CASE DIGEST -SERIES 7

(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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Dear Professional Colleagues,

Subject : Case Digest – Series 7

"Education is not the learning of facts but the training of the mind to think."
~Albert Einstein

Earl Warren, Chief Justice of the United States said and I quote, "It is the spirit and not the form of law that keeps justice alive." While each new aspect of human life has solicited the need for a dedicated law, the issues that have cropped over time, their resolution and the decisions accorded therein have paved the way in strengthening the legal structures prevalent and existent in the said areas.

Case laws have come to enjoy a significant place and position in the legal scenario, for it is these instances that have provided an apt and appropriate explanation to the provisions and their relevant applicability and decipherence as regards a certain situation.

As Company Secretaries and as Governance Professionals undertaking distinctive roles under different laws, as Experts dispensing with varied responsibilities and providing multifarious services; it is imperative that not only do we attain knowledge of the law but gain an understanding of the various discourses of the law.

Understanding the need for a comprehensive publication in this regard, the Institute of Company Secretaries of India had rolled out the Case Digest Series taking into account some of the most significant laws touching our professional lives and accumulating the cases arising and finding resolution therein.

I commend the dedicated efforts of the Directorate of Academics in having rolled out six series successfully till date and I hope and believe that this publication titled **Case Digest Series 7** shall prove to be a valuable addition in your reservoir of knowledge and information.

Happy Reading! Happy learning!

With Warm Regards,

(CS Nagendra D. Rao)
President
The Institute of Company Secretaries of India

CASE DIGEST – SERIES 7

(Case Snippets and Case Studies)

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Case Snippets

COMPANY LAW

1.	05.03.2021	*Piyush Dilipbhai Shah & Ors. (Appellants) vs. Syngenta India Limited (Respondent)*	NCLAT

Section 66(1) of the Companies Act, 2013 permits a Company to reduce its share capital in any manner subject to compliance of prescribed procedural requirements

Fact of the case:

In this case the Respondent Company was converted into a Public Company and its shares were listed on Bombay Stock Exchange (BSE). However, subsequently its shares were delisted and after delisting, 3.59% of total paid up share capital of the company comprising of 11,81,036 shares were held publically. Appellants herein are the minority/non-promoter shareholders of the Respondent Company.

The Respondent Company intends to reduce its equity-share capital under Section 66 of the Companies Act, 2013 thereby extinguishing all the non-promoter shareholding. The Appellants submitted that the Respondent Company is making good profits and therefore, the reduction of share capital especially extinguishing the public shares of the Company is unjustified.

The Respondent submitted that Section 66(1) of the Companies Act, 2013 expressly permits the Company to reduce its share capital in any manner including by way of selective reduction subject to compliance of prescribed procedural requirements. It was further submitted that it is a settled principle of law that reduction of share capital of a company is a matter of domestic concern and commercial wisdom of the Company and while reducing the share capital, the Company can decide to extinguish the some of its shares without dealing in the same manner as with all other shares of the same class.

Judgment:

The NCLAT observed that w.r.t. the contention of the Appellants, the Company adopted a selective method for the reduction of the share capital is concerned, Section 66(1) of the Companies Act, 2013 permits the Company to reduce the share capital in any manner and held that the reduction of the share capital is in accordance with law but it is unfair and unjust depriving the fruits of the company to its shareholders. So to protect the economic interest of public shareholders/non-promoter shareholders, the company is directed to revalue the shares by a registered/independent valuers and pay the fair price arrived at by the Valuer based on the latest audited accounts of the Company.

2.	01.03.2021	*A. Navinchandra Steels Private Limited (Appellant)* vs. *SREI Equipment Finance Limited & Ors. (Respondents)*	Supreme Court of India

Insolvency Proceedings are maintainable even if Winding-Up petition is pending against the Corporate Debtor.

Fact of the case:

The Appellant is an operational creditor of Respondent No.2 herein – M/s. Shree Ram Urban Infrastructure Limited ["SRUIL"], the company under winding up .In this petition, the Appellant contended that post admission of a winding-up petition, no petition under Section 7 of the IBC can be filed. The argument was on the fact that in accordance with Section 446 of the Companies Act, 1956 (which is equivalent to Section 279 of the Companies Act, 2013) no suit or other legal proceeding can be initiated once there is admission of a winding up petition.

Another contention raised was that the SREI has suppressed the winding up proceeding in its application under Section 7 of the IBC before the NCLT and has resorted to Section 7 of the IBC only as a subterfuge to avoid moving a transfer application before the High Court in the pending winding up proceeding.

Judgment:

The Supreme Court observed that the IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail vis-à-vis the Companies Act, which is a general statute dealing with companies, including companies that are in the red. The IBC is not only a special statute which must prevail in the event of conflict, but has a non-obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail. A petition either under Section 7 or Section 9 of the IBC is an independent proceeding which is unaffected by winding up proceedings that may be filed qua the same company. It is, thus, not possible to accede to the argument of the Appellant that given Section 446 of the Companies Act, 1956 / Section 279 of the Companies Act, 2013, once a winding up petition is admitted, the winding up petition should trump any subsequent attempt at revival of the company through Section 7 or Section 9 petition filed under the IBC. For all these reasons, therefore, the present appeal is dismissed.

3.	15.02.2021	*Union of India, Ministry of Corporate Affairs (Appellant)* vs. *Delhi Gymkhana Club Ltd. & Ors. (Respondents)*	NCLAT

According to section 242(4), the Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

Fact of the Case:

In view of the allegations of mismanagement in the affairs of the Delhi Gymkhana Club, leading to filing of the Company Petition by Union of India under Section 241(2) of the Companies Act,

2013 before the Tribunal, the NCLT, in its order dated June 26, 2020, had, while refusing to suspend the entire general committee of the Delhi Gymkhana Club, asked the Centre to appoint two members to the managing committee instead. Aggrieved by the order, the Union Government had, in its plea before the NCLAT, said that appointing two members to the general committee did not give it "effective and efficacious remedy to stem the rot" present in the Gymkhana Club.

Judgment:

The NCLAT observed that by restricting membership to select few and conferring benefits on chosen members is perpetrating apartheid in violation of Constitutional goals of social justice and equality and held that the interim relief, to which the Union of India is found entitled to on the strength of a prima facie case demonstrated by it, has to be effective and adequate enough to ensure that the affairs of the Club are conducted in accordance with law and the charter of the Club. The interim relief must prove to be result oriented. Accordingly modifying the interim relief, the NCLAT directed suspension of the General Committee and ordered appointment of an Administrator to be nominated by the Union of India to manage the affairs of the Club and also direct that acceptance of new membership or fee or any enhancement thereof till disposal of wait list applications be kept on hold till disposal of the Company Petition.

4.	**07.01.2021**	***Josco Jewellers Private Limited (Appellant)* vs. *Registrar of Companies, Kerala (Respondent)***	**NCLT, Kochi Bench**

The NCLT allowed Reduction of Paid Up Share Capital Structure of Josco Jewellers Private Limited from Rs. 120 Crores to Rs. 1 Crore

Facts of the case:

The Petitioner Company had filed a petition under Section 66 of the Companies Act, 2013 against the Registrar of Companies, Kerala seeking reduction of its share capital from Rs. 120 crores to Rs. 1 crore. The decision to reduce the company's share capital was taken subsequent to the transfer of the jewellery retail business to Josco Bullion Traders Private Limited. After a review of the capital structure, the Board of Directors of the Petitioner Company observed that the company's paid up capital was more than the required amount for the existing business of the company and that it would be beneficial for the company to remit back its excess capital by way of reduction of share capital. Therefore, the Board of Directors passed a resolution approving the proposed reduction of share capital. Further, a Special Resolution has also been passed in the Extra Ordinary General Meeting in accordance with Section 66(1) of the Companies Act, 2013.

When the Registrar of Companies was called upon to respond, he submitted that the Regional Director is the competent authority by virtue of the powers delegated to him by the Central Government to decide on the matter. After the Regional Director filed a report giving his approval to the capital reduction, the NCLT proceeded to allow the prayer.

Judgment:

The National Company Law Tribunal, Kochi Bench held that since all the requisite statutory procedures have been fulfilled and no objections has been received from any shareholders, the company petition filed for reduction of its share capital is hereby allowed.

5.	05.01.2021	***Naresh Kumar Poddar (Appellant)* vs. *Union of India, through Secretary, Ministry of Corporate Affairs and another (Respondent)***	**Calcutta High Court**

Disqualification of director due to non-filing of the annual return and financial statement of the company for three financial years.

Fact of the case:

The petitioner was a director of a Private Limited Company, namely, Lambodar Vinimay Private Limited whose name was removed/struck off from the Register of Companies. Accordingly, the petitioner's Director Identification Number (DIN) and Digital Signature Certificate (DSC) were deactivated under Section 164(2) of the 2013 Act, with effect from November 1, 2016 till October 3, 2021. A petition was moved by the director challenging his disqualification during the said period, due to non-filing of the annual return and financial statement of the company for three financial years.

The legal questions posed in the present case were:

- Whether Section 164(2)(a), as introduced by the 2014 Amendment Act and the proviso to Section 167(1)(a), as introduced by the 2018 Amendment Act, are prospective, retrospective or retroactive in nature?
- Whether there is any scope for giving opportunity to the defaulting company or its directors to represent against the disqualification under Section 164, read with Section 167 of the Companies Act, 2013 Act?

Judgment:

The Calcutta High Court observed that in the absence of any requirement of adherence to the principles of natural justice or any scope of discretion in applying the amended provisions of Sections 164 and 167 of the Companies Act 2013, there is no scope for the authorities to consider the reason behind defaults and desist from disqualifying the directors if necessary. This lack of discretion in the matter of disqualification operates directly to the detriment of corporate functioning of the small and medium corporate operators. The fall-out of retrospective operation of the amendments is fatal to small and medium businesses, which still comprise the backbone of the economy. There can be umpteen reasons, arising from the inherent disadvantages of functioning befalling private limited companies and small corporate units, which might result in unintentional contravention of Sections 92 and 137 of the Companies Act, 2013. That apart, there might be 'Black Swan' situations, for example, economic recession and debilitating pandemics, which would throw off business and commerce out of gear for considerable periods of time, having little or no effect on robust or anti-fragile large operators but ruining the credibility and goodwill of small companies, completely veering them off course. SOPs in the form of credit incentives for MSMEs and other medium sector units have

been proved to be ineffective to alleviate such large-scale economic disasters. This, coupled with the automatic disqualification envisaged in the 2014 and 2018 amendments to the Companies Act, 2013 is sufficient to ruin the economy as a whole which, somewhat counter-intuitively, is detrimental to the growth of the economy. Thus, attributing retrospective/retroactive effect to the said amendments would run contradictory to the purpose of public good.

Hence, the answer to Question (i), as formulated above, is that Section 164(2)(a), as introduced by the 2014 Amendment, and the proviso to Section 167(1)(a), as introduced by the 2018 Amendment, to the Companies Act, 2013 are prospective in operation. Thus, the appeal is allowed, thereby setting aside the deactivation of DIN by virtue of the notice dated April 7, 2017.

6.	**19.01.2021**	***R Narayanasamy (Appellant*) vs. *The Registrar of Companies (Respondent)***	**NCLAT**

Divergent views on the disposal of the Appeal pertaining to Striking off of the name of Company after following necessary procedure under Section 248 of the Companies Act, 2013

Fact of the case:

This Appeal was filed against the Impugned order dated 05.05.2020 passed by the NCLT, Chennai dismissing the Appeal under Section 252(3) of the Companies Act, 2013 which was filed for restoration of the name of the Company "Shri Laxmi Spinners Pvt. Ltd." which had been struck off by the Respondent – ROC after following necessary procedure under Section 248 of the Companies Act, 2013.

The Appellant who was the Managing Director of the Company – Shri Laxmi Spinners claimed that non-filing of Annual Returns and Filing Statements was due to absence of expert professional guidance. Further, the striking off was prejudicial to the interest of the Company and that Returns were not filed out of ignorance and inadvertence.

Judgment:

The members of the NCLAT bench delivered diverging judgments on analyzing the law as is existing, on basis of what is 'just' under Section 252(3) of the Companies Act, while applying the same to facts, after which it was placed before a third member. The third member of the NCLAT observed that Section 252 provides for relief to aggrieved parties when Registrar notifies a Company as dissolved under Section 248 of the Companies Act, 2013.

The name of the Company is required to be restored if the NCLT – (1) is satisfied that Company was at the time of its name being struck off, carrying on business or in operation, (2) or, otherwise it is 'just' that the name of the Company be restored to the Register of Companies. In the present matter, the admitted fact is that when the name of the Company was struck off, it was not functional and was not carrying on business or operations for more than two years immediately preceding the financial year and thus attracted Section 248(1)(c) of the

Companies Act, 2013. When question of law has neither been framed nor referred, and it appears from the Judgments that the two Hon'ble Members have divergent views, on the basis of facts the Appeal should be dismissed by not interfering in the dismissal Order of NCLT, on principles of Natural Justice, culled from Section 95 of CPC.

7.	17.11.2020	***Alanda Media & Entertainments Pvt. Ltd. (Appellant)* vs. *V. Ravi Prakash & Ors. (Respondents)***	**NCLAT**

Non-compliance with any procedural requirement relating to memorandum of the Appeal, pleading or Application should not lead to automatic dismissal or rejection.

Fact of the case:

The Appellant herein submitted that by the Impugned Order dated 30.01.2021, the NCLT, Hyderabad dismissed the Applications challenging the maintainability of the main Company Petition filed under Sections 241 & 242 of the Companies Act, 2013 as the Petition does not meet the threshold criteria under Section 244 of the Act. Further it was submitted that the Petition was filed on behalf of two Petitioners (Respondent No. 1 - V. Ravi Prakash & 2- M.K.V.N. Murthy herein). However, the Petitioner No. 2 has not signed the Joint Petition and his written consent obtained under Section 244(2) of the Companies Act, 2013 is not annexed with the Petition as required under Rule 81 of the National Company Law Tribunal Rules, 2016. This is a mandatory provision and non-compliance would *ipso facto* result in the dismissal of the Petition. Therefore, the Impugned Order is liable to be set aside.

Judgment:

The NCLAT observed that the Petitioner No 1 (Respondent No. 1 herein) holds 5,00,000 shares and Petitioner No. 2 (Respondent No. 2 herein) holds 1,40,000 shares in the Company and admittedly there are only six shareholders in the Company. Even if the Petitioner No. 2 has not signed the Petition, the Petitioner No. 1 alone can file the Petition as he is one of the shareholders out of six shareholders. It is well settled principle of law that the Petition is filed containing facts and law, the same cannot be dismissed at the threshold. It is also held that non-compliance with any procedural requirement relating to memorandum of the Appeal, pleading or Application should not lead to automatic dismissal or rejection. Thus, it was held that non-filing of written consent of one of the Petitioners in a petition under Sections 241 and 242 of the Companies Act, 2013 would not lead to an automatic dismissal of the petition and such defect can be cured subsequently, by filing the written consent of the members. Thus, there is no ground to interfere with the impugned order. Thus, the Appeal is dismissed in *limine*.

8.	06.09.2019	*Elektrans Shipping Pte Ltd. (Appellant)* vs. *Pierre D'Silva and Ors. (Respondents)*	NCLAT

Initiation of Corporate Insolvency Resolution Process (CIRP) under section 7 and 9 of the Insolvency and Bankruptcy Code, 2016 can be maintained even if Company's name has been struck off by the Registrar of Companies (ROC).

Fact of the case:

Mr. Pierre D'silva filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') against M/s. Elektrans Shipping Private Limited ('Corporate Debtor'), which was admitted by Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, by order dated 10th April, 2019. The Appellant, Elektrans Shipping Pte Ltd. – Shareholder has preferred the Appeal challenging the order of admission dated 10th April, 2019.

Learned Counsel appearing on behalf of the Appellant submitted that the name of M/s. Elektrans Shipping Private Limited ('Corporate Debtor') was struck off by the Registrar of Companies on September 12, 2018 in exercise of powers conferred by Section 248 of the Companies Act, 2013. Therefore, according to the learned Counsel for the Appellant, the application under Section 9 of the I&B Code was not maintainable and the Adjudicating Authority erred in admitting the application without considering the status of the 'Corporate Debtor' as on the date of admission.

Issue

Whether Corporate Insolvency Resolution Process (CIRP) can be initiated against a company whose name has been struck off from the Register of Companies?

Judgment:

On interpreting Section 248 of the Companies Act, 2013, the NCLAT noted that, before issuing an order to remove the name from the ROC, the Registrar must be satisfied that adequate provision has been made for the realization of all the amounts due to the Company and for the payment or release of the ROC. Section 248(7) of the Companies Act, 2013 clearly provides that, even after the removal of the company's name from the ROC, the existing liability of each company's ex-management continues. Keeping this view in mind the NCLAT observed the insolvency can still be initiated owing to the fact that liability of the Company and its management remains alive despite being struck off from the Register of Companies. In view of the provisions of Section 250 (3) read with Section 248 (7) and (8) of the Companies Act, 2013, it is held that the application under Sections 7 and 9 of IBC, 2016 will be maintainable against the 'Corporate Debtor', even if the name of a 'Corporate Debtor' has been struck-off. Thus, there is no merit in this Appeal, and accordingly dismissed.

SECURITIES LAWS

1.	19.03.2021	*Vyoman Tradelink India Pvt. Ltd. (Noticee) (In the matter of Prakash Constrowell Ltd.)* vs. *Securities and Exchange Board of India (SEBI)*	Adjudicating Officer, SEBI

Obligation to make disclosures within the stipulated time is a mandatory obligation and penalty is imposed for not complying with the mandatory obligation.

Facts of the Case:

SEBI had conducted an investigation into the trading activities of certain entities in the scrip of Prakash Constrowell Ltd. (company). The focus of investigation was to ascertain whether trading in the scrip of the company by the suspected entities was based on Unpublished Price Sensitive Information ("UPSI") and thus in violation of provisions of SEBI Act, 1992 and SEBI (Prohibition of Insider Trading) Regulations 2015 (PIT Regulations 2015), during the period February 09, 2016 (starting date of UPSI period) to August 25, 2016 (end date of UPSI period), (investigation period).

During the investigation, it was observed by SEBI that Vyoman Tradelink India Private Limited (erstwhile, Ganjam Trading Company Private Limited), (Noticee) has failed to disclose the release of pledged shares and subsequent change in its shareholding, to the company and to both the exchanges (NSE & BSE). Hence, it was alleged that the Noticee had violated Regulation 29 (2) read with 29 (3) & 29(4) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST Regulations, 2011).

The release of pledge by the pledgee ('Noticee'), changed its shareholding in the company by more than 2%. Hence, the Noticee was under obligation to make disclosures to the company and the stock exchange(s) under Regulation 29(2) read with 29(3) and 29(4). However, on perusal it was observed that the same was not done by the Noticee.

SEBI Order:

SEBI imposed a penalty of ₹1 lakh on the Noticee under the provisions of Section 15A(b) of the SEBI Act, 1992 on failure to make disclosures to the company and to both the exchanges (BSE & NSE) under Regulation 29 (2) read with 29 (3) & 29(4) of SAST Regulations, 2011.

For details:
https://www.sebi.gov.in/enforcement/orders/mar-2021/adjudication-order-in-respect-of-vyoman-tradelink-india-pvt-ltd-in-the-matter-of-prakash-constrowell-ltd-_49572.html

2.	18.03.2021	*Mr. Neeleshkumar Radheshyam Lahoti (Noticee) (In the matter of Supreme Tex Mart Limited)* vs. *Securities and Exchange Board of India (SEBI)*	Adjudicating Officer, SEBI

Every person from whom information is sought should fully co-operate with the investigating officer and promptly produce all documents, records, information as may be necessary for the investigations

Facts of the Case:

SEBI conducted an investigation into the affairs of Supreme Tex Mart Limited (STML/ Company) for the period June 01, 2016 to October 31, 2016. During the course of investigation, the Investigating Authority (IA) of SEBI issued summons under Section 11C(2) read with Section 11C(3) of the SEBI Act, 1992 to Mr. Neeleshkumar Radheshyam Lahoti (Noticee) seeking certain documents/ information. The Noticee replied to the summons and submitted certain information. However, it was alleged that the Noticee submitted incorrect information. In view of the same, SEBI initiated adjudication proceedings under Section 15HB of the SEBI Act against the Noticee.

SEBI Order :

SEBI imposed a penalty of ₹8 lakh on the Noticee under the provisions of Section 15HB of the SEBI Act. It was established that the Noticee provided incorrect information to the Investigating Authority (IA) of SEBI and hampered the process of investigation thus violating the provisions of Section 11C(2) read with Section 11C(3) of the SEBI Act, 1992. It was a deliberate attempt of Noticee to misguide investigation.

Section 11C(3) of the SEBI Act empowers the IA to obtain records, documents, information etc., as considered relevant or necessary for the purpose of investigation. Section 11C(2) of SEBI Act casts an obligation on every person associated with the securities market to preserve and to produce to the Investigating Authority or any person authorised by it in this behalf, such records, documents, information which are in their custody or power.

For details:
https://www.sebi.gov.in/enforcement/orders/mar-2021/adjudication-order-in-the-matter-of-supreme-texmart-limited_49580.html

3.	22.02.2021	Alchemist Infra Realty Limited & others vs. Securities and Exchange Board of India (SEBI)	Adjudicating Officer, SEBI

Operations of a company as a Collective Investment Scheme without obtaining certificate of registration from SEBI are illegal and liable for penalty.

Facts of the Case:

SEBI initiated Adjudication proceedings against Alchemist Infra Realty Limited and its present and past directors namely Mr. Brij Mohan Mahajan, Mr. Narayan Madhav kumar, Mr. Balvir Singh and Mr. Chandra Sekhar Chauhan (collectively referred to as 'Noticees). It was alleged that the company and its directors were engaged in fund mobilising activity from the public, which was in the nature of a Collective Investment Schemes (CIS) which required registration from SEBI under Section 11AA of the SEBI Act, 1992. They had collected money from investors in the name of developing land.

Noticees, by operating as an unregistered CIS allegedly violated provisions of Section 12(1B) of the SEBI Act, 1992 read with Regulation 3 of the SEBI(Collective Investment Scheme) Regulations, 1999 (CIS Regulations, 1999).

SEBI Order:

SEBI found that Noticees were engaged in the fund mobilising activity from public through investment contracts by floating / sponsoring / launching collective investment schemes as defined in section 11AA of the SEBI Act without obtaining registration from SEBI.

SEBI noted from the Balance Sheet of Alchemist Infra Realty Limited that it had mobilized funds to the tune of ₹ 54.1 Crore, ₹ 449.41 Crore and ₹ 1087.68 Crore as on March 31, 2009, March 31, 2010 and March 31, 2011 respectively upon failure to take necessary registration under relevant provisions of the SEBI Act, 1992 and the CIS Regulations, 1999 therefore the entity becomes liable for a penalty.

In view of the above, SEBI imposed a penalty of ₹1 Crore on the Noticees under the provisions of Section 15D(a) of the SEBI Act, 1992. The amount of penalty shall be payable jointly and severally by the Noticees.

For details:
https://www.sebi.gov.in/enforcement/orders/feb-2021/adjudication-order-in-respect-of-alchemist-infra-reality-limited-mr-brij-mohan-mahajan-mr-balvir-singh-mr-chandra-sekhar-chauhan-and-mr-narayan-madhav-kumar-in-the-matter-of-alchemist-infra-reality-_49218.html

4.	19.02.2021	*HDFC (Appellant)* vs. *Securities and Exchange Board of India (SEBI)*	**Securities Appellant Tribunal (SAT)**

SEBI circulars have been violated or not and whether the pledged securities have been rightly invoked requires consideration.

Facts of the Case:

The present appeal had been filed to SAT against the SEBI order dated January 21, 2021 directing the appellant to transfer a sum of ₹158.68 crore along with interest with effect from October 14, 2019 onwards in an escrow account and further penalized the appellant a sum of ₹1 crore for violation of the SEBI circulars.

The fact leading to the filing of the appeal is that the appellant granted credit facilities to M/s. BRH Wealth Kreators Limited ('BRH'). BRH pledged its shares against the loans given to it and also gave a declaration that it is the absolute owner of these securities and that the securities were not that of its clients based on which a pledge agreement was executed between the parties.

It transpired that BRH made several irregularities which led the SEBI to conduct an investigation into the affairs of BRH, pursuant to which an *ex parte* interim order dated October 7, 2019 was passed against BRH and eight other entities. By the interim order BRH and other entities were restrained.

The appellant invoked the pledge agreement which resulted in the issuance of the show cause notice dated March 19, 2020. This show cause notice *inter alia* alleged that appellant did not comply with the directions of the SEBI interim order dated October 7, 2019.

SAT Order:

SAT found that an *ex parte* interim order dated October 7, 2019 does not operate against the appellant. In fact, the interim order notes that certain securities were pledged by BRH to the appellant but no restraint order was directed against the appellant restraining them from encashing the pledged securities. It has been specifically asserted that the securities so pledged were that of BRH and were not of BRH clients and therefore there has been no violation of the circulars of SEBI which has been issued from time to time.

SAT found that the appellant is one of the largest private sector bank and as per balance sheet it has assets of 1,654,228 crore and therefore has sufficient financial strength and ability to furnish the amount as per the impugned order. It is not a case where the bank will run away or will become insolvent. SAT accordingly stay the effect and operation of the impugned order till further orders of the SAT, subject to the condition that appellant will give an undertaking to SEBI that they will abide by the result of the appeal and the directions given therein within four weeks from the date of the disposal of the appeal. Such undertaking shall be given by a responsible officer of the appellant to be filed before SEBI within two weeks.

For details:
http://sat.gov.in/english/pdf/E2021_JO202183_1.PDF

5.	15.02.2021	*Future Corporate Resources Pvt. Ltd. & Ors. (Appellants)* vs. *Securities and Exchange Board of India (SEBI) (Respondent)*	Securities Appellant Tribunal (SAT)

Appropriate time may be given to the respondent to file a reply.

Fact of the case:

SEBI had conducted an investigation in the scrip of Future Retail Limited to ascertain whether certain persons/ entities had traded in the aforesaid scrip during the period March 10, 2017 to April 20, 2017on the basis of unpublished price sensitive information.

SEBI's Investigation observed that Future Retail Limited (FRL) made an announcement on April 20, 2017 during market hours on the exchange platform for scheme of arrangement between FRL, Bluerock eServices Private Limited (BSPL), Praxis Home Retail Private Limited (PHRPL) and their respective Shareholders. Investigation observed that the aforesaid scheme of arrangement resulted in the demerger of certain business of FRL. The said announcement had a positive impact on the price of the scrip of FRL.

The information related to mergers, demergers, acquisitions, etc. qualifies as UPSI as per the 'Code of Conduct for Regulating, Monitoring and Reporting of Trading by Insiders' in the Securities of FRL.

The information related to scheme of arrangement which resulted in the demerger of certain business from FRL, qualifies as UPSI as per Regulation 2(1)(n)(iv) of PIT Regulations, 2015, prior to its announcement on the exchange platform dated April 20, 2017.

Chronology of events as per Investigation

March 10, 2017	**The announcement related to the "Composite Scheme of Arrangement between FRL, BSPL, PHRPL and their respective Shareholders" had come into existence on as preliminary discussion for the proposed scheme of arrangement was carried out on this date.**
March 14, 2017	A team was created by FRL on to work on this scheme on this date.
April 20, 2017	The press release pertaining to the aforesaid scheme was made on this day during market hours.

In view of the same, the period of UPSI was identified as March 10, 2017 to April 20, 2017.

SEBI's Observations

SEBI's Investigation observed that Future Corporate Resources Private Limited (FCRPL) (promoter and promoter group of FRL), Kishore Biyani (CMD and Promoter of FRL) and Anil Biyani (Promoter and brother of FRL) traded in the scrip of FRL during the period of UPSI.

SEBI Order:

- SEBI vide its order dated February 3, 2021 had restrained Kishore Biyani, Anil Biyani and FCRPL from accessing the securities market for a period of 1 year and from buying, selling or dealing in the securities of the Future Retail Limited (FRL) for a period of two years.
- Further, FCRPL, Kishore Biyani and Anil Biyani imposed with penalty of ₹1 crore each.
- They were also directed to disgorge an amount of ₹17.78 crore, jointly and severally, along with interest at the rate of 12 per cent per annum from April 20, 2020, till the date of actual payment.

Appeal to SAT

Pursuant to this, Kishore Biyani, Anil Biyani and FCRPL have moved the Securities Appellate Tribunal (SAT) against the SEBI order that barred them from the securities market.

SAT Order

The Securities Appellate Tribunal (SAT) has stayed the order passed by SEBI on FCRPL, Kishore Biyani and Anil Biyani. SAT also directed them to deposit a sum of ₹11 crore as an interim measure.

For details:
http://sat.gov.in/english/pdf/E2021_JO202181.PDF

DIRECT TAX

1.	March 2, 2021	*Engineering Analysis Centre Of Excellence Private Limited (Appellant)* vs. *CIT (Respondent)*	Supreme Court

Amount paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of computer software through EULAs/distribution agreements, is not payment of royalty for the use of copyright in computer software, and that the same does not give rise to any income taxable in India; as a result of which the persons are not liable to deduct any TDS under section 195 of the Income Tax Act.

Fact of the Case:

The appellant, Engineering Analysis Centre of Excellence Pvt. Ltd. **(EAC)**, is a resident Indian end-user of shrink-wrapped computer software, directly imported from the United States of America. The Assessing Officer by an order dated 15.05.2002, after applying Article 12(3) of the Double Taxation Avoidance Agreement (**DTAA**), between India and USA, and upon applying section 9(1)(vi) of the Income Tax Act, 1961 (**Act**), found that what was in fact transferred in the transaction between the parties was copyright which attracted the payment of royalty and thus, it was required that tax be deducted at source by the Indian importer and end-user, EAC. Since this was not done for both the assessment years, EAC was held liable to pay the amount of ₹1,03,54,784 that it had not deducted as TDS, along with interest under section 201(1A) of the Act amounting to ₹15,76,567. The appeal before the Commissioner of Income Tax (**CIT**) was dismissed by an order dated 23.01.2004. However, the appeal before the Income Tax Appellate Tribunal (**ITAT**) succeeded *vide* an order dated 25.11.2005.

An appeal was made from the order of the ITAT to the High Court of Karnataka by the Revenue. The High Court held that since no application under section 195(2) of the Act had been made, the resident Indian importers became liable to deduct tax at source, without more, under section 195(1) of the Act.

Order/ Judgment:

The "licence" that is granted *vide* the end user licence agreement 'EULA', is not a licence in terms of section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in sections 14(a) and 14(b) of the Copyright Act, but is a "licence" which imposes restrictions or conditions for the use of computer software. The EULAs do not grant any such right or interest to reproduce the computer software. In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user.

Further, what is "licensed" by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or directly supplied to the resident end-user, is in fact the sale of a physical object which contains an embedded computer programme, and is therefore, a sale of goods.

Further, given the definition of royalties contained in Article 12 of the DTAAs, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct

tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with *explanations* 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.

The amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Act were not liable to deduct any TDS under section 195 of the Act.

2.	**September 11, 2020**	***National Co-operative Development Corporation (Appellant)* vs. *CIT (Respondent)***	**Supreme Court**

Consideration of a particular source as business income is based on the notions of business activity and its purpose. Profit motive is immaterial.

Facts of the Case:

The National Co-operative Development Corporation ('NCDC') was established under the National Cooperative Development Corporation Act, 1962. The functions of the NCDC are set out in Section 9 of the NCDC Act, which are, *inter alia*, to advance loans or grant subsidies to State Governments for financing cooperative societies; provide loans and grants directly to the national level cooperative societies, as also to the State level cooperative societies, the latter on the guarantee of State Governments. The funding process for the NCDC is set out in Section 12 of the NCDC Act, by way of grants and loans received from the Central Government. The NCDC is required to maintain a fund called the National Cooperative Development Fund which is, *inter alia*, credited with all monies received by it by way of grants and loans from the Central Government, as well as sums of money as may from time to time be realized out of repayment of loans made from the Fund or from interest on loans or dividends or other realizations on investments made from the Fund.

The moneys in the Fund shall be applied for—

1. advancing loans and granting subsidies to State Governments to subscribe to the share capital of co-operative societies or for otherwise financing co-operative societies;
2. meeting the pay and allowances of the managing director, the officers and other employees of the Corporation and other administrative expenses of the Corporation; and
3. carrying out the purposes of this Act. In furtherance of this, as and when surplus funds accumulated, the NCDC invested the idle funds in fixed deposits from time to time, which generated income.

Even though the appellant-Corporation is an intermediary or "pass through" entity, it is a distinct juridical entity. Its taxation status is as follows:

(a) Funds are received from the Central Government are treated as capital receipts, and hence are not chargeable to tax.

(b) The interest income is treated as taxable income and is taxed as "business income.

The issue under consideration is whether the component of interest income earned on the funds received and disbursed by way of "grants" to national or state level co-operative societies, is eligible for deduction for determining the "taxable income" of the NCDC.

The Assessing Officer ('AO') opined that the non-refundable grants were in the nature of capital expense and not a revenue expense and, thus, disallowed the same as a deduction.

An appeal was preferred before the Commissioner of Income Tax (Appeals) who opined that the grants made by the NCDC undisputedly fall within its authorised activities, which are interlinked and interconnected with its main business of advancing loans on interest to State Governments and cooperative societies. These grants were intended to be utilised for various projects which were admittedly of capital nature and resulted in the acquisition of capital assets, but not by the NCDC itself. Thus, in terms of Section 37 of the Income Tax Act, 1961, any expenditure (except of the prohibited type) laid out or expended wholly and exclusively for the purpose of the business was allowable as a deduction while computing business income. The CIT (A), thus, found that the approach adopted by the AO was fallacious as the functions and activities of the NCDC included giving loans and grants which, in fact, was the very purpose for which it had been set up, accordingly allowed a deduction.

The Revenue Department preferred an appeal before the Income Tax Appellate Tribunal which, however, accepted the view taken by the AO and did not agree with the approach of the CIT (A), setting aside the order of the CIT(A). It held that the grants, additional grants and other sums received by the NCDC from the Central Government went to a single fund and were not treated as its income and, thus, the disbursements made from the same could not be treated as revenue expenses. The disbursement of monies to State Governments and cooperative societies were held to be a pure and simple application of the Fund under Section 13(2) of the NCDC Act and could not be an expenditure in the nature of revenue.

The assessee preferred an appeal before High Court. The High Court opined that since the business of the NCDC was to receive funds and to then advance them as loans or grants, the interest income earned which was so applied would also fall under the head 'of 'profits and gains of business or profession' being a part of its normal business activity. The other aspect the High Court opined on was that in order to claim deduction as revenue expenditure, the NCDC has to first establish that it incurred expenditure. The advancement of loans to the State Governments and cooperative societies could not be claimed as expenditure as the same does not leave the hands of the NCDC irretrievably.

Order/ Judgment:

The first aspect is whether interest on loans or dividends would fall under the head of 'Income from other sources' under Section 56 of the Income Tax Act or would it amount to income from 'Profits and gains of business or profession' under head 'D' of Section 14 of the Income Tax Act. In terms of Section 28 of the Income Tax Act such profits and gains of any business or profession would be chargeable to income tax if the income is relatable to profits and gains of business or

profession carried out by the assessee at any time during the previous year. Section 56 of the Income Tax Act is in the nature of a residuary clause, i.e., if the income of every kind which is not to be excluded from total income under the Income Tax Act would be chargeable under this head if it is not chargeable under any other head of Income.

The only business of the appellant-Corporation is to receive funds and then to advance them as loans or grants. The interest income arose on account of the fund so received and it may not have been utilised for a certain period of time, being put in fixed deposits so that the amount does not lie idle. That the income generated was again applied to the disbursement of grants and loans. The income generated from interest is necessarily inter-linked to the business of the appellant-Corporation and would, thus, fall under the head of 'profits and gains of business or profession'. There would, therefore, be no requirement of taking recourse to Section 56 of the Income Tax Act for taxing the interest income under this residuary clause as income from other sources.

In view of the aforesaid finding the crucial issue would be whether the amounts advanced as grants from this income generated could be adjusted against the income to reduce the impact of taxation as a revenue expense. If it is revenue expense the amount can be deducted but if it is capital expense then the answer would be in the negative.

Undoubtedly, the amount received to be advanced as loans and grants by the appellant-Corporation from the Central Government are treated as capital receipts. In fact, if it was otherwise, they would have become taxable in the hands of the NCDC.

To decide whether a particular source is business income, one has to look to the notions of what is the business activity. The activity must have a set purpose. The fact that the assessee does not carry on business activity for profit motive is not material as profit making is not an essential ingredient. The Act requires determination of 'real income' on the basis of ordinary commercial principles of accountancy. To determine the 'real income', permissible expenses are required to be set off. Every application of income towards business objective of the assessee is a business expenditure and nothing else.

3.	July 22, 2020	***DIT (Appellant)* vs. *Samsung Heavy Industries Co Ltd (Respondent)***	**Supreme Court**

The maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article.

Facts of the Case:

The Oil and Natural Gas Company ("ONGC") awarded a "turnkey" contract to Assessee, i.e. Samsung Heavy Industries Co. Ltd. (a Company incorporated in South Korea), and Larsen & Toubro Limited, being a contract for carrying out the "Work", *inter alia*, of surveys, design, engineering, procurement, fabrication, installation and modification at existing facilities, and start-up and commissioning of entire facilities covered under the 'Vasai East Development Project' ("Project").

The Assessee set up a Project Office in Mumbai, India, to act as "a communication channel" between the Assessee and ONGC in respect of the Project. Pre- engineering, survey, engineering, procurement and fabrication activities which took place abroad, these platforms were then brought outside Mumbai to be installed at the Vasai East Development Project. The Project was to be completed by 26.07.2009.

With regard to Assessment Year 2007-2008, the Assessee filed a Return of Income on showing nil profit, as a loss of ₹23.5 lacs had allegedly been incurred in relation to the activities carried out by it in India. A show-cause notice was issued to the Assessee by the Income Tax authorities requiring it to show cause as to why the Return of Income had been filed only at nil. Being dissatisfied with the reply, a draft Assessment Order was then passed and concluded that the Project in question is a single indivisible "turnkey" project, whereby ONGC was to take over a project that is completed only in India. Resultantly, profits arising from the successful commissioning of the Project would also arise only in India.

The opening of a project office clearly shows that the assessee was doing something more than what would have been done through liaison office. In any case nature and purport of activities undertaken in India determine the existence of Permanent Establishment (PE). Considering the nature of activities undertaken in India it is clear that PE existed in the case of assessee."

The agreement was a "turnkey" project which could not be split up, as a result of which the entire profit earned from the Project would be earned within India. Basing itself on data obtained from the database "Capital Line", the Panel picked up four similar projects executed by companies outside India, and found the average profit margin to be 24.7%, which would therefore justify the figure of 25% arrived at in the Draft Order. The Draft Order was made final by the Assessing Officer. The Assessee then filed an appeal against the Assessment Order before the Income Tax Appellate Tribunal ("ITAT").

The ITAT thus confirmed the decisions of the Assessing Officer. An appeal was filed in the High Court by the Assessee.

Order/ Judgment:

The condition precedent for applicability of "fixed place" permanent establishments under Article 5(1) of the Double Taxation Avoidance Treaties is that it should be an establishment "through which the business of an enterprise" is wholly or partly carried on. Further, the profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a permanent establishment. The maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article 5. Also, it is only so much of the profits of the enterprise that may be taxed in the other State as is attributable to that permanent establishment.

4.	April 24, 2020	*Basir Ahmed Sisodiya (Appellant)* vs. *ITO (Respondent)*	Supreme Court

Concealment of income or furnishing of inaccurate particulars of income by the assessee.

Fact of the Case:

The appellant / assessee was served with a notice under Section 143(2) of the Income Tax Act, 1961 by the Assessing Officer for the assessment year 1998-1999, pursuant to which an assessment order was passed making certain addition made under the heads "Trading Account" and "Credits" in the assessment order. The Officer, while relying on the Balance Sheet and the books of account, took note of the credits amounting to ₹2,26,000. The Officer treated that amount as "Cash credits" under Section 68 of the 1961 Act and added the same in declared income of the assessee and computed the income of the assessee for the concerned assessment year. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

The CIT (A) upheld the assessment order. The assessee then preferred further appeal to the ITAT. The ITAT upheld the assessment order. The assessee then filed an appeal before the High Court.

High court held that it is clear from the assessment orders and the finding affirmed in the appeals, that opportunity was given to the assessee to substantiate the genuineness of the alleged transactions, but the assessee failed, and efforts made by the Revenue, to investigate the correctness of the alleged transaction also could not yield any results in favour of the assessee. Thus it is clear, that the amounts shown to be standing to the credit of the persons, which had been added to the income of the assessee, was clearly a bogus entry, in the sense that it was only purportedly shown to be the amount standing to the credit of the fifteen persons, purportedly on account of assessee having purchased goods on credit from them, while since no goods were purchased, the amount did represent income of the assessee from undisclosed sources, which the assessee had only brought on record (books of accounts), by showing to be the amount belonging to the purported sellers, and as the liability of the assessee.

Order/ Judgment:

It has now come on record that the assessee in penalty proceedings offered explanation and caused to produce affidavits and record statements of the concerned unregistered dealers and establish their credentials. That explanation has been accepted by the CIT (A) vide order. In CIT (A) orders, it has been noted that the Officer recorded statements of 12 unregistered dealers out of 13 and their identity was also duly established. After analysing the evidence so produced by the assessee, the appellate authority [(CIT(A)] noted that the Officer had neither doubted the identity of those dealers nor any adverse comments were offered in reference to their version regarding sale of marble slabs by them to the assessee in the financial year relevant to assessment year 1998-1999 and receipt of payments after two to three years. In other words, the materials on record would clearly suggest that the concerned unregistered dealers had sold marble slabs on credit to the appellant/assessee, as claimed. As a consequence of this finding, the appellate authority concluded that there was neither any concealment of income nor furnishing of inaccurate particulars of income by the assessee.

Accordingly, though the assessee failed to prove the genuineness of the purchases during the assessment proceedings, he filed affidavits and statements of the dealers in penalty proceedings. That evidence fully supports the claim of the assessee. The CIT (A) accepted the explanation of the assessee and recorded a clear finding of fact that there was no concealment of income or furnishing of any inaccurate particulars of income by the assessee. Consequently, the quantum addition will also have to be deleted.

5.	February 9, 2020	M/s Ananda Social And Educational Trust (Appellant) vs. CIT (Respondent)	Supreme Court

Registration of a trust cannot be refused on the ground that no activities have been carried out as the term 'activities' in section 12AA of the Income tax Act, 1961 includes also 'proposed activities.

Fact of the Case:

Section 12AA of the Act empowers the Principal Commissioner or the Commissioner of Income Tax on receipt of an application for registration of a trust to call for such documents as may be necessary to satisfy himself about the genuineness of activities of the trust or institution and make inquiries in that behalf. It empowers the Commissioner to thereupon register the trust if he is satisfied about the objects of the trust or institution and genuineness of its activities.

In the present case, the trust was formed as a society on 30.05.2008 and it applied for registration on 10.07.2008 i.e. within a period of about two months. No activities had been undertaken by the respondent Trust before the application was made. The Commissioner rejected the application on the sole ground that since no activities have been undertaken by the trust, it was not possible to register it, presumably because it was not possible to be satisfied about whether the activities of the trust are genuine. The Income Tax Appellate Tribunal, Delhi reversed the orders of the Commissioner. The Revenue Department approached the High Court by way of filing an appeal. The High Court upheld the order of the Tribunal and came to the conclusion that in case of a newly registered trust even though there were no activities, it was possible to consider whether the trust can be registered under section 12AA of the Act.

Order/ Judgment:

Registration can be applied for by a newly registered trust. There is no stipulation that the trust should have already been in existence and should have undertaken any activities before making the application for registration. The term 'activities' in section 12AA includes 'proposed activities'. The CIT must consider whether the objects of the Trust are genuinely charitable in nature and whether the activities which the Trust proposes to carry on are genuine in the sense that they are in line with the objects of the Trust. However, he cannot refuse registration on the ground that no activities have been carried out.

Source:

- https://indiankanoon.org/doc/987467/
- https://itatonline.org/digest/ito-v-techspan-india-private-ltd-sc-www-itatonline-org/ manupatra.com

INDIRECT TAX

1.	09.03.2021	*Deepak Print (Appellant)* vs. Union of India (Respondent)	Gujarat High Court

Gujarat High Court directs GSTN to allow Appellant to rectify GSTR 3B return

Facts of the case:

The Appellant was engaged in the business of dress materials etc. The Appellant, Deepak Print, had submitted the returns of his business in May 2019 through the GST online portal. But inadvertently, in the course of making entries in the GSTR-3B it wrongly uploaded the entries of Deepak Process instead of Deepak Print. Subsequently it approached the nodal officer at Rajkot for correction, but the nodal officer did not respond to the representation.

Judgment:

The Gujarat High Court directed the Goods and Service Tax Network (GSTN) to allow the rectification of entries in the GSTR-3B return which was submitted by the appellant mistakenly on account of genuine bonafide human error.

2.	09.03.2021	*Canon India Pvt. Ltd. (Appellant)* vs. *Commissioner of Customs (Respondent)*	Supreme Court of India

Only Proper Officer to exercise Power under Section 28(4) and initiate Recovery Proceedings under Customs Act, 1962

Facts of the case:

A show cause notice was issued under Section 28 (4) of the Customs Act, 1962 alleging that the Customs Authorities had been induced to clear the cameras by willful mis-statement and suppression of facts about the cameras. While the decision to clear the goods for import because they were exempted from customs duties, was taken by Deputy Commissioner, Appraisal Group, Delhi Air Cargo, the show cause notice was issued by the Additional Director General, Directorate of Revenue Intelligence.

The question that arose was whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted.

Section 28(4) of the Customs Act, 1962 empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer".

Judgment:

The Supreme Court while giving relief to Canon India ruled that Additional Director General of the Directorate of Revenue Intelligence (DRI) was not the proper officer to exercise the power under Section 28(4) of Customs Act, 1962 and initiate recovery proceedings. The appellant, Canon India filed the batch of statutory appeals under Section 130E of the Customs Act, 1962 arising from a common final order of the Central Excise and Service Tax Appellate Tribunal (CESTAT).

3.	08.03.2021	***BA Continuum India Pvt. Ltd. (Appellant)* vs. *Union of India and others (Respondent)***	**Bombay High Court**

Telephone & E-mails cannot substitute personal hearing.

Facts of the case:

The Appellant is a company incorporated under the Companies Act, 1956engaged in the business of providing information technology and information technology enabled services to customers located outside India. The Appellant requested for personal hearing post-filing of reply. Due to technical glitches on the GSTN portal, the appellant was initially not able to file its replies on the portal.

Judgment:

The Bombay High Court while remanding the matter to the original GST authority for a fresh decision ruled that the Telephone and Emails cannot replace personal hearing.

The expression 'opportunity of being heard' is not an expression of empty formality. It is a part of the well-recognized principle of *audi alteram partem* which forms the fulcrum of natural justice and is central to fair procedure. The principle is that no one should be condemned unheard.

When the law requires that no application for refund shall be rejected without giving an applicant an opportunity of being heard, the same cannot be substituted by telephonic conversations and exchange of e-mails. This is more so in the case of a claim for refund where no time-limit is fixed vis-à-vis rejection of claim. Under sub-section (7) of section 54 of CGST Act, 2017, a time-limit of 60 days is prescribed for making of an order allowing claim of refund; but that period of 60 days would commence from the date of receipt of the application complete in all respects without there being a corresponding provision for rejection of application not complete in all respects.

Admittedly in this case, no hearing was granted to the petitioner. Impugned orders, therefore, would be in violation of the proviso to sub-rule (3) of rule 92 of the CGST Rules and also in violation of the principles of natural justice.

4.	16.02.2021	*M/s. Ram Auto (Appellant)* vs. *Commissioner of Central Taxes & Central Excise (Respondent)*	Madras High Court

Benefit of Input Tax Credit (ITC) cannot be denied on account of having entered details in the wrong column.

Facts of the case:

The Appellant was a dealer in two-wheelers. The Assessee was registered under Tamil Nadu Value Added Tax Act, 2006. The Appellant was having ITC to the tune of ₹4,85,684/-. Following the introduction of the GST regime, transition and migrations from the earlier system had to be made under which the appellant was required to file the necessary Form GST TRAN-1. While filing the said Form, instead of entering the details under column 7(a), the petitioner erroneously entered the details against column 7(d). The column 7(d) would apply only in cases of stock of goods not supported by invoices/documents evidencing payment of tax.

While the appellant was very much having the necessary invoices/documents evidencing payment of tax, since the appellant did not enter the details correctly, the consequential credit under the new GST regime was not given. The appellant submitted a request wherein it pointed out that the mistake committed by them was purely inadvertent. As a result, the appellant was not able to adjust the claimed credit amount against their present liability.

Judgment:

The Madras High Court held that the benefit of input tax credit (ITC) cannot be denied for having entered the details in the wrong column.

5.	15.02.2021	*Union of India & Ors. (Appellant)* vs. *National Engineering Co. (Respondent)*	Supreme Court of India

SC directed UOI to file affidavit regarding technical glitches faced in filing GST TRAN-01

Facts of the case:

A key contention of the tax-payers was that the relevant GST returns could not be filed due to technical glitches on the portal. Aggrieved by the ruling of the High Court, the Appellant had moved to the Supreme Court.

Judgment:

The Hon'ble Supreme Court of India directed Appellant to file an affidavit within 4 weeks, answering the assertion regarding technical glitches and problems faced by the taxpayers while uploading and filing Form GST TRAN-01 details. Further stated that, the factual assertions in this regard will be dealt with concretely and expressly and if required, by taking the help of experts.

Furthermore, stay over the judgement/ order of Hon'ble Punjab & Haryana High Court in ***M/s National Engineering Co. v. Union of India & Ors. [CWP No. 27891 of 2019 (O&M) decided***

on November 4, 2019] was granted wherein taxpayers were allowed to file or revise their already filed incorrect TRAN-1 either electronically or manually file statutory Form GST TRAN-01 on or before November 30, 2019. Further, it was held that Department cannot deprive taxpayers from their valuable right of credit and cannot deny the taxpayers from carry forwarding legitimate claim of CENVAT / Input Tax Credit on the ground of non-filing of Form GST TRAN-01 by December 27, 2017.

6.	**09.02.2021**	***Del Small Ice Cream Manufacturers Welfare's Association (Appellant)* vs. *Union Of India (Respondent)***	**Delhi High Court**

Decision of exclusion of ice cream from the benefits of Composition Scheme to be reconsidered

Facts of the case:

The appellant, Del Small Ice Cream Manufacturers Welfare's Association claiming to represent the interest of more than 50 small scale ice cream manufacturing units operating in Delhi, filed the petition impugning the decision dated June 18, 2017 of the GST Council, in exercise of powers under Section 10(2)(e) of the CGST Act, 2017, of exclusion of ice cream from the benefits of Composition Scheme under Section 10 of the CGST Act. The appellant contended that the said exclusion was in violation of the spirit of Articles 14 and 19 of the Constitution of India and against the principles of natural justice. The Appellant also contended that ice cream cannot be clubbed with sin goods like Pan masala and Tobacco.

Judgment:

Delhi High Court directed the GST Council to reconsider the exclusion of small scale manufactures of ice cream from the benefit of Section 10(1) of the CGST Act, including on the aforesaid two parameters i.e. the components used in the ice cream and the GST payable thereon and other similar goods having similar tax effect continuing to enjoy the benefit.

7.	**12.01.2021**	***M/s Podaran Foods India (P) Ltd. (Appellant)* vs. *State of Kerala (Respondent)***	**Kerala High Court**

Modalities of detention of vehicles and seizure of goods in transit under GST explained.

Facts of the case:

The Appellant filed writ petitions challenging detention orders passed under the CGST Act when the scheme of the Act clearly indicated that the writ court was not to be ordinarily approached in detention cases where effective alternative remedies by way of provisional clearance, and appeal thereafter, were provided against alleged arbitrary/illegal detention orders.

The goods and vehicles were detained by the respondents on the ground that there was only one common invoice (for 22 packages) that was generated in respect of the two consignments,

and when compared with the number of packages that were contained in each of the vehicles, there was a shortage of packages in both the vehicles. It was also found that the petitioner had not complied with the procedure prescribed under Rule 55 (5) of the CGST Rules while transporting goods in semi-knocked down (SKD) or completely knocked down (CKD) condition or in batches or lots.

Judgment:

Kerala HC explained the provision where the seizure of goods or the vehicle can be exercised in case where there seems to be a doubt of evasion in taxes. The consignee can choose to make the stipulated payments as per notice, after which the notice would be concretized in the form of another order and the proceedings be closed. But if the consignee wishes to challenge the detention/seizure, he can furnish security in the form of a bank guarantee covering the prescribed sum and get his goods/vehicle released provisionally, and then make his representation. And when it comes to making an appeal in the High Court, it was clearly specified that only after the consignee is given an opportunity to be heard and his objections considered can the concerned authority issue an order. If aggrieved, the consignee can approach the relevant authority under the legislation in appeal, but cannot approach the High Court at this stage.

Hence, it was decided that detention and seizure of goods and vehicles is a reasonable restriction on the exercise of free trade and movement, but shouldn't be exercised strictly only in order to prevent possible tax evasion. The Court opined the need for strict construction of detention laws since "what is at stake is a constitutional right, fundamental or otherwise, of a citizen".

8.	08.01.2021	***K P And Sons & Ors. (Appellant)* vs. *Union of India & Ors. (Respondent)***	**Delhi High Court**

Sections 69 and 132 are not arbitrary and unreasonable but are constitutional and fall within legislative competence of Parliament.

Facts of the case:

A petition filed in the Delhi High Court claimed that Section 69 being of criminal nature, it could not have been enacted under Article 246A of the Constitution. A person under the CGST Act can only be arrested, if the amount of tax evasion is more than ₹2 crore. All offences in which tax evasion is less than ₹5 crore are bailable and only grave offences involving tax evasion of ₹5 crore and above are non-bailable and cognizable.

Judgment:

Delhi High Court upheld the constitutional validity of Sections 69 & 132 of CGST Act, stating that even if these sections could not have been enacted in pursuance of power under Article 246A of Constitution, they could have been enacted under Entry 1 of List III, as laying down of a crime and providing for its punishment is criminal law. The Court is *prima facie* of the view

that in either option both Sections 69 and 132 of Act are constitutional and fall within the legislative competence of Parliament.

9.	04.01.2021	***Vinodkumar Murlidhar Chechani Proprietor of M/s Chechani Trading Co. (Appellant)* vs. *State of Gujarat & 1 Other (Respondent)***	**Gujarat High Court**

The tax officials should stop mechanically attaching bank accounts of alleged GST defaulters

Facts of the case:

The writ-applicant is a proprietor of a proprietary concern running in the name of M/s.Chechani Trading Company. The concern is engaged in the business of trading of ferrous and non-ferrous metal scrap. The writ-applicant holds a valid registration certificate under the provisions of the CGST Act and the GGST Act respectively. A spot visit was carried out by the flying squad of the department on 11th August 2020 at the premises of the writ-applicant. The department was prima facie of the view that the purchases made by the writ-applicant from the JSK Metacast and Uttam Metal and Alloys respectively are not genuine.

As the proceedings under Section 67 of the Act came to be initiated, the Additional Commissioner thought fit to exercise his powers under Section 83 of the Act for the purpose of provisional attachment of the bank accounts.

Judgment:

The Court took the view that the sine qua non for exercise of powers under Section 83 of the Act is that the proceedings should be pending under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74 of the GST Act. The Coordinate Bench, in the said case, took the view that as no proceedings under Section 67 of the Act were pending on the date of the passing of the order of provisional attachment, the same would render the order illegal and contrary to the provisions of the Act, more particularly, Section 83 of the Act.

10.	29.09.2020	**National Highways Authority of India (Appellant) vs. Sahakar Global Limited (Respondent)**	**Delhi High Court**

GST implementation being a "change in law" qualifies as a force majeure event

Facts of the case:

The Appellant invited bids from entities interested in undertaking toll collection from users. The bid by Respondent was accepted by the Appellant. The parties entered into a contract agreement on June 30, 2017 and accordingly the project site was duly handed over to the Respondent on July 2, 2017.

However, two days prior to the execution of the agreement i.e., on June 28, 2017, *Notification No. 9/2017-Central Tax* was issued stating that the CGST Act, 2017 would come into effect from July 1, 2017, due to which, there was a heavy fall in the traffic volume of the commercial transport vehicles and user fee collection on the highway owing to the implementation of GST.

The reduction in toll collections rendered the Respondent unable to deposit weekly remittances on time and it tried to plead its case with the Appellant in order to revisit their agreement pertaining to toll collections or seek grant of leniency.

Subsequently, the Respondent, citing implementation of GST as a *force majeure* event covered under the contract agreement, submitted a statement of the losses suffered by it until July 9, 2017. The Appellant refused to accept the Respondent's claims and denied that the implementation of GST was a *force majeure* event and shortfall in toll collection was a business risk associated with the work, and the Respondent was required to forthwith deposit the outstanding toll collections with penal interest.

Judgment:

The Respondent invoked arbitration wherein the Learned Arbitrator held that implementation of GST was indeed a *force majeure* event where under it accepted GST w.e.f. July 1, 2017 as a 'change in law' falling under the ambit of force majeure as envisaged in the contract agreement and the Appellant was liable to pay compensation for loss generated in revenue triggered by reduced toll collections due to implementation of GST.

Delhi High Court dismissed the petition and refused to interfere with the arbitral award passed by the Arbitrator to pay the compensation for loss generated in revenue triggered by the reduced toll collection due to implementation of GST and held that, the date of implementation of GST was not known and could not be speculated by anybody. It is a 'change in law' qualifying as a *force majeure* event.

BANKING & INSURANCE LAWS

1.	10.03.2021	*Pearson Drums & Barrels Pvt. Ltd. (Petitioner)* vs. *The General Manager, Consumer Education & Protection Cell of Reserve Bank of India and others*	Calcutta High Court

RBI is 'State' under Article 12 of Indian Constitution and thus, a writ petition is maintainable against it.

Facts of the Case:

The petitioner is a company coming within the purview of the Micro, Small and Medium Enterprises Act, 2006 and is engaged in the business of manufacture and supply of M.S. Barrels to the Oil Sector and various other sectors. On September 24, 2015, the Respondent, that is, the IndusInd Bank granted "in-principle" sanction, subject to final sanction of the Credit Committee, for credit facility worth ₹25.05 crore to the petitioner. It was mentioned that the processing fee of 0.60 percent of the total sanction facility, along with applicable rates and taxes, have to be paid by the petitioner to avail of the financial assistance. It was also mentioned therein that the communication by the bank to the petitioner did not create any binding/obligation on the bank to release any payment in favour of the petitioner by way of financial assistance provided the bank issued its final sanction letter to that effect and the terms thereof were duly accepted by the petitioner.

The IndusInd Bank sent an email to the petitioner to deposit ₹14,27,850/- as processing fees including service tax which was duly deposited by the petitioner . The petitioner refused to accept the credit facility sanctioned by the IndusInd Bank due to delay and non-receipt of final sanction letter and requested for refund of processing fees. The IndusInd Bank refused to refund the processing fees.

Judgement:

The IndusInd Bank cannot resile from its stand, which is revealed from a conjoint reading of the in-principle sanction letter and the e-mail asking for processing fees, that the entire processing fees would be refunded in the event the sanction did not go through from the end of the Bank "by any reason". In the present case, the reason was that the Bank sought a novation of the in-principle sanction agreement by issuance of a fresh sanction on deviated terms.

Upon considering the submissions of the parties, it was evident that the petitioner not only claimed refund of full processing fees from the bank, but also challenged the communication dated June 12, 2017 of the Assistant Manager, CEPC, RBI which closed the dispute raised by the petitioner regarding return of processing fees. Since the Reserve Bank of India is an instrumentality of the State, it comes squarely within the meaning of "State" as contemplated in Article 12 of the Constitution, thus making the writ petition maintainable.

Thus, the decision of the IndusInd Bank and that of the Consumer Education & Protection Cell of the Reserve Bank of India to refuse the petitioner's claim for refund of entire processing fees has to be set aside. The court directed the IndusInd Bank to refund the entire processing fees of ₹14,27,850/- to the petitioner within 30 days from date. In default, the IndusInd Bank shall

pay interest at the rate of 6 per cent per annum on the aforementioned amount, till the date of payment of the refund.

2.	19.02.2021	***Amitabha Dasgupta (Appellant)* vs. *United Bank of India & Ors. (Respondent)***	**Supreme Court of India**

SC Lays Down Guidelines for Operation & Safety of Locker

Facts of the Case:

In the early 1950's, the Appellant's mother (since deceased) took a locker on rent bearing No. A222 in the Deshapriya Park, Kolkata Branch of the Respondent Bank. In 1970, the Appellant/Complainant was included as a joint holder of the locker. On 27.05.1995, the Appellant visited the Respondent Bank to operate the locker and deposit the locker rent. However, the Appellant was informed that the Bank had broken open his locker on 22.09.1994 for nonpayment of rent dues for the period of 1993-1994. Further, that the locker had subsequently been reallocated to another customer. On 29.05.1995 and 02.06.1995, the Appellant sent communications to Respondent claiming that such breaking of his locker by the Bank was illegal since he had cleared dues for 1994-1995 on 30.07.1994, i.e., prior to the breaking of the locker. The Chief Manager of Respondent Bank in the present appeal, responded to the communication and admitted to having inadvertently broken open the locker, though there were no outstanding dues to be paid, and apologized for the same. On 17.06.1995, when the Appellant went to collect the contents of the locker, it is alleged that he found only two (one pair of bangles and one pair of ear pussa) of the seven ornaments that had been deposited in the locker in a nonsealed envelope. However, Respondent Bank contends that only those two ornaments were found in the Appellant's locker when it was broken open. That the same is evident from the inventory prepared by Respondent when the locker was broken open in the presence of an independent witness.

The Appellant filed a consumer complaint before the District Consumer Forum ('District Forum') calling upon Respondent to return the seven ornaments that were in the locker; or alternatively pay ₹3,00,000/- towards the cost of jewelry, and compensation for damages suffered by the Appellant.

Judgment:

In the present case, it is undisputed that the Respondent Bank inadvertently broke the Appellant's locker, without any just or reasonable cause, even though he had already cleared his pending dues. Moreover, the Appellant was not given any notice prior to such tampering with the locker. He remained in the dark for almost a year before he visited the bank for withdrawing his valuables and enquired about the status of the locker. Irrespective of the valuation of the ornaments deposited by the Appellant, he had not committed any fault so far as operation of the locker was concerned. Thus, the breaking open of the locker was in blatant disregard to the responsibilities that the bank owed to the customer as a service provider. The alleged loss of goods did not result from any force majeure conditions, or acts of third parties,

but from the gross negligence of the bank itself. It is case of gross deficiency in service on the part of the bank.

The RBI lays down comprehensive directions mandating the steps to be taken by banks with respect to locker facility/safe deposit facility management. The banks should not have the liberty to impose unilateral and unfair terms on the consumers. In view of the same, RBI was directed to issue suitable rules or regulations as aforesaid within six months from the date of this judgment. Until such Rules are issued, the principles stated in this judgment, in general and at para 13 in particular, shall remain binding upon the banks which are providing locker or safe deposit facilities. It was also left open to the RBI to issue suitable rules with respect to the responsibility owed by banks for any loss or damage to the contents of the lockers, so that the controversy on this issue is clarified as well and the Appeal is disposed of accordingly.

3.	**16.02.2021**	***Kotak Mahindra Bank Pvt. Ltd. (Appellant)* vs. *Ambuj A. Kasliwal & Ors. (Respondents)***	**Supreme Court of India**

When a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory.

Facts of the Case:

The brief facts leading to the present proceedings is that the respondent No.3, namely, Hindon River Mills Ltd. had availed financial assistance from the respondent No.6- IFCI Ltd. The respondents No.1 and 2 had offered their personal guarantee in respect of the said financial assistance. The respondents No.1 to 3 had defaulted in re-payment of the dues and the account having been classified as non-performing asset was thereafter auctioned by respondent No.6-IFCI Ltd. wherein the appellant herein was the successful bidder and accordingly, the unpaid debt and non-performing asset was assigned in their favour. The assignment as made was assailed by the respondents No. 1 to 3 before the High Court in WP(C) No.14999 of 2006 which came to be dismissed and the SLP(C) No. 35004 of 2011 filed was taken note by this Court and in the said proceedings the settlement which was entered into between the parties was recorded and disposed of. As per the settlement, the respondents No. 1 to 3 had agreed to repay the sum of ₹145 Crores with interest at 15% per annum subject to the same being repaid on or before 31.07.2012. The respondents No. 1 to 3 are stated to have not adhered to the terms of settlement and the re-payment was not made. The appellant Bank, therefore, instituted recovery proceedings by filing an application before the Debts Recovery Tribunal ('DRT'), New Delhi in O.A. No.281 of 2015. In the said proceedings the appellant Bank claimed that the respondents No. 1 to 3 would be liable to pay the entire outstanding since the benefit of the settlement wherein the outstanding amount was frozen had not been availed within the time frame. Accordingly, the sum of ₹572,18,77,112/-, which was due as on 31.12.2014 along with interest and other charges was claimed before the DRT.

Judgment:

The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub- section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre- deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third provisos to the said Section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty five per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on pre-deposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed."

In view of the above conclusion the interim direction to deposit the amount of ₹20 Crores as ordered on 22.11.2019 would lose its relevance at this point of time. In the result, the order dated 16.07.2019 passed by the High Court of Delhi in WP(C) No.7530 of 2019 was set aside. The order dated 27.02.2019 passed by the DRAT, Delhi on IA No.511 of 2018 in Appeal No.311 of 2018 was modified. The respondents No. 1 and 2 are permitted to deposit twenty-five per cent of ₹68,18,92,841/- and prosecute the Appeal No.311 of 2018, subject to such deposit being made within 8 weeks, failing which the appeal shall not subsist in the eye of law.

4.	22.01.2021	***Indian Bank (Appellant)* vs. *Mahaveer Khariwal (Respondent)***	**Supreme Court of India**

After voluntary retirement, all other subsequent proceedings of departmental enquiry will be null and void and shall be non est, as after the voluntary retirement, there shall not be an employer-employee relationship.

Facts of the Case:

The respondent, original writ petitioner employee (hereinafter referred to as the 'employee') was working with the appellant bank – employer (hereinafter referred to as the 'employer'), who was promoted as Chief Manager SMG-IV. In March, 1998, he was transferred and posted as Chief Manager, Colombo Branch, Colombo. Thereafter, by order dated 13.05.2013, he was transferred from Colombo overseas branch to the Defence Colony Branch, New Delhi as Chief Manager (BM). The employee applied for 30 days' leave to visit London as his son was admitted in the hospital. Thereafter, the employee wrote to the employer seeking extension of leave. The application for leave as well as the application for extension of leave were refused by the

employer and the employee was directed to report on duty at Defence Colony Branch, New Delhi.

That on 21.01.2004, the employee submitted an application seeking voluntary retirement from the services of the employer in accordance with Circular No. 32/9798 dated 15th July, 1997 and the format given by the employer for submitting the notice of voluntary retirement. In the application for voluntary retirement, the employee requested for waiver of three months' notice, as required under Regulation 29 of the Indian Bank Employees Pension Regulations, 1995 (hereinafter referred to as 'Pension Regulations, 1995') and requested/authorised the employer to deduct the salary of the notice period from out of the amount payable by the employer on retirement. The employer vide letter dated 20.04.2004, which was served on the employee on 23.04.2004, rejected the request of the employee for voluntary retirement on the ground that the employee was not eligible under Pension Regulations, 1995. Being aggrieved by the rejection of the application for voluntary retirement, the employee preferred Writ Petition.

One another prayer was for a direction to the employer to reimburse the educational expenses for the son of the employee, who had been sent to Singapore for his education while he was posted at Colombo. One another prayer was for grant of traveling allowance bills for the journey from Colombo to New Delhi, which was declined by the employer on account of delay in submitting the bills.

Feeling aggrieved and dissatisfied with the judgment and order passed by the learned Single Judge in dismissing the writ petition with respect to his prayer to quash the letter dated 20.04.2004 rejecting his request for voluntary retirement, the employee preferred Letters Patent Appeal before the Division Bench of the High Court. The Division Bench, by the impugned judgment and order, has allowed the said Letters Patent Appeal and has quashed and set aside the letter dated 20.04.2004 and has directed the employer to release retiral dues of the employee in accordance with Pension Regulations, 1995.

Judgment:

As far as the submission on behalf of the employer that the acceptance or non-acceptance of the voluntary retirement application is required to be taken before the expiry of the period specified in the notice, i.e., in the present case three months and the same was taken on the last date of the three months' period and date of receipt of the decision/communication is not material, it is true that in the present case the decision was taken before the expiry of the period specified in the notice, i.e., on or before three months (last day of the third month), however, as observed hereinabove, the rejection of the application for voluntary retirement itself is found to be illegal and bad in law. Therefore, the aforesaid shall not affect the ultimate conclusion reached by the Division Bench of the High Court. As observed hereinabove, communication dated 20.04.2004 rejecting the voluntary retirement application was bad in law and contrary to Regulation 29. Therefore, the employee shall be entitled to all retiral benefits on the basis of his voluntary retirement. Once, it is held that he is voluntary retired as per his application dated 21.01.2004 and the rejection of the application of voluntary retirement is held to be bad in law, all other subsequent proceedings of departmental enquiry will be null and void and shall be non est, as after the voluntary retirement, there shall not be an employer-employee relationship. In view of the above and for the reasons stated above, the appeal fails and the same deserves to be dismissed and is accordingly dismissed. However, there shall be no order as to costs.

5.	05.01.2021	*Kirti & Anr. Etc. (Appellant)* vs. *Oriental Insurance Company Ltd. (Respondent)*	Supreme Court of India

Fixing of notional income of a homemaker attains special significance dince it becomes a recognition of the work, labour and sacrifices of homemakers and a reflection of changing attitudes.

Facts of the Case:

These civil appeals, which have been heard through video conferencing, have been filed by three surviving dependents (who are two minor daughters and father) of the two deceased, impugning the judgment dated 17.07.2017 of the High Court of Delhi through which the motor accident compensation of ₹40.71 lakhs awarded by the Signature Not Verified Digitally signed by Satish Kumar Yadav Date: 2021.01.05 Motor Accident Claims Tribunal, Rohini. The deceased couple, Vinod and Poonam, while commuting on a motorcycle in Delhi at around 7AM on 12.04.2014 were hit at an intersection by a Santro Car bearing registration 'DL 7CA 1053'. The impact immediately incapacitated both the deceased and they soon passed away from cranio-cerebral damage and haemorrhagic shock caused by the accident's blunt-force trauma. An FIR was registered under Sections 279 and 304 of the Indian Penal Code, 1860 (hereinafter, "IPC") against the driver, and the statement of an independent eyewitness (Constable Vishnu Dutt) was recorded, which evidenced rash driving and negligence on part of the car driver. Subsequently, a claim petition was filed under Section 166 of the MV Act by the two toddler daughters and septuagenarian- parents of the deceased. This was contested by the driver and owner claiming that the deceased were themselves driving negligently and the accident was as a result of their very own actions. Two witnesses were examined by the appellant-claimants and none by the respondents. The insurance company (Respondent No. 1) offered as settlement a compensation of ₹6.47 lakhs for the death of Poonam and ₹10.71 lakhs for Vinod.

Judgement:

As both deceased were below 40 years and how they have not been established to be permanent employees, future prospects to the tune of 40% must be paid. The argument that no such future prospects ought to be allowed for those with notional income, is both incorrect in law and without merit considering the constant inflation induced increase in wages. It would be sufficient to quote the observations of this Court in *Hem Raj vs. Oriental Insurance Co. Ltd*., as it puts at rest any argument concerning non-payment of future prospects to the deceased in the present case. The income is determined on guesswork in the facts and circumstances of a case. Both the situations stand at the same footing. Accordingly, in the present case, addition of 40% to the income assessed by the Tribunal is required to be made."

Finally, given the lack of arguments on the other heads of funeral charges, loss of estate, love, and affection; there arises no cause of alteration. We similarly see no infirmity with the High Court's adoption of 17 as the age multiplier, award of 9% interest, calculation of Poonam's notional income or the division of total compensation in the ratio of 1:2:2 between the grandfather and the two girls.

ARBITRATION

1.	11.03.2019	*M/s. Icomm Tele Ltd. (Appellant)* vs. *Punjab State Water supply & sewerage Board & Anr. (Respondent)*	Supreme Court of India

Deterring a party from invoking alternative dispute resolution process by a pre-deposit would discourage arbitration, contrary to the object of de-clogging the Court system, rendering the arbitral process ineffective and expensive.

Facts of the Case:

The appellant company was awarded the tender which involved civil/electrical works in India. A formal contract was entered into between the appellant and respondent No. 2. The appellant had addressed letters to respondent No. 2 with regard to appointment of arbitrator and sought for waiving the 10% deposit fee. After having received no response, the appellant filed a writ petition before the High Court of Punjab and Haryana. This writ petition was dismissed by stating that such tender condition can in no way be said to be arbitrary or unreasonable. This appeal was filled before the Supreme Court.

Judgment :

The Hon'ble Court observed that the said clause cannot be said to be discriminatory in that it applies equally to both respondent No. 2 and the appellant. However, arbitrariness is a separate and distinct facet of Article 14. Thus it was seen, whether clause 25(viii) can be said to be arbitrary and violative of Article 14 of the Constitution of India. It observed that deterring a party to an arbitration from invoking alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive. The court strike down clause 25(viii) of the notice inviting tender and set aside the judgment of the High Court.

For details:
https://main.sci.gov.in/supremecourt/2018/1013/1013_2018_Judgement_11-Mar-2019.pdf

2.	24.07.2019	*Vinod Bhaiyalal Jain & Ors. (Appellants)* vs. *Wadhwani Parmeshwari Cold Storage Pvt. Ltd. Through its Director & Anr. (Respondents)*	Supreme Court of India

No room should be given for feeling of Unfairness when in the matter of arbitration the very basis is that the parties get the opportunity of nominating a judge of their choice in whom they have trust and faith unlike in a normal course of litigation where they do not have such choice.

Facts of the case:

Respondent No.1 herein owns a cold storage at Nagpur. Appellants who are the sons of Sri Bhaiyalal Jain are engaged in business as commission agents for agricultural products. Appellant had utilised the services of cold storage during the year 2004 for keeping 50 bags of

'Shingada'. The appellants herein the respondent No. 1 had failed to store the goods in an appropriate manner. The appellants therefore issued a notice for seeking compensation which was not only denied the claim but also put forth counter claim. Thus, dispute arose between the parties. Arbitrator proceeded with the matter in the absence of the appellants herein and passed the award directing the appellants to pay the claim and also imposed a cost. The appellants claiming to be aggrieved filed the petition under Sec. 34 of the Arbitration and Conciliation Act 1996 before the District Judge, Nagpur raising objection to the award, more particularly with regard to the conduct of the learned Arbitrator. The learned District Judge found the objection justified and set aside the award. Respondent No. 1 who was aggrieved by the same had filed the appeal under Sec. 37(1)(b) of the Act, 1996 to the High Court. It was held by High Court that merely because the learned Arbitrator had appeared as a lawyer in one mesne profits case for the respondent No. 1, it would not make a reasonable man believe that the Arbitrator was biased. The appellant filed the appeal before the Supreme Court.

Judgement :

The Hon'ble court observed that when one is required to judge the case of another, justice should not only be done, but it should also seem to be done is the bottom line. Hence in that background, if the present circumstance is taken not, there was reasonable basis for the appellants to put forth such contention which resulted in the situation wherein they had not participated in the arbitration proceedings. If nothing else, atleast propriety demanded that the learned Arbitrator should have recused in the present facts; but he has failed to do so. In that view, such an award passed by the learned Arbitrator was not sustainable and the learned District Judge was justified in entertaining the petition under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award. The appeal was allowed with no order as to costs.

For details:
https://main.sci.gov.in/supremecourt/2007/30713/30713_2007_7_1501_15262_Judgement_24-Jul-2019.pdf

3.	25.07.2019	***Brahmani River Pellets Limited (Appellant)* vs. *Kamachi Industries Limited (Respondent)***	**Supreme Court of India**

Parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction.

Facts of the Case:

The appellant entered into an agreement with the respondent for sale of 40,000 WMT (Wet Metric Tonne) of Iron Ore Pellets. Dispute arose between the parties regarding the price and payment terms and the appellant did not deliver the goods to the respondent. The respondent claimed for damages and the appellant denied any liability. Clause 18 of the agreement between the parties contains an arbitration clause. The respondent invoked arbitration clause and the appellant did not agree for the appointment of arbitrator. Hence, the respondent filed petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 before the Madras High Court.

The appellant contested the petition challenging the jurisdiction of the Madras High Court on the ground that the parties have agreed that Seat of arbitration be Bhubaneswar. The Madras High Court *vide* impugned order appointed a former judge of the Madras High Court as the sole arbitrator. The appellant preferred the appeal to the Supreme Court.

Judgement :

The Hon'ble supreme court observed that Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 (the Act) defines the "Court" with reference to the term "subject-matter of the suit". As per Section 2(1)(e) of the Act, if the "subject-matter of the suit" is situated within the arbitral jurisdiction of two or more courts, the parties can agree to confine the jurisdiction in one of the competent courts. In para (96) of BALCO, the Supreme Court held that the term "subject-matter" in Section 2(1)(e) of the Act is to identify the court having supervisory control over the arbitral proceedings. As per Section 20 of the Act, parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction. The Supreme Court observed that when the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act. The impugned order was liable to be set aside.

For details:
https://main.sci.gov.in/supremecourt/2019/9962/9962_2019_7_1501_15263_Judgement_25-Jul-2019.pdf

4.	**08.08.2019**	***Mahanagar Telephone Nigam Ltd. (Appellant)* vs. *Canara Bank & Ors. (Defendant)***	**Supreme Court of India**

Non-signatory to an arbitration agreement permitted to participate in the arbitration proceedings.

Facts of the case:

In 1992, MTNL floated 17% Non-Cumulative Secured Redeemable Bonds worth ₹425 crores. On 10.02.1992, MTNL placed bonds worth ₹200 crores with Can Bank Financial Services Ltd. ("CANFINA") under an MOU agreement. The bond amount of ₹200 cores was placed as fixed deposit by MTNL with CANFINA. CANFINA paid back ₹50 crores of the fixed deposit in 1992. The balance fixed deposit amount of ₹150 crores along with interest was not paid by CANFINA to MTNL. As a consequence, MTNL did not service the interest on bonds. Against payment of ₹50 crores received from CANFINA, MTNL serviced the bonds of approximately ₹31 crore. Canara bank was of view that an out-break of a security scam and CANFINA was faced with a severe liquidity crunch and Respondent No. 1 Canara Bank purchased the Bonds issued by MTNL, of the face value of ₹80 crores, from Respondent No. 2 – CANFINA which is its wholly owned subsidiary. Canara Bank requested for registration of these Bonds but MTNL refused to transfer the Bonds on various grounds. MTNL subsequently registered a part of the face value of ₹40 crores, in favour of CANFINA but however retained on the ground that CANFINA had failed to pay the deposit money of ₹150 crores, which was payable to MTNL with an accrued interest of 12% p.a. MTNL later cancelled all the Bonds inter alia on the ground that letters of

consideration remained with CANFINA. MTNL sent a statement of accounts by adjusting the proceeds of the cancellation of bonds and attached a cheque for ₹5,41,17,463 as the amount payable to Canara Bank. Canara Bank filed before the Delhi High Court challenging the cancellation of the Bonds. The Writ Petition was dismissed on the ground of availability of an alternative and efficacious remedy before the Company Law Board under Section 111 of the Companies Act, 1956. The proceedings before the Company Law Board came to be dismissed, since the remedy was no longer available, as per the amendment of Section 111 by the Depositories Act, 1996. Canara Bank filed an application for Restoration of the Writ Petition. Canara Bank made a representation to the Cabinet Secretary. A meeting was convened by the Cabinet Secretariat and attended by the representatives of MTNL, Canara Bank, and CANFINA. The Committee directed Canara Bank, CANFINA and MTNL to settle the disputes through arbitration. The Delhi High Court referred the disputes between the parties to the Committee on Disputes. The Writ Petition was adjourned sine die. The Delhi High Court disposed of the pending Writ Petition with the observation that the matter should be resolved by the Committee on Disputes expeditiously so that the arbitration agreement between the parties is signed as soon as possible. Accordingly, Canara Bank moved the Delhi High Court under section 151, CPC for restoration of the disposed of Writ Petition. Delhi High Court restored the Writ Petition. During the course of the proceedings, the parties before the Delhi High Court agreed that these issues may be referred to arbitration. The appointed Sole Arbitrator issued notice to all the three parties *i.e.* MTNL, Canara Bank, and CANFINA. Canara Bank raised an objection to joining CANFINA as a party to the arbitration. The learned Arbitrator passed an interim award holding that CANFINA had not appeared on 16.09.2011 before the High Court, when the disputes were referred to arbitration. MTNL filed C.M. No. 8100 of 2012 before the Delhi High Court seeking clarification of Order dated 16.09.2011, as to whether CANFINA ought to be impleaded as a necessary party to the arbitration agreement. The Delhi Court dismissed the application as "not pressed" on the statement made by the Counsel of MTNL. MTNL filed I.A.s before the Delhi High Court for recall of the Orders passed in W.P. The Delhi High Court dismissed the Application for Recall on the ground that the application was identical to the application previously filed by MTNL. Aggrieved by the Orders passed by the Delhi High Court in W.P. the Appellant – MTNL filed the Special Leave Petition. There are two issues which have arisen for the consideration of Hon'ble Supreme Court:

(i) the first issue raised by the Appellant – MTNL with respect to the existence of a valid arbitration agreement between the three parties;

(ii) the second issue has been raised by Respondent No. 1 – Canara Bank that the Order are between Canara Bank and MTNL. Respondent No. 2 – CANFINA, is not a party to the arbitration agreement, and hence cannot be impleaded in the proceedings.

Judgment:

Hon'ble Supreme Court observed that a binding agreement for disputes to be resolved through arbitration is a *sine-qua-non* for referring the parties to arbitration. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. If it can *prima facie* be shown

that parties are *ad idem*, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the various documents. The agreement between the parties as recorded in a Judicial Order, is final and conclusive of the agreement entered into between the parties. The Appellant – MTNL after giving its consent to refer the disputes to arbitration before the Delhi High Court, is now estopped from contending that there was no written agreement to refer the parties to arbitration. A non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. CANFINA is undoubtedly a necessary and proper party to the arbitration proceedings. The matter is remitted to the Sole Arbitrator to continue with the arbitral proceedings, and conclude the same as expeditiously as possible. Supreme Court had, however, expressed no opinion on the merits of the dispute.

For details:
https://main.sci.gov.in/supremecourt/2014/11020/11020_2014_6_1501_15918_Judgement_08-Aug-2019.pdf

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Part B

Case Studies

DETERRENCE TO FUGITIVE ECONOMIC OFFENDERS*

Introduction

There have been several instances of economic offenders fleeing the jurisdiction of Indian courts, anticipating the commencement of criminal proceedings or sometimes during the pendency of such proceedings. The absence of such offenders from Indian courts has several deleterious consequences, such as, obstructing investigation in criminal cases, wasting precious time of courts and undermining the rule of law in India. Further, most of such cases of economic offences involve non-repayment of bank loans thereby worsening the financial health of the banking sector in particular and the economy in general. The existing civil and criminal provisions in law have been considered to be inadequate to deal with the severity of the problem.

In order to address the above problem and lay down measures to deter economic offenders from evading the process of Indian law by remaining outside the jurisdiction of Indian courts, the Parliament enacted a legislation, namely, the **Fugitive Economic Offenders Act, 2018** (the Act) to ensure that fugitive economic offenders return to India to face the action in accordance with law.

The main object of the Fugitive Economic Offenders Act, 2018 is to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India for matters connected therewith or incidental thereto.

Salient Features

The salient features of the Act, *inter alia*, provide for:

- Application before the Special Court for a declaration that an individual is a fugitive economic offender;
- Issue of a notice by the Special Court to the individual alleged to be a fugitive economic offender;
- Confiscation of the property of an individual declared as a fugitive economic offender or even the proceeds of crime;
- Disentitlement of the fugitive economic offender from defending any civil claim;
- Appointment of an Administrator to manage and dispose of the confiscated property under the Act.
- Appeal to the High Court against the orders issued by the Special Court.

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

Who is Fugitive Economic Offender (FEO)?

According to the Act, "fugitive economic offender" means any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who—

(i) has left India so as to avoid criminal prosecution; or

(ii) being abroad, refuses to return to India to face criminal prosecution;

It may be noted that 'Scheduled Offence' means an offence specified in the Schedule of the Act, if the total value involved in such offence or offences is ***one hundred crore rupees or more.***

Fugitive Economic Offence

Followings are the Scheduled Offences known as fugitive economic offences:

- **Offences under the Companies Act, 2013**
  - *Section 42(4) of the Companies Act, 2013 read with section 24 of the SEBI Act, 1992*: Offer or invitation for subscription of securities on private placement.
  - *Section 74*: Repayment of deposits, etc., accepted before commencement of the Companies Act, 2013.
  - *Section 76A:* Punishment for contravention of section 73 or section 76 of the Companies Act, 2013.
  - *Second proviso to sub-section (4) of section 206*: Carrying on business of a company for a fraudulent or unlawful purpose.
  - *Section 213(b):* Conducting the business of a company with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose.
  - *Section 447:* Punishment for fraud.
  - *Section 452:* Punishment for wrongful withholding of property.
- **Offences under the Securities and Exchange Board of India Act, 1992**
  - *Section 12A read with section 24:* Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.
  - *Section 24:* Offences for contravention of the provisions of the Act.
- **Offences under the Insolvency and Bankruptcy Code, 2016**
  - *Section 69:* Punishment for transactions defrauding creditors
- **Offences under the Limited Liability Partnership Act, 2008**
  - *Section 30(2):* Carrying on business with intent or purpose to defraud creditors of the Limited Liability Partnership or any other person or for any other fraudulent purpose.

- **Offences under the Prevention of Corruption Act, 1988**
  - *Section 7:* Public servant taking gratification other than legal remuneration in respect of an official act.
  - *Section 8*: Taking gratification in order, by corrupt or illegal means, to influence public servant.
  - *Section 9*: Taking gratification for exercise of personal influence with public servant.
  - *Section 10:* Punishment for abetment by public servant of offences defined in section 8 or section 9 of the Prevention of Corruption Act, 1988.
  - *Section 13*: Criminal misconduct by a public servant.
- **Offences under the Foreign Contribution (Regulation) Act, 2010**
  - *Section 34:* Penalty for article or currency or security obtained in contravention of section 10.
  - *Section 35:* Punishment for contravention of any provision of the Act.
- **Offences under other laws:**
  - *Prevention of Money-laundering Act, 2002:* Section 3 (Offence of money-laundering) & Section 4 (Punishment for money-laundering) of the
  - *Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015:* Section 51 (Punishment for wilful attempt to evade tax.)
  - *Central Goods and Services Tax Act, 2017:* Section 132(5) (Punishment for certain offences) *Negotiable Instruments Act, 1881: Section 138 (Dis*honour of cheque for insufficiency, etc., of funds in the account)
  - *Reserve Bank of India Act, 1934:* Section 58B (Penalties)
  - *Central Excise Act, 1944:* Section 9 (Offences and Penalties)
  - *Customs Act, 1962:* Section 135 (Evasion of duty or prohibitions)
  - *Indian Penal Code, 1860:* Section 120B, 255, 257-260, 417, 418, 420-424, 467, 471-473, 475 -476, 481, 483-488, 489A and 489B.
  - *Prohibition of Benami Property Transactions Act, 1988:* Section 3 (Prohibition of benami transactions)

What is the process for declaring an individual an FEO?

Under the Act, an application must be filed in the Special Court asking that a particular individual may be declared an FEO.

If the Special Court is satisfied that an individual is a fugitive economic offender, it may, by an order, declare the individual as a fugitive economic offender for reasons to be recorded in writing. On a declaration, the Special Court may order that any of the properties stand confiscated to the Central Government.

The confiscation order of the Special Court shall, to the extent possible, identify the properties in India or abroad that constitute proceeds of crime which are to be confiscated and in case such properties cannot be identified, quantify the value of the proceeds of crime. The confiscation order of the Special Court shall separately list any other property owned by the fugitive economic offender in India which is to be confiscated.

Where the Special Court has made an order for confiscation of any property and such property is in a contracting State, the Special Court may issue a letter of request to a Court or authority in the contracting State for execution of such order. Every letter of request to be transmitted to a contracting State shall be transmitted in such form and manner as the Central Government may, by notification, specify in this behalf.

It may be noted that 'Contracting State' means *any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise*.

Illustrative Cases - Economic Offender

Few fugitive economic offenders of India include Vijay Mallya, Nirav Modi, Mehul Choksi, etc.

Vijay Mallya[1] is an Indian businessman at present fighting extradition from the UK. Mallya, who owes 17 Indian banks an estimated Rs 9,000 crore, is accused of fraud and money laundering in the country.

Also a former Rajya Sabha member, Mallya is the ex-chairman of United Spirits. He currently continues to serve as chairman of United Breweries Group. Previously, he also served as chairman of Sanofi India and Bayer CropScience, among other companies.

Of all his businesses, Vijay Mallya's name is most closely associated with now defunct Kingfisher Airlines. The airline company, launched in 2005, proved to be his undoing, as its business model floundered in 2008, when a global recession and soaring fuel prices brought it to a grinding halt.

Facing heat from lenders following the collapse of the airline, Mallya fled to the UK in 2016. Mallya has publicly offered to make good on his debts and said he has been doing so since 2016.

How Mallya ended up being a fugitive economic offender

Mallya inherited UB Spirits, known for the Kingfisher beer brand, from his father and turned it around into India's biggest spirits maker. He became the chairman of UB Group at the age of 28.

However, most other businesses of the group were not as successful, Kingfisher Airlines being the biggest failure.

Started in 2005, Kingfisher Airlines was grounded in 2012 after a burgeoning debt burden made it impossible for the beleaguered airline to continue operations. The airline is also being investigated for suspected diversion of funds and financial irregularities.

Mallya left the country on March 2, 2016, the day a clutch of public-sector banks moved the Debt Recovery Tribunal against him. In January 2019, he was declared a fugitive economic offender under the Fugitive Economic Offenders Act.

What is Mallya's response to the allegations?

Mallay has denied all allegations and publicly offered to repay the full principal amount he owes the

Just before leaving the country in 2016, Mallya wrote an open letter defending himself. "All enquiries conducted have failed to find evidence of misappropriation of funds by Kingfisher Airlines or myself," Mallya said. "Despite pledging blue-chip securities and depositing significant amounts in court, a successful disinformation campaign has ensured my becoming the poster boy of all bank NPAs."

What next?

The Indian government is making all efforts to extradite Mallya from the UK. In February 2019, UK Home Secretary approved the extradition. The case is now pending in the London High Court, where Mallya filed an appeal against the order. The appeal has been listed for a three-day hearing from February 11, 2020.

According to the Economic Times Newspaper published on March 05, 2021, India has been pressing the UK to extradite Mallya after he lost his appeals in the British Supreme Court. The UK top court's decision marked a major setback to the 64-year-old businessman as it came weeks after he lost his High Court appeal last April against an extradition order to India[2].

Nirav Modi[3] : The Punjab National Bank scam relates to fraudulent letter of undertaking worth Rs 10,000 crore issued by the bank.

The key accused in the case were jeweller and designer Nirav Modi, his maternal uncle Mehul Choksi, and other relatives and some PNB employees. Nirav Modi and his relatives escaped India in early 2018, days before the news of the scam became public. PNB scam has been dubbed as the biggest fraud in India's banking history.

How the 10,000-crore scam happened?

Bankers used fake Letters of Undertakings (LoUs) at PNB's Brady House branch in Fort, Mumbai. The LoUs were opened in favour of branches of Indian banks for import of pearls for a period of one year, for which Reserve Bank of India guidelines lay out a total time period of 90 days from the date of shipment.

This guideline was ignored by overseas branches of Indian banks. They failed to share any document/information with PNB, which were made available to them by the firms at the time of availing credit from them.

Nirav Modi got his first fraudulent guarantee from PNB on March 10, 2011 and managed to get 1,212 more such guarantees over the next 74 months.

The Enforcement Directorate (ED) recovered bank token devices of the foreign dummy companies used by the fugitive diamond trader to transfer the fraudulent funds.

The probe agency found that Nehal Modi, brother of Nirav Modi had destroyed the devices and had even secured a server located at United Arab Emirates (UAE) soon after the scam broke out. These dummy firms had been receiving the fraudulent PNB LoUs and were based out in British Virgin Island and other tax havens.

The enforcement agency has so far seized movable and immovable properties to the tune of Rs. 2362 crore in the PNB fraud case.

How was the Punjab National Bank management oblivious to this?

PNB employees misused the SWIFT network to transmit messages to Allahabad Bank and Axis Bank on fund requirement. While all this was done using SWIFT passwords, the transactions were never recorded in the bank's core system — thereby keeping the PNB management in the dark for years.

How did the scam unfold?

On 29 January 2018, PNB lodged a FIR with CBI stating that fraudulent LoUs worth Rs. 2.8 billion (Rs 280.7 crore) were first issued on 16 January. In the complaint, PNB had named three diamond firms, Diamonds R Us, Solar Exports and Stellar Diamonds.

As of 18 May 2018, the scam has ballooned to over Rs 14,000 crore.

Who is Nirav Modi?

Nirav Modi is a luxury diamond jeweller and designer who was ranked 57 in the Forbes list of billionaires in 2017. He is also the founder of the Nirav Modi chain of diamond jewellery retail stores.

Modi is the Chairman of Firestar International, the parent of the Nirav Modi chain, which has stores in key markets across the globe.

He has 16 stores in diverse locations such as Delhi, Mumbai, New York, Hong Kong, London and Macau.

He is currently in the United Kingdom and is seeking political asylum in Britain.

According to the Times of India Newspaper published on February 25, 2021, A UK magistrates' court ordered extradition of fugitive diamantine Nirav Modi, who is wanted in India in the Punjab National Bank (PNB) scam case[4].

Conclusion

Fugitive Economic Offenders Act definitely aims to re-establish the Rule of Law with respect to the Fugitive Economic Offenders as they would be forced to return to India to face trial for scheduled offences. This also helps the banks and other financial institutions to achieve higher recovery from financial defaults committed by such fugitive economic offenders, improving the financial health of such institutions.

Special forum under the Act for expeditious confiscation of the proceeds of crime, in India or abroad, would force the fugitive to return to India to submit to the jurisdiction of Courts in India to face the law in respect of scheduled offences. The Government issued directions from time to time to deal with willful bank loan defaulters or fugitive economic offenders. Further, Government has also advised Public Sector Banks to obtain certified copy of the passport of promoters/directors and other authorised signatories of companies availing of loan facilities of specified amount. Immigration Authorities empowers to detain as well as prevent any person, including a willful defaulter, from leaving India against whom Look Out Circular (LOC) has been issued.

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INSIDER TRADING CASES IN INDIA*

Introduction

Insider trading is done by company insiders or entities closely linked to the company management or promoters. SEBI's insider trading probe revolves around Unpublished Price Sensitive Information (UPSI) and its possession by entities that have traded in the stock and their linkages. Insider trading erodes investor confidence, and affects market integrity. To address these concerns, SEBI, in 1992 had put in place a framework for prohibition of insider trading in securities in the form of **SEBI (Prohibition of Insider Trading) Regulations, 1992**. Further to address new challenges, the regulations were reviewed and replaced by a new set of Regulations, *viz.*, **SEBI (Prohibition of Insider Trading) Regulations, 2015**.

Instance of Insider Trading Practices

A listed company had informed the stock exchanges regarding update for one of its unit by US Food and Drug Administration under Regulation 30 of SEBI (LODR) Regulations, 2015, which led to the price rise in the scrip. The above information was UPSI in the context of the present case. The CFO of the company was in the possession of the UPSI. During the course of investigations, it was observed that son of CFO had purchased shares of the company in the equity and derivatives (future) segment during the UPSI period and these orders were placed by one of the subordinates of CFO.

It was observed that the funds in respect of the above trades were provided by the CFO of the company.

It was further observed that the relatives of two subordinates of the CFO and one 'designated employee' of the company had also traded in the scrip of the company during the period of UPSI. These entities had traded mostly in the futures contracts where they bought shares of the company before the announcement and sold within few hours/days of the announcement.

Therefore, the acts and omissions of the persons/entities have allegedly resulted in the violation of the provisions of the SEBI Act and SEBI (Prohibition of Insider Trading) Regulations, 2015. Based on the facts and circumstances and the findings of the investigation, appropriate enforcement actions have been recommended against the persons/entities under the provisions of SEBI Act and SEBI (PIT) Regulations, 2015.

Detection of Insider Trading Cases

When it comes to detection of insider trading cases, in the two years including the financial year (FY) 2018-19 and 2019-20, SEBI detected 119 cases of insider trading, which is higher than the number of cases detected by SEBI in any of the previous years since its inception. The

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highest number of insider trading cases which SEBI detected was 34 in 2016-17, which has jumped to 70 in 2018-19 and 49 in 2019-20. Trends in investigations by SEBI suggest that share price rigging has gone down and is at its lowest in nearly a decade. However, insider trading is on the rise.

Among others, detection of Insider trading in Aptech; Kishore Biyani of Futures Group; Sun Pharma board members; and Spice Jet etc. are a few examples which were taken up by the SEBI aggressively in its clean-up drive.

CASE NO. 1

FUTURE CORPORATE RESOURCES PRIVATE LIMITED

Facts of the case

SEBI had conducted an investigation in the scrip of Future Retail Limited to ascertain whether certain persons/ entities had traded in the aforesaid scrip during the period March 10, 2017 to April 20, 2017on the basis of unpublished price sensitive information.

During the investigation it was observed that Future Retail Limited (FRL) made an announcement on April 20, 2017 during market hours on the exchange platform for scheme of arrangement between FRL, Bluerock eServices Private Limited (BSPL), Praxis Home Retail Private Limited (PHRPL) and their respective Shareholders. Furthermore, the aforesaid scheme of arrangement had resulted in the demerger of certain business of FRL. The said announcement had a positive impact on the price of the scrip of FRL.

The information related to mergers, demergers, acquisitions, etc. qualifies as UPSI as per the 'Code of Conduct for Regulating, Monitoring and Reporting of Trading by Insiders' in the Securities of FRL.

The information related to scheme of arrangement which resulted in the demerger of certain business from FRL, qualifies as UPSI as per Regulation 2(1)(n)(iv) of PIT Regulations, 2015, prior to its announcement on the exchange platform dated April 20, 2017.

Chronology of events as per Investigation

March 10, 2017	**The announcement related to the "Composite Scheme of Arrangement between FRL, BSPL, PHRPL and their respective Shareholders" had come into existence on as preliminary discussion for the proposed scheme of arrangement was carried out on this date.**
March 14, 2017	A team was created by FRL on to work on this scheme on this date.
April 20, 2017	The press release pertaining to the aforesaid scheme was made on this day during market hours.

In view of the same, the period of UPSI was identified as March 10, 2017 to April 20, 2017.

SEBI's Observations

It was observed that Future Corporate Resources Private Limited (FCRPL) (promoter and promoter group of FRL), Kishore Biyani (CMD and Promoter of FRL) and Anil Biyani (Promoter and brother of FRL) traded in the scrip of FRL during the period of UPSI.

SEBI Order

- SEBI restrained Kishore Biyani, Anil Biyani and FCRPL from accessing the securities market for a period of 1 year and from buying, selling or dealing in the securities of the Future Retail Limited (FRL) for a period of two years.
- Further, FCRPL, Kishore Biyani and Anil Biyani imposed with penalty of ₹1 crore each.
- They were also directed to disgorge an amount of ₹17.78 crore, jointly and severally, along with interest at the rate of 12 per cent per annum from April 20, 2020, till the date of actual payment.

Appeal to SAT

Pursuant to this, Kishore Biyani, Anil Biyani and FCRPL have moved the Securities Appellate Tribunal (SAT) against the SEBI order that barred them from the securities market.

SAT Order

The Securities Appellate Tribunal (SAT) stayed the order passed by SEBI on FCRPL, Kishore Biyani and Anil Biyani. SAT has also directed them to deposit a sum of ₹11 crore as an interim measure.

CASE NO. 2

INSIDER TRADING IN THE SCRIP OF NDTV

Facts of the Case

SEBI conducted an investigation into the suspected insider trading in the scrip of NDTV ("the Company") and the investigation detected that-

Mr. Prannoy Roy and Mrs. Radhika Roy indulged in the act of insider trading by trading in the scrip of New Delhi Television Ltd. (NDTV) while in possession of unpublished price sensitive information ("UPSI") relating to the proposed reorganization of the Company and therefore, have violated the provision of sections 12A(d) and (e) of the SEBI Act, 1992 read with Regulations 3(i) and 4 of the PIT Regulations, 1992.

Mr. Prannoy Roy and Mrs. Radhika Roy sold their shares of NDTV on April 17, 2008, during trading window closure period, *i.e.*, within 24 hours of the public announcement of Price Sensitive Information relating to the proposed reorganization of the Company on April 16, 2008 and as such have violated NDTV's Code of Conduct and the provisions of Regulation 12(2) read with Regulation 12(1) of the PIT Regulations, 1992.

Mr. Prannoy Roy and Mrs. Radhika Roy together made a wrongful gain of ₹16.97 crores by trading in the shares of NDTV while in possession of UPSI relating to the reorganization of the Company.

Mr. Prannoy Roy and Mrs. Radhika Roy were insiders in terms of regulation 2(e) of the PIT Regulations, 1992.

As per NDTV's Annual Reports for the financial years 2006-07, 2007-08 and 2008-09, Mr. Prannoy Roy, apart from being one of the promoters, was also the Chairman and Whole Time Director of NDTV during the investigation period. Further, Mrs. Radhika Roy, who is the spouse of Mr. Prannoy Roy, was also one of the promoters and also served as the Managing Director of NDTV.

SEBI Order

SEBI *vide* order dated 27.11.2020 issued the following directions:

(a) Mr. Prannoy Roy and Mrs. Radhika Roy shall, jointly or severally, disgorge the amount of wrongful gain of ₹16,97,38,335/- , alongwith interest at the rate of 6% per annum from April 17, 2008, till the date of actual payment of disgorgement amount alongwith interest, within 45 days from the date of coming into force of this order; and

(b) Mr. Prannoy Roy and Mrs. Radhika Roy shall be restrained from accessing the securities market and further prohibited them from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with the securities market in any manner, whatsoever, for a period of 2 years.

Appeal to SAT

Mr. Prannoy Roy and Mrs. Radhika Roy filed an appeal against the SEBI's order dated November 27, 2020 whereby SEBI had barred them from the securities market for two years and also directed them to disgorge illegal gains of ₹ 16.97 crore for indulging in insider trading more than 12 years ago.

SAT Order

SAT has directed NDTV's promoters Prannoy Roy and Radhika Roy to deposit 50 per cent of the disgorged amount before SEBI within four weeks. If NDTV deposits the amount, the balance amount will not be recovered during the pendency of the appeal before SAT.

Supreme Court Order

The Hon'ble Supreme Court vide its order dated February 15, 2021 exempted Prannoy Roy and Radhika Roy from making deposit before the SAT for hearing their appeals. The Hon'ble Supreme Court directed that "no amount shall be coercively recovered from the appellants (Prannoy Roy and Radhika Roy) for hearing the case".

Steps taken by SEBI to Curb Insider Trading Practices

1. SEBI has put in place a framework for prohibition of insider trading in securities in the form of SEBI (Prohibition of Insider Trading) Regulations, 2015 (PIT Regulations).
2. The PIT Regulations provides for various measures to curb insider trading like
   - Restrictions on Communication and Trading by Insiders

- Disclosure of Trading by Insiders
- Code of Fair Disclosure and Conduct
- Institutional mechanism for Prevention of Insider Trading

3. Investigations are conducted by SEBI against the entities for suspected violations of the provisions of PIT Regulations.
4. In case any contraventions of PIT Regulations are observed, enforcement actions are taken by the Board as per the Provisions of the SEBI Act, 1992.

Conclusion

Every shareholder invests his money in the market with the prior faith of transparency and efficiency in the market. Any investor while making his decision about investment (to sell, buy or hold stock) relies upon the available price sensitive information provided by the listed company in the stock exchange. Fluctuation in prices due to insider trading leads to loss of credence and trust of investors in securities market as they feel that market is rigged and only the persons, who have inside information, get benefit and make profits or avoid loss from their investments.

In past few years, SEBI has taken several initiatives to curb the insider trading practices and to build the confidence of the investors who are investing in the Indian market. Insider Trading Regulations, 2015 is much appreciated as it deals with a wide range of problems related to Insider Trading and also has severely reduced loopholes.

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