CASE DIGEST -SERIES 3

(Case Snippets and Case Studies)

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

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17th August, 2020

Dear Professional Colleagues,

***Subject* : Case Digest - Series 3**

"Continuous learning is the minimum requirement for success in any field."
~Brian Tracy

To attain excellence in our professional endeavours, learning the contemporary processes is imperative. In order to comprehend the changes taking place in political, economic, social, technological and legal environment and formulate plans, policies and procedures, one should keep continuing one's efforts towards learning and enhancing the knowledge and skill base regularly.

Indeed, learning and advancing knowledge are constant in all the professions and Company Secretaries are not an exception to it. With the expansion in the role of a Governance Professionals and with growing opportunities in the form of our roles as Insolvency Professionals; Registered Valuers; Internal Auditors; GST Professionals; so on and so forth; it is important that we develop a holistic approach towards any and every aspect of businesses and India Inc.

In order to cater to this academic need of the Governance Professionals and to assist them in advancing their knowledge, the Institute has initiated a learning oriented approach of providing 'Case Digest' to its Members and Students.

The series of Case Digest covers case snippets pertaining to Company Law, Economic Legislations, Banking and Insurance, Tax Laws, Insolvency; all collated with an extensive aim to broaden the horizon of learning and assist in gaining practical insights. I commend the dedicated efforts of the Directorate of Academics in bringing out this publication titled Case Digest – Series 3.

Happy reading ! Happy learning !

Regards,

(CS Ashish Garg)
President
The Institute of Company Secretaries of India

CASE DIGEST – SERIES 3

(Case Snippets and Case Studies)

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COMPANY LAW

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Write-off of the Bad Debts through the Board of Directors is a commercial decision, which does not warrant any judicial interference. The allegations made by Appellants are baseless.

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

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

2.	**02.12.2019**	***G. Vasudevan (Petitioner)* vs. *Union of India (Respondent)***	**Madras High Court**

Section 167(1)(a) Companies Act, 2013 is not violative of Articles 14, and 19(1)(g) of the Constitution of India.

The issue raised was that the Section 167(1)(a) of the Companies Act 2013, as inserted vide the Companies (Amendment) Act 2017 as ultra vires the Articles 14, 19(1)(g) of the Constitution of India.

The Court observed that the "purpose of the amendment was that if the post of Directorship is vacated under the provision (as it was) then, this post would remain vacant as these provisions would automatically apply to any individual subsequently appointed".

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

3.	**03.06.2020**	***Jayshree Damani and Ors. (Appellant)* vs. *Atlas Copco (India) Ltd. (Respondent)***	**The National Company Law Appellate Tribunal**

Power of NCLT/ Board to modify the approved Scheme of reduction of Share capital

In this case the contention of the appellant is that NCLT or Board of Directors on instructions from NCLT, do not have power to modify the Scheme as approved by the Shareholders. The Appellate tribunal stated that the NCLT has power to modify the Scheme as approved by the Shareholders, therefore, the Company has approached for approval of the same and the objectors have objected to the Scheme and the modification has been done. The same modification has been ratified by the Board of Directors. Therefore, it cannot be said the NCLT has no power. The Appellate tribunal mentioned that if we assume that the NCLT has no power then it means that the scheme approved by the shareholder, whether wrong or right, the NCLT has to approve.

4.	**03.06.2020**	***Jayshree Damani and Ors. (Appellant)* vs. *Atlas Copco (India) Ltd. (Respondent)***	**The National Company Law Appellate Tribunal**

Whether modification in the special resolutions passed is illegal

In this case the appellants has argued that the special resolution for reduction of share capital passed at EGM was illegally modified. The Appellate tribunal noted that the special resolution specifically provides for said reduction to be approved by the shareholders subject to any terms, modifications or conditions, imposed by NCLT Mumbai. This is to be followed with the agreement of the same by the Board of Directors of the Respondent. Therefore, the Appellate tribunal found no merit in the Appeal.

5.	**23.06.2011**	***In Re : Issuance of Optionally Fully Convertible Debentures by Sahara India Real Estate Corporation Limited (Now Known as Sahara Commodity Services Corporation Limited) and Sahara Housing Investment Corporation Limited***	**SEBI/SAT**

Interpretation of term "Accustomed to Act"

In a reply to Show Cause Notice dated May 20, 2011, Mr. Subrata Roy Sahara, *inter alia* stated that he is only a shareholder and neither a director nor hold any executive, managerial or other position in either of the said two companies. Hence, he mentioned that the notice is unwarranted and liable to be withdrawn. However, Mr. Subrata Roy Sahara, apart from being the founder of Sahara India Group, is admittedly a major shareholder (holding about 70% of capital in each of the two companies). He can be reasonably regarded as a person in accordance with whose directions or instructions, the Board of Directors of the two Companies were accustomed to act and therefore fall within the ambit of "Officer in Default".

Furthermore, with the 70% ownership or holding in the two Companies, he is definitely in a position of control and has the power direct the management policy and appoint the majority of directors to the Board.

6.	**31.03.2008**	***Krishna Kumar Birla (Appellant)* vs. *Rajendra Singh Lodha and Ors. (Respondent)***	**Supreme Court of India**

Observations while Defining the Terms "Accustomed to Act"

In this case the Respondent was appointed as statutory auditors and/or to be otherwise involved in matters concerning the finance and accounts of several companies and organizations where the Appellant has substantial stakes in management and/or shareholding. By reason of the same, the Respondent came to enjoy the trust and confidence of most of the members of the Appellant.

The deceased who has had no formal education relied and continued to rely on the respodent and reposed and continued to repose complete trust and confidence in the respondent in the matters pertaining to all her financial affairs by reason whereof, the respondent was at all material times, privy to all information concerning the personal and financial affairs of the deceased. The deceased also sought and obtained advice from the respondent with regard to her assets, savings and investments and with regard to and in the management and affairs of several companies and institutions where the deceased had a stake in the shareholding and/or management and the deceased was at all material times accustomed to act as per the wishes and dictates of the respondent. The respondent is and was at all material times aware of the same.

By reason of the aforesaid, the court considered that the respondent was, at all material times, in a fiduciary relationship with the deceased.

7.	**11.05.2011**	***Amar Singh (Petitioner)* vs. *Union of India (Respondent)***	**Supreme Court of India**

A litigant who come to court and invokes its writ jurisdiction must come with clean hands

This court wants to make it clear that an action at law is not a game of the chess. A litigant who come to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions. Courts have over the centuries, frowned upon litigants who, with intent to deceive and mislead the court, initiated proceeding without full discloser of facts. Court held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case. In one of the most celebrated cases upholding this principal in the court of appeal in *R* v. *Kensington Income-tax Commissioner (1917)* 1 KB 486 Lord Justice Scrutton formulated as under and it has been for many years the rules of the court and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure

of all the material facts-facts, now law. He must not misstate the law if he can help it the court is supposed to know the law. But it knows nothing about the facts and the applicant must state fully and fairly the facts and penalty by which the court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it the court will set aside any action which it has taken on the faith of the imperfect statement.

8.	**25.11.2019**	***Akal Spring Limited and Ors. (Appellant)* vs. *Amrex Marketing Private Limited (Respondent)***	**The National Company Law Appellate Tribunal**

Where the Tribunal has allowed condonation of delay passing the impugned order by exercising its discretionary power in the facts and circumstances of the case, there is no illegality

In the instant case on going through Impugned Order dated 23.09.2019 passed by the Tribunal, The NCLAT comes to a consequent conclusion that the Tribunal had borne in mind the well settled principal in Law that when the matter is 'fought on merits', the same is to be disposed of in accordance with law etc. Viewed in this perspective, the Tribunal had allowed the delay of condonation application in CA No. 67/2017 by passing the impugned order dated 23rd September, 2019 by exercising its discretionary power based on the facts and circumstances of the present case and the same, in the considered opinion of this Tribunal requires no interference, because of the reason the said order does not suffer from any material irregularity or patent illegality in the eye of Law.

9.	**04.12.2019**	***Regional Director, Southern Region (Appellant)* vs. *Real Image LLP and Ors. (Respondent)***	**The National Company Law Appellate Tribunal**

By applying the principal of casus omissus a Indian LLP incorporated under the LLP Act 2008 can be allowed to merge into a Indian Company incorporated under the Act, 2013.

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

NCLAT concluded that where the Legislature has enacted provision in the Companies Act, 2013 for conversion of LLP into company and vice versa in the Limited Liability Partnership Act, 2008, there is no question of infringement of any constitutional right of the respondent.

Casus omissus

An omitted case. When a statute or an instrument of writing undertakes to foresee and to provide for certain contingencies, and through mistake, or some other cause, a case remains to be provided for, it is said to be a casus omissus. For example, when a statute provides for the descent of intestates estates, and omits a case, the estate descends as it did before the statute, whenever that, case occurs, although it appear to be within the general scope and intent of the statute.

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SECURITIES LAW

1.	**16.06.2020**	***Aditya Omprakash Gaggar (Noticee)* vs. *SEBI***	**Adjudicating Officer, Securities Exchange Board of India**

Acts such as making UPSI available on a discriminatory basis will compromise the confidence of investors and has a serious impact on the price of the securities

Facts of the case :

During November 2017, there were certain articles published in newspapers / print media referring to the circulation of Unpublished Price Sensitive Information (hereinafter referred to as "UPSI") in various private WhatsApp groups about certain companies ahead of their official announcements to the respective Stock Exchanges. Against this backdrop, SEBI initiated a preliminary examination in the matter of circulation of UPSI through WhatsApp groups during which search and seizure operation for 26 entities of Market Chatter WhatsApp Group were conducted and approximately 190 devices, records etc., were seized. The WhatsApp chats extracted from the seized devices were examined further and while examining the chats, it was found that in respect of around 12 companies whose earnings data and other financial information got leaked in WhatsApp.

Accordingly, SEBI carried out an investigation in the matter of circulation of UPSI through WhatsApp messages with respect to Bata Ltd., to ascertain any possible violation of the provisions of the Securities and Exchange Board of India Act, 1992 and SEBI (Prohibition of Insider Trading) Regulations, 2015 during the period of January 1, 2016 to February 10, 2016.

It was observed that Bata India Ltd. had announced financial results for quarter and nine months ended on December 31, 2015 on February 10, 2016. The investigation inter alia revealed that Mr. Aditya Omprakash Gaggar (hereinafter also referred to as "Noticee") among other had communicated the UPSI related to Bata India Ltd. viz; Sales, PAT and EBITDA for quarter ended December 2015 through WhatsApp messages from the WhatsApp chat of Ms. Shruti Vora.

Order:

The instant case before SEBI is one such example where the information constituting UPSI has been circulated through WhatsApp messages, which conveniently wipes out any trace of the insider leaking the UPSI when the messages are deleted and manages to reach the selected group of targets. Such acts which are essentially in the form of making UPSI available on a discriminatory basis, if legitimized in the garb of routine sharing of market gossips/rumors will compromise the confidence of investors and the activity of such kind has a serious impact on the price of the securities where the limited set of people having access to UPSI stand to gain at the expense of the innocent gullible investors. SEBI in the opinion that the peculiar nature of such communication of UPSI as in the instant case has to be strictly dealt with, in order to curb and discourage any future attempts at the same

Thus, SEBI imposed a penalty of ₹15,00,000/-(Rupees Fifteen Lakhs only) on the Noticee viz., Mr. Aditya Omprakash Gaggar in terms of the provisions of Section 15G of the Securities and Exchange Board of India Act, 1992 for the violation of Sections 12 A (d) & 12 A (e) of the Securities and Exchange Board of India Act, 1992 and Regulation 3 (1) of SEBI (Prohibition of Insider Trading) Regulations, 2015. The Noticee shall remit / pay the said amount of penalty within 45 days of the receipt of this order.

2.	**05.06.2020**	***Narendra Singh Tanwar, Proprietor of M/s Capital True Financial Services (Noticee)* vs. *SEBI***	**Whole Time Member, Securities Exchange Board of India**

The Noticee cease and desist from acting as an Investment Adviser as it refused to refund the money so taken by it as service fee from complainant

Facts of the Case:

SEBI had received a complaint against Mr. Narendra Singh Tanwar, Proprietor of M/s Capital True Financial Services (hereinafter referred to as "Noticee"), a registered Investment Adviser (hereinafter referred to as “IA”) inter alia alleging that a promise was made on behalf of the Noticee to the complainant assuring him a huge return of Rs. 28.80 lakh on a meagre investment of Rs. 20,000/- over a short period of 4 months and 10 days. Pursuant to such an assurance, an amount of Rs. 1,30,000/- was transferred by the complainant to the Noticee towards first installment of the service fee, out of total service fee of Rs. 4,47,200/- demanded by the Noticee in installments. However, after suffering loss on the very first day of availing the services of the Noticee, the complainant asked the Noticee to return the amount paid to him. As the Noticee refused to refund the money so taken by it as service fee and also stopped attending the phone calls of the complainant, a compliant was lodged with SEBI. The said complaint was forwarded to the Noticee for resolution and to submit an Action Taken Report (ATR) in the SEBI Complaints Redress System (SCORES).

Order:

In view of the foregoing findings and in the interest of investors and for the protection of their rights, SEBI issue following directions:

i. The Certificate of Registration as Investment Adviser bearing Registration number INA000009038 issued in favour of the Noticee is hereby cancelled.

ii. The Noticee shall forthwith cease and desist from acting as an Investment Adviser.

iii. The Noticee shall not use the term ‘Investment Adviser’ directly or indirectly in any manner whatsoever on the letter-head, on the website, signage board, or otherwise.

iv. The Noticee is debarred from accessing the securities market and is further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with securities market in any manner, for a period of 2 years and during the period of restraint, the existing holding of securities including the holding of units of mutual funds of the Noticee (s) shall remain frozen.

3.	**02.06.2020**	***N. Ravichandran* vs. *SEBI***	**Whole Time Member, Securities Exchange Board of India**

SEBI, in special circumstance, permits Shri N. Ravichandran to subscribe for shares in the Rights Issue of Reliance Industries Limited

Facts of the Case:

SEBI, had passed an Order ("the order") dated November 05, 2019, in the matter of KLG Capital Services Limited, whereby Shri N. Ravichandran, along with certain other entities, was inter alia debarred from buying, selling or otherwise dealing in securities market, in any manner whatsoever, or accessing the securities market, directly or indirectly, for a period of five years from the date of the Order, subject to setting off of the period of debarment already undergone by him in the matter.

SEBI is in receipt of an email dated May 28, 2020, sent on behalf of Shri N. Ravichandran by his advocates, M/s. Crawford Bayley & Co., whereby Shri N. Ravichandran has submitted inter alia that he currently holds shares of Reliance Industries Limited, which has recently announced its Rights Issue, which is open for subscription from May 20, 2020 and closes on June 03, 2020. Shri N. Ravichandran has requested SEBI for permitting him to apply for shares in the said Rights Issue. He has further requested SEBI for permission to convert certain physical share certificates held by him into demat form.

Order:

SEBI note that the abovementioned request regarding applying for shares in the Rights Issue of Reliance Industries Limited pertains to availing benefits of corporate action on the shares which Shri N. Ravichandran was already holding as on the date of the Order. SEBI further note that conversion of physical shares certificates into demat form does not dilute the restraint imposed on the Shri N. Ravichandran vide the Order in any manner. Considering the above, SEBI grants the following limited relaxations to Shri N. Ravichandran:

(a) Shri N. Ravichandran is permitted to subscribe to shares in the abovementioned Rights Issue of Reliance Industries Limited up to his entitlement accruing due to his shareholding in Reliance Industries Limited as on the date of the Order (i.e. November 05, 2019).

However, Shri N. Ravichandra n shall not be permitted to subscribe to shares renounced by any other shareholder of Reliance Industries Limited in the abovementioned Rights Issue.

(b) Shri N. Ravichandran is permitted to convert the physical share certificates held by him, as on the date of the Order, into demat form, within 3 months of the date of this order.

(c) Except for subscribing to shares in the abovementioned Rights Issue and converting physical share certificates into demat form as permitted above, Shri N. Ravichandran shall continue to remain debarred from buying, selling or otherwise dealing in

securities market, in any manner whatsoever, or accessing the securities market, directly or indirectly, till the debarment period as directed in the Order is over.

4.	**29.05.2020**	***Arihant Capital Markets Ltd. (Noticee)* vs. *SEBI***	**Adjudicating Officer, Securities Exchange Board of India**

SEBI imposed penalty for the alleged violation of the provisions of SEBI (Stock Broker and Sub Brokers) Regulations, 1992

Facts of the case:

SEBI conducted investigation into trading activities of certain entities in the scrip of Moryo Industries Ltd. for the period of January 15, 2013 to August 31, 2014. Based on the findings of the investigation, SEBI initiated adjudication proceedings against Arihant Capital Markets Ltd. (hereinafter be referred to as, the "Noticee") under Section 15HB of the Securities and Exchange Board of India Act, 1992 , for the alleged violation of Clause A(2) of the Code of Conduct for Stock Brokers as specified under Schedule II read with Regulation 7 (as existed at the relevant time) of the Securities and Exchange Board of India (Stock Broker and Sub Brokers) Regulations, 1992.

Order:

In view of the above, after considering all the facts and circumstances of the case and exercising the powers conferred upon SEBI under Section 15-I (2) of the SEBI Act, 1992 read with Rule 5 of the Adjudication Rules, SEBI hereby impose monetary penalty of Rs.5,00,000/-(Rupees Five Lakhs only) on the Noticee. The Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order or May 31, whichever is later.

5.	**29.05.2020**	***Dewan Housing Finance Corporation Ltd. (Noticee)* vs. *SEBI***	**Adjudicating Officer, Securities Exchange Board of India**

SEBI imposed penalty for the alleged violation of provisions of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008, Companies (Share Capital and Debentures) Rules, 2014 and SEBI (LODR) Regulations, 2015

Facts of the case:

A department (in short OD) of SEBI received a reference from Catalyst Trusteeship Limited, a SEBI registered Debenture Trustee pertaining to Non-Convertible Debentures (in short NCDs) issued by Dewan Housing Finance Corporation Ltd. (hereinafter referred to as Company/Noticee). During examination, OD observed non-compliance with regards to provisions of regulation 16(1) of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 read with rules 18(7)(b)(ii) and 18(7)(c) *of Companies (Share Capital and Debentures) Rules, 2014 and regulation 52(1) read with 52(4) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 by the Noticee.

Order:

In exercise of the powers conferred under section 15-I of the SEBI Act, 1992 and rule 5 of the Adjudication Rules, 1995, SEBI imposed a penalty of Rs. 20,00,000 (Rupees Twenty Lakh only) on the Noticee i.e. Dewan Housing Finance Corporation Ltd. under sections 15A(b) and15HB of the SEBI Act, 1992 for violations of provisions of regulation 16(1) of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 read with rules 18(7)(b)(ii) and 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014 and regulations 52(1) and 52(4) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. The Noticee shall remit/pay the said amount of penalty within 45 days of receipt of this order.

6.	**17.01.2019**	***Indus Weir Industries Limited (Appellant)* vs. *SEBI (Respondent)***	**Securities Appellate Tribunal**

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

Facts of the case:

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

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

Order:

While upholding the impugned order on merit, SAT reduce the amount of penalty imposed on the appellant from Rs. 1 crore to Rs. 50 lakh. Appellant is directed to pay the penalty of Rs. 50 lakh to SEBI within a period of 4 weeks from the date of this order. In the event, the appellant fails to deposit the penalty within the stipulated period of 4 weeks SEBI is at liberty to recover the amount of Rs. 50 lakh along with interest @ 12% p.a. from the date of the impugned order. Appeal is partly allowed and is disposed of on above terms with no order as to costs.

7.	**05.06.2020**	***SEBI (Applicant) vs. Nitish Bangera (Respondent)***	**Securities Appellate Tribunal**

Considering the prevailing situation on account of the COVID-19 pandemic and the lockdown being extended by the Government of Maharashtra till 30th June 2020, SAT dispose of the Misc. Application directing SEBI to positively decide the matter on or before 15th August, 2020

The Tribunal by its order dated 3rd December, 2019, directed the Whole Time Member, SEBI to decide the matter pursuant to the show-cause notice dated 31st July, 2017 within six months. The period of six months would expire on 30th June, 2020 and, on account of the extension of the lockdown till 30th June, 2020, the present application has been filed by SEBI for extension of time by three months.

The appellant pointed out that the investigation in this matter has been going on for the past 10 years and the matter has not reached its logical conclusion and, therefore submitted that the Tribunal may consider this aspect of the matter in the event the Tribunal intends to extend the period. Considering the peculiar facts and circumstances of the case and considering the prevailing situation on account of the COVID-19 pandemic and the lockdown being extended by the Government of Maharashtra till 30th June 2020, SAT dispose of the Misc. Application directing SEBI to positively decide the matter on or before 15th August, 2020.

The present matter was heard through video conference due to Covid-19 pandemic.

8.	**28.02.2019**	***Mr. Mahendra Girdharilal (Appellant)* vs. *NSE, SEBI and T. Stanes And Company Limited (Respondents)***	**Securities Appellate Tribunal**

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

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

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

Order:

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

9.	**25.02.2019**	***Synergy Cosmetics (Exim) Limited (Appellant)* vs. *BSE Limited (Respondent)***	**Securities Appellate Tribunal**

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

Facts of the case:

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

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

Order:

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

10.	25.02.2019	*Nicer Green Housing Infrastructure Developers Ltd. & Ors. (Appellant)* **vs.** *SEBI (Respondent)*	**Securities Appellate Tribunal**

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

Facts of the case:

The Nicer Green Housing Infrastructure Developers Ltd., Appellant No. 1 is a company incorporated under the Companies Act, 1956 as a public limited company and is engaged in the business of acquiring agricultural land and developing the same for the purpose of re-sale. SEBI found that the activity of fund mobilization by the appellant no. 1 under its scheme fell within the ambit of "Collective Investment Scheme" as defined under Section 11AA of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, 'SEBI Act').

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

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

Order:

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

DIRECT TAX

1.	**2006**	**British Gas India Pvt. Ltd.**	**AAR Ruling**

Whether the purpose of the explanation (a) to section 6(1)(c) of the Income tax Act, 1961 requires that an individual should be an unemployed person who leaves India for employment outside India?

Employee, an Indian citizen commenced employment with British Gas India Pvt. Ltd. in Feb/March 2002 and w.e.f. July 2005, he was deputed to British Gas, UK for two years and accordingly was in India for less than 182 days in that financial year.

Revenue contended that as he was in India for more than 60 days, he was resident as per Section 6(1)(c) and that explanation (a) was not applicable as he was already in employment with British Gas in India.

AAR observed that a careful reading of explanation (a) would show that the requirement of the explanation is not leaving India for employment but it is leaving India for the purposes of employment outside India. For the purpose of the explanation an individual need not be an unemployed person who leaves India for employment outside India.

2.	**2009**	***ACIT (Appellant)* vs. *Hotel Harbour View (Respondents)***	**ITAT (Cochin)**

Whether the execution of contract for Sale (i.e. agreement for sale) would be construed as transfer as per section 2(47) of the Income Tax Act, 1961?

The tribunal held that as no possession was taken in pursuance of contract for sale, and therefore same cannot be construed as a transfer for the purpose of section 2(47) of the Income tax Act, 1961 read with Section 53A of the Transfer of Property Act, 1882.

Transfer takes place only when sale deed is executed and title of property is transferred. The telephone/electricity connection obtained without possession or executing sale deed cannot be treated as transfer of Capital Asset.

3.	**2011**	***CIT (Appellant)* vs. *O. Abdul Razak (Respondents)***	**High Court (Kerala)**

Whether the term 'employment' referred to in Explanation (a) to section 6(1)(c) of the Income tax Act, 1961 includes "self employment" ?

The High Court held that for purpose of Explanation (a) to section 6(1)(c) of the Income tax Act, 1961, "employment" include self employment like business or profession taken up by assessee abroad.

4.	**2011**	***CIT (Appellant*) vs. *Reliance Industries Ltd. (Respondents)***	**Supreme Court**

Whether the sales-tax incentive received for setting up a new industrial undertaking is capital receipt ?

The assessee received sales-tax incentive for setting up a new industrial undertaking in Patalganga. The assessee claimed that the said subsidy was a capital receipt. The Special Bench upheld the assessee's claim. On appeal by the department (for a subsequent year), the Bombay High Court held that the object of the subsidy was to encourage the setting up of industries in the backward area by generating employment therein, by applying the "purposive test" in *CIT* v. *Ponni Sugars and Chemicals Ltd. (2008)* 306 ITR 392 (SC), the subsidy was a capital receipt.

On appeal, the Supreme Court held that the High Court ought not to have dismissed the appeals. Accordingly, the following question was referred back to the High Court for its consideration "Whether on the facts and circumstances of the case and in law the Hon'ble Tribunal was right in holding that sales tax incentive is a Capital Receipt ?"

5.	**2010**	***CIT (Appellant)* vs. *Saurashtra Cement Ltd. (Respondents)***	**Supreme Court**

Whether the liquidated damages received on account of purchase of cement plant is capital receipt?

The supplier failed to supply the machinery within the stipulated time and the assessee received Rs. 8,50,000 from the supplier by way of liquidated damages. The Department sought to assess the amount to Income Tax. The appellate Tribunal held that the amount was a capital receipt. The High Court answered the issue in favour of assessee. On appeal, Supreme Court held that the damages to the assessee were directly linked with the procurement of a capital asset viz. the cement plant. The amount received by the assessee towards compensation for sterilization of the profit–earning source, not in the ordinary course of business, and was therefore capital receipt in the hands of assessee.

6.	**2011**	***CIT (Appellant)* vs. *Jagatjit Industries Ltd. (Respondents)***	**High Court (Delhi)**

Whether Gains due to fluctuation in foreign exchange on account of issue of equity shares by way of Global Depository Receipt in foreign country is capital receipt?

The assessee is a multiproduct company, had issued equity shares overseas by way of global depository receipts in US dollars, which was to be repatriated into the country as and when required for end uses as approved by the Ministry of Finance and Industry. It was intimated to the Government of India, that the share capital so raised abroad, 79% of which would be used to acquire assets and 21% for general corporate use. The balance amount not utilised were kept in fixed deposits in the UK and the same was reflected in the balance sheet at the exchange rate prevailing on March 31st. The assessee for the relevant year had accounted in its balance sheet, the gains arising from exchange rate fluctuation of foreign currency. The Assessing Officer treated this entire foreign gain on exchange rate fluctuation as revenue receipt.

On appeal, High Court held that the relevant consideration would be to see the source of funds held and not the utilizations of the funds. The High Court further held that even in cases where

money is raised in India, the money thus collected as share capital would be treated as capital receipt, and merely because part of the share capital was used for working capital, the same could not be treated as revenue receipt.

7.	**2010**	***Dy. CIT (Appellant)* vs. *Garden Silk Mills Ltd. (Respondents)***	**High Court (Gujrat)**

Whether the surplus received on account of cancellation of forward foreign exchange contract is capital receipt?

The High Court held that the surplus received by the assessee upon cancellation of forward foreign exchange contract was a capital receipt not liable to tax, as the foreign exchange acquired under the contract is for the purpose of discharging an obligation on capital account. Mere cancellation of the contract does not result in any transfer of any asset, even if the extended definition under section 2(47) of the Income tax Act, 1961 is made applicable.

8.	**2010**	***CIT (Appellant)* vs. *Bank of Rajasthan Ltd. (Respondents)***	**High Court (Rajasthan)**

Whether the excess cash received at bank cash counter can be construed as Income?

The High Court held that the excess cash received at the cash counters of the branches of the bank represents the liability to pay to the customers as and when they may demand payment, therefore such excess cash collection cannot be considered as the income of the assessee.

9.	**2007**	***S.D.S. Mongia (Appellant)* vs. *CBDT (Respondents)***	**High Court (Delhi)**

Whether the annuity received on superannuation [exempted u/s 10(13)(ii)] earlier offered to tax cannot seek exemption thereafter?

The assessee filed return for the A.Ys. 1990-91, 1991-92 and 1993-94 including the annuity received on superannuation as income. The assessee filed application under section 264 seeking exemption under section 10(13)(ii) of the Income tax Act, 1961 on the said annuities. The same was rejected as the assessee himself has offered the same for tax.

The Hon'ble court, on a writ petition under Article 226 of the Constitution, observed that Article 265 of the Constitution mandates that no person shall be taxed without the authority of law. Since in the present case there is no authority to tax annuities received by the petitioner, we consider it appropriate to exercise our extraordinary power to correct the injustice.

10.	2007	*Tam Tam Pedda Guruva Reddy (Appellant)* **vs.** *Jt. CIT (Respondents)*	**High Court (Karnataka)**

Whether non-compete fees received for not to carry particular business for certain period is capital receipt and therefore not taxable?

Agreement entered into between assessee and one construction company created by assessee that assessee was not to compete with said company for certain period viz. 5 years, in consideration, said amount of compensation be treated as income of assessee and not as capital receipt, even by invoking section 28(va) of the Income tax Act, 1961.

Source:

- Digest of Case Laws Direct Taxes : *http://aiftponline.org*

INDIRECT TAX

1.	**22.05.2020**	**In re NCS Pearson INC**	**GST AAR KARNATAKA**

Whether the Online Tests Scored after Human Intervention are outside the purview of OIDAR, No IGST applicable?

The applicant, NCS Pearson INC is an intermediary located in non-taxable territory and provides services of online exams or tests via electronic software to the non-taxable online recipients in India, which he has classified into three categories. For activities mentioned under Type 1, the applicant is clear regarding the taxability and has approached the Authority only for Type 2 and Type 3 activities performed by them.

The Authority while answering in respect of the Type 2 Tests ruled that provision of taking tests online at designated test centers are naturally bundled activities and are supplied in conjunction with each other in the ordinary course of business and therefore can be termed as Composite Supply as per Section 2 (30) of CGST Act, 2017. Here, since the main object of the whole activity is to take online tests, the principal supply would be Online Information Database Access and Retrieval (OIDAR) service provided by the applicant to non-taxable online recipients.

The Authority in respect of Type 3 Tests further ruled that since tests are scored after human intervention in type 3, it should be outside the purview of OIDAR and is exempted from paying Integrated Goods and Service Tax (IGST).

2.	**22.05.2020**	**In re ID Fresh Food (India) Pvt. Ltd.**	**GST AAR KARNATAKA**

Whether the Frozen parota is roti or not?

ID Fresh Food, a manufacturer of ready-to-cook food products, had demanded a ruling on whether its products such as Malabar parathas and whole-wheat parathas fall under the same category as Roti, which draws a GST rate of 5 per cent.

The company supplies the two products - which have a shelf life of 3-7 days - to distributors, retailers and other operators in the food services segment within the country as well as overseas. It contends that its products should be treated in the same way as khakhra, plain chapati or roti under the law.

The Authority for Advance Rulings (Karnataka bench) has said that parathas must attract 18% GST, while roti is taxed at the concessional GST tax slab rate of 5%.The Karnataka Government has ruled differentiating paratha or parota from roti, which are essentially two types of Indian breads, and has clarified that paratha must be taxed at more than triple the GST tax rate on roti.

3.	**6.05.2020**	***Assistant Commissioner CT (LTU) (Appellant) vs. Glaxo Smith Kline Consumer Health Care Limited (Respondent)***	**Supreme Court of India**

No writ can be issued to challenge assessment order foreclosed by law of limitation

Assessee was engaged in the business of manufacturing and sale of Horlicks, Boost, Biscuits, Ghee, Ayurvedic Medicines etc. Assistant Commissioner had called upon assessee to produce books of accounts for finalization of assessment. Assessee produced declaration in Form "F" in support of its claim that certain transactions were inter-State transfers. Assessee then filed an application under Rule 60 of the Andhra Pradesh Value Added Tax Rules, 2005, highlighting the error made in raising the demand based on incorrect turnover.

Power of Supreme Court & High Court under Articles 142 and 226 to entertain a challenge to the assessment order on the sole ground that the statutory remedy of appeal against that order stood foreclosed by the law of limitation however the statutory period prescribed for redressal of the grievance could not be disregarded and a writ petition could not be entertained as doing so would be in the teeth of the principle that the Court could not issue a writ which was inconsistent with the legislative intent. That would render the legislative scheme and intention behind the statutory provision otiose. No finding had been recorded by the High Court against the writ petition filed by assessee that it was a case of violation of principles of natural justice or non-compliance of statutory requirements in any manner, therefore, writ petition filed against foreclosure of same by law of limitation was not sustainable.

4.	**01.05.2020**	***Electrosteel Steels Limited (Appellant)* vs. *State of Jharkhand (Respondent)***	**Jharkhand High Court**

Tax dues not barred by Insolvency Proceedings under Insolvency and Bankruptcy Code (IBC)

The assessee company had challenged the garnishee order issued u/s 46 of the Jharkhand Value Added Tax Act, 2005 (JVAT Act) asking the respondent Bank to pay into the Government Treasury, the sum of Rs. 37,41,41,602, on account of tax/penalty due under the JVAT Act, from the assessee company, who failed to deposit the taxes for the period from 2011-12 & 2012-13, from the Bank account of the Company. The assessee Company had also challenged the letter dated 22.11.2009, issued by the State Tax Officer, Bokaro to the Respondent Bank, to deposit the amount of Rs. 75,57,000/- by way of demand draft in favour of the Deputy Commissioner, Commercial Taxes, Bokaro in view of the fact that pursuant to the garnishee order, the respondent Bank had furnished the information that only the amount of Rs. 75,57,000/- was available in the assessee's account. The assessee claimed that the amount, could no more be realised by the State Government from the Company, in view of the fact that the State Bank of India had filed a Company Petition, before the National Company Law Tribunal (NCLT) under the IB Code, 2016 which was admitted by the NCLT and the interim resolution professional was appointed. The resolution plan was made and approved. Upon approval of the Resolution Plan, M/s. Vedanta Limited took over the management of the assessee Company. According to the assessee, since no claim was made by the State Government as regards the tax liability in the corporate insolvency resolution process, the claim of the Government was now barred u/s 31 of the IB Code, 2016.

Judgment : Whether once a resolution plan is approved, tax liability of Company which is not claimed by the State Government during insolvency resolution process, is completely barred under Section 31 of the IB Code, 2016 – NO.

Whether if State Government has never been involved in corporate insolvency resolution process, such plan cannot be a binding on it and it can claim outstanding tax liabilities – YES.

5.	**27.04.2020**	***Commercial Taxes Officer (Appellant)* vs. *Bombay Machinery Store (Respondent)***	**Supreme Court of India**

Tax Administration Authorities cannot give their own interpretation to legislative provisions on the basis of their own perception of trade practice.

The Respondent had purchased electric motors and its parts in the said financial year out of the State and sold them to purchasers within the Kota region of the State of Rajasthan. For such sales, they obtained the benefit of exemption under Section 6(2) of the Central Sales Tax Act, 1956. These goods had remained with the transport company upon arrival in Kota for more than a month.

The question was whether as a condition of giving the benefit of Section 6(2) of the Central Sales Tax Act, 1956, which was operational at the material point of time., the tax authorities can impose a limit or timeframe within which delivery of the respective goods has to be taken from a carrier when the goods are delivered to a carrier for transmission in course of inter-state sale.

The Honorable Supreme Court issued the clarification on the question of law that whether as a condition of giving the benefit of Section 6(2) of the Central Sales Tax Act, 1956, the tax authorities can impose a limit or timeframe within which delivery of the respective goods has to be taken from a carrier when the goods are delivered to a carrier for transmission in course of the inter-state sale. They said if the authorities felt any assessee or dealer was taking unintended benefit under the aforesaid provisions of the 1956 Act, then the proper course would be a legislative amendment.

The Tax Administration Authorities cannot give their own interpretation to legislative provisions on the basis of their own perception of trade practice. This administrative exercise, in effect, would result in supplying words to legislative provisions, as if to cure omissions of the legislature.

6.	***14.02.2020***	***Great Sands Consulting Private Limited (Appellant) vs. Union of India & ors. (Respondents)***	**Bombay High Court**

Cancellation of GST Registration without considering reply of Taxpayer- HC set aside the order

In this case, order for cancelling the GST Registration has been passed without considering the reply and on the ground that no reply is filed, the impugned order will have to be set aside and the proceedings will have to be restored to the stage of show cause notice.

The Petitioner challenged the order of cancelling the registration of the Petitioner under the CGST Act, 2017. The impugned order was passed without considering the reply submitted by the petitioner to the show cause notice and on the ground that no reply is filed. Thus, the impugned of cancelling the registration of the Petitioner is set aside and the proceedings are restored to the stage of issuance of show cause notice.

7.	**16.11.2019**	***Jay Bee Industries (Appellant)* vs. *Union of India (Respondent)***	**Himachal Pradesh High Court**

Whether Input Tax Credit (ITC) can be denied on procedural grounds?

The Jay Bee Industries the Appellant was unable to upload Form TRAN-1 due to technical glitches. They were unable to get the benefits of transitional Input Tax Credit (ITC). The GST Laws contemplate seamless flow of tax credits on all eligible inputs on every sale and purchase occasion and resulting in a progressive system of taxation at every occasion. Input Tax Credits (ITC) in TRAN-1 are the credits legitimately accrued in the GST transition. Due date contemplated under the laws to claim the transitional credit is procedural in nature.

Judgment: The respondents are directed to provisionally allow the petitioner to upload the tran 1 return by opening a window by whatever mode – it is clarified that the return filed, if any, shall be subject to the outcome of the present petition.

8.	**16.11.2019**	**In re Carnation Hotels Private Limited**	**AAR KARNATAKA**

Accommodation services provided to SEZ units are to be treated as zero rated supplies

The applicant has his registered office in New Delhi , who proposed to operate hotels and rent out the rooms to the employees of SEZ units sought advance ruling whether such accommodation services rendered by the applicant to SEZ units can be treated as 'Zero Rated Supplies' under GST?

Under GST, Supply of goods/services or both to a SEZ Developer/Unit are treated as 'Zero Rated Supplies'. Supply to SEZ developer/units shall be treated as such only if those are used towards authorized operations by SEZ.

Judgment : If the hotel or accommodation services received by SEZ developer/ unit for authorized operations, as endorsed by the specified officer of the zone, the benefit of Zero Rated Supply shall be available to the supplier. Therefore, accommodation services supplied by the applicant to SEZ units are to be treated as 'zero rated supplies'.

9.	**25.09.2019**	**In re M/s Alcon Consulting Engineers (India) Pvt. Ltd.**	**AAR KARNATAKA**

Reimbursement of expenses incurred by employees on company behalf does not attract any GST

While providing consultancy services for construction project, employees of the applicant incurred some expenses on behalf of applicant, advance ruling is sought whether the periodic reimbursement of expenses incurred by staff on applicant's behalf liable to GST.

AAR Karnataka observed that amount paid by employees to the supplier of service is a 'consideration' as if it is paid by the applicant itself for services received by it. This amount reimbursed by the applicant to the employee later on would not amount to consideration for the supplies received by it because the service of employee to its employer, in the course of employment, is neither a supply of goods nor supply of services.

Hence, the same is not liable to GST. AAR held that the amount paid to employees by the applicant as reimbursement of expenses incurred by them in the course of employment are not liable to GST.

10.	**30.04.2019**	***Gurdeep Singh Sachar (Appellant)* vs. *Union of India (Respondents)***	**Bombay High Court**

Online Fantasy Sports Game is a 'Game of Skill' & Subject to 18% GST

The petitioner filed PIL to initiate criminal prosecution against the Company Dream 11 Fantasy Pvt. Ltd. for conducting illegal operations of gambling/betting/wagering activities in the name of Online Fantasy Sports Gaming, which attracts penal provisions of Public Gambling Act, 1867.

As observed by the Honorable Bombay High Court in online fantasy sports game conducted by the Company, participants create virtual teams comprising of players similar to real life teams. The participants compete within a time limit against such virtual teams created by other participants. The winners are decided based on points scored, using statistical data generated by the real-life performance of the players. The participants do not bet on the outcome of the match. The result of the fantasy game contest does not depend on winning or losing of any particular team in any real game on any given day.

The Honorable Bombay High Court held that success in Dream 11 game arises due to superior sports knowledge, judgment and attention of the participants. Therefore, the Online Fantasy Sports Gaming is a 'game of skill' and not any 'game of chance'.

Thus held by Honorable Bombay High Court that Online Fantasy Sports gaming of the company are not gambling services, hence, 18% GST rate shall be applicable.

Source:

1. *TaxGuru*
2. *Manupatra*

GENERAL LAWS

1.	**15.06.2020**	***Gaurav Jain* vs. *Union of India & Anr*, W.P.(C) 3519/2020, Para 4**	**High Court of Delhi**

Court cannot do charity at the cost of others. Charity beyond law is an Injustice to Others

This petition, filed as public interest litigation on behalf of the tenants resident in Delhi, is thoroughly misconceived and baseless. The general prayer for waiver of rent, cannot be granted by this Court while exercising powers under Article 226 of the Constitution of India. The payment of rent depends on a contractual arrangement between the tenant and the landlord. The prayer in the petition in essence asks landlords to forgo the consideration for their premises already retained by the tenant. The powers/discretion for waiving of such consideration (rent) vests first with the landlords, who are contractually entitled to the same. This Court will be extremely slow in interfering with the contractual terms which have been entered into by the parties to the contract. It is not the case of the petitioner that all such contracts were entered into under coercion, fraud, mistake, undue influence etc. nor was there any compulsion, on the part of tenant to enter into such contract with landlord. Although the prayer in the petition is not limited to a particular class of tenants, even assuming the petitioner intends to espouse the cause of the poorer sections of tenants, the prayer cannot be granted in a public interest litigation of this nature. Moreover, the persons who have to waive the payment of rent cannot be joined as party respondents when the petition is not confined to any specific cases. Thus, in absence of all these landlords of the city of Delhi, on their behalf, this Court cannot waive the payment of rent while exercising powers under Article 226 of the Constitution of India. Hence, we see no reason to entertain the prayer for waiver of the rent. It ought to be kept in mind that Court cannot do charity at the cost of others. Charity beyond law is an injustice to others.

2.	**19.06.2020**	**Applicant : Pradeep Kumar Srivastava And 2 Others** **Opposite Party : Vishal Singh And Chief Executive Officer And 2 Others** **Contempt Application (Civil) No. - 1785 of 2020, Para 28.**	**Allahabad High Court**

Suppression or Concealment of Material Facts is not an Advocacy. It is a Jugglery, Manipulation, Maneuvering or Misrepresentation

It is settled law that a person who approaches the court must come with clean hands and put forward all the material facts otherwise he shall be guilty of misleading the court and his application or petition may be dismissed at the threshold. If an applicant makes false statement and suppresses material facts or attempts to mislead the court, the court may dismiss action on that ground alone. The applicant cannot be allowed to play 'hide and seek' or to 'pick and choose' the facts he likes to disclose. Suppression of material facts is not an advocacy. In K.D. Sharma vs. Steel Authority of India and others [(2008) 12 SCC 481 (para-39)], Hon'ble Supreme Court observed that suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation. This rule has been evolved in the larger public interest to deter unscrupulous litigant from abusing the process of court by deceiving it.

INSOLVENCY & BANKRUPTCY CODE

1	**22.01.2020**	***Maharashtra Seamless Limited* vs. *Padmanabhan Venkatesh & Ors. [Civil Appeal No. 4242/2019 & Ors. Para 26, 27, 28, 29***	**Supreme Court of India**

There is no provision in the IBC or Regulations which prescribe that the bid of any resolution applicant has to match the liquidation value and the object behind prescribing the valuation process is to assist the CoC to take a decision on the resolution plan properly

No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of Essar Steel (supra). We have quoted above the relevant passages from this judgment.

It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.

The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel (supra), the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront.

So far as the IA taken out by the MSL is concerned, in our opinion they cannot withdraw from the proceeding in the manner they have approached this Court. The exit route prescribed in Section 12-A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code.

2.	**15.11.2019**	***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)s , Para 79**	**Supreme Court of India**

To upholds the sanctity of overall timeline of 330 days for a CIRP, except in exceptional cases

Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

3.	**10.10.2019**	***Action Ispat & Power Pvt. Ltd.* vs. *Shyam Metalics & Energy Limited & Ors.* [Co. App 11/2019 & CM No. 31047/ 2019, CM No. 34726/ 2019, Para 36**	**High Court of Delhi**

Proceedings under IBC are independent and have an object different from the one envisaged under the scheme of liquidation provided in the Company Law

Thus, the proceedings under IBC are independent and have an object different from the one envisaged under the scheme of liquidation provided in the Company Law. The former aims resolution by way of revival in a manner that benefits all stakeholders, the creditors as well as the company. Thus, the scope of the proceedings before the NCLT is wider – with the object of preserving the company and its business/ commercial activities. When transfer of winding up petition can aid in achieving the aforementioned objective, it ought to be allowed in the interest of justice. The court must be sensitive to the scheme and object of the Code; running of parallel proceedings will indeed be futile, create chaos and confusion as held in Jotun. Reliance placed by the appellant on Jotun is misconstrued, in that it failed to appreciate the true rationale of the

case, wherein the court was clearly of the opinion that the parties would benefit from such transfer, and the court would try the petition only if revival efforts by NCLT were unsuccessful.

4.	**30.05. 2020**	**In the matter of Mr. Mohan Lal Jain, Insolvency Professional (IP), No. IBBI/DC/24/2020, Para 4**	**Insolvency and Bankruptcy Board of India(IBBI)**

The role of RP is vital to the efficient operation of the insolvency and bankruptcy resolution process. The Code casts strenuous responsibilities on an IRP/ IP to run the affairs of the firm in distress as a going concern and to maximize the value of the assets

The Insolvency and Bankruptcy Board of India (IBBI)in the above cited caseobserved that: The role of RP is vital to the efficient operation of the insolvency and bankruptcy resolution process. An IP exercises the powers of the Board of Directors of the firm under resolution, manages its operations as a going concern, and complies with applicable laws on behalf of the firm. He conducts the entire insolvency resolution process: he is the fulcrum of the process and the link between the Adjudicating Authority and stakeholders - debtor, creditors - financial as well as operational, and resolution applicants. The process culminates in a resolution plan that maximizes the value of assets of the firm. The IP must apprise the members of the COC about the correct position of Law.

The Code casts strenuous responsibilities on an IRP/ IP to run the affairs of the firm in distress as a going concern and to maximize the value of the assets. As the key objective of the Code is maximization of the value of the assets, one needs to keep the assets of CD together during the CIRP and facilitate orderly completion of the processes envisaged during the insolvency resolution process and therefore, ensuring that the company may continue as a going concern while the creditors take a view on resolution of default.

IP organises all information relating to the assets, finances and operations of the firm, receives and collates the claims, prepares information memorandum, and provides access to relevant information, so that there is complete symmetry of information among the entitled stakeholders, while maintaining confidentiality. He thus addresses the market failure arising from information asymmetry. The resolution balances the interests of the stakeholders. This requires the services of a third person who does not side with any stakeholder and has no conflict of interests. The law casts this duty on the IP and makes several provisions to ensure his integrity, objectivity, independence and impartiality. It also requires him to be a fit and proper person. Given the responsibilities, an IP requires the highest level of professional excellence.

TRADE MARKS ACT

1.	**10.06.2020**	***M/s. ITC Limited* vs. *Nestle India Limited*, C. S. No. 231 of 2013, Para 21,22,23**	**High Court of Judicature at Madras**

"Magic", "Masala" Common Words in Packaged Food Industry and it would be Unfair to confer or recognise any Monopoly over the said expression "Magic" and "Masala"

In this connection, reference to the Latin phrase "Res Ipsa loquitur" i.e. the thing speaks for itself is apposite. Though traditionally this doctrine was used in the case of tortious liability in accident case, it appears that the Courts have over a period of time used this phrase for resolving Trade Mark disputes as well.

However, at the same time, the plaintiff has used the expression "Magic Masala" in a laudatory manner to praise the "Masala" in the sachet. Laudatory epithet cannot be given monopoly or protection as has been held by Courts. The expression "Masala" signifies a mixture of ground spices used in Indian cooking. It is a household name in Indian culinary and is used for describing a mixture of different spice. It is a generic name to collectively call a mix of different spice. The said word is used across length and breadth of the county irrespective of the zone, culture and geographical location.

Taste of masala varies from place to place and is peculiar to the geographical region and location. It is a common name for describing the mixture of spice in majority of the Indian languages. Therefore, it can never be appropriated.

The word "Magic" is also a common word in the food and cosmetic industry. It is not a coined or invented word. It is inherently not a distinctive word. It cannot be said that it was adopted to distinguish the noodles sold by the plaintiff. Since it is a laudatory word, it can never be monopolized.

Since the words "Magic" and "Masala" are also common word in the packaged food industry and are used by different manufacturers of different brands of "Masalas", it would be unfair to confer or recognize any monopoly over the said expression to the plaintiff whether the exclusion of the defendants or others from the trade and industry.

In my view, neither the plaintiff nor the defendant can claim the monopoly over the respective laudatory words "Magic" or "Magical" along with common word "Masala" to the exclusion of one another.

Therefore, neither the plaintiff nor the defendant can dissect a portion of a label and claim monopoly over it. As such the plaintiff cannot claim monopoly over the expression "Magic Masala".

COMPETITION LAW

1.	**03.06.2020**	***Monsanto Holdings Private Ltd. and Ors. (Appellant)* vs. *Competition Commission Of India & Ors. (Respondent)***	**Competition Commission of India**

An order passed by the CCI under Section 26(1) of the Competition Act is an administrative order and, therefore, unless it is found that the same is arbitrary, unreasonable and fails the Wednesbury test. No interference would be warranted

Specifically, with respect to the decision of the Apex Court as cited by the Petitioners, the Hon'ble Judge noted as follows:

- The Hon'ble Supreme Court in that case did not accept the contention that the jurisdiction of the CCI was ousted by virtue of the telecom industry being regulated by a statutory body (TRAI); and
- The Hon'ble Supreme Court did not accept the contention that the jurisdiction of the CCI in respect of matters, which are regulated by a specialised statutory body, were excluded from the applicability of the Competition Act.

Thus, the Hon'ble Judge observed that this decision does not support the Petitioners' contention that the Patents Act being a special act in respect of patents excludes the applicability of the Competition Act in respect of the matters that relate to patents on account of any implicit repugnancy.

In view of the above, the Hon'ble Judge upholding the jurisdiction of CCI and dismissing the writ petition of the Petitioners, held that an order passed by the CCI under Section 26(1) of the Competition Act is an administrative order and, therefore, unless it is found that the same is arbitrary, unreasonable and fails the Wednesbury test. No interference would be warranted. Since a review on merits was impermissible at the time of the decision of the Hon'ble Judge, therefore, the Hon'ble Judge refrained from examining the merits of the dispute.

Wednesbury Test/Wednesbury Unreasonableness : Meaning

A standard of unreasonableness used in assessing an application for **judicial review** of a public authority's decision. A reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (*Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation (1948) 1 KB 223*). The test is a different (and stricter) test than merely showing that the decision was unreasonable.

2.	**25.08.2014**	***Shamsher Kataria Informant (Appellant)* vs. *Honda Siel Cars India Ltd. (Respondent)***	**Competition Commission of India**

Commission is a statutory body, established under Competition Act/Act with legislative mandate inter alia to prevent practices having adverse effect on competition

The question for determination in the case was of the Jurisdiction of the Competition Commission of India that is the Locus standi. It was specified enquired Whether Commission has jurisdiction to inquire into those conduct of such Opposite Parties/OP's which have not been named specifically in information filed by Informant.

Supreme Court held, Commission is a statutory body, established under Competition Act/Act with legislative mandate inter alia to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. To perform above mentioned functions, under scheme of Act, Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. Moreover Commission was entitled to evolve its own procedure under Section 36(1) of Act for conducting inquiry as contemplated under provisions of Act. Further, said inquiry is set into motion before Commission in accordance with provisions of Section 19 of Act, which is to be conducted by Commission as per procedure provided under Section 26 of Act. Direction under Section 26(1) is an administrative direction to Director General/ DG for investigation of contravention of provisions of Act, without entering upon any adjudicatory or determinative process. It does not effectively determine or affect rights or obligation of parties.

ENVIRONMENT LAWS

1.	**09.02.2017**	***Satara Municipal Council (Appellant)* vs. *Ministry of Environment, Forests and Climate Change and Ors. (Respondent)***	**National Green Tribunal**

Central and/or State Government should appraise and formulate environmental safeguard measures/management plan to be implemented by Irrigation Department, prior to execution of project

Present application filed seeking direction to reconstruct dam. It was in determination that whether direction could be issued for construction of dam.

It is held, that Expert Committee in its report had dealt on issue extensively and had placed its concerns regarding transportation of construction material through existing road. State Government was put under obligation in terms of Ministry of Environment communication to ensure that environmental safeguards, measures plans were formulated and implemented. State Government had responsibility to ensure that environmental safeguard management plan for execution of said project was properly formulated and implemented appropriately. Central and/or State Government should appraise and formulate environmental safeguard measures/management plan to be implemented by Irrigation Department, prior to execution of project. Application allowed.

2.	**01.04.2020**	***Alembic Pharmaceuticals Ltd. (Appellant)* vs. *Rohit Prajapati and Ors. (Respondent)***	**Supreme Court**

Law did not permit grant of ex post facto clearances and that circular was internal communication and did not override provisions of EIA notification

Environmental Impact Assessment notification mandated prior Environmental Clearances (EC) for setting up and expansion of industrial projects. By circular, deadline for obtaining EC under EIA notification was extended for those industrial units which had gone into production without obtaining EC under EIA notification to apply for and obtain ex post facto EC.

First and second Respondents challenged circular before High Court which was transferred to National Green Tribunal (NGT).

NGT held that law did not permit grant of ex post facto clearances and that circular was internal communication and did not override provisions of EIA notification

Hence, present appeal was filed to determine 'Whether in view of requirement of prior EC under EIA notification, provision for ex post facto EC to industrial units could be validly made by means of circular.

The court held that none of the three industries were entitled to the benefit of the exemption contained in Clause 8 of the explanatory note to the EIA notification of 1994. This Court must take a balanced approach which holds the industries to account for having operated without environmental clearances in the past without ordering a closure of operations. The directions of the NGT for the revocation of the ECs and for closure of the units do not accord with the principle of proportionality. At the same time, the Court could not be oblivious to the environmental degradation caused by all three industries units that operated without valid ECs.

INTELLECTUAL PROPERTY RIGHTS : LAWS AND PRACTICES

1.	**20.01.2016**	***Jagatjit Industries Limited (Appellant)* vs. *The Intellectual Property Appellate Board and Ors. (Respondent)***	**Supreme Court**

The jurisdiction of the Registrar and the High Court, though apparently concurrent in certain matters, is mutually exclusive

In this case *Suo Motu* powers of the Registrar were affirmed by the Supreme Court. The Supreme Court of India on January 20, 2016 delivered this judgment, thus putting at rest a controversy that erupted a decade years ago.

The judgment of the Supreme Court is significant as it interprets the interplay of Section 124 and 125 of The Trade Marks Act, 1999 (the Act) with the *suo motu* powers of the Registrar under Section 57(4) of the Act to remove and cancel registrations. The issue is whether a trade mark registration, whose validity is under challenge in a suit for infringement, can be removed only by way of an application before Intellectual Property Appellate Board (IPAB) or whether the power of the Registrar to maintain purity of register and remove erroneously granted registrations is left intact.

2.	**12.07.2016**	***Asea Brown Boveri Ltd. (Appellant)* vs. *Commissioner of Central Excise and Service Tax, LTU (Respondent)***	**CESTAT**

Subject transfers of right to intellectual property, did not come within definition of Intellectual Property Service

Present appeal filed against demand confirmed against Appellant under category of Intellectual Property Service under Section 73 of Act along with interest. The question discussed was whether transfer of technical know-how was covered under taxable service of Intellectual Property Service. It was Held, that subject matter of transfer of various documents, designs, software, etc. were not covered under definition of Intellectual Property Right. Subject transfers of right to intellectual property, did not come within definition of Intellectual Property Service. Service provided by foreign companies by way of transfer of subject matter could not be covered under taxable service of Intellectual Property Service. Hence Appeal allowed.

3.	**18.10.2018**	***Sahil Kohli (Appellant)* vs. *Registrar of Trade Mark and Ors. (Respondent)***	**IPAB**

If the letter filed by the opponent was time barred and the same amounts to failure to comply with the provisions of rule 45 (1) of the Trade Marks Rules 2017

The issue regarding the request for extension of time has been discussed in the judgment by the Intellectual Property Appellate Board (IPAB)

Rule 45(1) is a rule provided under the Trade Mark Rules which cannot operate in an inflexible manner till the time there is a provision for extension of time after showing sufficient cause under the provisions of Section 131 of the Trade Marks Act, 1999 and there is a mechanism for extension of time set in place as per the scheme of the Trade Marks Act, 1999 and Trade Marks Rules 2017. However, the position becomes altogether different when any party doesn't avail the benefits of the provisions of Section 131 by filing the extension of time application in a prescribed manner accompanied by the prescribed fees.

The provisions of Section 131 of the Trade Marks Act, 1999 can be availed only, when an application is made to the Registrar in a prescribed manner and prescribed fees, showing the sufficient cause for extending the time period for doing any act. However, in the case, no extension application had been filed by the Appellant and therefore, the benefit of the provisions of Section 131 of the Trade Marks Act, 1999 cannot accrue to the Appellant. Therefore, in the absence of any extension application in the prescribed form along with prescribed fee, it cannot be said that there exists any occasion for the Registrar to condone the delay which has occasioned on account of non-compliance of the provisions of Rule 45(1).

No compassionate view could be taken in favor of the Appellant when the Appellant had got numerous opportunities to file request for extension of time, which included time period between December 27, 2017 till February 27, 2018, up to March, 2018, and later up to the date of hearing.

4.	**08.01.2019**	***Monsanto Technology LLC and Ors. (Appellant)* vs. *Nuziveedu Seeds Ltd. and Ors. (Respondent)***	**Supreme Court**

Nature of injunctive relief granted by Single Judge was in order and merits no interference during pendency of suit

Present appeal was against order of High Court dismissing Plaintiffs' appeal upholding Defendants' contention with respect to patent exclusion under Section 3(j) of Act and that Plaintiffs were at liberty to claim registration under PPVFR Act, Consequentially, allowed Defendants' counter claim - Further, Plaintiffs were required to continue with their obligations under sub-license agreement including payment of licence fee/trait value by Defendants in accordance with law - Whether Division Bench was right in dismissing Plaintiffs' appeal upholding Defendants' contention with respect to patent exclusion under Section 3(j) of Act.

Division Bench ought to have confined itself to examination of validity of order of injunction granted by learned Single Judge only. Nature of injunctive relief granted by Single Judge was in order and merits no interference during pendency of suit.

Order of Division Bench was set aside. Order of Single Judge was restored and suit was remanded to learned Single Judge for disposal in accordance with law.

Appeals and intervention applications disposed off.

5.	**25.04.2019**	***Anil Verma (Appellant)* vs. *R. K. Jewelers SK Group and Ors. (Respondent)***	**IPAB**

In so far as the expression "WE BUY GOLD" is concerned, the same in fact is a complete sentence which describes what the Plaintiff does i.e. it buys gold. Thus, the mark "WE BUY GOLD" is prima facie held to be descriptive in nature

The order dated 31st August, 2018 was clear and categorical. There could not have been any confusion in the said order. The said order clearly records that 19 centres of the Defendants were using the name "24 Karat CASH FOR GOLD".

Status quo was directed to be maintained, and it was directed that no new centres would be opened. Thus, clearly, the 19 running centres could not be disturbed for use of the impugned marks, while the interim injunction application was being heard. Only new centres could not be opened under the impugned marks.

Despite, complete knowledge of this order, the Plaintiff has taken active steps after the filing of the present suit, to exert pressure on the Defendants by filing a criminal complaint, writing repeated representations to the police authorities, approaching the MM in respect of falsification of the marks in addition to the allegation of forgery. The allegation of forgery was being gone into by the IPAB and the IPAB‟s order mentions the telephonic conversation, which was recorded with the employee of the courier agency. The IPAB came to the conclusion that the letter of the Defendants had not reached the Trademark Registry in time and accordingly, grant of trademark registration was upheld in favour of the Plaintiff. The issue of forgery and issue of use of the marks were, thus, pending in two separate forums i.e. the IPAB and this Court. The IPAB gave findings in favour of the Plaintiff in its order dated 18th October, 2018. This Court had permitted 19 centres to use the mark on 31st August, 2018. A combined reading of these two orders, clearly shows that the allegation of forgery was pressed before the IPAB which had held that the evidence of the Defendants was not submitted in time. This Court had, after hearing the matter at the ad-interim stage, granted protection to the Plaintiff after hearing the Defendants on 31st August, 2018.

BANKING LAWS

1.	**06.02.2020**	***Canara Bank (Petitioner)* vs. *United India Insurance Co. Ltd. (Respondent)***	**Supreme Court**

Beneficiaries of the policies taken out by the insured are also 'consumers' under the Consumer Protection Act

In the above case, some farmers had stored their agricultural produce in the cold storage run by a partnership firm and took loan from the Canara Bank against the agricultural produce stored in the cold storage. The cold store was insured with United India Insurance Co. Ltd. A fire took place in cold store, the entire building with agricultural produce was destroyed. The cold store owners had taken out a comprehensive insurance policy and raised claim with the insurance company but the claim was repudiated on the ground that the fire was not an accidental fire. The farmers also issued notice to insurance company in respect of the plant, machinery and building but this claim was also repudiated by the insurance company on additional ground that the farmers had no *locus standi* to make the claim and there was no privity between the farmers and insurance company. The farmers filed a claim against cold store, Canara Bank and the Insurance Company.

It was found that in the tripartite agreement among the farmers, Canara Bank and Cold store, it was mandatory to insure the agricultural produce hypothecated with the Canara Bank.

The Honorable Supreme Court held that the beneficiaries of the policies taken out by the insured are also 'consumers' under the Consumer Protection Act, even though they are not parties to the contract of insurance.

2.	**02.03.2020**	***Union Bank of India (Petitioner)* vs. *Rajat Infrastructure Pvt. Ltd. & Ors. (Respondent)***	**Supreme Court**

The High Court cannot waive pre-deposit for preferring appeal before Debt Recovery Appellate Tribunals

The Honorable Supreme Court held that the keeping in view the language of the Section even if the amount or debt due had not been determined by the Debt Recovery Tribunals (DRT), the appeal could not be entertained by the Debt Recovery Appellate Tribunals (DRAT) without insisting on pre-deposit. The DRAT, at best could, after recording the reasons, have reduced the amount to 25% but could not have totally waived the deposit. The Supreme Court also held that the right of appeal conferred under Section 18(1) of the SARFAESI Act is subject to the conditions laid down in the second proviso therein which postulates that no appeal shall be entertained unless the borrower has deposited 50% of the amount of debt due from him as claimed by the secured creditors or determined by the DRT, whichever is less. The third proviso enables the DRAT, for reasons to be recorded in writing, to reduce the amount of deposit to not less than 25%.

3.	04.03.2020	*Internet and Mobile Association of India* vs. *Reserve Bank of India*	Supreme Court

Crypto-currency exchanges can restart their operations in India, and trade in crypto-currency can be conducted through these exchanges

The Reserve Bank of India had issued a circular on 6 April 2018, which prohibited banks and other entities regulated by it from both dealing in Virtual Currencies, as well as from providing services to any individual or entity dealing with or settling Virtual Currencies. The effect of the prohibition was that exchanges through which Virtual Currencies were traded could no longer maintain and operate a bank account, thereby putting an end to the business of Virtual Currency trading that required conversion from fiat currencies using formal banking channels. Pertinently, at the time the Circular was issued, there was no legislative ban on the use and trading of Virtual Currencies in India, and by the Reserve Bank of India's proscription, Virtual Currencies were ring-fenced from the formal economy. The Circular issued by the Reserve Bank of India was based concerns that VCs Virtual Currencies were prone to hacking and there could be speculation on account of there being no underlying asset and the resultant volatility could lead to significant losses. The RBI also concerned that Virtual Currencies could potentially lead to money laundering and terrorist financing.

The Honorable Supreme Court has held that crypto-currency exchanges can restart their operations in India, and trade in crypto-currency can be conducted through these exchanges.

4.	*17.03.2020*	*Bank of Baroda (Petitioner)* vs. *Kotak Mahindra Bank Ltd. (Respondent)*	Supreme Court

The period of limitation shall be governed by the Act and not by Section 44A of the CPC, since the latter provides only for the procedure to be followed for executing a foreign decree

Kotak Mahindra Bank Ltd., issued a Letter of Credit for US $1,794,258 on behalf of its customer M/s. Aditya Steel Industries Limited in favour of M/s. Granada Worldwide Investment Company, London. The appellant Bank of Baroda was the confirming bank to the said letter of credit. The Vysya Bank issued instructions to the London branch of the appellant on 12.10.1992 to honour the Letter of Credit. Acting on this instruction the London branch of the appellant discounted the Letter of Credit for a sum of US $ 1,742,376.41 and payment of this amount was made to M/s Granada Worldwide Investment Company on 13.10.1992.

Later in 2009, Bank of Baroda filed an Execution Petition against Kotak Mahindra Bank under Section 44A read with Order 21 Rule 3 of the CPC for recovery of Rs. 16,43,88,187.86. The Execution Petition was filed in view of the decree passed by the High Court of Justice, Queens Bench, Divisional Commercial Court of London (UK Court) on 20 February 1995 for US$ 1,267,909.26 in favour of Bank of Baroda. The maintainability of the Execution Petition was challenged primarily on the ground of limitation.

One major Issue in the case for the court to decide '*What is the limitation for filing an application for execution of a foreign decree of a reciprocating country in India?*'

For this major issue of the case that related to the limitation period , the Supreme Court had rejected the argument that there is no limitation period for execution of foreign decree in India while observing that the term "*application*" in Section 3 of the Act shall be deemed to include execution petitions The period of limitation shall be governed by the Act and not by Section 44A of the CPC, since the latter provides only for the procedure to be followed for executing a foreign decree.

5.	**05.05.2020**	***Pandurang Ganpati Chaugule (Petitioner)* vs. *Vishwasrao Patil Murgud Sahakari Bank Limited (Respondent)***	**Supreme Court**

Recovery is an essential part of banking; as such, the recovery procedure prescribed under section 13 of the SARFAESI Act, is applicable to Co-operative banks

The question in this matter for the determination was 'Whether the 'SARFAESI Act' is applicable to Cooperative Banks ?

The Honorable Supreme held that the cooperative banks established under the State Legislation and Multi State Cooperative Banks are 'banks' under section 2(1)(c) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).

It was held that the recovery is an essential part of banking; as such, the recovery procedure prescribed under section 13 of the SARFAESI Act, legislation relatable to Entry 45 List I of the Seventh Schedule to the Constitution of India, is applicable.

It was further held that the Parliament has legislative competence under Entry 45 of List I of the Seventh Schedule of the Constitution of India to provide additional procedures for recovery under section 13 of the SARFAESI Act with respect to cooperative banks. A

It was concluded that the provisions of Section 2(1)(c)(iva), of SARFESI Act, adding "*ex abundanti cautela*", 'a multi State cooperative bank' is not ultra vires as well as the notification dated 28.1.2003 issued with respect to the cooperative banks registered under the State legislation.

6.	**24.04.2020**	***M/s. Tripower Enterprises Pvt. Ltd. (Petitioner)* vs. *State Bank of India & Ors. (Respondent)***	**Supreme Court**

Guarantor cannot be allowed to approbate and reprobate from the commitment made in successive proceedings before the DRT and the High Court

The Honorable Supreme Court held that guarantor has raised the issue regarding the validity of subject mortgage in different proceedings unsuccessfully. It was held that the concerned forum / Court unambiguously rejected the same. It was held, more importantly, that the guarantor through its Director(s) having offered to pay the entire outstanding dues and also admitting on affidavit the factum of existence of subject mortgage in favour of the Bank, the question of showing any indulgence to the guarantor (by the High Court) did not arise.

It was held that the guarantor cannot be allowed to approbate and reprobate from the commitment made in successive proceedings before the DRT and the High Court.

The Court made it clear that the parties are free to raise all contentions available to them on facts and in law before the DRT in the pending O.A. No. 11/2008, which need to be decided on their own merits in accordance with law. In other words, the DRT will be free to pass appropriate directions in respect of the stated documents including in respect of the title documents made over to the appellant herein in terms of this order, if necessary.

7.	**24.04.2020**	***Union of India (UOI)(Petitioner) and Ors.* vs. *U.A.E. Exchange Centre (Respondent)***	**Supreme Court**

The transaction(s) had completed with the remitters in foreign country, and no charges towards fee/commission could be collected by the liaison office in India in that regard

The matter was related to the Direct Taxations, wherein Liability of profit has to be accessed as Respondent was engaged in offering, among others, remittance services for transferring amounts from foreign country to various places in India. The question was 'Whether activities of Respondent-Assessee would qualify expression of preparatory or auxiliary character.'

Analyzing the facts the Apex Court observed that the Respondent was not carrying on any business activity in India as such, but only dispensing with the remittances by downloading information from the main server of Respondent in foreign country and printing cheques/drafts drawn on the banks in India as per the instructions given by the NRI remitters in foreign country. The transaction(s) had completed with the remitters in foreign country, and no charges towards fee/commission could be collected by the liaison office in India in that regard.

And since by a legal fiction it was deemed not to be a PE of the Respondent in India, it was not amenable to tax liability in terms of tax treaty.

8.	**27.11.2017**	***Agarwal Tracom Pvt. Ltd. (Petitioner)* vs. *Punjab National Bank (Respondent)***	**Supreme Court**

Section 17(1) provides that "any person" can file an appeal against any actions of the creditor under Section 13(4) of the Act. Thus, the auction purchaser can also file an appeal if aggrieved by any such actions

The matter in the question was 'Does an auction purchaser have the remedy under Section 17 of the Act while challenging the action of the secured creditor of forfeiting the deposit?'

The Court read Section 17(2), Section 13(4) and Rule 9(5) together to hold that such action of the creditor will form a part of Section 13(4) of the Act. Rule 9(5) of Security Interest (Enforcement) Rules, 2002, provides for forfeiture of deposit if the auction purchaser commits any default in the payment of consideration of sale. Section 17(2) empowers the Tribunal to examine all the issues arising out of any of the measures which may be taken under Section 13(4) of the Act. Further, the phrase "provisions of this act and rules made thereunder" appears repeatedly in Section 17. Thus, the court observed that Rules 8 and 9 are also included within the ambit of Section 13(4) for the purposes of Section 17 of the Act as they are instrumental in the completion of the sale of secured assets, which is the ultimate aim of the methods provided under Section 13(4).

Section 17(1) provides that "any person" can file an appeal against any actions of the creditor under Section 13(4) of the Act. Thus, the auction purchaser can also file an appeal if aggrieved by any such actions.

In the decision, the Supreme Court dismissed the appeal and upheld the verdict of the High Court. It is a settled principle of law that the writ jurisdiction of High Courts or the Supreme Court is of extraordinary nature and should be exercised only if no other effective remedy is available with the parties. However, as it is observed that an effective remedy exists under the provisions of law, the writ petition cannot be maintained.

BUSINESS STRATEGY AND MANAGEMENT

1. **How Mellow Made $200,000 + In Preorder Sales in Less Than a Month**

   In this case, Mellow is a company that makes a magical kitchen robot that syncs with smartphone to cook for its customers at their convenience. The founder, Ze Pinto Ferreira was interning at Braun when he realized everything he knew (mechanical engineering, food, product design) could intersect to create impactful work. He knew the sous-vide he wanted to create should change home cooking dramatically, but he also knew he couldn't do it alone. That's when he set off to find a co-founder, Catarina who was working as a freelance designer. He managed to convince her to use her talents on a potentially groundbreaking company and the two of them built Mellow together.

   Using Trycelery.com as their pre-order platform, Mellow was launched to great success. They collected a total of $64,000 in pre-orders in ONLY 3 days, and eventually made $200,000+ in less than a month. This case mentions about the marketing approach adopted in order to reach out directly to 100+ reporters.

2. **SumoJerky – The Results of the 24-Hour Business Challenge**

   This case speaks bout Noah Kagan who is known for starting multiple companies and growing all of them to 7 - and 8 - figures in revenue (including the budgeting startup Mint.com). As part of a 24-Hour Business challenge to prove to anyone that they can start a business today, Noah asked his followers which business he should start so he could show he would make $1,000 a day

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Part B
Case Studies

ROLE OF COMPANY SECRETARY WITH RESPECT TO DISCLOSURES AND COMPLIANCES*

Introduction

Deccan Chronicle Holdings Ltd. ("DCHL" or the "Company") is a publisher of newspapers such as 'Deccan Chronicle', 'Asian Age', 'Financial Chronicle' and 'Andhra Bhoomi'. In December 2004, the Company had come out with a public issue of 80,13,100 shares of Rs. 10 each at Rs. 162 per share and had got its shares listed on BSE and NSE.

DCHL announced the first buy-back in July 2009 for up to 3.50 cr. equity shares of Rs. 2 each (minimum of 1 cr. equity shares) from the open market through stock exchanges at a price not exceeding Rs.100/- per equity share for an aggregate amount not exceeding Rs. 180 crore. The buyback commenced on August 12, 2009 and closed on January 25, 2010 wherein 26.54 lakh equity shares were bought back at an average price of Rs. 97.78 aggregating Rs. 25.95 crore.

DCHL announced another buy-back of its equity shares in May 2011 up to 3.45 cr. equity shares and minimum of 1 cr. equity shares from the open market through stock exchanges.

SEBI's Investigation

SEBI conducted an investigation to ascertain:-

- if the promoters, Chairman, Vice Chairman of DCHL, have made any fraudulent pledging of shares of DCHL and have made wrong, misleading or inadequate disclosures to the stock exchange, as alleged in the media reports.
- whether there was understatement of loans by DCHL in its financial statements for the financial years from 2008- 09 to 2011-12.

The investigation, inter alia, revealed that:

(1) DCHL had understated its outstanding loans to the tune of Rs. 1,339.17 crore, Rs. 2,982.07 crore and Rs. 3,347.41 crore for the year 2008-09, 2009-10 and FY 2010-11 respectively.

(2) The Company had understated the interest and financial charges from financial year 2005-06 onwards and the cumulative amount of such understated amount stood at approximately Rs. 753.91 crore up to September 30, 2012.

(3) Without having adequate free reserves DCHL carried out buyback of its shares which misled the uninformed investors and shareholders about the perceived valuation, strong financials, and adequate free reserves of the company which actually was not true and might have influenced / induced the decision of investors and shareholders, particularly when the price of the share was declining since May 2010.

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* *Case Study written by Puneeta Ahuja, Consultant and reviewed by Mahesh Airan, Assistant Director, The ICSI.*

Views expressed in the Article are the sole expression of the Author and may not express the views of the Institute.

(4) The Company had manipulated its financials and the announcement for buyback of its securities was made even in the absence of adequate reserves.

(5) The Company had carried out the buyback of shares beyond the prescribed limit and also did not make any disclosure about change in its shareholding consequent to the buyback.

(6) The promoters and directors of DCHL, while making disclosure to the stock exchanges for the quarter ending on September 30, 2012 have for the first time disclosed that 99.81% of their shareholding in DCHL is encumbered / pledged whereas the promoters had obtained loans from financial institutions, banks, or finance companies either by way of pledging their shareholding or by way of entering into Non disposal Undertaking or Security Net Agreements since March 2011.

DCHL along with its promoters, chairman and vice-chairman who are responsible for the overall management of DCHL have, *inter alia*, failed to comply with the following conditions of the listing agreement, namely –

(a) Failed to disclose to the stock exchange material price sensitive information on the date of entering into agreement with DCM (partnership firm with its promoters and directors).

(b) Misleading financial information (i.e. understatement of interest and outstanding loans and thereby overstatement of profits) in its Annual Report for FY 2008-09, FY 2009-10 and FY 2010-11 which were not true and fair.

(c) Delay in filing shareholding pattern for quarters ended Sep-12 and Dec-12 to the stock exchange.

(d) Failure to provide updated information on the shareholding pattern from quarter ended Mar-13 onwards on its website.

(e) Failure to appoint Company Secretary of the Company.

(f) Failure to disclose related party transactions pertaining to funds advanced to Flyington Freightors Ltd., a related entity.

Show cause notice to the Company Secretary

Pursuant to the investigation, a common show cause notice ("SCN") dated May 10, 2016 was issued to its, Company Secretary of the company for the above mentioned allegations, based on the findings in the investigation conducted by SEBI, which further includes that Company Secretary being the signatories to the public announcement made by the Company on May 6, 2011 for buy back of its equity shares without having adequate free reserves which misled the uninformed investors and shareholders about the perceived valuation, strong financials or adequate free reserves of the company and these actions have wrongfully influenced and induced the decision of investors and shareholders particularly when the price of the share was declining since May 2010.

Reply of the Company Secretary

- He was appointed as a company secretary of DCHL on April 21, 2009 and resigned from the services of the Company vide resignation letter dated May 1, 2012. He had stopped attending the office and discharging his official duties at DCHL from June 1, 2012. The

Company has filed Form No. 32 showing relieving of Company Secretary on August 31, 2012.

- During his employment in DCHL, he was not invited to the meetings of the board of directors of the Company. The promoters/directors used to meet prior to the scheduled time on the board meeting date (for approval of results, etc.) and would direct him to send the financial results to the stock exchanges. He is not aware as to what transpired in those meetings. Based on the requirement for loan/borrowings any resolutions to be passed were discussed in the meeting.
- With regard to non-disclosure of encumbrance/pledge of shares it has been stated that neither he was involved in the transactions nor he had knowledge of the same. Further, the responsibility to make disclosure under regulation 31(1) r/w regulation 31(3) of the Takeover Regulations, 2011 is solely on the promoters.
- With regard to alleged mis-statement in books of accounts, it has been stated that at no point of time he was entrusted with any duties or responsibilities relating to the accounting or finance function of the Company by the management and as such he had no knowledge of the loan, bank correspondences, pledge etc.
- The presumption as to correctness of the Audited Financial statement is established immediately upon signing of the same by the Statutory Auditors and if any understatement of outstanding loans is noticed upon investigation then a person who is merely a company secretary may not be held liable as he was not involved in preparation and finalisation of annual accounts. He had signed the financial statements of the Company under the provision of Section 215 of the Companies Act, 1956 with a view only to authenticate that the documents were approved by the board of the company.
- He had ascribed his signature on the public announcement for buyback in his capacity as a Company Secretary. It was only in relation to the compliances of procedural formalities for the buy-back of shares and not in respect of financial statements and information contained therein.
- The alleged non-compliances with certain clauses of the Listing Agreement by DCHL have taken place after he had resigned from the Company as Company Secretary. Therefore, he may not be held responsible for the same.

As admitted by the Company Secretary, he was appointed as Company Secretary in DCHL on April 21, 2009. He resigned from the services of the Company vide his resignation letter dated May 01, 2012. The Company Secretary has further claimed that he had stopped attending the office and discharging his official duties at DCHL w.e.f. from June 01, 2012.

The Company Secretary has, inter alia, also contended that during the time when he was in the employment of DCHL, he was not invited to the meetings of board of directors of the Company. He has claimed that the promoters/directors used to meet prior to the scheduled time on the dates of board meeting (for approval of results, etc.) and would direct him to send the financial results to the stock exchanges and that he was not aware as to what transpired in those meetings.

With regard to the alleged mis-statement in books of accounts, the Company Secretary has stated that at no point of time he was entrusted with any duties or responsibilities relating to the accounting or financial transactions of the Company by the management and as such he had no knowledge of the loan, bank correspondences, pledge, etc.

The presumption as to correctness of the Audited Financial statement is established immediately upon signing of the same by the Statutory Auditors and if any understatement of outstanding loans is noticed upon investigation, then a person who is merely a company secretary may not be held liable as he was not involved in preparation and finalisation of annual accounts. He had signed the financial statements of the Company only pursuant to the statutory requirement under Section 215 of the Companies Act, 1956 which is mandatory and the signing was only in the nature of attestation to the effect that these financials have been considered and approved by the directors. He has also contented that as per the provisions of the Companies Act, 1956 the responsibility for accounts and financials rests ultimately on the board of directors.

The requirements of section 215 of the Companies Act, 1956 (section 134 of the Companies Act, 2013) regarding authentication of balance sheet and profit and loss account is given hereunder:-

"215. AUTHENTICATION OF BALANCE SHEET AND PROFIT AND LOSS ACCOUNT

(1) Save as provided by sub-section (2), every balance sheet and every profit and loss account of a company shall be signed on behalf of the Board of directors –
   (i) in the case of a banking company, by the persons specified in clause (a) or clause (b), as the case may be, of subsection (2) of section 29 of the Banking Companies Act, 1949 (10 of 1949);
   (ii) in the case of any other company, by its manager or secretary if any, and by not less than two directors of the company one of whom shall be a managing director where there is one.

(2) In the case of a company not being a banking company, when only one of its directors is for the time being in India, the balance sheet and the profit and loss account shall be signed by such director; but in such a case there shall be attached to the balance sheet and the profit and loss account a statement signed by him explaining the reason for non-compliance with the provisions of sub-section (1).

(3) The balance sheet and the profit and loss account shall be approved by the Board of directors before they are signed on behalf of the Board in accordance with the provisions of this section and before they are submitted to the auditors for their report thereon."

Thus, as per section 215 of the Companies Act, 1956 every Balance Sheet and every Profit and Loss account of the company shall be signed on behalf of the board of directors, in case of companies, (other than banking companies) by its manager or secretary, if any, and by not less than two directors of the company one of whom shall be a managing director where there is one.

Further, the Balance sheet and the Profit and Loss account shall be approved by the board of directors before they are signed on behalf of the board in accordance with the provision of this section and before they are submitted to the auditors for their report thereon. It is a trite law of interpretation that the heading or title prefixed to a particular section or group of sections in a statute can be referred to for construing the legislative intent of an Act of the Legislature, and so, in this case also, section 215 of the Companies Act, 1956, which deals with "authentication of

accounts" should be treated as a preamble to the other provisions spelt out in the Act following the said title on the subject of authentication of accounts.

There exists a Government clarification on section 215 of the Companies Act, 1956 vide circular no. 7/72, dated May 12, 1972 whereby it was clarified that the Department (erstwhile Department of Company Affairs) is of the view that as the authentication by the Secretary is "on behalf of the board of directors" and not in his personal capacity, secretary can be held responsible regarding errors, as an "officer" of the company within the meaning of section 628 of the Companies Act, 1956 and not because of authentication by him under section 215 as such. Where, however, the secretary is charged with the responsibility of maintaining the accounts and also assisting the auditor at the time of auditing, he cannot conceivably escape the consequence of any wrong statement in the accounts.

Role of Company Secretary as prescribed under other case laws

The Hon'ble SAT has examined the role of company secretary, insofar as the requirement of making timely and absolutely true disclosures under the Securities Laws is concerned in various appeals filed in the matter of GHC Ltd.

In this regard, SEBI would also like to draw attention to the findings of the Hon'ble Tribunal in the matter of *Mr. Bhuwneshwar Mishra* vs. *SEBI* (Appeal no. 7 of 2014 – Date of decision – July 31, 2014) which are as under:

"19. Therefore, the company, the Company Secretary and the Chairman of the company have a greater responsibility on their shoulders to ensure, in a free and fearless manner, that the promoters make timely and absolutely true disclosures as regards their respective shareholding in the company in consonance with various regulations prescribed by SEBI and the Listing Agreement. In fact, the companies are required to maintain a register in this respect and if a vast variation is noted by the company, the Company Secretary and the Chairman, in the shareholding pattern of the promoters they are duty bound to inform to the stock exchange or even to SEBI accordingly. Such acts of wrong disclosures are condemned as fraudulent and unfair trade practices.

23. In this connection, it is pertinent to note that the Company, the Company Secretary and the Chairman are not mere conduit to pass-on whatever details they receive from the promoters to the Stock Exchanges irrespective of the records maintained by the Company in respect of the shares which may be held by a promoter at given point of time. The Appellants should have acted more diligently and responsibly and should not have been guided by mere legal opinions. It is settled law that legal opinions are only advisory in nature and not binding on anyone. Therefore, no legal infirmity can be attributed to the impugned order which holds all the appellants guilty of violating the PFUTP Regulations, 2003 and imposes monetary penalties on them."

Observations and Findings of SEBI

Observations - 1

Admittedly, the Company Secretary has served as a Company Secretary in DCHL during the financial year 2009-10 and 2010-11 which means, he has attested the Balance Sheet and Profit

and Loss accounts of DCHL for two of the three financial years in which the accounts have been allegedly fraudulently understated.

The provisions of section 215 of the erstwhile Companies Act, 1956 fasten a duty on the Company Secretary to authenticate the Balance Sheet and Profit and Loss account of the company on behalf of the board of directors. Under the circumstances, as a Company Secretary, cannot plead innocence by stating that he has merely fulfilled a statutory duty by signing the audited accounts which were prepared by the auditors and approved by the board of directors of the Company. The Company Secretary was performing the job of a secretary to the board of directors and it was his duty to aid and advice and assists the board in ensuring that the accounts contained all the true information before the same were approved. Further, he was not merely supposed to attest the accounts but was required to authenticate the Balance Sheet and Profit and Loss account of the Company, which cannot be undermined as a mere routine attestation job but has to be taken up as a serious responsible job of declaring the authenticity of the contents of the accounts and all the information contained therein. The Company Secretary ought to have verified if the audited accounts have contained all the assets & liabilities or any other material facts that needed to be incorporated in the accounts.

Findings - 1

In view of the above, SEBI finds that, Company Secretary has failed to act diligently and responsibly while acting as the company secretary of DCHL at a time when the Company and its directors understated outstanding loans and interest and finance charges in the annual reports for FYs 2008-09, 2009-10 and 2010-11 and thereby overstated the profits of the Company for all the three successive financial years.

Observations – 2

Company Secretary was appointed in DCHL on April 21, 2009. He resigned from the services of the Company vide his resignation letter dated May 01, 2012. He has further claimed that he had ascribed his signature on the Public Announcement for buyback in his capacity as a Company Secretary and that it was only as a matter of compliance of procedural formalities for the buyback of shares and not in respect of any financial statements or information contained therein.

Thus, it is not in dispute here that the Noticee was acting as the Company Secretary of DCHL during the FY 2010-11 when buyback offer worth Rs. 270 crore was made by the Company. It is also an admitted fact that the Company Secretary had ascribed his signature on the public announcement for buyback in his capacity as a Company Secretary of DCHL.

In this regard, SEBI once again rely upon the findings of the Hon'ble Tribunal in the matter of Mr. Bhuwneshwar Mishra vs SEBI (Supra) and SEBI'S observations recorded at clauses A(12) to (14) of para 16 of this Order about the roles & responsibilities vested in the Company Secretary, towards the Company and its board of directors.

SEBI reiterate that as a statutory official of the Company, the Company Secretary should have exercised utmost due diligence and checked the veracity of the buyback offer document and its

legal compliances before authenticating such a document and signing the aforesaid public announcement which apparently violated the provisions of the Companies Act, 1956.

Findings - 2

In the light of the above, SEBI held that the company secretary of DCHL responsible as for signing the public announcement made by the Company on May 6, 2011 for buyback of its equity shares, without having adequate free reserves, which misled the uninformed investors/ shareholders about the perceived and artificially overstated valuation, strong financials and adequate free reserves of the Company which might have certainly influenced/ induced the decision of investors/shareholders particularly when the price of the share was declining since May 2010.

Considering the foregoing, SEBI held Company Secretary equally liable for violation of the provisions of sections 68 and 77A of the Companies Act, 1956 and regulation 3(a), (b), (c), (d), 4(1), 4(2)(f), (k) and (r) of the PFUTP Regulations, 2003 read with section 12A(a), (b) and (c) of the SEBI Act, 1992.

Responsibilities of the Company Secretary

The analysis of facts and evidences which have been alluded to by the SCN and the explanations offered by the Noticees to unfasten them from the liabilities that have been fastened on to them in the SCN for the violations committed by them, succinctly bring out a case, where one finds the Company, its directors and management in cahoots with its company secretary and auditor, have manipulated the accounts by understating the liabilities and expenditure over many years from 2005-06 onwards with an objective to mislead the shareholders and defraud the investors with an artificially projected strong financial statements which were full of falsehood and misrepresentations. The attempt to buyback shares of the Company by the directors and promoters based on the falsely reported reserves amount despite the Company actually lacking the requisite free reserves was another attempt to hoodwink innocent investors and to sell the Company's misplaced false story about its strong fiscal position to its shareholder/investors.

The Company Secretary went on generously authenticating and attesting the financial statements and the buyback offer documents without any application of mind and with an intent to aid and abate the malicious conduct of the Company and its promoters and directors.

Such actions of the Company are replete with glaring manipulations, fraudulent intents and exaggeration of accounts to the extent that it went on for a number of years with the connivance of the Company Secretary and Auditors. Such blatant and egregious misconduct is not conducive for the integrity of securities market and cannot be spared to be viewed leniently, rather such mis-conduct of the Company deserve to be dealt with strictly.

The order of SEBI

However, keeping in view the foregoing factual findings and observations SEBI in order to protect the interest of the investors in the securities market hereby issue the directions to the Company Secretary as follows:

- Company Secretary shall not directly or indirectly provide company secretarial services for a period of one year to any listed company or offer services pertaining to compliance

of obligations of listed companies and intermediaries registered with SEBI in terms of the requirements under the SEBI Act, 1992, the SCRA 1956, the Depositories Act, 1996, those provisions of the Companies Act, 2013 which are administered by SEBI under section 24 thereof and the Rules, Regulations and Guidelines made under those Acts which are administered by SEBI.

- For a period of one year, listed companies and intermediaries registered with SEBI shall not engage the Company Secretary for company secretarial services for issuing any certificate with respect to compliance of statutory obligations which SEBI is competent to administer and enforce, under various laws.

Conclusion

Company Secretary is a vital link between the company and its Board of Directors, shareholders, government and regulatory authorities. Also Section 205 of the Companies Act, 2013 entrusted the Company Secretary with the duty a) to report to the Board about compliance with the provisions of Companies Act, 2013 Act, the rules made there under and other laws applicable to the company, b) to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers, to assist the Board in the conduct of the affairs of the company, c) to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices.

Further a listed company appoints a qualified company secretary as the compliance officer who shall be responsible for ensuring conformity with the regulatory provisions applicable to the listed entity in letter and spirit.

[Reference : https://www.sebi.gov.in/enforcement/orders/dec-2019/order-dated-december-31-2019-in-the-matter-of-deccan-chronicle-holdings-limited_45517.html]

PREFERENTIAL TRANSACTIONS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016 ("IBC")*

1. Jaypee Infratech Limited (JIL) is the Corporate Debtor (CD) Company and Jaiprakash Associates Limited (JAL) is the holding company of JIL; it had approximately 71.64% equity shareholding in JIL.

2. The Corporate Debtor, JIL had mortgaged its properties as collateral securities for the loans and advances made by the Banks and Financial Institutions to its holding company, JAL.

3. The Resolution Professional (RP) filed an application under sections 43, 45, 48, 60 (5) (a) and 66, read with section 25 (2) (j) of the Insolvency & Bankruptcy Code before the Adjudicating Authority(AA) seeking direction that transactions entered into by promoters and directors of the Corporate Debtor creating mortgage of 858 acres of immovable property owned and in possession of the Corporate Debtor , to secure the debt of related party, namely, Jaiprakash Associates Ltd. (JAL) by the way of mortgage deeds dated 12 May, 2014, 4 March, 2016, 24 May, 2016, 29 December, 2016, and 7 March, 2017 are fraudulent and wrongful transactions within the meaning of section 66 of the Code.

4. Resolution Professional (RP) also sought directions against promoters and directors of the Corporate Debtor to make such contributions to the assets of the Corporate Debtor as the Adjudicating Authority may deem fit and direction to lenders of JAL to release or discharge security interest created by the CD over its immovable property.

5. The Adjudicating Authority in its Order dated 16.05.2018 *(Mr. Anuj Jain, RP for Jaypee Infratech Ltd. Vs. Manoj Gaur & Ors. [CA No. 26/2018 in CP No. (IB) 77/ALD/2017]* , held that the mortgage of land of the Corporate Debtor in favour of lenders of JAL amounts to transfer of interest in the property of the Corporate Debtor for the benefit of the creditor, i.e. JAL, and putting it in a beneficial position vis-à-vis other creditors, is a preferential transaction. Further, Adjudicating Authority also held the transactions which were executed during the look back the period that is, from 10 August, 2015 to 9 August, 2017 (date of commencement of CIRP) as fraudulent, preferential and undervalued as defined under section 66, 43 and 45 respectively of the Code. Accordingly, Adjudicating Authority passed an order for release of the security interest created by the Corporate Debtor in favour of lenders of JAL under section 44 (1) (c) of the Code and that the properties mortgaged by way of preferential and undervalued transactions shall be deemed to be vested in the Corporate Debtor under section 48 (1) (a) of the Code.

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* *Case Study written by Chittaranjan Pal, Assistant Director, The ICSI.*

Views expressed in the Article are the sole expression of the Author and may not express the views of the Institute.

6. Appeals before NCLAT: Assailing the aforesaid order passed by Adjudicating Authority accepting the application of IRP in relation to six of the mortgage transactions, the aggrieved parties filed separate appeals before the Appellate Tribunal, the NCLAT. The Appellate Tribunal took note of the facts of the case and the rival contentions and set aside the order passed by Adjudicating Authority on 16.05.2018.

7. Aggrieved by the order of NCLAT, the Interim Resolution Professional for Jaypee Infratech Limited and others appeal to the Hon'ble Supreme Court of India.

8. In appeal, the Supreme Court *(Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited Etc. Etc. [Civil Appeal Nos. 8512-8527/2019 & other appeals])* in its Judgement dated 26th February, 2020 sets the guidelines and laid down factors for Preferential Transactions under the IBC. The Hon'ble Supreme Court held as under:

(a) Preferential Transactions:

Looking at the broad features of Section 43 of the Code, it is noticed that as per sub-section (1) thereof, when the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has, at a relevant time, given a preference in such transactions and in such manner as specified in sub-section (2), to any person/persons as referred to in sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in Section 44. If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference.

As per clause (a) of sub-section (2) of Section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be for the benefit36 of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53.

To put it more explicit, the sum total of sub-sections (2) and (4) is that a corporate debtor shall be deemed to have given a preference at a relevant time if:

(i) the transaction is of transfer of property or the interest thereof of the corporate debtor, for the benefit of a creditor or surety or guarantor for or on account of an antecedent financial debt or operational debt or other liability;

(ii) 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 in accordance with Section 53; and

(iii) preference is given, either during the period of two years preceding the insolvency commencement date when the beneficiary is a related party (other than an employee), or during the period of one year preceding the

insolvency commencement date when the beneficiary is an unrelated party.

(b) Look back period:

The scheme of IBC is to disapprove and disregard such preferential transaction which falls within the ambit of Section 43 and to ensure that any property likely to have been lost due to such transaction is brought back to the corporate debtor; and if any encumbrance is created, to remove such encumbrance so as to bring the corporate debtor back on its wheels or in other event (of liquidation), to ensure pro rata, equitable and just distribution of its assets. Such provisions as contained in Sections 43 and 44 came into operation as the comprehensive scheme of corporate insolvency resolution and liquidation from the date of being made effective; and merely because look-back period is envisaged, for the purpose of finding 'relevant time', it cannot be said that the provision itself is retrospective in operation. Reference to the decision of this Court in the case of Purbanchal Cables (supra) is entirely inapt. In the said case, by virtue of the enactment in question, i.e., Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, a new liability of high rate of interest was created against the buyer in displacement of the general principles of Section 34 of the Code of Civil Procedure. Hence, this Court found that the enactment creating new liability would only be prospective in operation. As noticed, fraudulent preferences in the affairs of corporate persons had been dealt with by the legislature in the Companies Act, 1956 and have also been dealt with in the Act of 2013. Though therein, essentially, the fraudulent preferences and transfers not in good faith are dealt with whereas, in the scheme of IBC, separate provisions are made as regards the transactions intended at defrauding the creditors (Section 49 IBC) as also for fraudulent trading or wrongful trading (Section 66 IBC). The provisions contained in Section 43, however, indicate the intention of legislature that when a preference is given at a relevant time and thereby, the beneficiary of preference acquires unwarranted better position in the event of distribution of assets, the same may not be countenanced. Looking to the scheme of IBC and the principles applicable for the conduct of the affairs of a corporate person, it cannot be said that anything of a new liability has been imposed or a new right has been created. Maximisation of value of assets of corporate persons and balancing the interests of all the stakeholders being the objectives of the Code, the provisions therein need to be given fuller effect in conformity with the intention of the legislature.

We may also observe that if the contentions urged on behalf of the respondents were to be accepted, the result would be of postponing the effective date of operation of sub-section (4) of Section 43 by two years in the case of related party and to one year in the case of unrelated party, and thereby, effectively postponing the application of entire Section 43 for a period of two years! That cannot be and had never been the intention of legislature. It is also noteworthy that by virtue of proviso to sub-section (3) of Section 1 of the Code, different dates can be provided for enforcement of different provisions of the Code; and in fact, different provisions have been brought into effect on different dates. However, after coming into force of the provisions, if a look-back period is provided for the purpose of any particular enquiry, it cannot be said that the operation of the provision itself would remain in hibernation until such look-back period from the

date of commencement of the provision comes to an end. There is nothing in the Code to indicate that any provision in Chapter II or Chapter III be taken out and put in operation at a later date than the date notified. Such contentions being totally devoid of substance, deserve to be, and are, rejected.

(c) Ordinary Course of Business:

Looking to the scheme and intent of the provisions in question and applying the principles aforesaid, we have no hesitation in accepting the submissions made on behalf of the appellants that the said contents of clause (a) of sub-section (3) of Section 43 call for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives. Therefore, the expression "or", appearing as disjunctive between the expressions "corporate debtor" and "transferee", ought to be read as "and"; so as to be conjunctive of the two expressions i.e., "corporate debtor" and "transferee". Thus read, clause (a) of sub-section (3) of Section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by way of such reading of "or" as "and", it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of the core question as to whether corporate debtor has done anything which falls foul of its corporate responsibilities.

In other words, we are clearly of the view that the ordinary course of business or financial Affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health.

(d) Duties and responsibilities of Resolution Professional:

Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the Code and another of the remaining persons.

2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two

sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

3. Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.
4. In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (a) of sub-section (2) of Section 43.
5. In yet further step, such of the scanned and scrutinised transactions that are found covered by clause (a) of sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question 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 per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of Section 43.
6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of Section 43. 7. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

(e) Undervalued and Fraudulent Transactions:

However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving

preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor under Section 47 of the Code. The consequences of undervaluation are contained in Sections 48 and 49. As per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefore. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.

In the present case, it is noticed that NCLT in its detailed and considered order essentially dealt with the features of the transaction in question being preferential at a relevant time but recorded combined findings on all these three aspects that the impugned transactions were preferential, undervalued and fraudulent. Appropriate it would have been to deal with all these aspects separately and distinctively.

Role of Resolution Professional on PUFE Transactions	
Action of RP	**TIMELINE**
The resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.	On or before the seventy-fifth day of the insolvency commencement date
Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66,	On or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board, he shall make a determination

Make an application to Adjudicating Authority for appropriate relief	On or before the one hundred and thirty-fifth day of the insolvency commencement date.
PUFE Transactions as per I & B Code, 2016	
Transaction	**Time line**
Preferential Transactions (Section 43) Preference is said to be given if – (a) Transfer of property happens for the benefit of creditor / surety / guarantor; and (b) Such transfer puts the creditor in beneficial position than what he would have been obtained, in the event of distribution of assets. *Exception :* The following are not considered to be in Preference: 1. transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee; 2. any transfer creating a security interest in property acquired by the corporate debtor to the extent that – (i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property: Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.	• With related party – 2 years preceding the insolvency commencement date. • With others – 1 year preceding the insolvency commencement date.

Undervalued Transactions (Section 45) • Gift is given; or • Transfer the asset for consideration which is significantly less than the consideration provided by the CD • Above transaction is not in ordinary course of business.	• With related party – 2 years preceding the insolvency commencement date. • With others – 1 year preceding the insolvency commencement date.
Extortionate Transactions (Section 50) It's a credit transaction involving the receipt of financial or operational debt. A transaction shall be considered extortionate where the terms: • require the corporate debtor to make exorbitant payments in respect of the credit provided; or • are unconscionable under the principles of law relating to contracts. *Exemption:* It is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.	During the period within two years preceding the date of commencement of insolvency
Fraudulent Transaction (Section 66) Transaction to defraud the creditors during CIRP.	Relevant period – During CIRP

Source:

1. *Mr. Anuj Jain, RP for Jaypee Infratech Ltd.* vs. *Manoj Gaur & Ors.* [CA No. 26/2018 in CP No. (IB) 77/ALD/2017]
2. *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited* vs. *Axis Bank Limited Etc.* [Civil Appeal Nos. 8512-8527/2019 & other appeals]
3. *https://www.ibbi.gov.in/uploads/whatsnew/c1ae27b5ad2d0df6cb82a2fa9e544641.pdf*

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