) As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

(iii) As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53?

(iv) If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency Commencement date?

(v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?

4. In the case of ***Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Ors.*** [Civil Appeal No. 8766-67/2019 Diary No. 24417/2019 with other Civil Appeals and WP(C)] judgement dated November 15, 2019 (Para 62 & 69) the Hon'ble Supreme Court of India **upholding the constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2019** and observed that :

The legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts.

We find, that when it comes to the exercise of the Committee of Creditors' powers on questions which have a vital bearing on the running of the business of the corporate debtor, Section 28(1)(h) provides that though these powers are administrative in nature, they shall not be delegated to any other person, meaning thereby, that the Committee of Creditors alone must take the decisions mentioned in Section 28 and not any person other than such Committee. When it comes to approving a resolution plan under Section 30(4), there is no doubt whatsoever that this power also cannot be delegated to any other body as it is the Committee of Creditors alone that has been vested with this important business decision which it must take by itself. However, this does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the Committee of Creditors.

5. Capital Gains Tax qualify for Operational Debt

In the case of ***M/s Shree Ram Lime Products Pvt. Ltd.* Vs. *Gee Ispat Pvt. Ltd*** **(CA-666/2019 in (IB) - 250(ND)/2017*) Order dated 22.10.2019*** in Para 7, 8 & 9, National Company Law Tribunal held that "*Section 53 (1) (e) provides for the liability towards government dues. As per Section 238 of the Insolvency & Bankruptcy Code, the provisions of the Code shall have an overriding effect on any other enactment. The dues towards Government, be it tax on Income on or sale of properties, would qualify for being an operational debt and has to be dealt with accordingly. The provisions of Section 178 of the Income Tax Act have also been amended in view of the provisions of the Insolvency*

& Bankruptcy Code. Further, the asset liquidated are those released by the secured creditors under the Code. A secured creditor is entitled to effect sale under the SARFAESI Act and appropriate the entire amount towards its dues, without any liability to first pay the capital gain. It is only upon residual liquidity that the distribution of the assets has to be made according to the Operational Creditors (in this case the tax authorities) in terms of the provisions of Section of the Code. If the capital gain is first to be provided for, and then be included as liquidation cost, it would create an anomalous situation in the Secured Creditor getting a lesser remittance than what they could have realised had they not released the security into the common corpus. It is for this purpose that the provision of Section 178 of the Code has been amended giving priority to the waterfall mechanism over government dues. We therefore hold that the tax liability arising out of the sale shall be distributed in accordance with the provisions of Section 53 of the Code. The applicability of Section 178 or 194 IA of the IT Act will not have an overriding effect on the water fall mechanism provided under Section 53 of the Code, which is a complete code in itself, and the capital gain shall not be taken into consideration as the liquidation cost."

COMPETITION LAWS

1. The National Company Law Appellate Tribunal (NCLAT) held that the Competition Commission of India (CCI) cannot take action retrospectively on abuse of dominant position where the event occurred before the enactment of law, in the matter of ***Asmi Metal Products Private Limited Vs. SKF India Limited & Anr. Competition Appeal (AT) No. 27 of 2018, dated March 12, 2020.***

2. ***M/s Adani Gas Limited vs. Competition Commission of India TA (AT) (Competition) No. 33 of 2017, (Old Appeal No. 50 of 2014)*** National Company Law Appellate Tribunal observed that on a plain reading of the provision engrafted in Section 27 of the Act, it emerges that contravention of Section 3 or Section 4 of the Act being established, the Commission is empowered to pass all or any of the orders envisaged under Clauses (a) to (g). The language of this provision leaves no scope for doubt that the Commission may, befitting the circumstances of a case, pass any order falling under either one or more of the Clauses in combination or even encompassing all the Clauses. ***The term 'any' has to be accorded a purposive and a creative interpretation which can be explained on no hypothesis other than the one that it embraces one, more than one, some, many and all. In 'Shri Balaganesan Metals Vs. M N Shanmugham Chetty & Ors.'***, reported in (1987) 2 SCC 707, the Hon'ble Apex Court interpreted the term 'any' to mean 'some', 'one of many' and 'an indiscriminate number'. Again *in* ***'Excel Crop Care Ltd. Vs. Competition Commission of India & Anr.'***, reported in (2017) 8 SCC 47, the term 'any' was interpreted to mean 'all', 'every', 'some' or 'one' based on the context and subject matter of the statue. It is abundantly clear that the term 'any' is all-encompassing and empowers the Commission to pass orders either singularly (such as to desist, discontinue and not reenter) or coupled with any other discretion (such as imposition of penalty and / or modification of the impugned agreement) or pass all orders under Section 27 of the Act.

Both the appeals are accordingly disposed of upholding the impugned order passed by the Commission holding AGL guilty of abuse of dominant position with the orders and directions passed by the Commission with modification in imposition of penalty on AGL as indicated herein above. Balance amount of the penalty as reduced be deposited by AGL within thirty days of pronouncement of this judgment. All other orders/directions given by the Commission shall remain intact. The revised agreement (GSA) as approved by us shall be made operational with immediate effect.

3. In a matter of deciding the Jurisdiction of the Competition Commission of India in relation to the Subject matter via Section 66(6) of the Competition Act, 2002, it was in question that Whether the allegations against the Opposite Party were in the nature of Restrictive Trade Practices and Competition Commission of India had the power and authority to investigate into the same after the repeal of MRTP Act, 1969?

It was held, that even a plain reading of Section 66(6) of the Act clearly demonstrated that on receiving the matters where investigation was pending, the Commission may order for conduct of the investigation in the manner as it deems fit. As the complaint filed before the DGIR, MRTPC was still at the stage of preliminary investigation no right, liability, privilege or obligation could be said to have been accrued to any party and, therefore, the provisions of Section 66(1A) or 66(10) were are not applicable in the present situation. Furthermore, the Commission has not been conferred any power to adjudicate any matter invoking the provisions of repealed MRTP Act. This premise becomes clear when the provisions of Section 66(6) are contrasted with the provisions of Section 66(3) of the Act. Whereas the Competition Appellate Tribunal has been specifically conferred power to adjudicate cases pertaining to monopolistic and restrictive trade practices pending before MRTP Commission in accordance with the provisions of repealed MRTP Act under Section 66(3) of the Act, no such power has been given to the Commission under Section 66(6) of the Act. In the backdrop of the provisions of the Act as analyzed above, it was held that there is no illegality in entertaining and examining the present case under the Competition Act, 2002 in which the investigation was pending before the DGIR, MRTPC before the MRTP Act was repealed. Further, even in cases where the alleged anti-competitive conduct was started before coming into force of Section 3 and 4, the Commission has the jurisdiction to look into such conduct if it continues even after the enforcement of relevant provisions of the Act which was found in the present case.

4. In the matter of deciding the meaning of Relevant Market under the Critical parameters for defining relevant market and Determination thereof with respect to Sections 2(r), (s) and (t) of the Competition Act, 2002. The question for decision was 'Whether transportation of containers within boundaries of the Country is a relevant market?'

It is held, that relevant product market as defined in the Act mandates demand substitutability as revealed by consumer preferences. The informant and DG have defined the relevant product market as 'transportation of goods/freight either through containers or wagons over the railway network'. Their definition lays

emphasis on the substitutability of wagons and containers for carrying freight of all types over the rail network. The DG observes that freight is carried in both containers and wagons and avers that on the basis of technical substitution a commodity is capable of being carried in either of them and therefore no distinction has been drawn between wagon freight and container freight. Therefore, the market is defined by DG to be the transportation of freight over the rail network thereby ruling out substitutability, in the present case, between road, rail, air and water as alternative medium of transportation for carrying container freight. ***The Deutsche Bahn/PCC logistics judgment of the European Commission is referred to in the report to justify rail network as the appropriate market***

5. In the matter of deciding the Jurisdiction of CCI with respect to Allegation of formation of cartels by Respondent Tyre Manufacturers before the MRTP Commission and there was a Transfer of case to the CCI subsequent to the repeal of the MRTP Act, 1969 ("MRTP Act"). It was a question of fact 'Whether the Commission has the jurisdiction to proceed with the matter under the provisions of the Competition Act, 2002 ? In this matter it is held, that no doubt the period of contravention of the provisions of the Competition Act, 2002 has to be reckoned only from the date of its enforcement but that does not imply that either the D.G. or the Commission could not examine the conduct of parties post notification where the information/complaint was filed before the MRTP Commission. The Commission, while passing order under Section 26(1) of the Act did not specify any period for the reason that at that stage it would not be desirable to curtail the period of examination by the D.G. Thus, the plea of the Opposite Parties that the D.G. had no authority to examine their conduct for a period subsequent to the alleged period of contravention had no force and was liable to be rejected.

6. In the matter of deciding the Dominant position and its Abuse thereof under Sections 3, 4 and 19(1)(a) of Competition Act, 2002, an information filed under Section 19(1)(a) of Act against Opposite parties alleging contravention of provisions of Sections 3 and 4 of Act for abusing dominant position. The question was 'Whether Opposite Parties had contravened provisions of Sections 3 and 4 of Act for abusing dominant position'. In this matter it is held that all transactions/events resulting in alleged contravention of provisions of Section 3 and 4 of Act had taken place prior to date of enforcement of provisions of Section 3 and 4 of Act - Alleged conduct being prior to date of enforcement of Section 3 or 4 could not be examined by Commission - Thus, no prima facie case of contravention of provisions of Sections 3 and 4 of Act was made out against Opposite Parties. Hence Matter closed.

SECURITIES LAWS

1. Any Person (Appellant) aggrieved by SEBI's order can file appeal before SAT instead of filing repeated complaints to SEBI: SAT **(*Ind Finance & Securities Trust (P.) Ltd. v. Securities & Exchange Board of India APPEAL NO. 72 OF 2018)***

2. Appellant has been restrained from dealing in securities market for 5 years for fraudulent trading ***(Jayprakash Bohra v. Securities and Exchange Board of India APPEAL NO. 162 OF 2019)***

3. Penalty imposed u/s 15HA of SEBI Act to be set aside due to inordinate delay of 5 yrs in initiating proceeding and issuing show cause notice by SEBI. ***(Sanjay Jethalal Soni v. Securities and Exchange Board of India APPEAL NOS. 102, 122, 193, 268 & 269 OF 2019)***

4. Non-appearance by the appellant before the SEBI even having knowledge of the proceedings did not violate the principles of natural justice as alleged by Appellant. ***(Ms. Lopamudra Bandyopadhyay v. Securities & Exchange Board of India APPEAL NO. 396 OF 2019)***

5. Synchronization and rapid reverse trade on stock market affected the price discovery system except the parties who have pre-fixed the price nobody is in the position to participate in the trade. Stock Market is open to all the investors. It has an adverse impact on the Fairness, integrity and transparency of the stock market in India and the Stock market is not a platform for any fraudulent or unfair trade practice. ***Held, the Hon'ble Supreme Court of India in the case of SEBI v. Rakhi Trading Pvt. Ltd., (2018) 13 SCC 753.***

6. Disclosure requirements under the respective SEBI regulations serve very important purposes. By virtue of the failure to make the necessary disclosures on time, the fact remains that the investors were deprived of the important information at the relevant point of time. By not complying with the regulatory obligation of making the disclosure, it had concealed the vital information from the investors. The purpose of the disclosures to stock exchanges is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market. ***Held, the Hon'ble SAT, in Appeal No.66 of 2003 order dated April 15, 2005 - Milan Mahendra Securities Pvt. Ltd. Vs. SEBI.***

7. It is of utmost importance that every listed company assigns high priority to investor grievances and takes all necessary steps to redress the grievances of investors at the earliest. Timely redressal of the investors' grievances by the companies is of utmost importance. ***Held, the Hon'ble SAT in the matter of M/s Golden Proteins Ltd. Vs. SEBI decided on September 11, 2015.***

8. Cancellation of the certificate of registration by SEBI, granted to Jaypee Capital Services Ltd. to act as a Depository Participant, for non-compliance with the bye-laws of Depositories (CDSL & NSDL). ***Held, SEBI in the matter of Jaypee Capital Services Ltd, WTM/GM/EFD/90/2019-20 dated 31st March, 2020.***

9. Contravention of the Act and Regulations would immediately attract the levy of penalty, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. ***Held, the Hon'ble Supreme Court of India in the matter of SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216(SC).***

10. Considering the reversal transactions, quantity, price and time and sale, parties being persistent in number of such trade transactions with huge price variations, it will be too naive to hold that the transactions are through screen-based trading and hence anonymous. It would be over-looking the prior meeting of minds involving synchronization of buy and sell order and not negotiated deals as per the board's (SEBI) circular. The impugned transactions are manipulative/deceptive device to create a desired loss and/or profit. Such synchronized trading is violative of transparent norms of trading in securities. ***Held, Hon'ble Supreme Court in the matter of SEBI v. Rakhi Trading Private Limited (Civil Appeal Nos. 1969, 3174-3177 and 3180 of 2011 decided on February 8, 2018).***

11. SEBI imposed penalty on company delayed in making disclosures made to stock exchange. Penal liability arises as soon as provisions under the regulations are violated and that penal liability is neither dependent upon intention of parties nor gains accrued from such delay. ***Held, the Hon'ble SAT in the matter of Akriti Global Traders Ltd. Vs. SEBI (Appeal No. 78 of 2014) decided on September 30, 2014.***

12. The acquisition of voting rights that triggers the public announcement and not mere acquisition of securities without voting rights. The requirement of public announcement arises only with the allotment of shares and not with the allotment of warrants. ***Held, the Hon'ble SAT in the matter of Mr. Sohel Malik vs. SEBI & Anr. decided on October 15, 2008.***

13. An intentional trading for loss per se is not a genuine dealing in securities. 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 on stock exchange, it is not genuine, it is an unfair trade practice. ***Held, Hon'ble Supreme Court in the matter of SEBI v. Rakhi Trading Private Limited (Civil Appeal Nos. 1969, 3174-3177 and 3180 of 2011 decided on February 8, 2018).***

14. Any transaction executed with the intention to defeat the market mechanism whether negotiated or not would be illegal. Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism, will depend upon the intention of the parties. ***Held, the Hon'ble SAT order dated July 14, 2006, in the case of Ketan Parekh vs. SEBI (Appeal no. 2/2004).***

15. A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of, but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. ***Held, Hon'ble Supreme Court in the matter of Official Liquidator v. P.A. Tendolkar (1973) 1 SCC 602.***

CONSUMER LAW

1. The jurisdiction of National Consumer Disputes Redressal Commission in Revision Petition under the Consumer Protection Act, 1986:

In the case of ***Sakuntala Devi vs. Dr. Md. Mumtaz alam [Revision Petition No. 78 OF 2020 (Against the Order dated 27/12/2019 in Appeal No. 73/2019 of the State Commission West Bengal)*** National Consumer Disputes Redressal Commission New Delhi, Order dated 06 Mar 2020 in para 6&7 observed that the jurisdiction of this Commission under Section 21 (b) of the Consumer Protection Act, 1986 is very limited. This Commission is not required to reassess or re-appreciate the evidences and substitute its opinion to the concurrent findings of fact by the Fora below. It was so held by the Hon'ble Supreme Court in the case of ***Mrs. Rubi (Chandra) Dutta Vs. M/s United India. (2011) 11 SCC 269*** has held as under: - Insurance Co. Ltd. "13. Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21 (b) of the Act, under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. This is not the manner in which revisional powers should be invoked. In this view of the matter, we are of the considered opinion that the jurisdiction conferred on the National Commission under Section 21 (b) of the Act has been transgressed. It was not a case where such a view could have been taken by setting aside the concurrent findings of two fora."

Same principle has been reiterated by Hon'ble Supreme Court in the case of ***Lourdes Society Snehanjali Girls Hostel and Ors. Vs. H & R Johnson (India) Ltd. and Ors. (2016***) 8 wherein Hon'ble Supreme Court has held as under :- 286 SCC "23. *The National Commission has to exercise the jurisdiction vested in it only if the State Commission or the District Forum has failed to exercise their jurisdiction or exercised when the same was not vested in their or exceeded their jurisdiction by acting illegally or with material irregularity. In the instant case, the National Commission has certainly exceeded its jurisdiction by setting aside the concurrent finding of fact recorded in the order passed by the State Commission which is based upon valid and cogent reasons."*

CORPORATE FRAUD

1. In the matter of deciding the Company's Ban of Business under the erstwhile Indian Company Act, 1956, the Railway Board decided that Business dealings with M/s. Annapurna Construction, Vijayawada and their sister concerns and partners/shareholders should be banned for a period of five years. In the petition before the Apex Court, the question was 'Whether, decision of Railway Board was arbitrary'. It was held that applying the principles of piercing corporate veil, it was not

proper for Respondents to assume that company were sister concerns of Vijayawada firm - Company acted on behalf of Vijayawada firm and also claimed experience/ credentials of Vijayawada firm while submitting tenders - Two firms and company were acting in unison with consensus ad idem - Therefore, if there was a fraud committed by Vijayawada firm, other two could not feign ignorance and sought exoneration from misdeeds. And hence the Petition dismissed. **(*Ratio Decidendi: "When fraud vitiated, it unravels everything, therefore, discretion of Court cannot be asked to piercing corporate veil."*)**

2. In the matter of deciding the appeal by Usha Ananthasubramanian - former MD & CEO of the Punjab National Bank, who was MD & CEO of the said Bank from 14.08.2015 to 05.05.2017, wherein charge sheet has been filed by the CBI against several persons occupying positions in the Punjab National Bank as well as the Directors of Gitanjali Gems Ltd. The honorable Supreme Having heard learned Counsel for both sides, have first set out Section 241(2) and Sections 337 and 339 of the Companies Act, which read as follows:

241. Application to Tribunal for relief in cases of oppression, etc.-

(1) xxx

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter: Provided that the applications under this Sub-section, in respect of such company or class of companies, as may be prescribed, shall be made before the Principal Bench of the Tribunal which shall be dealt with by such Bench.

337. Penalty for frauds by officers.- If any person, being at the time of the commission of the alleged offence an officer of a company which is subsequently ordered to be wound up by the Tribunal under this Act. –

(a) has, by false pretences or by means of any other fraud, induced any person to give credit to the company;
(b) with intent to defraud creditors of the company or any other person, has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the property of the company; or
(c) with intent to defraud creditors of the company, has concealed or removed any part of the property of the company since the date of any unsatisfied judgment or order for payment of money obtained against the company or within two months before that date, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

The Court held that this being the case, it is clear that powers under these Sections cannot possibly be utilized in order that a person who may be the head of some other

organization be roped in, and his or her assets be attached. Hence, the honorable court set aside the impugned order passed by the NCLAT and well as the NCLT. The appeal is allowed in the aforesaid terms. **[*Usha Ananthasubramanian vs. Union of India (UOI) (12. 02. 2020 - SC)]***

MONEY LAUNDERING

1. In the matter of deciding the Validity of Order under Sections 2, 5 and 8 of Prevention of Money Laundering Act (PMLA), 2002 - Appellant challenged impugned order which was passed by Adjudicating Authority vide which provisional attachment order had been confirmed. The question was 'Whether impugned order passed by adjudicating authority was liable to be set aside'. It is held, it appeared from record that Appellant was innocent party since it had already lent its own money to Predicate Offender and property in question being mortgaged to Bank which was provisionally attached by Respondent - Deputy director ought to have been released by Adjudicating Authority under section 8(2) of Act - Adjudicating Authority did not appreciate that afore mentioned moveable/Immoveable property could not be said to have been acquired out of "proceeds of crime" as defined in section 2 (1) (u) of Act and therefore, same could not be Attached under section 5 of Act by enforcement directorate vide PAO - Therefore impugned order passed by adjudicating authority was set aside - Consequently, provisional attachment order was also quashed as far as Bank was concerned. Hence Appeal allowed**. *[The Branch Manager, Central Bank of India vs. The Deputy Director Directorate of Enforcement , Mumbai (28. 03. 2019 - ATML)]***

2. In the matter related to Appointment of Special Public Prosecutor under Section 46 of the Prevention of Money Laundering Act 2002; Section 24 of the Criminal Procedure Code, 1973 (Cr.P.C), the question was 'Whether appointment of lawyers in present case is prerogative of Government'. It is Held, normally Central or State Government, make such appointments - However, having regard to larger issue of public interest involved in proper investigation of case and ultimate unearthing of crime, Court requested senior counsel for Central Bureau of Investigation (CBI) and Enforcement Directorate (ED), to suggest names of advocates who could undertake responsibility of conducting prosecution as Special Public Prosecutor in 2G Spectrum case - Expression "prerogative" cannot be used in context of statutory provision - Under Constitutional and statutory framework, nothing is known as prerogative - Expression "person conducting the prosecution before the Special Court" in Section 46(1) means that such person must either be appointed by Central or State Government after following procedure prescribed in Sub-Section (4), (5) along with Sub-Section (7) of Section 24 Cr.P.C or in alternative after following procedure in Section 24(6) or (7) of Code - Expression 'under' occurring in Section 46(2) must be construed in manner consistent with dignity of office of Public Prosecutor - Special Public Prosecutor cannot be treated as Government employee but may be lawyer on Government panel - In interest of fair prosecution of case, Mr. U.U. Lalit suitably appointed as Special Public Prosecutor to conduct prosecution on behalf of CBI and ED and he may choose two

advocates on panel of CBI to assist him. **[*Center for PIL and Ors. vs. Union of India (UOI) and Ors. (11. 04. 2011 - SC*)]**

3. In the matter of deciding the Order of attachment under Section 8(6) of Prevention of Money Laundering Act, 2002, a Writ Petition filed against order of provisional attachment under Act. The question is 'Whether order of provisional attachment passed under Act was valid and legal' It is Held, there were positive opinions and findings recorded in all reports - Therefore one of Government agencies could not turn around and make a victim of fraud, suffer once more, in a classic example of secondary victimization - Act empowers Adjudicating Authority to order confiscation of property to Government under Section 8(6) of act - After such confiscation property would lose character of "proceeds of crime" - Otherwise Enforcement Directorate could not deal with property including by way of sale after such confiscation - Clause contained in order of amalgamation could not be taken to have extinguished rights of Petitioner in writ petition filed much earlier - Enforcement Directorate was part of multi-disciplinary investigation team and hence they were in know of things about induction of a strategic investor - After inducing Petitioner to infuse funds in order to rehabilitate company it was not open to another Department of Government to treat a portion of assets of company at time of competitive price bids, as proceeds of crime liable for attachment and confiscation - Impugned order of attachment was liable to be set aside. Hence, Writ Petition allowed. ***[Satyam Computer Services Limited vs. Directorate of Enforcement, Government of India and Ors. (31. 12. 2018 - HYHC)]***

GENERAL LAWS

1. The Supreme Court of India observed that pension is property within the meaning of Article 300A of the Constitution, and executive instructions which do not have any statutory sanction cannot be termed as "law" within the meaning of Article 300A. It was further held that in the absence of statutory rules permitting withholding of pension or gratuity, the State could not do so by way of executive instructions. ***(Arising out of SLP (C) Nos.4722-4723/2020 @ D.No.37355/2017) Dr. Hira Lal vs. State of Bihar & Ors. Dated February 18, 2020***.

2. The pension cannot be dealt with arbitrarily and cannot be denied in an unfair manner. This Court observed that the principal aim of the socialist State as envisaged in the Preamble is to eliminate inequality. The basic framework of socialism is to provide security in the fall of life to the working people and especially provides security from the cradle to the grave when employees have rendered service in hey days of life, they cannot be destituted in old age, by taking action in an arbitrary manner and for omission to complete obligation assured one***. (Assistant General Manager vs. Radhey Shyam Pandey, Civil Appeal No. 2463 of 2015, Supreme Court Judgement dated March 2, 2020).***

3. The direction that was issued to the State Government to collect quantifiable data pertaining to the adequacy or inadequacy of representation of persons belonging to Scheduled Castes and Scheduled Tribes in Government services is the subject matter of challenge in some appeals before us. In view of the law laid down by this Court, there is no doubt that the State Government is not bound to make reservations. There is no

fundamental right which inheres in an individual to claim reservation in promotions. No mandamus can be issued by the Court directing the State Government to provide reservations. **(*Mukesh Kumar & Others vs. State of Uttarakhand and others, Civil Appeal No. 1226 of 2020 [Arising out of S.L.P. (Civil) No. 23701 of 2019] Supreme Court Judgement dated February 07, 2020, Para- 16)***

4. In the case of ***Punjab and Sind Bank and Others Appellants Versus Mrs Durgesh Kuwar, Civil Appeal No 1809 of 2020 (Arising out of SLP(C) No 11985 of 2019),*** Judgement Dated 25 February 2020 the Supreme Court observed that the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted to provide protection against sexual harassment of women at the workplace as well as for the prevention and redressal of complaints of sexual harassment. Sexual harassment at the workplace is an affront to the fundamental rights of a woman to equality under Articles 14 and 15 and her right to live with dignity under Article 21 of the Constitution as well as her right to practice any profession or to carry on any occupation, trade or business. Clause (c) of Section 4(2) indicates that one member of the ICC has to be drawn from amongst a non-governmental organization or association committed to the cause of women or a person familiar with issues relating to sexual harassment. The purpose of having such a member is to ensure the presence of an independent person who can aid, advise and assist the Committee. It obviates an institutional bias.

LABOUR LAWS

1. In the matter of deciding the Validity of amendment - Respondents assail provisions of the Madhya Pradesh Labour Laws (Amendment) and Misc. Provisions Act, 2002 as ultra vires provisions of Article 14 of Constitution. Hence, in the present appeal it was in question 'Whether impugned amendment by which regular criminal Courts was set up as forum for adjudication of disputes related with labour laws was sustainable.' It was held, while allowing the appeal:

(i) 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 labour law statutes. It was not the function of this Court to test the wisdom of the Legislature and substitute its mind with the same. It was 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.

(ii) The process as evolved shows that the system, as it was, working in the criminal Courts for the last more than a decade and no grievance had been made about the same. The absence of any representation on behalf of the Respondent(s) further gives credence to this reasoning.

(iii) It was really not possible to sustain the impugned order which was accordingly set aside and the provisions of Madhya Pradesh Labour Laws (Amendment) & Misc. Provisions Act, 2002 were upheld.

DIRECT TAX LAWS

1. Genuineness of Share Application Money can't be suspected without Proper Inquiry: ITAT

The Assessing Officer, with aid of section 68 of the Act, treating the share application money received by the assessee as unexplained credit.

Brief facts of the case are that the assessee has filed its return of income on 30.9.2012 declaring total income at NIL. The case of the assessee was selected for scrutiny assessment, and notice under section 143(2) of the Act was issued and served upon the assessee. On scrutiny of the accounts, it revealed to the AO that the assessee has received share application money of Rs. 3,87,72,000/-. The AO has called the assessee to submit identity of the creditors, capacity of creditors to advance money, and show genuineness of the transaction. According to the AO, the assessee has submitted partial information. Thereafter, the AO has made reference to large number of decisions viz. ***Rajshree Synthetics P. Ltd. Vs. CIT, 176 CTR 300 (Raj), ITO Vs. Diza Holdings P. Ltd., 173 CTR 45 (Ker), CIT Vs. N.R. Portfolio P. Ltd., 263 CTR 456 (Del),*** and ultimately made addition of Rs. 3,87,72,000/.

The Income Tax Appellate Tribunal (ITAT), Ahmedabad bench has held that the genuineness of the share application money cannot be suspected without a proper inquiry by the Assessing Officer.

https://www.taxpundit.org/phocadownload/Taxpundit_Reporter/Taxpundit_Reporter_2020/March_2020/320Taxpundit155.pdf

2. *Commissioner of Income Tax Vs. Oil and Natural Gas Corporation Ltd.*

Issue: "Whether the Income Tax Appellate Tribunal was right in law in confirming the order of the Income Tax Appellate Tribunal (sic. Commissioner of Income Tax (Appeals)) deleting the additions made by the Assessing Officer under section 201(1) of the Income Tax Act, 1961, and consequential interest charged by the Assessing Officer in relation to the assessee's payments to its employees under the head of uniform allowance?"

Facts of the Case : The Assessing Officer noticed that section 10(14)(i) of the Act provides that any such special allowance or benefit, not being in the nature of a perquisite within the meaning of clause (2) of section 17, specially granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, as may be prescribed to the extent to which such expenses are actually incurred for that purpose. According to the Assessing Officer,

such allowances firstly become part of the salary and exempt to the extent of spending, but the assessee had not included these allowances as part of the salary and had not examined the aspect of actual expenditure and instead has done self-certification at the beginning of the financial year from all employees without verification of the claim to ascertain whether such expenditure had actually been incurred for the purpose.

The assessee contended that such reimbursement is exempt under rule 2BB (1)(f) of the Income Tax Rules, 1962 (hereinafter referred to as "the rules") read with section 10(14)(i) of the Act. However, the Assessing Officer was of the view that such reimbursement was completely out of the provisions of rule 2BB of the rules read with section 10(14)(i) of the Act. He accordingly, treated reimbursement of Rs. 3,92,67,843/- for 752 employees as taxable whereon TDS was not deducted by the DDO in the financial year 2010 and held that the same is required to be taxed now.

The Commissioner (Appeals) held that there exists a circular of the Board enabling non-deduction of tax from the reimbursement of allowances on the strength of certificate of utilisation from the employees. He further observed that in any case the matter was decided in favour of the assessee in its own case for earlier years. Following the said decisions, the Commissioner (Appeals) has held that there was no liability for deduction of tax from the payments made to employees as uniform allowance on the strength of the certificate given by the employees for utilisation of the same.

He, accordingly, held that the assessee cannot be said to be as assessee in default within the meaning of section 201(1) read with section 201(1A) of the Act and deleted the payment of Rs. 1,60,21,247/- raised under section 201(1) and 201(1A) of the Act.

The Tribunal, after considering the submissions advanced on behalf of the respective parties, observed that the uniform given to an employee for using the same during his duty hours is presumed to be used for the purpose of employment only. When there was a circular of CBDT enabling the assessee for non-deduction of tax from the reimbursement of allowances on the basis of utilisation certificate of the employee, there was no liability on the part of the assessee for deduction of tax from payments made to the employees as uniform allowance. The Tribunal was of the opinion that the conclusion drawn by the Commissioner (Appeals) is correct and accordingly dismissed the appeal.

High Court Judgement : This court is of the view that the impugned order passed by the Tribunal does not suffer from any legal infirmity warranting interference. The substantial question framed by this court while issuing notice is answered in the affirmative, that is, in favour of the assessee and against the revenue. The Income Tax Appellate Tribunal was right in law in confirming the order of the Commissioner of Income-tax (Appeals) deleting the additions made by the Assessing Officer under section 201(1) of the Income Tax Act, 1961, and consequential interest charged by the Assessing Officer in relation to the assessee's payments to its employees under the head of uniform allowance. The appeal, therefore, fails and is accordingly dismissed with no order as to costs.

3. ***Commissioner of Income Tax Vs. Down Town Hospital Ltd.***

Issue : Whether Tribunal was not justified and correct in law in holding Respondent assessee to be an industrial undertaking and entitled to claim deduction under Sections 80-HH and 80-I of the Act, 1961 ?

Facts of the Case: The assessee carries on the business of a Hospital and claimed a deduction under Section 80-HH and Section 80-I of the Act, 1961, amounting to Rs. 14,85,387. The Assessing Officer held that since the assessee company was not an industrial undertaking, it was not eligible for deduction under Sections 80-HH and 80-I of the Act, 1961.

The Commissioner held following his earlier decision that the respondent was an industrial undertaking and directed the Assessing Officer to allow relief as per the provisions of Sections 80-HH and 80-I of the Act, 1961.

The Income Tax Appellate Tribunal observed in its order dated 17.8.2000 that running of a hospital by the assessee was an industrial undertaking following the decision of the Kerala High Court in the case of ***CIT v. Upasana Hospital, the decision of the Rajasthan High Court*** in the case of ***CIT v. Trinity Hospital, and also the decision of the Apex Court*** in ***CIT v. B. Venkata Rao*** and accordingly, rejected the appeal of the Department. Aggrieved by the said order of the Appellate Tribunal, the department has filed this appeal under Section 260-A of the Act, 1961.

High Court Judgement : In this context, we would like to refer to the decision of the Supreme Court in ***Union of India v. Delhi Cloth and General Mills***, in which the Supreme Court discussed at length the authorities on the point of what amounted to "manufacture' and cited Permanent Edition of Words and Phrases, Vol.26, from an American Judgment, the following passage:

"Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

Since the respondent - assessee was calming the reliefs under Sections 80-HH and Section 80-I of the Act, the respondent - assessee should have adduced all relevant materials to establish that it was an industrial undertaking manufacturing or producing articles or things during the previous year relevant to the assessment year 1994-95 and set aside the impugned orders of the Appellate Tribunal and the commissioner of Income Tax (Appeals), Guwahati, insofar as they relate to reliefs under Sections 80-HH and Section 80-I of the Act, 1961.

4. ***Har Narain Textiles (P.) Ltd. Vs. Commissioner of Income Tax***

Issues:

a. *Whether the Income-tax Appellate Tribunal was right in holding that notice under section 143(2) sent under registered cover could be treated as valid service having regard to the provisions of section 282 of the Income-tax Act and in absence of any finding that the service was effected on the principal officer or an agent authorised in that behalf by the applicant?*

b. *Whether on the facts and in the circumstances of the case, was there any material on the record in support of the finding of the Income-tax Appellate Tribunal that the applicant has failed to discharge the onus that lay on it that the impugned notice under section 143(2) was not validly served and the assessment under section 144 was bad?*

c. *Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in placing the burden on the applicant to prove that the service was not validly effected and upholding the service as valid since the notice had been served under registered post?*

d. *Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in its view that the assessment made in pursuance to the notice sent under registered cover was valid and whether there was any material in support of such finding?*

e. *Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in raising presumption of valid service in respect of the notice sent under registered cover in absence of any finding that the notice was properly addressed and served on the principal officer or any authorised person in that behalf as required by the provisions of section 282 of the Income-tax Act?*

f. *Whether the Income-tax Appellate Tribunal was right in its view that the application under section 146, which was filed beyond time was not liable to be entertained and the income-tax authorities had no inherent jurisdiction to condone the delay in absence of any specific provision in that behalf under the Act?*

Facts of the Case: Orders for the relevant years were passed by the ITO on 2-2-1979 under section 144 of the Act. For setting aside of the same, the assessee sent applications by registered post under section 146 of the Act on 24-3-1979 to the ITO, which were received by him on 27-3-1979. They were rejected by him on the ground that they were barred by time. The ITO took the view that the assessment orders and the demand notices having been served on 23-2-1979, the applications under section 146 should have been made on or before 22-3-1979. In appeal, the Commissioner (Appeals) reversed the orders of the ITO holding that the ITO had an inherent power to condone the delay in such matters. On further appeal, the Tribunal took the view that the Commissioner (Appeals) was wrong in holding that the ITO had an inherent power to condone the delay. Also, it was found by the Tribunal that the demand notices and the assessment orders had been properly served on 23-2-1979.

High Court Judgement: The demand notices and the assessment orders should have been addressed in the case of the assessee, which is a company, to its principal officer, who under section 2(35), read with the provisions of the Companies Act, may be a director of the company or his agent.

The demand notices and the assessment orders had been sent on the address of the assessee-company and not to the principal officers. As no finding was recorded by the Tribunal that the assessment orders and the demand notices were addressed to the proper person, the Tribunal was wrong in presuming that on the facts and in the

circumstances of the case, there was a valid service. For having the presumption of valid service, the Tribunal should have recorded a finding on the condition precedent that the postal cover was addressed to the proper person and that the Tribunal was wrong in assuming the basic fact that the postal cover was addressed to the proper person.

5. ***Flipkart India Private Limited v. ACIT [2018]***

Issues: Whether the discounts offered to the buyer's creating intangible assets?

Facts of the Case : The assessee-co., a wholesale dealer, acquired goods from various persons and immediately sold them to retail seller - WS Retail Services Pvt. Ltd. The retail seller ultimately sold those goods from e-commerce platform 'Flipkart.Com'. To increase the volume of sale, assessee was purchasing goods, say, at Rs. 100 and selling them to the retailers at discount, say, at Rs. 80. The strategy to forego the profit had resulted in assessee-co. became a loss making company.

The Assessing Officer held that the profits foregone by selling goods at less than cost price were to be regarded as expenditure incurred in creating intangibles/brand value or goodwill. Thus, only depreciation claim could be allowed on it.

Judgement: The Tribunal held in favour of assessee that one couldn't proceed on the basis of presumption that the profit foregone would be deemed as expenditure to acquire an intangible asset, being brand value or goodwill. For creation of an intangible asset, i.e., goodwill, it is not possible to ascertain the cost of acquisition of goodwill. It was, therefore, not possible to say that profits foregone created goodwill or any other intangibles or brand value to assessee.

Since assessee did not incur any expenditure in creating intangibles, being brand value or goodwill, discounts offered by selling goods at less than cost price were to be treated as revenue expenditures and, accordingly, deduction was allowable.

6. ***Gyanchand M. Bardia v. ITO [2018]***

Issues: Whether the Gift received by an individual from HUF is exempt?

Facts of the Case: The assessee claimed that gift of certain amount received from his Hindu undivided family (HUF) was exempt from tax under section 56(2)(vii). However, the Assessing Officer held that the term 'relative' in Explanation (e) to Section 56(2)(vii) does not include HUF as donor and, therefore, added the impugned amount to assessee's income under Section 68.

Judgements : The Tribunal held in favour of revenue that as per Explanation to Section 56(2)(vii) members of an HUF are its relatives. Therefore, if HUF receives any sum from any of its member, such sum shall not be chargeable to tax. However, in vice-versa cases when member receives any sum from the HUF, same would be chargeable to tax as the term 'relatives' defined under said Explanation does not include HUF as a relative of such individual. The legislative intent is very clear that an HUF is not to be taken as a donor in case of an individual recipient. Thus, the assessee's plea of having received a valid gift from his HUF was rightly declined and impugned addition was to be upheld.

7. ***Pendurthi Chandrasekhar v. DCIT [2018]***

Issues: Whether additions u/s 68 tenable on grounds that relatives gave gift without any occasion?

Facts of the Case : In the Instant case, additions were made under section 68 on the grounds that assessee had failed to show why, without any occasion, Rs. 73 Lakhs had been gifted by the maternal aunt without any consideration. The appellate authorities also upheld the action of the Assessing Officer.

Judgement : The High Court held in favour of assessee that an occasion is not necessary to accept a gift from a relative. Section 56 does not envisage any occasion for a relative to give a gift, it was almost impermissible for any authority and even for the Court to import the concept of occasion and develop a theory based on such concept.

The Court further held that when donor had given a confirmation letter that she had transferred Rs. 73 lakhs to her nephew as a gift out of natural love and affection, the AO should not have further doubted her. The donor in instant case was assessee's own maternal aunt and was covered within the definition of 'relative' defined under explanation to section 56(2)(v). Therefore, unexplained addition under section 68 with respect to gift of Rs. 73 lakh received by assessee from his maternal aunt was to be deleted.

8. ***Minda S M Technocast (P.) Ltd. v. ACIT [2018]***

Issue : Whether the Market value of other business assets is relevant to determine FMV value of unlisted shares of a co.?

Facts of the Case: The assesse - company was deriving its income under the head 'rental and interest income'. It acquired shares of another entity at Rs. 5 per share. The value of such shares was derived on basis of book value of assets of issuing co. in accordance with Rule 11UA of the I-T Rules. Valuation Report from a CA firm was also produced in support of claim.

The Assessing Officer was of the view that the fair market value (FMV) of the land as per the circle rate should be taken into consideration while determining the value of the shares of issuing co. Accordingly, he substituted the book value of the land with FMV of the land as per the circle rate and determined the value of shares at Rs. 45.72 per share.

Judgement: The Tribunal held in favour of assessee that Rule 11UA contains the provisions for determination of fair market value of a property, other than an immovable property. Rule 11UA provides that while valuing the shares the book value of the assets and liabilities declared by the issuing co. should be taken into consideration. There is no provision in Rule 11UA as to substitute the FMV of land with its book value while calculating the FMV of shares. Therefore, the share price calculated by the assessee of issuing co. at Rs. 5 per share had rightly been determined in accordance with the provisions of Rule 11UA.

9. ***Bhojison Infrastructure (P.) Ltd. v. ITO [2018]***

Issue: Whether sum received on relinquishment of 'right to sue' is taxable capital receipt?

Facts of the Case: The assessee company entered into a development agreement by virtue of which a right in land was created in its favour by owner of land. Assessee's case was that despite development agreement entered into by landlord, the landlord had decided to sell said land to other parties. The assessee filed a suit in the Courts of law for specific performance of pre-emptive right to purchase the land. Later on, it received damages from the potential purchaser for relinquishment of 'right to sue' in the Courts of law for breach of development agreement. The assessee claimed that 'right to sue' was a personal right which would not fall within sweep of definition of 'capital asset' under section 2(14). Consequently, damages received from potential purchaser were treated as non-taxable capital receipts.

Judgement: The ITAT held in favour of assessee as under:

The essence of long list of judicial pronouncements cited by assessee was that section 6 of the Transfer of Property Act which uses the same expression 'property of any kind' in the context of transferability makes an exception in the case of a mere right to sue. The decisions thereunder make it abundantly clear that the 'right to sue' for damages is not an actionable claim. It cannot be assigned. Transfer of such a right is opposed to public policy as it tantamount to gambling in litigation.

Hence, such a 'right to sue' does not constitute a 'capital asset ' which, in turn, has to be 'an interest in property of any kind'. Despite the definition of expression 'capital asset ' in the widest possible terms in Section 2(14), a right to a capital asset must fall within the expression 'property of any kind' subject to certain exclusions.

Notwithstanding widest import assigned to the term 'property' which signifies every possible interest which a person can hold and enjoy, the ' right to sue' was a right in personam and such right could certainly not be transferred. In order to attract the charge of tax on capital gains, the sine qua non is that the receipt must have originated in a 'transfer ' within the meaning of section 45, read with section 2(47) of I-T Act. In the absence of its transferability, damages received by assessee couldn't be assessed as capital gains.

10. ***G. Bahadur v. ACIT [2018]***

Issue: Whether payment of advance salary to defeat purpose of demonetisation would come under purview of benami transaction?

Fact of the Case: The appellant was employed in a College run by a Trust. He received Rs. 50 thousand as advance salary from the said trust. The appellant deposited entire amount in his bank account, which was subsequently withdrawn by him and used for own purposes.

The Initiating Officer (IO) assumed that Chairman of trust had forced employees to distribute, deposit and retain their own money in demonetized currency in guise of loan received, which had to be repaid after some time in new currency. Thus, IO held chairman of college as beneficial owner and appellant as benamidar and passed order provisionally attaching bank account of appellant.

Judgement: The Appellate Tribunal held in favour of appellant as under:

Every cash transaction couldn't be termed as a 'benami' transaction. As per section 2(9) of Benami Act the following twin conditions are needed to be satisfied to construe any transaction as benami: (1) the property being held by a person who has not provided the consideration, (2) the property is held by that person for the immediate or future benefit, direct or indirect of the person who has provided the said consideration.

The characteristic of a 'benami' transaction is that there must be a mere lending of name without any intention to benefit the person in whose name it is made, i.e., a mere name lender. The mischiefs sought to be punished by the Act are only such transactions which have a name lending element without deriving any benefit therein, i.e., 'benami' transactions.

The transaction where cash was paid to person in lieu of a future promise couldn't be a 'benami' transaction, as there was no lending of name. There could be no 'benami' transaction if the future benefit was due from the person who was also the holder of property.

The impugned order was not sustainable as it intended to punish the appellants for wanting to defeat the purpose of demonetization and was beyond the purview of the Act.

11. ***DCIT v. Shah Rukh Khan [2018]***

Issue: Whether there is concealment penalty if assessee has bonafide belief that notional income isn't taxable?

The assessee, Mr. Shah Rukh Khan, had received a villa at Dubai as gift and offered an amount of Rs. 14 lakhs as the notional income of the villa for tax in his return of income for the year under consideration. During the course of assessment proceedings, assessee claimed that Article 6 of India-UAE tax treaty doesn't expressly recognize the right of the resident State to tax the income from immovable property situated in the source State. Therefore, the notional income of the villa owned by him in Dubai could not be subjected to tax in India.

Judgement: The ITAT held that claim raised by the assessee being clearly backed up by a bonafide belief on his part that the notional income of the villa was not liable to be taxed in India, no penalty for concealment of income could be validly imposed on the assessee.

Source:

1. Taxmann
2. Manupatra

GOODS AND SERVICES TAX LAWS

1. In the matter of ***Tax Bar Association v/s Union of India*** **(Writ Petition No. 1805/2020)**, Rajasthan High Court held that the authorities shall accept GSTR 9/ GSTR9C returns without any late fees till 12th February, 2020.

2. In the matter of ***Refex Industries Ltd. v/s Assistant Commissioner of CGST & Central Excise (Writ Petition Nos. 23360 & 23361 of 2019***), Madras High Court held that Interest cannot be levied on Gross GST Liability before adjusting Input Tax Credit.

3. Law permits a person to rectify or revise the Form, who voluntarily admits to have made a mistake in the form or admits to have submitted detail that is not true. The tax authorities have the right to retain original Form GST TRAN-2 for assessment purpose and they may ask the petitioner to provide proper explanation for such revision/rectification. Held, Calcutta High Court in the matter of ***Optival Health Solutions Private Limited Vs. UOI.***

4. A two-judge bench of the Gujarat High Court has nullified the clause 4(i) of Circular dated 01.03.2018 issued by the Central Board of Indirect Taxes and Customs (CBIC) which deals with the imposition of GST on Distribution Companies. The Court also observed that, the ancillary charges collected by electricity distribution company towards application fee, meter rent, charges for shifting of lines, etc. are covered by entry 25 of exemption notification relating to transmission and distribution of electricity. According to the Court, the same would constitute composite supply and therefore also held to be exempt as per section 8 of the GST Acts since principal supply is exempt. Held, Gujarat High Court in the matter of ***Torrent Power Limited Vs. Union of India.***

5. Kansai Nerolac Paints Ltd. filed an Application for Advance Ruling (AAR) regarding admissibility of Krishi Kalyan Cess (KKC) as Input Tax Credit (ITC) under the GST Act. The AAR held that the ITC of KKC could not be carried forward under GST. The Maharashtra Appellate Authority for Advance Ruling (AAAR) subsequently held that cess and duty are separate levies and cannot be equated. The credit of Krishi Kalyan Cess can only be utilised for payment of the same. In ***Kansai Nerolac Paints Limited (GST AAR Maharashtra).***

6. The Appellate Authority for Advance Ruling observed that the applicant, ***Caltech Polymers Pvt. Ltd,*** recovered food expenses from its employees for the canteen services it offered under the provisions of the Factories Act. Although the company had made it clear that not profit margins were involved, the AAAR ruled that the supply of food would come under the definition of 'supply' as per the GST Act and, hence, would be taxable.

7. The Allahabad High Court has held that the 'reasons to believe' are mandatory to conduct search and seizures procedure adopted as per the State GST Acts. The Court held that, "it is essential that the officer authorizing the search should have 'reasons to believe.' The principles that are culled out from the catena of decisions referred above is that the 'reasons to believe' should exist and should be based on reasonable material and should not be fanciful or arbitrary. It is also established that this Court in exercise of its powers under Article 226 cannot go into the sufficiency of the reasons and should not sit as an appellate court over the reasons recorded. It is also well established that

the reasons may or may not be communicated to the assessee but the same should exist on record," Held by Allahabad high Court in matter of ***Rimjhim Ispat Limited Vs. State of U.P. & Others.***

8. The department cannot detain the goods on failure to fill Part-B of the E-way Bill if the supply is not taxable under GST. The Court observed that on perusal of the impugned order imposing tax and penalty against the petitioner, it is revealed that the basis for computing the additional tax is the IGST paid by the petitioners. Held by Gujarat High Court in the matter of ***M/s Neuvera Wellness Ventures (P) Ltd. Vs. State of Gujarat.***

9. ***Govind Enterprises vs. State of U.P:*** The Allahabad High Court upheld the First Information Report (FIR) against GST evaders under the Criminal Procedure Code. The Court held that the contention of the petitioner that no first information report can be lodged against the petitioner under the provisions of the Code of Criminal Procedure for offences punishable under the Indian Penal Code, as proceeding could only be drawn against him under the U.P. Goods and Services Tax Act, 2017, is liable to be rejected.

10. ***Vimal Yashwantgiri Goswami vs State of Gujarat :*** The Gujarat High Court had restricted the Goods and Services Tax (GST) authorities from arresting a city-based trader Vimal Goswami merely on suspicion of tax evasion. The bench comprising J B Pardiwala and Justice A C Rao clarified that the authorities should not use the power to arrest without 'completing their homework' namely determining the tax liability and ascertaining the evasion.

11. ***Jilmon John vs. State of Kerala :*** The Kerala High Court held that, there is a stipulation contained under clause 44 of tender notice that, the Sales Tax as per Rules from time to time is liable to be paid by the petitioner. So after the introduction of CGST Act 2017, the petitioner is liable to pay GST.

12. ***Shailesh Rajpal vs. Commissioner :*** The Madhya Pradesh High Court had ruled that Non-filing of Return and Non-payment of GST within the due date is an Offence. While denying the Bail Application, the Court also observed that the taxpayer has to declare their tax liability for a month in GST return (GSTR-1) by 10th day of the subsequent month. And pays liability so declares in return GSTR-3B. The due date for payment of GST liability for a month is the 20th day of the subsequent month.

BANKING LAWS

1. In the matter of ***Bank of India Vs. M/s. Brindavan Agro Industries Pvt. Ltd. [Civil Appeal No. 1720 of 2020 arising out of SLP. (Civil) No. 2007 of 2019]***, Honorable Supreme Court set aside the orders passed by the NCDRC and SCDRC. It was found that though, the Bank agreed to refund Rs.9.16 lakhs from the processing charges through email dated 29th June 2012 but the Consumer had not accepted such proposal in its e-mail dated 24th July, 2012. Therefore, the Court held that the Consumer is entitled to refund of Rs.9.16 lakhs only in terms of the decision of the Bank communicated to the Consumer rather than waiver of TEV charges in its entirety. The request was to give

concession of 50% of all charges, therefore, it is the cumulative amount of charges which is to be taken into consideration and not the charges under a particular head.

2. In the matter of ***Union Bank of India Vs. Rajat Infrastructure Pvt. Ltd. & Ors. [Civil Appeal No. 1902 of 2020 @ Special Leave Petition (Civil) No. 28608 of 2019]*** and [Civil Appeal No. 1903 of 2020 @ Special Leave Petition (Civil) No. 1753 of 2020]}, Honorable Supreme Court set aside both the orders dated 25.11.2019 and 16.12.2019 of the High Court in so far as they hold that pre-deposit is not required and allow the appeals. The court has extend the time given to the auction purchasers to deposit the balance of the sale amount till 20.03.2020.

3. In a writ petition filed before the High Court, the honorable Court set aside the judgment of the DRT, condoned the delay in filing of the review application itself, and restored the review application to the file. It was held, while allowing the appeal:

   (i) The peremptory language of Rule 5A would also make it clear that beyond thirty days there is no power to condone delay. Rule 5A was added with a longer period within which to file a review petition. This period was cut down, by amendment to thirty days. From this two things were clear one, whether in the original or un-amended provision, there was no separate power to condone delay, as was contained in Section 20(3) of the Act and second, that the period of sixty days was considered too long and cut down to thirty days thereby evincing an intention that review petitions, if they were to be filed, should be within a shorter period of limitation - otherwise they would not be maintainable.

   (ii) Section 22(1) of the Act makes it clear that the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, making it clear thereby that Order 47 Rule 7 would not apply to the Tribunal. Also, in view of Section 20, which applies to all applications that may be made, including applications for review, and orders being made therein being subject to appeal, it was a little difficult to appreciate how Order 47 Rule 7 could apply at all, given that Section 20 of the RDB Act was part of a complete and exhaustive code. Section 34 of the Act makes it clear that the 1993 Act, would have overriding effect over any other law for the time being in force, which includes the Code of Civil Procedure. The High Court, in holding that no appeal would be maintainable against the dismissal of the review petition, and that therefore a writ petition would be maintainable, was clearly in error on this count also. [*Standard Chartered Bank* vs. *MSTC Limited* (21. 01. 2020 - SC)]

4. In the matter of appeal filed in the honorable Supreme Court in ***Union Bank of India vs. Rajat Infrastructure Pvt. Ltd. and Ors. (02.03.2020 - SC),*** the Court held that In view of the law laid down by this Court in many other case, the observation made by the High Court was totally incorrect. It further kept on stating that "We are not in agreement with the submission of Mr. Chaudhri that the High Court has exercised its discretionary powers Under Article 226 of the Constitution. The order of the High Court does not show any exercise of such discretionary powers but according to the High Court on an interpretation of the Section, pre-deposit was not required. We are

also not impressed with the argument of Mr. Chaudhri that his client is not a borrower. A guarantor or a mortgagor, who has mortgaged its property to secure the repayment of the loan, stands on the same footing as a borrower and if he wants to file an appeal, he must comply with the terms of Section 18 of the SARFAESI Act. Furthermore, it was added that the High Court has no powers akin to powers vested in this Court under Article 142 of the Constitution. The High Court cannot give directions which are contrary to law.

In view of the above discussion, the honorable Supreme Court aside both the orders dated 25.11.2019 and 16.12.2019 of the High Court in so far as they hold that pre-deposit is not required and allow the appeals.

5. In the matter of ***Aarifaben Yunusbhai Patel and Ors. vs. Mukul Thakorebhai Amin and Ors (2020),*** the court has come to the conclusion that the auction of both the properties were vitiated on account of lack of notice to the judgment-debtor, and that being an error fatal to the validity of auction sale, in light of the decision of the Supreme Court the auction sale cannot be permitted to remain and they have to be quashed. Other submissions of the counsel for the auction purchasers therefore need not be elaborately dealt with, but suffice it to say that the Court is quashing the auction sale on ground of non-compliance with the mandatory provision of notice to the judgment-debtor." The court was constrained to observe that the High Court totally ignored the order of this Court quoted hereinabove. This Court had specifically directed the executing court to decide both, the issue of limitation and objections on merits. This was obviously done with the purpose that in case later if the issue of limitation is decided in favour of the objectors, R-1 and R-3, then the matter again should not be remanded for decision on merits of the case. The issue of limitation could not have been ignored and should have been decided by the High Court.

6. In the matter of Appeal in ***Connectwell Industries Pvt . Ltd . vs . Union of India (UOI) and Ors . (06. 03. 2020 - SC) . (17. 03. 2020 - SC),*** the Honorable Supreme Court held that there is no dispute regarding the facts of this case. The property in dispute was mortgaged by BPIL to the Union Bank of India in 2000 and the DRT passed an order of recovery against the BPIL in 2002. The recovery certificate was issued immediately, pursuant to which an attachment order was passed prior to the date on which notice was issued by the Tax Recovery Officer- Respondent No.4 under Rule 2 of Schedule II to the Act. It is true that the sale was conducted after the issuance of the notice as well as the attachment order passed by Respondent No.4 in 2003, but the fact remains that a charge over the property was created much prior to the notice issued by Respondent No.4 on 16.11.2003. The High Court held that Rule 16(2) is applicable to this case on the ground that the actual sale took place after the order of attachment was passed by Respondent No.4. The High Court failed to take into account the fact that the sale of the property was pursuant to the order passed by the DRT with regard to the property over which a charge was already created prior to the issuance of notice on 11.02.2003. As the charge over the property was created much prior to the issuance of notice under Rule 2 of Schedule II to the Act by Respondent No.4, we find force in the submissions made on behalf of the Appellant.

The judgment of the High Court is set aside and the Appeal is allowed. The MIDC is directed to issue a 'No Objection" certificate to the Appellant.

7. In the matter of ***Vinay Kumar Mittal and Ors vs. Dewan Housing Finance Corporation Ltd . and Ors. (31 . 01 . 2020 - SC)***, and by placing reliance on Section 36 and 36 (A) of the National Housing Bank Act, 1987 and Section 45 (q) (a) of the Reserve Bank of India Act, 1934, it was submitted that the repayments of the deposits of the Appellants should be given preference over the contractual claims of the debenture holders. Mr. Vishwanathan from RBI informed this Court that an order was passed by the NCLT on 03.12.2019, imposing moratorium under Section 14 of the IBC prohibiting the institution of any suit or continuation of proceedings or execution of any decree against the Financial Service provider i.e. DHFL and transferring, alienating or disposing of any asset of DHFL and any action to foreclose, recover or enforce any security interest created by DHFL in respect of its property with effect from the date of filing the application i.e. 29.11.2019 till the completion of the Corporate Insolvency Resolution Process.

On the basis of the contentions, the honorable Supreme Court held that "We leave it open to the Appellants to raise all points and contentions before the Committee of Creditors, the Administrator and if necessary, the NCLT. In view of the above, we are not inclined to interfere with the decision of the Committee of Creditors taken on 30.12.2019. We are informed that there are nearly one lakh depositors who have invested their life time earnings with Respondent No.1. Some of the deposits have matured and some of the depositors are critically ill. We have no doubt that the concerns of the depositors and their rights shall be considered in accordance with law."

8. In the matter of ***Assistant General Manager and Ors . vs . Radhey Shyam Pandey (02. 03 . 2020 - SC)*** the Honorable Supreme Court was of the opinion that the employees who completed 15 years of service or more as on cutoff date were entitled to proportionate pension under SBI VRS to be computed as per SBI Pension Fund Rules. Let the benefits be extended to all such similar employees retired under VRS on completion of 15 years of service without requiring them to rush to the court. However, considering the facts and circumstances, it would not be appropriate to burden the bank with interest. Let order be complied with and arrears be paid within three months, failing which amount to carry interest at the rate of 6 per cent per annum from the date of this order. The appeals are accordingly disposed of. No costs were issued.

9. In ***UCO Bank vs. National Textile Corporation Ltd . and Ors (05 . 03 . 2020 - SC)***, the Apex Court held therefore, that the question of liability could neither have been decided in the writ proceedings before the High Court nor in this appeal. If this aspect is kept in view, the conclusion reached by the Division Bench in paragraph 25 to hold that the respondent herein is not liable for the dues of Shree Sitaram Mills Ltd. and the proceedings is misconceived for such claim is an erroneous conclusion reached in a proceedings where such conclusion ought not to have been recorded. Hence the decision to that effect is liable to be set aside.

10. In ***Osians Connoisseurs of Art Pvt . Ltd . vs . Securities and Exchange Board of India and Ors . (12 . 02 . 2020 - SC)***, the Honorable Supreme Court held that No person other than a Collective Investment Management Company which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme." The statutory scheme, therefore, is that, if a collective investment scheme, as defined, is to be floated by a person, it could only be done in the form of a collective investment management company and in no other form. This is the reason why Section 11AA uses the expression "company" in sub-Section (2) and not the word "person" (as the CIS Regulations of 1999 had come into force on 15.10.1999; Section 11AA being enacted and coming into force on 22.02.2000).

11. Once the statutory scheme becomes clear, it is clear that the collective investment scheme that was being carried on by the appellants in the form of a private Trust would be in the teeth of the Statute read with the CIS Regulations and would thus be illegal. This being the case, it is difficult to upset any part of SEBI's order that remains after the penultimate part of the order was set aside by the Appellate Tribunal. However, we find that this litigation has been going on for an extremely long period of time and instead of remanding the matter to SEBI to decide the refund issue afresh, we order as follows: The principal amount repayable to each investor of both the Schemes shall be paid back within a period of six months from today in the following manner:

We are informed that so far as the first Fund is concerned, 81.32 per cent of the total principal sum of Rs.10.95 crores has been repaid. Insofar as Fund No. 2 is concerned, we have been informed that 50 per cent of the principal amount of Rs. 21.92 crores has been repaid. The balance owing to the 50 investors of Fund No. 1 and to the 132 investors of Fund No. 2 be therefore, repaid within six months from the date of this judgment. So far as the interest at the rate of 10 per cent is concerned, this amount will be paid on the principal outstanding amount from the date on which it becomes due to each such member, till the date on which each Fund came to an end, i.e., insofar as Fund No. 1 is concerned till 15.09.2011 and so far as Fund No. 2 is concerned till 31.01.2012. The aforesaid interest shall be paid within nine months from the date of this judgment. Once the amounts are actually paid within the time period specified, *compliance report be filed with SEBI in this behalf.* The appeal stands disposed of.

12. In ***Anuj Jain vs. Axis Bank Limited and Ors. (26. 02. 2020 - SC),*** the honorable Supreme Court on the issue as to whether lenders of JAL could be treated as financial creditors, hold that such lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any 'financial debt' within the meaning of Section 5(8) of the Code; and hence, such lenders of JAL do not fall in the category of the 'financial creditors' of the corporate debtor JIL.

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Part B
Case Studies

GROUP INSOLVENCY UNDER IBC*

Introduction

The Insolvency and Bankruptcy Code, 2016 (the Code) was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order or priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.

According to Chapter 4 of Economic Survey 2019-20, Vol II titled " Monetary Management and Financial Intermediation":- Three years into operation, the regime under the Insolvency and Bankruptcy Code (IBC) boasts of a strong ecosystem, comprising the Adjudicating Authority, the IBBI, three insolvency professional agencies, 11 registered valuer organisations and 2,374 registered valuers and 2,911 insolvency professionals (as on December 31, 2019). The debtors and creditors alike are initiating the processes under the Code with 2,542 corporates, some of them having very large nonperforming assets account, and undergoing corporate insolvency resolution process. Upto September 2019, about 743 of them have completed the process yielding either resolution or liquidation and 498 corporates have commenced voluntary liquidation process. Out of the 562 Corporate Insolvency Resolution Process (CIRPs) initiated in October-December 2019, 132 are under liquidation, and 14 have been already settled. As on end December 2019, Rs. 1.58 lakh crore were realizable in cases resolved. These cases have been filed under various sectors. 41.2 per cent of the cases admitted by NCLT for CIRP are in manufacturing sector followed by 19 per cent in Real Estate, Renting and Business Activities sector.

The Government has been proactively addressing the issues that come up in implementation of the reform. Since its enactment in 2016, the Code has been amended three times, within a short span of time, mainly to streamline the processes and address any lacuna to ensure proper operationalizing of the provisions of the Code.

The first amendment has introduced section 29A of IBC, which deals with the provision to bar promoters from bidding for their own companies. It prevented defaulters from regaining control of their companies at a cheaper value. The second amendment has introduced section 12A of IBC, which aims to provide creditors an option to withdraw insolvency application within 30 days of filing the petition. The amendment also stated that home buyers shall be treated as financial creditors. This enables the home buyers a voice in the insolvency proceedings as they, also provide funding for projects by making advance payments, and to discourage real estate developers from defaulting on commitments not only to banks but also to their customers.

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Views expressed in the Article is the sole expression of the Author and it does not express the views of the Institute.

The third amendment primarily focused upon the revival of a Corporate Deator (CD) by ensuring timely admission and completion of the resolution process. The amendment ensures that 14 days period deadline given to the NCLT for admitting or rejecting a resolution application shall be strictly adhered to. The amendment of IBC further specifying the mandatory time frame of ***330 days to complete the Corporate Insolvency Resolution Process*** (CIRP) without exception. This tries to instill discipline amongst the stakeholders to avoid inordinate delays in the insolvency resolution process. The Government also reaffirms its stance as a facilitator in the third amendment by specifically making a resolution plan binding on the Central Government, State Governments or a local authority to whom debt in respect of payment of dues is owed.

Group Insolvency

Insolvency and Bankruptcy Code provides detailed provisions to deal with ***the insolvency of a corporate debtor on standalone basis, it does not envisage a framework to either synchronise insolvency proceedings of different corporate debtors in a group or resolve their insolvencies together. Consequently, the insolvency of different corporate debtors belonging to the same group is dealt with through separate insolvency proceedings for each corporate debtor.***

However, in the insolvency resolution of some corporate debtors, including *Videocon, Era infrastructure, Lanco, Educomp, Amtek, Adel, Jaypee and Aircel,* special issues arose from their interconnections with other group companies. In some of these cases, the Adjudicating Authority under the Code as well as the Supreme Court, in some cases, have passed orders to partially ameliorate some such issues.

In the case of *Venugopal Dhoot v. State Bank of India & Ors., (CA- 1022(PB)/2018- decision dated 24.10.2018)* multiple companies of the Videocon group were being put through insolvency resolution processes. In this case, parties sought that all matters pertaining to the insolvency resolution of different Videocon companies be dealt with by the same Adjudicating Authority and that there be consolidation of separate proceedings of multiple Videocon companies to treat "the corporate insolvency resolution process as one in respect of all of these companies".

The Principal Bench of the National Company Law Tribunal ("NCLT") ordered that all the matters regarding the insolvency resolution processes of these different companies be dealt with by the same bench of the NCLT for the purpose of "avoiding conflicting orders and facilitating the hearing" of these matters.

In the case of *Chitra Sharma v. Union of India, W.P. (Civil) No(s).744/2017- decision dated 11.09.2017* where insolvency proceedings had been initiated against Jaypee Infratech Ltd., but homebuyers had entered into contracts with both Jaypee Infratech Ltd. and its parent company Jai Prakash Associates Ltd., the Supreme Court ordered that the parent company which was not subject to the insolvency proceedings at that time, deposit a sum of INR two thousand crores before the court.

In the case of *Bikram Chatterji v. Union of India, (W.P. (Civil) No(s).940/2017- decisions dated 17.05.2018 and 01.08.2018)* homebuyers in projects developed by different companies of the Amrapali group filed a Writ Petition before the Supreme Court in order to protect their interests in the wake of the insolvency of different Amrapali group companies. The Supreme Court in these proceedings dealt with the group as a whole. Given the nature of the transactions between the group companies, the Court also ordered that the properties of all forty group companies in the Amrapali group be attached and the bank accounts of all companies and their directors be frozen.

In the case of *Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors.,(Company Appeal (AT) (Insolvency) Nos. 377 to 385 of 2019- decision dated 20.09.2019)* the Appellate Authority held that "group insolvency proceedings were required to be initiated" against five companies that had been working as a joint consortium to develop a residential plotted colony. To enable successful development of this colony, the Appellate Authority ordered that "simultaneous 'Corporate Insolvency Resolution Processes' should continue against them under the guidance of same 'Resolution Professional" who should run the processes so that they are "completed in one go by initiating a consolidated 'Resolution Plan(s)' for total development".

In the case of *State Bank of India & Anr. v. Videocon Industries Ltd. & Ors., (M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 08.08.2019)* the Adjudicating Authority ordered that the assets and liabilities of 13 Videocon companies should be substantively consolidated due to common control, common directors, common assets, common liabilities, interdependence, interlacing of finance, co-existence for survival, pooling of resources, intertwined accounts, interloping of debts, singleness of economics of units, common financial creditors and common group of corporate debtors.

Case Analysis: Group Insolvency of Videocon Industries Ltd. & Ors.

An Application was filed before National Company Law Tribunal(NCLT) on 30.10.2018 by State Bank of India (SBI) to seek an order for the 'Consolidation' of the Corporate Insolvency Resolution Process ("CIRP") of (1) Videocon Industries Ltd. (VIL), (2) Videocon Telecommunications Limited (VTL), (3) KAIL Ltd. (KAIL), (4) Evans Fraser & Co. (India) Ltd. (Evans Fraser), (5) Millennium Appliances (India) Ltd. (Millennium Appliances), (6) Applicomp India Ltd. (Applicomp), (7) Electroworld Digital Solutions Ltd. (Electroworld), (8) Techno Kart India Ltd. (Techno Kart), (9) Trend Electronics Ltd. (Trend Electronics), (10) Century Appliances Ltd. (Century Appliances), (11) Techno Electronics Ltd. (Techno Electronics), (12) Value Industries Ltd. (Value Industries), (13) PE Electronics Ltd. (PE Electronics), (14) CE India Ltd. (CE India), and (15) Sky Appliances Ltd. (Sky Appliances). Each of these Companies were promoted by Dhoot Family and thus form part of the Videocon group of companies. The Videocon Group Companies are engaged in different types of businesses.

The list of creditors of these companies are: i. Dena Bank, ii. State Bank of India, iii. Allahabad Bank, iv. IDBI Bank, v. Indian Overseas Bank, vi. Jammu & Kashmir Bank, vii. Bank of Maharashtra, viii. Bank of Baroda, ix. United Bank of India, x. Canara Bank, xi. Syndicate Bank, xii. Infotel Business Solution Ltd., xiii. UCO Bank, xiv. ICICI Bank, xv. Corporation Bank, xvi. IFCI, xvii. Central Bank of India, xviii. Punjab National Bank, xix. Andhra Bank, xx. Vijaya Bank.

The SBI, pursuant to the order dated 24.10.2018 passed by the Hon'ble Principal Bench, NCLT, New Delhi, has filed this Application seeking the following reliefs: "….

(a) Order and direct substantive consolidation of the Corporate Debtors into a single proceedings solely for the purposes of CIRP in accordance with the provisions of the Code, including but not limited to the acceptance, confirmation and all other actions with respect to the resolution plan for the Corporate Debtors and any and all amendments or modifications thereto, in such consolidated proceedings.

(b) Order and direct that solely for the purpose of the consolidated proceedings, all assets and liabilities of the Corporate Debtors are merged and are deemed to be the assets and liabilities of all the Corporate Debtors on a consolidates basis;

(c) Order and direct that solely for the purpose of the consolidated proceedings that all obligations and debts due or owing to or from any Corporate Debtor from or to any other Corporate Debtor are eliminated;

(d) Order and direct that solely for the purpose of the consolidated proceedings, any obligations of any Corporate Debtor an all guarantees thereof executed by one or more of the other Corporate Debtors are deemed to be one obligations of all the Corporate Debtors on a consolidated basis;

(e) That each and every claim filed in the individual proceedings of any of the Corporate Debtors is deemed filed against all the Corporate Debtors in the consolidated proceedings;

(f) That the appointment of a single common Resolution professional who will carry on the duties and perform the functions of a Resolution Professional in accordance with provisions of the Code for the consolidated proceeding;

(g) That a common COC may be constituted for all the Corporate Debtors so that the decision making process in relation to the CIRP may be done in an efficient manner and to diminish the scope of any conflicting decision;

(h) That September 25, 2018 shall be considered as the common insolvency commencement date for all the corporate debtors and therefore, the maximum period during which CIRP has to be completed in accordance with section 12 of the Code shall be computed from September, 25, 2018;

(i) That a comprehensive Resolution Plan dealing with all or a collection of the Corporate Debtors based on relevant factors including without limitation commonality of business may be formulated and approved by the COC and put up for approval before this Tribunal for its approval in accordance with the provisions of the Code."

It is submitted by the Learned Counsel for State Bank of India (SBI) that the business activities of each of the Corporate Debtors are inextricably interlinked and intertwined. There is tremendous interdependent amongst each of the Corporate Debtor. It is pleaded that pursuant to Rupee Term Loan Agreement dated August 8, 2012 (RTL Agreement) a consortium of banks and financial institutions led by the Applicant had agreed to grant a rupee terms loan to VIL, KAIL, Electroworld, Value Industries, Evans Fraser, Millennium Appliances, PE Electronics, Techno Electronics, Trend Electronics, Applicomp, Techno Kart, Sky Appliances and Century Appliances (RTL Obligors) under an "obligator" structure. The Rupee term loans under the RTL Agreement were to be utilized for the purposes of refinancing of existing Rupee debt of the RTL obligators, funding the capital expenditure in relation to the Ravva field and the capital expenditure in relation to the consumer electronics and home appliances business of the RTL Obligators and such other end users as permitted by the facility agreement under the RTL agreement.

One of the constituent of the RTL is CE India. CE India, pursuant to indenture of mortgage dated March 20, 2013, created charge by way of mortgage over, inter alia, the Videocon brand, goodwill, trademarks and patents to secure the Rupee Term Loan facility granted to the RTL obligors pursuant to the RTL Agreement.

Another constituent of the agreement was Videocon Telecommunications Ltd. (VTL), which had availed of Rupee Term Loan facility from certain lenders including SBI pursuant to the terms and conditions of Rupee Facility Agreement dated May 31, 2010, as amended by the Agreement of Modification to the Rupee Facility Agreement dated August, 30, 2010 (collectively the "VTL Agreement").

Some of the Corporate Debtors have also availed working capital facilities, most of which have been guaranteed by VIL.

Due to 'defaults' in the accounts of the Corporate Debtor, a "Joint Lenders' Forum" (JLF) of the lenders of the RTL obligors and the lenders of VTL was constituted in accordance with RBI guidelines. Pursuant to the decision taken as part of the collective-action-plan by the combined JLF in its meeting held on June 04th 2016, it was decided to release proceeds received by VTL upon sale of Unified Access Services Licenses from the relevant escrow account and utilize the amount for servicing existing debt of VTL and the RTL obligors.

The lenders/banks have also agreed that security available to the lenders under the RTL Agreement will be shared on pari-passu basis with the lenders under the VTL agreement and further, the security available to the lenders under the VTL Agreement will be shared on pari-passu basis with lenders under the RTL Agreement.

VTL agreed by way of a Confirmation Agreement dated June 20, 2016 that it shall be deemed to be "Co-obligor" under the RTL Agreement. The RTL obligors agreed that each of the RTL obligors shall be deemed to be a "Co-obligor" under the VTL Agreement.

It is further noticed that on account of 'inter-linkage' and 'interdependence' in business and operations of the Corporate Debtors, they used to prepare 'consolidated financial statements' so as to give the overall financial position of the RTL obligors as a whole for the benefit of the various stake holders.

The lenders and other stake-holders of RTL obligors dealt with the RTL obligors a 'single-economic-unit' as per the 'consolidated financial statements'.

Therefore, SBI submitted this Application before NCLT for substantive consolidation of CIRP of the corporate debtors. Another Application MA 1416/2018 is filed by the promoter of the Videocon group of companies Mr. Venugopal Dhoot seeking the similar relief of 'Consolidation' of CIRP i.e. commencement of Insolvency Process under Insolvency Code of all the group companies of Videocon which are undergoing insolvency..Mr. Venugopal Dhoot is a guarantor, shareholder and also the ex-managing Director/Chairman of the Videocon Group of Companies. The relief sought in this application is similar as was in the previous application MA 1306/2018 i.e. for the 'substantive consolidation' of the CIRP of the above stated 15 Corporate Debtors for a successful resolution and restructuring of Videocon Group of Companies. The facts of this case and arguments supporting the consolidation of CIRP of the Corporate Debtor in this application are no different than as stated in MA 1306/2018. Hence both these applications can be disposed of cumulatively.

Adjudication Authority Order

In the case of *State Bank of India & Anr. vs. Videocon Industries Ltd. & Ors., (M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 08.08.2019, Para 82)* the Adjudicating Authority ordered that:

.....Decisively, the above discussion has deciphered cases of this group into two categories. Rather it is absolutely necessary to place my view with humility that if at all a question of 'Group Insolvency' is to be answered in such type of group of cases, then in that situation, a blanket view is not possible to declare that the entire Group is fit to be CONSOLIDATED simply being connected or controlled by common management. Although, these two factors are necessary for determination of 'consolidation', but not the only basis. Over and above, each unit or subsidiary is to be examined on its merits, that whether all the parameters are being satisfied or not. These parameters in fact are the 'factors' to distinguish the units in two categories, precisely as under:-

a. A category/ classification of those cases can be made where the business operations are so dove-tailed that their management, deployment of staff, production of goods, distribution system, arrangement of funds, loan facilities etc. are so intricately interlinked that segregation may result in an unviable solution. Over and above, most important is that if segregated, the possibility of restructuring or the option of maximisation of value of assets become so bleak which shall overweigh the consolidation.

b. The other category/ classification can be of such group cases where the accounts are interlinked and due to the existence of debt agreement, the liabilities have become common but assets are identifiable. Hence, on segregation the independent structure of each unit shall survive which shall also result into viable profitable restructuring proposals. Therefore, in this category of cases, although for the limited purpose of signing of certain documents through which loan facilities might have been commonly availed but that can be segregated so that the assets and liabilities are identifiable separately thus facilitating a good investor.....

Further, the National Company Law Tribunal (NCLT) in February 2020 has ordered the inclusion of VIL's overseas oil and gas companies are VOVL Ltd, Videocon Hydrocarbon Holdings Ltd. (VHHL), Videocon Energy Brasil Ltd (VEBL), Videocon Indonesia Nunukan Inc. (VINI) in the ongoing insolvency process being conducted in the country. The Tribunal also directed the resolution professional (RP) to include the assets, liabilities, claims of the above mentioned overseas assets/companies in the information memorandum of Videocon Industries.

Conclusion

Working Group on Group Insolvency in its Report submitted to the Insolvency and Bankruptcy Board of India on 23rd September, 2019 recommended that a legislative framework on substantive consolidation need not be introduced in the first phase of implementing a framework dealing with the insolvency of group companies and the IBBI and the Government could consider the need for substantive consolidation mechanisms in India and devise the necessary framework for the same at a later date.

Source:

1. Economic Survey 2019-20, Vol II
2. Report of Working Group on Group Insolvency dated 23rd September, 2019
3. *State Bank of India & Anr.* v. *Videocon Industries Ltd. & Ors*., (M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors - decision dated 08.08.2019.
4. https://energy.economictimes.indiatimes.com/news/oil-and-gas/nclt-orders-inclusion-of-videocons-overseas-assets-in-bankruptcy-process/74132085

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SECURITIES AND EXCHANGE BOARD OF INDIA AND SECURITIES APPELLATE TRIBUNAL ORDERS ON KARVY STOCK BROKING LIMITED–BRIEF FACTS SO FAR*

Background

Karvy Stock Broking Limited (KSBL) is incorporated as provider of financial services company in India. It provides the services related to stock broking, depository participant, distribution of financial products (including mutual funds, bonds and fixed deposits), commodities broking, personal finance advisory services, wealth management and alike. Its headquarter is situated in Hyderabad.

During 2019, many investors complained to SEBI about discrepancies in their Demat accounts held by KSBL. Scores of investors complained that the firm had not provided their stipulated payouts.

In India, settlement happens on T+2 basis, where 'T' is the day of trading. The abbreviations T+2 basis means that the final settlement of transactions done on T, i.e., trade day by exchange of monies and securities between the buyers and sellers respectively takes place on second business day (excluding Saturdays, Sundays, Bank and Exchange trading holidays) after the trade day. For instance, if a person buys (or sells) a security with a T+2 settlement basis on Monday, assuming there are no holidays during the week, the settlement date will be on Wednesday. The 'T' or trading date is counted as a separate day. Therefore, a person should get the money in his account on the third day of transaction but some clients alleged that they didn't receive the payments after more than a week of executing the trades.

Following this, the National Stock Exchange of India Limited (NSE) initiated a limited period probe on August 19, 2019 covering a period from January 1, 2019 onwards and provided its preliminary report on the non-compliances observed with respect to the pledging/misuse of client securities by KSBL to the SEBI.

On the basis of this report, SEBI banned KSBL from new client operations in the stock market. Further, the National Stock Exchange (NSE) also initiated the forensic audit of KSBL in order to examine in detail the cases of misuse of client funds and securities.

Facts of the Case

1) KSBL has opened a DP account no. 11458979, named KARVY STOCK BROKING LTD (BSE) in December 2000 and categorised it as Beneficiary Client. It didn't report this DP account in the filings made by it in Stock-Exchange from January, 2019 to August, 2019;

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Views expressed in the Article is the sole expression of the Author(s) and it does not express the views of the Institute. Article is based on the SEBI Orders, Securities Appellate Tribunal orders, SEBI Circulars and facts available in the print as well as electronic media.

2) It was found that the KSBL has mishandled its client's securities by misusing the Power of Attorney (PoA) given to it by its clients. It has transferred securities from client's demat accounts to the demat accounts controlled by it;

3) KSBL credited the funds raised by pledging of client securities to six of its own bank accounts ("Stock Broker-own Account") instead of the "Stock Broker-Client Account" and further has not reported these six own bank accounts ("Stock Broker-own Account") to Exchange which is required to be reported under the provisions of enhanced supervision, as stipulated under SEBI Circular No. SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016;

4) The securities lying in the aforesaid Demat account of KSBL actually belong to the clients who are the legitimate owners of those pledged securities. Therefore, KSBL did not have any legal right to create a pledge on these securities and generate funds. If at all the client securities were pledged, it should be only for meeting the obligation of the respective clients.

5) Apparently as per report of NSE, KSBL has transferred a net amount of approx. Rs. 1,096 crores of client's money to its group company i.e. Karvy Realty Private Limited over a period of three years. Approximately, around 1 Lakh clients are estimated to be impacted by this scam.

Since last one year, SEBI has brought in a number of new regulations to improve the health of the stock broking industry. SEBI has strictly defined the do's and don'ts of handling of Clients' Securities by Trading Members (TM)/Clearing Members (CM). All TM/CM are required to transfer the clients securities received in pay-out to client's demat account within one working day. In case the client does not pay for such securities received in pay-out, then the TM/CM shall be entitled to retain those securities up to five trading days after pay-out. Further, where the client fails to meet its funds pay-in obligation within five trading days from pay-out day, the TM/CM shall liquidate the securities in the market to recover its dues. Under no circumstances, shall the securities of the clients received in pay-out be retained by the TM/CM beyond five trading days and be used for any other purpose. Client's securities lying with the TM/CM in "client collateral account", "Client Margin Trading Securities account" and "client unpaid securities account" cannot be pledged to the Banks/NBFCs for raising funds even with authorization by client as the same would amount to fund based activity by TM/CM which is in contravention of Rule 8(1)(f) & 8(3)(f) of Securities Contracts (Regulation) Rules, 1957 with effect from September 01, 2019.

Further, the client's securities already pledged in terms of clause 2.5 of SEBI Circular SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016 and clause 2 (c) of SEBI circular CIR/HO/MIRSD/MIRSD2/CIR/P/2017/64 dated June 22, 2017 shall by August 31, 2019 either be unpledged and return to the clients upon fulfilment of pay-in obligation or disposed off after giving notice of 5 days to the client.

KSBL had, however, failed to comply with SEBI's guidelines and continued the misuse of client's securities.

SEBI Order[1]

SEBI after examining all the facts and circumstances found gross violations of its rules and regulations on part of KSBL and on *22nd November, 2019*, issued following directions by way of

1. *SEBI Order dated 22nd November, 2019*

ex-parte order under Sections 11(1), 11(4) and 11B read with Section 19 of the SEBI Act, 1992 and Regulation 35 of SEBI (Intermediaries) Regulations, 2008:

i) KSBL is prohibited from taking new clients in respect of its stock broking activities;

ii) The Depositories i.e. NSDL and CDSL, in order to prevent further misuse of clients' securities by KSBL, are hereby directed not to act upon any instruction given by KSBL in pursuance of power of attorney given to KSBL by its clients, with immediate effect;

iii) The Depositories shall monitor the movement of securities into and from the DP account of clients of KSBL as DP to ensure that clients operations are not affected;

iv) The Depositories shall not allow transfer of securities from DP account no. 11458979, named KARVY STOCK BROKING LTD (BSE) with immediate effect. The transfer of securities from this account shall be permitted only to the respective beneficial owner who has paid in full against these securities, under supervision of NSE; and

v) The Depositories and Stock Exchanges shall initiate appropriate disciplinary regulatory proceedings against the Noticee (KSBL) for misuse of clients' funds and securities as per their respective bye laws, rules and regulations.

Further, NSE via order/circular dated 2nd December, 2019 has suspended KSBL from its membership due to the alleged non compliance of the regulatory provisions of the Exchange.

Meanwhile, to prevent Karvy's lenders to claim on the securities, SEBI used a pre-emptive move and directed the depositories to transfer the securities under supervision of SEBI and NSE from Karvy Stock Broking Limited's demat account to the demat account of respective clients who are the legitimate owners and who have paid in full. This heroic move of SEBI has given relief to approximately 87% of the investors whose securities were unlawfully pledged by Karvy.

Legal Battle

Appeal filed by KSBL before the Securities Appellate Tribunal (SAT), MUMBAI against SEBI and NSE

KSBL being aggrieved by the ex-parte ad-interim order given by SEBI has filed an appeal before SAT asking for clarification from Whole Time Member (WTM) of SEBI regarding direction issued by SEBI in its point no (ii) of the ex-parte order dated 22nd November, 2019, which restrains the depositories to act upon any instruction given by KSBL in pursuance of power of attorney given to it by its clients. According to KSBL, they are facing difficulties in settling of the trades of their clients with the clearing house. Considering the aforesaid facts, the necessary clarifications were sought from the SEBI.

In an another appeal filed by KSBL against NSE seeking to quash the impugned order/circular dated 2nd December, 2019 related to suspension of its membership from NSE due to the alleged non-compliance of the regulatory provisions of the Exchange with effect from 2nd December, 2019.

After hearing both the sides in case of first appeal against SEBI, SAT on 2nd December, 2019 has given direction to the WTM to consider the request of the KSBL and provide clarification on direction no. (ii) of the ex-parte SEBI order dated 22nd November, 2019.

For the second appeal against NSE, after hearing the both sides, the tribunal on 3rd December, 2019 said that KSBL would be at liberty to file an appeal under the NSE Rules. In case, if such an appeal is filed, appellant (KSBL) shall be heard as expeditiously as possible.

However in February, 2020 KSBL has withdrawn both these appeals from the SAT against NSE and SEBI.

Appeal filed by Lenders of KSBL (HDFC Bank, ICICI Bank, Bajaj Finance, IndusInd Bank) before the Securities Appellate Tribunal (SAT) against SEBI, Karvy Stock Broking Limited, NSE and NSDL.

Aggrieved by the SEBI order dated 22nd November, 2019 the lenders of KSBL i.e. HDFC Bank, ICICI Bank, Bajaj Finance Limited, IndusInd Bank filed different appeals before the Securities Appellate Tribunal (SAT). The lenders sought to quash the above mentioned ex-parte SEBI order, which prevented them from accessing the pledged securities. They also wanted SAT to set aside the NSDL's move of transferring of these securities to client accounts. They asserted that they have bonafide rights on those securities and it was common industry practice to lend against pledged shares (LAS) and there was no reason to suspect Karvy's claim that it owned those shares.

After hearing all the parties, the Securities Appellate Tribunal (SAT) on 3rd December, 2019 and 4th December, 2019 without going into the merit of the case directed SEBI to consider the representation(s) of the lenders of KSBL and, after giving an fair opportunity of being heard, pass an order as per law.

Appeal filed by Axis Bank Limited before the Securities Appellate Tribunal (SAT), against SEBI, National Stock Exchange of India Limited, Central Depository Services (India) Limited, National Securities Depository Limited and Karvy Stock Broking Limited.

Meanwhile Axis Bank Limited received communication from National Securities Depository Limited (NSDL) on 23rd November, 2019 which states that NSDL has put the DP account number-19502787 of Karvy in abeyance and hence the Axis Bank is prevented from accessing the securities pledged with it by Karvy Stock Broking Limited (KSBL).Aggrieved by the aforesaid communication, the Bank has challenged this order in SAT, stating that it was illegal and without jurisdiction.

Axis Bank contended that its position viz-a-viz. other lenders who appealed before this Tribunal earlier is different in the sense while the other lenders/ appellants were directly impacted by direction no. (iv) of the SEBI ex-parte order dated 22nd November, 2019, it's illegal extension of that order by NSDL that has impacted it. This is because vide direction no. (iv) only a particular account of *no. 11458979, named KARVY STOCK BROKING LTD (BSE)* of KSBL was frozen; there is no such direction relating to freezing or restricting in any manner the DP account number-19502787 relevant to the lender.

The Axis Bank has claimed that an aggregate amount of about Rs. 81 crores and further interest etc. are due from KSBL which was given to it in the form of overdraft against shares ("OAS") from time to time. It was contended that under the provisions of the Depositories Act, 1996 the pledgee has rights over the securities pledged and such rights could not be arbitrarily kept in abeyance or extinguished without following the due process.

Hence, Axis Bank sought the quashing and setting aside of NSDL's move to keep the pledged securities in abeyance. It also demanded quashing of directions given by SEBI order dated 22nd November, 2019 particularly those which were preventing it from exercising its right over

pledged securities. Further it requested SAT to issue a restraining order against NSDL, SEBI, and CDSL from taking any action against the bank, if it exercises its rights over pledged securities.

After hearing all the parties the Securities Appellate Tribunal on 17th December,2019(later modified its order on 20th December, 2019) directed SEBI to pass an order by 15th January, 2020 on Axis Bank's plea and pass appropriate directions. Meanwhile the status quo shall be maintained in respect of the securities in Account No. 19502787 named "Karvy Stock Broking Limited- Client Account-NSE CM".

Securities and Exchange Board of India in respect of representation made pursuant to order of Hon'ble SAT, by Axis Bank Limited

In view of the aforesaid order passed by the Hon'ble SAT, SEBI provided an opportunity of being heard to the Axis Bank Limited along with other concerned entities like National Stock Exchange of India Limited (NSE), Karvy Stock Broking Ltd. (KSBL), National Securities Depository Limited (NSDL) and Central Depositories Services Limited (CDSL).

As per the data provided by NSE, securities pledged by KSBL in favour of Axis Bank belonged to its fully paid as well as partly or unpaid clients. The value of securities belonging to fully paid client is Rs 171.74 crore and the value of securities of other than fully paid clients is Rs 13.69 crore.

The Axis Bank contended that the pledge created by KSBL on the securities was in accordance with the provisions of SEBI circular dated 26th September, 2016 and was a valid pledge. It has further been argued that such a validly created pledge has not been rendered invalid by SEBI circular dated 20th June, 2019 which merely casts obligation on the stock brokers to unpledge all the securities belonging to their client and does not declare pledges so created as invalid.

Further, Axis Bank contended that prior to the enforcement of SEBI circular dated 20th June, 2019, in terms of SEBI circular dated 26th September, 2016, with regard to pledging of securities belonging to partly paid/unpaid clients, stock broker was entitled to have a lien on client's securities only to the extent of indebtedness of the client and the stock broker could pledge securities of indebted clients with the "explicit authorization" of the client. Further, they have urged that the PoA given by the client was sufficient authorization to create such a pledge.

Accordingly, SEBI after assessing all the facts and circumstances held that regarding pledging of securities of fully paid clients, a stock broker has no authority to pledge the securities of its fully paid clients. If a stock broker pledges securities of its fully paid clients, it amounts to misappropriation of clients' securities by the stock broker. Even if securities belong to fully paid clients are pledged by the stock broker, such pledge does not pass any title to the pledgee, as the stock broker in such case himself/itself does not possess any title/right over such securities. Thus, pledge of securities, belonging to fully paid client, is not treated as valid pledge in law. `

Further, SEBI disagreed with such interpretation given to the scope of PoA. The SEBI circular dated 23rd April, 2010, makes it clear that the PoA given by the client to the broker can be used for the purpose of pledging in favour of the stock broker, "only" for the purposes of meeting the margin requirements. The authorization claimed under said PoA by the Axis Bank is not the "explicit authorization" of the client, as referred to under SEBI circular dated 26th September, 2016.

The bank in its representation to SEBI also prayed that in respect of partly or unpaid clients, KSBL be directed to issue five days' notice to the clients or the bank be allowed to issue five days' notice to clients to enable the clients redeem the pledged shares by making payment of the corresponding outstanding indebtedness, failing which the lender be permitted to invoke the pledge on shares.

SEBI rejected Axis Bank's plea. It ascertain that if the bank is able to show proof of authorisation in respect of securities having value of Rs. 13.69 crore belong to unpaid clients, such securities can be released to it after following the procedure under supervision of NSE.

Later, SEBI also rejected the relief sought by the other four lenders i.e. (Bajaj Finance Limited, HDFC Bank Limited, ICICI Bank Limited, IndusInd Bank Limited) urging it as not tenable.

After rejection of the Axis bank's plea by SEBI, it has filed an appeal before SAT against the SEBI order dated 14th January, 2020. The SAT granted interim relief to Axis Bank by directing status quo to be maintained on the SEBI order till further hearing on the matter.

Move by Ministry of Corporate Affairs

Meanwhile viewing such developments in this case, Ministry of Corporate Affairs in the month of January, 2020, ordered a probe into the affairs of the KSBL under *Section 206 of the Companies Act, 2013- Power to Call for Information, Inspect Books and Conduct Inquiries*. MCA directed Registrar of Companies (RoC), Hyderabad to conduct such inquiry. MCA has also asked RoC to examine if KSBL, its promoters and officials have violated the provisions of the Companies Act, 2013 and committed non-compoundable offences which are punishable by imprisonment. RoC had to look into the instances of misrepresentation of facts or misstatements in filing of balance sheets and other necessary documents. It has also been asked to look into the relationship between various Karvy groups and related party transactions. MCA also probed regarding any misuse or diversion of funds and in what manner the money that KSBL borrowed from banks and financial institutions was utilised.

Based on the Registrar of Companies (RoC) inquiry report submitted in February, 2020, pointing towards a potential fraud. The Central Government in exercise of powers conferred under Section 212(1) (a) & (C) of the Companies Act, 2013 has formed an opinion that the affairs of the KSBL need to be investigated to examine the serious nature of fraud committed as large public interest is involved.

The knot has further tightened around Karvy Stock Broking Ltd with the Ministry of Corporate Affairs (MCA) ordering a Serious Fraud Investigation Office (SFIO) probe into the alleged financial irregularities of the company. MCA directed the SFIO officials to investigate into the affairs of Karvy and its group companies.

KSBL sought interim relief from High Court, Telangana, so as to prevent MCA officials from taking any 'coercive steps including investigation under Section 212 of the Companies Act 2013. It further argued that the RoC's investigation under Section 206 to 208 of Companies Act, 2013 were ongoing and not final. Besides, the final decision of SEBI is also pending. Karvy, in its affidavit, contended that the Ministry of Corporate Affairs has taken the decision without following due process of law, proper enquiry and giving an opportunity to be heard, passed the order in violation of principles of natural justice.

But Telangana High Court in the month of March, 2020 dismissed its petition, urging that the Central government has already taken a decision on the issue and granted liberty to the company to file another petition challenging the order.

On 25th February, 2020, SEBI to further tightened the norm of capital market has issued a circular related to Margin obligations to be given by way of Pledge/ Re-pledge in the Depository System in order to devise a framework that mitigates the risk of misappropriation or misuse of client's securities available with the Trading Members (TM) /Clearing Members (CM) / Depository Participants (DP) so that to prevent incidents such as Karvy Broking Services, which had allegedly misused clients' securities.

Aforementioned SEBI circular states that with effect from 01st June, 2020, TM / CM shall, inter alia, accept collateral from clients in the form of securities, only by way of 'margin pledge', created in the Depository system in accordance with Section 12 of the Depositories Act, 1996 read with Regulation 79 of the SEBI (Depositories and Participants) Regulations, 2018 and the relevant Bye Laws of the Depositories. Any procedure followed other than as specified under the aforesaid provisions of law for creating pledge of the dematerialised securities is prohibited. It is clarified that an off-market transfer of securities leads to change in ownership and shall not be treated as pledge. Transfer of securities to the demat account of the TM / CM for margin purposes (i.e. title transfer collateral arrangements) shall be prohibited. In case, a client has given a power of attorney in favour of a TM / CM, such holding of power of attorney shall not be considered as equivalent to the collection of margin by the TM / CM in respect of securities held in the demat account of the client.

The TM / CM shall be required to close all existing demat accounts tagged as 'Client Margin/ Collateral' by June 30, 2020. The TM / CM shall be required to transfer all client's securities lying in such accounts to the respective clients' demat accounts. Thereafter, TM / CM are prohibited from holding any client securities in any beneficial owner accounts of TM/CM, other than specifically tagged accounts as indicated above, and in pool account(s), unpaid securities account, as provided in SEBI Circular CIR/HO/MIRSD/DOP/CIR/P/2019/75 dated 20th June, 2019.

Although, this move against Karvy is a part of a long-drawn effort of SEBI to tighten the scrutiny over brokers' misuse of client money and putting through unauthorized trades yet this Karvy scam raised many questions and concerns. It is apparent that it is not the end but a mere beginning. Since such an event is possible, it must be happening at a smaller scale elsewhere too. Certainly, from anecdotal evidence, it would appear that 'temporary' use of clients' holdings happens at a certain scale. Having use of other's money is a great temptation. SEBI must ensure stringent regime and take effective steps to prevent such scams in future.

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IN PURSUIT OF PROFESSIONAL EXCELLENCE

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