STUDY MATERIAL

PROFESSIONAL PROGRAMME

MULTIDISCIPLINARY CASE STUDIES

MODULE 3
PAPER 8

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
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ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003
tel 011-4534 1000 **fax** +91-11-2462 6727
email info@icsi.edu **website** www.icsi.edu

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Phones
011-45341000

Fax
011-24626727

Website
www.icsi.edu

E-mail
info@icsi.edu

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PROFESSIONAL PROGRAMME

Module 3

Paper 8

Multidisciplinary Case Studies (Max Marks 100)

SYLLABUS

Objective

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

Detailed Contents

Case studies mainly on the following areas:

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

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MULTIDISCIPLINARY CASE STUDIES

1

Corporate Laws Including Company Law

HARI SANKARAN v. UNION OF INDIA [SC]

Civil Appeal No. 3747 of 2019

M.R. Shah & Indu Malhotra, JJ. [Decided on 04/06/2019]

Companies Act, 2013- section 130- application by central government for reopening and recasting of accounts- objection by ex-director of the company- NCLT allowed the application- on appeal NCLAT concurred with NCLT- whether correct-Held, Yes.

Brief facts:

Feeling aggrieved and dissatisfied with the impugned Order dated 31.01.2019 passed by the National Company Law Appellate Tribunal, by which the learned Appellate Tribunal has dismissed the said appeal preferred by the appellant herein – ExDirector of respondent No. 2 – Infrastructure Leasing & Financial Services Limited (hereinafter referred to as 'the IL&FS') and has confirmed the order passed by the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as 'the learned Tribunal') dated 01.01.2019 by which the learned Tribunal allowed the said application preferred by the Central Government under Section 130(1) & (2) of the Companies Act, 2013 (hereinafter referred to as the 'Companies Act') and has permitted recasting and re-opening of the accounts of IL&FS, IL&FS Financial Services Limited (hereinafter referred to as the "IFIN") and IL&FS Transportation Networks Limited (hereinafter referred as the "ITNL") for the last five years, the original appellant has preferred the present appeal.

Decision: Appeal dismissed.

Reason:

At the outset, it is required to be noted that by the impugned order and in exercise of powers under Section 130 of the Companies Act, the learned Tribunal has allowed the said application preferred by the Central Government and has directed/permitted reopening of the books of accounts and re casting the financial statements of IL&FS and other two companies for the last 5 years, viz., F.Y 20122013 to 20172018. The order passed by the learned Tribunal has been affirmed by the learned Appellate Tribunal. Therefore, the short question which is posed for consideration before this Court, whether in the facts and circumstances of the case, can it be said that the order passed by the learned Tribunal is illegal and/or contrary to Section 130 of the Companies Act?

Ongoing through the order passed by the learned Tribunal passed under Section 130 of the Act, it appears that the learned Tribunal is conscious of the relevant provisions of the Act, more particularly Section 130 of the Companies Act and more particularly the conditions precedent to be complied with/satisfied while directing/ permitting reopening of the books of accounts and recasting of the financial statements of the company. From the order passed by the learned Tribunal under Section 130 of the Companies Act, it appears that the learned Tribunal has considered the preliminary report submitted by the ICAI and SFIO and the observations made in the aforesaid reports/preliminary reports. That thereafter having satisfied that the conditions precedent for invoking powers under Section 130 of the Companies Act, stated in Section 130 (i) OR (ii) of the Companies Act are satisfied, thereafter the learned Tribunal has passed an order allowing the application under Section 130 of the Companies Act for reopening the books of accounts and re casting the financial statements of IL&FS and other two companies, viz, for the last 5 years.

Considering the facts narrated hereinabove and the preliminary reports of SFIO and ICAI which came to be considered by the learned Tribunal and considering the specific observations made by the learned Tribunal while passing the order under Section 241/242 of the Companies Act and considering the fact that the Central Government has entrusted the investigation of the affairs of the company to SFIO in exercise of powers under Section 242 of the Companies Act, it cannot be said that the conditions precedent while invoking the powers under Section 130 of the Act are not satisfied. We are more than satisfied that in the facts and circumstances of the case, narrated hereinabove, and also in the larger public interest and when thousands of crores of public money is involved, the Tribunal is justified in allowing the application under Section 130 of the Companies Act, which was submitted by the Central Government as provided under Section 130 of the Companies Act.

Now so far as the submission on behalf of the appellant that all the three provisions, viz., Section 130, Sections 211/212 and Sections 241/242 operate in different fields and in different circumstances and they are in the different Chapters and therefore any observation made while passing the order/orders with respect to a particular provision may not be considered while passing the order under relevant provisions is concerned, it is required to be noted that all the three provisions are required to be considered conjointly. While passing an order in a particular provision, the endeavour should be to see that the order/orders passed under other provisions of the Companies Act are given effect to, and/or in furtherance of the order/orders passed under other Sections. Therefore, the observations made while passing order under Section 241/242 of the Companies Act can be said to be relevant observations for passing the order under Section 130 of the Companies Act. At this stage, it is required to be noted that even otherwise in the order passed by the Tribunal under Section 130 of the Companies Act, there is a specific observation made by the learned Tribunal with respect to mismanagement of the affairs of the company, and even with respect to the relevant earlier accounts prepared in a fraudulent manner.

In view of the above and for the reasons stated above, we see no reason to interfere with the impugned order dated 01.01.2019 passed by the learned Tribunal under Section 130 of the Companies Act for reopening of the books of accounts and recasting the financial statements of the Infrastructure Leasing & Financial Services Limited; IL&FS Financial Services Limited and IL&FS Transportation Networks Limited for the last five years, viz. from Financial Year 201213 to the Financial Year 201718, which came to be confirmed by the learned Appellate Court vide impugned judgment and order dated 31.01.2019. Consequently, the present appeal fails and deserves to be dismissed and is accordingly dismissed.

PR. COMMISSIONER OF INCOME TAX, DELHI

v.

REGISTRAR OF COMPANIES, DELHI & ORS [NCLAT]

Company Appeal (AT) No. 405 of 2018

Bansi Lal Bhat & Balvinder Singh. [Decided on 20/08/ 2019]

Companies Act,2013- striking out of company's name- Fast track Exit Scheme- name of the company struck off- Revenue did not raise any objection- later revenue objected to the striking of – whether tenable-Held, No.

Brief facts:

M/s Nexus Marketing Pvt. Ltd (for short the 'Company') was incorporated in 2007 and in 2011 the Company applied for striking off its name under 'Fast Track Exit Scheme, 2011' [FTE], which was processed by the Respondent - Registrar of Companies, Delhi (for short 'ROC'). ROC issued notice to the Company and forwarded a copy of the notice the appellant Revenue for seeking objections, if any. Since, no objections were received by ROC from any stakeholder within the prescribed period of 30 days, name of the Company was struck off. The Revenue filed an appeal to the NCLT seeking restoration of the name of the company on the ground that the tax dues against the company were not determined, which was dismissed. Against the dismissal, the Revenue is in appeal before NCLAT.

Decision: Appeal dismissed.

Reason:

Heard learned counsel for the parties and perused the records.

In the instant case, the Report-cum-Affidavit filed by ROC and supported by Annexures - I and II satisfactorily establishes that the procedure laid down for striking off the name of Company from Register of Companies has been observed in letter and spirit. In the face of the material on record corroborated by contemporary record, no exception can be taken as regards compliance of the procedural aspect laid down in the Guidelines governing FTE of the Company.

Though, in terms of the Guidelines, decision of the ROC in respect of striking off the name of Company from its Register is final, it is open to this Appellate Tribunal to examine whether the fundamental principles of jurisprudence have been observed in compliance. Whether the Company resorted to FTE with malafide intention of defrauding the Creditors would be a consideration having a bearing on the application of FTE Guidelines for defunct companies but before dwelling upon the question of Revenue being a Creditor qua the Company on the material date, it would be of primary importance to find whether the Company was 'defunct company' within the meaning of FTE Guidelines. Nil asset and liability was a sine-qua-non for a company to fall within the ambit of a 'defunct company'. Non-commencement of business activity/ non-operation since incorporation or non-operation for last one year prior to filing of application for extension of FTE were the further requirements under the Guidelines.

It was therefore incumbent upon the Revenue, in the first instance to lay proof before the Tribunal or even before this Appellate Tribunal that the Company was possessed of assets besides having liabilities. Unfortunately, the Revenue has not even made any feeble attempt at disclosing any details of the assets, movable and immovable, that the Company possessed and liability, if any, on the material date. Liability to pay Income Tax would necessarily depend on assets besides trade and business activity culminating in profit or loss. The proof in regard to possession of assets by the Company and owing of any liabilities by it as also in regard to factum of any income from legitimate sources assessable to Income Tax being abysmally absent, no fault can be found in regard to striking off the Company by ROC under FTE which has been duly notified in the 'Gazette of India'.

Plea in this regard emanating from the Revenue is without substance and cannot be countenanced. Same is true about the plea of Revenue being a 'Creditor' within the meaning of Section 252(3) of the Companies Act, 2013, when admittedly it had not raised any demand or passed any assessment order prior to passing of the order of striking off the Company from the Register of Companies by ROC.

In so far as the undertaking given by Respondent No. 2, one of the erstwhile Directors of the Company qua the Tax demand subsequently raised by Revenue, during pendency of appeal proceedings before the Tribunal is concerned, same being a subsequent event and an issue not amenable to Appellate Jurisdiction across the ambit of this appeal, it would be open to the Revenue to approach the Tribunal in regard to breach, if any, of such undertaking violating the orders of the Tribunal. However, same cannot be a ground justifying restoration of the Company's name in the Register of ROC.

Yet another aspect cannot be overlooked while parting with this judgment. Striking off the Company which was a Private Company, from the Register of Companies, indisputably does not absolve its erstwhile Directors who are liable as provided under Section 179 of the Income Tax Act, 1961 to pay the amount of Tax leviable in respect of income of any previous year. Why, in presence of such mechanism within the legal framework available to Revenue, insistence is on restoration of Company without laying any proof of its being possessed of any assets and liabilities and without any evidence of the Company being in operation, is a question that can be best answered, though has not been answered by the Revenue. We refrain from making any comment on this question lest the same prejudices the Revenue.

For the foregoing reasons, we are not inclined to interfere with the impugned order, which does not appear to be legally infirm or unsustainable. The appeal is dismissed leaving the Revenue to pursue appropriate legal remedy in the light of observations in this judgment. There shall be no orders as to costs.

KANODIA KNITS PVT LTD

v.

REGISTRAR OF COMPANIES DELHI & HARYANA [NCLAT]

Company Appeal (AT) No.216 of 2018

A.I.S. Cheema & Balvinder Singh. [Decided on 28/01/2019]

Companies Act, 2013 – Section 248 – Striking of name of the company documents could not prove that the company was working – Whether name to be restores – Held, No.

Brief facts:

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

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

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

Decision: **Appeal dismissed.**

Reason:

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

We have no reasons to doubt the affidavit filed before us by the ROC attaching copy of the Notice dated 21.3.2017 as per STK 1 and the affidavit which claims that such notice was issued to the appellant company as per the official records of the ROC. Apart from this the appeal filed before NCLT itself admitted that notice under Section 248 was published in the official gazette, copy of notice STK 5 also gave opportunity to the appellant to move the ROC if it was aggrieved by the proposed removal of the company name. After such notice the appellant made no effort to move the ROC and put up its case that the appellant was in business or in operation when the name was struck off. Thus we are not accepting the contention that opportunity to the appellant was not given. Regarding the merits of the claim that the appellant was in business or in operation the documents filed before us include two income tax returns for the assessment years 2016-17 and 2017-18. The return for 2016-17 claims that the gross total income of the year was Rs.504 and the income tax return for 2017-18 claims that the gross total income was Rs.1473/-. If the invoices are seen, the seller is shown as Kanodia Hosiery Mills and buyer is Kanodia Knit (P) Ltd. If the address of the seller is perused in these invoices it is 35, North Basti Harphool Singh, Sadar Thana Road, Delhi. This is the same address of the appellant, Kanodia Knits Pvt Ltd, also. How much weight such documents should be given is a foregone consequence. We are not impressed by such documents to claim that the company was in business or in operation. Perusal of the impugned order shows that the NCLT considered the documents placed before it.

Having heard the appellant, and seeing the documents when we have considered the above findings and observations of the NCLT, we do not find any reason to differ from NCLT. There is no substance in this appeal. The appeal is rejected. No order as to costs.

JOHN THOMAS

v.

Dr. K. JAGADEESAN [SC]

Appeal (Crl.) 688 of 2001(Arising out of SLP (Crl.) No.1875 of 2001)

K.T.Thomas & R. P. Sethi, JJ. [Decided on 12/07/2001]

Equivalent citations: (2001) 6 SCC 30; 2001 SCC (Crl) 974; (2001) 106 Comp Cas 619.

Companies Act,1956 read with Indian Penal Code, 1860 – Defamatory publication against a reputed hospital – Director filed defamation case against the publisher – Whether director has locus standi to file such case – Held, Yes

Brief facts:

A renowned hospital in the Metropolis of Madras (Chennai) has been caricatured in a newspaper as the abattoir of human kidneys for trafficking purposes. When the Director of the Hospital complained of defamation, the publisher of the newspaper sought shelter under the umbrage that the libel is not against the Director personally, but against the hospital only and hence he cannot feel aggrieved. The accused/publisher, who raised the objection before the trial court, on being summoned by the court to appear before it, succeeded in stalling the progress of the trial by clinging to the said contention which the trial magistrate has upheld. But the High Court of Madras disapproved the action of the magistrate and directed the trial to proceed. Hence the accused has come up to this Court by filing the special leave petition.

Decision: Appeal dismissed.

Reason:

The appellant contended that the imputations contained in the publication complained of are not per se defamatory. After reading the imputations we have no doubt that they are prima facie libellous. The only effect of an imputation being per se defamatory is that it ould relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public. However, even if the imputation is not per se defamatory, that by itself would not go to the advantage of the publisher, for, the complaining person can establish on evidence that the publication has in fact amounted to defamation even in spite of the apparent deficiency. So the appellant cannot contend, at this stage, that he is entitled to discharge on the ground that the imputations in the extracted publication were not per se defamatory.

The contention focussed by the learned senior counsel is that the respondent, who filed the complaint, has no locus standi to complain because he is only a Director of K.J. Hospital about which the publication was made and that the publication did not contain any libel against the complainant personally. It is not disputed that the complainant is the Director of K.J. Hospital.

Explanation 2 in Section 499 of the IPC reads thus:

“Explanation 2. - It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.”

In view of the said Explanation, it cannot be disputed that a publication containing defamatory imputations as against a company would escape from the purview of the offence of defamation. If the defamation pertains to an association of persons or a body corporate, who could be the complainant? This can be answered by reference to Section 199 of the Code. The first subsection of that section alone is relevant, in this context. It reads thus:

> "***199. Prosecution for defamation.*** - (1) No court shall take cognizance of an offence under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence."

The collocation of the words "by some persons aggrieved" definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the court depending upon the facts of each case. If a company is described as engaging itself in nefarious activities its impact would certainly fall on every Director of the company and hence he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it. If K.J. Hospital is a private limited company, it is too farfetched to rule out any one of its Directors, feeling aggrieved on account of pejoratives hurled at the company. Hence the appellant cannot justifiably contend that the Director of the K.J. Hospital would not fall within the wide purview of "some person aggrieved" as envisaged in Section 199(1) of the Code.

The learned senior counsel made a last attempt to save the appellant from prosecution on the strength of the decision of this Court in K.M. Mathew v. State of Kerala {1992 (1) SCC 217}. In that case prosecution against Chief Editor was quashed for want of necessary averments in the complaint regarding his role in the publication. That part of the decision rests entirely on the facts of that case and it cannot be imported to this case. It is pertinent to point out, in this context, that the appellant did not have any such point either when he first moved the High Court for quashing the proceedings or when he moved the trial court for discharge. Hence it is too late in the day for raising any such point, even apart from non-availability of that defence to the appellant on merits. We, therefore, dismiss this appeal.

JAIPUR METALS & ELECTRICALS EMPLOYEES ORGANISATION

v.

JAIPUR METALS & ELECTRICALS LTD & ORS [SC]

Civil Appeal No. 12023 of 2018 [Arising out of SLP(C) No.18598 of 2018]

R F Nariman & M R Shah, JJ. [Decided on 12/12/2018]

Companies Act, 2013 read with Insolvency and Bankruptcy Code, 2016 – Winding up of sick company – Pending in High Court – Application moved to transfer the same to NCLT – Refused – Whether correct – Held, No.

Brief facts:

The present appeal has been filed by an employees' union challenging the judgment of the High Court of Judicature for Rajasthan, in which the High Court has refused to transfer winding up proceedings pending before it to the National Company Law Tribunal ("NCLT"), and has set aside an order of the NCLT by which order a financial creditor's petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Insolvency Code" or "Code") has been admitted.

Decision: Appeal allowed.

Reason:

It is clear that under Section 434 as substituted by the Eleventh Schedule to the Code vide notification dated 15.11.2016, all proceedings under the Companies Act, 2013 which relate to winding up of companies and which are pending immediately before such date as may be notified by the Central Government in this behalf shall stand transferred to the NCLT. The stage at which such proceedings are to be transferred to the NCLT is such as may be prescribed by the Central Government.

It is clear that the present case relates to Rule 5(2) alone. Despite the fact that Section 20 of the SIC Act speaks of a company being wound up under the Companies Act, 1956 under the just and equitable provision, which is Section 433(f) of the Companies Act, 1956, yet, since cases that fall under Section 20 of the SIC Act are dealt with separately under Rule 5(2), they cannot be treated as petitions that have been filed under Section 433(f) of the Companies Act, 1956, which are separately specified under Rule 6. The High Court is therefore not correct in treating petitions that are pursuant to Section 20 of the SIC Act as being pursuant to Section 433(f) of the Companies Act, 1956 and applying Rule 6 of the 2016 Transfer Rules.

However, though the language of Rule 5(2) is plain enough, it has been argued before us that Rule 5 was substituted on 29.06.2017, as a result of which, Rule 5(2) has been omitted. The effect of the omission of Rule 5(2) is not to automatically transfer all cases under Section 20 of the SIC Act to the NCLT, as otherwise, a specific rule would have to be framed transferring such cases to the NCLT, as has been done in Rule 5(1). The real reason for omission of Rule 5(2) in the substituted Rule 5 is because it is necessary to state, only once, on the repeal of the SIC Act, that proceedings under Section 20 of the SIC Act shall continue to be dealt with by the High Court. It was unnecessary to continue Rule 5(2) even after 29.06.2017 as on 15.12.2016, all pending cases under Section 20 of the SIC Act were to continue to be dealt with by the High Court before which such cases were pending. Since there could be no opinion by the BIFR under Section 20 of the SIC Act after 01.12.2016, when the SIC Act was repealed, it was unnecessary to continue Rule 5(2) as, on 15.12.2016, all pending proceedings under Section 20 of the SIC Act were to continue with the High Court and would continue even thereafter. This is further made clear by the amendment to Section 434(1) (c), with effect from 17.08.2018, where any party to a winding up proceeding pending before a Court immediately before this date may file an application for transfer of such proceedings, and the Court, at that stage, may, by order, transfer such proceedings to the NCLT. The proceedings so transferred would then be dealt with by the NCLT as an application for initiation of the corporate insolvency resolution process under the Code. It is thus clear that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of the SIC Act pending before the High Court are to continue as such until a party files an application before the High Court for transfer of such proceedings post 17.08.2018. Once this is done, the High Court must transfer such proceedings to the NCLT which will then deal with such proceedings as an application for initiation of the corporate insolvency resolution process under the Code.

The High Court judgment, therefore, though incorrect in applying Rule 6 of the 2016 Transfer Rules, can still be supported on this aspect with a reference to Rule 5(2) read with Section 434 of the Companies Act, 2013, as amended, with effect from 17.08.2018. However, this does not end the matter. It is clear that Respondent No. 3 has filed a Section 7 application under the Code on 11.01.2018, on which an order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No. 3 at any time before a winding up order is passed to apply under Section 7 of the Code.

The ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule of the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment.

BANK STREET SECURITIES PVT LTD & ORS.

v.

REGIONAL DIRECTOR, NORTHERN REGION [NCLAT]

Company Appeal (AT) No.340 of 2018

A.I.S. Cheema & Balvinder Singh. [Decided on 17/01/2019]

Companies Act, 2013 – Amalgamation – Petition filed under old Act transferred to NCLT – Based on the report of the RD amalgamation was rejected – Whether correct – Held, Yes.

Brief facts:

It appears that the appellants had filed first motion before the Hon'ble High Court of Delhi and the Court was pleased to dispense with the requirement of convening meetings of equity shareholders, secured and unsecured creditors of the Companies in view of their consent being obtained. The appellant then filed joint petition for sanction of scheme of amalgamation before the Court vide second motion under Section 391 to 394 of Companies Ac, 1956 ("Old Act" in short). Notice was issued to the Registrar of Companies/ Regional Director and Official Liquidator. Notice by newspaper publication was also directed. The second motion petition, before it could be decided came to be transferred to the Learned NCLT in view of the powers getting vested with NCLT.

It is stated that when the matter came up before NCLT, NCLT heard the same and considered report of the Regional Director and concluded that certain companies in the scheme were carrying on NBFC activities and approval of Reserve Bank of India had not been taken and the petition required to be rejected.

Decision: **Appeal dismissed.**

Reason:

We have heard the learned counsel for the appellant and perused the record. A copy of the report of Regional Director has been filed at Annexure-21. The report shows that the Regional Director had issued query to the appellant company by letter dated 8th March, 2016 and the letters returned undelivered. Then one Advocate Mr. Ashish Middha by letter dated 15th March, 2016 filed reply with the Regional Director on behalf of the company. The impugned order shows that the ROC during the pendency of the matter before NCLT took action under Section 12(1) r/w Section 12(4) of the Companies Act, 2013 and imposed penalty which came to be reduced by Regional Director in an appeal and which penalty was paid by the appellants. This relates to not giving notice of change of the registered office to the Registrar of Companies. This should reflect on working of these appellant companies with regard to how bona fide their actions are.

It is apparent, from paras 7, 8 and 9 of the report of the Regional Director, that the appellants who had made their submissions to the Regional Director through letter dated 15.03.2016 were unable to convince the Regional Director regarding the issue of NBFC. Report shows that Regional Director was satisfied that the appellant companies were prima facie engaged in investment activities or extending loans and advances to certain parties like corporate bodies and there was no mention that these companies are registered with RBI as NBFC to carry on such business.

The learned counsel for appellants argued that if the appellant company No.1,2,4,5,6 had 'zero' income and transferee company also had ‘zero’ income and so it cannot be said that both the conditions i.e. more than 50% of assets should be invested in financial activities and more than 50% of income should be from financial activities were satisfied.

Having gone through the matter if the transferor companies show ‘zero’ income from operations and still show huge investments to be their assets, the Regional Director rightly observed that the intrinsic value of these investment (assets) is not known and the reasonableness of the proposed exchange ratio could not be ascertained. Such accounts showing ‘zero’ income and showing huge investments as assets must be said to be not inspiring confidence. If there are huge investments as assets and it shows that financial assets are more than non-financial assets and income from operation is zero without its break up between financial income and non-financial income, the required criteria to determine the principal business of the company being finance company gets met. The NCLT not being satisfied from the case put up by the appellant declined to accept the scheme and we find it difficult to interfere with the impugned order.

Looking to these definitions as mentioned above, when the report of the Regional Director shows that the appellant companies were engaged in investment activities or extending loans and advances, these above provisions would be attracted. Even with or without the circular of Reserve Bank of India dated 19th October, 2006, keeping in view the above legal provisions, the appellants have not been able to satisfy the Regional Director or the NCLT that they are not involved in NBFC activities. The counsel for the appellants has not been able to satisfy us also. The appeal does not even plead that the appellants are not indulging in NBFC activities. The appeal memo while referring to the appellant companies merely stated that the objects of the companies were as amended from time to time and which have been set out in Memorandum of Association of the different companies. No such Articles of Association or Memorandum of Association have been produced before us to show what are aims and objects of these companies. No documents are shown as to what are the activities of these companies. Thus no material has been brought to satisfy that the impugned order is erroneous and deserves to be interfered with.

THE ASSOCIATED JOURNALS LTD & ANR

v.

LAND & DEVELOPMENT OFFICE [Del]

LPA 10/2019 & CM Nos. 566/2019 & 649/2019

Rajendra Menon & Kameshwar Rao, JJ. [Decided on 28/02/2019]

National Herald case – Companies Act – Acquisition of shares principle of piercing corporate veil – Delhi High Court reiterates the principle.

Brief facts:

Though this case covered law on various aspects of the issue such as cancellation of lease, right to re-entry, transfer of property by transfer of shareholdings, we are concerned with the issue of ‘piercing the corporate veil’ and how and when the smoke screen of corporate identity could be pierced to identify the real beneficiaries in the camouflaged transaction. The following are relevant facts for the above issue.

Indian National Congress sometimes referred to as AICC had advanced a loan of Rs.90 crores to AJL. On 13th August 2010, an application was made for incorporation of a charitable non-profit company (a company under Section 25 of the Companies Act) named Young India and ultimately on 23rd November 2010 Young India was incorporated with Sh. Suman Dubey and Sh. Sam Pitroda as its founder Directors. This company had an authorized share capital of 5,000 shares of Rs.100/- each valued at Rs.5, 00,000/- and the paid up share capital was 1100 shares of Rs.100/- each valued at Rs.1, 10,000/- and the company at that point of time had two shareholders, (a) Shri Sam Pitroda - 550 shares valued at Rs.100/- each and (b) Shri Suman Dubey - 5,000 shares valued at Rs.100/- each.

On 13th December 2010, the first Managing Committee Meeting of Young India took place and Shri Rahul Gandhi was appointed as its Director, namely, a non-shareholder and Shri Motilal Vora and Shri Oscar Fernandes as ordinary members. Within five days thereafter, that is, on 18th December 2010, by a deed of assignment the loan of Rs.90 crores and odd outstanding in the books of Indian National Congress as recoverable from Associated Law Journals for the period 2002 to 2011 was transferred to Young India. Three days thereafter, on 21st December, 2010, a Board Meeting of AJL called for an EGM which was subsequently held on 24th December, 2010 and on the said date a loan of Rs.1 crore was received by Young India from another company M/s Dotex and thereafter on 28th December, 2010 i.e. within a week a formal deed of assignment was executed by AICC assigning the loan of Rs.90 crores in favour of Young India.

Immediately thereafter on 21st January, 2011, an EGM of Associated Law Journal was held approving fresh issue of 9.021 crores shares to Young India and on 22nd January, 2011 i.e. on the next day the second Managing Committee of Young India was held in which Smt. Sonia Gandhi, Mr. Motilal Vohra and Mr. Oscar Fernandes were appointed as Directors and the 550 shares of the existing shareholders of Young India - Suman Dubey and Sam Pitroda were transferred to Smt.Sonia Gandhi and Mr.Oscar Fernandes and on the same day fresh allotment of Young India shares were made in the following manner: (a) 1,900 shares having paid up value of Rs.1,90,000/- to Shri Rahul Gandhi, (b) 1,350 shares with a paid up amount of Rs.1,35,000/- in the name of Smt. Sonia Gandhi, (c) 600 shares with a paid up value of Rs.60,000 in the name of Sh. Motilal Vohra and (d) 50 shares with a paid up value of Rs.5,000 in the name of Sh.Oscar Fernandes and after issuance of PAN by the Income Tax Department a bank account was opened by Young India with Citibank on 14th February, 2011 and the cheque issued by M/s Dotex for Rs.1 crore was deposited in the Young India Bank account on the said day and on 26th February, 2011 Young India issued a cheque of Rs.50 lakhs to AICC as consideration for assignment of Rs.90 crore debt payable by ALJ to AICC. On the same day, i.e., 26th February, 2011, ALJ allotted 9, 02, 16,899 equity shares to Young India in pursuance to the AGM Meeting decision held on 21st January, 2011 and the ALJ Board Meeting on 26th February, 2011 and thereafter Young India applied for exemption under Section 12-Aon 29th March, 2011 and on 9th May, 2011 the Income Tax Authorities granted the exemption with effect from the F.Y. 2010-11.

Decision: Appeal dismissed.

Reason:

We have heard the learned counsel for the parties at length and we have also gone through the written submissions filed by them.

Be that as it may, by the aforesaid transaction that had taken place, Young India acquired beneficial interest on AJL's property which on the said date was valued at more than Rs.400 crores on payment of a sum of Rs.50 lakhs to AICC. This, according to the respondent, if viewed in the backdrop of the purpose of transfer lease and the modus operandi adopted is nothing but a devise to transfer the property held on lease from the Government by AJL, Young India which became 99% or rather 100% shareholder of AJL. With these facts, we now propose to examine the judgments relied upon by both the parties to evaluate the legal implication and the principles culled out from these judgments and examine their applicability in the present factual matrix to decide the issue of breach of conditions of the lease on this count.

On a consideration of the argument as canvassed by Dr.Singhvi, at the first instance, the same looks very attractive and the findings recorded may look to be unsustainable and perverse, however, it is an equally settled principle of law that in public interest and for assessing the actual nature of a transaction or the modus operandi employed in carrying out a particular transaction, the theory of lifting of the corporate veil is permissible and a Court can always apply this doctrine to see as to what is the actual nature of transaction that has taken place, its purpose and then determine the question before it after evaluating the transaction or the modus operandi employed in the backdrop of public interest or interest of revenue to the State etc. The theory and doctrine of lifting of corporate veil had been considered by the Supreme Court in the case of *Gotan Lime Stone* (*Supra*) and in the said case, judgments in the case of *Vodafone* (*supra*) and *Skipper Construction* (*supra*) etc. have been taken note of and in para 30, specific reference has been made to the Constitution Bench judgment in the case of *Bacha F. Guzdar* (*supra*).

If we consider the transaction in the present case in the backdrop of the aforesaid principles laid down by the Hon'ble Supreme Court, we have no hesitation in holding that the purpose for which the doctrine of lifting of the veil is applied is nothing but a principle followed to ensure that a corporate character or personality is not misused as a device to conduct something which is improper and not permissible in law, fraudulent in nature and goes against public interest and is employed to evade obligations imposed in law. If that is the purpose for which the doctrine of lifting of the veil is to be employed and if we see the transaction that has taken place in the present case with regard to how the transfer of shares between AJL and Young India took place, we find that within a period of about three months, that is, between 23rd November, 2010 to 26th February, 2011, Young India was constituted. It took over the right to recover a loan of more than 90 Crores from All India Congress Committee for a consideration of Rs.50 Lakhs, thereafter replaced the original shareholders of Young India by four new entities including Sh.Moti Lal Vohra, Chairman of AJL and Young India after acquiring 99% of shares in AJL, became the main shareholder with four of its shareholders acquiring the administrative right to administer property of more than 400 Crores. Even though Dr.Singhvi had argued that there is nothing wrong in such a transaction and it is legally permissible, but if we take note of the principles and the doctrine for which the theory of lifting of the corporate veil has received legal recognition, we have no hesitation in holding that the entire transaction of transferring the shares of AJL to Young India was nothing but, as held by the learned writ Court, a clandestine and surreptitious transfer of the lucrative interest in the premises to Young India. In fact, the contention of Dr. Singhvi has to be rejected and rightly so was rejected by the Single Judge even though without applying the principle of lifting of the corporate veil.

In case the theory of lifting of the corporate veil, as discussed hereinabove, is applied and the transaction viewed by analysing as to what was the purpose for such a transaction, the so called innocent or legal and permissible transaction as canvassed before us, in our considered view, is not so simple or straight forward as put before us, but it only indicates the dishonest and fraudulent design behind such a transaction.

Apart from the aforesaid judgments, there are various other judgments which have been brought to our notice wherein the said theory of lifting of the corporate veil has been approved and we have no hesitation in holding that the transfer in question, if analysed in the backdrop of the principles as discussed hereinabove, we see no error in the findings recorded by the learned writ Court to hold that the transfer in question comes within the prohibited category under clause XIII (3) of the lease agreement.

Accordingly, finding no ground made being out for making any indulgence into the matter, we dismiss the appeal.

STEEL AUTHORITY OF INDIA LTD.

V.

SHRI AMBICA MILLS LTD. & ORS [SC]

CIVIL APPEAL NO.2889 OF 1985

M.M. PUNCHHI & K. VENKATASWAMI, JJ. [DECIDED ON 17/10/1997]

EQUIVALENT CITATIONS: (1998) 92 COMP CAS 120; (1997) 27 CLA (SN) 38

Companies Act, 1956 – Government company – Whether department of the government – Held, No.

Brief facts

Though this case involves a main dispute arose as to the issuance of advance license and its rejection, the question as to whether a government company in which the major shareholder is the government becomes a department of the government or remains as a separate entity was also decided.

The Respondent obtained an advance license and submitted to SAIL for the supply of rolled strips in coils under a special scheme. As the licence was defective SAIL rejected the license and refused to supply the goods at concessional price. Respondent company contended that the license issuing authority and the major shareholder of SAIL are the same government and because of this SAIl could not have rejected the defective advance license. We are primarily concerned with this issue here.

Decision: Appeal allowed.

Reason

Coming to the merits of the case, we accept the contention of the appellant that the High Court went wrong in holding that SAIL was a department of the Union of India. In Dr. S.L. Agarwal v. The General Manager, Hindustan Steel Ltd, AIR 1970 SC 1150 and Western Coalfields Ltd. vs. Special Area Development Authority, Korba & Anr, AIR 1982 SC 697 this court had held that the companies which are incorporated under the Companies Act have a corporate personality of their own, distinct from that of Government of India.

In the view of the above decisions of this Court, we have no hesitation to hold that the High Court erred in thinking that SAIL was a department of the Union of India and most of the reasons given in the judgment are based on this wrong premise.

The High Court held that the licensing authority and the appellant being two different wings/departments of Union of India, the appellant on receipt of rectified documents on 26.8.1983 must register the indent as if it was presented on 20.8.1983. We are afraid, we cannot accept the above reasoning of the High Court as we have pointed out that the basic error committed by the High Court was in assuming that the appellant was a Department of Union of India. We have already noticed that there are number of judgments of the Court taking the view that a company though fully owned by Union of India when incorporated takes its own entity/identify and cannot be considered as department of the Union of India. In view of our above conclusion, it is not necessary for us to consider and decide the other points raised by learned counsel for the appellant.

USHA MARTIN VENTURES LTD. & ORS.

v.

USHA MARTIN LTD. & ANR [NCLAT]

Company Appeal (AT) No. 94 of 2019

S.J. Mukhopadhaya, A.I.S Cheema & Kanthi Narahari. [Decided on 22/04/2019]

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

Brief facts

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

Decision: Appeal dismissed.

Reason

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

Referring to the impugned order, it is submitted that even the Tribunal observed that the State Bank of India is not a necessary party, inspite of the same, it has allowed to intervene the Respondents.

Counsel for the Respondent – State Bank of India submitted that the bank has a nominee Director in the Board of Directors of the company who is required to be present in board meetings in the interest of the company.

Having heard learned counsel for the parties, as we find that the lender State Bank of India has a nominee as one of the Director of the Company and the petitioner have alleged mismanagement of the company, we hold that the Tribunal rightly allowed the State Bank of India to intervene in the matter. The appeal is accordingly dismissed. No cost.

MEL WINDMILLS PVT. LTD.

v.

MINERAL ENTERPRISES LIMITED & ANR [NCLAT]

Company Appeal (AT) No. 04 of 2019 with connected appeals

Bansi Lal Bhat & Balvinder Singh. [Decided on 27/05/ 2019]

Companies Act, 2013 – Section 230 – Merger and amalgamation – Investigations pending against one of the merging companies – NCLT rejected the scheme – Whether correct – Held, No.

Brief facts:

These appeals arise out of common order passed by the NCLT Bengaluru Bench (hereinafter referred to as 'Tribunal') by virtue whereof the Tribunal declined to sanction the scheme of demerger on the ground that several issues were pending finalization and certain investigations were pending in relation to the business of the demerged company. However, liberty was granted to file afresh after the pending investigations are disposed of. Since, the parties and subject matter are common, all the three appeals were heard together and are proposed to be disposed of by a common judgment.

Admittedly, the Demerged Company in para IV (h) of its application disclosed the factum of pendency of certain proceedings in relation to the mining business of the Demerged Company which on clarification turned out to be investigations registered arising out of charge sheet lodged by Special Investigation Team, wherein proceedings are stated to have been stayed by Hon'ble High Court of Karnataka. According to Appellants the said proceedings have no bearing and cannot be an impediment in considering approval of the scheme of demerger.

Decision: Appeals allowed.

Reason:

We have given our anxious consideration to the submissions made at the bar and scanned through the record.

On a plain reading of the aforesaid provisions it comes to fore that the Tribunal, while dealing with an application under Section 230 of the Act, on being satisfied that the compromise or arrangement has been proposed in connection with a scheme for the reconstruction of the company or companies involving merger/ amalgamation of two or more companies and under the scheme property or liabilities of the transferor company is required to be transferred to transferee company or divided among/ transferred to two or more companies is required to order meeting of the creditors or members, as the case may be, to be called. Sub-section (9) thereof empowers the Tribunal to dispense with calling of a meeting of creditors where such creditors, having at least 90% value agree to and confirm the scheme of compromise or arrangement. The creditors/ members are required to file an affidavit stating that they agree to and confirm the scheme of compromise or arrangement. It is abundantly clear that where the creditors/ members having at least 90% value signify their consent to the scheme of compromise or arrangement by filing affidavits, the Tribunal will have the discretion to dispense with calling of meeting of creditors/ members. This is to be done at the very threshold stage and precedes an order by the Tribunal under Sub-Section (6) sanctioning a compromise or arrangement which can be passed by the Tribunal only after majority of the persons representing three-fourths in value of the creditors or members as the case may be agree to any compromise or arrangement. Once the companies concerned approach the Tribunal for sanctioning of a compromise or an arrangement, the Tribunal, at the very outset is required to order a meeting of the creditors/ members to be held for according consideration to the proposed scheme. This is a sine quo non for proceeding further and any order of sanctioning or refusing to sanction such compromise or arrangement by the Tribunal would be without jurisdiction unless the Tribunal has dispensed with calling of such meeting of creditors/ members in terms of Sub-section (9). It is manifestly clear that at the stage of calling of meeting of creditors/members for consideration of the scheme of compromise or arrangement the Tribunal is not required to examine the merits of the scheme qua the proposed compromise/ arrangement. Any such indulgence on the part of Tribunal would fall foul of the provision engrafted in Section 230 (1) of the Act and would be without jurisdiction.

As noticed elsewhere in this judgment, the Tribunal declined to sanction the proposed scheme of demerger, albeit on account of several issues pending finalization, without either considering prayer for dispensation of meeting of creditors and members of the three Appellant Companies or in the alternative directing convening of a meeting of the creditors and members of these companies for considering the proposed scheme of demerger. The mandate of law engrafted under Section 230(1) of the Act requiring the Tribunal to order calling of meeting of the creditors/ members of the concerned companies not being complied with and the mandatory provisions being observed in breach, the impugned order cannot be supported. The Tribunal, at the very threshold stage, was not required to venture into the merits of the proposed scheme of demerger which had to be examined only after obtaining the consent of creditors/members with requisite majority. For proper exercise of jurisdiction vested in the Tribunal it was imperative either to call the meeting of creditors/ members for consideration of the proposed scheme of demerger or to dispense with such meeting by invoking Sub-section (9) of Section 230 as 100% of shareholders of each company, 100% of creditors of Resulting Companies and 97.18% of creditors of the Demerged Company had filed consent affidavits. The Tribunal failed to adhere to the mandate of law which was mandatory and imperative in nature. This goes to the root of the impugned order which cannot be sustained.

Apart from what has been stated hereinabove, the pending issues could not be construed as an impediment in sanctioning the proposed scheme of demerger. It is so for more than one reason. First being the case of Appellants - Petitioners before the Tribunal, that the demerger scheme proposed by the Appellants was not with regard to business of Mining which would continue with the Demerged Company and the pending investigation would continue unhindered against the Director of the Demerged Company without having any impact on the proposed scheme of demerger. Second, because pendency of investigation would not stand as a legal impediment in sanctioning the proposed scheme of demerger for any civil action or criminal proceedings in respect of past events/ transactions. In identical circumstances, the Hon'ble Gujarat High Court sanctioned the modified composite scheme of arrangement in terms of its judgment dated 1st March 2007 rendered in Core Health Care Limited v. Nirma Ltd reported in 2007 SCC Online Guj 235.

For the foregoing reasons the impugned order cannot be supported. The Tribunal seriously erred in dismissing the application on merit when the stage of consideration of the proposed scheme of demerger was yet to arrive. The impugned order suffers from serious legal infirmity and the same is set aside. The appeals are accordingly allowed. The matter is remanded back to the National Company Law Tribunal.

BACHA F. GUZDAR

v.

COMMISSIONER OF INCOMETAX [SC]

Civil Appeal No.104 of 1953

Mehar Chand Mahajan (CJI), S.R.Das, Ghulam Hasan, N.H.Bhagwati, T. L. Venkatarama Aiyyar, JJ. [Decided on 28/10/1954]

Equivalent citations: 1955 AIR 740, 1955 SCR (1) 876, (1955) 25 Comp Cas 1

Indian Companies Act, 1913 – Whether a shareholder has any personal right over the assets and properties of the company – Held, No. Whether the shareholders own the property of the company- Held, No.

Brief facts:

This appeal raised an interesting point of law under the Indian Income-tax Act, 1922, with respect to the nature of dividend income. While deciding the issue, the Supreme Court had also clearly explained the relationship between a shareholder and a company and the rights of the shareholder vis-a-vis the properties of the company and also the nature of shares. We are more particularly concerned with these aspects in this case.

The appellant, Mrs. Bacha F. Guzdar, was, in the accounting year 1949-50, a shareholder in two tea companies and received from these companies dividends aggregating to Rs. 2,750. The two companies carried on business of growing, manufacturing and sale of tea and that 40% of the income of the tea companies was taxed as income from the manufacture and sale of tea and 60% of such income was exempt from tax as agricultural income. According to the appellant, the dividend income received by her in respect of the shares held by her in the said Tea companies is to the extent of 60% agricultural income in her hands and therefore pro-tanto exempt from tax while the Revenue contends that dividend income is not agricultural income and therefore the whole of the income is liable to tax.

Decision : Appeal dismissed.

Reason :

It is true that the agricultural process renders 60% of the profits exempt from tax in the hands of the company from land which is used for agricultural purposes but can it be said that when such company decides to distribute its profits to the shareholders and declares the dividends to be allocated to them, such dividends in the hands of the shareholders also partake of the character of revenue derived from land which is -used for agricultural purposes? Such a position - if accepted would extend the scope of the vital words “revenue derived from land” beyond its legitimate limits. Agricultural income as defined in the Act is obviously intended to refer to the revenue received by direct association with the land which is used for agricultural purposes and not by indirectly extending it to cases where that revenue or part thereof changes hands either by way of distribution of dividends or otherwise.

In fact and truth dividend is derived from the investment made in the shares of the company and the foundation of it rests on the contractual relations between the company and the shareholder. Dividend is not derived by a shareholder by his direct relationship with the land. There can be no doubt that the initial source which has produced the revenue is land used for agricultural purposes but to give to the words ‘revenue derived from land’ the unrestricted meaning, apart from its direct association or relation with the land, would be quite unwarranted.

It was argued on the strength of an observation made by Lord Anderson in *Commissioners of Inland Revenue v. Forrest, (1924) 8 Tax cases 704*, that an investor buys in the first place a share of the assets of the industrial concern proportionate to the number of shares he has purchased and also buys the right to participate in any profits which the company may make in the future. That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word 'assets' in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. **A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them.** The interest of a shareholder vis-à-vis the company was explained in the case of *Chiranjitlal Chowdhuri v. Union of India & Ors [1950] S.C.R. 869(known as Sholapur Mills* Corporate Laws *case)*. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company.

It is true that the shareholders of the company have the, sole determining voice in administering the affairs of the company and are entitled, as provided by the Articles of Association to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. **The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders.** The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. Reliance is placed on behalf of the appellant on a passage in Buckley's Companies Act, 12th Ed., page 894, where the etymological meaning of dividend is given as dividendum, the total divisible sum but in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. This statement does not justify the contention that shareholders are owners of a divisible sum or that they are owners of the property of the company.

The proper approach to the solution of the question is to concentrate on the plain words of the definition of agricultural income which connects in no uncertain language revenue with the land from which it directly springs and a stray observation in a case which has no bearing upon the present question does not advance the solution of the question. **There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders.** The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up, but not in the assets as a whole as Lord Anderson puts it.

It was argued that the position of shareholders in a company is analogous to that of partners *inter se*. This analogy is wholly inaccurate. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders.

In Halsbury's Laws of England, Volume 6 (3rd Ed.), page 234, the law regarding the attributes of shares is thus stated:

"A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the, nature of real estate. "

In *Borland's Trustee v. Steel Brothers & Co. Ltd. L.R. [1901] 1 Ch. 279*, Farwell J. held that "a share in a company cannot properly be likened to a sum of money settled upon and subject to executory limitations to arise in the future; it is rather to be regarded as the interest of the shareholder in the company, measured, for the purposes of liability and dividend, by a sum of money ...." It was suggested that the dividend arises out of the profits accruing from land and is impressed with the same character as the profits and that it does not change its character merely because of the incident that it reaches the hands of the shareholder.

This argument runs counter to the definition of agricultural income which emphasizes the necessity of the recipient of income having a direct and an immediate rather than an indirect and remote relation with land. To accept this argument will be tantamount to saying that the creditor recovering interest on money debt due from the agriculturist who pays out of the produce of the land is equally entitled to the exemption.

The learned Attorney-General also contended that the conclusion that dividend is not agricultural income also follows from the provisions of section 16, subsection (2) and the proviso to the Act. According to him, this section compels the assessee to show in his return the whole dividend including the portion which is excluded on the ground of agricultural income. We do not consider it necessary to express any opinion upon this contention as our conclusion reached as a result of the foregoing discussion is sufficient to dispose of the appeal. We accordingly dismiss the appeal with costs.

UNION OF INDIA & ANR

v.

MAHALAXMI SAW MILLS P. LTD [DEL]

LPA No.2514-15/2005

G.Rohini (CJ) & Rajiv Sahai Endlaw, J. [Decided on 23/12/2015]

Government Grant Act read with Companies Act and Transfer of Property Act-grant of government lease-Conversion of partnership firm into private company assets and properties of the firm transferred and vested into the company- leasehold rights of the land of the firm also stood transferred to the company- lessor claimed the payment of unearned increase, based on the terms of the lease deed, from the firm for giving transfer permission – Whether the demand is tenable-Held, Yes.

Brief facts:

The lease of land admeasuring 207 sq. yards bearing No.3/13, Industrial Area, Kirti Nagar, New Delhi was granted by the President of India to one Jagjodh Singh vide Lease Deed dated 31st December, 1962 for a term of 99 years. Clause (b) supra of the Lease Deed of the land aforesaid requires the lessee to obtain approval in writing of the appellants L&DO before any "assignment or transfer" of the leased premises. Clause (c) supra of the Lease Deed entitled the appellants L&DO to claim and recover unearned increase at the time of "transfer" subsequent to the first "transfer".

In 1966, the lessee Jagjodh Singh transferred the leasehold rights in the said property to M/s Mahalaxmi Saw Mills, a partnership firm ("MSM"). The constitution of the said MSM changed from time to time but no intimation thereof was given to the appellants L&DO; as on 7th May, 1986 there were 7 partners in the partnership firm.

The aforesaid seven partners of MSM, on 26th August, 1986 got incorporated the respondent Company and transferred the business, assets and liabilities of partnership firm MSM to the respondent Company at their net book value and became shareholders of respondent Company in proportion of their shares in the partnership firm.

The respondent Company thereafter applied to the appellants L&DO for mutation of the leasehold rights in the land aforesaid from the name of MSM to the name of the respondent Company. The appellants L&DO demanded the payment of unearned increase of Rs.13,04,294/- together with penalty of Rs.35,532/- for giving permission.

The respondent Company challenged the demand under a writ petition and the Single Judge, relying on Vali Pattabhirama Rao v. Sri Ramanuja Ginning and Rice Factory (P) Ltd. AIR 1984 AP 176, had allowed the writ petition of the respondent Company by quashing the demand for unearned increase and by directing the appellants L&DO to mutate / record the leasehold rights in the property from the name of the partnership firm to the name of the respondent Company.

The appellants appealed to the Division Bench.

Decision: Appeal allowed.

Reason:

We have considered the rival contentions and for the reasons hereinafter appearing are unable to concur with the view taken by the learned Single Judge and / or with the additional arguments of the counsel for the respondent Company before us.

The "transfer" if any by M/s Mahalaxmi Saw Mills (partnership firm) to respondent Company is a transfer subsequent to the first transfer which was effected by Sh. Jagjodh Singh in favour of M/s Mahalaxmi Saw Mills. Thus, if it is a transfer or assignment within the meaning of clauses aforesaid of the Lease Deed, as is contended by appellants L&DO, unearned increase would be payable thereon.

A firm under the Indian Partnership Act, 1932 is not a juristic person and has no entity independent from that of its partners and is merely a compendious name for its partners. The property of a firm is the property of all its partners in proportion to their share in the partnership firm.

The said partners of the partnership firm M/s Mahalaxmi Saw Mills converted the partnership firm into a private limited company i.e. the respondent Company herein and further provided in the Memorandum of Association of the respondent Company that all the assets of the partnership firm stood vested in the respondent Company by so doing, what was earlier the property of the partners of the partnership firm M/s Mahalaxmi Saw Mills became the property of the respondent Company.

Even though all the erstwhile partners of M/s Mahalaxmi Saw Mills were shareholders of the respondent Company in proportion to their share in the partnership firm but a company incorporated under the Companies Act, 1956 as distinct from a partnership firm is not only a juristic person and a corporation sole but also, as distinct from a partnership firm, a legal entity different from its shareholders. Thus, notwithstanding the partners of M/s Mahalaxmi Saw Mills who as aforesaid were the owners / lessees of the aforesaid property of M/s Mahalaxmi Saw Mills being the shareholders of respondent Company, the ownership / leasehold rights in the aforesaid property vested not in them as shareholders but in the respondent Company.

In the aforesaid state of law, it cannot be said that the change in the ownership / title to leasehold rights from that of the partners of M/s Mahalaxmi Saw Mills to the respondent Company did not result in change of ownership / title to leasehold rights. Transfer is defined in Black's Law Dictionary, 8th Edition as any mode of disposing of or parting with an asset or an interest in an asset; Assignment is defined as transfer of rights or property. A change in ownership of leasehold rights in the land underneath the property from partners of M/s Mahalaxmi Saw Mills to respondent Company would thus amount to the said partners parting with the leasehold rights to the respondent Company and would constitute a transfer or assignment of leasehold rights within the meaning of Clauses (b) & (c) supra of the Lease Deed.

It is not as if the vesting even if any under Section 575 of the Companies Act of the property is an involuntary act. The conversion of a partnership firm into a private limited company was a voluntary act of the partners of M/s Mahalaxmi Saw Mills and it is not the case of the respondent Company that there was any legal compulsion therefor. The vesting of leasehold rights in the property from the partners of Mahalaxmi Saw Mills (partnership firm) to the name of the company, even if under Section 575 supra was thus a voluntary act to qualify as a transfer. We are however of the view that the Clauses (b) & (c) supra of the Lease Deed do not require the transfer or assignment to be for consideration. The measure for unearned increase provided therein, of the difference between the premium paid and the market value of the land prevailing, also does not require exchange of any consideration for computation of unearned increase. We are unable to find any requirement of monetary consideration as a necessary concomitant of transfer, neither in Transfer of Property Act nor in any other law. If it were to be so, a gift, for consideration of natural love and affection, would also cease to be a transfer and would not attract any stamp duty or unearned increase. It is also not as if there was no consideration in the subject transaction. The consideration for the partners of M/s Mahalaxmi Saw Mills (partnership firm) to transfer their property to the respondent Company was the issuance of shares of the respondent Company to the partners in lieu thereof. However, that consideration has got nothing to do with the computation of unearned increase as above.

We thus allow the appeal and set aside the judgment of the learned Single Judge and dismiss the writ petition filed by the respondent Company.

SIDDARTH GUPTA

v.

THE DELHI GOLF CLUB LIMITED & ANR [DEL]

I.A. No. 19355/2015 in C.S (OS) No. 2805/2015

Manmohan Singh, J. [Decided on 18/12/2015]

Companies Act, 1956 – Expulsion of member without following the provisions of the AOA – Whether tenable – Held, No – Whether plaintiff is entitled to interim injunction – Held, Yes.

Brief facts:

The plaintiff applied to the defendant No. 1 on 7th August, 2009 along with a cheque of Rs.44,120/- however no decision was taken for a long time. On 16th April, 2014 the plaintiff received a communication from defendant No. 2 approving nomination of 'Out of Turn' regular membership. Upon the receipt of the said communication, the plaintiff applied afresh to defendant No. 1 on 21st April, 2014 along with a cheque of Rs.67,416/- . Defendant No. 1 vide a communication dated 3rd June, 2014 informed the plaintiff of being duly elected as an associate 'C' member and was instructed to pay the balance fees. The letter also stated that the plaintiff will be entitled to all the rights and privileges of a member of the club as per the Articles of Association.

Plaintiff has been availing these facilities since he became a member on 3rd June, 2014. Plaintiff vide letter dated 23rd July, 2014 sought refund of Rs.44,120/- deposited in 2009 which was returned by defendant No. 1 with covering letter dated 14th August, 2014. The plaintiff states that he learnt from a well-wisher on 8th September, 2015 who is a member of defendant No. 1, that a resolution was passed by the general committee of defendant No. 1 to revoke his membership on 10th August, 2015. On receipt of this information the plaintiff logged onto the member's area of defendant No. 1's website to peruse the minutes of the meeting on 10th August, 2015. The minutes revealed that membership of the plaintiff was decided to be revoked at the behest of defendant No. 2 who decided to cancel his nomination as it was found to be in contravention of the rules and regulations/established procedures of the Govt. of India.

Therefore, the plaintiff has filed the present suit seeking declaration that he is entitled to continue as a member of the defendant Company and that the decisions made by defendant Nos. 1 and 2 are bad in law and illegal, seeking permanent injunction against removal/revocation of plaintiff's membership with the defendants. The plaintiff had also prayed for an interim injunction as well.

Decision: Interim injunction granted.

Reason:

A person who joins the club is governed by Rules under which he may also be expelled and if he is expelled without following the Rules, in an unfair and unjust manner and the principles of natural justice and fair play have not been applied, it is necessary that he must be given his chance of defence and explanation.

Admittedly, the plaintiff has paid the requisite fee and having waited for 5 years for being a member and having been granted membership, has a legitimate right that he would be entitled to continue as a member as per the rules and Memorandum of Articles of Association and that he could be removed only as per the terms stipulated in the Articles of Association.

It is the admitted position that the defendant No.1 has not granted an opportunity of hearing before passing any adverse orders as per the Memorandum and Articles of Association. The decision of the defendant No.2, referred to in the minutes of the meeting dated 10th August, 2015, has been taken without issuing any notice to the Petitioner. The same was taken at the back of the plaintiff. The defendant No.1 is club if the club is exploiting its member, at least the member must be apprised with. In case the Article 34 and 35 are read in meaningful manner, it is clear that before expelling a member the conditions and rules laid down have to be complied with whether those are mandatory or directory.

Article 34 of the Memorandum and Articles of Association of the defendant No.1 provides the circumstances/ reasons in/for which any membership can be revoked/cancelled. None of the conditions mentioned therein arise in the present case.

Article 35 of the Memorandum and Articles of Association, which mandates that before action is taken against any member, he/ she must be given notice of such proposed action and also an opportunity to explain his/her alleged misconduct. In the present case, no opportunity of hearing was granted to him. Even no notice for cancellation of his membership was given. It was given after filing of the suit and even the plaintiff has challenged the same by filing of application for amendment of plaint. At least both defendant Nos. 1 and 2 ought to have put the plaintiff to notice and granted him an opportunity of hearing before passing any adverse orders. Prima facie on the face of it, rule of natural justice has been violated by the club in a discriminatory manner in violation of the fundamental rights of the plaintiff guaranteed under the Constitution of India.

The plaintiff has also challenged the locus of the defendant No. 2 by stating that once a person is nominated and admitted/elected as a member he can be removed only as per the provision of Memorandum and Articles of Association.

In view of above said reasons, the Court is of the view that defendant No.1 could have, if necessary, revoked the membership only in accordance with the procedure laid down in the Articles of Association. The plaintiff is entitled to continue as member unless he is disqualified in terms of Article 34 and 35 of the defendant No.1.

Once a person becomes the member of the club, who has enjoyed its facility whether he becomes a member in its ordinary course or out of turn, it is the duty of the club to follow the due process as prescribed under Regulations. The membership cannot be terminated without due process of procedure and regulations.

In case of Charles Mantosh & Ors v. Dalhousie Institute & Ors, AIR 1993 Cal 232, it was contended that terminating membership without even giving an opportunity of hearing is not permissible. It was emphatically mentioned that member has prima facie case for grant of temporary injunction restraining authority of club from giving effect to its decision to remove. Similarly in the case of T.P. Daver v. Lodge Victoria, AIR 1963 SC 114, it was contended on behalf of the respondents that expulsion of a member no doubt demands strict compliance of the rules and it is to be done in good faith and in fairness.

In the present case, due process of Articles 34 and 35 has not been followed. The application of the plaintiff is accordingly allowed by passing the interim at this stage in favour of the plaintiff and against the defendants restraining the defendants from interfering with the enjoyment of the rights and facilities available to the members of defendant No.1 by the plaintiff, his spouse and dependents.

MADHUSUDAN GORDHANDAS & CO

v.

MADHU WOOLLEN INDUSTRIES PVT. LTD [SC]

Civil Appeal No. 1113 of 1970

A.N. Ray & D.G.Palekar, JJ. [Decided on 29/10/1971]

Equivalent citations: 1971 AIR 2600; 1972 SCR (2) 201; (1972) 41 Comp Cas 125.

Companies Act,1956 – Section 433 – Winding up of a company – Inability to pay debts – Loss of substratum – Principles laid down.

Brief facts :

The appellants are a partnership firm. The partners are the Katakias. They are three brothers. The appellants carry on partnership business in the name of Madhu Wool Spinning Mills. The respondent company has the nominal capital of Rs. 10,00,000 divided into 2000 shares of Rs. 500 each. The issued subscribed and fully paid up capital of the company is Rs. 5,51,000 divided into 1,103 Equity shares of Rs. 500 each. The three Katakia brothers had three shares in the company. The other 1,100 shares were owned by N.C. Shah and other members described as the group of Bombay Traders. Prior to the incorporation of the company there was an agreement between the Bombay Traders and the appellants in the month of May, 1965. The Bombay Traders consisted of two groups known as the Nandkishore and the Valia groups. The Bombay Traders was floating a new company for the purpose of running a Shoddy Wool Plant. The Bombay Traders agreed to pay about Rs. 6,00,000 to the appellants for acquisition of machinery and installation charges thereof. The appellants had imported some machinery and were in the process of importing some more. The agreement provided that the erection expenses of the machinery would be treated as a loan to the new company. Another part of the agreement was that the machinery was to be erected in portions of a shed in the compound of Ravi Industries Private Limited. The company was to pay Rs. 3,100 as the monthly rent of the portion of the shed occupied by them. The amount which the Bombay Traders would advance as loan to the company was agreed to be converted into Equity capital of the company. Similar option was given to the appellants to convert the amount spent by them for erection expenses into equity capital.

The company was incorporated in the month of July, 1965. The appellants allege that the company adopted the agreement between the Bombay Traders and the appellants. The company however denied that the company adopted the agreement. The appellants filed a petition for winding up in the month of January, 1970. The appellants, claiming that they were the creditors of the company, alleged that the company was liable to be wound up under the provisions of section 433 (c) of the Companies Act, 1956 as the company is unable to pay the debts.

It was alleged that the substratum of the company disappeared and there was no possibility of the company doing any business at profit. The company was insolvent and it was just and equitable to wind up the company.

The learned Single Judge refused to wind up the company and asked the company to deposit the disputed amount of Rs. 72,556.01 in court. The further order was that if within six weeks the appellants did not file the suit in respect of the recovery of the amount the company would be able to withdraw the amount and if the suit would be filed the amount would stand credited to the suit. The High Court on appeal upheld the judgment and order and found that the alleged claims of the appellants were very strongly and substantially denied and disputed. Hence, the appeal to the Supreme Court.

Decision: Appeal dismissed.

Reason:

The High Court correctly gave four principal reasons to reject the claims of the appellants to wind up the company as creditors. First, that the books of account of the company did not show the alleged claims of the appellants save and except the sum of Rs. 72,556.01. Second, many of the alleged claims are barred by limitation. There is no allegation by the appellants to support acknowledgement of any claim to oust the plea of limitation. Thirdly, the Katakia brothers who were the Directors resigned in the month of August, 1969 and their three shares were transferred in the month of December, 1969 and up to the month of December, 1969 there was not a single letter of demand to the company in respect of any claim. Fourthly, one of the Katakia brother was the Chairman of the Board of Directors and therefore the Katakias were in the knowledge as to the affairs of the company and the books of accounts and they signed the balance sheets which did not reflect any claim of the appellants except the two invoices for the amounts of Rs. 14,650 and Rs. 36,000. The High Court characterised the claim of the appellants as tainted by the vice of dishonesty.

The alleged debts of the appellants are disputed, denied, doubted and at least in one instance proved to be dishonest by the production of a receipt granted by the appellants. The books of the company do not show any of the claims excepting in respect of two invoices for Rs. 14,650 and Rs. 36,000. It was said by the appellants that the books would not bind the appellants. The appellants did not give any statutory notice to raise any presumption of inability to pay debt. The appellants would therefore be required to prove their claim.

This Court in *Amalgamated Commercial Traders* (*P*) *Ltd*. v. *A. C. K. Krishnaswami & Anr* (1965) 35 Comp Cas 456 (SC) dealt with a petition to wind up the company on the ground that the company was indebted to the petitioner there for a sum of Rs. 1,750 being the net dividend amount payable on 25 equity shares which sum the company failed and neglected to pay in spite of notice of demand. There were other shareholders supporting the winding up on identical grounds. The company alleged that there was no debt due and that the company was in a sound financial position. The resolution of the company declaring a dividend made the payment of the dividend contingent on the- receipt of the commission from two sugar mills. The commission was not received till the month of May, 1960. The resolution was in the month of December-, 1959. Under section 207 of the Companies Act a company was required to pay a dividend which had been declared within three months from the date of the declaration. A company cannot declare a dividend payable beyond three months. This Court held that the non-payment of dividend was bona fide disputed by the company. It was not a dispute 'to hide' its inability to pay the debts. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the, creditor was unreasonable [See *London and Paris Banking Corporation* [1968] 1 W.L.R. 1091]. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company, when the company contended that the work had not been done properly was not allowed. [See *In Re. Brighton Club and Norfold Hotel Co. Ltd.* (1865) 35 Beav.204].

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt [See Re. A Company (1894) 94 S.J. 369]. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantity the debt precisely (See Re. Tweeds Garages Ltd (1962) Ch.406; (1962) Comp Cas 795 (Ch.D)]. The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. Under section 557 of the Companies Act 1956 in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered though perhaps the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st Edition page 742 as follows:

"*This right to a winding up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order*".

The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (See Re. P. & J. Macrae Ltd (1961) 1 All E.R.302; (1961) 31 Comp Cas 424 (C.A)]

In the present case the claims of the appellants are disputed in fact and in law. The company has given prima facie evidence that the appellants are not entitled to any claim for erection work, because there was no transaction between the company and the appellants or those persons in whose names the appellants claimed the amounts. The company has raised the defence of lack of privity. The company has raised the defence of limitation. As to the appellant's claim for compensation for use of shed the company denies any privity between the company and the appellants. The company has proved the resolution of the company that the company will pay rent to Ravi Industries for the use of the shed. As to the three claims of the appellants for invoices one is proved by the company to be utterly unmeritorious. The company- produced a receipt granted by the appellants for the invoice amount. The falsehood of the appellants' claim has been exposed. The company however stated that the indebtedness is for the sum of Rs. 14,850 and the company alleges the agreement between the company and the appellants that payment will be made out of the proceeds of sale. On these facts and on the principles of law to which reference has been made the High Court was correct in refusing the order for winding up.

The appellants contended that the shortfall in the assets of the company by about Rs. 2,50,000 after the sale of the machinery would indicate first that the substratum of the company was gone and secondly that the company was insolvent. An allegation that the substratum of the company is gone is to be alleged and proved as a fact. The sale of the machinery was alleged in the petition for winding up to indicate that the substratum of the company had disappeared. It was also said that there was no possibility of the company doing business at a profit. In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case the, company alleged that with the proceeds of sale the company intended to enter into some other profitable business. The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the court is reluctant to hold that it has no such prospect. (See Re. Suburban Hotel Co. (1867) 2 Ch.App.737; and Davis & Co. v. Brunswick (Australia) Ltd (1936) 1 All E.R.299; (1936) 6 Comp Cas 227 (P.C.)]. The company alleged that out of the proceeds of sale of the machinery the company would have sufficient money for carrying on export business even if the company were to take into consideration the amount of Rs 1,45,000 alleged to be due on account of rent. Export business, buying and selling yarn and commission agency are some of the business which the company can carry on within its objects. One of the Directors of the Company is Kishore Nandlal Shah who carries on export business under the name and style of M//'s. Nandkishore & Co. in partnership with others. Nandkishore & Co. are creditors 'of the company to the extent of Rs. 4,95,000. The company will not have to meet that claim now. On the contrary, the Nandkishore group will bring in money to the company. This Nandkishore group is alleged by the company to help the company in the export business. The company has not abandoned objects of business. There is no such allegation or proof. It cannot in the facts and circumstances of the present case be held that the substratum of the company is gone. Nor can it be held in the facts and circumstances of the present case that the company is unable to meet the outstandings of any of its admitted creditors. The company has deposited in court the disputed claims of the appellants. The company has not ceased carrying on its business. Therefore, the company will meet the dues as and when they fall due. The company has reasonable prospect of business and resources.

Counsel on behalf of the company contended that the appellants presented the petition out of improper motive. Improper motive can be spelt out where the position is presented to coerce the company in satisfying some groundless claims made against it by the petitioner. The facts and circumstances of the present case indicate that motive. The appellants were Directors. They sold their shares. They went out of the management of the company in the, month of August, 1969. They were parties to the proposed sale. Just when the sale of the machinery was going to be effected the appellants presented a petition for winding up. In the recent English decision in Mann v. Goldstein [(1968) 1 W.L.R.1091; (1968) 39 Comp Cas 353 (Ch.D)] it was held that even though it appeared from the evidence that the company was insolvent, as the debts were substantially, disputed the court restrained the prosecution of the petition as an abuse of the process of the court. It is apparent that the appellants did not present the petition for any legitimate purpose.

MADRAS PETROCHEM LTD & ANR

v.

BIFR & ORS [SC]

Civil Appeal Nos.614 – 615 of 2016 (Arising out of SLP(C) Nos. 26170 – 26171 of 2008)

Kurian Joseph & Rohinton Fali Nariman, JJ.

[Decided on 29/01/2016]

Section 22 of the SICA read with section 13 of the SARFESI Act – Enforcement of security of the sick company by creditor banks – Whether provisions of SICA prevail over the provisions of SARFESI Act – Held, No.

Brief facts:

The Appellant No.1 Company filed a reference under SICA before the BIFR, which was registered as BIFR Case No.115 of 1989 and ICICI was appointed as the Operating Agency to formulate a rehabilitation scheme. Two rehabilitation schemes were framed, over a period of time, but failed to be implemented. Despite efforts by the Operating Agency to attempt to revive the company, all such efforts failed, and ultimately, on 30.4.2001, BIFR, on the basis of the recommendation of the Operating Agency, formed a prima facie opinion that the appellant No.1 company should be wound up and therefore BIFR recommended to the High Court of Bombay that the said company be wound up. On 4.2.2002, appellant No.1's challenge to the BIFR order was dismissed by the AAIFR. While matters stood thus, ICICI issued a notice dated 20.11.2002 under Section 13(2) of the SARFESI Act to the appellant No.1 company and followed it up with a possession notice dated 9.5.2003. Meanwhile, appellant Nos. 1 & 2 filed a writ petition before the Delhi High Court challenging the AAIFR order dated 4.2.2002 and the BIFR order dated 25.7.2001.

The Delhi High Court passed the impugned order on 24.7.2008, as has been stated hereinabove, in which it was of the view that Section 15(1) proviso 3 of the SICA when construed to include all proceedings under the SICA, would make the present proceedings under the SICA abate on the facts of this case. Ultimately, in this view of the matter, and differing with a judgment of the Orissa High Court, the Delhi High Court disposed of the appellants' writ petition as having become infructuous. Appeals have been filed against the said order by the present appellants which appeals, as has been stated hereinabove, raise interesting questions of law on the interplay of the SICA with the SARFESI Act. The main issue was whether section 22 of the SICA prevail over section 13 of the SARFESI Act.

Decision: Appeal dismissed.

Reason:

After elaborately discussing plethora of case laws and the background history of enacting SICA and SARFESI, the Court arrived at the following conclusion:

Section 22 of the SICA will continue to apply in the case of unsecured creditors seeking to recover their debts from a sick industrial company. This is for the reason that the SICA overrides the provisions of the Recovery of Debts Due To Banks and Financial Institutions Act, 1993.

Where a secured creditor of a sick industrial company seeks to recover its debt in the manner provided by Section 13(2) of the SARFESI Act, such secured creditor may realise such secured debt under Section 13(4) of the SARFESI Act, notwithstanding the provisions of Section 22 of the SICA.

In a situation where there are more than one secured creditor of a sick industrial company or it has been jointly financed by secured creditors, and at least 60 per cent of such secured creditors in value of the amount outstanding as on a record date do not agree upon exercise of the right to realise their security under the SARFESI Act, Section 22 of the SICA will continue to have full play.

Where, under Section 13(9) of the SARFESI Act, in the case of a sick industrial company having more than one secured creditor or being jointly financed by secured creditors representing 60 per cent or more in value of the amount outstanding as on a record date wish to exercise their rights to enforce their security under the SARFESI Act, Section 22 of the SICA, being inconsistent with the exercise of such rights, will have no play.

Where secured creditors representing not less than 75 per cent in value of the amount outstanding against financial assistance decide to enforce their security under the SARFESI Act, any reference pending under the SICA cannot be proceeded with further – the proceedings under the SICA will abate.

In conclusion, it is held that the interim order dated 17.1.2004 by the Delhi High Court would not have the effect of reviving the reference so as to thwart taking of any steps by the respondent creditors in this case under Section 13 of the SARFESI Act. This is because the SARFESI Act prevails over the SICA to the extent of inconsistency therewith. Section 15(1) proviso 3 covers all references pending before the BIFR, no matter whether such reference is at the inquiry stage, scheme stage, or winding up stage. The Orissa High Court is not correct in its conclusion on the interpretation of Section 15(1) proviso 3 of the SICA. This being so, it is clear that in any case the present reference under Section 15(1) of the Appellant No. 1 company has abated inasmuch as more than 3/4th of the secured creditors involved have taken steps under Section 13(4) of the SARFESI Act. The appeals are accordingly dismissed.

REGISTRAR OF COMPANIES

v.

RAJSHREE SUGAR & CHEMICALS LTD & ORS [SC]

Civil Appeal No. 485 0f 2000

Ruma Pal, D.P.Mohapatra & K.T.Thomas, JJ. [Decided on 11/05/2000]

Equivalent Citations: (2000) 101 Comp Cas 271; (2000) 37 CLA 400.

Sections 113 & 621 of the Companies Act, 1956 read with sections 468 & 469 of the Code of Criminal Procedure, 1973 – Offences – Delay in despatching the share certificates – Registrar filed complaint after getting knowledge of the same during inspection – Complaint dismissed by trial court that it is time barred - High court upheld the same and in addition held that Registrar is incompetent to file the complaint – Whether tenable – Held, No.

Brief facts:

Two lots of share transfer forms along with share certificates were sent to the Respondent Company on 23.11.1990 and 18.12.1990. The first batch of applications for transfer was received by the company on 11.12.1990, approved on 29.3.1991 and dispatched on 6.4.1991. The second batch of applications was received on 26.12.1990 approved by the company on 3.4.1991 and dispatched on 16.4.1991. Apparently, Section 113 (1) was not complied with. This came to the knowledge of the Appellant Registrar only on 20.7.1992 when the

Appellant inspected the books of account of the company under Section 209A (1) (i) of the Act. The complaint was filed by the appellant on 20.08.1992 before the Chief Judicial Magistrate, Coimbatore, who dismissed the complaint on the ground that it was barred by limitation. The Revision Petition challenging the above order was also dismissed on the additional ground that the Registrar was incompetent to file the complaint.

Decision: Appeal allowed.

Reason:

This appeal has been preferred from the decision of the High Court of Madras dated 17th March, 1998. The appeal was filed on 26th July, 1999 after a delay of 406 days. The application for condonation of delay filed by the appellant shows that the Department of Legal Affairs took up the matter only on 16th December, 1998. No explanation whatsoever has been given for the Appellant's inaction during this period of nine months. The observation of this Court in State of U.P. v. Bahadur Singh and Others, AIR 1983 SC 845 regarding the latitude to be shown to the Government in deciding questions of delay, does not give a licence to the Officers of the Government to shirk their responsibility to act with reasonable expedition. However, since the matter has been permitted to be argued on merits, it would not be appropriate to dismiss the appeal on the ground of delay, but our disapproval of the conduct of the appellant in this regard will be reflected in the costs which we intend to award against the appellant in favour of the respondents, irrespective of our decision on merits.

The only decision cited by the respondents which is on Section 113 of the Act is the decision in Nestle India Ltd & Ors v. State & Anr 1994(4) Comp L.J. 446 (Del). Neither the learned Judge in his decision in Nestle India nor the High Court in the judgment under appeal considered the provisions of Section 621 (1) of the Companies Act, which provides:

"*621 (1) No Court shall take cognizance of any offence against this Act (other than an offence with respect to which proceedings are instituted under Section 545), which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, or of a shareholder of the company, or of a person authorised by the Central Government in that behalf*."

Under this Section therefore, the appellant is competent to file a written complaint in respect of offences under, inter-alia, Section 113 of the Act. The phrase person aggrieved has not been defined in the Code. However, as far as offences under the Companies Act are concerned, the words must be understood and construed in the context of Section 621 of the Act. If the words person aggrieved are read to mean only the person affected by the failure of the Company to transfer the shares or allot the shares, then the only person aggrieved would be the transferee or the allottee, as the case may be. Under Section 621 of the Act, no Court can take cognizance of an offence against Companies Act except on the complaint of a share-holder, the Registrar or the person duly authorised by the Central Government. Where the transferee or allottee is not an existing share-holder of the Company, if the words person aggrieved is read in such a limited manner, it would mean that Section 469 (1) (b) of the Code would be entirely inapplicable to offences under Section 113 of the Act. There is, in any event, no justification to interpret the words person aggrieved as used in Section 469 (1) (b) restrictively particularly when, as in this case, the statute creating the offence provides for the initiation of the prosecution only on the complaint of particular persons. Having regard to the clear language of Section 621 of the Act, we have no manner of doubt that the appellant would be a person aggrieved within the meaning of Section 469 (1) (b) of the Code in respect of offence (except those under Section 545) against the Companies Act.

Apart from overlooking the provisions of Section 621 of the Act, the High Court erred in construing the provisions of Section 113 (2) with reference to Section 113(3). The latter deals with the civil liability of the Company and its officers for a breach of Section 113 (1) at the instance of the transferee of the shares. Section 113 (2) deals with the criminal liability arising out of a violation of Section 113 (1). The objects of the two sub-sections are disparate. Section 113 (3) is primarily compensatory in nature whereas Section 113 (2) is punitive. An application under Section 113 (3) can only be made by the transferee. And as already seen, a transferee who is not an existing shareholder of the Company cannot file a complaint under Section 113 (2) at all.

For the reasons stated, we are of the view that the appellant as a person aggrieved would be entitled to the benefit of the provisions of Section 469 (1) (b) of the Code. It is not in dispute that the appellant came to know of the offences on 20th July 1992. The commencement of the period of limitation of six months for initiating the prosecution would have to be calculated from that date. The complaint was filed on 20th August 1992 well within the period specified under Section 468(2) of the Code.

In the circumstances, the decision of the High Court as well as the Chief Judicial Magistrate, Coimbatore are set aside and the matter is remanded back to the Chief Judicial Magistrate, Coimbatore for being decided on merits. Because of the inordinate delay by the appellant in preferring this appeal, the appellant shall pay the costs of the appeal to the respondents.

OM PRAKASH PARASRAMPURIA & ORS

v.

UNION OF INDIA & ORS [DEL]

W.P. (C) 8617 and 8732/2015

Pradeep Nandrajog & Mukta Gupta, JJ. [Decided on 03/03/2016]

Recovery proceedings against guarantors of a sick company – Whether protection under section 22A of SICA is available to them – Held, No.

Brief facts:

In the case of KSL & Industries Ltd. vs. Arihant Threads Ltd. & Ors (2015) 1 SCC 166 a Three Judge Bench of the Supreme Court held that provisions of section 22 of the SICA will prevail over section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 19931. This judgement reiterated the legal principle that coercive recovery proceedings could not be initiated against a sick company.

In the present appeals the appellants are guarantors to the loan obtained by a sick company and recovery proceedings against them were initiated before the DRT. As per the writ petitioners the said decision holds that recovery proceedings under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are to be treated as a suit and therefore if the principal borrower is declared as a sick industrial company proceedings under Recovery of Debts due to Banks and Financial Institutions Act, 1993 cannot lie or be continued against the guarantors.

Decision: Appeal dismissed.

Reason:

A plain grammatical reading of Section 22(1) as originally enacted would reveal that the bar created was to the continuation or institution of proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company and for the appointment of a receiver in respect thereof without the consent of BIFR, and post-amendment, to the continuation or institution of suits for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company.

The second limb of sub-Section (1) of Section 22, which begins with the expression ‘and no suit’ concerns itself with actions for recovery of money or for enforcement of security once again against the industrial company. The latter part of this second limb which reads, ‘or of any guarantee in respect of any loans or advances granted to the industrial company’ creates some kind of a doubt as regards the guarantors i.e. whether notwithstanding proceedings being suspended by virtue of sub- Section 1 of Section 22 of SICA against the sick industrial company, could the proceedings continue or be instituted against the guarantors.

The word used in sub-Section 1 of Section 22 is 'guarantee' and not 'guarantor'. The possible argument that the term 'guarantee' meant a guarantee extended by the sick industrial company need not be debated upon in view of the law declared by the Supreme Court in the decision reported as M/s. Pathreja Brothers Forging & Stamping & Anr. Vs. ICICI Ltd. & Ors. (2000) 6 SCC 545 wherein it has been held that the term 'guarantee' would also extend to the guarantors.

A Division Bench of this Court in the case of Inderjeet Arya & Anr. Vs. ICICI Bank Ltd reported as ILR (2012) Vol.5 Delhi 218, held that the judgment of the Supreme Court in Paramjit Singh Patheja's case (supra) cannot be interpreted to conclude that each and every kind of action is contemplated to be included in the term 'suit' because the Supreme Court was dealing with a specific issue i.e. whether an award was a decree or an order within the meaning of Section 9(2) of the Insolvency Act.

The Division Bench thereafter noted that what emerges on a reading of the objects and reasons along with the interpretation accorded by the Supreme Court, to the provisions of sub-Section (1) of Section 22, and held that having regard to the law laid down in the various judgments, the word 'suit' cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made the necessary provision, like it did, in inserting in the first limb of Section 22 of SICA, where the expression proceedings for winding up of an industrial company or execution, distress, etc. is followed by the expression or 'the like' against the properties of the industrial company. There is no such broad suffix placed alongside the term 'suit'. The term suit would thus have to be confined, in the context of sub-Section (1) of Section 22 of SICA, to those actions which are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum as was sought to be contended before us. The term, 'suit' would therefore apply only to proceedings in a civil court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal, such as, the 'DRT'. The two appellants are guarantors and notwithstanding the principal borrower company being a sick industrial company, the Debts Recovery Tribunal as also the Debts Recovery Appellate Tribunal have rightly opined that proceedings under Recovery of Debts due to Banks and Financial Institutions Act, 1993 can continue against the two.

B.I.F.R. & ORS

v.

KMA LTD & ORS [Bom]

Company Application No. 593 of 2011 & Company Application

No. 620 of 2011 in Company Petition No. 778 of 2005

S.C. Gupte, J. [Decided on 06/01/2016]

Payment to workmen as per consent terms – Dissent workers demanded priority of payment – Bombay High Court explains the law.

Brief facts:

The Company had a total of about 1162 workmen, majority of whom have accepted the consent terms between the registered union and the secured creditors filed in the writ petitions and approved by the Company Court. Eight Workmen led by the Applicant in Company Application No. 593 of 2011, and sixty three workmen through the rival union are the only dissenting workmen out of these 1162 workmen. Their case is that they are not bound by the consent terms and must be paid in accordance with the adjudication originally made by the Industrial Court or at any rate, on the principles of that adjudication and in the alternative, in accordance with their entitlement in law under Sections 529A and 530 of the Companies Act, 1956. They submit that whilst their dues other than preferential dues under Section 529A can wait (and which they would like to be kept open) till there is availability of surplus of funds, their dues under Section 529A be determined and paid from the amount set apart for the purpose.

Decision: Applications disposed of.

Reason:

Based on these rival submissions, the following questions broadly arise for the consideration of this Court:

(a) Whether the dissenting workmen are bound by the consent terms or whether they are entitled to be paid in accordance with Sections 529 and 529A of the Act?

The dissenting workmen cannot be said to be represented by the Union which signed the consent terms. The sixty three workmen whom the rival union, KMA workers and Staff Union, Bangalore, claims to represent say that they were not consulted when the consent terms were arrived at; that they never authorised the union to enter into any consent terms; and that they have throughout objected to the consent terms. Ditto for the Applicant in Company Application No. 593 of 2011. For the registered union, it was submitted that many of these workmen including the Applicant in Company Application No. 593 of 2011 did sign affidavits in favour of the registered union accepting the consent terms. But there is no support for this contention in the pleadings or documents. The affidavits themselves are not on record. In fact, the record of the case including affidavits and documents referred to therein suggest otherwise. These dissenting workmen have to be paid dues on the basis of their entitlements in law, particularly under Sections 529 and 529A of the Act. That is how the Company Court had sanctioned the consent terms, noticing that the funds set apart were adequate to meet the claims of dissenting workmen upon adjudication thereof by the Liquidator. The issue of their entitlement was clearly kept open.

(b) If they are to be paid according to their entitlement under Sections 529 and 529A, up to what date are they entitled to be paid wages?

The registered Union, in the consent terms, has taken '31 December 2002' as the date up to which wages ought to be calculated. That was presumably on the footing that the substratum of the Company no longer subsisted after the sale of its assets under orders of the Court. (The consent order for sale of all movable and immovable assets of the Company at Mumbai and Bangalore was passed by this Court in Writ Petition No. 1512 of 2002 on 20 December 2012.) On the other hand, the dissenting workmen root for '24 October 2008' as the relevant date, contending that the contract of employment between a company and its workmen subsists till the date of the winding up order and that is the date up to which the wages ought to be computed. (The Company Court ordered the company to be wound up on 24 October 2008.) It is only those workers, who became members of the workers' cooperative by fulfilling the terms of the scheme such as conversion into equity of 50 per cent wages due from the year 1991 and waiver of balance 50 per cent and payment of amounts of Rs.20, 000/- (for the Mumbai unit) and Rs.15, 000/- (for the Bangalore unit), who are entitled to wages under the scheme. The others, who did not become such members and who did not work, cannot claim to have continued as workmen of the Company. A scheme sanctioned by BIFR under SICA has the effect of altering contracts of the Sick Industrial Company with its shareholders, creditors, guarantors and employees. Under Section 18(8) of SICA, such scheme is binding on the shareholders, creditors, guarantors and employees. The Company in the present case offered to provide employment to those workmen who agreed to join the Workers' co-operative on the terms of the sanctioned scheme. Those who did not so join must be treated as having refused to offer themselves for service and accordingly, ceased to be workmen. They cannot now demand wages after 20 September 1991, i.e. the date of closure of the factory. (c) Whether they are entitled to any (i) notice pay, (ii) leave wages, (iii) bonus or (iv) gratuity and (v) any interest on these dues? There is no question of the workmen getting any notice pay under Section 25-N of the Industrial Disputes Act by virtue of Section 25-O introduced by the Maharashtra amendment. The leave that can, thus, be encashed under Section 79 of the Factories Act is only the earned or accumulated leave during the calendar year up to a maximum of thirty days under conditions of Sub-section (3). The rate of such wages has to be as per Section 80 of the Factories Act. Bonus is not included in the category of wages under Sections 529 and 529A of the Companies Act and cannot be accorded any priority. The dissenting workmen in the present case accept this position, though they would like to keep their option to claim bonus in the event of availability of surplus funds so as to satisfy non-priority debts of the Company (in liquidation).

On gratuity, all parties including the Official Liquidator agree that gratuity would be payable. The consent terms provide for such gratuity. So does the adjudication made by the Official Liquidator. The dissenting workmen would accordingly have to be paid gratuity in accordance with law. There is no question of awarding any interest on gratuity, in the premises, as preferential payment under Sections 529 and 529A of the Companies Act. If and when there is a surplus, a claim for interest on gratuity can be considered, but not otherwise. The same reasoning would apply to other items such as notice pay and leave wages.

SHRI GOPAL PAPER MILLS CO. LTD.

v.

COMMISSIONER OF INCOME TAX [SC]

Civil Appeal No. 1669 of 1966.

K.S.Hegde, J.C.Shah & A.N.Grover,JJ. [Decided on 21/04/1970]

Equivalent citations: 1970 AIR 1750; 1971 SCR (1) 323;1970 SCC (2)80

Companies Act,1956 – Capitalisation of profits – Issue of bonus shares – Date of the resolution declaring bonus – Actual allotment taking a date thereafter – When does the shares are said to have been allotted – SC held that it is the date of the resolution.

Brief facts:

Though this case relate to income tax on dividends distributed by way of bonus shares, the crucial and interesting question which arose, to decide the correctness or otherwise of the taxation, was When does the bonus shares become the property of the shareholders? Is it on the date of the resolution of the General Meeting of the company or on any later date? We are concerned with this aspect of law laid down by the Supreme Court of India.

The appellant company-assessee at a general meeting on 30/12/1954 passed a resolution to the effect that a portion of the accumulated undivided profits be capitalised and distributed amongst the holders of the ordinary shares in the company as bonus shares. The said resolution also authorised and directed the directors of the company to issue allot and distribute the new shares,credited as fully paid up amongst the persons whose names are registered as such in the books of the company on 01/01/1955. The shareholders were entitled to get dividends on those shares only as from 1st January 1955. For the assessment year 1956-57 the relevant accounting period ending on 31/12/1954, the Income-tax Officer determined the total income of the company and in computing the Corporation tax due in respect of the income reduced the rebate to which the appellant company was entitled on two counts (i) Rs.50,07,500 was not included in the paid up capital as on 31/12/1954 and (ii) the said bonus shares were not issued to the shareholders in the accounting year ended 31/12/1954.

As a result of proceedings before authorities under the Act, the above two issues were referred to the High Court, which answered both the questions in favour of the department. Assessee appealed to the Supreme Court.

Decision: Appeal allowed.

Reason:

The first question that arises for decision is as to when the bonus shares became the property of the shareholders? Is it on the date of the resolution of the General Meeting of the company namely 30/12/1954 or on any later date? It may be remembered that for the allotment of the bonus shares, there was no question of calling for applications. Under the Articles of Association of the Company it was not open to the ordinary shareholders to refuse to accept those shares when allotted. The company had full powers to convert its accumulated undivided profits into bonus shares. The resolution passed at the General Meeting specifically says that those accumulated undivided profits of the company standing to the credit of the general reserve as on June 30, 1954 "be capitalised and distributed amongst the holders of the ordinary shares in the Company on the footing that they had become entitled thereto as capital and that the said capital be applied on 'behalf of such Ordinary shareholders in payment in full for 5,00,750 Ordinary shares of Rs. 10/- each, in the Company and that such 5,00,750 New Ordinary shares of Rs. 10/- each, credited as fully paid up shall rank in all respects *pari passu* with the existing Ordinary shares. . . . "

From this part of the resolution it is clear that the ordinary shareholders became owners of the bonus shares to which they were entitled under the resolution as from the date of the resolution. The expression "be capitalised and distributed" in the resolution means "is hereby capitalised and distributed". In fact the whole tenor of the resolution shows that the distribution of the bonus shares became effective as from 30th December, 1954. If the ordinary shareholders became the owners of the bonus share on January 1, 1955 or on some later date, the statement in the resolution "save and except that the holders thereof will not participate in any dividend in respect of any period ending on or before 31st December, 1954" becomes meaningless.

The word "allotment" has not been defined in the Companies Act. The meaning, of the word "allot" or "allotment" will have to be gathered from the context in which those words are used. This Court considered the meaning of the word "allotment" in Sri Gopal Jalan &Co. v. Calcutta Stock Exchange Association Ltd[1964] 3 SCR698. Therein it referred to a large number of English decisions which have considered the meaning of that word. In that decision this Court referred to the observations of Chitty J. in Re Florence Land and Public Works Company (1885) 2 L.R. 29, Ch. D. 421.

"*To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares*".

In Gopal Jalan's case (supra) Sarkar J. (as he then was) quoted with approval the following passage ,from Farwell L.J. in Mosley v. Koffyfontain Mines Ltd. (1911) L.R. Ch. 73, 84.

"*As regards the construction of these particular articles, it is plain that the words 'creation', 'issue' and 'allotment' are used' with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital; first, it is created; till it is created the capital does not exist at all. When it is created it may remain unissued for years, as indeed it, was here; the market did not allow of a favourable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in Spitzel v. Chinese Corporation, 80 L.T. 347, 35 1, he says: 'What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person'*."

After examining the various decisions, Sarkar J. observed :

"*It is beyond doubt from the authorities to which we have earlier referred, and there are many more which could be cited to show the same position, that in Company law 'allotment' means the appropriation out of the previously unappropriated capital of a company of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence.*"

The word "distribute" found in cl. (b) of the resolution in the context means to record the distribution of the shares in the books of the company. If the resolution passed at the General Meeting of the company on December 30, 1954 is read as a whole, there is no doubt that on that day a portion of the accumulated undivided profits were converted into capital; that capital was divided into bonus shares and allotted to the ordinary shareholders on the basis of their shareholdings. The shares so allotted 'became the property of the shareholders as from that date subject to the qualification that they are entitled to get, dividends on those shares only as from 1st January 1955. Under cls. (b) andc) of the resolution, certain directions were given to the Directors in the matter of implementation of that resolution.

Hence there was no justification in reducing the rebate firstly under sub-cl. (a) of cl. (1) of the second proviso to Section D of Part II of the Finance Act, 1956 (i.e. on the ground that bonus shares were not part of the paid up capital in the accounting year ended 31/12/1954) and secondly under sub-cl. (b) of cl. (1) of the second proviso to Section D of Part 11 of the Finance Act, 1956 (i.e. on the ground that bonus shares were not issued in the accounting year ended 31/12/1954). For the reasons mentioned above, we allow this appeal and answer the questions referred to the High Court in favour of the assessee.

THE CHIEF CONTROLLING REVENUE AUTHORITY & ANR

v.

RELIANCE INDUSTRIES LIMITED & ANR [BOM-FB]

Civil Reference No.1 of 2007 in Writ Petition No. 1293 of 2007

in Reference Application No.8 of 2005

S. C. Dharmadhikari, K. R. Shriram & B.P.Colabawalla, JJ.

[Decided on 31/03/2016]

Merger of companies and payment of stamp duty – Transferor company obtains sanction order from Bombay High Court – Transferee company obtains sanction order from Gujarat High Court – Transferee company paid Rs.10 crore as stamp duty in Gujarat – Seeks remission of the same from the Government of Maharashtra against the stamp duty payable in Maharashtra – Whether tenable – Held, No.

Brief facts:

Reliance Petroleum Limited, Jamnagar Gujarat ("RPL/respondent no.2") amalgamated with Reliance Industries Limited ("RIL/respondent no.1"). The transferee company RIL filed the petition in the Bombay High Court, which was sanctioned on 7.6.2002. Similarly the transferor company RPL filed the petition in the Gujarat High Court, which was sanctioned on 13.9.2002. RIL submitted the above two orders sanctioning the scheme of amalgamation for adjudication of stamp duty in the office of Superintendent of Stamp, Mumbai (the applicant no.2). Respondent no.1 requested the applicant no.2 to adjudicate the stamp duty, if any, payable on the order dated 7.6.2002 passed by the Bombay High Court. RIL had paid stamp duty of Rs.10 crores in the State of Gujarat on the order dated 13.9.2002 passed by the Gujarat High Court and requested for the remission/ deduction/ setoff this sum in the stamp duty payable in the State of Maharashtra. The applicant no.2 rejected the submissions of respondent no.1 and direct respondent no.1 to pay the entire amount of Rs.25 crores as stamp duty.

Against this, various appeals were preferred by RIL and ultimately the issues were referred to the High Court for determination.

Decision: Reference answered in favour of revenue.

Reason:

In view of the above, we answer the questions raised by the present reference as under:-

(i) Whether a scheme sanctioned between the two companies under Sections 391 and 394 of the Companies Act is one and the same document chargeable to stamp duty regardless of the fact that order sanctioning the scheme may have been passed by two different High Courts by virtue of the fact that the Registered Office of the two companies are situated in different States?

Ans. A scheme settled by two companies is not a document chargeable to stamp duty. An order passed by the Court sanctioning such a Scheme under Section 394 of the said Act, which effects transfer is a document chargeable to stamp duty. In case if the Registered Offices of the two Companies are situated in two different States, requiring such Orders, sanctioning the Scheme to be passed under Section 394 of the Companies Act by two different High Courts, then in that event, the order of this High Court which sanctions the Scheme passed under Section 394 of the Companies Act will be the instrument chargeable to stamp duty.

(ii) Whether the instrument in respect of amalgamation or compromise or scheme between the two Companies is such a scheme, compromise or arrangement and the orders sanctioning the same are incidental as the computation of stamp duty and valuation is solely based on the scheme and scheme alone?

Ans. The orders of the court, sanctioning a Scheme of amalgamation are not just incidental orders even in accordance with the Scheme of the Companies Act laid down by Section 391 read with, Section 394. Only after the orders are passed by the Court, sanctioning the Scheme of Amalgamation, such a scheme becomes operational and effective. Computation of stamp duty and valuation does not make Scheme of Amalgamation alone chargeable to stamp duty. The order is the instrument.

(iii) Whether in a scheme, compromise or arrangement sanctioned under Sections 391 and 394 of the Companies Act where Registered Offices of the two Companies are situated in two different States, the Company in State of Maharashtra is entitled for rebate under Section 19 in respect of the stamp duty paid on the said scheme in another State?

Ans. The answer to this question will be in the negative for the reasons set out in detail herein above.

(iv) Whether for the purposes of Section 19 of the Act, the scheme/compromise/arrangement between the two Companies must be construed as document executed outside the state on which the stamp duty is legally levied, demanded and paid in another State?

Ans. Basically, a scheme/compromise/arrangement between the two companies is never a document chargeable to stamp duty, whether such a document is executed in the State or outside the State of Maharashtra. Moreover, in view of our conclusions above, Section 19 of the Act in any event, has no application whatsoever.

MESSER HOLDINGS LTD.

v.

SHYAM MADANMOHAN RUIA & ORS [SC]

SLP(C) Nos. 33429-33434 of 2010 with SLP(C) Nos. 23088-23090 of 2012

J. Chelameswar & Abhay Manohar Sapre, JJ. [Decided on 19/04/2016]

Companies entering into shareholders/share purchase agreements – Later on indulging in vicious litigation for over 18 years – Supreme Court imposes heavy exemplary cost on the litigating parties.

Brief facts:

Facts are complicated and voluminous. The crux of the issue was that one Messer Griesham GmbH, a German Company (hereinafter referred to as “MGG”) had entered into a Share Purchase and Cooperation Agreement (hereinafter referred to as AGREEMENT-1) with the shareholders of an Indian company called Goyal Gases Ltd. (hereinafter referred to as “GGL”) on 12.5.1995. This agreement contained a non-compete clause by which both parties agreed not to enter into a competing business.

Thereafter, with respect to a company known as Bombay Oxygen Corporation Limited (hereinafter referred to as the 'BOCL') MCG had entered into a Share Purchase Agreement dated 23/06/1997 (hereinafter referred to as AGREEMENT -II) with RUIAS, where MGG agreed (i) to purchase 45001 shares of BOCL from RUIAS, and(ii) also to acquire another 30000 shares of BOCL from the open market which would make MGG the majority shareholder of BOCL (creating a controlling interest).

GGL protested (in writing) against the attempt of MGG to independently acquire shares of BOCL saying that it would amount to breach of Clause 9 of the AGREEMENT-I. Some correspondence took place between both the Companies in this regard. Eventually, both the Companies entered into AGREEMENT-III on 8.11.1997 where under it was agreed that out of 75001 shares of BOCL to be acquired by MGG under AGREEMENT-II, 50000 shares will be acquired in the name of GGL and only 25001 will be acquired in the name of MGG.

RUIAS came to know of the AGREEMENT-III. By their letter dated 5.5.1998 they informed MGG that they were not agreeable for the proposal of MGG and GGL jointly purchasing the shares of the BOCL. In this background all the three parties i.e. MGG, GGL and Ruias instituted various suits and applications against each other and have been fighting for the past 18 years. Several interlocutory orders passed in these proceedings were challenged before the Supreme Court.

Decision: Appeal disposed of by imposing an exemplary cost.

Reason:

The net effect of all the litigation is this. For the last 18 years, the litigation is going on. Considerable judicial time of this country is spent on this litigation. The conduct of none of the parties to this litigation is wholesome. The instant SLPs arise out of various interlocutory proceedings. Arguments were advanced on either side for a period of about 18 working days as if this Court were a Court of Original Jurisdiction trying the various above-mentioned suits. The fact remains that in none of the suits even issues have been framed so far. The learned counsel appearing for the parties very vehemently urged that there should be a finality to the litigation and therefore this Court should examine every question of fact and law thrown up by the enormous litigation. We believe that it is only the parties who are to be blamed for the state of affairs. This case, in our view, is a classic example of the abuse of the judicial process by unscrupulous litigants with money power, all in the name of legal rights by resorting to half-truths, misleading representations and suppression of facts. Each and every party is guilty of one or the other of the above-mentioned misconducts. It can be demonstrated (by a more elaborate explanation but we believe the facts narrated so far would be sufficient to indicate) but we do not wish to waste any more time in these matters.

This case should also serve as proof of the abuse of the discretionary Jurisdiction of this Court under Article 136 by the rich and powerful in the name of a 'fight for justice' at each and every interlocutory step of a suit. Enormous amount of judicial time of this Court and two High Courts was spent on this litigation. Most of it is avoidable and could have been well spent on more deserving cases.

This Court in Ramrameshwari Devi & Others v. Nirmala Devi & Others, (2011) 8 SCC 249 observed at para 54;

"*While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.*"

We therefore, deem it appropriate to impose exemplary costs quantified at Rupees Twenty Five Lakhs only to be paid by each of the three parties i.e. GGL, MGG and RUIAS. The said amount is to be paid to National Legal Services Authority as compensation for the loss of judicial time of this country and the same may be utilized by the National Legal Services Authority to fund poor litigants to pursue their claims before this Court in deserving cases.

Kishinchand Chellaram

v.

Commissioner of Income Tax [SC]

Civil appeal Nos. 462-465 of 1960

J.C.Shah, S.K. Das & M.Hidayatullah, JJ. [Decided on 19/04/1962]

Equivalent citations: 1963 AIR 390; 1963 SCR (2) 268; (1962) 32 Comp Cas 1046(SC).

Companies Act,1913 and 1956 – Dividends – Declared dividend credited to the accounts of shareholders company later on reversed the declaration of dividend - Whether dividend declared and credited to the accounts of the shareholders could be reversed – Held, No.

Brief facts:

Though this case relate to income tax on dividends at the hands of the shareholders, the crucial and interesting question which arose, to decide the correctness or otherwise of the taxation, was "Whether dividend declared and credited to the account of the shareholders could be reversed by the company by passing a resolution to that effect later on?" We are concerned with this aspect of law laid down by the Supreme Court of India.

The Appellants Kishinchand Chellaram, Shewakram Kishinchand, Lokumal Kishinchand and Murli Tabilram were the shareholders of the company Chellsons Pvt Ltd at the material time. The company declared dividend for the year 1941-42, 1942-43 and 1943-44 and also credited the dividend amount to the shareholders account. On December 4, 1947, at an Extraordinary General Meeting another resolution purporting to reverse the earlier resolutions that declared dividends was passed by the company. The ITO considered the dividends as the income of the shareholders and assessed as such. However, the appellants contended that the dividends were not their income as it was reversed by the company. Being unsuccessful they carried their dispute through First appellate authority, Tribunal, High court and ultimately it came before the Supreme Court.

Decision: Appeals dismissed.

Reason:

The only question material to these appeals which was argued by the assessees before the Tribunal was whether it was competent to the company by a subsequent resolution to reverse an earlier resolution declaring the dividend. The Tribunal held that the earlier resolution could not be reversed by a subsequent resolution, and therefore what was paid and received as dividend could not by a subsequent resolution of the company be treated as paid otherwise than as dividend. The High Court held that the assessments were properly made by the Income Tax Officer. They observed that the assessment of an assessee for each year is self- contained and subsequent events cannot justify modification of the assessment.

It is common ground that on July 15, 1944 dividend was declared by a resolution of the company and the amounts payable to the assessees were, in fact, credited on September 29, 1944, in the accounts maintained by the company, to each of the shareholders as dividend. The amounts were therefore declared as dividend, treated as dividend and received by the assessees as dividend. The assessees included the dividends so credited to their accounts in the returns. It may be assumed that the company failed to provide for payment of tax before declaring dividend and that after providing for payment of tax the net profits of company may not have been sufficient to justify declaration of dividend at 60% of the value of the shares. On that assumption it may be inferred that the dividend or a part thereof was in truth paid out of the capital of the company. Payment of dividend otherwise than out of profits of the year, or other undistributed profits was at the material time prohibited by Art. 97 of Table A- of the Indian Companies Act, 1913 as amended by Act. XXXII of 1936 read with s. 17(2) of the Act; and therefore such payment may be regarded as unlawful. If the Directors of a company have deliberately paid or negligently been instrumental in paying dividend out of capital they may have, in an action by the company-or if the company is being wound up at the instance of the Liquidator- to compensate the company for loss occasioned by their wrongful or negligent conduct. *(In' the matter of The Union Bank Allahabad Ltd (1925) I.L.R. 47 All. 669.)*

In this case we are not concerned with the validity of the distribution of dividend, or the liability of the directors arising out of improper distribution of dividend. We are concerned with the true character of the payment made on September 29, 1944, to the assessees. If dividend is declared and the amount is credited or paid to the share-holders as dividend can the character of the credit or payment be altered by a subsequent resolution so as to alter the incidence of tax which attaches to that amount? It is not necessary to consider in this case whether the shareholders may be compelled by the company to refund the amount improperly paid as dividend out of capital. Even if the shareholders agree to refund the amounts received by them as dividend the original character of the receipt as dividend is not thereby altered. In ascertaining whether liability to pay Income-tax on dividend arose, a resolution of the company whereby payments made to the shareholders as dividend are to be treated as loans cannot retrospectively alter the character of the payment and thereby exempt it from liability which has already attached thereto.

Before this Court two contentions were raised by counsel for the assesses : (1) that on the amount received by each of the asseseees tax was not eligible because it was not dividend at all, and (2) that what was declared and paid as dividend ceased to be such by virtue of the subsequent resolution.

The first plea was not raised before the Tribunal, and on the question as framed it did not arise for decision on a reference under s. 66 of the Indian Income Tax Act. The jurisdiction of the High Court under s. 66 being advisory, they were concerned to give their opinion on questions which fairly arose out of the order of the Tribunal, and were in fact raised and referred. The question whether the payment made by the Company was not in the nature of dividend not having fairly arisen out of the order of the Tribunal, it cannot be raised in this Court as it could not in the High Court.

In any event, we are of the opinion that payment made as dividend by a company to its shareholders does not lose that character merely because it is paid out of capital. Under the Income Tax Act, liability to pay tax attaches as soon as dividend is paid, credited or distributed or is so declared. The Act does not contemplate an enquiry whether the dividend is properly paid credited or distributed before liability to pay Tax attaches thereto. The answer to the second contention for reasons already set out by us must be in the negative.

JABAL C.LASHKARI & ORS

v.

OFFICIAL LIQUIDATOR & ORS [SC]

Civil Appeal Nos. 3147-3149 of 2016 (Arising out of S.L.P. (C) Nos.29282-29284 of 2008) with batch of appeals

Ranjan Gogoi & Prafulla C. Pant, JJ. [Decided on 29/03/2016]

Companies Act,1956 read with Bombay Rent Control Act – Company under liquidation- secured creditors willing to pay rent for the leased land to the landlords landlords approached the court to evict the company from the land and return of the land – Whether their claim tenable – Held, No.

Brief facts:

One Durgaprasad Lashkari (predecessor of the appellants) had leased out land admeasuring 35,772 sq. mtrs. in favour of one Bechardas Spinning and Weaving Mills Ltd. (subsequently known as Prasad Mills Ltd.) for a period of 199 years by a lease deed dated 10.12.1916. A secured creditor of Prasad Mills Ltd. had in the year 1984 filed a company petition seeking the winding up of the aforesaid Prasad Mills Ltd. While the company petition was pending some of the legal heirs of Durgaprasad Lashkari had filed a suit in the Small Causes Court seeking permanent injunction against the sale of assets of company more particularly the sale of the leased property.

An order dated 5.5.1989 was passed by the learned Company Judge of the Gujarat High Court directing the winding up of Prasad Mills Ltd. and the appointment of an official liquidator. The official liquidator was directed to take charge and possession of all the assets of the company. An application was filed by another heir of Durgaprasad Lashkari in the winding up petition seeking direction to further prosecute the suit pending before the Small Causes Court. The learned Company Judge by order dated 24.2.1995 ordered that the suit may be withdrawn and instead directions may be sought from the Company Court for return of the leased property.

Pursuant thereto a Company Application (C.A. No.462 of 1999) was filed by some of the heirs of Durgaprasad Lashkari for return of the leased property and also for orders restraining the official liquidator from selling/ transferring the leased property. While the above Company Application was pending the building, superstructure, plant and machinery of the company was sold in a public auction. It appears that on 6.2.2004 an advertisement was issued by the official liquidator for the sale of the leased property. As against the aforesaid advertisement, the appellant had filed Company Application No.33 of 2004 for a declaration that the official liquidator had no right to sell the leased property. Another Company Application i.e. C.A. No.34 of 2004 was filed seeking permission from the Company Court to file a suit before the appropriate court for eviction of the official liquidator from the leased property.

The learned Company Judge by a very elaborate order dated 13.10.2004 rejected all the three company applications. Aggrieved, the appellant and other legal heirs of Durgaprasad Lashkari filed three separate appeals before the Division Bench of the High Court. The High Court by a common order dated 17.10.2008 dismissed all the appeals on grounds and reasons that will be noticed shortly. It is against the aforesaid common order dated 17.10.2008 that the present appeals have been filed.

Decision: Appeal dismissed.

Reason:

Before cataloguing the arguments advanced on behalf of the rival parties it will be apposite to take note of the reasoning of the High Court which had prompted it to arrive at the impugned conclusions recorded in the order under appeal.

Section 12 of the Rent Act confers protection on a tenant who is regularly paying or is ready and willing to pay the rent. In the present case while there is no doubt that rent has not been paid, equally, there is no doubt that the secured creditors including the State Bank of India had all along been ready and willing to pay the rent and the reasons for non-payment appears to be (para 43 of the impugned order of the High Court) lack of communication by the official liquidator to the SBI of the precise amount of rent due. While there can be no doubt that mere readiness and willingness to pay without actual payment cannot enure to the benefit of the tenant in perpetuity what is required under Sub-section (2) of Section 12 is a notice in writing by the landlord raising a demand of rent and only on the failure of the tenant to comply with such notice within a period of one month that the filing of a suit for recovery of possession is contemplated. The service of notice giving an opportunity to the tenant to pay the unpaid rent is the first chance/opportunity that the Rent Act contemplates as a legal necessity incumbent on the landlord to afford to the tenant. Admittedly, in the present case, no such notice as contemplated by Section 12 (2) has been issued by the landlord; at least none has been brought to our notice. In such a situation, the readiness and willingness of the tenant to pay the rent, though may have continued for a fairly long time without actual payment, will not deprive the tenant of the protection under the Rent Act. Though the order of the High Court in para 43 of the impugned judgment has been placed before the Court as an order under Section 12(3) (b) of the Rent Act we do not find the said order to be of the kind contemplated by Section 12(3)(b) inasmuch as not only the order does not mention any specific rent which has to be tendered in Court but what is encompassed therein is a direction to the official liquidator to let the State Bank of India know the precise amount that is required to be paid on account of rent and, thereafter, to pay the same to the official liquidator where after it has been left open for the lessors to withdraw the said amount from the official liquidator. Such an order by no stretch of reasoning would be one contemplated under Section 12(3)(b). In the aforesaid situation, the finding of the High Court that the landlord is not entitled to seek eviction on the ground of non-payment of rent under Section 12 of the Bombay Rent Act cannot be said to be so inherently infirm so as to require the interference of this Court.

This will bring the Court to a consideration of the liability of the official liquidator to a decree of eviction on the ground contemplated under Section 13(1) (e) of the Bombay Rent Act. As already discussed in a preceding paragraph of the present order, the non obstante clause of Section 13 (1) overrides only the other provisions of the Bombay Rent Act and is also subject to the provisions of Section 15, which deals with sub-letting and transfer, though overrides the provisions contained in any other law, is subject to any contract to the contrary. Though in the present case the lease deed (clause 7) is capable of being read as permitting sub-letting and not assignment what has been held in the present case by the High Court, by virtue of the decision of this Court in *Laxmidas Bapudas Darbar v. Rudravva 2001 (7) SCC 409*, is that in view of the limited operation of the non obstante clause in Section 15 of the Bombay Rent Act, unlike Section 21 of the Karnataka Act, the provisions of the Transfer of Property Act [Section 118 (o)] will not become irrelevant to the relationship between the parties in which event assignment may also be permissible notwithstanding the specific content of clause 7 of the lease deed in question. However, we need not dwell on this issue at any length or would also be required to consider the efficacy of the arguments of the learned Additional Solicitor General on the strength of the two Privy Council decisions mentioned above i.e. *Hans Raj vs. Bejoy Lal Sel and Ram Kinkar Banerjee vs. Satya Charan Srimani, AIR 1939 PC 14* inasmuch as from Company Application No. 34 of 2004, which deals with the claim of the appellants for eviction of the official liquidator from the leased property, what is clear and evident is that the case of sub-letting of the leased premises on which basis eviction has been prayed for is not sub-letting/assignment by the official liquidator but assignment of the leased premises to Prasad Mills by the original managing agents in whose favour the initial lease was executed by the predecessors of the present owners. The ground of unauthorized and impermissible assignment by the official liquidator on the strength of the notice/advertisement for disposal of the leased land thereby making the said authority liable for eviction is an argument advanced only at the hearing of the appeals before us. That apart the said argument overlooks the fact that the assignment was only sought to be made by the advertisement/notice issued and did not amount to a completed action on the part of the official liquidator so as to attract the relevant provisions of the Bombay Rent Act dealing with the consequential liability for eviction. Such argument also belies the injunctive/prohibitory relief sought for in the Company Applications, as already noticed, insofar as the contemplated sale/transfer/assignment of the leased property by the official liquidator is concerned. The arguments advanced on the strength of the provisions of Section 19 of the Bombay Rent Act would also stand answered on the above basis.

Insofar as liability under Section 13(1) (k) of the Bombay Rent Act is concerned what is to be noticed is the requirement of unjustified non-user for a period exceeding 6 months which evidently is not be attracted to the present case in view of the pendency of the liquidation proceedings. That apart, Clause 5 of the lease deed which deals with non-user of the leased land does not contemplate eviction on account of such non-user but merely entitles the lessor to receive rent for the period of such non-user of the land.

The mere fact that the company has been ordered to be wound up cannot be a ground to direct the official liquidator to handover possession of the land to the owners inasmuch as the company in liquidation continues to maintain its corporate existence until it stands dissolved upon completion of the liquidation proceedings in the manner contemplated by the Companies Act. In the present case it has been repeatedly submitted before this Court by both sides that presently revival of Prasad Mills is a live issue pending before the Gujarat High Court, a fact which cannot be ignored by this Court in deciding the above issue against the appellants. For the aforesaid reasons we affirm the order of the High Court.

RAM PRSHAD

v.

COMMISSIONER OF INCOME-TAX, NEW DELHI [SC]

Civil Appeal No. 1946 of 1968

K.S.Hegde, P.Jaganmohan Reddy & H.R.Khanna, JJ. [Decided on 24/08/1972]

Equivalent citations: 1973 AIR 637; 1973 SCR (3) 985; (1972) 42 Comp. Cas. 544; (1972) 2 SCC 696

Income tax Act, 1922 read with Companies Act, 1956 – Managing director – Nature of relationship with the company – Master and Servant or agency – Tests for – Whether a managing director is an employee of the company – Held, Yes.

Brief facts :

Though this case relates to income tax on salary received by a managing director of a company, the crucial and interesting question which arose, to decide the correctness or otherwise of the taxation, was "Whether the managing director is an employee of the company or an agent?" We are concerned with this aspect of law laid down by the Supreme Court of India. The appellant assesse became the first Managing Director on terms and conditions agreed to and embodied in an agreement dated 20.11.1955 between himself and the company. Under the said agreement, the appellant would get 10 per cent of gross profits of the company besides monthly fixed salary. For the assessment year 1956-57 the appellant was assessed in respect of Rs. 53,913/- payable to him as 10% of the gross profits of the company which he gave up soon after the accounts were finalised but before they were passed by the general meeting of the shareholders. The above amount was given up by him because the company would not be making net profits if the stipulated commission was paid to him. The appellant claimed that the amount given up by him was not liable to be included in his total income because the amount had not accrued to him at all, but the assessing officer included the same in his income as salary. This was confirmed and upheld by the Tribunal and the High Court in appeal. Hence the appeal came before the Supreme Court.

Decision: Appeal dismissed.

Reason:

On behalf of the assessee, it was contended that in order to assess the income as salary it must be held that there was a relationship of master and servant between the company and the assessee. For such a relationship to exist, it must be shown that the employee must be subject to the supervision and control of the employer in respect of the work that the employee has to do. Where, however, there is no such supervision or control it will be a relationship of principal and agent or an independent contractor. Applying these tests, it is submitted that the appointment of the assessee as a Managing Director is not that of a servant but as an agent of the company and accordingly the commission payable to him is income from business and not salary. In support of this contention, reference has been made to Halsbury's Laws of England, Bowstead on Agency and Treatises on Company Law by Palmer, Gower, Pennington and Buckley.

There is no doubt that for ascertaining whether a person is a servant or an agent, a rough and ready test is, whether, under the terms of his employment, the employer exercises a supervisory control in respect of the work entrusted to him. A servant acts under the direct control and supervision of his master. An agent, on the other hand, in the exercise of his work is not subject to the direct control or supervision of the principal, though he is bound to exercise his authority in accordance with all lawful orders and instructions which may be given to him from time, to time by his principal. But this test is not universal in its application and does not determine in every case, having regard to the nature of employment, that he is a servant. A doctor may be employed as a medical officer and though no control is exercised over him in respect of the manner he should do the work nor in respect of the day to day work, he is required to do, he may nonetheless be a servant if his employment creates a relationship of master and servant. Similar is the case of a chauffeur who is employed to drive the car for his employer. If he is to take the employer or any other person at his request from place ‘A’ to place ‘B’ the employer does not supervise the manner in which he drives between those places. Such examples can be multiplied. A person who is engaged to manage a business may be a servant or an agent according to the nature of his service and the authority of his employment. Generally it may be possible to say that the greater the amount of direct control over the person employed, the stronger the conclusion in favour of his being a servant. Similarly the greater the degree of independence the greater, the possibility of the services rendered being in the nature of principal and agent. It is not possible to lay down any precise rule of law to distinguish one kind of employment from the other. The nature of the particular business and the nature of the duties of the employee will require to be considered in each case in order to arrive at a conclusion as to whether the person employed is a servant or an agent. In each case the principle for ascertainment remains the same.

Though an agent as such is not a servant, a servant is generally for some purposes his master’s implied agent, the extent of the agency depending upon the duties or position of the servant. It is again true that a director of a company is not a servant but an agent inasmuch as the company cannot act in its own person but has only to act through directors who qua the company have the relationship of an agent to its capacity. Managing Director may have a dual capacity. He may both be a Director as well as employee. It is therefore evident that in the capacity of a managing director he may be regarded as having not only the capacity as persona of a director but also has the persona of an employee or an agent depending upon the nature of his work and the terms of his employment. Where he is so employed, the relationship between him as the Managing Director and the Company may be similar to a person who is employed as a servant or an agent for the term ‘employee’ is facile enough to cover any of these relationships. The nature of his employment may be determined by the articles of association of a company and/or the agreement if any, under which a contractual relationship between the Director and the company has been brought about, where under the Director is constituted an employee of the company, if such be the case, his remuneration will be assessable as salary under section 7.

In other words, whether or not a Managing Director is a servant of the company apart from his being a Director can only be determined by the articles of association and the terms of his employment. A similar view has been expressed by the Scottish Court of Session in *Anderson v. James Sutherland (Peterhead) Limited [1941] SC 203,* where Lord Normand at p.218 said:

“........ *the managing director has two functions and capacities. Qua managing director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of opinion that it is a contract of service and not a contract for service.*”

A number of cases have been referred before us but the conclusion in each of the decisions turned on the particular nature of employment and the facts disclosed therein. In each of these decisions the “context played a vital part in the conclusions arrived at”.

A detailed consideration of all the cases cited and the passages from text books referred to before us does not assist us in coming to the conclusion that the test for determining whether the person employed by a company is a servant or agent is solely dependent on the extent of supervision and control exercised on him. The real question in this case is one of construction of the articles of association and the relevant agreement which was entered into between the company and the assessee. If the company is itself carrying on the business and the assessee is employed to manage its affairs in terms of its articles and the agreement, he could be dismissed or his employment can be terminated by the company if his work is not satisfactory, it could hardly be said that he is not a servant of the company.

The other terms of the agreement enumerate the powers and duties given to him under the articles of association. A perusal of the articles and terms and conditions of the agreement definitely indicate that the assessee was appointed to manage the business of the company in terms of the articles of association and within the powers prescribed therein. These terms are inconsistent with the plea that he is an agent of the company and not a servant. The control which the company exercises over the assessee need not necessarily be one which tells him what to do from day to day. That would be a too narrow view of the test to determine the character of the employment. Nor does supervision imply that it should be a continuous exercise of the power to oversee or superintend the work to be crone. The control and supervision is exercised and is exercisable in terms of the articles of association by the Board of Directors and the company in its general meeting. As a Managing Director he functions also as a member of the Board of Directors whose collective decisions he has to carry out in terms of the articles of association and he can do nothing which he is not permitted to do.

Under s. 17(2) of the Indian Companies Act 1913 Regulation No. 71 of Table A which enjoins that the business of the company shall be managed by the directors is deemed to be continued in the articles of association of the company in identical term or to the same effect. Since the Board of Directors are to manage the business of the Company they have every right to control and supervise the assessee's work whenever they deem it necessary. Every power which is given to the Managing Director therefore emanates from the articles of association which prescribes the limits of the exercise of that power. The powers of the assessee have to be exercised within the terms and limitations prescribed thereunder and subject to the control and supervision of the Directors which in our view is indicative of his being employed as a servant of the company. We would therefore hold that the remuneration payable to him is salary. In this view, the other questions need not be considered, and the appeal is dismissed with costs.

AIR FRANCE GROUND HANDLING PVT. LTD (IN LIQUIDATION) [DEL]

Co.Pet. 382/2016

Sudershan Kumar Misra, J. [Decided on 31/05/2016]

Companies Act, 1956 – Section 497 – Voluntary winding up – Court accords approval.

Brief facts:

This is a petition filed under Section 497(6) of the Companies Act, 1956 by the Official Liquidator for voluntary winding up of Air France Ground Handling Private Limited.

The Company has passed a special Resolution in its Extraordinary General Meeting held on 09.11.2009 for voluntary winding up of the Company, wherein Mr. Manoj Kumar Malhotra was appointed as a Voluntary Liquidator of the Company. The Registrar of Companies was informed regarding the voluntary winding up and the appointment of the Voluntary Liquidator. Notices under Rule 315 of the Company (Court) Rules, 1959 were issued and requisite forms were filed with the Registrar of Companies.

The declaration of solvency was executed and approved by the Board of Director in their meeting held on 09.11.2009, and the same has been filed with the office of the Registrar of Companies in Form 149 as prescribed under Rule 488 of the Companies (Court) Rules, 1959.

The Voluntary Liquidator has filed the requisite forms, and notices were published in the Official Gazette on 12.12.2009 as well as in two newspapers namely "The Financial Express" (English) on 18.11.2009 and "Jansatta" (Hindi) dated 19.11.2009 along with the Memorandum of Association and Articles of Association with the Office of the Official Liquidator.

Decision & Reason:

Pursuant to Section 497 of the Companies Act, 1956, final Extraordinary General Meeting was held on 02.05.2011 and the Voluntary Liquidator filed the final accounts of the Company in Forms No.156 and 157, as prescribed under Rules 329 and 331 of the Companies (Court) Rules, 1959, before the Registrar of Companies and to the Official Liquidator.

The Official Liquidator has received 'No Objection Certificates' from the Registrar of Companies and the Income

Tax Department. The Voluntary Liquidator of Air France Ground Handling Pvt Ltd. has filed an affidavit with the Official Liquidator to declare that no outstanding amount stands against the Company as on winding up date.

The Official Liquidator has scrutinized the records submitted by the Voluntary Liquidator and has recorded satisfaction that necessary compliances of Section 497 of the Companies Act, 1956 and the other relevant provisions of the Companies Act, 1956 have been made and that the affairs of the Company have not been conducted in a manner prejudicial to the interest of its members or to the public.

The Official Liquidator, in these circumstances, has sought winding up and final dissolution of the Company from the date of filing of the petition, i.e., 07.04.2016.

In view of the above, and the satisfaction recorded by the Official Liquidator, the Company is wound up and shall be deemed to be dissolved with effect from the date of the filing of the petition, i.e., 07.04.2016. Copy of the order be filed by the Official Liquidator with the Registrar of Companies within the statutory period as per the Companies Act, 1956.The petition stands disposed of.

BANDHU SYSTEMATIX PVT LTD.

v.

REGISTRAR OF COMPANIES [DEL]

Co.Pet. 787/2015

Sudershan Kumar Misra, J. [Decided on 30/05/ 2016]

Companies Act, 1956 – Section 560 – Restoration of struck of company – Court accords approval.

Brief facts:

The petitioner was incorporated with the Registrar of Companies, NCT of Delhi & Haryana (hereinafter called the “respondent”) as a company limited by shares on 17.07.1984 vide Certificate of Incorporation No. 18703 of 1984- 85 with the object of carrying on the business, *inter alia*, as manufacturers and/or dealers in all types of machinery, plant equipment accessories and spores required for and used for printing, binding, perforating, folding, stitching or manufacture of other stationery used for such purposes. Presently, the registered office of the petitioner is stated to be situated at 8-B, Bahadur Shah Jafar Marg, New Delhi- 110002.

The respondent initiated the proceedings under S.560 of the Companies Act, 1956 to strike the name of the petitioner off the register due to defaults in statutory compliances, namely, non-filing of Annual Returns from 2000 to 2015, and Balance Sheets from 1998 to 2015. It has been submitted on behalf of the respondent that procedure under S.560 was duly followed, with notices/letter as required under S.560(1) and S.560(3) sent at the registered office address of the petitioner. It is further submitted that notification under Section 560(5) was issued and published in the Official Gazette on 23.06.2007 mentioning the petitioner-company’s name at Serial no.1503.

On the contrary the petitioner contented that it did not receive any notices/ letters/show-cause notices as required under Section 560(1) and (2) of the Companies Act, 1956, nor was it afforded any opportunity of being heard before action under Section 560(5) was taken by the respondent. The petitioner also averred that upon inspection of official records of the petitioner-company carried out by its authorised representative, no documents pertaining to Section 560 were found. It is further averred that no documents evidencing the basis on which the respondent came to the conclusion that the petitioner-company was not carrying on its business was either provided to the petitioner or was available on the records maintained with the respondent. The petitioner further contended that it has all through since its incorporation has been a working concern and at no point of time the petitioner has ever stopped carrying on the business or stopped its business operations.

Decision: Petition allowed.

Reason:

In Purushottamdass and Anr. (BulakidasMohta Co. P. Ltd.) v. Registrar of Companies, Maharashtra, &Ors. (1986) 60 Comp. Cas. 154 (Bom), the Bombay High Court has held, *inter alia*, that;

"*18. The object of section 560(6) of the Companies Act is to give a chance to the company, its members and creditors to revive the company which has been struck off by the Registrar of Companies, within a period of 20 years, and to give them an opportunity of carrying on the business only after the company judge is satisfied that such restoration is necessary in the interests of justice*."

This decision has been followed by this Court in *Pancham Hotels Pvt. Ltd. v. Registrar of Companies, CP No. 554/2014; M/s Medtech Pharma (India) Pvt. Ltd. v. Registrar of Companies, CP No. 241/ 2009; M/s Santaclaus Toys Pvt. Ltd. v. Registrar Of Companies, CP 271/2009; M/s Deepsone Non-Ferrous Rolling Mills Pvt. Ltd. v. Registrar of Companies, NCT of Delhi and Haryana, CP No. 285/2009; M/s Kakku E and P Control Pvt. Ltd. & Anr. v. The Registrar of Companies, NCT of Delhi and Haryana, CP No. 409/2008 and M/s Sohal Agencies Pvt. Ltd. v. Registrar of Companies, NCT of Delhi and Haryana, CP No. 297/2009.*

Under the facts and circumstances, it is possible that notice in respect of action under Section 560 was not sent to the registered office of the company. Consequently, the condition precedent for the initiation of proceedings to strike off the name of petitioner from the Register maintained by the respondent was not satisfied. Looking to the fact that the petitioner is stated to be a running company; and that it has filed this petition within the stipulated limitation period, and to the decision of the Bombay High Court in *Purushottamdass and Anr. (BulakidasMohta Co. P. Ltd.) v. Registrar of Companies, Maharashtra, &Ors. (supra)*; it is only proper that the impugned order of the respondent dated 23.06.2007, which struck off the name of the petitioner from the Register of Companies, be set aside. At the same time, however, there is no gainsaying the fact that a greater degree of care was certainly required from the petitioner company in ensuring statutory compliances. Looking to the fact that annual returns and balance sheets were not filed for almost seventeen years, the primary responsibility for ensuring that proper returns and other statutory documents are filed, in terms of the statute and the rules, remains that of the management.

Accordingly, the petition is allowed. The restoration of the company's name to the Register maintained by the Registrar of Companies will be subject to payment of costs of Rs.22,000/- to be paid to the common pool fund of the Official Liquidator, and the completion of all formalities, including payment of any late fee or any other charges which are leviable by the respondent for the late deposit of statutory documents within 8 weeks; the name of the petitioner company, its directors and members shall, stand restored to the Register of the respondent, as if the name of the company had not been struck off, in accordance with Section 560(6) of the Companies Act, 1956. Liberty is granted to the respondent to proceed with penal action against the petitioner, if so advised, on account of the petitioner's alleged default in compliance with Section 162 of the Companies Act, 1956.

MIHEER H. MAFATLAL

v.

MAFATLAL INDUSTRIES LTD [SC]

Civil Appeal No.11879 of 1996

N.P.Singh & S.B. Majmudar, JJ. [Decided on 11/09/1961]

Equivalent citations: JT 1996 (8) 205; (1996) 87 Comp Cas 792; AIR 1997 SC 506.

Companies Act, 1956 – Section 391-394 – Amalgamation of companies – Company court's jurisdiction – Supreme Court explains the scope.

Brief facts:

The transferor-company Mafatlal Fine Spinning and Manufacturing Co. Ltd [MFL'] amalgamated with the transferee company Mafatlal Industries Limited ('MIL') under a scheme of amalgamation. The learned Single Judge granted requisite sanction to the applicant transferee-company MIL to amalgamate in it the transferor-company MFL under Section 391(2) of the Companies Act, 1956 (hereinafter referred to as 'the Act'). Bombay High Court sanctioned the scheme presented by MFL while the transferee company MIL presented the scheme before the Gujarat High Court. Overruling the objections raised by the appellant the single judge sanctioned the scheme which was confirmed by the Division bench on appeal. The appellant challenged the judgement of the Division Bench on various grounds before the Supreme Court, which rejected all the objections.

While examining the objections in the light of the jurisdiction of the company court while sanctioning a scheme of amalgamation, the Supreme Court exhaustively dealt with the scope of the company court's jurisdiction, with which we are concerned with.

Decision: Appeal dismissed.

Reason:

It will be necessary to view the limited scope of the jurisdiction of the Company Court which is called upon to sanction the Scheme of Amalgamation as per the provisions of Section 391 read with Section 393 of the Act.

In the present proceedings we will be concerned with the Sections 391 and 393 of the Act. The aforesaid provisions of the Act show that compromise or arrangement can be proposed between a company and its creditors or any class of them or between a company and its members or any class of them. Such a compromise would also take in its sweep any scheme of amalgamation/merger or one company with another. When such a scheme is put forward by a company for the sanction of the Court in the first instance the Court has to direct holding of meetings of creditors or class of creditors or members or class of members who are concerned with such a scheme and once the majority in number representing threefourths in value of creditors or class of creditors or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting accord their approval to any compromise or arrangement thus put to vote, and once binding to all creditors or class of creditors or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme even though approved by a majority of the concerned creditors or members the Court has to be satisfied that the company or any other person moving such an application for sanction under sub-Section (2) of Section 391 has disclosed all the relevant matters mentioned in the provision to sub-section (2) of that Section.

So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391(1) (a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the concerned voters so that the parties concerned before whom the scheme is placed for voting can take an informed and objective decision whether to vote for the scheme or against it.

On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company, has to act merely as rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting minority of creditors or members as the case may be, even though they have not consented to such scheme and to that extent absence of their consent will have to effect the scheme. It can be postulated that even in case of such a Scheme of Compromise and Arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote. However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be called out from the provisions of Section 392 of the Act. Of course this Section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the compromise or arrangement have to be judged by the parties who as *sui juris* with their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement.

The Court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial economic interest by majority agree to give green signal to such a compromise or arrangement. The aforesaid statutory scheme which is clearly discernible from the relevant provisions of the Act, as seen above, has been subjected to a series of decisions of different High Courts and this Court as well as by the Courts in England which had also occasion to consider schemes under pari material English Company Law. We will briefly refer to the relevant decisions on the point. After referring to several authoritative rulings i.e. In Re. Alabama, New Orleans Texas and Pacific Junction Railway Company reported in 1891 (1) Chancery Division 213; Anglo-continental Supply Co. Ltd. Re. (1992) 2 Ch. 723; In Re. Mankam Investments Ltd. and others (1995) 4 Comp LJ 330 (Cal.); and Hindustan Lever Employees' Union v. Hindustan Lever Ltd. and others 1995 Supp. (1) SCC 499 the court summed up the broad contours of company court's jurisdiction as under:

1 . The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meeting as contemplated by Section 391(1) (a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just fair to the class as whole so as to legitimately blind even the dissenting members of that class.

4. That all the necessary material indicated by Section 393(1) (a) is placed before the voters at the concerned meetings as contemplated by Section 391 sub-Section (1).

5. That all the requisite material contemplated by the provision of sub- Section (2) of Section 391of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court’s jurisdiction.

MADURA COATS LTD

v.

MODI RUBBER LTD & ANR [SC]

Civil Appeal No. 1475 of 2006

J. S. Khehar, M.B. Lokur & C. Nagappan, JJ. [Decided on 29/06/2016]

Companies Act read with SICA – Winding up order passed reference to BIFR made during the winding

up proceedings – Reference registered after the passing of the winding up order- on appeal division bench set aside the winding up order – Whether tenable – Held,Yes.

Brief facts:

The appellant (Madura Coats) is aggrieved by the judgment and order dated 20th May, 2004 passed by the Division Bench of the Allahabad High Court in Special Appeal No. 420 of 2004. By the impugned judgment and order the Division Bench of the High Court allowed the Special Appeal of the respondent and stayed further proceedings before the Company Court consequent upon a winding up order passed against the respondent (Modi Rubber) till a final decision is taken on a reference made by Modi Rubber to the Board for Industrial and Financial Reconstruction.

Company Petition No.1 of 2002 was filed by Madura Coats in the Allahabad High Court for winding up Modi Rubber on the allegation that Modi Rubber was unable to pay its huge undisputed debts. Modi Rubber who entered appearance but took several adjournments in the matter on one pretext or the other and eventually, after two years of adjournments, the Company Court declined to grant any further adjournment to Modi Rubber and passed an order on 12th March, 2004 holding that it was just and equitable that the company be wound up. An Official Liquidator was appointed to take charge of the assets of the company and to submit a report along with the inventory.

Feeling aggrieved by the winding up order, Modi Rubber preferred an appeal before the Division Bench of the High Court. Before the Division Bench it was brought out for the first time that a reference to the BIFR had been made on 3rd February, 2004 which was received by the BIFR on 4th February, 2004. Thereafter, the application was scrutinized and on 17th March, 2004 the reference made by Modi Rubber was registered as Case No. 153 of 2004. It will be seen that while the application for making a reference was sent to the BIFR before the winding up order was passed by the Company Court, the reference was actually registered after the winding up order was passed by the Company Court. The Division bench allowed the appeal and passed the impugned judgement which is under challenge before the Supreme Court.

Decision: Appeal dismissed.

Reason:

The correctness of the impugned judgment and order will need to be tested on these facts and the law placed before us in connection with the reference made to the larger Bench. On hearing learned counsel for the parties on these facts, we are of the opinion that different situations can arise in the interplay between the Companies Act and the SICA in the matter of winding up of a company and these situations have already been dealt with by this Court at one time or another.

One such situation is where winding up proceedings are pending and a reference is made to the BIFR. This situation occurred in Real Value Appliances Ltd. v. Canara Bank(1998) 5 SCC 554, where winding up proceedings were pending and the appointment of a provisional liquidator was under challenge. At that stage, steps were taken by Real Value for making a reference under the SICA to the BIFR. Under these circumstances, one of the questions agitated for consideration by this Court was whether on the registration of a reference, the Division Bench of the High Court could pass orders in an appeal against an interim order passed by the Company Court.

While referring to the provisions of the SICA, this Court concluded that once a reference is registered after scrutiny, it is mandatory for the BIFR to conduct an enquiry. It was also held that the SICA is intended to revive and rehabilitate a sick industry before it can be wound up under the Companies Act. The legislative intention is to ensure that no proceedings against the assets of the company are taken before any decision is taken by the BIFR because if the assets are sold or the company is wound up, it may become difficult to later restore the status quo ante. It was held that it is for this reason that the enquiry under the SICA must be treated to have commenced as soon as the registration of the reference is completed after scrutiny and that action against the company's assets must remain stayed in view of Section 22 of the SICA till a final decision is taken by the

BIFR. Another facet of this situation is when proceedings are pending both before the BIFR and the Company Court but no order of winding up has been passed against the company. In such a situation (though we are not directly concerned with it) this Court took the view in Tata Motors Ltd v. Pharmaceutical Products of India Ltd. (2008) 7 SCC 619, that the provisions of SICA would prevail over the provisions of the Companies Act. Another situation is where a winding up order is passed by the Company Court but it is stayed in appeal. In Rishabh Agro Industries Ltd. v. P.N.B. Capital Service Ltd. (2000) 5 SCC 515,the company was ordered to be wound up but this order was stayed by the Division Bench of the concerned High Court. Thereafter the company made a reference to the BIFR under the SICA.

From the above it is quite clear that different situations can arise in the process of winding up a company under the Companies Act but whatever be the situation, whenever a reference is made to the BIFR under the SICA, the provisions of the SICA would come into play and they would prevail over the provisions of the Companies Act and proceedings under the Companies Act must give way to proceedings under the SICA. In this state of the law, in so far as the present appeal is concerned, we do not find any error in the view taken by the High Court in concluding that the winding up proceedings before the Company Court cannot continue after a reference has been registered by the BIFR and an enquiry initiated under Section 16 of the SICA. The present appeal is squarely covered by the primacy given to the provisions of the SICA over the Companies Act as delineated in Real Value, Rishabh Agro and Tata Motors. Consequently, the High Court was right in concluding that the provisions of Section 22 of the SICA would come into play and that the Company Court could not proceed further in the matter pending a final decision in the reference under the SICA.

Quite apart from the above, we are also of opinion that in view of the subsequent developments and the fact that Madura Coats had participated before the BIFR and has taken its dues in terms of the rehabilitation scheme approved and sanctioned by the BIFR, nothing really survives for consideration in this appeal. Strictly speaking, we have merely undertaken an academic exercise pursuant to a reference made to a larger Bench.

CANARA BANK

v.

NUCLEAR POWER CORPORATION OF INDIA & ORS [SC]

Civil Appeal No.3206 of 1995

J.S.Verma, S.P.Bharucha & K.S.Paripooranan, JJ. [Decided on 06/03/1995]

Equivalent Citations: 1995 SCC. Supl (3) 81; JT 1995 (3) 42; (1995) 84 Comp CAS 70; 1995 SCALE (2)162.

Companies Act, 1956 – Section 10E – Jurisdiction of CLB- share market scam – Transfer of shares by notified person – Jurisdiction of special court – Whether CLB has jurisdiction – Held, No.

Brief facts :

Canara Bank (the appellant) had made an application before the CLB seeking relief against the Nuclear Power Corporation of India Ltd. (the first respondent), which had refused to register in its books in the name of the Canara Bank bonds of the Nuclear Power Corporation purchased by the Canara Bank. The Standard Chartered Bank (the fourth respondent) had also claimed ownership of the said bonds. The Canara Bank alleged that it had acquired the said bonds from the Andhra Bank Financial Services Ltd. (the third respondent) through one Hiten P. Dalal, (the second respondent) who had acted as a broker. Hiten P. Dalal is a person notified under the provisions of Section 3(2) of the Special Court Act and was, as the application of the Canara Bank before the CLB showed, involved as a broker in the transaction relating to the said bonds. The application of the Canara Bank was pending disposal before the CLB when, on 25th January, 1994, the Special Court Act was amended by the Special Court (Trial of Offences Relating to Transactions in Securities) Amendment Ordinance, 1994, and Section 9-A was introduced. Canara Bank and the Nuclear Power Corporation took the stand that the application of the Canara Bank stood transferred to the Special Court by virtue of the provisions of Section 9-A (2)of the Special Court Act. The Standard Chartered Bank (Stanchart) contended that the CLB retained the jurisdiction to deal with the application. The CLB held that it was not a court within the meaning of the Companies Act nor was it a civil court. Its jurisdiction was, therefore, unaffected by the provisions of Section 9-A (2) of the Special Court Act.

Decision: Appeal allowed.

Reason :

As to what are courts and tribunals, the leading decision is *M/s. Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhuwala & Ors, (1962) 2 S.C.R. 339*, delivered by a Constitution Bench of this Court. In *Kihoto Hollohan v. Zachillhu & ors. (1992) Suppl 2 S.C.C. 651*, the observations in the case of Harinagar Sugar Mills case (supra) were quoted with approval and it was said that where there was a lis - an affirmation by one party and denial by another, the dispute involved the rights and obligations of the parties to it and the authority was called upon to decide it, there was an exercise of judicial power. That authority was called a tribunal if it did not have all the trappings of a court. In the case of *Harinagar Sugar Mills* case (*supra*) this court was called upon to decide whether an order of the Central Government under Section 111 of the Companies Act, as it then read, was appealable under Article 136 of the Constitution. Article 136 empowers this court to grant special leave to appeal from any judgment, decree determination, sentence or order in any cause or matter passed or made by “any court or tribunal” in the territory of India. The connotation of the words “court” and “tribunal” was determined in the judgment in the context of Article 136. The argument was that the Central Government, acting under Section 111 of the Companies Act, as it then read, was exercising administrative authority. The court held that it was exercising judicial authority. The majority judgment relied upon the provisions of Section III for so holding. Hidayatullah, J., concurring held that “all tribunals were not courts though all courts were tribunals. The word “courts” was used to designate the tribunals that a State established to administer justice. They were fixed and permanent and could try any suit or cause within their jurisdiction. They went under the compendious name of “Courts” of Civil Judicature”. A large number of administrative tribunals had come into existence with the growth of civilisation and the problems of modem life. They acted in a judicial manner but they were not part of the ordinary courts of civil judicature. What distinguished them had never been successfully established. When the Constitution spoke of “courts” in Article 136 and other Articles, it contemplated courts of civil judicature but not tribunals other than such courts. This was the reason both expressions were used in Articles 136 and 226. The judgment is, therefore, determinative in deciding whether a tribunal is subject to the jurisdiction of this court under Article 136 or of the High Court under Article 227, but it does not hold that a “Court” is only a court of civil judicature in the ordinary hierarchy of courts. In our view, the word “court” must be-read in the context in which it is used in a statute. It is permissible, given the context, to read it as comprehending the courts of civil judicature and courts or some tribunals exercising curial, or judicial, powers. In the context in which the word “court” is used in Section 9A of the Special Court Act, it is intended to encompass all curial or judicial bodies which have the jurisdiction to decide matters or claims, *inter alia*, arising out of transactions in securities entered into between the stated dates in which a person notified is involved. The occasion for enacting the Special Court Act must not be lost sight of. The Statement of Objects and Reasons of the Bill to replace the Amendment Ordinance has already been quoted. Having regard to the enormity of the “scam” and its vast ramifications, Parliament thought it was necessary that all the matters of claims arising out of transactions in securities entered into between the stated dates in which a person notified was involved should be brought before and tried by the same forum. That forum had been invested with the jurisdiction to try persons accused of offences relating to transactions in securities entered into between the stated dates. It was also required to give directions to the Custodian in regard to property belonging to persons notified which stood attached under the provisions of the Special Court Act. The object of amending the Special Court Act invest the Special Court with the power and authority to decide civil claims arising out of transactions in securities entered into between the stated dates in which a person notified was involved has already been stated. In these circumstances, it is proper to attribute to the word "court" in Section 9A (1) of the Special Court Act, not the narrower meaning of a court of civil judicature which is part of the ordinary hierarchy of courts, but the broader meaning of a curial body, a body acting judicially to deal with matters and claims arising out of transactions in securities entered into between the stated dates in which a person notified is involved. Now, under Section 111 of the Companies Act as amended with effect from 31st May, 1991, the CLB performs the functions that were therefore performed by courts of civil judicature under Section 155. It is empowered to make orders directing rectification of the company register, as to damages, costs and incidental and consequential orders. It may decide any question relating to the title of any person who is a party before it to have his name entered upon the company's register; and any question which it is necessary or expedient to decide. It may make interim orders. Failure to comply with any order visits the company with a fine. In regard to all these matters it has exclusive jurisdiction (except under the provisions of the Special Court Act, which is the issue before us). In exercising its function under Section 111 the CLR must, and does, act judicially. Its orders are appealable. The CLR, further, is a permanent body constituted under a statute. It is difficult to see how it can be said to be anything other than a court, particularly for the purposes of Section 9A of the Special Act. We shall assume that a shareholder whose name the company has refused to enter in its register would be put to some difficulty in deciding whether he should approach the Special Court or the CLB, but that is no reason to interpret the provisions of Section 9A in a manner that would defeat its intendment and adversely affect the public interest. In any event, the time taken in approaching the CLB in a matter that should have been filed before the Special Court would not be of any consequence for there is no time limit within which the Special Court has to be approached; and it is most unlikely that the Special Court would be approached unless the shareholder were sure that his claim fell within Section 9A (1). As has been pointed out, sub-sections(2) and (3) of Section 111 of the Companies Act term the pleading that the person aggrieved has to file before the CLE an 'appeal', sub-section (4) requires the person aggrieved to apply, sub-section (5) speaks of it as an 'appeal' or an 'application', subsection (7) as an 'application ' and sub-section (10) as an 'appeal or application' which shall be made by a "petition in writing". The words "appeal" and "application" in the context of the provisions of Section 111 have, therefore the same meaning and it is, plainly, an original application that is made. The shareholder does not resort to a superior court to review the decision of an inferior court or tribunal. The fact, therefore, that Section 9A(2) of the Special Court Act speaks of the transfer of 'every suit', claim or other legal proceeding (other than an appeal) does not exclude the "application' or "appeal" made under the provisions of Section 111 of the Companies Act from the purview of Section 9A(1) of the Special Court Act. The appeal is allowed. The judgment and order of the CLB under appeal is set aside. The application of the Canara Bank pending before the CLB shall stand transferred to the Special Court constituted under the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

SINGER INDIA LTD.

v.

CHANDER MOHAN CHADHA & ORS [SC]

Civil Appeals No. 387 & 388 of 2004

R.C. Lahoti, G. P. Mathur & C. K. Thakker, JJ. [Decided on 13/08.2004]

Equivalent citations: (2004) 122 Comp Cas 468(SC); (2004) 62 CLA 213 (SC); AIR 2004 SC 4368.

Companies Act, 1956 read with Delhi Rent Control Act – Shop let out to American company – The company merged with Indian company – Landlord initiated eviction proceedings on the ground of sub-letting – Contested that the transfer was due to merger which is by operation of law – Whether tenable – Held, No.

Brief facts:

Respondent landlord let out one Shop to M/s. Singer Sewing Machine Company, incorporated under the laws of the State of New Jersey, USA, (hereinafter referred to as 'American Company'), vide a registered lease deed dated 11.7.1966. In the year 1982, the American Company, without obtaining any written consent from the landlord, had parted with the possession of the premises in dispute in favour of Indian Sewing Machine Company Limited, and it was the said company which was in exclusive possession of the premises and thereby it was liable for eviction in view of Section 14(1)(b) of the Delhi Rent Control Act (hereinafter referred to as the 'Act'). The eviction petition was contested by the appellant on the ground, *inter alia*, that a direction was issued to the American Company to reduce its share capital to 40 per cent in order to carry on business in India in view of Section 29 of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA'). Accordingly, Company Court under which a scheme of amalgamation was sanctioned whereby the undertaking in India of the American Company was amalgamated with the Indian Company. It was submitted that the Indian Company is no other entity except the legal substitute of the American Company and in substance there is no case of subtenancy. The Additional Rent Controller, Delhi dismissed the eviction petition, but this was reversed by the Rent Control Tribunal in the appeal preferred by the landlord and eviction petition was allowed. The Second Appeal preferred by the appellant was dismissed by the High Court. During the pendency of the appeal before the Rent Control Tribunal, the name of M/s. Indian Sewing Machine Company was changed as Singer India Limited which is the appellant herein.

Decision: Appeal dismissed.

Reason:

The effect of parting of possession of the tenanted premises as a result of sanction of scheme of amalgamation of companies under Section 394 of the Companies Act by the High Court has also been considered in two decisions of this Court. In M/s. General Radio and Appliances Co. Ltd and others v. M.A. Khader 1986 (2) SCC 656, which is a decision by a bench of three learned Judges, the premises had been let out to M/s. General Radio and Appliances Co. Ltd. On account of a scheme of amalgamation sanctioned by the High Court, all property, rights and powers of every description including tenancy right, held by M/s. General Radio and Appliances Co. Ltd. had been blended with M/s. National Ekco Radio & Engineering Co. Ltd. Thereafter the landlord instituted proceedings for eviction on the ground of unauthorized sub-letting. It was held that the order of amalgamation was made by the High Court on the basis of the petition filed by the transferor company in the company petition and, therefore, it cannot be said that this is an involuntary transfer effected by the order of the Court. It was further held that appellant No. 1 Company was no longer in existence in the eyes of law and it had effaced itself for all practical purposes. The appellant No. 2 Company i.e., the Transferee Company, was not a tenant in respect of the suit premises and it was appellant No. 1 Company which had transferred possession of the suit premises in favour of the appellant No. 2 Company. The Court further took the view that under the relevant Act, there was no express provision that in case of any involuntary transfer or transfer of the tenancy right by virtue of a scheme of amalgamation sanctioned by the High Court, such a transfer will not come within the purview of Section 10(ii) (a) of Andhra Pradesh Building (Lease, Rent and Eviction) Control Act. On this finding, it was held that the appellant was liable for eviction.

Cox & Kings Ltd. & Anr v. Chander Malhotra 1997 (2) SCC 687 is also a decision by a bench of three learned Judges and arose out of proceedings for eviction under Section 14(1)(b) of Delhi Rent Control Act. Here, the premises were given on lease to Cox & Kings (AGENTS) Limited, a company incorporated under the United Kingdom Companies Act (for short, "Foreign Company"). A petition for evictions was filed on several grounds and one of the ground was of sub-letting to Cox & Kings Limited, a company registered under the Indian Companies Act (for short an "Indian Company"). It was urged that the transfer of leasehold interest from the Foreign Company to the Indian Company was by compulsion, it was an involuntary one and, therefore, it was not a case of sub-letting within the meaning of Section 14(1) (b) of the Act. It was held that under FERA, there was no compulsion that the premises demised to the Foreign Company should be continued or given to the Indian Company. On the other hand, under the agreement executed between the Foreign Company and the Indian Company, incidental to the assignment of the business as a growing concern, the Foreign Company also assigned the monthly and other tenancies and all rented premises of the assignor in India to the Indian Company.

The Court, accordingly, concluded that though by operation of FERA the Foreign Company had wound up its business, but under the agreement it had assigned the leasehold interest in the demised premises to the Indian Company which was carrying on the same business in the tenanted premises without obtaining the written consent of the landlord and, therefore, it was a clear case of sub-letting.

These cases clearly hold that even if there is an order of a Court sanctioning the scheme of amalgamation under the Companies Act where under the leases, rights of tenancy or occupancy of the Transferor Company get vested in and become the property of the Transferee Company, it would make no difference in so far as the applicability of Section 14(1)(b) is concerned, as the Act does not make any exception in favour of a lessee who may have adopted such a course of action in order to secure compliance of law. It was next contended that on amalgamation Singer Sewing Machine Company (American Company) merged into Indian Sewing Machine Company (Indian Company) shedding its corporate shell, but for all practical purposes remained alive and thriving as part of the larger whole. He has submitted that this Court should lift the corporate veil and see who are the directors and shareholders of the Transferee Company and who are in real control of the affairs of the said company and if it is done it will be evident there has been no sub-letting or parting with possession by the American Company. It is not open to the Company to ask for unveiling its own cloak and examine as to who are the directors and shareholders and who are in reality controlling the affairs of the Company. This is not the case of the appellant nor could it possibly be that the corporate character is employed for the purpose of committing illegality or defrauding others. It is not open to the appellant to contend that for the purpose of FERA, the American Company has effaced itself and has ceased to exist but for the purpose of Delhi Rent Control Act, it is still in existence. Therefore, it is not possible to hold that it is the American Company which is still in existence and is in possession of the premises in question. On the contrary, the inescapable conclusion is that it is the Indian Company which is in occupation and is carrying on business in the premises in question rendering the appellant liable for eviction.

SARASWATI INDUSTRIAL SYNDICATE LTD

v.

C.I.T. [SC]

Civil Appeal No. 91 of 1976.

K.N.Singh, T.K.Thommen & Kuldip Singh, JJ. [Decided on 04/09/1990]

Equivalent citations: 1991 AIR 70; 1990 SCR Supl. (1) 332; 1990 SCC Supl. 675; JT 1990 (4)353; (1991) 70 Comp Cas 184.

Income tax Act, 1961 read with Companies Act, 1956 – Amalgamation of two companies – Nature of amalgamation – Whether after amalgamation the transferor company ceases to exist and loses its identity – Held, Yes.

Brief facts:

Though this case relate to income tax, the crucial and interesting question which arose, to decide the correctness or otherwise of the taxation, was “Whether after the amalgamation, the transferor company ceases to exist and loses its identity or not”. We are concerned with this aspect of law laid down by the Supreme Court of India.

Indian Sugar and General Engineering Corporation (hereinafter referred to as ‘the Indian Sugar Company’) amalgamated with the appellant Saraswati Industrial Syndicate Ltd. Prior to the amalgamation, the Indian Sugar Company had been allowed expenditure to the extent of Rs.58,735 on accrual basis in its earlier assessment. The company had shown the aforesaid amount as a trading liability and the said trading liability was taken over by the appellant company. After amalgamation, the appellant company claimed exemption on the amount of

Rs.58,735 from income tax for the assessment year 1965-66 on the ground that the amalgamated company was not liable to pay tax under Section 41(1) of the Income Tax Act 1961 as the expenditure had been allowed to the erstwhile Indian Sugar Company which was a different entity from the amalgamated company. The Income Tax Officer disallowed the appellant's claim for exemption. The assessee filed appeal before the Appellate Assistant Commissioner who confirmed the order of the Income Tax Officer. The assessee, thereafter, preferred appeal before the Income Tax Appellate Tribunal, which allowed the appeal holding that after the amalgamation of the Indian Sugar Company with the assessee company the identity of the amalgamating company was lost and it was no longer in existence, therefore, the assessee company was a different entity not liable to tax on the aforesaid amount of Rs.58,735/. The High Court reversed this order. Hence this appeal.

Decision: Appeal allowed.

Reason:

The question is whether on the amalgamation of the Indian Sugar Company with the appellant company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Act. The amalgamation of the two companies was effected under the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate, the transferee company was a subsidiary of the Indian Sugar Company, namely, the transferor company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that company incurred or it could incur, any liability, before the dissolution or not thereafter. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England, 4th Edition Vol. 7 Para 1539. Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity.

In M/s. General Radio and Appliances Co. Ltd. & Ors. v. M.A. Khader (dead) by Lrs., [1986] 2 S.C.C. 656, the effect of amalgamation of two companies was considered. This Court in appeal held that under the order of amalgamation made on the basis of the High Court's order, the transferor company ceased to be in existence in the eye of law and it effaced itself for all practical purposes. This decision lays down that after the amalgamation of the two companies the transferor company ceased to have any entity and the amalgamated company acquired a new status and it was not possible to treat the two companies as partners or jointly liable in respect of their liabilities and assets. In the instant case the Tribunal rightly held that the appellant company was a separate entity and a different assessee, therefore, the allowance made to Indian Sugar Company, which was a different assessee, could not be held to be the income of the amalgamated company for purposes of Section 41(1) of the Act.

The High Court was in error in holding that even after amalgamation of two companies, the transferor company did not become non-existent instead it continued its entity in a blended form with the appellant company. The High Court's view that on amalgamation there is no complete destruction of corporate personality of the transferor company instead there is a blending of the corporate personality of one with another corporate body and it continues as such with the other is not sustainable in law. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there cannot be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective.

In view of the above discussion, we agree with the Tribunal's view that the amalgamating company ceased to exist in the eye of law, therefore the appellant was not liable to pay tax on the amount of Rs.58,735. The appeal is accordingly allowed and we set aside the order of the High Court and answer the question in favour of the assessee against the Revenue. There will be no order as to costs.

TIN PLATE DEALERS ASSN. P. LTD. & ORS

v.

SATISH CHANDRA SANWALKA & ORS [SC]

Civil Appeal No. 589 of 2010 with Civil Appeal No.599 of 2010

Ranjan Gogoi & Prafulla C. Pant, JJ. [Decided on 07/10/2016]

Companies Act, 1956 – Various acts of oppression & suppression – Supreme Court upholds the CLB order.

Brief facts:

The appellant company consisted of two groups viz "Gupta Group" appellants in CA 589/2010 and "Sanwalka Group" who are the appellants in CA 599/2010. These two appeals are cross appeals. The dispute relate to the management control of the company. Both the appeals being against the common judgment and order of the High Court of Calcutta dated 14th September, 2005 were heard together and are being dealt with by this common order. Sanwalka group filed a petition before the CLB alleging that Gupta group had come into the power of the company by actions of commission and omission such as forfeiture of preference shares issued to Sanwalka group, increasing the authorised capital, issuing bonus shares without notice to Sanwalka group, removing two members of the Sanwalka group from the board of directors. The eventual reliefs prayed for in the Company Petition in the light of the averments made in the said petition and the supplementary applications were for: (i)restoration of the names of the members of the Sanwalka Group in the register of members of the company;(ii)cancellation of the allotment of bonus shares;(iii) cancellation of the issue and allotment of 25000 partly paid up ordinary equity shares to the Gupta Group;(iv)cancellation of 3065 equity shares to the holders of the 3065 preference shares;(v) cancellation of the lease agreement in respect of the industrial plot and restoration of the names of the concerned members of the Sanwalka Group as Directors of the Company.

The CLB by its order dated 01.03.2001 disposed of the petition by granting majority of the reliefs to Sanwalka group. Aggrieved by the aforesaid order of the CLB with regard to the maintainability of the company petition, issue of bonus shares and 25,000 ordinary equity shares and also the re-induction of the members of the Sanwalka Group in the Board of Directors, the Gupta Group appealed to the High Court. Challenging the decision of the Board insofar as the issue of 3065 preference shares and the lease in respect of the industrial plot is concerned, the Sanwalka Group also had filed a separate appeal. The High Court, by its impugned order dated 14.9.2005, dismissed both sets of appeal leading to the institution of the present appeals before the Supreme Court.

Decision : Civil Appeal No.589 of 2010 filed by the Gupta Group is dismissed whereas Civil Appeal No.599 of 2010 filed by the Sanwalka Group is disposed of with directions.

Reason:

Notwithstanding the very elaborate and persuasive arguments made by both sides a resolution of the above question is possible by a close look of the share certificates issued to the members of the Sanwalka Group after allotment of the shares in question following the forfeiture of the same in the hands of M/s. Gupta Brothers. Some of the share certificates in question are on record. A reading thereof discloses that the same constitute a fresh and independent allotment of the shares by reference to their distinctive numbers specified therein. The certificates do not contain any stipulation or condition that the same are being held either on account of a third person or as beneficiaries on behalf of any third person. The shares in question were allotted on payment of Rs.35 being the application money (Rs.25) and allotment money (Rs.10). A further amount of Rs.10/- per share was paid against the first call made on 7.8.1986. Therefore, the share certificates, *ex facie*, do not support any of the contentions advanced on behalf of Gupta Group, details of which have been noticed herein above. If the shares were held by the members of the Sanwalka Group in their own right without any connection to the erstwhile/forfeited shares held by M/s. Gupta Brothers, the second question arising i.e. failure to respond to the call notice dated 5.1.1991 really does not arise. Be that as it may, the said notice required the members of the Sanwalka Group to pay the unpaid value of the forfeited shares (which coincidentally was also Rs.55/- per share i.e. same as the unpaid amount of the shares at the time of forfeiture when held by M/s. Gupta Brothers) along with interest. In this regard it was found by the CLB as well as the High Court that even issue of notice of the call in terms of Section 53 of the Act had not been proved by the Gupta Group. Not only the call notice dated 5.1.1991 had not been proved to have been issued in the matter required under Section 53 of the Act, the notice also does not mention the consequences of nonpayment i.e. forfeiture. Also the fastening of the liability on the Sanwalka Group to pay the unpaid amount of the forfeited shares along with interest is plainly contrary to the provisions of Article 18 of the Articles of Association. Besides, the date of the forfeiture also is not clear though it appears that in a Board Meeting held on 2.8.1995 a decision was taken to restore the said shares to M/s. Gupta Brothers. The reason for the said decision appears to be to comply with an order of attachment of the shares passed earlier by the Civil Court. All these would demonstrate the apparent falsity of the claim now made that the forfeiture was due to failure of the Sanwalka Group to comply with the terms of the call notice dated 5.1.1991.

If the primary question i.e. maintainability of the company petition has to be answered in favour of the Sanwalka Group, as we are inclined to, the other issues highlighted in the earlier part of this order would now have to be considered.

There is no denial of the fact that notice of the E.O.G.M. dated 5.7.1994 was not given to the members of the Sanwalka Group though they, admittedly, continued to be members of the company on the date of the meeting. It is pursuant to the decision taken in the said E.O.G.M. dated 5.7.1994 to raise the share capital of the company from Rs.10 lakh to Rs.5 crores that the other decisions with regard to bonus shares; the issue of 25,000 ordinary equity shares and the conversion of preference shares to equity shares were made subsequently. Such notice is mandatory under Section 172(2) read with Section 41 of the Act. This is, *ex facie*, apparent from the reading of the said provisions of the Act. Reference to the elaborate case laid before us on this score would, therefore, not be required.

Specifically, so far as the issue of bonus shares is concerned, the arguments laid down before us would require a consideration whether Section 205(3) of the Act, particularly, the proviso thereto permits issue of bonus shares out of revaluation reserves of a company. The further question that would arise is the correct interplay between the provisions of the Act and those contained in the Articles of Association of a Company. So far as the issue with regard to utilization of reserves arising from revaluation of assets for the purpose of issuing fully paid bonus shares is concerned, the same has been held to be permissible in Bhagwati Developers v. Peerless General Finance & Investment Co. & Ors. (2005) 6 SCC 718.

However, it has to be noticed that in Bhagwati Developers (supra) the Articles of Association (Article 182) specifically permitted/ contemplated such a course of action. In the present case, the Articles of Association of the Company do not empower the Directors to so act. No such situation i.e. issue of bonus shares out of revaluation reserve is contemplated. When the Articles of the Company do not confer any such power in the Board exercise thereof on the basis that the Act so provides would be impermissible. Enabling provisions under the Act would require incorporation in the Articles of a company.

That apart, the resolution of the Board dated 5.7.1994 pursuant to which bonus shares were issued indicates that the real purpose for issue of the bonus shares is to raise funds which were badly needed by the company at that point of time. On the very face of it, the purpose indicated in the resolution is a sham and a pretence inasmuch as revaluation of the existing assets of the company and issuance of bonus shares against such revaluation could not and did not generate any additional funds as the additional capital available is purely fictional or notional. A self-serving interest of the Gupta Group (who received all the bonus shares issued) in issuing the bonus shares, therefore, is evident.

So far as the issue of 25,000 equity shares is concerned, there can be no manner of doubt that the decision of the Board to issue the said shares has to be tested in the light of the wide powers of the Board to act in such matters as has been laid down by this Court in Needle Industries (India) Ltd. & Ors. v. Needle Industries Newey (India) Holding Ltd. & Ors. (1981) 3 SCC 333. The power of the Board of Directors of the Company to issue fresh shares must always be viewed as an adjunct of its extensive powers under the Act and the bona fides of such an exercise cannot be called into question by construing the power to issue fresh shares to be limited by any particular purpose or purposes. This was the view of the Company Law Board also. However, the same would not detract from the fundamental principle of fair play that is to be expected from the Board of Directors in making a fair and proportionate distribution/allotment of such fresh shares. The direction of the Company Law Board upheld by the High Court, namely, that allotment from the aforesaid 25,000 newly issued ordinary equity shares should be proportionate to the shareholding of the two groups taking the members of the Sanwalka Group as having continued to be members of the company, will, therefore, not require any interference.

Insofar the issue of 3065 ordinary equity shares in lieu of 3065 preference shares is concerned, the CLB and the High Court had thought it proper to leave the matter for a just determination by the Delhi High Court in view of the suit filed by the Sanwalka Group contending that the said shares had ceased to exist in the year 1967 and therefore no equity shares could have been issued in lieu of the said preference shares as has been done. The suit in question which is of the year 1996 may take some further time for resolution. In such circumstances, the apprehension of the Sanwalka group is that if the equity shares issued against the said preference shares are allowed to remain alive and valid the balance would still tilt in favour of the Gupta Group.

It is not known whether the High Court had been requested by the parties to make an interim arrangement and if so the result thereof. However, before us, the Gupta Group has sought to contend that the above apprehension of the Sanwalka Group is unfounded. It is claimed that it is not correct that by virtue of the conversion of the 3065 preference shares into equity shares the Gupta Group has emerged in the majority for the first time. Even prior to such conversion, the Gupta Group was in a majority inasmuch as the preference shares always carried a right to vote. Therefore, even on the basis of the original shareholding, the Gupta Group was in majority.

The aforesaid Articles must necessarily have to be understood in the light of the provisions of Section 87 particularly those contained in sub- Section (2). The meaning sought to be given to Articles 20, 21 and 22, extracted above, namely, that every share holder including the holder of a preference share has a right to vote cannot be readily accepted. The resolution of the Board dated 5.7.1994 relating to the conversion of preference shares into equity shares proceeds on the basis that dividends in respect of the 3065 shares have not been paid and in lieu thereof the shareholders had agreed to receive an equivalent number of equity shares. The above statement of fact is difficult to accept. Neither is the period during which dividends had not been paid is specified, nor is the amount due indicated. No material has been laid to show that the 3065 equity shares represent a fair value of the dividends claimed to be unpaid. What cannot also be lost sight of is that the preference shares in question were held by the Gupta Group who was in control of the company at that point of time. A number of self-serving decisions by the Gupta Group and its conduct of the business of the company in a manner detrimental to the interest of the company, as discussed hereinabove, would make it extremely perilous to rely on the version available in the resolution of the Board for allotment of 3065 equity shares in place of the preference shares in question. In the above circumstances it would be just and proper to strike down the conversion of the 3065 preference shares into equity shares and revert the preference shares to its earlier status to be dealt with in the future in accordance with law. This is, of course, subject to the orders of the Delhi High Court in the appeal pending before it. If the forums below have left the above matter for a just determination in an Extra Ordinary General Meeting of the Company, in view of the directions hereinabove, we do not consider it necessary to deal with the said aspect of the case any further.

Before parting, certain subsidiary issues raised on behalf of the parties may be briefly noticed if only to make the discussion complete. The failure of the High Court to frame a substantial question of law to hear the appeal before it can hardly invalidate the order passed. The order of the High Court is an order of affirmation; further there is no provision in Section 10F of the Act which is akin to the provisions contained in Section 100 (4) of the Code of Civil Procedure, 1908.

The argument that having regard to the conduct of the Gupta Group in managing the affairs of the Company and all decisions taken being in the best interest of the Company, no case for winding up is made out so as to justify the exercise of powers under Section 397/398 of the Act by the CLB, would hardly require a detailed consideration in view of the specific findings of the High Court in this regard, which are wholly adverse to the Gupta Group. The said view and the conclusions reached have our approval, as already indicated. Besides, the High Court in the order under challenge has taken into account that apart from the industrial plot in question the Company has no subsisting business and that the terms of the lease entered into by the Gupta Group in respect of the said property are wholly adverse to the Company's interest. The question whether a single act of oppression would enable the CLB to intervene or oppression must be the cumulative result of continuous acts should not require any debate in the facts of the present case which demonstrate a series of unacceptable decisions and actions on the part of the Gupta Group. In the last resort, satisfaction that oppression has been committed has to be reached in the facts of each case.

MORGAN STANLEY MUTUAL FUND

v.

KARTICK DAS [SC]

Civil appeal No.4584 of 1994 (arising out of SLP (C) No.272 of 1994)

M.N.Venkatachalliah, A.S.Anand & S.Mohan, JJ. [Decided on 20/05/1994]

Equivalent citations: 1994 SCC (4) 225; JT 1994 (3) 654; 1994 SCALE (2) 1121; (1994) 81 Comp CAS 318.

Consumer protection Act, 1985 read with Sale of Gods Act, 1930 – Goods – Whether shares before allotment is goods – Held, No.

Brief facts:

Though this case relate to consumer protection qua unfair trade practice with respect to the issue of shares/ debentures/ units etc., the crucial and interesting question which arose, to decide the correctness or otherwise of the decision of the High Court, was "When the shares/ debentures/ units etc., become 'goods' so as to maintain a consumer complaint". We are concerned with this aspect of law laid down by the Supreme Court of India.

The appellant made a public issue inviting subscription from the public to its mutual fund scheme "Morgan Stanley Growth Fund". The respondent moved the Calcutta District Consumer Disputes Redressal Forum seeking to restrain the public issue from being floated. The principal grounds taken were that the appellant's Offering

Circular was not approved by the SEBI. There are several irregularities in the same. The basis of allotment is arbitrary and unfair. The appellant was seeking to collect money by misleading the public. The consumer forum passed and interim order restraining the appellant to raise funds from the public on the scheme. Aggrieved by this order, civil appeal arising out of SLP (C) No. 272 of 1994 has come to be preferred.

Decision: Appeal allowed.

Reason:

The consumer as the term implies is one who consumes. As per the definition, consumer is the one who purchases goods for private use or Consumption. The meaning of the word 'consumer' is broadly stated in the above definition so as to include anyone who consumes goods or services at the end of the chain of production. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. The consumer deserves to get what he pays for in real quantity and true quality. In every society, consumer remains the centre of gravity of all business and industrial activity. He needs protection from the manufacturer, producer, supplier, wholesaler and retailer.

In the light of this, we will have to examine whether the 'shares' for which an application is made for allotment would be 'goods'. Till the allotment of shares takes place, "the shares do not exist". Therefore, they can never be called goods. Under the Sale of Goods Act, all actionable claims and money are excluded from the definition of goods since Section 2(7) of the Sale of Goods Act, 1930 is as under:

"(7) 'goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

It will be useful to refer to clause (6) of Section 2 of the Sale of Goods Act, 1930. That reads:

"(6) 'future goods' means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale."

As to the scope of this clause, reference may be made to Maneckji Pestonji Bharuclia v. Wadilal Sarabhai & Co. AIR 1926 PC 38. It was observed thus:

"The Company is entitled to deal with the shareholder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate together with a transfer signed by the registered holder. This-is what Bharucha had. He had the certificates and blank transfers, signed by the registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with the certificate and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would have been choses in action, and he delivered choses in action. But in India, by the terms of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that not only registered shares, but also this class of choses in action, are goods. Hence equitable considerations not applicable to goods do not apply to shares in India."

Again in Madholal Sindhu of Bombay v. Official Assignee of Bombay AIR 1950 FC 21 it was held thus:

"A sale according to the Sale of Goods Act (and in India goods include shares of joint stock companies) takes place when the property passes from the seller to the buyer."

Therefore, at the stage of application it will not be goods. After allotment different considerations may prevail. A fortiori, an application for allotment of shares cannot constitute goods. In other words, before allotment of shares whether the applicant for such shares could be called a consumer? In CIT v. Standard Vacuum Oil Co. AIR 1966 SC 1393 while defining shares, this Court observed:

"A share is not a sum of money; it represents an interest measured by a sum of money and made up of diverse rights contained in the contract evidenced by the articles of association of the Company."

Therefore, it is after allotment, rights may arise as per the contract (Article of Association of Company). But certainly not before allotment. At that stage, he is only a prospective investor (sic in) future goods. The issue was yet to open on 27-4-1993. There is no purchase of goods for a consideration nor again could he be called the hirer of the services of the company for a consideration. In order to satisfy the requirement of above definition of consumer, it is clear that there must be a transaction of buying goods for consideration under Section 2(1) (d) (i) of the said Act. The definition contemplates the pre-existence of a completed transaction of a sale and purchase. If regard is had to the definition of complaint under the Act, it will be clear that no prospective investor could fall under the Act.

What is that he could complain of under the Act? This takes us to the definition of complaint under Section 2(1) (c) which reads as follows:

"2. (1)(c) 'complaint' means any allegation in writing made by a complainant that –

(i) as a result of any unfair trade practice adopted by any trader, the complainant has suffered loss or damage;

(ii) the goods mentioned in the complaint suffer from one or more defects;

(iii) the services mentioned in the complaint suffer from deficiency in any respect;

(iv) a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods, with a view to obtaining any relief provided by or under this Act."

Certainly, clauses (iii) and (iv) of Section 2(1) (c) of the Act do not arise in this case. Therefore, what requires to be examined is, whether any unfair trade practice has been adopted. The expression 'unfair trade practice' as per rules shall have the same meaning as defined under Section 36-A of Monopolies and Restrictive Trade Practices Act, 1969. That again cannot apply because the company is not trading in shares. The share means a share in the capital. The object of issuing the same is for building up capital. To raise capital, means making arrangements for carrying on the trade. It is not a practice relating to the carrying of any trade. Creation of share capital without allotment of shares does not bring shares into existence. Therefore, our answer is that a prospective investor like the respondent or the association is not a consumer under the Act.

There is an increasing tendency on the part of litigants to indulge in speculative and vexatious litigation and adventurism which the for a seem readily to oblige. We think such a tendency should be curbed. Having regard to the frivolous nature of the complaint, we think it is a fit case for award of costs, more so, when the appellant has suffered heavily. Therefore, we award costs of Rs 25,000 in favour of the appellant. It shall be recovered from the first respondent. C.A. No. 4584 of 1994 arising out of SLP (C) No. 272 of 1994 is allowed accordingly.

PRESIDENT/SECRETARY J.K. SYNTHETICS MAZDOOR UNION (CITU), KOTA

v.

ARFAT PETROCHEMICALS PVT.LTD & ORS [SC]

Civil Appeal No. 8597 of 2010 & Civil Appeal No. 8598 of 2010 with Civil Appeal No. 8599 of 2010.

Anil R. Dave & L. Nageswara Rao, JJ. [Decided on 18/11/2016]

SICA, 1985 – Sale of unit by sick company to purchaser – Purchaser is not a sick company – Whether BIFR issues directions to the purchaser – Held, No.

Brief facts:

J.K. Synthetics Limited (now Jay Kay Enterprises Ltd.), who is the Second Respondent was declared a sick industrial company and the Rehabilitation Scheme recommending the de- merger of cement units was accepted.

In the meanwhile, the Second Respondent entered into a Memorandum of Understanding (MoU) with M/s Arafat Petrochemicals Pvt. Ltd. (APPL), the First Respondent herein. According to the said MoU the assets of the Kota Units of Respondent No. 2 were to be sold to Respondent No.1 for a total consideration of Rs. 15 crores. The liability towards payment to the workmen was to be borne by APPL. on 07.01.2005, the AAIFR sanctioned a Scheme for transfer of the Kota units to the First Respondent in terms of the MoU dated 19.10.2001.

On 24.03.2008 a sale deed was executed by the Second Respondent in favour of the First Respondent for sale of the assets of the Kota units. In the review meeting held on 05.05.2008, the BIFR took note of the complaints that were made regarding the sale of assets of the Kota units as waste/scrap by the First Respondent. The BIFR held that the interest of the workmen have to be safeguarded in accordance with the Sanctioned Scheme of 2005. The BIFR also held that the Second Respondent cannot escape responsibility towards the rehabilitation of the Kota unit on the ground that there is change in management. The First Respondent participated in the next review meeting held by the BIFR and informed the BIFR that it is not a sick company and no directions can therefore be issued to it. The BIFR held that the First Respondent was not right in contending so.

The orders dated 05.05.2008 and 30.06.2008 of the BIFR were assailed by the First and Second Respondents before the AAIFR. The AAIFR by its order dated 11.12.2008 dismissed the Appeals filed by the First Respondent and directed the BIFR to re-examine the exact position relating to the payment of dues to the workmen. The BIFR was also directed to continue the monitoring of the Scheme and review the efforts made by the First Respondent towards revival of the Kota units. The contention of the First Respondent that the BIFR has no jurisdiction over a company which is not a sick company was rejected.

Aggrieved by the order dated 11.12.2008 of the AAIFR, the First Respondent filed a Writ Petition in the Rajasthan High Court. The High Court allowed the Writ Petition by holding that the BIFR and the AAIFR do not have jurisdiction to issue directions to a company which is not a sick industrial company under Section 22 A of the Act. Being aggrieved by the said judgment of the High Court, the Labour Unions filed Civil Appeal No. 8597 and 8598 of 2010. Civil Appeal No. 8599 of 2010 is filed by JK Synthetics Limited aggrieved by the judgment in so far as it set aside the findings in its favour which were not challenged in the Writ Petition.

Decision: Appeals of the trade union dismissed and the appeal of the company allowed.

Reason:

The only point that falls for consideration in these Appeals is regarding the scope of Section 22 A of the Act.

It is clear from a plain reading of Section 22 A of the Act that the Board can issue a direction not to dispose of assets only to a sick industrial company. There is no dispute that the First Respondent is not a sick industrial company and that it purchased the assets from a sick industrial company in accordance with the Sanctioned Scheme. The BIFR was not correct in passing an order of status quo and directing the First Respondent not to alienate/transfer the assets by its orders dated 05.05.2008 and 30.06.2008. We agree with the findings of the High Court in the impugned judgment that the BIFR does not have competence to issue directions to a company which is not a sick industrial company under Section 22 A of the Act. We are fortified in this view by a judgment of this Court in U.P. State Sugar Corporation Ltd. v. U.P. State Sugar Corporation Karamchari Association & Anr reported in (1995) 4 SCC 276 wherein it was held as follows:

"It runs counter to the express terms of Section 22 A of the Act which confers a limited power on the Board to pass an order prohibiting a sick industrial company from disposing of its assets only during the period specified in Clause (a) and (b)."

Several contentions have been raised by both sides during the course of hearing of these Appeals which we have not adverted to as they are not relevant for adjudication of the dispute in these appeals. We express no opinion on the jurisdiction of BIFR under other provisions of the Act. It is open to the BIFR to review the implementation of the Sanctioned Scheme and pass suitable directions.

As stated supra, the AAIFR held that the Second Respondent has no liability in respect of Kota units which have been sold to the First Respondent. The said findings were not challenged by the First Respondent in the Writ Petition filed in the High Court. The High Court set aside the entire order dated 11.12.2008 without taking note of the findings in favour of the Second Respondent. The petition filed for clarification by the Second Respondent was also dismissed by the High Court. The High Court ought not to have disturbed the findings in favour of the Second Respondent as they were not in challenge in the Writ Petition filed by the First Respondent. For the aforesaid reasons, Civil Appeal Nos. 8597 and 8598 of 2010 are dismissed. Civil Appeal No. 8599 of 2010 is allowed. No costs.

THE STATE TRADING CORPORATION OF INDIA LTD & ORS

v.

THE COMMERCIAL TAX OFFICER & ORS [SC]

Interveners: Advocate Generals for the States of Madras, Punjab, West Bengal, Gujarat & Rajasthan.

Writ Petitions No.202 -204 of 1961

P.B.Sinha(CJI), S.K.Das, Gajendragadkar, S.K.Sarkar, K.N. Wanchoo, M.Hidayatullah, K.C. Das Gupta, J.C. Shah & N. Rajagopala Ayyangar JJ.

[Decided on 26/07/1963]

Equivalent citations: 1963 AIR 1811; 1964 SCR (4) 89; (1963) 33 Comp Cas 1057.

Companies Act, 1956 read with Constitution of India and (Indian) Citizenship Act, 1955 – Company filed writ petition under Art.32 before the Supreme Court challenging the imposition of sales tax on it – Whether company is a citizen entitled to invoke fundamental rights under Art.32 – Held, No.

Brief facts:

The Sales-tax Authorities of the States of Andhra Pradesh and Bihar sought to assess the Corporation to sales tax under their respective Sales Tax Acts and issued notices of demand. The Corporation claiming to be an Indian citizen filed petitions under Art. 32 of the Constitution for quashing the said proceedings on the ground that they infringed its fundamental rights under Art. 19(1) (f) and (g) of the Constitution.

Preliminary objections having been taken by the respondents to the maintainability of the said petitions, the Constitution Bench hearing the matters referred the two following questions for decision by the special bench:[comprised 9 judges].

"(1) whether the State Trading Corporation, a company registered under the Indian Companies Act, 1956, is a citizen within the meaning of Art. 19 of the Constitution and can ask for the enforcement of fundamental rights granted to citizens under the said article; and

(2) whether the State Trading Corporation is, notwithstanding the formality of incorporation under the Indian Companies Act, 1956, in substance, a department , organ of the Government of India with the entirety of its capital contributed by Government; and can it claim to enforce fundamental rights under Part III of the Constitution against the State as defined in Art. 12 thereof."

Decision: Petitions dismissed.

Reason:

It is clear on a consideration of the provisions of Part III of the Constitution that the makers of the Constitution deliberately and advisedly made a clear distinction between fundamental rights available to 'any person' and those guaranteed to 'all citizens'. In other words, all citizens are persons but all persons are not citizens, under the Constitution.

In our opinion, it is not correct to say, as was contended on behalf of the petitioners, that the expression “citizen” in Art. 5 is not as wide as the same expression used in Art. 19 of the Constitution.

One could understand the argument that both the Constitution and the Citizenship Act have not dealt with juristic persons at all, but it is more difficult to accept the argument that the expression “citizen” in Part 11 of the Constitution is not coterminous with the same expression in Part III of the Constitution. Part II of the Constitution, supplemented by the provisions of the Citizenship Act (LVII of 1955) deals with “citizens” and it is not correct to say that citizenship in relation to juristic persons was deliberately left out of account so far as the Constitution and the Citizenship Act were concerned. On the other hand, the more reasonable view to take of the provisions of the Constitution is to say that whenever any particular right was to be enjoyed by a citizen of India, the Constitution takes care to use the expression “any citizen” or “all citizens”, in clear contradistinction to those rights which were to be enjoyed by all, irrespective of whether they were citizens or aliens, or whether they were natural persons or juristic persons. On the analogy of the Constitution of the United States of America, the equality clause in Art. 14 was made available to “any person”. On the other hand, the protection against discrimination on denominational grounds (Art. 15) and the equality of opportunity in matters of public employment (Art. 16) were deliberately made available only to citizens. In this connection, reference may be made to the Constitution of the United States of America (1) “Corporations Citizens of the United States within the meaning of this article must be natural and not artificial persons; a corporate body is not a citizen of the United States.” (p. 965) “Persons” defined “Notwithstanding the historical controversy that has been waged as to whether the framers of the Fourteenth Amendment intended the word, “persons” to mean only natural persons, or whether the word, “persons” was substituted for the word “citizen” with a view to protecting corporations from oppressive State legislation, the Supreme Court, as early as the Granger cases, decided in 1877, upheld on the merits various State laws without raising any question as to the status of railway corporation-plaintiffs to advance, due process contentions. There is no doubt that a corporation may not be deprived of its property without due process of law; and although prior decisions have held that the “liberty” guaranteed by the Fourteenth Amendment is the liberty ‘of natural, not artificial, persons, nevertheless a newspaper corporation was sustained, in 1936, in its objection that a State law deprived it of liberty of press. As to the natural persons protected by the due process clause, these include all human beings regardless, of race, colour or citizenship.” (p. 981). We have already referred, in general terms, to those Senate Document No. 170, 82d. Congress, Ed. Edward S. Corwin, provisions of the Constitution, Part III, which guarantee certain rights to “all persons” and the other provisions of the same part of the Constitution relating to fundamental rights available to ‘citizens’ only, and, therefore, it is not necessary to recount all those provisions. It is enough to say that the makers of the -Constitution were fully alive to the distinction between the expressions “any person” and “any citizen”, and when the Constitution laid down the freedoms contained in Art. 19(1) (a)-(g), as available to “all citizens”, it deliberately kept out all noncitizens. In that context, non-citizens would include aliens and artificial persons.

The question may be looked at from another point of view. Art. 19 lays down that “all citizens” shall have the right to freedoms enumerated in cls. (a) to (g). Those freedoms, each and all of them, are available to “all citizens”. The Article does not say that those freedoms, or only such of them as may be appropriate to particular classes of citizens, shall be available to them. If the Court were to hold that a corporation is a citizen within the meaning of Art. 19, then all the rights contained in cls. (a) to (g) should be available to a corporation. But clearly some of them, particularly those contained in cls. (b), (d) and (e) cannot possibly have any application to a corporation. It is thus clear that the Rights of citizenship envisaged in Art. 19 are not wholly appropriate to a corporate body. In other words, the rights of citizenship and the rights flowing from the nationality or domicile of a corporation are not coterminous. It would thus appear that the makers of the Constitution had altogether left out of consideration juristic persons when they enacted Part II of the Constitution relating to “citizenship”, and made a clear distinction between “persons” and “citizens” in Part III of the Constitution. Part III, which proclaims fundamental rights, was very accurately drafted, delimiting those rights like freedoms of speech and expression, the right to assemble peaceably, the right to practise any profession, etc., as belonging to “citizens” only and those more general rights like the right to equality before the law, as belonging to “all persons”.

In view of what has been said above, it is not necessary to refer to the controversy as to whether there were any citizens of India before the advent of the Constitution. It seems to us, in view of what we have said already as to the distinction between citizenship and nationality that corporations may have nationality in accordance with the country of their incorporation; but that does not necessarily confer citizenship on them. There is also no doubt in our mind that Part II of the Constitution when it deals with citizenship refers to natural persons only. This is further made absolutely clear by the Citizenship Act which deals with citizenship after the Constitution came into force and confines it only to natural persons. We cannot accept the argument that there can be citizens of this country who are neither to be found within the four corners of Part II of the Constitution or within the four corners of the Citizenship Act. We are of opinion that these two provisions must be exhaustive of the citizens of this country, Part II dealing with citizens on the date the Constitution came into force and the Citizenship Act dealing with citizens thereafter. We must, therefore, hold that these two provisions are completely exhaustive of the citizens of this country and these citizens can only be natural persons. The fact that corporations may be nationals of the country for purposes of international law will not make them citizens of this country for purposes of municipal law or the Constitution. Nor do we think that the word "citizen" used in Art. 19 of the Constitution was used in a different sense from that in which it was used in Part II of the Constitution. The first question, therefore, must be answered in the negative.

I have no cause for anxiety about Corporations in general and companies in which the States own all or the majority of the shares in particular. They are amply protected under our Constitution. There can be no discrimination, no taxation without authority of law, no curbs involving freedom of trade, commerce or intercourse and no compulsory acquisition of property. There is sufficient guarantee there and if more is needed then any member (if citizen) is free to invoke Art. 19(1) (f) and (g) and there is no doubt that the corporation in most cases will share the benefit. We need not be apprehensive that corporations are at the mercy of State Governments. For these reasons answers to the question posed are against the State Trading Corporation.

STATE OF ANDHRA PRADESH & ANR

v.

ANDHRA PROVINCIAL POTTERIES LTD & ORS [SC]

Criminal Appeal No. 34 of 1970

H.R.Khanna & A.Alagiriswam, JJ. [Decided on 17/08/ 1973]

Equivalent citations: 1973 AIR 2429; 1974 SCR (1) 410; (1973) 43 Comp Cas 514.

Section 220 of the Companies Act, 1956 read with section 134 of the Companies Act, 1913 – Company did not hold AGM – Annual accounts could not be adopted in the AGM- failure to file annual accounts with the ROC – Whether directors are liable to be punished for the default- Held, No.

Brief Facts:

In this case the interesting question that arose was whether failure to file the copies of annual accounts with the RoC, given that the AGM was not convened, is an offence visited with penal consequences.

This is an appeal against the judgment of the Full Bench of the Andhra Pradesh High Court reported in A.I.R. (1970) A.P. 70. It arises out of a complaint filed against the 1st respondent company and its directors for failure to file with the Registrar of Companies on or before 30-10-1967 the balance sheet and profit and loss account of the company as required under section 220(1) of the Companies Act, 1956, which is punishable under sub-section (3) of that section. Admittedly no general body meeting had been held and, therefore, the balance sheet and profit and loss account had not been laid before a general body meeting nor could it be so laid.

The Full Bench speaking through Jaganmohan Reddy, C.J., as our learned brother then was, held that if no balance sheet is laid before a general body, there can be no question of that balance sheet not being adopted nor of complying with the requirements of section 220 and though wilful omission to call a general body meeting and to lay the balance sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Act, it certainly does not make him liable under the provisions of section 134(4) of the Companies Act, 1913 or section 220 of the Companies Act, 1956. In this the Bench was taking a view contrary to that of most of the High Courts, after the decision of this Court in the State of Bombay v. Bandhan Ram Bhandani & Ors. [1961] (1) S.C.R. 801, had taken the view that a person charged with an offence cannot rely on his default as an answer to the charge and so, if he was responsible for not calling the general meeting, he cannot be heard to say in defence to the charges brought against him that because the general meeting had not been called, the balance sheet and profit and loss account could not be laid before it.

Decision: Appeal dismissed.

Reason:

In this state of difference of opinion among the various High Courts and the absence of a decision of this Court on section 134 this appeal has been filed. Though the respondent was not represented before this Court the learned Addl. Solicitor General who appeared for the State of Andhra Pradesh and the learned Solicitor General who appeared for the Advocate General of Andhra Pradesh fairly placed before this Court all the decisions for and against, which we have already referred to, and also placed before us all the relevant considerations. It was urged before us that the principle accepted by this Court in the State of Bombay v. Bandhan Ram Bhandani & Ors. (supra) that a company or its directors in a prosecution under section 32 and section 133 of the 1913 Act could not in defence to such prosecution rely upon their own failure to call the general body meeting, applies with equal force to a prosecution under section 134 of the Act. But it appears to us that there is a very clear distinction between Sections 32 and 133 on the one hand and Section 134 on the other. Section 32 relates to the preparation of a list of members of the company and of persons who have ceased to be members as well as a summary, and also provides that it shall be completed within 21 days after the day of the first or only ordinary general meeting in the year. It also provides that the company shall forthwith file with the registrar a copy of the list and summary, and any default in complying with the requirements of the section is made punishable. Under section 131 the laying of a balance-sheet and profit and loss account before the company in the general meeting is made obligatory. Under section 133 the failure to comply with section 131 is made punishable. But section 134 lays down that after balance-sheet and profit and loss account or the income and expenditure account, as the case may be, have been laid before the company at the general meeting three copies thereof shall be filed with the registrar, and a failure to do so is made punishable under sub-section (4) of that section. The difference in language is very clear and pointed. The responsibility of sending three copies of the balance-sheet and profit and loss account or the income and expenditure account, as the case may be, arises only after they have been laid before the company at the general meeting. Without so laying copies could not be sent to the Registrar and even if they are sent it would not be a compliance with the provisions of the section. It is possible to conceive of the law providing that the balance- sheet and profit and loss account shall be sent to the registrar even without the necessity of their being laid before the general body meeting of the company. In that case any failure to do so would be punishable and the question whether a general body meeting had been held and the balance-sheet and profit and loss account have been laid before it will not arise. Therefore the condition precedent or the essential prerequisite of the balance-sheet and the profit and loss account being laid before the general meeting of the company not being fulfilled, the requirement of section 134 cannot be complied with. While the appeal to a question of principle might be attractive we cannot ignore the clear words of the section. Where the words of the section are very clear it is unnecessary to consider whether it embodies any principle and whether that principle is consistent with the principle as embodied in certain other sections which are differently worded. In interpreting a penal provision it is not permissible to give an extended meaning to the plain words of the section on the ground that a principle recognised in respect of certain other provisions of law requires that this section should be interpreted in the same way.

We may also point out that in Park v. Lawton (supra) the principle laid in which has been adopted in this Court'-, decision in The State of Bombay v. Bandhan Ram Bhandani & Ors (supra) it is realised that there might be circumstances where the principle laid down in that decision will not apply. The court there observed:

"If it were the case that everything required to be inserted in the list was dependent on the fact of the general meeting having been held, it might perhaps have been contended with some force that it is impossible to calculate a continuing penalty from a day which has never come into existence; but when one sees that Section 25 requires a number of most important matters to be included in the list of members which are entirely independent of the holding of a general meeting, this very much weakens the contention that no list need be compiled if, owing to the failure to hold a general meeting, it is impossible to say what day is the fourteenth day thereafter."

This observation may provide no defence to a prosecution under section 133 but it might well do so in a prosecution under section 134. This was what the learned Solicitor General was fair enough to point out with regard to the difficulty of working out the daily penalty under Section 162 after the thirtieth day mentioned in section 220(1) of the 1956 Act. He pointed out that where no meeting has been held it was not possible to calculate the period of 30 days specified in that section and it would not be possible to give effect to the provisions of that section. The Bombay High Court pointed out in Emperor v. Pioneer Clay & Industrial Works A.I.R. 1948 Bom 357, that the decision in Park v. Lawton [1911] 1 K.E is based on S. 26 of the English Act, which in its scheme and terms is entirely different from the section with which they (the Bombay High Court) were concerned, and that the section in the English Act is a composite one which lays down various requirements which are to be complied with by the company under its first four sub- clauses and sub-cl. (5) is the penal sub-section which penalises the failure to comply with any of the requirements contained in any of the four preceding sub-sections. In our Act various stages have to be gone through before we reach the stage of a copy of the balance-sheet and the profit and loss account being filed with the Registrar and the failure to reach any one of the stages within the time prescribed is made penal by the Act. The court pointed out that this is not a case where an accused person relies on his default and pleads his innocence. What he says is, I may have committed an offence, but the offence that I have committed is not the one with which I am charged. On the facts proved by the prosecution an offence is not disclosed under Section 134(4). A different offence might have been committed either under Section 76(2) or under Section 133(3).

It is interesting to note that it was argued in Park v. Lawton (supra), that the fact that Section 26 makes the offence a continuing one also shows that the obligation to file the list is independent of the holding of a general meeting. The observations which we have extracted earlier will show that the submission on behalf of the prosecution that provisions of Section 26 show that the, obligation to file the list is independent of the holding of the general meeting was accepted. But under section 134 of the 1913 Act the obligation to send a copy of the balance-sheet and profit and loss account is dependent completely on its being laid before a general meeting. It is clear, therefore, that on principle and authority it should be held that no offence was committed by the directors in this case under section 134. They might have been guilty of offences under Sections 76 and 133 but not under Section 134. We say nothing about Section 32 about which this Court has already laid down the law. The appeal is dismissed.

INDIAN CHEMICAL PRODUCTS LTD.

v.

STATE OF ORISSA & ANR [SC]

Civil Appeal No. 303 of 1963

J.R. Mudholkar, R.S.Bachawat, & Raghubar Dayal, JJ. [Decided on 05/05/1966]

Equivalent citations: 1967 AIR 253; 1966 SCR 380; (1966) 36 comp Cas 592.

Companies Act – Transmission of shares by operation of law – Whether board of directors have discretion to reject transmission – Held, No.

Brief facts :

Indian Chemical Products, Ltd had seven share-holders. The Maharaja of Mayurbhanj subscribed and paid for 7,500 shares. The remaining six shareholders hold 150 shares only. All the shareholders are signatories to the memorandum of association of the company. The State of Orissa claimed that by reason of the constitutional changes since the declaration of independence, all the shares held by the Maharaja of Mayurbhanj have now vested in it by operation of law. The State also based its claim to the shares on a formal instrument of transfer executed by the Maharaja.

On March 16, 1950, the Government of Orissa lodged the share scrip and the transfer deed with the company, and requested it to make the necessary changes in the share register. The Government as also the Maharaja, through his agent, the Imperial Bank of India, repeatedly requested the company to register the Secretary to the Government of Orissa, Finance Department as the holder of the shares in place of the Maharaja.

There was protracted correspondence in the matter for over three years and eventually on May 16, 1953, the board of directors of the company refused to register the transfer. On December, 1, 1953, Sri S. K. Mandal, attorney for the State of Orissa, requested the company to record the name of the State as the owner of the shares in the share register, but the company declined to do so. On February 9, 1955, the State of Orissa filed' an application under s. 38 of the Indian Companies Act, 1913 in the High Court of Orissa asking for rectification of the share register by inserting its name as the holder of the shares in place of the Maharaja. The company and the Maharaja were impleaded as respondents. The application was contested by the company only. On November 22, .1956, Ray, J. allowed the application. On September 13, 1957, he passed a supplemental order directing the filing of the notice of rectification with the Registrar within a fortnight. On September 5, 1960, a Division Bench of the High Court dismissed the appeal preferred by the company. The company now appeals to this Court on a certificate granted by the High Court.

Decision: Appeal dismissed.

Reason:

Both courts concurrently held that (1) the title to the shares vested in the State of Orissa by operation of law; (2) the, refusal of the board of directors to register the transfer was mala fide; (3) the State of Orissa was entitled to rectification of the share register and a proper case for the exercise of the Court's jurisdiction under s. 38 of the Indian Companies Act, 1913 had been made out; (4) the petition was not liable to be dismissed on the ground that the State had asked the company to register the name of the Secretary to the Government of Orissa, as the shareholder in place of the Maharaja. The appellate Court also held that under the articles of association of the company the board of directors had no power to refuse registration of a transfer where the transfer was by operation of law. The appellant challenges the correctness of these findings.

The State of Mayurbhanj was one of the feudatory States of Orissa under the suzerainty of the British Crown. As from August 15, 1947, with the declaration of independence the paramountly of the British Crown lapsed. Thereafter, steps were taken for the integration of the State with the Dominion of India. On October 17, 1948, the Maharaja of Mayurbhanj signed an agreement for the merger of the State with the Dominion. By this agreement, the Maharaja completely ceded to the Dominion his sovereignty over the State of Mayurbhanj as from November 9, 1948. Article 4 of the agreement allowed the Maharaja to retain the ownership of his private properties only as distinct from the State properties. On and from November 9, 1948, as a necessary consequence of the cesser of sovereignty all the public properties of the State including the 7,500 shares in the company vested in the Dominion. By operation of law in consequence of the change of sovereignty, all the public properties of the State which were vested in the Maharaja as the sovereign ruler devolved on the Dominion as the succeeding sovereign.

As from January 1, 1949, the Government of India in exercise of its powers under s. 3(2) of the Extra Provincial Jurisdiction Act (47 of 1947) delegated to the Government of Orissa the power to administer the territories of the merged State. On August 1, 1949, the States Merger (Governors' Provinces) Order, 1949 came into force, and in consequence of s. 5(1) of the Order, all property vested in the Dominion Government for purposes of governance of the merged State became from that date vested in the Government of Orissa, unless the purposes for which the property was held were central purposes. By a certificate dated November 10, 1953, the Government of India declared that the 7,500 shares were not held for central purposes. Under the Constitution which came into force on January 26, 1950, the territories of the merged State were included in the State of Orissa. By reason of these successive constitutional changes, the shares became vested in the State of Orissa. The State is now the legal owner of the shares and the directors of the company are bound to enter its name in the register of members, unless there is one restrictive provision in the articles authorising them to refuse the registration.

The company contends that under its articles, the directors have the power to refuse the registration. It relies on art. 11, which reads:-

"The Board of Directors shall have full right to refuse to register the transfer of any share or shares to any person without showing any cause or sending any notice to the transferee or transferor, The Board may refuse to register any transfer of shares on which the Company has lien."

Article 1-A attracts the regulations in Table A of the First Schedule to the Indian Companies Act, 1913 so far as they are applicable to private companies and are not inconsistent with the articles. The regulations in Table A make a distinction between transfer and transmission of shares. In respect of a transfer, they require that the instrument of. transfer shall be executed both by the transferor and the transferee. A transmission by operation of law in not such I transfer. In In re. Bentham Mills Spinning Company (1), James, L.J. said "In Table A the word 'transmission' is put in contradistinction to the word 'transfer'. One means a transfer by the act of the parties, the other means transmission by devolution of law." Article 11 refers to transfers. A devolution of title by operation of law is not within its purview. Being a restrictive provision, the article must be strictly construed. In the instant case, the title to the shares vested in the State of Orissa by operation of law, and the State did not require an instrument of transfer from the Maharaja to complete its title, Article 11 does not confer upon the board of directors a power to refuse recognition of such a devolution of title. We may add that we express no opinion on the question whether such an article applies to an involuntary transfer of shares by a Court sale having regard to the provisions of O.21, r. 80 of the Code 'of Civil Procedure with regard to the execution of necessary documents of transfer.

Clause 22 of the regulations in Table A read with art. 1-A confers power upon the board of directors to decline registration of transmission of title in consequence of the death or insolvency of a member. In the instant case, there is no transmission of title in consequence of death or insolvency, and clause 22 has no application. Under the articles, the directors had therefore no power to refuse registration of the devolution of title on the State of Orissa by operation of law in consequence of the constitutional changes.

Though the State of Orissa had acquired title to the shares by operation of law, by way of abundant caution it obtained a deed of transfer and lodged it with the company together with the share scrip. The transfer deed was duly stamped and complied with all the formalities required by law. The claim of the State of Orissa based upon the transfer deed was within the purview of Art. 11. Even with regard to this claim, the Courts below concurrently held that the board of directors acted mala fide in refusing to register the transfer. This finding is amply supported by the materials on the record. In spite of the fact that the State had filed with the company a certificate of the Collector of Stamp Revenue. West Bengal, that no stamp duty was payable on the transfer, the company raised the objection that the transfer deed must be stamped. To avoid this objection, the Government stamped the deed and again lodged it with the company. For over three years, the directors delayed registration of the transfer on frivolous pretexts. On May 16, 1953, the directors without assigning any reason declined to register the transfer. Before the High Court, the company asserted that the registration was refused because the Maharaja of Mayurbhanj was under an obligation to execute an agreement conferring valuable rights on the company and the State of Orissa had failed to honour this obligation. Reliance was, placed on cl. 6 of the company's memorandum of association, which stated that the company and the Maharaja proposed to enter into an agreement and a copy of the proposed agreement was annexed. Clause 6 shows that there was a proposal between the parties to enter into an agreement, but there was no concluded agreement between them, nor was there any binding obligation on the Maharaja to execute an agreement. The directors could not use their power of declining to register the transfer under Art. 11 for the purpose of forcing the State of Orissa to enter into the proposed agreement. Actually, the reason given at the trial was an afterthought. The Imperial Bank of India representing the Maharaja was pressing for registration of the transfer. By its letter dated March 17, 1953, the company assured the Bank that the registration would be effected shortly. Nevertheless, on May 16, 1953 the directors capriciously refused to register the transfer.

The power under Art. 11 to refuse registration of the transfer is a discretionary power. The directors must exercise this power reasonably and in good faith. The Court can control their discretion if they act capriciously or in bad faith. The directors cannot refuse to register the transfer because the transferee will not enter into an agreement which the directors conceive it to be for the interests of the company.

We cannot accept the contention that the petition was liable to be dismissed because the State of Orissa had asked for registration in the name of the Secretary, Finance Department. No such objection was taken by the company, although it had taken numerous other objections. Moreover, by letter dated December 1, 1953, Shri S. K. Mandal, the attorney for the State of Orissa, had definitely called upon the company to record the name of the State as the owner of the shares in the share register. In spite of this letter, the company refused to make the necessary registration.

The Maharaja of Mayurbhanj has ceased to be the owner of the shares. The State of Orissa, is now their owner, and has the legal right to be a member of the company and is entitled to say that the company should recognise its membership and make an entry on the register of the fact of its becoming a member and its predecessor-in-title having ceased to be a member. The name of the State of Orissa has, without sufficient reason, been omitted from the register and there is default in not entering on the register the fact of the Maharaja having ceased to be a member. The Court's jurisdiction under S. 38 is, therefore, attracted. The High Court rightly ordered the rectification in the exercise of its summary powers under S. 38. The jurisdiction created by S. 38 is very beneficial and should be liberally exercised. We see no reason why the Court should deny the applicant relief under S. 38. The directors of the appellant company on the most frivolous of objections have prevented the State of Orissa from becoming a member for the last 16 years. It is a matter of regret that justice has been obstructed so long. There is no merit in this appeal. The appeal is dismissed with costs. The appellant company do forthwith carry out the order of rectification passed by the Courts below in case the order has not been carried out yet.

SHANTA GENEVIENVE POMMERAT & ANR

v.

SAKAL PAPERS PVT LTD & ORS [SC]

Civil appeal No.91 of 1983

D.A. Desai & R.B. Misra, JJ. [Decided on 11/01/1983]

Equivalent citations: AIR 1983 SC 269; (1985) 57 Comp Cas 469 SC; (1983) 2 Comp LJ 1 SC; 1983 (1) SCALE 708; (1983) 1 SCC 295.

Companies Act,1956 – Sections 397, 398 and 483 – Petition alleging oppression and suppression dismissed by the single Judge – Appeal to Division bench- appeal posted for admission and later dismissed in limine whether tenable – Held, No.

Brief facts:

Petitioners filed Company Petition No. 306 of 1980 in the High Court of Judicature at Bombay complaining about the oppression by the respondents in their management of the affairs to the 1st respondent-Company Sakal Papers Pvt, Ltd. The matter came-up before the learned Company Judge, who dismissed the petition and directed the petitioners to pay Rs. 10,000/- as and by way of costs to the respondents. Petitioners preferred an appeal against the decision of the learned Company Judge under the Companies Act, 1956. This appeal was placed for admission before a Division Bench of the Bombay High Court and it was dismissed in limine. Appellants have preferred this appeal by special leave against the order dismissing their appeal by the Division Bench in limine.

Decision: Appeal allowed.

Reason:

As we are of the opinion that it was not open to the Division Bench of the Bombay High Court to dismiss the appeal in limine, we are at this stage not inclined to examine other Contentions on merits.

Section 483 of the Companies Act provides that appeals from any order made, or decision given, in the matter of the winding up of company by the Court shall lie to the same Court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction. The company petition filed by the appellants was under Sections 397, 398 and 483 of the Companies Act. This group of Sections are included in Chapter VI headed “Prevention of Oppression and Mismanagement” which in turn falls within Part VI bearing the heading “Management & Administration”. Provisions for winding-up are grouped together under Part VII. Section 483 is placed in chapter II of Part VII. Therefore, at the first blush it would appear that Section 483 provided for appeals from any order made, or decision given, in the matter of winding up of the company by the Court. Expression Court is defined to mean with respect to any matter relating to a Company (other than any offence against this Act), the Court having jurisdiction under the Act with respect to that matter relating to that Company as provides in Section 10.

Section 483 confers the right to appeal and forum for the same in respect of any order made or decision given, in the matter of the winding up of a Company by the High Court having jurisdiction in the matter. The appeal shall lie to the same Court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction.

Now an Order under Sections 397, 398 and 483 of the Companies Act, on the face of it, cannot be said to be an Order made or decision given, in the matter of the winding up of a company. Relief, undoubtedly under Section 397 and/or 398 is in fact an alternative to winding up. No doubt, an order under Section 397, or 398 could be an order made or decision given by the High Court having jurisdiction under the Companies Act and therefore, an appeal will lie to the Division Bench of the same High Court. This is not disputed.

Chapter XLII of the Bombay High Court Rules provides for appeals to appellate court. The Rules make provision for certain type of appeals to be placed in the first instance, for admission before a bench of the High Court to be appointed by the Chief Justice. It is not in dispute that the appeal preferred by the present appellants was not one such appeal which can be placed for admission under Rule 966 A and it follows from this Rule that the appeal other than those mentioned in that Rule are not to be placed for admission. This point is no more res integra in view of the decision of this Court in M/s. Golcha Investment (P) Ltd. v. Shanti Chandra Bafna AIR 1978 SC 1350 wherein after considering the provision contained in Rule 966-A, it was held that appeals, other than those set out in the Rule are not to be placed for admission and they were entitled to be admitted as a matter of course. This Court accordingly quashed the order dismissing the appeal in limine observing that the appellate court erred in summarily dismissing the appeal because it was bound to entertain the same and dispose it of on merits. This observation will mutatis mutandis apply to the present appeal. Accordingly this appeal must succeed on this limited ground. We accordingly allow this appeal and set aside the order dismissing the appeal preferred by the present appellants in limine by the Division Bench and Bombay High and remit the case to the appellate bench for disposal of the same according to law.

BANK OF NEW YORK MELLON LONDON BRANCH

v.

ZENITH INFOTECH LTD [SC]

Civil Appeal No.3055 of 2017 (Arising out of SLP(C) No.1587 of 2015)

Ranjan Gogoi & Abhay Manohar Sapre, JJ. [Decided on 21/02/2017]

Sections 15, 16 and 22 of SICA read with Insolvency and Bankruptcy Code, 2016 (IBC) – reference to BIFR was rejected by the registrar, secretary and the chairman of the Board on the ground that the applicant was not an industrial company- meanwhile Bombay High Court wound up the respondent company – Whether tenable – Held, No. – Whether the respondent company can approach the NCLT under IBC – Held, Yes.

Brief facts:

On 23.07.2013 the respondent No. 1 company-Zenith Infotech Ltd filed a Reference before the BIFR under Section 15 of the SICA. The said application was refused registration by the Registrar of the Board on 12.08.2013 on the ground that respondent No.1 Company is not an industrial company within the meaning of the SICA. An appeal was filed by the respondent No. 1 company before the Secretary of the Board against the order of Registrar which was dismissed on 13.09.2013. There was a further appeal to the Chairman of the BIFR against the order of the Secretary. The Chairman of the BIFR also dismissed the second appeal filed by the respondent No. 1 company by order dated 03.04.2014.

It appears that on 30.07.2013 a petition for winding up of the respondent No.1 Company was admitted by the High Court of Bombay and the order of admission was affirmed by the Division Bench in appeal. The appeal to the supreme Court also dismissed on 30.09.2013. Thereafter, it appears that on 13.12.2013 the High Court of Bombay passed orders for winding up of the respondent No. 1 which was upheld in appeal by the Division Bench of the High Court on 23.04.2014. Thereafter the Official Liquidator came to be appointed by the High Court on 02.09.2014.

The orders of the Secretary and Chairman of the BIFR rejecting the application for reference filed by the Respondent No.1 Company were subjected to a challenge in a writ petition filed by the respondent-company before the Delhi High Court out of which the present proceedings have arisen.

The High Court, by the impugned order, took the view that under the provisions of the SICA read with the Regulations, the Registrar and the other authorities like the Secretary and the Chairman of the Board have not been conferred any power of adjudication which would necessarily be involved in determining the question as to whether the respondent No.1 company is an industrial company within the meaning of Section 3(e) and 3(f) of the SICA.

Regarding the second question, the High Court of Delhi relying on the decisions of this Court in Real Value Appliances Ltd. Vs. Canara Bank and Others [1] and Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd. (1998) 5 SCC 554 came to the conclusion that the winding up order passed by the Company Court would not foreclose the proceedings under the SICA and registration of a Reference under Section 15 and the inquiry under Section 16 can still be made.

The question that was agitated in the present appeal is consequential to the above determination and revolve around the application of Section 22 of SICA to bar further steps in the winding up proceeding before the High Court. The above question would no longer survive in the context of the provisions of the now repealed Act but would still require an answer from the stand point of the provisions of the Insolvency and Bankruptcy Code in force with effect from 1.12.2016.

Decision: Appeal disposed of.

Reason:

The first question, namely, the one with regard to the power and jurisdiction of the Registrar and Secretary to refuse registration of the application for reference made by the respondent company on the grounds mentioned above may now be taken up. From the provisions of Regulation 19(5) it would appear that on receipt of a Reference under Regulation 19(4) the Secretary or the Registrar, as may be, after making an endorsement of the date on which the same has been received in the office of the Board is required to make a scrutiny and, thereafter, if found to be in order, to register the same; assign a serial number thereto and place the same before the Chairman for being assigned to a Bench.

When the Regulations framed under the statute vests in the Registrar or the Secretary of the Board the power to "scrutinize" an application prior to registration thereof and thereafter to register and place the same before the Bench, we do not see how such power of scrutiny can be understood to be vesting in any of the said authorities the power to adjudicate the question as to whether a company is an industrial company within the meaning of Section 3(e) read with 3(f) and 3(n) of the SICA. A claim to come within the ambit of the aforesaid provisions of the SICA i.e. to be an industrial company, more often than not, would be a contentious issue. Surely, the rejection of the above stand could have been made only by a process of adjudication which power and jurisdiction clearly and undoubtedly is vested by the SICA and the Regulations framed thereunder in a Bench of the Board and not in authorities like the Registrar and the Secretary.

The High Court, in view of what has been discussed above, was correct in coming to the conclusion that the refusal of registration of the reference sought by the respondent Company by the Registrar, Secretary/ Chairman of the Board was non-est in law. The reference must, therefore, understood to be pending before the Board on the relevant date attracting the provisions of Section 252 of the Insolvency and Bankruptcy Code. The second question arising before the High Court, namely, whether the reference before the Board stood foreclosed by the order of winding up of the respondent Company and the appointment of liquidator was answered in the negative relying on Real Value Appliances Ltd. (supra) and Rishab Agro Industries Ltd. (supra). The core principles laid down in the said decisions of the Court, namely, that immediately on registration of a reference under Section 15 of the erstwhile SICA, the enquiry under Section 16 is deemed to have commenced and that the winding up proceedings against a company stood terminated only after orders under Section 481of the Companies Act, 1956, are passed, will have to be noticed to adjudge the correctness of the said view of the High Court. In any event, the aforesaid question becomes redundant in view of our conclusion that the reference sought by the respondent Company must be deemed to have been pending on the date of commencement of the Insolvency and Bankruptcy Code, particularly, Section We, therefore, dispose of the appeal by holding that it would still be open to the respondent Company to seek its remedies under the provisions of Section 252 of the Code read with what is laid down in Sections 13, 14, 20 and 25. We make it clear that we should not be understood to have expressed any opinion on the scope and meaning of the said or any other provisions of the Code and the adjudicating authority i.e. National Company Law Tribunal would be free and, in fact, required to decide on the said questions in such manner as may be considered appropriate.

LUXMI TEA COMPANY LTD

v.

PRADIP KUMAR SARKAR [SC]

Civil Appeal No.4565 of 1989

M.N.Venkatachalliah, N.D.Ojha & J.S. Verma, JJ. [Decided on 07/11/1989]

Equivalent citations: 1989 SCR, Supl.2) 82; 1989 SCC Supl. (2) 656; JT 1989 (4) 350; 1989 SCALE (2)1035 and (1990) 67 Comp Cas 518.

Companies Act, 1956 – Section 111 & 155 – Share transfer and rectification of members' register – Whether directors have inherent powers to refuse transfer of shares – Held, No.

Brief facts:

The respondent made an application under section 155 of the Companies Act, 1956 ("the Act") for rectification of the share register of the appellant company by inserting his name therein as a registered shareholder of certain shares transferred in his favour. These shares were fully paid up and the company had no lien over them. According to the respondent, notwithstanding the shares being duly lodged with the Company along with the transfer deeds and requisite fees for registration being paid the Board of Directors of the Company disapproved of the registration of the said shares. This disapproval led the respondent to make the application under section 155 of the Act for rectification of the share register. The application aforesaid was contested by the Company on various grounds. Overruling the objections raised by the Company a learned single judge allowed the application. Aggrieved, the Company preferred the appeal aforesaid before a Division Bench of the High Court which has been dismissed by the judgment appealed against.

Decision: Appeal dismissed

Reason:

It has been urged by learned counsel for the appellant that even if the Articles of Association do not make any specific provision in this behalf the Company had residuary inherent power to refuse registration of the transfer of the shares for the benefit of the Company and its existing shareholders. Power of refusal to register the transfer of shares was also sought to be derived from the words "or otherwise" used in Article 42 of the Articles of Association and section 111(2) of the Act. The transferor not being made a party to the application under section 155 of the Act was also pleaded in justification of the submission that the said application deserved to be dismissed. It was also urged that in view of section 108 of the Act the Company was entitled to go into the question as to whether the consideration for transfer of shares as shown in the transfer deeds was real consideration for purposes of finding out as to whether the transfer deeds were duly stamped and refuse registration of the transfer of the shares if the Company was of the view that the transfer deeds were not duly stamped. For the respondent on the other hand it was urged by his learned counsel that in view of the specific provision contained in this behalf in Article 39 of the Articles of Association and no residuary power whatsoever having been conferred on the Company or its Directors to refuse registration of the transfer of shares it did not have the power claimed by it in aid of refusal of registration of the shares transferred to the respondent.

Having heard learned counsel for the parties we are of the opinion that unless there is any impediment in the transfer of a share of a public limited company, such as the appellant, a shareholder has the right to transfer his share. Correspondingly, in the absence of any impediment in this behalf the transferee of a share, in order to enable him to exercise the rights of a shareholder as against the Company and third parties, which is not possible until the transfer is registered in the company's register, is entitled to have a rectification of the share register of the company by inserting his name therein as a registered shareholder of the share transferred to him. To have such rectification carried out is the right of the transferee and can be defeated by the company or its Directors only in pursuance of some power vested in them in this behalf. Such power has to be specified and provided for. It may even be residuary but in that case too it should be provided for and traceable either in the Act or the Articles of Association. Even if the power of refusal is so specified and provided for the registration of a transferred share cannot be re- fused arbitrarily or for any collateral purpose, and can be refused only for a bona fide reason in the interest of the company and the general interest of the shareholders. If neither a specific nor residuary power of refusal has been so provided, such power cannot be exercised on the basis of the so-called undeclared inherent power to refuse registration on the ground that the company or its Directors take the view that in the interest of the company and the general interest of the shareholders, registration of the transfer of shares should be refused. Indeed making a provision in the Act or the Articles of Association etc. conferring power of refusal would become futile if existence of an inherent power such as claimed by the company in the instant case is assumed, for the simple reason that the amplitude of the so-called undeclared inherent power would itself take care of every refusal to register the transfer of share. Assumption of such a power would result in leaving the matter of transfer of share and its registration at the mercy and sweet will of the company or its Directors, as the case may be. In the absence of any valid and compelling reason it is difficult to comprehend such a proposition.

Even the submission based on the words "or otherwise" in sub-section (2) of Section 111 of the Act and in Article 42 of the Articles of Association to the effect that these words recognise the existence of an inherent power to refuse registration of the transfer of the share does not commend itself to us. The words "or otherwise" were inserted in sub-section (2) of Section 111 of the Act in 1960 and it is this subsection so amended which is applicable to the facts of the instant case. Sub-section (2) of Section 111 does not confer any right but only casts a duty to give notice of refusal to register the transfer of a share and provides for punishment in case of default in doing so. Giving of notice is necessary, *inter alia*, to facilitate the exercise of the right of appeal conferred by sub-section (3) and (4) of Section 111. To introduce a concept of either conferment or recognition of a right to refuse registration of the transfer of a share in sub-section (2) militates against and runs counter to the very texture and purpose of this sub-section. Such an interpretation would have the effect of imputing to the legislature an intention of making an effort to fix a square peg in a round hole, when the purpose, if it was to confer or recognise any inherent power to refuse registration of the transfer of a share, could plainly be achieved by inserting the words "or otherwise" after the words "under its articles" and before the words "to refuse to register" in sub-section (1) of Section 111 which is the sub-section relevant for such purpose.

The words "or otherwise" take colour from the context in which they are used. In our opinion, the words "under its articles" in subsection (2) of Section 111 of the 'Act have been used in the same sense as is expressed in legal terminology by the familiar words "conferred by law". Consequently, if the opening part of sub-section (2) is read as "If a Company refuses, whether in pursuance of any power conferred by law or otherwise" it would be incongruous to suggest that the legislature in using the words "or otherwise" intended to give recognition to a power to refuse registration of the transfer of a share even otherwise than in accordance with law. This would be tantamount to putting a premium on taking the law into one's own hands. The legislature cannot be imputed with any such intention. For these reasons, we are of the view that in the context in which the words "or otherwise" have been used in sub-section (2) of Section 111, they only purport to cast a duty or impose an obligation of giving notice of refusal to register the transfer of a share irrespective of the fact whether such refusal is under the Articles of Association of the Company or *de hors* the Articles, which would include even a case where such refusal has been made arbitrarily or for any collateral purpose. A fortiorari, this would be the interpretation of even Article 42 of the Articles of Association of the Company inasmuch as on its plain language which, except for the provision for punishment, is in pari materia with sub-section (2) of Section 111 of the Act, the purpose of this Article is the same as of the said sub-section (2). Even the marginal note of Article 42 lends support to this interpretation. At this place, we may point out that it has not been disputed before us by learned counsel for the appellant that the shares in question having been fully paid up and the Company having no lien over them, Article 39 of the Articles of Association could not be invoked to refuse registration of the transfer of these shares.

Suffice it to say in this behalf that what has been stated above with regard to residuary, implied or incidental powers is calculated to accomplish the objects, the corporate purpose or corporate existence of the corporation. Refusal to register the transfer of a share obviously does not fall in this category. As has been pointed out in Palmer's Company Law 24th Edition Page 121 the objects or purposes for which a company is created should be distinguished from the powers which it can exercise. So far as refusal to register the transfer of a share is concerned it is almost the consistent view in decided cases that the power has to be specified and can be exercised only in the manner specified and within the frame- work of the said specification. There is no inherent power in this behalf.

We find no justification for interfering with the said finding of fact in the present appeal. On this finding the transfer deeds could not be termed as unduly stamped and power to refuse the registration of the transfer of shares contemplated by section 108 of the Act would not be invoked.

TATA ENGINEERING AND LOCOMOTIVE CO LTD.

v.

STATE OF BIHAR & ORS [SC]

Writ Petitions Nos.112 and 113 of 1961 etc.

Gajendragadkar (CJI), K.N. Wanchoo, J.C.Shah, N. Rajagopala Ayyangar, & S.M. Sikri, JJ. [Decided on 25/02/1964]

Equivalent citations: 1965 AIR 40; 1964 SCR (6) 885; (1964) 34 Comp Cas 548.

Companies Act, 1956 read with Articles 19 and 32 of the constitution of India whether the corporate veil could be lifted so as to enable the Indian citizens who are the shareholders of the company to enforce their fundamental rights under Article 32 – Held, No.

Brief facts:

Though these writ petitions raise a common question of law in regard to the validity of the demand for sales tax which has been made against the respective petitioners by the Sales-tax Officers for different areas, we are concerned with that part of the judgement where the issue of 'lifting the corporate veil' was raised and dealt with by the Court.

Decision: Petitions dismissed.

Reason:

That takes us to the question as to whether the petitioners, some of whom are companies registered under the Indian Companies Act and one of whom is the State Trading Corporation, can claim to file the present writ petitions under Art. 32 having regard to the decision of this Court in the case of the State Trading Corporation of India Ltd. v. The Commercial Tax Officer & Ors A.I.R. 1963 S.C. 1811[LMJ 15: 01:2017]. The petitioners argue that the said decision merely held that the State Trading Corporation of India Ltd. was not a citizen. The question as to whether the veil of the Corporation can be lifted and the rights of the shareholders of the said Corporation could be recognised under Art. 19 or not, was not decided, and it is on this aspect of the question that arguments have been urged before us in the present writ petitions.

Mr. Palkhivala has very strongly urged before us that having regard to the fact that the controversy between the parties relates to the fundamental rights of citizens, we should not hesitate to look at the substance of the matter and disregard the doctrinaire approach which recognises the existence of companies as separate juristic or legal persons. If all the shareholders of the petitioning companies are Indian citizens, why should not the Court look at the substance of the matter and give the shareholders the right to challenge that the contravention of their fundamental rights should be prevented. He does not dispute that the shareholders cannot claim that the property of the companies is their own and cannot plead that the business of the companies is their business in the strict legal sense. The doctrine of lifting of the veil postulates the existence of dualism between the corporation or company on the one hand and its members or shareholders on the other. So, it is no good emphasising that technical aspect of the matter in dealing with the question as to whether the veil should be lifted or not.

The doctrine of the lifting of the veil has been applied in the words of Palmer in five categories of cases : where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control; and in the law relating to trading with the enemy where the test of control is adopted(1). In some of these cases, judicial decisions have no doubt lifted the veil and considered the substance of the matter. Gower has similarly summarised this position with the observation that in a number of important respects, the legislature has rent the veil woven by the Salomon case. Particularly is this so, 'says Gower, in the sphere of taxation and in the steps which have been taken towards the recognition of enterprise-entity rather than corporate- entity. It is significant, however, that according to Gower, the courts have only construed statutes as "cracking open the corporate shell" when compelled to do so by the clear words of the statute; indeed they have gone' out of their way to avoid this construction whenever possible. Thus, at present, the judicial approach in cracking open the corporate shell is somewhat cautious and circumspect. It is only where the legislative provision justifies the adoption of such a course that the veil has been lifted. In exceptional cases where courts have felt "themselves able to ignore the corporate entity and to treat the individual shareholders as liable for its acts", the same course has been adopted. Summarising his conclusions, Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation.

That being the position with regard to the doctrine of the veil of a corporation and the principle that the said veil can be lifted in some cases, the question which arises for our decision is; can we lift the veil of the petitioners and say that it is the shareholders who are really moving the Court under Art. 32, and so, the existence of the legal and juristic separate entity of the petitioners as a corporation or as a company should not make the petitions filed by them under Art. 32 incompetent?

We do not think we can answer this question in the affirmative. No doubt, the complaint made by the petitioners is that their fundamental rights are infringed and it is a truism to say that this Court as the guardian of the fundamental rights of the citizens will always attempt to safeguard the said fundamental rights; but having regard to the decision of this Court in State Trading Corporation of India Ltd (supra) we do not see how we can legitimately entertain the petitioners' plea in the present petitions, because if their plea was upheld, it would really mean that what the corporations or the companies cannot achieve directly, can be achieved by them indirectly by relying upon the doctrine of lifting the veil. If the corporations and companies are not citizens, it means that the Constitution intended that they should not get the benefit of Art. 19. It is no doubt suggested by the petitioners that though Art. 19 is confined to citizens, the Constitution-makers may have thought that in dealing with the claims of corporations to invoke the provisions of Art. 19, courts would act upon the doctrine of lifting the veil and would not treat the attempts of the corporations in that behalf as falling outside Art. 19. We do not think this argument is well-founded. The effect of confining Art. 19 to citizens as distinguished from persons to whom other Articles like 14 apply, clearly must be that it is only citizens to whom the rights under Art. 19 are guaranteed. If the legislature intends that the benefit of Art. 19 should be made available to the corporations, it would not be difficult for it to adopt a proper measure in that behalf by enlarging the definition of 'citizen' prescribed by the Citizenship Act passed by the Parliament.

On the other hand, the fact that the Parliament has not chosen to make any such provision indicates that it was not the intention of the Parliament to treat corporations as citizens. Therefore, it seems to us that in view of the decision of this Court in the case of the State Trading Corporation of India Ltd (supra) the petitioners cannot be heard to say that their shareholders should be allowed to file the present petitions on the ground that, in substance, the corporations and companies are nothing more than associations of shareholders and members thereof. In our opinion, therefore, the argument that in the present petitions we would be justified in lifting the veil cannot be sustained.

J.K. (BOMBAY) LTD.

v.

BHARU MATHA MISHRA & ORS [SC]

Criminal Appeal No. 87 of 2001

K.T. Thomas & R.P. Sethi, JJ. [Decided on 18/01/2001]

Equivalent Citations: 2001 (1) SCR 439; AIR 2001 SC 649; (2001) 104 Comp Cas 424;(2001) 2 JT 36.

Companies Act, 1956- section 630- criminal proceedings against directors/employees – Refusal to vacate quarters – Whether family members of the defaulting officer, who is alive, could be prosecuted – Held, No.

Brief facts:

Whether the family members of an employee or an ex-employee of a company can be proceeded with in a criminal court, convicted and sentenced for the commission of offence under Section 630 of the Companies Act? ("the Act") is the question of law to be determined by us in this appeal.

Relying upon the judgment of this Court in Abhilash Vinod Kumar Jain (Smt.) v. Cox & Kings (India) Ltd. & Ors., [1995] 3 SCC 732, it has been argued on behalf of the company that the expression "officer or employee" appearing in Section 630 of the Act would include all his family members.

One Mata Harsh Mishra, who is the husband of respondent No. 1 and father of respondent No. 2, joined the employment of the appellant-company as Trainee Supervisor in its plant, He was allotted Flat No. 8 in Anil Co-operative Housing Society Ltd. After resigning from the job, he refused to vacate the flat on the pretext that as he had not been paid his dues, he had a right to remain in occupation. Company filed a complaint under Section 630 of the Act against Mishra, its ex-employee and the respondents 1 and 2 herein. The recall application of respondents herein was rejected by the Trial Court. High court allowed the writ petition and quashed the process against the respondents herein. Company challenged the above order before the Supreme Court.

Decision: Appeal dismissed.

Reason:

The divergence of opinion between various High Courts regarding interpretation of the expression "an officer or employee of a company" appearing in Sub-section (1) of Section 630 of the Act was resolved by this Court in Baldev Krishna Sahi v. Shipping Corporation of India, [1987] 4 SCC 361 holding that the expression "officer or employee of a company" applies not only to existing officer or employee but also includes past officers or employees where such officer or employee; either (a) wrongfully obtains possession of any property, or (b) wrongfully withholds the same after the termination of his employment.

Section 630 of the Act which makes the wrongful withholding of any property of a company by an officer or employee of the company a penal offence, is typical of the economy of language which is characteristic of the draughtsman of the Act, The Section is in two parts. Sub-s. (l) by clauses (a) and (b) creates two distinct and separate offences. First of these is the one contemplated by clause (a), namely, where an officer or employee of a company wrongfully obtains possession of any property of the company during the course of his employment, to which he is not entitled. Normally, it is only the present officers and employees who can secure possession of any property of a company. It is also possible for such an officer or employee after termination of his employment to wrongfully take away possession of any such property. This is the function of clause (a) and although it primarily refers to the existing officers and employees, it may also take in past officers and employees. In contrast, clause (b) contemplates a case where an officer or employee of a company having any property of a company in his possession wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by the Act It may well be that an officer or employee may have lawfully obtained possession of any such property during the course of his employment but wrongfully withholds it after the termination of his employment. That appears to be one of the functions of clause (b). It would be noticed that clause (b) also makes it an offence in any officer or employee of a company having any property of the company in his possession knowingly applies it to purposes other than those expressed or directed in the articles and authorised by the Act. That would primarily apply to the present officers and employees and may also include past officers and employees. There is therefore no warrant to give a restrictive meaning to the term 'officer or employee' appearing in Sub-section (1) of Section 630 of the Act. It is quite evident that clauses (a) and (b) are separated by the word 'or' and therefore are clearly disjunctive."

Again, this Court in Amritlal Chum v. Devoprasad Dutta Roy, [1988] 2 SCC 269; Atul Mathur v. Atul Kalra, [1989] 4 SCC 514 and Gokak Patel Vokart Ltd. v. Dundayya Gurushiddaish Hiremath, [1991] 2 SCC 141, interpreted the position of law and approved the dictum of this Court in Baldev Krishna Sahi's case. In Abhilash Vinod Kumar Jain's case (supra) this Court was concerned with the prosecution of the legal representatives of the deceased employee and in that context, it held; "Thus, our answer to the question posed in the earlier part of this judgment is in the affirmative and we hold that a petition under S.630 of the Act is maintainable against the legal heirs of the deceased officer/employee for retrieval of the Company's property wrongfully withheld by them after the demise of the employee concerned." Stretching further the verdict of the Court in Abhilash Vinod Kumar Jain's case, the learned counsel appearing for the appellant has submitted that as legal heirs of the erstwhile employee can be prosecuted, the other family members of such employee, living with him cannot escape their liability of prosecution. The argument, though attractive on the face of it, is devoid of any force when examined in depth in the light of the constitutional mandate and the legal provisions applicable in the case. The penal law cannot be interpreted in a manner to cover within its ambit such persons who are left out by the legislature. The position of the legal heirs of the deceased employee cannot be equated with the family members of an erstwhile employee against whom, admittedly, the criminal prosecution is launched and pending. In criminal cases the law which entails conviction and sentence, liberal construction, with the aid of assumption, presumption and implications cannot be resorted to for the purpose of roping in the criminal prosecution, such persons who are otherwise not intended to be prosecuted or dealt with by criminal court. Accepting the contention of the appellant would amount to the violation of fundamental right of personal liberty as enshrined under Article 21 of the Constitution which declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The paramount object of Article 21 is to prevent the encroachment of the right of a person with respect to his life and liberty, save in accordance with the procedure established by law and in conformity with the provisions thereof. Personal liberty envisaged under this Article means freedom from physical restraint of a person by incarceration or otherwise. Agreeing with the plea of the appellant would also be against the public policy, inasmuch as under similar circumstances the companies would be authorised to resort to harassment tactics by having recourse of arraigning minors and old members of the family of its officer or employee in office or even past.

We are of the firm opinion that all the family members of an alive 'officer' or 'employee' of a company cannot be proceeded with and prosecuted under Section 630 of the Act. The order impugned does not suffer from any illegality, requiring our interference.

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MADANLAL FAKIRCHAND DUDHEDIYA

v.

SHREE CHANGDEO SUGAR MILLS LTD [SC]

Civil Appeal No. 64 of 1959

P.B.Gajendragadkar, A.K.Sarkar, K.N.Wanchoo,JJ.[Decided on 20/03/1962]

Equivalent citations: 1962 AIR SC 1543; 1962 SCR Supl (3) 973; (1962) 32 Comp Cas 604 (SC).

Companies Act,1956 – Section 76 – payment of commission-restriction/prohibition to pay commission – Agreement to pay commission was entered into before the commencement of 1956 Act – Whether the agreement is hit by the restriction/prohibition – Held, Yes. Whether commission paid out of profits hit by the restriction/prohibition – Held, Yes.

Brief facts:

The principal question which arises in this appeal relates to the construction of s. 76(1) and (2) of the Companies Act, 1956 (1 of 1956) (hereinafter called the Act) before the amendment of sub-s. (2) in 1960. That question arises in this way.

The appellantwas one of the promoters of the respondent Company, which was incorporated in 1939 as a Private Limited Company and later converted into a Public Ltd Company in 1944. At the time of the original incorporation of the Company a Promoter’s Agreement was arrived at whereby the Company agreed to pay a sum equal to 12.5% of its net profits to the four promoters (i.e. 3.125% each). In 1941, this agreement was modified and the said commission payable to the promoters was reduced to 6-1/4%. This payment of commission was authorised by article 3 of the articles of Association [AoA].

After the Act came into force on the 1st of April, 1956, the respondent company informed the appellant that as from the date of the commencement of the, Act, the agreement between the parties as to the payment of the promoters’ commission had become illegal and void and it would not, therefore, pay any more, commissionand sought to pass a resolution for deleting article 3 from its AoA.

The appellants filed a suit to restrain the company from passing any resolution deleting Article 3 of the AoA or from taking any action on the basis that the said agreement had become illegal and void. The trial Judge dismissed the suit and the High court also confirmed the same. Hence the present appeal before the Supreme Court.

Decision: Appeal dismissed by 2:1 majority.

Reason: In construing section 76 (1) and (2), it would be necessary to bear in mind the relevant rules of construction. The first rule of construction which is elementary, is that the words used in the section must be given their plain grammatical meaning. Since we are dealing with two sub- sections of s. 76, it is necessary that the said two sub- sections must be construed as a whole “each portion throwing light, if need be, on the rest.” The two sub-sections must be read as parts of an integral whole and as being inter- dependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided.

The important part in s. 76(1) with which we are directly concerned is the one that provides that the commission paid or agreed to be paid does not exceed the limit therein prescribed. One of the conditions which has to be satisfied in the matter of payment of commission to a person subscribing for any shares is’ that the said commission shall not exceed 5% of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is less. It is significant that this provision seeks to place an absolute ceiling on the payment of commission and in doing so, it refers to the commission generally as such and does not refer to the commission paid either out of capital or out of profits, so that a. 76(1) read by itself unambiguously and clearly prescribes a ceiling on the payment of commission whatever may be the source from which the said commission may be paid. We have already seen that a. 76(1) cannot be treated merely as an enabling section. This position has been conceded by the appellant before us, and so there can be no doubt that the ceiling placed on the payment of commission is intended to act as a prohibition against the payment of any commission beyond the said ceiling. Since the payment of commission, which is referred to in this clause is commission payable either for the shares or for the debentures, it may be relevant to consider whether the commission here referred to can be commission only out of capital. Ordinarily, commission paid for debentures would be commission out of debenture money or profit though, of course it is conceivable that the commission on debenture may also be paid out of capital. But if commission on debentures can be paid out of profits. then it would not be unreasonable to assume that the said provision refers to commission payable not only out of capital but out of profits as well. The inclusion of debentures within the scope s. 76 suggests that the commission mentioned scope 76(1) (c) (i) would not, on a reasonable construction, be confined to a commission payable out of capital alone.

Clause (iii) of s. 76 (1) (b) seems to suggest the same conclusion. Under this clause, the condition imposed is that the amount or rate per cent of the commission paid or agreed to be paid is in the case of shares or debentures not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed before the payment of the commission with the Registrar.

The prohibition imposed by s. 76(1) is in general terms and it includes payments from any source or fund. The Legislature knew that payment of commission may be made by adopting several devices and what sub-s. (2) intends to achieve is to prohibit the adoption of such devices by making it clear that whatever be the nature of the device adopted, if the object of the device is to pay commission, then it must conform to the limit prescribed by s. 76(1). It is well-known that sometimes shares or debentures are allotted or capital money is applied in payment of commission. Similarly, under the garb of what may ostensibly be lawful payments, for instance, in respect of purchase money of any property acquired by the company or the contract price of ‘any work to be executed for the company, commission may be paid; the purchase price of any property or the contract price of any work may be fixed so as to include something more than its real value the difference being intended to be paid as commission. It was in view of these devices which the Legislature knew were being adopted for the payment of commission that s. 76(2) has been inserted in the form which it has taken.

In other words, in order to clarify the position in regard to the devices which may be adopted to defeat the limit imposed by s. 76 (1), the Legislature has provided by s. 76 (2) that these devices are also subject to s. 76(1) and payments can be made under those garbs or devices, provided they do not exceed the limit prescribed by 8. 76(1). In our opinion, therefore, far from there being any conflict or repugnancy between s. 76(1) and a. 76(2) they constitute one integrated provision, one of the objects of which is to impose a limit on the payment of commission either in respect of shares or in respect of debentures. The anxiety to save the profits of the company is as much in evidence in s. 76(1) as it is in other sections to which we have already referred.

Therefore, in our opinion, the learned Judges of the High Court were right when they held that a claim for commission out of the profits of the company which the appellant seeks to make in the present suit is hit by is. 76(1) and cannot be entertained.

That leaves one minor point-still to be considered. It was urged in the Courts below that the provisions of a. 76 cannot be invoked against the appellant because the agreement on which the appellant rests his claim was made prior to the 1st April, 1956 when the Act came into force. The contention appears to have been that in’ invoking the provisions of s. 76, respondent No. 1 was seeking to make the said provision retrospective which it is not. In our opinion, there is no substance in this argument. Section 9 of the Act is a clear answer to this contention. Under s. 9(a) any agreement executed by the company cannot prevail if it is inconsistent with the provisions of the Act and under a. 9(b) the articles shall likewise not prevail if they are inconsistent with the provisions of the Act.

The result is, the appeal fails and is dismissed with costs.

S. V. KONDASKAR, OFFICIAL LIQUIDATOR

v.

V. M. DESHPANDE, ITO & ANR [SC]

Civil appeal No.1650 of 1970

S.M.Sikri, J.M. Shelat, I.D.Dua, H.R.Khanna & g.K.Mitter,JJ.[Decided on 04/01/1972]

Equivalent citations: AIR 1972 SC 878; (1972) 42 Comp Cas 168 SC; (1972) 83 ITR 685 SC; (1972) 1 SCC 438; (1972) 2 SCR 965.

Companies Act,1956 – Section 446 – Company under liquidation – Income tax proceedings initiated against the OL – Whether leave of the winding up court is required – Held,No.

Brief facts :

The Colaba Land & Mills Co., Ltd., (in liquidation) was ordered to be wound up and the Official Liquidator was appointed its liquidator. The Income-tax Officer (Companies Circle) concerned issued six different notices proposing to reopen the assessment of the Company and to re-assess it. Certain negotiations followed between the Official Liquidator and the Inspecting Assistant Commissioner of Income-tax but they were infructuous. On an application made by the Official Liquidator, the Company Court stayed the proceedings on the ground that income tax officer has no jurisdiction to issue the said notices or to proceed with the re-assessment of the Company without the leave of the court. On appeal the Division Bench reversed the above stay order passed by the company court. Hence the appeal by the OL to the Supreme Court.

The only question which required the consideration of the Supreme Court was, whether it is necessary for the Income-tax Officer to obtain leave of the liquidation court, when he wants to re-assess the company for escaped income in respect of past years.

Decision : Appeal dismissed.

Reason :

Turning now to the Income-tax Act it is noteworthy that Section 148 occurs in Chapter XIV which beginning with Section 139 prescribes the procedure for assessment and Section 147provides for assessment or re-assessment of income escaping assessment. This section empowers the Income-tax Officer concerned subject to the provisions of Sections 148 to 153to assess or re-assess escaped income. While holding these assessment proceedings the Income-tax Officer does not, in our view, perform the functions of a court as contemplated by Section 446(2) of the Act. Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446 read as a whole, it appears to us that the expression “other” legal proceeding” in Sub-section (1) and the expression “legal proceeding” in Sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income-tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income-tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income-tax payable also being a debt has to rank pari passu with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court under Section 446 of the Act. The liquidation court, in our opinion, cannot perform the functions of Income-tax Officers while assessing the amount of tax payable by the assessees even if the assessee be the company which is being wound up by the court. The orders made by the Income-tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income-tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income-tax. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income-tax. The argument on behalf of the appellant by Shri Desai is that the winding up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of Section 446 of the Act must be held to vest in that court to be exercised only if considered expedient. We are not impressed by this argument. The language of Section 446 must be so construed as to eliminate such startling consequences as investing the winding up court with the powers of an Income-tax Officer conferred on him by the Income-tax Act, because in our view the legislature could not have intended such a result.

The argument that the proceedings for assessment or reassessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income-tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after income-tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law, the amount of Income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding up court. On the view that we have taken, the decisions in the case of *Seth Spinning Mills Ltd., (In Liquidation) 46 I.T.R. 193 and the Mysore Spun Silk Mills Ltd., (In Liquidation) 68 I.T.R. 695* do not seem to lay down the correct rule of law that the Income-tax Officers must obtain leave of the winding up court for commencing or continuing assessment or reassessment proceedings. For the foregoing reasons we have no hesitation in dismissing the appeal with costs.

RAM CHAND AND SONS SUGAR MILLS PVT LTD.

v.

KANHAYA LAL BHARGAVA & ORS [SC]

Civil Appal No.166 of 1966

K.Subba Rao & V.Ramaswami, JJ. [Decided on 10/03/1966]

Equivalent citations: (1967) 37 Comp Cas 42.

Companies Act,1956 read with Order 23 of the CPC – Suit against company – Director fails to appear in court – Defence of the company struck off – Whether correct – Held, No.

Brief facts :

Respondent Kanhaya Lal Bhargava filed a suit against the appellant company and one Ram Sarup for the recovery of a, sum of Rs. 45,112.94. The respondent filed an application for striking off the defence or in the alternative for directing Jugal Kishore, a director of the Appellant-company, to appear in court. Inspite of the court issuing summons on the director and giving many opportunity, he did not appear. Therefore the court struck off the defence of the Appellant Company. The High court also confirmed the same. Hence the present appeal.

Decision : Appeal allowed.

Reason :

There is nothing in O.XXIX of the Code which, expressly or by necessary implication, precludes the exercise of the inherent power of the court under S. 151 of the Code. We are, therefore, of the opinion that in a case of default made by a director who failed to appear in court when he was so required under O.XXIX, r. 3, of the Code, the court can make a suitable consequential order under s. 151 of the Code as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The next question is whether the court can, as it did in the present case, strike off the defence of the appellant for the default made by its director to appear in court. Learned counsel for the respondent contended that both the courts in effect found that the director was guilty of a recalcitrant attitude and that he had abused the process of the court and, therefore, the Subordinate Judge had rightly exercised his inherent power in striking off the defence of the appellant, We are satisfied, as the courts below were, that Jugal Kishore, the director of the appellant-company, purposely for one reason or other, defied the orders of the court on the pretext of illness and had certainly abused the process of the court. The learned Subordinate Judge would have been well within his rights to take suitable action against him, but neither of the courts found that the appellant was responsible or instrumental for the director not attending the court. Unless there is a finding of collusion between the appellant and the director in that the former prevented the latter from appearing in court, we find it difficult to make the company constructively liable for the default of one of its directors. Many situations may be visualized when one of the directors may not obey the directions of the company or its board of directors or may be even working against its interests.

It cannot be disputed that a company and the directors of the company are different legal personalities. The company derives its powers from the memorandum of association. Some of the powers are delegated to the directors. For certain purposes they are said to be trustees and for some others to be the agents or managers of the company. It is not necessary in this case to define the exact relationship of a director qua the company. The acts of the directors within the powers conferred on them may be binding on the company. But their acts outside the said powers will not bind the company. It is not possible to hold that the director in refusing to respond to the notice given by the court was acting within the scope of the powers conferred on him. He is only liable for his acts and not the company. If it was established that the company was guilty of abuse of the process of the court by preventing the director from attending the court, the court would have been justified in striking off the defence. But no such finding was given by the courts below.

The orders of the courts below are not correct. We set aside the said orders and direct the Subordinate Judge to proceed with the suit in accordance with law. The appeal is allowed, but, in the circumstances of the case, without costs.

SHAILESH PRABHUDAS MEHTA

v.

CALICO DYEING & PRINTING MILLS LTD [SC]

Civil Appeal No.854 of 1994 (Arising out of SLP (C) No.9345 of 1990)

K. Jayachandra Reddy & G.N.Ray, JJ. [Decided on 15/02/1994]

Equivalent citations: 1994 SCC (3) 339; JT 1994 (1) 671; (1994) 80 Comp Cas 64.

Companies Act, 1956 – Section 111 – Refusal to register transmission of shares – Action of directors – Whether correct – Held, Yes.

Brief facts :

The directors of the respondent company refused to register the transmission of 100 shares to the appellant. The appellant had a long standing disputes with the company. The appellant alleged malafide intention on the part of the directors.

Decision : Appeal dismissed.

Reason :

We find that the language of Section 78 of the English Companies Act is not the same as Section 111 of our Companies Act and Section 78 does not provide for any penalty or for any appeal. It is necessary to note that if the right to refuse was to come to an end, as contended by the learned counsel, after the expiry of two months and that an absolute right was created in favour of transferee then the Legislature would have so categorically provided. But, on the other hand, the section provides for penalty if there is failure on the part of the Company to send such an intimation within two months and that itself shows that no absolute right was to be created in favour of the transferee. Further Section 111 of the Act provides for a right of appeal to the Central Government and if as contended by the learned counsel that on a mere failure to send an intimation within two months an absolute right came to be vested in transferee then the question of transferee filing an appeal would not arise at all. Thus this section mainly deals with right to receive a notice and the consequence of non-sending of such a notice results in penalty. These provisions would go to show that what was intended was to provide for a notice of refusal to be sent and that failure thereof only resulting in levying penalty.

The submission that the Company had no power to refuse registration of transmission of shares in the absence of a specific provision in the Articles of Association is also untenable. According to the learned counsel, the Articles of Association at the time of death of deceased did not provide for such a refusal and that even if there is an amendment later the same cannot empower the Board to refuse the registration of the shares. In our view particularly in view of the facts of this case, the Board had such power when the registration and transfer was sought in 1984. Even otherwise the facts show that the registration and transmission was sought only in 1984 as mentioned above. By then the articles were amended and the Board was given power to refuse registration or transmission. Therefore we are not able to see any irregularity or lack of bona fide action, as contended, in bringing about those amendments. However we notice that before the learned Single Judge as well as before the Division Bench of the High Court, the main question urged was that of limitation of two months and for the aforesaid reasons, we are of the view that the High Court has rightly held that the right to refuse is not lost.

At this stage we may refer to the factual background in the instant case. Initially the company petition was dismissed by the Company Judge on April 17, 1985 on the preliminary ground. As against that the appellants went in appeal and in that appeal the order of dismissal of the company petition was set aside and a remand was ordered for disposal on merits and that the appellate court also permitted for filing further affidavits and they were in fact filed before the matter came up for rehearing before the Company Judge on remand. It must further be remembered that the appellants moved the High Court even before the expiry of the period of two months and from the dates mentioned above it can be seen that the appellants complied with the requirements namely sending the heirship certificate etc. only after 6 or 7 years from the date of their letter to the Company seeking transmission. Therefore it has to be concluded that sometime after November 21, 1984 when the appellants' letter with necessary enclosures was received by the Company, necessary formalities to become heirs had been completed. The appellants without waiting for the expiry of period of two months filed the company petition on January 14, 1985 for rectifying the shares register by bringing them on record. From these facts it can broadly be accepted that the power or discretion vests in the Board of Directors for two months after submission of the proper application supported by the necessary documents. However, that does not mean that right would be lost after the expiry of two months and what all that is necessary to see is whether the Board has acted in a bona fide manner in rejecting the transmission of the shares.

We shall now therefore deal with the other submission namely whether the action of the Board of Directors was mala fide. In Bajaj Auto Ltd. v. N.K. Firodia (1970) 2 SCC 550, it was laid down that the Court can consider whether the Directors acted in the interest of the Company. This case was cited in Life Insurance Corporation of India. v. Escorts Ltd (1986) 1 SCC 264; (1986) 59 Comp Cas 548 with approval and in that case the nature of the power of the Directors and scope of scrutiny by the court were explained and it was observed as under: (SCC pp. 554-55, para 12) "Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion the Directors will act for the paramount interest of the company and for the general interest of the shareholders because the Directors are in a fiduciary position both towards the company and towards every shareholder. The Directors are therefore required to act bona fide and not arbitrarily and not for any collateral motive."

Keeping these principles in mind we shall examine the reasons that weighed with the Board of Directors for refusing transmission. The Board of Directors have stated in the affidavits and also appended the copies of the earlier correspondence including the proceedings of the mediator and the history of the disputes originally between late Shri Prabhudas v. Mehta and the Management of the Company and subsequently between the heirs of Shri Prabhudas v. Mehta and the Management of the Company. The learned Single Judge as well as the Division Bench have exhaustively examined the correspondence and the affidavits and have given a concurrent finding that there is animosity between the parties and that the decision of the Management was a proper and commercial decision keeping in view the interest of the Management of the Company. Therefore it cannot be said that there was dishonest intention. In any event this is a concurrent finding of fact based on the affidavits and records in which we need not interfere.

We have already held that the decision of the Directors was a commercial decision made in the interest of the Management of the Company. It is also significant to note that the appellants have only 100 shares which are only insignificant as compared to the total shares and the contention that the relevant articles were amended only to defeat the rights of the appellants in respect of those 100 shares, is wholly untenable. For all these reasons, the appeal is dismissed.

OFFICIAL LIQUIDATOR OF HIGH COURT OF KARNATAKA

v.

SMT. V. LAKSHMIKUTTY [SC]

Special Leave Petition (C) No. 5844 of 1980

P.N.Bhagwati & A.P.Sen, JJ. [Decided on 12/12/1980]

Equivalent citations: 1981 AIR 1483; 1981 SCR (2) 349; (1981) 51 Comp Cas 566.

Companies Act, 1956 read with Provincial Insolvency Act – Liquidation proceedings – Claim of the company against debtor – Debt due – Whether the claim of the debtor against the company should also be considered – Held, Yes.

Brief facts :

The appellant OL applied to the High Court, on behalf of the company, for the issue of direction to the respondent to pay the balance due by her under a chit fund account. The respondent claimed that since there were mutual dealings between her and the company in liquidation an account should be taken in respect of such mutual dealings and only that amount should be payable or receivable by her which is due at the foot of such account. She claimed that she was entitled to the benefit of the rule enacted in section 46 of the Provincial Insolvency Act. The High Court upheld her contention. Hence the challenge before the Supreme Court.

Decision : Appeal dismissed.

Reason : We think that the view taken by the High Court is the correct view on the interpretation of sections

529 and 530 of the Companies Act, 1956. Section 529 provides that in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the provable debts as are in force to the time being under the law of insolvency with respect to the estate of persons adjudged insolvent. This provision brings in the applicability of section 46 of the Provincial Insolvency Act which reads:

"Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

This rule enacted in section 46 of the Provincial Insolvency Act with regard to the debts provable by a creditor against the insolvent must, therefore, likewise apply in regard to debts provable against a company in winding up. Consequently, when the respondent in the present case claimed to prove her debt against the company in liquidation, she was entitled to the benefit of the rule enacted in Section 46 of the Provincial Insolvency Act and she could legitimately claim that since there were admittedly mutual dealings between her and the company in liquidation, an account should be taken in respect of such mutual dealings and only that amount should be payable or receivable by her which is due at the foot of such account.

It is true that section 530 provides for preferential payments, but that provision cannot in any way detract from full effect being given to section 529 and in fact the only way in which these two sections can be reconciled is by reading them together so as to provide that whenever any creditor seeks to prove his debt against the company in liquidation, the rule enacted in Section 46 of the Provincial Insolvency Act should apply and only that amount which is ultimately found due from him at the foot of the account in respect of mutual dealings should be recoverable from him and not that the amount due from him should be recovered fully while the amount due to him from the company in liquidation should rank in payment after the preferential claims provided under S. 530. We find that the same view has been taken by the English Courts on the interpretation of the corresponding provisions of the English Companies Act, 1948 and since our Companies Act is modelled largely on the English Companies Act 1948, we do not see any reason why we should take a different view, particularly when that view appears to be fair and just. We may, point out that Gore Browne in his book on Company Law, 43rd Ed at page 34-14 also confirms this view:

"Indeed, all claims provable in the winding up may be the subject of set-off, provided that there is mutuality."

Moreover, we find that the observations of the House of Lords in *National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd*, (1972) 1 All ER 641 at 659, are also to the same effect. We may also usefully refer to the observations of Sir Ernest Pollock, M. R. *In Re. City Life Assurance Co. Ltd (1926) Ch. 191, 203(CA)* where the learned Master of the Rolls after referring to section 207 of the Companies Act, 1908 (s. 317 of the Companies Act, 1948) which corresponds to section 529 of Companies Act, 1956 and section 31 of the Bankruptcy Act, 1914 which corresponds to section 46 of the Provincial Insolvency Act, says:

"It is to be observed that s. 31 of Bankruptcy Act, 1914, is definite in its terms that where there is a mutual credit, mutual debt or other mutual dealings, the sums are to be set off and the balance of the account and no more shall be claimed or paid on either side respectively. It is not merely permissive, it is a direct statutory enactment that the balance only is to be claimed in bankruptcy."

We are in agreement with these observations and affirm the view taken by the Karnataka High Court in the judgment sought to be appealed against. We accordingly dismiss the special leave petition on merits after condoning the delay in filing it.

A.P. STATE FINANCIAL CORPORATION

v.

OFFICIAL LIQUIDATOR [SC]

Civil Appeal Nos. 3439 & 3440 of 1997

S Rajendra Babu & S N Phukan, JJ. [Decided on 09/08/2000]

Equivalent citations: AIR 2000 SC 2642; (2000)102 Comp Cas 1 SC; JT 2000 (8) SC 587; 2000 (5) SCALE 486; (2000) 7 SCC 291; 2000 Supp 2 SCR 288; (2000) 3 UPLBEC 2229.

Companies Act, 1956 – Section 446 – Conditional permission granted to secured creditor to stand out of the winding up proceedings – Whether company court could grant permission with conditions – Held, Yes.

Brief facts :

Two companies viz. M/S Nagarjuna Paper Mills and M/S Chandra Pharmaceuticals Limited were in liquidation and the liquidation proceedings were pending before the learned Company Judge of the High Court. The above two companies obtained loans from the appellant and for realisation of dues, the appellant invoked the provisions of Section 29 of the State financial corporations Act, 1951 (the Act of 1951). As both the companies were under liquidation, the appellant filed two separate applications under Section 446(1) of the Companies Act read with Sections 29 and 46 of Act of 1951 before learned Company Judge of the High Court for staying outside the liquidation proceeding. The learned Judge passed two similar orders in respect of both the companies and granted permission to the appellant to stay outside the liquidation proceedings subject to certain conditions. The appeals filed challenging the above order were dismissed by the Division Bench of the High Court by the impugned judgment and hence these appeals.

Decision: Appeals dismissed.

Reason:

The short question to be decided in these appeals is whether the order of the High Court imposing the above three conditions is lawful.

The only contention of the appellant was that the Act of 1951 being a special Act, power of the appellant corporation to invoke provisions of Section 29 of the Act of 1951 is absolute and cannot be restricted.

By inserting the proviso of Section 529 of the Companies Act by the amending Act of 1985 legislature has provided that the security of every secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen’s portion therein.

Now the question is whether Section 29 of the Act of 1951 can override above provisions of the proviso to Sub-section (1) of Section 529 and Section 529A of the Companies Act. In other words whether the Corporation can exercise its rights under above Section 29 ignoring a *pari passu* charge of the workmen.

The Act of 1951 is a special Act for grant of financial assistance to industrial concerns with a view to boost up industrialisation and also recovery of such financial assistance if it becomes bad and similarly the Companies Act deals with companies including winding up of such companies. Both Section 29 of Act of 1951 and Section 529A of the Companies Act have competing non obstante provisions but the proviso to Sub-section (1) of 529 and Section 529Abeing a subsequent enactment, the non obstante clause in Section 529A prevails over the non obstante clause found in Section 29 of the Act of 1951 in view of the settled position of law. We are, therefore, of the opinion that the above proviso to Sub-section (1) of Section 529 and Section 529A will control Section 29 of the Act of 1951. In other words the statutory right to sell the property under Section 29 of the Act of 1951 has to be exercised with the rights of *pari passu* charge to the workmen created by the proviso to Section 529 of the Companies Act. Under the proviso to Sub-section (I) of Section 529, the liquidator shall be entitled to represent the workmen and force the above *pari passu* charge. Therefore, the Company Court was fully justified in imposing above conditions to enable the Official Liquidator to discharge his function properly under supervision of the Company Court as the new Section 529A of the Companies Act confers upon a Company Court a duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with provisions of the above Section. The Legislature has amended the Companies Act in 1985 with a social purpose viz. to protect dues of the workmen. If conditions are not imposed to protect the right of the workmen there is every possibility that secured creditor may frustrate the above *pari passu* right of the workmen.

In the impugned judgment High Court expressed the views as follows:

"In our opinion, therefore, it was not at all necessary for the Financial Corporation to approach this Court for permission to stay outside the winding up proceedings. In spite of the same, the Financial Corporation did venture to make such application in view of the fact that pari passu charge was created on the assets of the company for payment of arrears to workmen of the company...."

In view of the above opinion of the High Court that it was not necessary for Financial Corporation to approach the Court for permission to stay outside the winding up proceedings, the learned Counsel for appellant has urged that High Court erred in imposing the above conditions. We are of the opinion that above observation of the High Court was uncalled for as we have stated that power under Section 29 of the Act of 1951 can be exercised subject to the above provisions of the Companies Act.

For what has been stated above, we hold that imposition of the above conditions by the High Court was lawful. The present appeals have no merit and accordingly dismissed.

63, MOONS TECHNOLOGIES LTD (FORMERLY FINANCIAL TECHNOLOGIES (INDIA) LTD.

v.

UNION OF INDIA & ORS [BOM]

W.P.No. 2743 of 2014 with W.P.Nos. 2985 of 2014, 387 of 2015, 1785 of 2016 & 1922 Of 2016

Manjula Chellur & M.S. Sonak, JJ. [Decided on 04/12/2017]

Companies Act, 1956 – Section 396 – Power of central government to amalgamate companies – Amalgamation of NSEL and FTIL – Whether valid in the public interest – Held, Yes.

Brief facts :

The main challenge in all these petitions is to the final amalgamation order dated 12th February 2016 (impugned order) made by the Central Government under Section 396 of the Companies Act, 1956 (Companies Act), amalgamating the National Spot Exchange Limited (NSEL) and 63 Moons Technologies Limited, formerly known as Financial Technologies (India) Limited (FTIL).

The petitioners challenged the impugned order on the following grounds. Firstly, it is in gross breach of the principles of natural justice and fair play for at least four reasons. Firstly, no opportunity of personal hearing was granted to any of the affected parties except FTIL and NSEL, despite specific directions issued by this Court in its order dated 4 th February 2015. Secondly, the Central Government has not even properly considered the objections and suggestions made by the affected parties and such non-consideration constitutes breach of the principles of natural justice and fair play. Thirdly, the Central Government has relied upon adverse material in the form of proposals inter alia from FMC, without granting the affected parties any opportunity to explain why such proposals were flawed. Fourthly, they submit that there is a variation between the grounds stated in the draft order and the final order. They submit that considering the drastic nature of the impugned order, prejudice is inherent, particularly to NSEL whose corporate existence stands wiped out and to the shareholders of FTIL the economic value of whose shares, and stands drastically diminished. They submit that any action which visits the parties with such serious civil consequences, if taken in violation of principle of natural justice and fair play, is a nullity and must be declared as such.

Decision : Petition dismissed.

Reason :

It is in backdrop of such facts and circumstances and the scheme of FCRA that we have to consider and evaluate the submissions made by the learned counsel for the parties and to determine the issues which arise in these petitions.

ISSUE -A whether the impugned order is in violation of the principles of natural justice and fair play?

This is also not a case where there is failure of natural justice because the objections and suggestions made by FTIL, NSEL, and several other interested parties have not at all been considered by the Central Government before making the impugned order. The record indicates that the Central Government, in this case, constituted a Committee headed by the Additional Secretary assisted by the Legal Adviser to facilitate the consideration of such objections and suggestions. This Committee with the help of specially created computer software, tabulated and collated various objections and suggestions, as received. Such objections and suggestions were then analysed and addressed to. Such analysis and address is reflected to a substantial extent in the impugned order. Merely because the suggestions or objection, may not have been accepted by the Central Government, does not mean or imply that the same have not at all been considered before making the impugned order.

ISSUE - (B)

Whether, taking into consideration the provisions in Section 396(3) of the Companies Act, the Central Government was at all empowered to order compulsory amalgamation of loss making wholly owned subsidiary (NSEL) with its profit making holding company (FTIL) under Section 396 of the Companies Act?

There is sufficient material on record on basis of which the Central Government has subjectively satisfied itself that the amalgamation is essential in public interest to facilitate recoveries of dues from defaulters from pooling human and financial resources of FTIL and NSEL. Despite claims by NSEL that it has the means to and it has been rigorously pursuing recoveries, the fact remains that the position of recoveries is not very promising and may further deteriorate if only NSEL has to fend for itself. In such matters, it is not sufficient that some decrees or attachment orders are obtained. This is also not an issue of mere recoveries but this is an issue of investor confidence in the very functioning of stock and commodity exchanges. If the Central Government, were not to act in a situation of this nature, investor confidence would certainly be a casualty. Such a situation then, has a cascading effect, which is by no means conducive to the national economy.

The Central Government, in making the impugned order has balanced the interests of the two companies, its shareholders, creditors and employees on one hand and the interests, not only of the investors who may have claims, but also, of the investing public, which is required to be given the confidence that the Central Government will act to see that a holding company does not take shelter behind its wholly owned subsidiary and thereby shirk responsibility in the wake of such an unprecedented payment crisis. The three grounds or reasons stated in the impugned order, in our opinion, were sufficient to arrive at the subjective satisfaction that it was essential in public interest to order the amalgamation of the two companies. This is not a case of exercise of powers for any extraneous considerations or alien purposes.

ISSUE -G (i) Whether the impugned order is based on only one ground or reason, i.e., facilitating NSEL in recovering dues from defaulters, and therefore, applying Mohinder Singh Gill principle, the Central Government is barred from adding or supplementing reasons by way of affidavits ?

(G)(ii) Whether the impugned order stands vitiated because there is no material whatsoever on record in support of the aforesaid solitary ground or reason?

In Ion Exchange (India) Ltd. (supra), this Court has held that though, as a matter of law, the transferee companies are independent corporate entities, equally, as a matter of business reality, the Court cannot ignore the plea of the Transferee Company that the that the health and the wellbeing of its wholly owned subsidiaries was a matter which was legitimately entitled to be taken into account by the Transferee Company in coming out with the decision to amalgamate its wholly owned subsidiaries with itself. In the circumstances, the plea that the scheme of Amalgamation is an attempt to reduce the business and operational losses, inclusive of manpower and machinery costs ought to be accepted. Similarly the foundation of the scheme for Amalgamation is that the amalgamation will enable the three Companies to pool together human, material and financial resources. This consideration particularly in a case where the two Transferor Companies are wholly owned subsidiaries cannot be regarded as extraneous or irrelevant. This Court, taking into consideration the business reality noted that the holding company seeks to emerge from the economic difficulty which face its subsidiaries which have become loss making entities. The effort is to pool together human, financial and material resources and to deploy them, upon amalgamation in a manner that would enhance profitability. This is a permissible object and nothing in the proposed scheme in the present case militates against commercial morality, the public interest or a view which a reasonable body or shareholders or creditors would adopt. The impugned order cannot, in such circumstances, be held to be irrational or based on any extraneous or irrelevant considerations.

For all the aforesaid reasons, we are unable to accept the contention that the impugned order is based on only one ground or reason. We are also unable to accept the contention that there was no material on record in support of such ground or reason and further, such ground or reason was not sufficient to prompt any reasonable man or authority to order the compulsory amalgamation of NSEL with FTIL.

ISSUE - (H) Whether the impugned order can be said to be unreasonable, applying Wednesbury principles?

The material on record, however, indicates that NSEL, offered and promoted contracts which were in breach of the conditions in exemption notification dated 5 th June 2007. Further, NSEL offered and promoted paired contracts, which were found to be nothing but financing transactions distinct from genuine sale and purchase transactions in commodities. There is material on record which indicates that NSEL went to the extent of assuring fixed returns to the investors and by the year 2013, almost 99% of the turnover of the exchange comprised such paired contracts. Ultimately, on 31st July 2013, NSEL, suspended the operations at the exchange. At this stage, the commodities sellers defaulted on their outstanding payments obligations to the Trading Clients to the extent of almost Rs.5600 crores. The NSEL also sought to wriggle itself out of its obligations by contending that the counter guarantee was to apply only in relation to specified commodities and since none had been specified, the counter guarantee was in effective. The settlement guarantee fund to be maintained by NSEL and which was stated to be Rs.738.55 crores as on 1 st August 2013, was, on 4th August 2013 found to be only Rs.62 crores. Even though the transactions at the spot exchange were to be backed by commodities supposedly checked and stored in warehouses owned and controlled by NSEL, SGS India Limited, which was appointed to inspect and audit the position, reported that stock worth only Rs.358 crores was available, even though, NSEL, had solemnly stated that it has stocked valued at Rs.2389.36 crores. This means that there was hardly any stock in the warehouses with which deliveries could be effected. All this, left the Trading Clients in a lurch. The impugned order details the nexus between NSEL and FTIL, in the context of the crisis, which led to the collapse of the spot exchange. For all these reasons, we are unable to fault the impugned order applying the test of Wednesbury unreasonableness.

ISSUE -I Whether the impugned order defies the doctrine of proportionality?

Even applying the proportionality test, we are quite satisfied that the impugned order warrants no interference in the facts and circumstances of the present case. The impugned order amalgamates NSEL with FTIL for the three broad reasons set out in the impugned order. In the context of the three reasons, we have already held that neither of them could be regarded as extraneous or irrelevant to the purpose for enactment of Section

If exchanges such as these are permitted to be subverted or fail without honouring their obligations and commitments, the confidence in national economic institutions is bound to suffer and the repercussion to the national economy will be severe. In such situations, a negative perception about the business environment of the country is created, which has grave repercussions on the national economy. The Central Government, quite conscious of all such factors, has taken a balanced decision in the facts and circumstances of the present case. For all the aforesaid reasons, we dismiss these petitions.

DIVYA MANUFACTURING CO PVT LTD.

v.

UNION BANK OF INDIA & ORS [SC]

Civil Appeal No.4706 of 1998 with Civil Appeal No.4707 of 1998

M.B.Shah & R.P. Sethi, JJ. [Decided on 11/07/2000]

Equivalent citations: (2000) 102 Comp Cas 66 (SC).

Companies Act, 1956 – Company in liquidation – Sale of assets through public auction – Principles of determining the sale value of the asset – Supreme Court explains.

Brief facts:

These appeals are filed against the judgment and order passed by the Division Bench of the High Court of Calcutta whereby the sale of the assets and properties of the Tirupati Woolen Mills Limited (Tirupati Mills for short) (under liquidation) confirmed on July 2, 1998 in favour of the appellant-Divya Manufacturing Co. (Divya for short) had been recalled and set aside on the application of respondent No.7, Sharma Chemical Works (For short Sharma) and respondent No.8, Jay Prestressed Products Ltd. (Jay for short) herein.

Decision : Appeals dismissed.

Reason :

In our view, on facts it is apparent that the Division Bench of the High Court has considered all the relevant facts including the fact that at the initial stage, the appellant Divya offered only Rs.37 lakhs to purchase the properties. That means, the appellant wanted to purchase at a throw away price. Thereafter, at the intervention of the Court, the price was increased to Rs.1.3 crores by the appellant. This indicates that appellant was keen to purchase the property, however by paying only the bare minimal amount and to take advantage of sale by the liquidator in the hope that if there are no other purchasers, it would purchase the Company at a price which is abnormally below the market price. It is also true that on 2nd July 1998, the offer made by the appellant was accepted and it was ordered that sale in its favour be confirmed, but at the same time, before possession of the property could be handed over, or before the sale deed could be executed in its favour, respondent Nos.7 and 8 pointed out that the assets and properties could be sold at Rs.2 crores. For showing their bona fides, they were directed to deposit Rs.40 lakhs each and also to pay Rs.70 thousand each as damages to the appellant. Further, the application for setting aside the sale was filed within a few days of the order accepting the bid of the appellant. In these set of circumstances, when correct market value of the assets was not properly known to the Court and the sale was confirmed at grossly inadequate price, it was open to the Court to set it at naught in the interest of the company, its secured and unsecured creditors and the employees. Appellant is also duly compensated by payment of Rs.70 thousand each by respondent Nos.7 & 8.

The law on this subject is well-settled. In the case of *Navalkha & Sons v. Sri Ramanya Das & Ors (1969) 3 SCC 537*, after appellants offer was accepted, a fresh offer from one Gopaldas Darak for higher amount was received by stating that he could not offer in time because he came to know of the sale only 2 days prior to the date of the application and there was possibility of higher bids. Instead of directing a fresh auction or calling for fresh offers, the learned Judge thought it proper to arrange an open bid in the Court itself on that very day as between M/s Navalkha and higher offeror Gopaldas Darak. M/s Navalkha thereafter offered higher bid at

Rs.8,82,000 and its bid was accepted and the learned Judge concluded the sale in its favour with a direction to pay the balance amount. Thereafter an application was filed offering Rs.10 lakhs. A contention was raised that due publicity of the sale of the property was not made, but that application was rejected by the Court. Hence, an appeal was filed by the applicant who made an offer of Rs.10 lakhs and another by one contributory against the order of confirmation. Both appeals were allowed by the Division Bench and the order passed by the learned Judge was set aside with a direction to take fresh steps for sale of the property either by calling sealed tenders or by auction in accordance with law. That order was challenged before this Court by M/s Navalkha. It was contended that there was no justification for the Division Bench to interfere with the order of the learned Single Judge. In that context, after quoting Rule 273 of the Companies (Court) Rules, 1959, the Court observed: The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. In *Gordhan Das Chuni Lal v. T. Sriman Kanthimathinatha Pillai (AIR 1921 Mad.286)*, it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the court to satisfy itself that the price fixed is the best that could be expected to be offered. That is because the Court is the custodian of the interests of the company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the Company and its creditors as well. This principle was followed in *Rathnaswami Pillai v. Sadapathy Pillai (AIR 1925 Mad. 318)* and *S. Soundarajan v. M/s Roshan & Co. (AIR 1940 Mad. 42.)* In *A. Subbaraya Mudaliar v. K. Sundararajan (AIR 1951 Mad. 986)* it was pointed out that the condition of confirmation by the Court being a safeguard against the property being sold at an inadequate price, it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud.

From the aforesaid observation, it is abundantly clear that the Court is the custodian of the interests of the Company and its creditors. Hence, it is the duty of the Court to see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud. As stated above, in the present case, the sale proceedings have a chequered history. The appellant started its offer after having an agreement with the Employees Samity for Rs.37 lakhs. This was on the face of it under bidding for taking undue advantage of Court sale. At the intervention of the learned Single Judge, the bid was increased to Rs.85 lakhs. Subsequently, before the Division Bench, the appellant increased it to Rs.1.30 crores. At that stage, respondent No.7, Sharma was not permitted to bid because it had not complied with the requirements of the advertisement. It is to be stated that on 26th June, 1998, the Division Bench has ordered that offers of Eastern Silk Industries Ltd. and Jay Prestressed Products Ltd. would only be considered on 2nd July, 1998 and confirmation of sale would be made on the basis of the offers made by the two parties. Further, despite the fact that the appellant Divya had withdrawn its earlier offer, the Court permitted it to take part in making further offer as noted in the order dated 2nd July, 1998. In these set of circumstances, there was no need to confine the bid between three offerors only.

Further, there is a specific condition No.11 in terms and conditions of sale as quoted above which empowers the Court to set aside the sale even though it is confirmed for the interests of creditors, contributories and all concerned and/or public interest. In this view of the matter, it cannot be said that the Court became functus officio after the sale was confirmed. As stated above, neither the possession of the property nor the sale deed was executed in favour of the appellant. The offer of Rs.1.30 crore is totally inadequate in comparison to the offer of Rs.2 crores and in case where such higher price is offered, it would be in the interest of the Company and its creditors to set aside the sale. This may cause some inconvenience or loss to the highest bidder but that cannot be helped in view of the fact that such sales are conducted in Court precincts and not by a business house well versed with the market forces and price. Confirmation of the sale by a Court at grossly inadequate price, whether or not it is a consequence of any irregularity or fraud in the conduct of sale, could be set aside on the ground that it was not just and proper exercise of judicial discretion. In such cases, a meaningful intervention by the Court may prevent, to some extent, underbidding at the time of auction through Court. In the present case, the Court has reviewed its exercise of judicial discretion within a shortest time.

In the result, Civil Appeal No. 4706 of 1998 filed by Divya and Civil Appeal No. 4707 of 1998 filed by the Samity stand dismissed. Interim order stands vacated. Pending hearing and disposal of this appeal as the order passed by the Division Bench of the High Court was stayed, fresh directions are required to be obtained from the Court for fixing the time- table for conduct of the auction sale. Hence, the Liquidator is directed to take appropriate steps at the earliest, by obtaining an order from the Court for sale of the property by calling sealed tenders or by auction in accordance with law after giving due publicity in the newspapers, particularly, the newspapers having circulation in Delhi and in the State of Haryana with a reserved price fixed at Rs.2 crores (as offered). The parties are directed to bear their respective costs.

P. PUNNAIAH

V.

JEYPORE SUGAR CO. LTD & ORS [SC]

Civil appeal No.1899 of 1981

B.P.Jeevan Reddy & B.L.Hansaria, JJ. [Decided on 06/04/1994]

Equivalent citations: 1994 AIR SC 2258, 1994 SCC (4) 341; (1994) 81 Comp Cas 1 SC; (1994) 14 CLA 155.

Companies Act,1956 – Sections 397,398 & 399 – Petition signed by power of attorney holder of the shareholder – Whether valid consent – Held, Yes.

Brief facts :

The three appellants in this appeal are the shareholders of the first respondent-company. The first appellant's daughter Smt V. Rajeshwari also holds certain shares in the first respondent-company. She executed a General Power of Attorney (GPA) in favour of her father, the first appellant herein. The three appellants herein filed an application under Sections 397/398 in the High Court of Orissa. Appellant 1 signed the petition on behalf of his daughter on the strength of the GPA.

The precise question in this appeal is whether the consent given by her GPA holder for and on her behalf and not by her personally is a valid consent within the meaning of sub-section (3) of Section 399.

Decision : Appeal allowed.

Reason :

A reading of the several clauses of the GPA discloses ex facie that the powers given thereunder are wide enough to take in the power to grant the consent under Section 399(3). Under the said deed, Smt Rajeshwari empowered her father to manage and otherwise administer her moveable and immovable properties including shares and stock as may be held by her and to take all proceedings before all the authorities and courts concerning the said properties and shares. The deed also empowered him to sign all necessary papers relevant in that behalf and to file them in courts and generally to do all things as may be necessary to safeguard her interest. It is obvious that in pursuance of the said deed, it would have been perfectly legitimate for the first appellant to institute suits, petitions and other proceedings with respect to the shares or other moveable and immovable properties held by Smt Rajeshwari. Indeed it would well have been within the power of the GPA holder to have himself figured as an applicant, acting in the name of Smt Rajeshwari, in the said application filed under Sections 397/398. If so, there appears no reason why the consent could not have been given by the Power of Attorney holder which is only a step towards protecting the interest of Rajeshwari. It in effect means joining the filing of the application under Sections 397/398. May be that there are some functions/duties which cannot be performed through a Power of Attorney Agent (e.g. quasi-judicial/judicial functions) but there appears to be no good reason why the consent contemplated by Section 399(3) cannot be given by such Power of Attorney holder, when indeed he could himself have filed such an application in the name of and on behalf of Smt Rajeshwari. In this connection we may notice yet another fact. With a view to counteract the objection taken by the respondents, the appellants filed an affidavit of Smt Rajeshwari wherein she affirmed that on her recent visit to India she was apprised by her father of the affairs of the first respondent-company and of the proposal to file an application against the first respondent-company and its management alleging oppression and mismanagement. She affirmed that she had authorised her father to act on her behalf as her GPA in that behalf and to take all such steps as he deemed proper to protect her interest.

The Company Judge and the Division Bench have, however, taken the view that the consent to be granted by a member of the Company under Section 399(3) must be a conscious decision of the member himself/herself. They opined that the member must personally apply his mind to the advisability of granting consent and then grant it. In this view of the matter, they held, the GPA holder is not competent to grant the consent.

We are unable to agree with the said reasoning. Section 399 or subsection (3) thereof does not either expressly or by necessary implication indicate that the consent to be accorded thereunder should be given by the member personally, As we have emphasised hereinabove, the first appellant could have filed, or joined as an applicant in an application under Sections 397/398 in the name of and for and on behalf of Smt Rajeshwari as her GPA holder. No question of 'consent' would have and could have arisen in such a case. If so, it is un-understandable as to why and how he could not have given consent on behalf of Smt Rajeshwari, the member, under Section 399(3). No rule or decision could be brought to our notice saying that the consent under Section 399(3) cannot be given by a GPA holder (who is empowered by the principal to manage and administer the shares and stocks held by the principal and to take all necessary steps and proceedings in all courts, offices and tribunals in that behalf). In this connection, it is relevant to notice that shares may also be held by a company or other corporate body. Question may arise what one means by a personal decision by a company or other juristic person. Be that as it may, we see no warrant for holding that Section 399(3) is an exception to the normal rule of agency. The normal rule is that whatever a person can do himself, he can do it through his agent, except certain functions which may be personal in nature or otherwise do not admit of such delegation. The consent contemplated by Section 399(3) falls under the general rule and not under the exception.

Learned counsel for the appellant invited our attention to a decision of the Division Bench of the Bombay High Court in *Killick Nixon Ltd. v. Bank of India, (1985) 57 Comp Cas 831*. In this case it is held that the General Power of Attorney holder is empowered to grant consent under Section 399(3). The General Power of Attorney concerned therein is substantially in the same terms as the one concerned herein. We agree with the said decision.

The observations to the effect that the right to present an application of winding up and the right to vote for the election of Directors are the personal rights of shareholders must be understood in the context of the question considered therein. The observations cannot be torn from their context to hold that the said rights cannot be exercised through an agent. That was not the issue before the Court. Mr Sibal also brought to our notice the decision of this Court in *R. Subba Rao v. CIT, AIR 1956 SC 604*. The matter arose under Section 26-A of the Indian Income Tax Act, 1922 read with Rules 2 and 6 of the rules framed in that behalf. The rules provided that an application for renewal of registration of the firm "shall be signed personally by all the partners". It is because of the said requirement that it was held that partners must sign such an application personally. In the absence of any such expression in Section 399(3), the said decision is of no help to the respondents herein.

For the above reasons, the appeal is allowed and the orders of the learned Company Judge and the Division Bench impugned herein are set aside.

MACKINTOSH BURN LTD.

v.

SARKAR AND CHOWDHURY ENTERPRISES PVT.LTD [SC]

Civil Appeal Nos. 3322-3323 of 2018(Arising out of S.L.P. (C) Nos.8204-8205 of 2018)

M M Shantanagoudar & K Joseph, JJ. [Decided on 27/03/2018]

Companies Act, 2013 – Section 58 – Refusal to register share transfer – Conflict of interest between the company and the transferee – Whether this could be sufficient cause – Held, Yes.

Brief facts :

The appellant is a public company with majority of shares held by the Government of West Bengal. The respondent, which is holder of 28.54 per cent of the shares purchased 100 shares, which together would make its holding 39.77 per cent, sought registration of the shares. Since, no orders were passed on the registration, the respondent approached the Company Law Board. It was mainly contended by the appellant that the respondent Company is controlled by a competitor in business, and hence, it would not be in the interest of the Government Company to permit such transfer. The Company Law Board, however, rejected the contentions and directed registration as per order dated 16.09.2015.Thereafter, the appellant appealed to the High Court and also sought review of its order and ultimately the issue reached the Supreme Court.

Decision : Appeal allowed. Case remanded to NCLT.

Reason :

Refusal of registration of the transfer of shares and the appellate remedy are provided under Section 58 of the Companies Act, 2013. This provision had come into force at the relevant time. Right to refuse registration of transfer on sufficient cause is a question of law and whether the cause shown for refusal is sufficient or not in a given case, can be a mixed question of law and fact.

In the instant case, there is no resolution passed by the company refusing to register the transfer of shares. Since the Company Law Board has gone into the contentions by the appellant for refusing to register transfer for all purposes, it has to be taken that those contentions are the grounds taken by the appellant for refusing to transfer the shares.

The appellant has taken several grounds in the memorandum of appeal and raised questions of law as well on these aspects. No doubt, one of the main questions of law stressed in the appeal pertains to the limitation. But on going through the several grounds taken in the Memorandum of Appeal and the questions of law raised specifically in the appeal and the grounds, it is apparent that the appellant had raised questions of law other than the question of law on limitation. Hence, the High Court has gone wrong in its view in the order dated 15.10.2015 that “the only question of law sought to be urged in the present appeal is as to whether the Company Law Board lacked authority in reviewing petition under Section 5 of the Companies Act, 2013 beyond the period envisaged in sub-Section 4 thereof”.

Be that as it may, as we have been taken through the grounds before the Company Law Board, we propose to consider the matter from that stage. The Company Law Board, it appears, was of the view that the refusal to register the transfer of shares can be permitted only if the transfer is otherwise illegal or impermissible under any law. Going by the expression "without sufficient cause" used in Section 58(4), it is difficult to appreciate that view. Refusal can be on the ground of violation of law or any other sufficient cause. Conflict of interest in a given situation can also be a cause. Whether the same is sufficient in the facts and circumstances of a given case for refusal of registration, is for the Company Law Board to decide since the aggrieved party is given the right to appeal. The contention of the appellant before the Company Law Board that the whole transfer is deceptive and mala fide in the background of the respondent company, should have been considered.

In that view of the matter, we do not think that we should go in further detail on the merits of the contentions. The order passed by the Company Law Board and the orders passed by the High Court are set aside. The matter is remitted to the Company Law Board, now the National Company Law Tribunal for consideration afresh of the appeal filed under Section 58 of the Companies Act, 1956.

HANUMAN PRASAD BAGRI & ORS

v.

BAGRESS CEREALS PVT. LTD. & ORS [SC]

Special Leave Petition (Civil) 17137 of 2000

S. Rajendra Babu & K.G. Balakrishnan, JJ. [Decided on 27/03/2001]

Equivalent citations: (2001) 105 Comp Cas 493; (2001) 41 CLA 238;

Companies Act, 1956 – Section 397-399 – No case made out as to winding up of the company will cause prejudice to the appellants – High court dismissed the petition – Whether correct – Held, Yes.

Brief facts :

A petition under Sections 397 & 398 of the Companies Act, 1956 [hereinafter referred to as the Act] was filed before the Calcutta High Court on grounds of oppression and mismanagement. The learned Company Judge held that the Petitioners grievance in regard to ouster from the management of the company is legitimate and justified; that respondent No.3 had manoeuvred the matters in such a manner to result in the ouster of the Petitioner No.1 from the management of the Company. The learned Company Judge further directed the Petitioner No.1 and his group members to sell their shares to respondents at a value to be determined by a Valuer as on 16.5.1988, that is, the date of the petition and also held that the Petitioner No.1 had been illegally removed as an Executive Director of the Company.

Appeal was preferred on behalf of the Company by respondent No.2 and also on his own behalf. The Petitioners also claimed in that appeal that the learned Company Judge should have given guidelines for valuation of the shares on the market value and should have also provided for payment of interest on the amount receivable by them both on account of share value and remuneration. The Division Bench of the Calcutta High Court allowed the appeal by the order made on 25.8.2000 holding that one of the conditions precedent for granting relief under Section 397 of the Act is that the Petitioners should prove that winding up of the company would unfairly prejudice the Petitioners who are claiming of oppression, that otherwise the facts will justify the making of a winding up on just and equitable grounds. Contesting the correctness of this view, this special leave petition is filed.

Decision : Petition dismissed

Reason :

Section 397(2) of the Act provides that an order could be made on an application made under sub-section (1) if the court is of the opinion (1) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member or members; and (2) that the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, and (3) that the winding up order would unfairly prejudice the applicants.

No case appears to have been made out that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member or members.

Therefore, we have to pay our attention only to the aspect that the winding up of the company would unfairly prejudice the members of the company who have the grievance and are the applicants before the court and that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. In order to be successful on this ground, the Petitioners have to make out a case for winding up of the company on just and equitable grounds. If the facts fall short of the case set out for winding up on just and equitable grounds no relief can be granted to the Petitioners. On the other hand the party resisting the winding up can demonstrate that there are neither just nor equitable grounds for winding up and an order for winding up would be unjust and unfair to them.

On these tests, the Division Bench examined the matter before it. It was noticed that the shareholding of the Petitioners is well under 20% while that of those opposing the winding up is more than 80%. Therefore, the adversary group has sufficient majority shareholding even to pass a special resolution.

In this background, the appeal having been dismissed, we do not find any good reason to interfere with such an order. However, the Petitioners sought to urge the legal question as to the interpretation placed by the Division Bench that if the facts fall short of a case upon which the company court feels that the company should be wound up on just and equitable grounds in that event no relief can be granted to the Petitioners in regard to Section 397 of the Act. We find adequate support to the view taken by the Division Bench and we cannot read the provisions of Section 397 of the Act in any other manner than what has been done by the Division Bench. Therefore we find no merit in this petition. The same shall stand dismissed. No costs.

CHERAN PROPERTIES LTD.

v.

KASTURI AND SONS LTD & ORS [SC]

Civil Appeal Nos 10025-10026 of 2017

Dipak Misra, M.Khanwilkar & D.Y.Chandrachud, JJ. [Decided on 24/04/ 2018]

Companies Act, 2013 read with Arbitration and Conciliation Act, 1996 – Arbitral award directing transfer of shares – NCLT ordered rectification of register of members accordingly – NCLAT affirmed the decision – Whether correct – Held, Yes.

Brief facts :

An arbitral award was passed against the Appellant directing him to transfer the shares to Respondent No.1, pursuant to which Respondent No.1 filed an application for rectification of members register before the NCLT which was allowed. The appeal preferred by the appellant against this judgment and order before the NCLAT was dismissed. Hence the present appeal before the Supreme Court.

Decision : Appeal dismissed.

Reason :

In the present case, as we have seen, the parent agreement dated 19 July 2004 envisaged the allotment of equity shares of KSL to KCP with the intent that KCP would take over the business, assets and liabilities of SPIL. While KCP was entitled to transfer his shareholding, this was expressly subject to the condition of the acceptance by the transferee of the terms and conditions of the agreement. KCP's letter dated 17 August 2004 to KSL contains a specific reference to the share purchase agreement dated 19 July 2004. It was in pursuance of that agreement that KCP indicated, as authorised signatory of the appellant that his group of companies had agreed to purchase the shares in SPIL. The shares were to be purchased by several entities in the same group. A supplementary agreement was to be entered into, to reflect the altered consideration. Eventually, no supplementary agreement was executed and the transaction was structured on the basis of the parent agreement dated 19 July 2004 which the appellant recognised in its letter dated 17 August 2004. Having regard to this factual context, the defence of the appellant against the enforcement of the award cannot be accepted. To allow such a defence to prevail would be to cast the mutual intent of the parties to the winds and to put a premium on dishonesty.

The arbitral award envisaged that KSL was entitled to the return of documents of title and the certificates pertaining to the shares of SPIL contemporaneously with the payment or tendering of a sum of Rs 3.58 crores together with interest. KSL is in terms of the arbitral award entitled to the share certificates. That necessarily means the transfer of the share certificates. To effectuate the transfer, recourse to the remedy of the rectification of the register under Section 111 was but appropriate and necessary. The arbitral award has the character of a decree of a civil court under Section 36 and is capable of being enforced as if it were a decree. Armed with that decree, KSL was entitled to seek rectification before the NCLT by invoking the provisions of Section 111 of the Companies Act, 1956. There can be, therefore, no question about the jurisdiction of NCLT to pass an appropriate order directing rectification of the register.

In the present case, the arbitral award required the shares to be transmitted to the claimants. The arbitral award attained finality. The award could be enforced in accordance with the provisions of the Code of Civil Procedure, in the same manner as if it were a decree of the Court. The award postulates a transmission of shares to the claimant. The directions contained in the award can be enforced only by moving the Tribunal for rectification in the manner contemplated by law.

In the present case, the arbitral award, in essence, postulates the transmission of shares from the appellant to the claimant. The only remedy available for effectuating the transmission is that which was provided in Section 111 for seeking a rectification of the register. There is, therefore, no merit in the challenge addressed by the appellant.

The present case which arises under the Arbitration and Conciliation Act 1996 stands on even a higher pedestal. Under the provisions of Section 35, the award can be enforced in the same manner as if it were a decree of the Court.

The award has attained finality. The transmission of shares as mandated by the award could be fully effectuated by obtaining a rectification of the register under Section 111 of the Companies Act. The remedy which was resorted to was competent. The view of the NCLT, which has been affirmed by the NCLAT does not warrant interference.

THE COMMISSIONER OF INCOME TAX

v.

CITY MILLS DISTRIBUTORS (P) LTD [SC]

Tax Reference Case No.11 of 1982

J.S.Verma, S.P.Bharucha & Sujata V Manohar, JJ. [Decided on 05/02/1996]

Equivalent citations: 1996 SCC (2) 375; JT 1996 (3) 15; (1996) 86 Comp Cas 546; 1996 SCALE (1)674.

Companies Act, 1956 – Incorporation of company – Pre-incorporation transactions carried out by promoters – When a company comes to exist as a juristic person – Supreme Court settles the issue.

Brief facts :

Though this is a tax reference case under the Income Tax Act, 1961, with reference to the taxability of a company's pre-incorporation transactions, yet the crucial question involved was when a company does comes into existence so as to be considered as a juristic person.

The Income Tax Officer assessed the-assessee Company's total income by including, inter alia, the company's pre-incorporation profit. He found that the promoters of the assessee company had carried on business on its behalf and had received the sum of Rs.80,534/- for the period 1st October to 29th October, 1972. After deducting expenses, the income in this behalf was Rs.24,862/-. According to the ITO, this was the income of the assessee company because its promoters had acted and carried on business on its behalf and the assessee company had accepted the act of the promoters after its incorporation.

The assessee company's appeal to the Commissioner of Income Tax (Appeals) was dismissed. The assessee company then appealed to the Tribunal. The Tribunal held that, in law, the promoters and the assessee company were different legal persons and that the income which had accrued on 29th October, 1972, was income that was earned by the promoters. Accordingly, the appeal of the assessee company was allowed.

Decision : Appeal dismissed.

Reason :

In our view, the Tribunal was right in saying that the relevant question was: what was the legal entity that had carried on the business before the assessee company was incorporated and earned the income at the time of its accrual. A Company becomes a legal entity in the eye of the law only when it is incorporated. Prior to its incorporation, it simply does not exist. The assessee company did not exist when the income with which we are here concerned was earned. It is, therefore, not the assessee company which earned the income when it accrued and it is not liable to pay tax thereon.

The same result is reached by a somewhat different process of reasoning. A company can enter into an agreement only after its incorporation. It is only after incorporation that a company may decide to accept that its promoters have carried on business on its behalf and appropriate the income thereof to itself. The question as to who is liable to pay tax on such income cannot depend upon whether or not the company after incorporation so decides. It is he who carried on the business and received the income when it accrued who is liable to bear the burden of tax thereon.

It may be that the transaction of appropriation by a company to itself of income earned by its promoters before its incorporation is also subject to tax; that is not in issue before us and we do not express any view in that behalf. For the reasons afore stated, we answer the question in the affirmative and in favour of the assessee.

COMPANY LAW BOARD

v.

UPPER DOAB SUGAR MILLS LTD [SC]

Civil Appeal Nos. 1840- 1842/1972

Khanna, Hans Raj Gupta, A.C. & Jaswant Singh [Decided on 17/12/1976]

Equivalent citations: 1977 AIR 831; 1977 SCR (2) 503; (1976) 47 Comp Cas 173; 1977 SCC (2) 198.

Companies Act, 1956 – Managerial remuneration – Power of central government to impose condition while allowing remuneration – Provision explained.

Brief facts :

Shri Rajinder Lal and Shri Narinder Lal have been appointed managing directors of the company for the first time after the coming into force of the Act. Their appointment as managing directors had to be approved in terms of section 269_of the Act. The company consequently applied to the Central Government for approving their appointment. The appellant Board, to whom the powers of the Central Government have been delegated for this purpose, while granting approval to the appointment of the aforesaid two persons as managing directors, inserted the condition that the total remuneration of each managing director by way of commission and salary shall not exceed rupees one lakh twenty thousand per annum. This order was challenged before the High court which allowed the appeal. Hence the present appeal before the Supreme Court by the Central Government.

The core issue was whether the company law board, representing the Central Government had powers to impose conditions as to the ceiling of the remuneration while allowing managerial remuneration.

Decision : Appeals allowed.

Reason :

After hearing learned counsel for the parties and giving the matter our earnest consideration, we are of the opinion that the view taken by the High Court in quashing the condition imposed by the appellant Board about the fixation of the remuneration of the managing directors cannot be sustained.

Section 198 deals with the overall maximum managerial remuneration and managerial remuneration in the case of absence or adequacy of profits. The total managerial remuneration payable by a public company or a private company which is a subsidiary of a public company to its managerial staff, according to sub-section (1) of that section, cannot exceed 11 per cent of the net profits for a financial year. The total managerial remuneration covers the remuneration not merely of the managing directors but also of other managerial personnel like secretaries, treasurers and managers. Sub-section (3) of the section provides that within the limits of the maximum remuneration, a company may pay a monthly remuneration to its managing director in accordance with section 309. Sub- section (1) of section 309 prescribes the formalities which have to be complied with for fixing of the remuneration of a managing or full-time director of a company. We are not concerned with sub-section (2) of that section. Sub-section (3). which constitutes the main plank of the case of the respondents, provides that a director who is either in the whole-time employment of the company or a managing director may be paid remuneration either by way of monthly pay ment or at a specified percentage of the net profits of the company or partly by one way or partly by the other. According to the proviso to that sub-section, except with the approval of the Central Government, such remuneration of the whole-time director or managing director shall not exceed 5 per cent of the net profits for one such director and if there is more than one such director 10 per cent for all of them together. Perusal of section 309 shows that it does not deal with the appointment of managing directors. It only pertains to the remuneration of managing or whole-time directors who have already been appointed. The effect of the proviso to sub-section (3) of section 309 is that if the tenure of a managing director who has already been appointed continues after the coming into force of the Act, the remuneration to be paid to such a managing director shall not after the coming into force of the Act exceed 5 per cent of the net profits for one such director, and if there be more than one such director, 10 per cent for all of them together.

The present, however, is not a case of managing directors having been appointed earlier and continuing to act as such after the coming into force of the Act. The Board, in our opinion, acted well within its power in imposing this condition. Section 637A of the Act makes it clear inter alia that where the Central Government is required or authorised by any provision of the Act to accord approval in relation to any matter, then, in the absence of anything to contrary contained in such or any other provision of the Act, the Central Government may accord such approval subject to such conditions, limitations or restrictions as it may think fit to impose. In view of the provisions of sections 269 and 637A of the Act, we find no infirmity in the condition imposed by appellant Board. The provisions of both sections 269 and 637A expressly deal with the question which arises directly in this ease.

We may observe that according to the affidavit filed on behalf of the appellant Board, since 1959 the said Board has been imposing a maximum administrative ceiling on the total amounts payable to a managing director. The basic principle that has been kept in view by the Board is that no individual should be paid remuneration exceeding Rs. 1,20,000 per annum or Rs. 10,000 per month. A large number of instances have also been given by the Board and it would appear there- from that the maximum remuneration which has been allowed by the Board to the managing director of any company is Rs. 1,20,000.

The High Court, in our opinion, was in error in quashing the order of the Board. We accordingly accept the appeals, set aside the judgment of the High Court and dismiss the writ petitions. Looking to all the facts, we leave the parties to bear their own costs throughout.

IN THE MATTER OF TMD FRICTION INDIA PVT LTD [DEL]

CO.PET. 15/2018

Jayant Nath, J. [Decided on 01/06/2018]

Companies Act, 1956 – Section 497 – Voluntary winding up – Allowed.

Brief facts :

This is a petition filed under Section 497(6) of the Companies Act, 1956 (herein referred to as “the Act”) by the Official Liquidator (OL), seeking for voluntary winding up of TMD Friction India Private Limited (in Members Voluntary Liquidation) (herein referred to as the “said company”).

Decision : Petition allowed.

Reason :

At the time of Members Voluntary Winding up of the said company, there were two shareholders. The directors at the time of Members Voluntary Winding-up were Mr. Stefan Bernhard Gunnewig, Mr. Frank Heinz Malburg and Mr. Xavier Louis Marie Roth Le Gentil. The financial position of the said company as disclosed in the audited balance sheets ending as on 31.03.2014 & 31.03.2013 are also annexed to the present petition. The prescribed Form No. 149 for the Declaration of Solvency was filed with the ROC.

Pursuant to the provisions of Section 484(1) of the Act and other applicable provisions of the Act, the Extra Ordinary General Meeting of the said company was held on 30.12.2014 and a special resolution was passed whereby Sh. Rajiv Kumar Adlakha, Company Secretary was appointed as Voluntary Liquidator of the said company at a remuneration fixed at Rs.1,50,000/-. In this regard Form MGT-14 was filed with the ROC.

That as per the requirement of Section 485 of the Act, the said company has published a notification in newspapers. The notice for appointment of Voluntary Liquidator in Form 152 as required under Section 493 read with Rule 315 of the Companies (Court) Rules, 1959 was filed with ROC by the said Company. The Voluntary Liquidator had also filed Form 151 with ROC for his appointment as Voluntary Liquidator. Further, pursuant to the provisions of Section 497 of the Act, the Liquidator has also published Form No.155 in the newspaper and in Official Gazette for final meeting.

The Final Meeting of the said company was held on 07.04.2017 and the Voluntary Liquidator filed accounts of the said Company in Form No. 156 & 157 as prescribed under Rule 329 & 331 of the Companies (Court) Rules, 1959 for the period from 30.12.2014 to 27.01.2017 with the OL on 05.09.2017 and before the ROC on 10.04.2017.

The OL has received No Dues Certificate from Income Tax Department dated 07.10.2015 and no objection has been received from the ROC. The Voluntary Liquidator has filed affidavit dated 31.10.2017 and the shareholders of the said company have filed indemnity bonds dated 03.05.2017 with the OL undertaking that in case of loss to any person or any valid claim arising after the winding up of the said company, they undertake to indemnify any person for such loses, valid claim and liability.

The OL is also satisfied that the necessary compliance of Section 497 and other relevant provisions of the Act have been made and the affairs of the said company have not been conducted in a manner prejudicial to the interest of its members or to the public interest and the said company may be dissolved.

In view of the foregoing and in view of the satisfaction accorded by the OL by way of the present petition, the said company is hereby wound up and shall be deemed to be dissolved with effect from the date of the filing of the present petition i.e. 26.04.2018.

BALKRISHAN GUPTA & ORS

v.

SWADESHI POLYTEX LTD & ANR [SC]

Civil Appeal No. 4803 of 19

E.S.Venkataramiah, Sabyasachi Mukharji, JJ. [Decided on 12/02/1985]

Equivalent citations: 1985 AIR 520, 1985 SCR (2) 854 ;(1985) 2 SCC 167; 1985 SCALE (1) 236.

Companies Act, 1956 – Section 169 – Member's right to vote – Requisitionists' meeting – Shares of one of the requisitionists were attached by collector and receiver was also appointed – Whether such shareholder's shares could be considered for the eligibility criteria – Whether such requisitionist could participate in the meeting – Held, Yes.

Brief facts :

The dispute involved in this case relates to the validity of an extraordinary general meeting of the Swadeshi Polytex Ltd. (hereinafter referred to as 'the Polytex Company'), held pursuant to a notice issued under section 169 of the Act by some of its members.

The principal ground urged on behalf of the appellants is that the extraordinary general meeting had not been validly called since the Cotton Mills Company had ceased to enjoy the privileges of a member of the Polytex Company by reason of the appointment of a Receiver by the Collector of Kanpur in respect of the ten lakhs shares in the Polytex Company held by the Cotton Mills Company, the attachment of the 9 lakhs shares out of the said 10 lakhs shares and also the pledge of 3,50,000 shares out of the said 10 lakhs shares with the Government of Uttar Pradesh as security for the loans advanced by it. The total paid-up equity share capital of the Polytex Company is Rs. 3,90,00,000 (39,00,000 shares of Rs. 10 each) and it is not disputed that if the 10 lakhs shares held by the Cotton Mills Company are omitted from consideration, the remaining requisitionists would not have sufficient voting strength to issue a notice under section 169 of the Act. The appellants contend that the Cotton Mills Company could not, therefore, join the other requisitionists in issuing the notice under section 169 of the Act calling upon the Polytex Company to call the extraordinary general meeting and without the support of the shares held by the Cotton Mills Company, the remaining requisitionists would not have been eligible to requisition the meeting.

Decision : Appeal dismissed.

Reason :

We have already referred to the order of the Collector appointing the Receiver in respect of the shares in question, attaching them and ordering that 3,50,000 shares be pledged in favour of the Government of Uttar Pradesh.

It is clear from the relevant provisions of the Act which are referred to hereafter that a member can participate and exercise his vote at the meetings of a company in accordance with the Act and the articles of association of the company. Section 41 of the Act defines the expression «member» of a company. The subscribers of the memorandum of association of a company shall be deemed to have agreed to become members of the company and on its registration shall be entered as members in its register of members. A subscriber of the memorandum is liable as the holder of shares which he has undertaken to subscribe for. Any other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company. In his case the two conditions namely that there is an agreement to become a member and that his name is entered in the register of members of the company are cumulative. Both the conditions have to be satisfied to enable him to exercise the rights of a member. Subject to section 42 of the Act, a company or a body corporate may also become a member. When once a person becomes a member, he is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the provisions of the Act.

The voting rights of a member of a company are governed by section 87 of the Act. Section 87of the Act says that subject to the provisions of section 89 and sub-section (2) of section 92 of the Act every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company and his voting right on a poll shall be in proportion to his share of the paid-up equity capital of the company.

We shall first consider the effect of appointment of a Receiver in respect of the shares in question. A perusal of the provisions of section 182-A of the Land Revenue Act shows that there is no provision in it which states that on the appointment of a person as a Receiver the property in respect of which he is so appointed vests in him similar to the provision in section 17 of the Presidency Towns Insolvency Act, 109 where on the making of an order of adjudication the property of the insolvent wherever situate would vest in the official assignee, or in section 28 (2) of the Provincial Insolvency Act, 1920 which states that on the making of an order of adjudication, the whole of the property of the insolvent would vest in the court or in the Official Receiver. Sub-section (4) of section 182-A of the Land Revenue Act provides that Rules 2 to 4 of Order XL of the Code of Civil Procedure, 1908 shall apply in relation to a Receiver appointed under that section. A Receiver appointed under Order XL of the Code of Civil Procedure only holds the property committed to his control under the order of the court but the property does not vest in him. The privileges of a member can be exercised by only that person whose name is entered in the Register of Members. A Receiver whose name is not entered in the Register of Members cannot exercise any of those rights unless in a proceeding to which the company concerned is a party and an order is made therein.

Under section 51 of the Code of Civil Procedure, 1908 a Receiver may be appointed by a civil court on the application of a decree-holder in execution of a decree for purposes of realising the decree-debt. This is only a mode of equitable relief granted ordinarily when other modes of realization Or the decretal amount are impracticable. A Receiver appointed under that section will be able to realise the amounts due from a garnishee and his powers are taking to the powers of a Receiver appointed under Order 40 rule 1 of the Code of Civil Procedure, 1908. But he would not have any beneficial interest in the assets of the judgment-debtor. He collects the debts not as his own but as an officer of the court.

Mere appointment of a Receiver in respect of certain shares of a company without more cannot, therefore, deprive the holder of the shares whose name is entered in the Register of Members of the company the right to vote at the meetings of the company or to issue a notice under section 169 of the Act.

The consequence of attachment of certain shares of a company held by a shareholder for purposes of sale in a proceeding under section 149 of the Land Revenue Act is more or less the same. The effect of an order of attachment is what section 149 of the Land Revenue Act itself says. Such attachment is made according to the law in force for the, time being for the attachment and sale of movable property under the decree of a civil court. Section 60 of the Code of Civil Procedure, 1908 says that except those items of E property mentioned in its proviso, lands. houses, or other buildings, goods money, banknotes, cheques, bills of exchange, hands, promissory notes, Government securities, bonds or other securities of money, debts, shares in a corporation and all other saleable property, movable or immovable, belonging to a judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf, is liable for attachment and sale in execution of a decree against him. Section 64 of the

Code of Civil Procedure, 1908 states that where an attachment of a property is made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is forbidden under section 64 of the Code of Civil Procedure is a private transfer by the judgment-debtor of the property attached contrary to the attachment, that is, contrary to the claims of the decree holder under the decree for realisation of which the attachment is effected. A private transfer under section 64 of the Code of Civil Procedure is not absolutely void, that is, void as against all the world but void only as against the claims enforceable under the attachment. Until the property is actually told, the judgment-debtor retains title in the property attached. Under Rule 76 of Order 21 of the Code of Civil Procedure, 1908, the shares in a Corporation which reattached may sold through a broker. In the alternative such shares may be sold in public auction under Rule 7 thereof. On such sale' either under Rule 76 or under Rule 77, the purchaser acquires title. Until such sale is effected, all other rights of the judgment-debtor remain unaffected even if the shares may have been seized by the officer of the count under Rule 43 of Order 21 of the Code of Civil Procedure, 1908 for the purpose of effecting the attachment, or through a Receiver or through an order in terms of Rule 46 of Order 21 of the Code of Civil Procedure may have been served on the judgment-debtor or on the company concerned.

An order of attachment cannot, therefore, have the effect of depriving the holder of the shares of his title to the shares. We are of the view that the attachment of the shares in the Polytex Company held by the Cotton Mills Company had not deprived the Cotton Mills Company of its right to vote at the meeting or to issue the notice under section 169 of the Act.

KAMAL KUMAR DUTTA & ANR

v.

RUBY GENERAL HOSPITAL LTD. & ORS [SC]

Appeal (Civil) 3471 of 2006

H.K.Sema & A.K.Mathur, JJ. [Decided on 11/08/2006]

Equivalent citations: (2006) 134 Comp Cas 678 (SC).

Companies Act, 1956 – Sections 397 & 398 – Company floated by elder brother – Younger brother usurps the company – Whether an act of oppression & suppression – Held, Yes.

Brief facts :

Ruby General Hospital Limited was established in memory of late wife of Dr.Kamal Kumar Dutta. Since Dr.Dutta and Dr.Binod Prasad Sinha were both NRIs, the company was being looked after by Sajal Kumar Dutta. No problem arose for some time till the hospital was in a struggling stage. But it appears that soon after the hospital started showing the sign of prosperity, the chord of discord grew between the brothers and attempt was made by the younger brother to oust the elder brother by denying him his shares for the medical equipment worth Rs.3.5 crore supplied by him from USA. Thus, ultimately the appellants filed a petition under Sections 397 & 398 of the Act before the CLB.

The main grievance of Dr.Dutta was denial of his shares for supply of medical equipment's worth Rs.3.5 crore and consequential ousting from the chairman and directorship of the company which led to filing of a petition before the CLB in 1997.The stand of the company was that Dr.Kamal Kumar Dutta and Dr.Binod Prasad Sinha who alleged to have had 88.88% shares in the company discontinued themselves as Directors and refusal of the company to allot shares to them worth the value of second hand equipment's was justified.

The CLB heard the parties at length and passed a detailed order giving certain directions in favour of the petitioners. The High Court, on appeal, set aside the order of the CLB. Aggrieved against this order passed by the learned Single Judge, the present Special Leave Petitions were filed by the appellants.

Decision : Appeal allowed.

Reason :

Now, coming to the merits of the case, learned counsel for the appellants submitted that learned Single Judge of the High Court has gone wrong in holding that no case is made out under Sections 397 & 398of the Act as necessary ingredients of the said sections are not present in this case.

Now, adverting to the facts of the present case, we will examine whether there was any case of oppression of the member or attempt to materially change in the management or control over the company to the detriment of the company.

The seed of discord started with the resolution dated 19.4.1995 when a resolution was passed for infusing some more money in the company and it appears that the said resolution was passed in which Dr.K.K.Dutta, Mr.Sajal Dutta, Wing Cdr.(Retd.) T.Chaudhuri as Director were present along with special invitee, Dr.Ashok K.Maulik as Director and Mr.M.K.Datta was the Financial Controller and Secretary. Dr.Kamal Kumar Dutta took the chair as the chairman of the meeting. But the crucial resolution which was passed that gave rise to strained relationship between two brothers was to issue and allot not exceeding 40,00,000 (forty lacs) equity shares of Rs.10/- each at par to such persons, corporate bodies, banks, mutual funds or other financial institutions whether or not they are the existing shareholders of the company and in such manner as may be decided by the Board.

This resolution was alleged to have been fabricated and not passed on the date though it is alleged that Dr.K.K.Dutta was present. According to Dr.K.K.Dutta this resolution was subsequently inserted and he was not made known about such resolution and he came to know about it only on a later date when he was said to be thrown out from the Managing Directorship. Though this aspect according to Mr.Nariman was not specifically challenged before the CLB but the answer of learned counsel for the appellants was that in fact these resolutions were not made known to the appellants and they only came to know about it at a late stage when all these resolutions were placed by Respondent No.2, Sajal Dutta. It is alleged that objection to this was taken in a rejoinder filed by the appellants before the CLB.

The CLB has in minute detail discussed with regard to all the resolutions which we have already adverted to. No proper notice was served on the appellant No.1 who is a major shareholder of the company or to appellant No.2. If the Board meeting had been convened without proper service of notice on the appellants by the respondent No.2 then such Board meeting cannot be said to be valid.

Mr.Nariman however tried to explain various meetings and their subsequent confirmation by next board meeting to show that once the resolution of the subsequent meeting has confirmed the resolution of earlier meetings then those minutes stand confirmed irrespective of the fact that the appellants had been served or not. It does not appeal to us. Be that as it may, when such an important decision was taken in the absence of the main promoter of the company to oust him from the Managing Directorship and to install Sajal Dutta in his place, it is the grossest act of oppression by the Board of Directors. Sometime after dispatching Dr.Dutta from the Managing Directorship most of the shares were cornered by the subsidiary companies of Sajal Dutta so as to acquire the management of the company and to alter material change in the management of the company. What can be more unfortunate than this? When a material change is brought about in the management to the detriment of the interest of the main promoter it is squarely covered under section 398 (1) (b) of the Act. The company which is floated by the elder brother and which has been run by the younger brother in the absence of the elder brother the younger brother manages the whole company and that the Managing Director is totally ousted and shares are being cornered substantially so as to have full control of the company, is oppression being squarely covered by section 397 (1) (b) of the Act.

Since the issue of granting of equity shares against the medical equipment's supplied by the appellant No.1 to the tune of Rs.3.5 crore is pending before the Calcutta High Court in a writ petition, therefore the CLB has not passed any final order but passed a limited order as mentioned above. However, we have examined the matter in detail and we are satisfied that there is full proof case of oppression. But at the same time we do not feel inclined to pass an order for winding up of the company because it will not be in the interest of the company nor to the interest of the parties.

Therefore, we allow the appeals and set aside the impugned order dated 31.3.2005 passed by the learned Single Judge of the High Court and pass limited direction that all the resolutions which have been passed by the Board of Directors, or in the Annual General Meeting or Extraordinary General Meeting with regard to the raising of funds of Rs.40 lakhs in the meeting of 19.4.1995 and the meeting dated 16.2.1996 whereby the appellant No.1 was stripped off of his powers as Managing Director, the resolution by which Dr.Binod Prasad Sinha was removed from the office of Director and other resolutions by which the shares were allotted to the subsidiary company of Sajal Dutta or other persons are bad and we restore the position ante 19.4.1995 and direct that let a fresh meeting be convened and proper decision be taken in the matter in the interest of the company. We confirm the order and direction of the CLB.

SHAH BROTHERS ISPAT PVT. LTD.

v.

P. MOHANRAJ & ORS. [NCLAT]

Company Appeal (AT) (Insolvency) No. 306 of 2018

S. J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 31/07/2018

Section 14 of Insolvency & Bankruptcy Code, 2016 read with section 138 of the Negotiable Instruments Act,1882 – Moratorium fixed against corporate debtor – Operational creditor filed complaint under NI Act against corporate debtor & IDs directors during moratorium period – Whether tenable – Held, Yes.

Brief facts :

The Appellants filed complaint under Section 138 of the Negotiable Instrument Act, 1881 prior to initiation of Corporate Insolvency Resolution Process. Another complaint u/s 138 of NI Act was filed after the order of moratorium. The Respondent – Directors moved before the Adjudicating Authority and argued that during the period of moratorium proceeding petition under Section 138 of NI Act was not maintainable. This was opposed by the Appellants but the Adjudicating Authority directed the Appellants to withdraw the complaint case filed under Section 138 of NI Act treating it as a proceeding filed after order of moratorium with observation that such action amounts to deliberate attempt on the part of Appellant and sheer misuse of the process of law.

Decision : Appeal allowed.

Reason :

The question arises for consideration in this appeal is whether the order of moratorium will cover a criminal proceeding under Section 138 of NI Act, which provides punishment of imprisonment for a term which may extend to three years or with fine which may extend to twice the amount of cheque or with both?

The Company cannot be imprisoned, therefore aforesaid punishment under Section 138 cannot be imposed against the company (Corporate Debtor) However, fine can be imposed by a court of competent jurisdiction on the Company (Corporate Debtor), if find guilty. The Directors of the Company (Corporate Debtor) being parties so can be imprisoned or fine may be imposed on them.

The Respondent submitted that the proceeding under Section 138 of the NI Act is covered by clause of Sub-section (1)(a) of Section 14 of I&B Code, therefore, proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority cannot proceed.

We do not agree with such submission as Section 138 is a penal provision, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim. Imposition of fine cannot held to be a money claim or recovery against the Corporate Debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors, they cannot come within the purview of Section 14. In fact no criminal proceeding is covered under Section 14 of I & B Code.

The Adjudicating Authority having failed to appreciate law, we have no option but to set aside the impugned order. The court of competent jurisdiction may proceed with the proceeding under Section 138 of NI Act, even during the period of moratorium.

STANDARD CHARTERED BANK & ORS

v.

DIRECTORATE OF ENFORCEMENT & ORS [SC]

Civil Appeal No. 1748 of 1999 along with batch of other civil appeals, criminal & a criminal writ petition

N.Santosh Hegde, K.G. Balakrishnan, D.M.Dharmadhikari, Arun Kumar & B.N.srikrishna, JJ. [Decided on 05/05/2005]

Equivalent citations: (2005) 4 SCC 530; (2005) 125 Comp Cas 513; SCC (Crl) 961.

Foreign Exchange Regulation Act, 1973 – Section 50 & 51 – Mandatory punishment of imprisonment and fine – Whether a company could be prosecuted – Held, yes.

Brief facts :

The interesting question of law, settled in this case, was whether a company or a corporate body could be prosecuted for offences for which the sentence of imprisonment and fine is a mandatory punishment.

Prosecution was initiated against the appellant under Section 50 read with Section 51 of the Foreign Exchange Regulation Act, 1973 (for short, the FERA Act). The appellant, relying on Assistant Commissioner, Assessment-II Bangalore & Ors v. Velliappa Textiles Ltd & Anr. (2003) 11 SCC 405, contended that it was not liable to be prosecuted for the offence under Section 56 of the FERA Act as the minimum punishment prescribed is imprisonment for a term which shall not be less than six months and with fine. The bench doubted the correctness of the above decision and by reference, the matter has thus been placed before the constitution bench by the learned Chief Justice of India for decision.

Decision : Appeal dismissed by 3:2 majority.

Reason :

In Velliappa Textiles' case (supra), by a majority decision it was held that the company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. It was further held that where punishment provided is imprisonment and fine, the court cannot impose only a fine.

There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

As in the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorized powers, and without proof that his act was expressly authorized or approved by the corporation. In the statutes defining crimes, the prohibition is frequently directed against any "person" who commits the prohibited act, and in many statutes the term "person" is defined. Even if the person is not specifically defined, it necessarily includes a corporation. It is usually construed to include a corporation so as to bring it within the prohibition of the statute and subject it to punishment. In most of the statutes, the word "person" is defined to include a corporation.

Therefore, as regards corporate criminal liability, there is no doubt that a corporation or company could be prosecuted for any offence punishable under law, whether it is coming under the strict liability or under absolute liability.

Inasmuch as all criminal and quasi-criminal offences are creatures of statute, the amenability of the corporation to prosecution necessarily depends upon the terminology employed in the statute. In the case of strict liability, the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but on the establishment of the 'actus reus', subject to the defence of due diligence. The law is primarily based on the terms of the statutes. In the case of absolute liability where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. It is only in a case requiring mens rea, a question arises whether a corporation could be attributed with requisite mens rea to prove the guilt. But as we are not concerned with this question in these proceedings, we do not express any opinion on that issue.

Going by the provisions in Section 56 of the FERA Act, if the view expressed in Velliappa Textiles is accepted as correct law, the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.

The question whether a company could be prosecuted for an offence for which mandatory sentence of imprisonment is provided continued to agitate the minds of the courts and jurists and the law continued to be the old law despite the recommendations of the Law Commission and the difficulties were expressed by the superior courts in many decisions.

As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. We overrule the views expressed by the majority in Velliappa Textiles on this point and answer the reference accordingly.

PAHUJA TAKII SEED LTD. & ORS

v.

REGISTRAR OF COMPANIES, NCT OF DELHI & HARYANA [NCLAT]

Company Appeals (AT) Nos. 80-83, 92, 101, 113-118 of 2018

S.J.Mukhopadhyaya, A.I.S.Cheema & Balwinder singh. [Decided on 27/09/2018]

Companies Act, 2013 – Sections 441 & 451 – Compounding of offences – Powers of Tribunal – Legal principles elucidated.

Brief facts :

In these appeals as common question of law is involved, they were heard together and disposed of by this common judgment. The Appellants, Companies along with its Officers, filed applications under Section 441 of the Companies Act, 2013 for compounding of the offence(s) committed by them, on the ground that corrective measures have already been taken, which have been dismissed/disposed of by the National Company Law Tribunal (hereinafter referred to as "Tribunal") by common order.

The questions require for determination in these appeals are:

i. Whether the Companies Act, 2013 bars filing of a joint application for compounding of offence by a defaulting company along with its officers in default?

ii. Whether the Companies Act, 2013 bars filing of a joint application for compounding of the same offence committed in different years?

iii. Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with 'imprisonment or fine', if repeated within a period of three years results into a mandatory imprisonment for the defaulters and whether the same can be compounded or not?

iv. Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with 'only fine', if repeated within a period of three years results into a mandatory imprisonment for the defaulters and whether the same cannot be compounded?

v. Whether the Tribunal has jurisdiction to compound offences where the fine prescribed for such offence does not exceed Rs. 5,00,000/-

Decision : Appeals allowed.

Reason :

On perusal of sub-section (1) to (4) of Section 441, it is clear that any offence punishable under the Companies Act, whether committed by a company or any officer thereof with fine only, may, either before or after the institution of any prosecution can be compounded by the Tribunal, and where the maximum amount of fine does not exceed five lakh rupees, can be compounded by the 'Tribunal' as also by 'the Regional Director' or 'any officer authorised by the Central Government'.

The aforesaid provision makes it clear that Section 441 only puts a restriction on the power of the 'Regional Director' and 'the authorised officers of the Central Government' permitting them to compound the offences wherein the maximum amount of fine does not exceed five lakh rupees and is punishable with 'fine only'. No such fetter has been put on powers of the Tribunal, which is the main forum for such compounding of offences, the other forum of 'Regional Director' and 'Officer of the Central Government' being alternative but restricted by extent of quantum of punishment. The Tribunal has the powers to compound all the offences irrespective of any pecuniary limit as evident from a bare perusal of Section 441.

The Tribunal erroneously read Section 441 to hold that where the penalty is less than five lakh rupees, it has no jurisdiction because of limitation on its pecuniary jurisdiction, which is non-existent. In absence of any pecuniary jurisdiction limitation under Section 441 (except for the 'Regional Director' and 'the officer authorised by the Central Government'), the Tribunal has no power to lay pecuniary jurisdiction limitation in respect of Tribunal itself.

In terms of the scheme envisaged under Section 441 of the Companies Act, 2013, there is no bar on preferring a single application for compounding the same offence committed during different financial years by the Company and its Officers, nor there do any bar on a joint application being preferred by a Company along with its Officers in default. It is trite that procedures are deemed to be permitted unless expressly prohibited. In this connection, we may refer the decision of the Hon'ble Supreme Court in *Rajendra Prasad Gupta v. Prakash Chandra Mishra and Ors, AIR 2011 SC 1137.*

Further, in absence of any specific bar of 'joinder of parties' or joinder of separate cause of actions in preferring a compounding application, we hold that joinder of parties for same offence is permitted. Since facts leading to any non-compliance under the Act on the part of a company and its officers in default will be same, any suggestion to the contrary will only lead to multiplication of proceedings and different findings, which is not desirable.

The provision for compounding offences vested with the Tribunal, the Regional Director and the Officer authorised by the Central Government was earlier vested under earlier Section 621A of the Companies Act, 1956. Explaining its position, the Central Government from its Ministry of Corporate Affairs by letter dated 28th April, 1993 informed that there is no bar under the Companies Act, 1956 for filing joint compounding applications under Section 621A. After enactment of Section 441 of the Companies Act, 2013, the Central Government from its Ministry of Corporate Affairs reiterated its position by letter dated 31st January, 2018 that there is no bar under the Companies Act, 2013 in filing joint compounding applications.

Section 451 of the Companies Act, 2013 relates to 'punishment in case of repeated default', is attracted both to 'a company' or 'an officer' of a Company who commits an offence punishable either with fine or with imprisonment. From bare perusal of Section 451, it is clear that where the same offence is committed for the second or subsequent occasions within a period of three years, then, (a) that company and (b) every officer thereof who is in default shall be ***punishable with twice the amount of fine*** for such offence in addition to any imprisonment provided for that offence.

It is a settled that the Company cannot be imprisoned but if such Company also commits an offence punishable with fine, in such case, if such offence is committed for the second or subsequent occasions within a period of three years, then, the company and every officer thereof who is in default shall be liable to pay twice the amount of fine. The sentence *'in addition to any imprisonment'* will not be applicable to the Company even if provided for that offence.

On the other hand, if an officer of a company commits an offence punishable either with fine or with imprisonment and the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and such officer thereof who is in default shall be punishable with twice the amount of fine for such offence. It is not necessary that additional imprisonment will be automatically attracted, in absence of any such additional punishment of imprisonment is prescribed under the substantive penal provision of the Act.

It cannot be stated that Section 451 is not attracted in case of violation of sub-section (1) of Section 88. If Section 451 is made applicable to sub-section (5) of Section 88, it is clear that the Company and every officer of the Company who is in default in case of repeated default for the second or subsequent occasions within a period of three years is punishable with twice the amount of fine for such offence as prescribed under sub-section (5) of Section 88. In absence of any provision of imprisonment prescribed under sub-section (5) of Section 88, it cannot be held that in terms of Section 451, the company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to imprisonment even if not prescribed under the provision and the Company cannot be imprisoned.

At this stage, it is also to be determined as to what should be the meaning of “same offence is committed for the second or subsequent occasions within a period of three years” or to say as to how the period of three years to be counted to determine that the same offence is committed for the second or subsequent occasions.

In order to interpret Section 451 and the words used in it “where the same offence is committed for the second or subsequent occasions within a period of three years” aid can be taken from Explanation of sub-section (2) of Section 441 where with regard to that Section, it is provided that “any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously “compounded”, shall be deemed to be a first offence”. (Emphasis supplied) It is apparent that unless previously the offence has been “compounded”, the rigour of higher punishment as contemplated under Section 451 would not get attracted.

From the aforesaid provision, it is clear that if a company contravenes any of the provision of Chapter VI, the company shall be punishable with fine which shall not be less than one lakh rupees and may extend to ten lakh rupees. With respect to every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

We have held that the Company cannot be imprisoned. The officer of the company who is in default shall be punishable with imprisonment or fine or with both as prescribed under Section 86. Whether such officer is to be imposed punishment of fine or imprisonment or both will dependent on the basis of gravity of offence which can be decided only by the Court of Competent Jurisdiction (Special Court). Such power having been delegated to the Court of Competent Jurisdiction, it cannot be held that in view of Section 451 for committing the same offence for the second or subsequent occasions within a period of three years, the officer is liable to be imprisoned. If such interpretation is given, then it will amount to taking away the power of the Competent Court (Special Court) to decide whether in the fact and circumstances of the case and on the basis of gravity of offence, the officer will be liable for punished of imprisonment or fine or both.

Therefore, we hold that the Tribunal is wrong in holding that if Section 451 is read along with Section 441(6) for offence punishable with ‘fine or imprisonment’ or ‘only with fine’ or ‘fine and imprisonment’ on repeated defaults committed within three years, the Tribunal does not have jurisdiction to compound the offence.

A bare perusal of the provision makes it evident that Section 451 only provides that ‘fine’ in case of any repeated defaults shall be ‘twice the amount of fine’, in addition or in alternative to any imprisonment for such default if prescribed under the relevant provisions of Act, 2013. It does not make the imprisonment mandatory.

Secondly, use of word ‘any’ in Section 451 in the phrase ‘in addition to any imprisonment for that offence’ leaves discretion with the prosecuting authority/court to punish the defaulter with imprisonment. Had the intention of the legislature been to make the imprisonment mandatory, it would not have used the word ‘any’. If the interpretation adopted by the Tribunal is accepted then it will amount to substituting words in a penal provision, which is impermissible in the law.

For the reasons aforesaid, we hold that the Tribunal failed to appreciate Section 451 of the Companies Act, 2013. We further hold that Section 451 only provides with ‘fine’ in case of any repeated defaults shall be ‘twice the amount of fine’, in addition to any imprisonment for such default under the relevant provisions of the Act, if prescribed and it does not make the ‘imprisonment mandatory’.

In view of the aforesaid findings, we set aside the impugned order and remit the respective Company Petitions to the Tribunal for decision on its merit taking into consideration the offence committed by the Company and its Officers and the Report of the Registrar of Companies.

WORKMEN OF ROHTAS INDUSTRIES LTD.

v.

ROHTAS INDUSTRIES LTD [SC]

Writ Petition No.5222 of 1985

Ranganath Misra & G.L.Oza, JJ [Decided on 27/04/1987]

Equivalent citations: 1987 SCR (2)1216; 1987 SCC (2) 588; JT 1987 (2) 283; 1987 SCALE (1)894; (1987) 62 Comp Cas 872.

Companies Act, 1956 – Wagers of workmen – Priority of payment – Finished goods hypothecated with secured creditor – Realisation of sale proceeds – Whether workmen wages get priority over secured creditors claim – Held, Yes.

Brief facts :

Inspite of the directions of the Supreme Court to pay the workers' salaries and wages in three instalments, the same was not paid. It was brought to the notice of the Court that notwithstanding that order of the Court, the State of Bihar has issued a notification wherein this industry has been declared to be a sick industry and by this Notification the Bihar Government has declared the company in liquidation to be a relief undertaking for one year from the date of issue of the notification. On the basis of this an attempt was made to suggest that the liability of the industry for payment to the workers cannot be enforced. In this circumstances, the workmen approached the Supreme Court for the release of their dues.

Decision : Petition allowed.

Reason : The State of Bihar frankly conceded that so far as the liability of payment of wages to the workers is concerned the State Government wants that it should be paid. As directed by this Court a report had been submitted by the Official Liquidator in the case of this industry. This report shows that the products produced by this industry which are lying in stocks are of the value of Rs.91,77,000. This report also discloses that from the month of May, 1984 till 8th July, 1984 when this industry closed down an amount of Rs.89,00,000 remains to be paid to the workers as their salaries and emoluments.

The learned counsel appearing for the State Bank of India' and other financial institutions attempted to contend that these goods which are the finished products lying in stock are pledged with these Banks and, therefore, they have a prior claim over the sale proceeds of these stocks and it was, therefore, contended that this could not be sold and the workers could not be paid off. On the other hand it was suggested that in fact a scheme has been drawn up to review the industry in the interests of the workers and the society in general and in that scheme of starting the industry again financial problems may arise and if this stock is sold out and the money collected therefrom-are paid out to the workers then it may create difficulties.

It is no doubt true that these' products the stock of which have been shown' in the report and the value of which has been shown by the Liquidator as Rs.91,77,000 is pledged with Banks, is a priority in law in favour of the Banks but it also could not be disputed that these stocks were the products of this industry before its closure and, therefore, the workers also contributed their labour and it is the result of their hard-work that these stocks could be produced and in our opinion therefore, it could not be said that the wages and emoluments for the period up to closure would not rank in priority.

It is also significant that after the closure in July, 1984, till today in spite of the order passed by this Court the workers have not been paid. Their subsistence and living is also perhaps of paramount importance and has to rank with highest priority. It is in view of this as it appears, that the Government of India is keen to have a scheme for revival of this industry. Learned counsel for the State of Bihar also frankly conceded that so far as payment to the workers is concerned the State Government also desires that they should be paid their salaries.

It is no doubt true that at present there are no assets available out of which the whole payment of all the dues to the workers from May 1984 till today could be done but from out of these assets the products which are lying in stocks valued at Rs.91.77,000 the salaries and the dues of the workers from May 1984 tilt the date of closure could be made. It was contended that in case these stocks are liquidated and the amount collected are paid off to the workers, difficulty may arise as this asset which has been taken into account will not be available for the scheme of re-starting the industry.

Looking to all the circumstances and taking a broad and humane view of the situation we are of the opinion, that it would be just and proper that these goods which are lying in stock should be sold and out of the sale proceeds the workers should be paid their dues up to the date of closure (from May 1984 to July 1984 i.e. 8th July, 1984) so that at least they will get something for subsistence.

Learned counsel for the State Bank of India pointed out that his client has paid for the insurance of certain assets and for loss thereof in whole or in part, the insurance has paid for the loss. The Official Liquidator may keep that amount separately and allow the State Bank to adjust the same against its insurance. So far as the pledge and the priority of the financial institutions are concerned, we have no doubt that they have other sufficient securities and properties of the Company and, therefore, if this stock of finished products are sold to meet the basic requirements of the workers, their interests would not be in jeopardy.

Apart from it, we also hope and trust that if the loss of this amount of Rs.91,77,000 somehow comes in way of the scheme of restarting of the industry, the Government of India would find funds to save the situation and help early revival of the Company. We therefore direct that these stocks which are lying with the industry valued at Rs.91,77,000 shall immediately be dis- posed of and out of this the wages and other dues of the workers for the period from May 1984 till 8th July, 1984, shall be met. The balance, if any, will be utilised for meeting other pressing demands in the discretion of the Official Liquidator subject to orders of the Court. We are sure that the Official Liquidator will ensure that the disposal fetches the best of rates. We may also make it clear that issuance of the notification by the Bihar State Government will not come in the way of sale of these assets and payment to the workers.

SAS HOSPITALITY PVT LTD & ANR

v.

SURYA CONSTRUCTIONS PVT LTD & ORS [DEL]

CS (Comm) 1496 of 2016

Prathiba M. Singh. [Decided on 16/10/2018]

Companies Act, 2013 – Sections 59 & 62 – Allotment of shares – Jurisdiction of civil court – Suit filed seeking declaration that the allotment of shares is null and void – Whether civil court has jurisdiction – Held, No.

Brief facts :

The Plaintiff has filed the present suit seeking a declaration that the allotment of shares in favour of the Defendant Nos.5 to 9 is null and void and a permanent injunction be passed from giving effect to the allotment dated 5th October, 2013. Defendant contested the suit on the ground that the High court has no jurisdiction to try the suit and the proper forum to adjudicate the dispute is NCLT.

Decision : Suit dismissed

Reason :

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

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

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

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

The bar contained in Section 430 of the 2013 Act is in respect of entertaining "any suit", or "any proceedings" which the NCLT is "empowered to determine". The NCLT in the present case would be empowered to determine that the allotment of shares in favour of the Defendant Nos.5 to 9 was not done in accordance with the procedure prescribed under Section 62 of the 2013 Act. The NCLT is also empowered to determine as to whether rectification of the register is required to be carried out owing to such allotment, or cancellation of allotment ordered, if any. The NCLT can also determine if in the interregnum, the Defendant Nos.5 to 9 ought to exercise any voting rights. The NCLT would be empowered to pass any such orders as it thinks fit, for the smooth conduct of the affairs of the company, which would include an injunction order protecting the assets of the Defendant No.1 Company. The NCLT would also be empowered to oversee and supervise the working of the company, and also appoint such persons as it may deem necessary to regulate the affairs of the company.

The allegations in the present case relate to non-compliance of the stipulations in Section 62 of the 2013 Act. The non-compliance of any conditions contained in Section 62 of the 2013 Act also constitutes mismanagement of the company, inasmuch as under Section 241 of the 2013 Act, the conduct of affairs of the company "in a manner prejudicial" to any member or "in a manner prejudicial to the interest of the company", would be governed by the same. The jurisdiction to go into these allegations, vests with the Tribunal under Section 242 of the 2013 Act. Under Section 242(2), the NCLT has the power to pass "such order as it thinks fit", including providing for "regulation of conduct of affairs of the company in future". These powers are extremely broad and are more than what a Civil Court can do. Even if in the present case, the Court grants the reliefs sought for by the Plaintiff, after a full trial, the effective orders in respect of regulating the company, and administering the affairs of the company, cannot be passed in these proceedings. Such orders can only be passed by the NCLT, which has the exclusive jurisdiction to deal with the affairs of the company.

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

K. J. SUWRESH & ANR

v.

TEAMLEASE STAFFING SERVICES PVT. LTD. & ANR [NCLAT]

Company Appeal (AT) No.30 of 2018 & CA 167 of 2018

A.I.S. Cheema (JM) & Balvinder Singh (TM). [Decided on 24/10/2018]

Companies Act, 2013 – Amalgamation – Allowed by NCLT – Objection raised based on alleged non-receipt of notice – Not raised before NCLT – On merits dismissed by NCLAT.

Brief facts :

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

To put the case of the Appellants in a nutshell, their grievance is that they were holding 100% equity shares in the transferor Company No.1 - ASAP Info Systems Private Limited and there was Share Purchase Agreement (‘SPA’, in short) dated 04.07.2016 between them and the transferee Company whereby the 100% shareholding was to be transferred by them to the transferee Company. Their grievance is that the payments were to be made by the Transferee Company in tranches and after initial payment, there has been default. According to the Appellants they ought to have been treated either as shareholder or creditors of the transferee Company and in either case they were entitled to Notice. It is claimed that no Notice was given to them and hence they are aggrieved by such amalgamation.

Decision : Appeal dismissed.

Reason : The learned Counsel for the Respondents rightly submitted that with such Affidavits executed by the Appellants in May, 2017, on record, it is clear and apparent that the Appellants had knowledge. The Appellants clearly had knowledge and information regarding the scheme of amalgamation of these Companies and had given their No Objections, even if they relate to Appellant No.1 in capacity of Director of Lakshmi Car Zone Limited. We are not impressed by the arguments on behalf of the Appellants that they had different capacity as the 100% shareholders of the transferor Company No.1 which had entered into the Share Purchase Agreement and thus in that capacity Notice should have been given to them and their objections or no objections should have been taken. At the time of arguments, Counsel for the Appellants accepted that Diary No.4167 shows that the audited balance sheet (Page – 42) as available was till 31.03.2016 and the Share Purchase Agreement was of subsequent date of 04.07.2016. Although it is argued that the Share Purchase Agreement being subsequent, the Auditors may not have known about the same and so did not refer, we find from the certified copy of record of proceedings before NCLT, Chennai filed with Diary No.4167 that the Official Liquidator in his Report para – 6 noted that the CA did record that there was change in management in the month of August, 2016 in respect of transferor Company No.1. Para – 4 of the Report of Official Liquidator shows that both the transferor Companies were wholly owned subsidiaries of transferee Company.

What appears is that after the Appellants executed the SPA, they handed over their shares and admitted that they had resigned as Directors on 01.01.2017. In fact, the Appellants even approved the balance sheet of the transferor Company No.1, as on 31st March, 2016 by signing the same on 31.08.2016 as can be seen from Page – 66 of Diary No.4167 (Volume – 1). What appears after going through such documents is that the Appellants were clearly aware of the proceedings relating to the scheme of amalgamation and had no difficulties initially but it appears that, as their transaction based on SPA landed in difficulties and so, now they want to raise grievances to the scheme of amalgamation on the plea that Notice to them also was necessary.

Going through the material on record, we do not find that there is any substance in the grievance raised by the Appellants. Dispute relating to SPA is before Arbitration and Transferee Company is facing it. If Appellants had difficulty, they never went before NCLT to raise Objections although they knew about the amalgamation process going on. This being so, we are proceeding to reject both the Appeals.

INDUSTRIAL CREDIT AND INVESTMENT CORPORATION OF INDIA LTD.

v.

M/S. SRINIVAS AGENCIES & ORS [SC]

Civil Appeal Nos. 5082-85 of 1989

A.M Ahmadi & B.L. Hansaria, JJ. [Decided on 22/02/1996]

Equivalent citations: 1996 SCC (4) 165; JT 1996 (5) 405; 1996 SCALE (2) 774; (1996) 86 Comp Cas 255.

Companies Act, 1956 – Winding up – Rights of secured creditors – Approaching civil court for realisation-power of company court to permit the continuance of proceedings or to transfer the proceedings to itself – Law explained.

Brief facts :

The extent of right of secured creditors to realize their debts from the assets of a company which is under winding-up or has been wound up, by approaching fora other than the company court, was required to be spelt out in these appeals. The Supreme Court was called upon to decide as to when a pending suit or proceeding relating to realization of the debts by such a secured creditor should be transferred to itself by a company court seized with the winding-up proceeding.

The foundational premise of the aforesaid points is that a secured creditor stands outside the winding-up proceeding and under the law he can proceed to realize his security without the leave of the winding-up court, if by the time he initiated the action the company has not beer wound up. This view has been holding field ever since a three-Judge bench decision of this Court in M.K. Ranganathan v. Government of Madras, 1955 (2) SCR 374.

Decision : Appeals disposed of.

Reason :

The real bone of contention is as to when (i) leave of the winding-up court should be granted to a secured creditor to proceed with the suit after an order of winding-up has been made; and (ii) when should a winding-up court transfer to itself any suit or proceeding by or against the company during the pendency of the winding-up proceeding.

The aforesaid questions arise because a secured creditor who has initiated a suit or proceeding in a civil court is interested in realization of his debt only, whereas the company court looks after the interest of all the creditors; so too, the workmen’s dues, which rank *pari passu* with debts due to secured creditors.

We have duly applied our mind to the rival contentions. It is no doubt correct that the interest of the secured creditor, who has taken recourse to an independent proceeding to realise his debt has to be protected; but it is apparent this cannot be done at the cost of other secured creditors. To preserve the integrity of one secured creditor, another secured creditor cannot be discredited - his integrity has to be of equal concern. It may, however, be that in a particular case the secured creditor who has approached the civil court happens to be one who has lent huge amount, or be one who is the main secured creditor. In such a situation, on approach being made by such creditor, we have no doubt that company court would duly take note of this fact and should like to grant leave required by sub- section (1) of section 446; and by the same token refuse to transfer the proceeding to his court. This is not to say that in all cases where the proceedings have been initiated by the main secured creditor, the company court would grant leave. Such would depend on the circumstances of each case. But, if the position be that the secured creditor who had approached the civil court is one amongst many similar creditors, it may be that the company court feels that to take care of the interest of other secured creditors, either the relief of leave does not deserve to be granted or that the proceeding is required to be transferred to it for disposal. It may be pointed out that sections 529 and 529A of the Act do contain provisions in so far as the priority of secured creditor›s claim is concerned. Of course, the company court would not transfer the proceeding to it merely because of its convenience ignoring the difficulties which may have to be faced by the secured creditor, who may be at a place far away from the seat of the company court. The need to protect the company from unnecessary litigation and cost have, however, to be borne in mind by the company court.

We are, therefore, of the view that the approach to be adopted in this regard by the company court does not deserve to be put in a straight jacket formula. The discretion to be exercised in this regard has to depend on the facts and circumstances of each case. While exercising this power we have no doubt that the company court would also bear in mind the rationale behind the enactment of Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, to which reference has made above. We make the same observation regarding the terms which a company court should like to impose while granting leave. It need not be stated that the terms to be imposed have to be reasonable, which would, of course, vary from case to case According to us, such an approach, would maintain the integrity of that secured creditor who had approached the civil court or desires to do so, and would take care of the interest of other secured creditors as well which the company court is duty bound to do. The company court shall also apprise itself about the fact whether dues of workmen are outstanding; if so, extent of the same It would be seen whether after the assets of the company are allowed to be used to satisfy the debt of the secured creditor, it would be possible to satisfy the workmen's dues *pari passu*.

The appeals and transfer cases stand disposed of with these observations, leaving the company court to pass appropriate orders in the concerned matters in the light of what has been stated by us.

MONTREAUX RESORTS (P) LTD & ORS

v.

ASCOT HOTELS & RESORTS LTD & ORS [NCLAT]

Company Appeal (AT) No.220 of 2017

S.J. Mukhopadhaya & Balvinder Singh. [Decided on 02/11/2018]

Companies Act, 2013 – Sections 241 – Oppression & mismanagement – Several intricate issues settled and explained by NCLAT.

Brief facts :

The appellant company M/s Montreux Resort was incorporated, inte-ralia, with one of the objects to develop a Holiday Resort at Kasauli. In terms of business arrangement, it was proposed that 2nd respondent would infuse investment for developing the project and would be a majority shareholder. Respondent No.2 to 4 were inducted as Directors. It is alleged that Respondent No.2 further allotted shares to his wife and 4 daughters i.e. Respondents No.5-8, in an attempt to fraudulently usurp majority control of the appellant company under the garb of increasing its capital. It is further alleged that the 2nd Respondent, during his tenure as the Director of the 1st Appellant got sale deeds of various pieces of land parcels executed in favour of 1st Respondent or his nominees instead of getting it executed directly in favour of 1st Appellant. It is also alleged that 2nd Respondent being a majority stake holder in the 1st Respondent has set up competing business with that 1st Appellant, breaching the fiduciary relationship and the trust reposed in him by the appellants.

Therefore, appellants had filed Company Petition before the National Company Law Tribunal (hereinafter referred to as the Tribunal) accusing 1st respondent of oppression and mismanagement. After hearing the parties, the Tribunal dismissed the petition. Being aggrieved by the said order of the Tribunal the appellants have preferred this appeal.

Decision : Appeal allowed.

Reason : We have heard the learned counsel appearing on behalf of both the parties and perused the record.

The appellants argued that they have not made any claim that they are the shareholders of the 1st Respondent and it is not their claim. This is also the position pinpointed by the counsel for the respondent. The appellants argued that they are not required to be shareholders of 1st Respondent, as it is not 1st respondent whose affairs were alleged to have been mismanaged or conducted oppressively. It has been argued that the appellants agitating oppression and mismanagement of affairs of 'x' company must be shareholder of that 'x' company, not of company 'y' and further argued at the highest, 1st Respondent could have been stripped from the array of respondents instead of dismissing the petition. We have given a thoughtful consideration on this issue and it would have to be examined whether 1st Respondent is a necessary party or not and if so the appellants (original petitioners) would have been directed to make suitable amendments. In the light of it we do not find that the dismissal of company petition at the preliminary stage on this would be justified and at best 1st Respondent could only be deleted from the arrays of the parties which also we have to reach a conclusion after some examination.

The other issue on which the company petition was dismissed raised in this appeal that No Board Resolution authorising representation of appellant company was presented. On this issue the appellants argued that No Board Resolution is required to be shown by shareholders of a Company claiming to act in the name of that company, on the principle of derivative rights to act for and/or on behalf of, and/or in the name of the company. It has been further argued that at the highest appellants (original petitioners) could have been directed that the company shall not be allowed to be represented until such time a Board Resolution was presented or it could have been directed to stand stripped from the array of appellants. We are, therefore, of the opinion that the appellants (original petitioners) should have been given time to produce the authority to represent the company or it could have been directed to stand stripped from the arrays of the appellants. Further 2nd to 4th appellants have also an independent right to move the application for oppression and mismanagement against their interest even if they are representing the company. Therefore, the dismissal of the petition that they do not have a Board Resolution etc. would be a partial truth only which should not amount to denial of right of a shareholder to move an application for oppression and mismanagement.

The other issue raised by the Respondents was that the appellants are not shareholders of the appellant company. On the other hand, the appellants have stated that they are the shareholders of the appellant company on affidavit, therefore, the Tribunal would have directed the appellants to present the proof of their shareholding during the course of hearing and then should have come to the conclusion whether the appellants are shareholders of the appellant company or not. In view of the above observations, we set aside the impugned order.

S. AHAMED MEERAN

v.

RONNY GEORGE & ORS [NCLAT]

Company Appeal (AT) No. 162 of 2018

S.J. Mukhopadhaya & A. I. S. Cheema. [Decided on 02/11/2018]

Companies Act, 2013 – Sections 241 & 244 – Eligibility criteria to petition the Tribunal – Grant of waiver to maintain application – Whether correctly granted – Held ,No.

Brief facts :

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

Decision : Appeal allowed.

Reason : In the present case, the 1st Respondent tried to argue that he is also a less than 10% shareholder but that cannot be held to be an exceptional ground to grant waiver. From the shareholding pattern in the 2nd Respondent Company - 'Professional International Couriers Private Limited' as on 31.03.2018, it is clear that except two members all the member are individually eligible to maintain application under Section 241-242 having more than 10% of the share of the company. It is not necessary that they will have to join with one or other member to maintain their petition.

In *'Cyrus Investment Pvt. Ltd. & Anr. V.Tata Sons Ltd. & Ors., 2017 SCC OnLine NCLAT 261*, this Appellate Tribunal noticed the shareholding pattern and taking into consideration the fact that majority of the shareholders having less than 10% of the shareholding, except 2 got more than 10% and that the Appellant 'Cyrus Investment Pvt. Ltd.' has invested about Rs.1,00,000 Crore in 'Tata Sons Ltd.' out of the total investment of Rs.6,00,000 Crore, held that the Appellant of the said case namely 'Cyrus Investment Pvt. Ltd.' has made out an exceptional case to maintain a petition for waiver under Proviso to Sub-section (1) of Section 244 of the Companies Act, 2013.

In Another Case 'S. Ahamed Meeran Vs. Ronny George & Ors.', Company Appeal (AT) No. 161 of 2018 (CA/121/2017), which relates to another Group Company, this Appellate Tribunal by judgment dated 2nd November, 2018 having noticed the shareholding pattern that majority of them had less than 10% shares held that justified waiver has been granted by the Tribunal and refused to interfere with the impugned order.

The present case of the 1st Respondent 'Ronny George' is not only different but a reversal case where majority of the shareholders have more than 10% of shareholding except two who are less than 10% shareholding. Therefore, it cannot be held that the 1st Respondent has made out a case of exceptional circumstances for grant of waiver to maintain an application under Section 241- 242 on such ground. This apart, no exceptional circumstance has been shown by the Tribunal to grant waiver. The factors recorded by NCLT in Para 17 of the impugned order are no grounds to treat them as exceptional circumstances keeping in view our Judgment in the matter of *'Cyrus Investment Pvt. Ltd. & Anr. Versus Tata Sons Ltd. & Ors.' (Supra).*

In view of the aforesaid fact, the impugned order of Tribunal being based on wrong presumptions of fact and law and as the1st Respondent has failed to make out a case for waiver, the said order is set aside. We hold that the petition under Section 241 and 242 preferred by 1st Respondent (Petitioner) before the Tribunal in respect to 2nd Respondent Company – 'Professional International Couriers Private Limited' is not maintainable and to be dismissed. The appeal is allowed with aforesaid observations.

NOTES

2

Securities Laws

NSE- DARK FIBRE CO-LOCATION CASE

NSE Co-location Facility

Under the NSE co-location facility, trading members can place their servers in the exchange's data centre, where they get faster access to the price feed, helping in swift execution of trades. The NSE's co-location facility provides access to brokers for a cost to execute trades faster.

NSE Co-location: Case in Brief

In NSE – Dark Fibre case, the Noticees (herein referred to the group of individuals to whom notice were issued by SEBI, unless the context specifies otherwise) have been alleged to have followed unfair conduct while allowing an unauthorized service provider i.e. Sampark Infotainment Private Limited ("Sampark") to provide the P2P connectivity to only a few selective registered stock brokers so as to help them gain undue advantage of latency vis- a- vis other stock brokers.

> ***Explanation: A dark fibre or unlit fibre****, with respect to network connectivity, refers to an already laid but unused/ passive optical fibre, which is not connected to any active electronics/equipment's and does not have other data flowing through it and is available for use in fibre-optic communication.*

Further, it has been alleged that by permitting an unauthorized service provider i.e. "Sampark", to provide the dark fiber connectivity for certain stock brokers, the Noticees allowed these stock brokers to gain more bandwidth and lower latency for their data transmission and again by allowing "Sampark" to continue the service even after it was found that "Sampark" did not possess the necessary license from the Department of Telecommunications to provide the required P2P connectivity to the brokers of NSE.

Also, the Noticees have allegedly acted in violation of NSE circular in which, NSE had authorized only four (04) specific Telecom Service Providers from whom its brokers could avail the P2P connectivity.

The Noticees allegedly being the Director and/or KMP of NSE can be held liable thus, the Show Cause Notice issued to the Noticees in the present proceedings broadly cover the following points/issues:

- NSE allowed Sampark to lay down a P2P connectivity,
- By allowing Sampark to provide the P2P connectivity to stock broker, despite not having the authorised licence for the same, NSE has acted in violation of its own circular no. NSE /MEM/12985 dated August 31, 2009 which states to inform all the Trading Members about the introduction of co-location services, to facilitate better use of DMA and ALGO trading.
- Preferential treatment granted to certain stock brokers by NSE in accessing its Co-location facility to install P2P connectivity while refusing the request of some others.

Note: Companies which have Infrastructure Provider Category – I registration, can provide assets such as Dark Fibres, etc. on lease / rent / sale basis to the licensed providers of Telecom Services having license under Section 4 of Indian Telegraph Act, 1885, on a mutually agreed terms and conditions.

Detailed Background

In NSE – Dark Fibre, the Securities and Exchange Board of India ("SEBI") received complaints alleging various irregularities in respect of Co-location facility provided by NSE. To deal with the same, a Cross Functional Team of SEBI officials was constituted to undertake a preliminary fact finding with respect to various irregularities alleged in these complaints.

Subsequently, another complaint was received which alleged inter alia, that certain stock brokers were permitted to avail of Point to Point ("P2P") dark fibre connectivity from "Sampark", a non-empanelled service provider and the P2P connectivity provided by "Sampark" conferred a latency advantage to a few brokers which resulted in substantial increase in their turnover during the period April-August, 2015.

Based upon the preliminary findings on the above complaints, a common Show Cause Notices was issued to a number of entities including the Noticees covered in the instant proceedings, inter alia alleging that :-

- NSE system architecture allowed the Tick–by-Tick ("TBT") price information to be disseminated sequentially in the order in which the stock brokers were connected/logged-into the server. However, multiple TBT servers at NSE have experienced varied load and have started at different points of time. Further, the back-up servers were allowed to be accessed by certain stock brokers(s) as load on such servers was low.
- The above set-up enabled 'first-to-connect' stock brokers to receive data ahead of others and thus, they were able to react to the information earlier than the rest of the stock brokers.
- Differential access in the form of 'dark fibre' was given to a certain brokering firms/ members at NSE, especially to connect across NSE and BSE co-location facilities at least 4-5 months ahead of other members.

In the Show Cause Notice, the Noticees were called upon to explain as to why direction under Section 11(1), 11(2) (a), 11(2)(j) and 11B of Securities and Exchange Board of India Act, 1992 ("SEBI Act") should not be issued to them for acting in breach of the code of ethics prescribed in regulations 26(2) of SEBI (Stock Exchanges and Clearing Corporations) Regulation, 2012 ("SECC Regulations").

A detail investigation into the complaint was carried out by SEBI to find out possible violation of provisions of SEBI Act, Securities Contracts (Regulation) Act, 1956 ("SCR Act") and/ or the Rules and the Regulations made there-under such as SECC Regulations and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations").

Investigation so conducted by SEBI revealed various irregularities in addition to the preliminary findings cited above and accordingly another show cause Notice was issued to different entities/ persons for violations of different provisions of SEBI Act, SECC Regulations and PFUTP Regulations by them. It is observed that NSE allowed Sampark Infotainment Private Limited to provide lease lines in NSEs co-location facility despite not being on authorized service provider of NSE. NSE has acted in contradiction to its own policy by allowing an unauthorized service provider to lay dark fibre/ lease line.

In view of the above, it has been alleged that the Noticees covered in the present proceedings who were Directors/KMPs for discharging various functions at NSE, failed to act in a manner to ensure fairness, openness, transparency and to provide fair, equal, unrestricted and transparent access to its co-location facilities and trade data etc., to all market participants in conformity with the SECC Regulations. Consequently, it was alleged that the Noticees have not complied with the Code of conduct specified under Regulation 26(2), of the SECC Regulations read with SEBI Master Circular Dated December 31, 2010.

Directors/KMP Roles and Responsibilities

To providing equal, fair and transparent access to trade data by the stock exchanges to persons in the securities market is one of the underlying unassailable principles, which is embodied in the SCRA as well as in the regulations framed thereunder, more particularly in regulation 41(2) of SECC Regulations.

Regulation 41(2) of SECC Regulations provide that "the recognised Clearing Corporation and recognised Stock Exchange shall ensure equal, unrestricted, transparent and fair access to all persons without any bias towards its associates and related entities."

The fundamental principle of corporate law i.e the obligation to comply with the abovementioned principle of equality and fair access as enshrined in the SECC Regulations rigorously applies to the Directors, management and Key Managerial Persons (KMP) of the stock exchanges.

Further, regulation 26 (1) of SECC specifically casts such onus on the Directors of the stock exchange by requiring them to abide by the Code of Conduct specified under Part-A of Schedule-II of SECC Regulations.

Regulation 26(2) additionally requires the Directors and KMPs to abide by the Code of Ethics specified under Part-B of Schedule-II of SECC Regulations.

The provisions contained in clause V (b) of the Code of Conduct, affirm that every Director shall endeavour to analyse and administer the stock exchange with professional competence, fairness, impartiality, efficiency and effectiveness. Therefore, a comprehensive understanding of the SECC Regulations and the Code of Conduct and Code of Ethics prescribed thereunder for Directors and KMPs explicitly makes it imperative to "establish a minimum level of business/ professional ethics to be followed by these Directors and KMPs, toward establishing a fair and transparent market place."

SECC Regulations cast an omnibus duty on the stock exchange, its Directors and/or KMPs to abide by the fundamental principle of providing equal, fair and transparent access to all the market participants and not to resort to granting favour to any select market participants at the cost of interest of other participants or to indulge in any acts of discrimination while dealing with market participants.

It has been noted that while granting permission to the stock brokers for the purpose of establishing P2P connectivity from its Co-location facility with the help of "Sampark", NSE has adopted a discriminatory approach towards large number of other stock brokers, by allowing "Sampark" services to be availed by only a few selected stock brokers.

Under this circumstances, it has been alleged that NSE has not acted in a fair and equitable manner while dealing with its members and also by allowing a selected few market participants to avail the dark fiber services of "Sampark", NSE has indulged in a practice of differential and discriminatory treatment vis- a- vis its stock brokers and has promoted preferential treatment to some of the members, at the cost of large number of other stock brokers.

Submission by Noticees

The Noticees have stated that the Dark fibre team was not reporting to them at any point of time during their tenure as employees or consultants of NSE. Therefore, the Noticees did not have any role in relation to either allowing the 'Sampark' to lay down the dark fibre line so as to provide P2P connectivity between Co-location facility of NSE and Co-location center of BSE or in facilitating brokers to avail the service of 'Sampark'.

Further, show cause notices were issued based on the complaints received and some preliminary observation thereon by SEBI. There is no specific evidence available on record pointing out the liability of the Noticees. There is no independent evidence available which could indicate the involvement of Noticees in allowing "Sampark" to establish P2P connectivity from Co-location facility of NSE to Co-location center of BSE.

It has further been submitted that the functional reporting of the Co-location team was with the business development team and none of the Noticees was part of the business development team at the relevant point of time. As per the Noticees, during the relevant period of time, none of them was in-charge of the Co-location facility at NSE. They have also not participated in any discussions, verbal or written, relating to laying of the dark fibre by 'Sampark'.

SEBI Observations

The replies and submissions of the Noticees have been carefully perused and their explanations and arguments have been considered by SEBI. On perusal of the Show Cause Notice, the materials available on record and the submissions made by the Noticees, SEBI observed that the allegations pertaining to the involvement of the Noticees have been made only because of their association in some capacities with NSE during the relevant period of time. Since, it is the liability of a Director and/or KMP for breaches, if any, ought to be determined by taking into consideration, the specific functions entrusted to such Directors or KMPs by virtue of their position or designation in the organisation.

Therefore, it is an admitted position that none of the Noticees was occupying the position of a Director or KMP in NSE, when 'Sampark' was allowed to lay down dark fibre lines to establish P2P connectivity between the two stock exchanges for a few selected stock brokers during the relevant period i.e. April – July 2015.

During this period, when "Sampark" was allowed to install dark fibre connectivity in the Co-location facility of NSE, the Noticees were not working /employed with NSE either in the capacity of a Director or as a KMP. Thus, from the records, SEBI did not find any evidence or any material that establishes or even remotely indicates any role played by any of the Noticees as far as establishment of P2P connectivity by 'Sampark' is concerned. The allegations have been made on the presumption that the Noticees were holding the post of KMP.

It is further observed that, the available records do not indicate any role played by the Noticees in permitting "Sampark" to either lay down the dark fibre optical lines or to continue with the services despite the fact that "Sampark" did not possess the desired eligibility to provide such services.

Conclusion

In the above high profile NSE Co-location case, SEBI exonerated the Noticees (nine current and former officials of NSE) as they could not be held responsible for any misconduct or non compliance in dark fibre issue and hence, disposed off proceedings initiated against the Noticees.

References

Order dated January 16, 2020 in the matter of NSE- Dark Fibre. Detailed order is available at *https://www.sebi.gov.in/enforcement/orders/jan-2020/order-dated-january-16-2020-in-the-matter-of-nse-dark-fibre_45694.html*

SECURITIES APPELLATE TRIBUNAL, MUMBAI BENCH

Dr. Uppal Devinder Kumar

v.

Securities and Exchange Board of India

JUSTICE TARUN AGARWALA, PRESIDING OFFICER
DR. C.K.G. NAIR, MEMBER
AND JUSTICE M.T. JOSHI, JUDICIAL MEMBER

APPEAL NO. 220 OF 2017

SEPTEMBER 25, 2019

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

The question referred can be enumerated and summarized as follow:

1. Whether thus, SEBI was not justified in holding that appellant had sponsored or carried out CIS specially when SEBI had specifically recorded that month-wise mobilization of companies was not available.

2. Whether thus, impugned order passed by SEBI imposing penalty upon appellant was not justified.

BRIEF FACTS

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

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

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

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

HELD

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

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

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

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

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

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

Conclusion

Thus, no penalty could be imposed upon the appellant. In view of the aforesaid the impugned order passed by, SEBI cannot be sustained and is quashed. The appeal is allowed.

PLEDGING SHARES WITH NBFC

[Bajaj Finance Limited v. SEBI [SAT], Appeal (L) No. 585 of 2019,Dr. C.K.G. Nair & M.T. Joshi, [Decided on 03/12/ 2019]

Introduction

Bajaj Finance Limited ("Appellant"), a Non-Banking Financial Company ('NBFC') aggrieved by the interim order of the Securities and Exchange Board of India ('SEBI') dated November 22, 2019 in the matter of M/s. Karvy Stock Broking Ltd. ('Karvy') has filed an appeal. Appellant is particularly aggrieved by direction no. (iv) as mentioned in the order, ***which prohibited transfer of pledged shares by Karvy to the Appellant. The transfer of securities from Karvy shall be permitted only to the respective beneficial owner who has paid in full against these securities, under supervision of NSE.***

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

Brief Facts

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

ADJUDICATING OFFICER, SEBI

v.

BHAVESH PABARI [SC]

Civil Appeal No(s).11311 of 2013 with connected appeals

Ranjan Gogoi, Deepak Gupta & Sanjeev Khanna, JJ. [Decided on 28/02/2019]

SEBI Act – Section 15J read with sections 15A to H – Powers of adjudicating officer in levying penalty – Supreme Court clarifies law.

Brief facts:

Two primary questions, in a way interconnected, have been referred by the Referral judgment and order dated 14th March 2016 passed in Siddharth Chaturvedi Vs. Securities and Exchange Board of India (2016) 12 SCC 119. The questions referred can be enumerated and summarized as follows:

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

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

Decision & Reasoning :

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

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

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

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

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

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

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

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

PVP GLOBAL VENTURES PVT LTD

v.

SEBI [SAT]

Appeal No. 451 of 2018 with batch of connected appeals

Tarun Agarwala, Dr. C.K.G. Nair & M.T. Joshi. [Decided on 12/04/2019]

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

Brief facts

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

Decision: Appeals dismissed.

Reason

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

This Tribunal in *Dushyant N. Dalal & Anr.* v. *SEBI* decided on March 10, 2017 (Appeal No. 41 of 2014) which judgment was affirmed by the Supreme Court reported in 2017 SCC OnLine SC 1188, after considering the provision of Section 28A of SEBI Act read with Section 220 of the Income Tax Act held that the liability to pay interest under Section 28A read with Section 220 is automatic and arises by operation of law.

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

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

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

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

THERM FLOW ENGINEERS PVT. LTD.

v.

SEBI [SAT]

Appeal No.349 of 2018

Tarun Agarwala, Dr. C. K. G. Nair, M.T. Joshi. [Decided on 01/05/2019]

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

Brief facts

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

Decision: Appeal partly allowed.

Reason

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

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

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

Order

1. The appeal is hereby partly allowed. The order of the WTM directing the appellant to make public announcement to acquire shares of the target company and to pay interest at the rate of 10 percent as detailed in the order is hereby set aside.

2. Instead it is hereby directed that the appellant shall transfer 2000 shares in open market within a period of 4 weeks and shall deposit an amount of Rs.3, 60,300 in the Investor Protection and Education Fund established by SEBI within a period of six weeks from the date of this order.
3. In default, the amount shall carry interest at the rate of 12 percent p.a. from the date of this order till the date of deposit.

GRD SECURITIES LTD.

v.

NATIONAL STOCK EXCHANGE & ANR [SAT]

Appeal No. 285 of 2018

Tarun Agarwalla, C.K.G. Nair & M.T. Joshi. [Decided on 10/06/2019]

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

Brief facts:

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

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

Decision: Appeal partly allowed.

Reason:

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

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

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

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

SEBI

v.

KISHORE R.AJMERA [SC]

Civil Appeal No. 2818 of 2008 with Civil Appeal No.8769 of 2012, Civil Appeal No.6719 of 2013, Civil Appeal No.252 of 2014 & Civil Appeal No.282 of 2014.

Ranjan Gogoi & Prafulla C. Pant, JJ. [Decided on 23/02/2016]

SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations and SEBI (Stock-Brokers and Sub-Brokers) Regulations – Penalty for matching trade – Whether tenable – Held, No – Penalty for synchronised trade and circular trade – Whether tenable - Held, Yes.

Brief facts:

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

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

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

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

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

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

Reason:

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

Insofar as C.A. No.2818 of 2008 SEBI v. Kishore R. Ajmera is concerned the proved facts are that (i) Both the clients are known to each other and were related entities;(ii) This fact was also known to the sub-broker and the respondent-broker;(iii) The clients through the sub-broker had engaged in mutual buy and sell trades in the scrip in question, volume of which trade was significant, keeping in mind that the scrip was an illiquid scrip.

Apart from the above there is no other material to hold either lack of vigilance or bona fides on the part of the sub-broker so as to make respondent-broker liable. An irresistible or irreversible inference of negligence/lack of due care etc., in our considered view, is not established even on proof of the primary facts alleged so as to make respondent-broker liable under the Conduct Regulations, 1992 as has been held in the order of the Whole Time Member, SEBI which, according to us, was rightly reversed in appeal by the Securities Appellate Tribunal.

This will take us to the second and third category of cases i.e. M/s Ess Intermediaries Pvt. Ltd., M/s Rajesh N. Jhaveri and M/s Rajendra Jayantilal Shah [second category] and M/s Monarch Networth Capital Limited (earlier known as Networth Stock Broking Limited) [third category]. In these cases the volume of trading in the illiquid scrips in question was huge, the extent being set out hereinabove. Coupled with the aforesaid fact, what has been alleged and reasonably established, is that buy and sell orders in respect of the transactions were made within a span of 0 to 60 seconds. While the said fact by itself i.e. proximity of time between the buy and sell orders may not be conclusive in an isolated case such an event in a situation where there is a huge volume of trading can reasonably point to some kind of a fraudulent/manipulative exercise with prior meeting of minds. Such meeting of minds so as to attract the liability of the broker/sub-broker may be between the broker/ sub-broker and the client or it could be between the two brokers/sub-brokers engaged in the buy and sell transactions. When over a period of time such transactions had been made between the same set of brokers or a group of brokers a conclusion can be reasonably reached that there is a concerted effort on the part of the concerned brokers to indulge in synchronized trades the consequence of which is large volumes of fictitious trading resulting in the unnatural rise in hiking the price/value of the scrip(s).

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

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

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

IN RE: NEESA TECHNOLOGIES LIMITED & ORS [SEBI]

WTM/PS/46/WRO/JUN/2016

Prashant Saran, Whole Time Member [Decided on 02/06/2016]

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

Brief facts:

On the basis of the material available on record i.e., correspondences exchanged between SEBI and NTL; complaint and additional documents received by SEBI and information obtained from the Ministry of Corporate Affairs' website i.e. MCA 21 Portal and IDBI Trusteeship Services Limited (ITSL), SEBI vide an ex-parte interim order dated June 03, 2015 (hereinafter referred to as 'interim order'), *prima facie* observed that Neesa Technologies Limited (hereinafter referred to as the 'Company' or 'NTL') had engaged in fund mobilizing activity from the public, through its offer and issue of Non-Convertible Debentures (hereinafter referred to as 'NCDs') and violated the provisions of Sections 56, 60, 73 and 117C of the Companies Act, 1956 and the provisions of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (hereinafter referred to as the 'ILDS Regulations').

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

Decision : NCD's to be refunded with interest.

Reason:

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

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

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

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

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

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

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

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

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

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

SEBI

v.

OPEE STOCK-LINK LTD & ANR [SC]

Civil Appeal No. 2252 of 2010 with Civil Appeal Nos. 2285, 2286, 2294 & 2303 of 2010

Anil R. Dave & R. Banumathi, JJ. [Decided on 11/07/2016]

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

Brief facts:

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

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

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

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

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

Decision: Appeals allowed.

Reason:

We do not find any substance in the submissions made on behalf of the respondents to the effect that the price of the shares of Jet Airways India Ltd. paid by the respondents to the demat account holders was reasonable. Even according to the submission made by the learned counsel, value of the said shares, during the said period varied from Rs.1172/- to Rs. 1339/- and in such circumstances, nobody would believe that all the demat account holders would sell their shares at the same rate, viz. Rs.1170/- per share to the respondents. These transactions are, therefore, definitely of fishy nature.

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

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

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

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

SEBI

v.

BURREN ENERGY INDIA LTD& ANR [SC]

Civil Appeal No. 361 of 2007

Ranjan Gogoi & N.V. Ramana, JJ. [Decided on 02/12/2016]

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

Brief facts:

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

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

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

Decision: Appeal allowed.

Reason:

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

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

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

If the offer period can be triggered of by an understanding that is yet to fructify into an agreement, we do not see how the same can be said not to have commenced/started from the date of a concluded agreement i.e. share purchase agreement as in the present case. On the view that we have taken we will have to hold that the learned Tribunal was incorrect in reaching its impugned conclusions and in reversing the order of the Adjudicating Officer. Consequently the order of the learned Tribunal is set aside and that of the Adjudicating Officer is restored. The penalty awarded by the Adjudicating Officer by order dated 25th August, 2006 shall be deposited in the manner directed within two months from today.

NATIONAL SECURITIES DEPOSITORY LTD

v.

SECURITIES AND EXCHANGE BOARD OF INDIA [(2017) 5 SCC 517]

Civil Appeal No. 5173 of 2006 with Civil Appeal No. 186 of 2007.

Pinaki Chandra Ghose & R.F.Nariman, JJ. [Decided on 07/03/2017]

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

Brief facts:

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

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

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

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

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

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

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

Reason:

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

We have now to determine on a conspectus of the authorities as to whether Section 15T refers only to quasi-judicial orders, quite apart from the construction placed upon the Section earlier in this judgment. SEBI is an expert body created by the Act which, as has been stated earlier, has administrative, legislative and quasi-judicial functions.

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

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

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

LAUREL ENERGETICS PVT LTD.

v.

SEBI [SC]

Civil Appeal No.5675 of 2017 with Civil Appeal No.5694 of 2017

R.F. Nariman & S.K. Kaul, JJ. [Decided on 13/07/2017]

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

Brief facts:

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

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

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

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

From the aforesaid order, the Appellate Tribunal dismissed an appeal on 5th April, 2017, holding that Regulation

10 did not exempt the acquisitions of 2014, as a result of which the price payable per share necessarily became Rs.6.30 instead of Rs.3.20 per share. The correctness of the aforesaid order is now before the Supreme Court.

Issue:

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

Decision: Appeal dismissed.

Reason :

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

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

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

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

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

Having gone through the appellate tribunal’s judgment, we find that, for the reasons stated by us, we cannot fault its conclusion and accordingly the appeals stand dismissed.

DUSHYANT N DALAL

v.

SEBI [SC]

Civil Appeal No. 5677 of 2017 with batch of appeals

R.F. Nariman & S.K.Kaul, JJ. [Decided on 04/10/2017]

SEBI Act, 1992 – Section 28A – Recovery of interest on penalty and disgorgement of unlawful gains cases – Whether interest could be recovered – Held, Yes.

Brief facts :

The present appeals raise an interesting question under Section 28Aof the Securities and Exchange Board of India Act, 1992 (SEBI Act), namely, as to whether interest can be recovered on orders of penalty issued under the Act and/or orders of disgorgement of unlawful gains, when the said amounts have remained unpaid. In the penalty cases, it is SEBI who is before us as appellant, whereas in the disgorgement case, it is private individuals who are before us.

C.A. 5677 of 2017 is the disgorgement case. In this case while awarding interest for the years 2005 to 2009, WTM had not expressly awarded any future interest and that this was done deliberately inasmuch as if the amount of Rs. 6 crores was not paid within 45 days from the date of the order, the consequence was specified as being debarment for a further period of 7 years which was so severe that further future interest was deliberately not found necessary to be awarded. SAT upheld that interest is payable. Aggrieved broker appealed against this order.

Insofar as the penalty orders are concerned, the delinquent persons paid the penalty but did not pay the interest charged under section 28A. SAT held that the imposition of interest has to operate prospectively and set aside that portion of the order levying interest. It is against this part of the order that SEBI has appealed.

Decision : Appeals allowed.

Reason :

We are of the view that an examination of the Interest Act, 1978 would clearly establish that interest can be granted in equity for causes of action from the date on which such cause of action arose till the date of institution of proceedings.

It is clear, therefore, that the Interest Act of 1978 would enable Tribunals such as the SAT to award interest from the date on which the cause of action arose till the date of commencement of proceedings for recovery of such interest in equity. The present is a case where interest would be payable in equity for the reason that all penalties collected by SEBI would be credited to the Consolidated Fund under Section 15JA of the SEBI Act. There is no greater equity than such money being used for public purposes. Deprivation of the use of such money would, therefore, sound in equity. This being the case, it is clear that, despite the fact that Section 28A belongs to the realm of procedural law and would ordinarily be retrospective, when it seeks to levy interest, which belongs to the realm of substantive law, the Tribunal is correct in stating that such interest would be chargeable under Section 28A read with Section 220(2) of the Income Tax Act only prospectively. However, since it has not the same 2014 Amendment which introduced Section 28A, with effect from 18.7.2013, also introduced Section 15JB retrospectively, with effect from 20.4.2007. This is a positive indication that Section 28A was intended only to have prospective application. It must be taken into account the Interest Act, 1978 at all, we set aside the Tribunal's findings that no interest could be charged from the date on which penalty became due. The Civil Appeals 10410- 10412 of 2017 are allowed insofar as the penalty cases are concerned.

However, going to the facts in Civil Appeal No. 5677 of 2017, we observe that the same whole time member of SEBI has passed similar orders in other cases where all the aforesaid orders show that the said whole-time member was fully cognizant of his power to grant future interest which he did in all the aforesaid cases. In fact, in the last mentioned case, whose facts are very similar to the facts of the present case, the order was passed "without prejudice to SEBI's right to enforce disgorgement along with further interest till actual payment is made." The words "along with further interest till actual payment is made" are conspicuous by their absence in the order dated 21.7.2009. In the circumstances, if there is default in payment of Rs. 6 crores within the stipulated time, no future interest is payable inasmuch as a much severer penalty of being debarred from the market for 7 years was instead imposed. We have noticed how the appellant has, in fact, suffered the aforesaid debarment and how he made payment of Rs. 6 crores on 6.1.2014 from the sale of shares. The SAT was incorrect in stating that the order dated 21.7.2009 contained an obligation to pay interest at the rate of 12% per annum on the unlawful gain of Rs.4.05 crores till payment. We, therefore, allow C.A. 5677 of 2017 and set aside the SAT's judgment in this appeal as well.

RATNABALI CAPITAL MARKETS LTD

v.

SEBI & ORS [SC]

Civil Appeal No. 4945 of 2007 with Civil Appeal No. 3674 of 2007

S. H. Kapadia & B. Sudershan Reddy, JJ. [Decided on 23/10/2007]

Equivalent citations: (2007) 140 Comp Cas 677; (2008) 82 CLA 266.

SEBI Act,1992 read with section 391 of the Companies Act, 1956 – Merger of companies dealing in stocks and shares – Benefit of payment of registration fees – Merged entity operated in derivative market – Whether fee exemption available – Held, No.

Brief facts :

The short question that arises for our consideration in these civil appeals filed is whether the appellants were entitled to the benefit of fee continuity under para 7 of Circular dated 30.9.2002 issued by SEBI.

In 1995 Ratnabali Securities Ltd. ("RSL") was registered as a broker with National Stock Exchange ("NSE") and had paid initial registration fees for the first year and thereafter it had paid fees on turnover basis for subsequent four years. No further fees on turnover basis was paid by RSL under the said Regulations for continuation of registration except a fee of rupees five thousand for a block of next five years. RSL operated in cash and spot market.

SEBI adopted recommendations of Gupta Committee stating that no company whose net worth was less than rupees three crores would be allowed to trade as a broker in the derivative segment of the Stock Exchange. To meet this net worth criteria, RSL and RCML merged under the Scheme of Amalgamation sanctioned by the order of the Calcutta High Court. Under that order, all rights, licences, assets, properties and registrations of RSL stood transferred by operation of law to RCML.

On 30.9.2002 SEBI issued a circular stating that in the case of merger carried out as a result of compulsion of law, fees would not have to be paid afresh by a transferee entity provided that majority shareholders of transferor entity (RSL) continues to hold majority shareholding in the transferee entity (RCML).

After the merger of RSL with RCML, a demand was made by SEBI for registration fees on turnover basis. According to RCML, when the above two companies stood merged on 9.2.2000, which merger was approved by Calcutta High Court, all assets and liabilities, including benefits in the form of licences obtained by RSL, stood transferred by operation of law in the hands of RCML. According to RCML, the concept of merger constitutes transfer by operation of law. According to RCML, the concept of merger operates on account of legal compulsion or compulsion in law. According to RCML, in the case of merger, which takes place after complying with the procedure prescribed by Sections 391 to 394 of the Companies Act, duly approved by the High Court, the assets and liabilities of the transferor company comes into the hands of RCML on account of legal compulsion. There is nothing voluntary in such cases of merger. According to RCML, the registration fees once paid by RSL should be given the benefit of continuity vide para 7 of Circular dated 30.9.2002 issued by SEBI. In other words, RCML now claims that it is entitled to the benefit of registration fees which RSL had paid from time to time as a broker in the cash and spot market. This claim of RCML has been rejected by the impugned decision. Hence, this civil appeal.

Decision : Appeals dismissed.

Reason :

We repeat that there is a dichotomy between functions of the stock exchange and the functions performed by SEBI. The licences given by the stock exchange enables the stock- broker to buy and sell securities on the exchange whereas the regulation of the trade per se is done by SEBI for which it is entitled to charge requisite registration fees.

In the present case, we have no doubt in our mind that, on merger of the above two companies, a new entity stood emerged/constituted, which was given a right to operate in the derivative segment and, therefore, it had to pay fresh registration fees on the turnover basis. That new entity (RCML) was not entitled to the benefit of continuity of fees deposited earlier by RSL, which got merged into RCML. According to RCML, the two companies were required to merge because of acceptance of recommendations of Gupta Committee by SEBI. According to the report of the said Committee, if a broker desires to enter derivative market then he is required to have a net worth of at least rupees three crores. According to RCML, the said requirement constituted a pre-condition for entering the derivative market. According to RCML, this pre-condition of possessing net worth of rupees three crores constituted compulsion of law, which made RSL merged into RCML and, in the circumstances, the appellants were entitled to the benefit of Circular dated 30.9.2002 issued by SEBI. Under the said circular, mergers/amalgamations carried out as a result of compulsion of law stood excluded from payment of fees afresh.

We do not find any merit in the above arguments. Two points arises for determination in the present case. They are interconnected. Firstly, whether RCML, on amalgamation, duly sanctioned by Calcutta High Court, was entitled to claim the benefit of Fee Continuity and, secondly, whether the demand made by SEBI imposing fresh turnover/registration fees on the merged entity (RCML) constituted an act in derogation of the provisions of any other law for the time being in force in terms of section 32 of the said 1992 Act.

We make it clear that it would depend on the facts of each case whether a scheme under section 391 could be construed as an alternative to liquidation. It is not in every matter that the scheme under section 391 would constitute an alternative to liquidation. Therefore, it would depend on the facts of each case. Under circular dated 30.9.2002 what SEBI intends to say is that fresh turnover/registration fees would not be payable by a company which goes for amalgamation/merger as an alternative to liquidation. In other words, if the company's net worth is negative and if that company is on the brink of liquidation, which compels it to go for a scheme under section 391, then in such cases SEBI exempts such companies from payment of fresh turnover/ registration fees. Such is not the case herein. On the contrary, in the present case, amalgamation has taken place in order to increase the "reserves" component of the net worth. The difference between the amount recorded as fresh share capital issued by the transferee company on amalgamation and the amount of share capital of the transferor company to be reflected in the Revenue Reserve(s) of the transferee company was the sole object behind amalgamation. Therefore, SEBI was right, in the present case, in refusing to give the benefit of exemption to the transferee companies. These transferee companies were not on the brink of liquidation. The scheme under section 391 was not an alternative to liquidation. Hence, the transferee companies were not entitled to claim the benefit of Circular dated 30.9.2002. Further, we do not find any merit in the argument that the demand raised by SEBI for fresh turnover/registration fees constituted an act derogatory of the provisions of the Companies Act. In our view, on the emergence of a new entity, which was entitled to operate in derivative market, SEBI was certainly entitled to regulate its trade in the derivative segment for which it was entitled to charge requisite fees. Under the 1992 Act, a duty is cast on SEBI to protect the interest of investors in securities and to regulate the trade in securities on the Stock Exchange. Such Regulation is not a part of the Companies Act. Derivative market is highly speculative. It carries lot of risks. In fact, history shows that many investors and traders lost money earlier when badla transactions were prevalent. Derivative market, to a certain extent, replaces badla. The point to be noted is that Gupta Committee recommended the net worth of rupees three crores in order to secure the interests of investors and traders who regularly play in derivatives. In the circumstances, it cannot be said that raising of an amount of rupees three crores as net worth constituted legal compulsion for RSL to merge into RCML. As stated above, the Government decided to vest SEBI with statutory powers in order to deal effectively with all matters relating to capital market. The main function of SEBI is to regulate the trade which takes place in the securities market and for that purpose it is entitled to charge registration fees. In the present case, we are concerned with merger of two distinct independent companies. In the present case, we are not concerned with merger of firms. In the present case, we are not concerned with joint ventures. After the merger of RSL into RCML a new entity has emerged. In the circumstances, SEBI was entitled to charge the stipulated fees.

PENTA GOLD LIMITED

v.

NATIONAL STOCK EXCHANGE [SAT]

Appeal No. 116 of 2018

J.P. Devadhar & C.K.G. Nair. [Decided on 17/04/2018]

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 – Regulation 106P – Discharge of underwriter's obligation – Done through procuring applications from third parties – Whether permissible – Held, Yes.

Brief facts :

Where a public issue is undersubscribed, whether, the underwriters to the public issue are entitled to discharge their obligation contained in regulation 106P of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations' for short) by procuring applications from third parties is the basic question raised in this appeal.

Decision : Appeal allowed.

Reason :

In the present case, the underwriting agreement executed on September 26, 2017 in accordance with the model underwriting agreement prescribed by SEBI specifically records that the underwriters agree to underwrite and/or procure subscription for the issue of shares in case the issue is undersubscribed. Admittedly the said underwriting agreement was vetted by NSE before the public issue was opened.

Thus on one hand, regulation 106P(2) of ICDR Regulations require the merchant banker to underwrite at least 15% of the issue size on his own account and further regulation 106P(4) provides that if the other underwriters or the nominated investors fail to fulfil their obligation then the merchant banker shall fulfil their underwriting obligations. On the other hand, the model underwriting agreement prescribed by SEBI in the year 1993 which continues to be in force till date permits the underwriters to procure applications from the investors to subscribe to the unsubscribed shares if the issue is undersubscribed. The model underwriting agreement prescribed by SEBI further provides that in the event of failure by the underwriters to subscribe to the shares, the issuer company shall be free to make arrangement with one or more persons to subscribe to such shares without prejudice to the rights of the issuer company to take such measures and proceedings as may be available to it against the underwriters including the right to claim damage for any loss suffered by the company by reason of failure on part of the underwriters to subscribe to the shares.

In the present case the underwriting agreement executed by and between the appellant and the underwriters was in accordance with the model underwriting agreement prescribed by SEBI and the said underwriting agreement was admittedly vetted by NSE. Having vetted the underwriting agreement executed by the appellant company and the underwriters which is in consonance with the model underwriting agreement prescribed by SEBI, NSE is not justified in rejecting the basis of allotment submitted by the appellant on ground that the underwriters have failed to subscribe to the unsubscribed shares as contemplated under regulation 106P of the ICDR Regulations.

In these circumstances, in the interest of investors and securities market, we dispose of the appeal by passing the following order:-

(a) The impugned communication of NSE dated April 6, 2018 is quashed and set aside;

(b) Appellant is at liberty to ascertain from the underwriters within 3 days from today as to whether they are ready and willing to discharge their obligation set out in regulation 106P of the ICDR Regulations and intimate the same to the NSE immediately thereafter.

(c) If the underwriters express their inability to discharge their obligation under the ICDR Regulations, then the appellant company be permitted to take into consideration the shares subscribed by the 8 investors and proceed to complete the public issue process.

(d) If the underwriters agree to discharge their obligation set out in the ICDR Regulations, then, in the peculiar facts of present case, no action need be taken against the underwriters.

Before concluding we deem it proper to bring to the notice of SEBI that there is no clarity between the ICDR Regulations and the model underwriting agreement prescribed by SEBI in the year 1993 (which is still in operation) in relation to the obligations to be discharged by the underwriters. Therefore, it would be just and proper that SEBI addresses itself on the above issue expeditiously and ensure that there is clarity in relation to the obligations to be discharged by the underwriters.

BOI SHAREHOLDING LIMITED

v.

SEBI [SAT]

Appeal No. 256 of 2017

J.P. Devadhar & C.K.G. Nair. [Decided on 17/04/2018]

SEBI Act – Section 15HB – Delay in implementation of anti-money laundering policy – Imposition of penalty of Rs. 40 lakhs – Whether tenable – Penalty reduced.

Brief facts :

This appeal is filed challenging the order of the Adjudicating Officer (‘AO’ for short) of SEBI whereby a penalty of Rs.40 Lakh has been imposed on the appellant under Section 15HB of SEBI Act read with Section 19G of the Depositories Act, 1996 for delayed implementation of the SEBI Circulars / Guidelines relating to anti-money laundering (AML) policy.

Decision : Quantum of penalty reduced.

Reason :

We have perused the records produced before us. In the Master Circular on AML/CFT dated December 31, 2010 issued by SEBI we note that all the registered intermediaries were directed to comply with the requirements contained therein on an immediate basis. Similarly, subsequent amendments made on January 24, 2013 also required adoption on immediate basis though the Circular dated March 12, 2014 does not specify the implementation time schedule. However, following the spirit of the basic policy it has to be presumed that implementation has to be done at the earliest. From the evidence produced before us it is clear that the appellant has implemented all the requirements of the AML/CFT policy as specified in the SEBI Circulars though belatedly. We have also noted that for delayed implementation / violation SEBI has imposed varying penalty including no penalty in some cases. However, under the relevant Sections i.e. 15HB of SEBI Act read with Section 19G of the Depositories Act, 1996 the penalty imposable for each violation shall not be less than Rs. 1 Lakh which may extend to 1 Crore rupees. Accordingly, the minimum penalty imposable in case of six violations committed by the appellant should be in tune with the statutory provisions relating to the penalty.

Given the fact that, though belatedly, the appellant has implemented all the required policies and procedures on AML/CFT policy as stipulated under the various circulars of SEBI and by the penalty precedent set by SEBI itself we are of the view that the penalty of Rs.40 Lakh imposed on the appellant is excessive. We, therefore, reduce the amount of penalty imposed on the appellant to Rs.6 Lakh.

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FEMA and Other Economic and Business Legislations

EMAAR MGF LAND LIMITED

v.

AFTAB SINGH [SC]

Review Petition (C) Nos. 2629-2630 of 2018 IN Civil Appeal Nos.23512-23513 of 2017

Ashok Bhushan & U U Lalit, JJ. [Decided on 10/12/2018]

Consumer Protection Act, 1985 read with Arbitration and Conciliation Act, 1996 – Flat buyer's agreement – Consumer dispute – Agreement contained arbitration clause – Purchaser filed consumer complaint – Whether liable to be referred to arbitration – Held, No.

Brief facts:

A Buyer's agreement was entered into between the appellant and the respondent. In the Buyer's agreement, there was an arbitration clause providing for settlement of disputes between parties under the 1996 Act. On 27.07.2015, the respondent filed a Consumer Complaint before the NCDRC against the appellant praying for delivery of possession of the built up Villa, adjustment of excess payment and compensation for deficiency of service. Appellant filed an application under Section 8 of the 1996 Act for referring the matter to arbitration for and on behalf of the appellant. The single judge referred the issue to the larger Bench and the larger bench dismissed the application on the ground that the consumer dispute is not arbitrable. On appeal, The Supreme Court also concurred with the National commission but the appellant sought a review of the judgement under the present review petition.

Decision: Petition dismissed.

Reason:

This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above.

Not only the proceedings of Consumer Protection Act, 1986 are special proceedings which were required to be continued under the Act despite an arbitration agreement, there are large number of other fields where an arbitration agreement can either stop or stultify the proceedings. For example, any action of a party, omission or commission of a person which amounts to an offence has to be examined by a criminal court and no amount of agreement between the parties shall be relevant for the said case. For example, there may be a commercial agreement between two parties that all issues pertaining to transaction are to be decided by arbitration as per arbitration clause in the agreement. In case where a cheque is dishonoured by one party in transaction, despite the arbitration agreement party aggrieved has to approach the criminal court. Similarly, there are several issues which are non- arbitrable. There can be prohibition both express or implied for not deciding a dispute on the basis of an arbitration agreement.

We have already noted several categories of cases, which are not arbitrable. While referring to judgment of this Court in Booz Allen & Hamilton Inc v. SBI Home Finace ltd & Ors (2011) 5 SCC 532 those principles have again been reiterated by this Court in A. Ayyasamy v .A. Paramasivam & Ors (2016) 10 SCC 386.

The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in National Seeds Corporation Limited(supra) is no more a good law cannot be accepted. The words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall entitle to look into various facets of the arbitration agreement, subject matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning.

We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/ special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration. We, thus, do not find that any error has been committed by the NCDRC.

CARLSBERG BREWERIES A/S

v.

SOM DISTILLERIES AND BREWERIES LTD [Del-FB]

C.S. (COMM) 690/2018 & I.A. No.11166/2018

S. Ravindra Bhat, Hima Kohli, Vipin Sanghi, Valmiki. J. Mehta & Vibhu Bakhru, JJ. [Decided on 14/12/2018]

Infringement of design and passing off of the plaintiff's trade dress – Composite suit filed – Whether maintainable – Held, Yes.

Brief facts:

The reference to this larger, Special Bench of five judges, was occasioned by the detailed speaking order of a learned Single Judge, in the present suit, which sought the reliefs of infringement of design and a decree for injunction against passing off. The learned Single Judge, by the order dated 02.05.2017, referred the question as on the whether the decision in Mohan Lal v. Sona Paint, 2013 (55) PTC 61 (Del) (FB) - hereafter "Mohan Lal" on the aspect of maintainability of a composite suit in relation to infringement of a registered design and for passing off, where the parties to the proceedings are the same needs re-consideration by a larger bench in the light of Order II Rule 3 CPC, which permits joinder of causes of action. The decision in Mohan Lal (supra) was by a Full Bench of three judges, which held that "infringement of design" and "passing off" cannot be combined in a composite suit.

The present suit (out of which this reference arose) was filed, complaining of infringement of a registered design as well as passing off (of the plaintiff's trade dress) in respect of the bottle and overall get up of the "Carslberg" mark. The defendant objected to the frame of the suit, pointing out that per Mohan Lal (supra), the two claims (for passing off and reliefs regarding design infringement) could not be combined in one suit. The single judge analysed parties" submissions and felt that the issue decided in Mohan Lal (supra) required a second look; he therefore, referred the matter for appropriate orders to the Chief Justice.

Decision: Composite suit is maintainable.

Reason:

The issue therefore which is required to be squarely addressed by this Full Bench is as to whether there would arise common questions of facts and law in the two causes of action of infringement of registered design and passing off so that these two causes of action can be joined under Order II Rule 3 CPC, and which is an issue which was not decided either in Dabur India Limited v. K.R. Industries, (2008) 10 SCC 595 or in the case of Dhodha House v. S.K. Maingi, (2006) 9 SCC 41. Before however we go on this aspect, the general law with respect to joinder of causes of action under Order II Rule 3 CPC can be usefully referred to and as held in the case of Prem Lata Nahata & Anr v. Chandi Prasad Sikaria, (2007) 2 SCC 551.

The ratio of the judgment in the case of Prem Lata Nahata & Anr (supra) is that with respect to entitlement or otherwise of joinder of causes of action, the question to be asked is as to whether the evidence to be led in the two causes of action would be common, and if the substantial evidence of two causes of action would be common, then there can be joinder of causes of action under Order II Rule 3 CPC. Putting it negatively if the evidence is for the most part different of the two causes of action, then there cannot be joinder of causes of action.

Therefore since the crux of the matter for joinder of causes of action under Order II Rule 3 CPC is to see if common questions of law and facts arise in two separate causes of action and whereupon there can be joinder of causes of action under Order II Rule 3 CPC in one composite suit which joins two causes of action, therefore we now proceed to examine as to whether there would exist common questions of law and fact in the two causes of action of infringement of registered design and passing off. For so deciding first it would be necessary to refer to the meaning of cause of action.

Let us now accordingly examine as to what are the bundle of facts, or the bundle of material facts, in the two causes of action of infringement of a registered design and passing off, and as to whether there would arise common questions of law and fact in the two bundle of facts of the two causes of action of infringement of registered design and passing off.

To decide the issue of existence of common questions of law and fact in the two causes of action of infringement of a registered design and passing off, at this stage it would be instructive to refer to a judgment passed by the Division Bench of this Court in the case of M/s. Jay Industries v. M/s. Nakson Industries, 1992 SCC Online Del 84; AIR 1992 Del 338 because this judgment lays down the ratio for the issue at hand as to when there can be joinder of causes of action.

A reading of the observations made in the judgment of M/s. Jay Industries (supra) shows that the Division Bench was of the view that two different causes of action in fact can be a part of the same transaction. The same transaction is that transaction of the selling of goods by the defendant by packing and labelling them in such a manner which infringes the trademark and the copyright of the plaintiff. In such facts there would be common bundle of facts in the two causes of action of infringement of trademark and copyright, because there is a single and same transaction of sale of the goods by the defendant of its goods in cartons under being similar to the cartons in which the plaintiff sells its goods and which as per plaintiff results in violation of his rights in his registered trade mark and copyright in his label.

The Division Bench has concluded that since the transaction of sale by the defendant in effect results in the infringement of both the trademark rights and violation of copyright of the plaintiff, therefore under Order II Rule 3 CPC it is permissible to join the two causes of action against the same defendant and that in fact in such cases the joinder of causes of action would result in avoidance of multiplicity of proceedings.

It is therefore seen that once a transaction of sale which is impugned by the plaintiff results in infringement of two rights of the plaintiff of infringement of plaintiff's trademark and violation of plaintiff's copyright, since there would be common questions of law and facts because it is the transaction of sale with its bundles of facts which is impugned being common in both the causes of action, therefore joinder of causes of action can take place under Order II Rule 3 CPC, and ought to be done because this will avoid multiplicity of proceedings.

The reference is answered by holding that one composite suit can be filed by a plaintiff against one defendant by joining two causes of action, one of infringement of the registered design of the plaintiff and the second of the defendant passing off its goods as that of the plaintiff on account of the goods of the defendant being fraudulent or obvious imitation i.e. identical or deceptively similar, to the goods of the plaintiff.

HINDUSTAN INFRASTRUCTURE CONSTRUCTION CORPORATION LTD.

v.

M/S. R.S. WOODS INTERNATIONAL & ORS [DEL]

C.R.P. No.19/2018 & C.M. Nos.4276-4277/2018

Vinod Goel, J. [Decided on 13/12/2018]

Indian Partnership Act, 1932 read with Negotiable instruments Act, 1881 – Dishonour of cheque – Civil suit filed by unregistered partnership firm – Whether suit is barred under section 69(2) – Held, No.

Brief facts:

In the suit filed by the Respondent, the petitioners/defendants Nos. 2 & 3 have filed an application under Order VII Rule 11 CPC for rejection of the plaint on the ground that the suit is barred under Section 69 (2) of the Indian Partnership Act, 1932 (‘the Act’).

By the impugned order, the learned ADJ dismissed the application of the petitioners by relying upon a judgment of the Kerala High Court in Afsal Baker v. Maya Printers 2016 SCC OnLine Ker 29914. The petitioners have challenged the above judgement in the present revision petition.

Decision: Petition dismissed.

Reason:

The above provision i.e. Section 69 deals with the effect of non-registration of a partnership firm and bars filing of a suit by or on behalf of such firm to enforce a right arising from a contract by or on behalf of such firm against any third party.

Admittedly the respondents/plaintiff has filed a Civil Suit for recovery of Rs.24,41,967/- against the petitioners/defendant on account of dishonour of cheques bearing no.482933 dated 18.11.2013 for Rs.5 lacs, no.482934 dated 19.11.2013 for Rs.5 lacs, no.482935 dated 20.11.2013 for Rs.5 lacs , no.709846 dated 18.11.2013 for Rs.5 lacs and no.709845 dated 20.11.2013 for Rs.4,41,967/-, total of which comes to Rs.24,41,967/-, which is the suit amount.

The Kerala High Court in Afzal Baker (surpa) observed as under:- “10. In the instant case, as noticed above, by virtue of Section 30 and 37 of the Negotiable Instruments Act, on the dishonour of a cheque, the statute creates a liability on the drawer, apart from the general law of contracts. The right to sue on the contract is available and open to the party. However, apart from that, the statute creates a liability as against the drawer of the instrument. If the suit is on the original cause of action based on the original contract between the parties, there is no doubt, the suit would be hit by Section 69 (2) of the Indian Partnership Act. But, in the instant case, what is sought to be enforced is the liability created under the Negotiable Instruments Act. It is not a case where suit is filed on the original cause of action by producing the cheques as a piece of evidence to prove the liability under the original contract. Here, the suit itself is laid on the instrument. A reading of the plaint leaves no room for doubt regarding that. The bar under Section 69(2) of the Indian Partnership Act would apply only where the suit is sought to be laid on a contract and not in a case where statutory right/liability is sought to be enforced. In the instant case, the suit being purely based on the liability under Section 30 and 37 of the Negotiable Instruments Act, it is a suit based on statutory liability dehors the contract between the parties. The suit cannot be held to be barred under Section 69(2) of the Indian Partnership Act.”

In the instant case, the respondent is seeking enforcement of the liability of the petitioners created under

Section 30 and 37 of the Negotiable Instruments Act, 1881 as the cause of action for the plaint is based on the dishonour of the said cheques. Since, the suit is not based on any contract between the parties, the bar under Section 69 (2) of the Act would not apply.

In view of this, I do not find any illegality or infirmity in the impugned order. Accordingly, the revision petition along with application, being C.M. No.4276/2018, is dismissed with no order as to costs.

M/S. SICAGEN INDIA LTD

v.

MAHINDRA VADINENI & ORS [SC]

Criminal Appeal Nos. 26-27 of 2019 (Arising out of SLP (Crl.) Nos. 6789-6790 of 2015)

R Banumathi & Indira Banerjee, JJ. [Decided on 08/01/2019]

Negotiable Instruments Act, 1881 – Section 138 – Dishonour of cheque – Complaint filed on the basis of second notice – Whether maintainable – Held, Yes.

Brief facts:

Case of the appellant-complainant is that they had business dealings with the respondents and in the course of business dealings, the respondents had issued three cheques, which when presented for collection were dishonoured and returned with the endorsement "insufficient funds". The appellant-complainant had issued first notice to the respondent(s) on 31.08.2009 demanding the repayment of the amount. The cheques were again presented and returned with the endorsement "insufficient funds". The appellant had issued a statutory notice on 25.01.2010 to the respondent(s). Since the cheque amount was not being paid, the appellant-complainant had filed the complaint under Section 138 of the Negotiable Instruments Act based on the second statutory notice dated 25.01.2010.

The respondent(s)-accused filed petition before the High Court under Section 482 Cr.P.C. seeking to quash the criminal complaint filed by the appellant-complainant on the ground that the complaint was not filed based on the first statutory notice dated 31.08.2009 and the complaint filed based on the second statutory notice dated 25.01.2010 is not maintainable. The High Court quashed the complaint by holding that "the amount has been specifically mentioned in the first notice and, thereafter, the complainant himself has postponed the matter and issued the second notice on 25.01.2010 and the complaint filed on the same cause of action was not maintainable.

Decision: Appeal allowed.

Reason:

The issue involved whether the prosecution based upon second or successive dishonour of the cheque is permissible or not, is no longer res integra. In Sadanandan's case [(1998) 6 SCC 514] it was held that while second and successive presentation of the cheque is legally permissible so long as such presentation is within the period of six months or the validity of the cheque whichever is earlier, the second or subsequent dishonour of the cheque would not entitle the holder/payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. The correctness of the decision in Sadanandan's case was doubted and referred to the larger bench.

Three-Judge Bench of this Court in MSR Leathers v. S. Palaniappan & Anr 2013 ((1) SCC 177 held that there is nothing in the provisions of Section 138 of the Act that forbids the holder of the Cheque to make successive presentation of the cheque and institute the criminal complaint based on the second or successive dishonour of the cheque on its presentation.

In the present case as pointed out earlier that cheques were presented twice and notices were issued on 31.08.2009 and 25.01.2010. Applying the ratio of MSR Leathers (supra) the complaint filed based on the second statutory notice is not barred and the High Court, in our view, ought not to have quashed the criminal complaint and the impugned judgment is liable to be set aside.

The Complaint CC No. 4029 of 2010 before the Court of XVIII, Metropolitan Magistrate at Saidapet, Chennai is restored to the file of the Trial Court and the Trial Court shall proceed with the matter in accordance with law after affording sufficient opportunity to both the parties.

UNION OF INDIA

v.

KHAITAN HOLDINGS (MAURITIUS) LTD & ORS [DEL]

CS (OS) 46/2019, I.As. 1235/2019 & 1238/2019

Prathiba M. Singh, J. [Decided on 29 /01/2019]

Arbitration under bilateral investment treaties – BIT between India and Mauritius – Investment in India by Mauritius entity – Dispute – Arbitration proceedings initiated under BIT by investor – Government of India sought anti-arbitration injunction – Whether grantable – Held, No.

Brief facts:

Arbitration as a means for resolution of disputes is well entrenched in most judicial systems. In the context of commercial arbitration, there are two types - domestic arbitration and international commercial arbitration. In all these disputes, minimum judicial interference in the conduct of arbitral proceedings is the norm. There is yet another species of arbitration which is the subject matter of the present case i.e., Arbitral proceedings under Bilateral Investment Treaties. While traditional arbitrations arise out of commercial contracts entered into between individuals and companies, arbitrations under BITs arise out of agreements signed between two sovereign nations. Under these agreements, each of the States, signatory to the Agreement agrees to provide Fair and Equitable Treatment to investors from the other State, as also extend protection against arbitrary, discriminatory and unfair practices. The investments made by investors of the State are to be safeguarded against any expropriation and remedies are also provided for adjudication of disputes through international dispute settlement mechanisms. The dispute settlement mechanisms can be triggered both by the aggrieved State as also an aggrieved investor from a State which is party to the Agreement, against the other State. Interference by domestic courts in arbitral proceedings that may be commenced under BITs is permissible but only in `compelling circumstances, in `rare cases. Courts are hesitant to interfere in the arbitral process once the Tribunal is constituted and is seized of the dispute.

The Union of India seeks an anti-arbitration injunction against the arbitral proceedings initiated by Defendant No.1 - M/s Khaitan Holdings (Mauritius) Ltd. a Mauritius based company, under the Agreement entered into between the Republic of India and the Republic of Mauritius for the Promotion and Protection of Investments (hereinafter “BIT agreement”).

Decision: Injunction refused.

Reason:

The genesis of the dispute, which has been encapsulated in the notice invoking arbitration is the judgement of the Supreme Court in CPIL (supra) of the Supreme Court by which the Supreme Court cancelled the licences granted to various companies including Loop Telecom. The judgment of the Supreme Court resulted in fresh recommendations being made by the Telecom Regulatory Authority of India, and thereafter an auction being conducted for allocation of the spectrum and award of licenses.

It can be seen that in the era of BIT agreements, even judgements of Courts could trigger investment disputes under the BITs resulting in enormous claims being raised against the Government. This is so because under public international law which primarily governs BIT agreements, the Articles of State Responsibility specifically provide that the conduct of any organ of the State can be called to question. The grounds on which the Republic of India seeks an anti-arbitration injunction are inter alia as under:

- That Khaitan Holdings is not a genuine investor due to the clear link and control by Sh. Ishwari Prasad Khaitan and Smt.Kiran Khaitan of both Khaitan Holdings (Mauritius) and Loop Telecom;
- That the BIT cannot be invoked by an entity, though incorporated in Mauritius, but is actually controlled by Indian citizens;
- That there has been no expropriation as due process has been followed and the decision to cancel the licences was rendered by the Supreme Court of India in public interest;
- That the entire foreign investment, being through the automatic route, was subject to Indian laws under the UASL;
- That Loop Telecom has already availed of its remedies against the cancellation of its licences under Indian law and hence rights under the BIT stand waived;
- Overlapping nature of the claims raised by Loop Telecom before TDSAT and Defendant no.1 in the arbitral proceedings;

All the above grounds, are those that can be that with and decided by the Arbitral Tribunal. The arbitration having been invoked in 2013 and the Tribunal having been constituted and being seized of the dispute, it is not for this Court to adjudicate on these issues. The above issues ought to be raised by the Republic of India before the Arbitral Tribunal, which under Article 21, would rule upon the same. The proceedings which are already underway cannot be termed as being oppressive, vexatious or an abuse of process at this stage. The prayer for adinterim relief seeking stay of the arbitral proceedings commenced by Khaitan Holdings under the BIT, is accordingly rejected, at this stage.

BIR SINGH

v.

MUKESH KUMAR [SC]

Criminal Appeal Nos.230-231 of 2019 arising out of (@ SLP (CRL) Nos. 9334-35 of 2018)

R Banumathi & I Banerjee, JJ. [Decided on 06/02/2019]

Negotiable Instruments Act,1882 – Section 138 & 139 – Issuance of cheque admitted by drawer – Objection raised that payee filled in the cheque and the cheque was given as security – Trial court and first appellate court convicted the drawer – High Court reversed the decision-whether correct – Held, No.

Brief facts:

The respondent-accused issued a cheque in the name of the appellant towards repayment of a “friendly loan” of Rs.15 lakhs advanced by the appellant-complainant to the respondent accused. On 11-4-2012, the appellant-complainant deposited the said cheque in his bank, but the cheque was returned unpaid with the endorsement “Insufficient Fund”. The appellant complainant again presented the cheque to his bank, but it was again returned unpaid with the remark “Insufficient Fund”.

The appellant-complainant filed a Criminal Complaint against the respondent-accused, where the Judicial Magistrate convicted the respondent-accused. On appeal by the accused, the Appellate Court upheld the conviction of the respondent accused and confirmed the compensation of Rs.15 lakhs directed to be paid to the appellant- complainant. The sentence of imprisonment was however reduced to six months from one year. The respondent-accused filed a Criminal Revision Petition in the High Court challenging the Judgment and order of the Appellate Court. The appellant- complainant also filed a Criminal Revision Petition challenging the reduction of the sentence from one year to six months.

By a common final Judgment and order, the High Court has reversed the concurrent factual findings of the Trial Court and the Appellate Court and acquitted the respondent, observing, inter alia, that there was fiduciary relationship between the appellant- complainant, an Income Tax practitioner, and the respondent- accused who was his client.

Decision: **Appeal allowed.**

Reason:

In passing the impugned judgment, the High Court misconstrued Section 139 of Negotiable Instruments Act, which mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.

[After referring to various judgements] The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion.

Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant-complainant, it may reasonably be presumed that the cheque was filled in by the appellant-complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent accused of the charge under Section 138 of the Negotiable Instruments Act.

ROHITBHAI J PATEL

v.

THE STATE OF GUJARAT [SC]

Criminal Appeal No. 508 of 2019 (Arising out of S L P (Crl.) 1883 of 2018)

A M Sapre & D Maheshwari, JJ. [Decided on 15/03/2019]

Negotiable Instruments Act – Section 138 &139 – Preseumption as to cheque drawn in favour of complainant – Yet trial court put the onus on the complainant to prove the liability – Whether correct – Held, No.

Brief facts:

This appeal is directed against the common judgment and order whereby, the High Court of Gujarat has reversed the respective judgment and orders as passed by the 8th Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Vadodara in 7 criminal cases pertaining to the offence of dishonour of 7 cheques in the sum of Rs. 3 lakhs each, as said to have been drawn by the accused-appellant in favour of the complainant-respondent No. 2. In the impugned judgment and order High Court has disapproved the acquittal of the accused-appellant and, while holding him guilty of the offence under Section 138 of the NI Act, has awarded him the punishment of simple imprisonment for a period of 1 year with fine to the extent of double the amount of cheque (i.e., a sum of Rs. 6 lakhs) with default stipulation of further imprisonment for a period of 1 year in each case; and, out of the amount payable as fine, the complainant-respondent No. 2 is ordered to be compensated to the tune of Rs. 5.5. Lakhs in each case.

Decision: Appeal dismissed.

Reason:

Having given anxious consideration to the rival submissions and having examined the record, we are clearly of the view that as regards conviction of the accused-appellant for the offence under Section 138 NI Act, the impugned judgment and order dated 08.01.2018 does not call for any interference but, on the facts and in the circumstances of this case, the punishment as awarded by the High Court deserves to be modified.

In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/ circumstances which could be of a reasonably probable defence.

Hereinabove, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier cheques in the rains though the office of the complainant being on the 8th floor had also been of irrelevant factors for consideration of a probable defence of the appellant.

On perusing the order of the Trial Court, it is noticed that the Trial Court proceeded to pass the order of acquittal on the mere ground of 'creation of doubt'. We are of the considered view that the Trial Court appears to have proceeded on a misplaced assumption that by mere denial or mere creation of doubt, the appellant had successfully rebutted the presumption as envisaged by Section 139 of the NI Act. In the scheme of the NI Act, mere creation of doubt is not sufficient.

The result of discussion in the foregoing paragraphs is that the major considerations on which the Trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the Trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the Trial Court and after examining the evidence on record as a whole, found that the findings of the Trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter. For what has been discussed hereinabove, the findings of the High Court convicting the accused-appellant deserves to be, and are, confirmed.

BHARAT BROADBAND NETWORK LTD.

v.

UNITED TELECOMS LTD [SC]

Civil Appeal No.3972 of 2019 (Arising out of S L P(C) No.1550 of 2018)

R.F. Nariman & Vineet Saran, JJ. [Decided on 16/04/2019]

Arbitration and Conciliation Act, 1996 – Section 12 – Appointment of arbitrator – Agreement provided for CMD as arbitrator – CMD disqualified and became ineligible to be appointed as arbitrator – Whether such disqualified person can appoint an arbitrator – Held, No.

Brief facts:

The Chairman & Managing Director of the appellant, had the right to appoint the arbitrator as provided in the arbitration clause in the purchase order dated 30/09/2014 (contract). Since disputes and differences arose between the parties, the respondent, by its letter dated 03.01.2017, invoked the aforesaid arbitration clause. The appellant's Chairman and Managing Director, by a letter dated 17.01.2017, nominated one Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen between the parties.

The Supreme Court, by its judgment in TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377 (rendered on 03.07.2017), held that since a Managing Director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be null and void.

The appellant therefore made an application to the sole arbitrator praying that since he (arbitrator) is de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. The application was rejected and on appeal High court also rejected the appeal stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. Hence the present appeal before the Supreme Court.

Decision: Appeal allowed.

Reason

From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub- section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such.

Under this provision, any prior agreement to the contrary is wiped out by the non- obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule.

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility", i.e., to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

We thus allow the appeals and set aside the impugned judgment. The mandate of Shri Khan having terminated, as he has become de jure unable to perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties.

ANJUM HUSSAIN & ORS

v.

INTELLICITY BUSINESS PARK PVT LTD & ORS [SC]

Civil Appeal No. 1676 of 2019

Arun Mishra & Uday Umesh Lalit, JJ. [Decided on 10/05/2019]

Consumer Protection Act,1986 – Section 12 – Class action by consumers – Delay in handing over possession of office/flats – All buyers filed a joint complaint before the NC – NC dismissed the case as not maintainable as class action – Whether correct – Held, No.

Brief facts:

The Appellant No.1 had booked an office space admeasuring about 440 sq. ft. in a project consisting of residential units, shops and offices launched by the respondent. The Builder – Buyer Agreement was executed between the Appellant No.1 and the respondent on 02.12.2013, where under the respondent was to deliver possession of the office unit within four years. Similar such Agreements were entered between the appellant nos.2 to 44 and the respondent in respect of various units from the same project.

Since the respondent had failed to honour its commitments of delivering possession in four years and as the project was still at the stage of excavation, consumer complaint Case No.2241 of 2018 was filed, as class action, by the appellants 1 to 44 seeking refund of the amounts paid by them to the respondent along with interest and compensation. The National Commission vide the impugned judgement/order concluded that the case could not be accepted as class action and dismissed the same. The dismissal of the case as class action is questioned in this appeal.

Decision: Appeal allowed.

Reason:

According to the National Commission, though all the appellants had a common grievance that the respondent had not delivered possession of the respective units booked by them and thus the respondent was deficient in rendering service, it was not shown how many of the allottees had booked the shops/commercial units solely for the purchase of earning their livelihood by way of self-employment. In Chairman, Tamil Nadu Housing Board, Madras v. T. N.Ganapathy (1990) 1 SCC 608 it was held by this Court that the persons who may be represented in a Suit under Order 1 Rule 8 of Civil Procedure Code need not have the same cause of action and all that is required for application of said provision is that the persons concerned must have common interest or common grievance. What is required is sameness of interest. Very same issue was dealt with by Full Bench of the National Commission in Ambrish Kumar Shukla and Ors. v. Ferrous Infrastructure Pvt. Ltd. [Consumer Case No.97 of 2016, decided on 07.10.2016]. The National Commission relied upon the decision of this Court in T.N. Housing Board (supra)

It was observed by this Court in T.N. Housing Board (supra) that the provision must receive an interpretation which would subserve the object for its enactment. It is in this light that the Full Bench of the National Commission held that oneness of the interest is akin to a common grievance against the same person.

However, the National Commission in the instant case, completely lost sight of the principles so clearly laid down in the decisions referred to above. In our view, the approach in the instant case was totally erroneous.

We, therefore, allow this appeal, set aside the Order under appeal. The application preferred by the appellants is held to be maintainable. Case No.2241 of 2018 is restored to the file of the National Commission and shall be proceeded with in accordance with law.

RESERVE BANK OF INDIA

v.

JAYANTILAL N. MISTRY [SC]

Transferred Case (Civil) No. 91 of 2015 (Arising out of Transfer Petition (Civil) No. 707 of 2012) along with batch of petitions

M.Y. Eqbal & C. Nagappan, JJ. [Decided on 16/12/2015]

Right to Information Act, 2005 – Section 8 – Exemptions from disclosure – Informants asked information as to investigation, audit, bad debts, FEMA violations etc. of various banks from RBI – RBI refused to furnish the same on the ground of information obtained from these banks on fiduciary relationship – Whether refusal tenable – Held, No.

Brief facts:

The main issue that arose for the consideration of the Court in these transferred cases was as to whether all the information sought for under the Right to Information Act, 2005 can be denied by the Reserve Bank of India and other Banks to the public at large on the ground of economic interest, commercial confidence, fiduciary relationship with other Bank on the one hand and the public interest on the other. If the answer to above question is in negative, then up to what extent the information can be provided under the 2005 Act.

The following information were sought by various respondents from the RBI:

- Details of the reports of pertaining to investigation and audit carried out by RBI, details of past 20 years' investigation with respect to cooperative banks.
- Details of the report sent by RBI to the Finance Minister with respect to FEMA violations committed by several commercial banks.
- Details of the inspection reports of apex cooperative banks.
- Details of the loans taken by the industrialists that have not been repaid, and he had asked about the names of the top defaulters who have not repaid their loans to public sector banks.
- Details of the show cause notices and fines imposed by the RBI on various banks. RBI had refused to provide the requested information on the ground that they are exempted from disclosure, and the applicants moved the CIC and got orders in favour of them which were being challenged by the RBI in various High courts. Ultimately all these appeals were transferred to the Supreme Court and the Supreme Court had decided the cases by passing a common order.

Decision: Appeals dismissed.

Reason:

We have extensively heard all the counsels appearing for the petitioner Banks and respondents and examined the law and the facts.

The information sought for by the respondents from the petitioner-Bank have been denied mainly on the ground that such information is exempted from disclosure under section 8 of the RTI Act.

Learned counsel appearing for the petitioner-Bank mainly relied upon Section 8(1) (e) of the RTI Act taking the stand that the Reserve Bank of India having fiduciary relationship with the other banks and that there is no reason to disclose such information as no larger public interest warrants such disclosure. The primary question therefore, is, whether the Reserve Bank of India has rightly refused to disclose information on the ground of its fiduciary relationship with the banks. [Court examined in detail the term 'fiduciary relationship' from various angles]

In the instant case, the RBI does not place itself in a fiduciary relationship with the Financial institutions (though, in word it puts itself to be in that position) because, the reports of the inspections, statements of the bank, information related to the business obtained by the RBI are not under the pretext of confidence or trust. In this case neither the RBI nor the Banks act in the interest of each other. By attaching an additional "fiduciary" label to the statutory duty, the Regulatory authorities have intentionally or unintentionally created an in terrorem effect.

RBI is a statutory body set up by the RBI Act as India's Central Bank. It is a statutory regulatory authority to oversee the functioning of the banks and the country's banking sector. RBI has been given powers to issue any direction to the banks in public interest, in the interest of banking policy and to secure proper management of a banking company. It has several other far- reaching statutory powers.

RBI is supposed to uphold public interest and not the interest of individual banks. RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty bound to comply with the provisions of the RTI Act and disclose the information sought by the respondents herein.

The baseless and unsubstantiated argument of the RBI that the disclosure would hurt the economic interest of the country is totally misconceived. In the impugned order, the CIC has given several reasons to state why the disclosure of the information sought by the respondents would hugely serve public interest, and non-disclosure would be significantly detrimental to public interest and not in the economic interest of India. RBI's argument that if people, who are sovereign, are made aware of the irregularities being committed by the banks then the country's economic security would be endangered, is not only absurd but is equally misconceived and baseless.

In the present case, we have to weigh between the public interest and fiduciary relationship (which is being shared between the RBI and the Banks). Since, RTI Act is enacted to empower the common people, the test to determine limits of Section 8 of RTI Act is whether giving information to the general public would be detrimental to the economic interests of the country? To what extent the public should be allowed to get information?

In the context of above questions, it had long since come to our attention that the Public Information Officers (PIO) under the guise of one of the exceptions given under Section 8 of RTI Act, have evaded the general public from getting their hands on the rightful information that they are entitled to.

And in this case the RBI and the Banks have sidestepped the General public's demand to give the requisite information on the pretext of "Fiduciary relationship" and "Economic Interest". This attitude of the RBI will only attract more suspicion and disbelief in them. RBI as a regulatory authority should work to make the Banks accountable to their actions.

Even if we were to consider that RBI and the Financial Institutions shared a "Fiduciary Relationship", Section 2(f) would still make the information shared between them to be accessible by the public. The facts reveal that Banks are trying to cover up their underhand actions, they are even more liable to be subjected to public scrutiny. We have surmised that many Financial Institutions have resorted to such acts which are neither clean nor transparent. The RBI in association with them has been trying to cover up their acts from public scrutiny. It is the responsibility of the RBI to take rigid action against those Banks which have been practicing disreputable business practices.

The ideal of 'Government by the people' makes it necessary that people have access to information on matters of public concern. The free flow of information about affairs of Government paves way for debate in public policy and fosters accountability in Government. It creates a condition for 'open governance' which is a foundation of democracy.

We have, therefore, given our anxious consideration to the matter and came to the conclusion that the Central Information Commissioner has passed the impugned orders giving valid reasons and the said orders, therefore, need no interference by this Court.

There is no merit in all these cases and hence they are dismissed.

GAUTAM KUNDU

v.

MANOJ KUMAR ASSISTANT DIRECTOR, DOE [SC]

Criminal Appeal No. 1706 of 2015 (Arising out of SLP (Crl.) No.6701 of 2015)

Pinaki Chandra Ghose & R.K. Agrawal, JJ. [Decided on 16/12/2015]

Prevention of Money Laundering Act, 2002 read with the Code of Criminal Procedure, 1973 and SEBI

Act, 1992 – Offence committed under section 3 of the PMLA – Bail sought under section 439 of the CRPC appellant floating as many as 27 companies – Monies collected through front company routed through these companies – Whether appellant entitled for bail – Held, No.

Brief facts:

This appeal, by special leave, is directed against the judgment and order passed by the High Court of Calcutta, whereby the High Court has rejected appellant's application for bail under Section 439 of the Code of Criminal Procedure, 1973. The appellant was arrested on 25.03.2015 in relation to an offence alleged to have been committed under Section 3 of the Prevention of Money Laundering Act, 2002, (hereinafter referred to as "PMLA"). The appellant is the Chairman of Rose Valley Real Estate Construction Ltd. (hereinafter referred to as the "Rose Valley"), a public company incorporated in the year 1999 and registered under the Companies Act, 1956. Certain non-convertible debentures were issued by the Rose Valley by 'private placement method.' No advertisements etc. were issued to the public. The said debentures were issued to the employees of the Company and to their friends and associates after fulfilling the formalities for private placement of debentures. Thus, the appellant collected money by issuing secured debentures by way of private placement in compliance with the guidelines issued by the Securities and Exchange Board of India from time to time. Further the appellant had floated as much as 27 companies and routed the monies collected by his front companies through these companies.

Decision: Appeal dismissed.

Reason:

We have heard the learned counsel for the parties. At this stage we refrained ourselves from deciding the questions tried to be raised at this stage since it is nothing but a bail application. We cannot forget that this case is relating to "Money Laundering" which we feel is a serious threat to the national economy and national interest. We cannot brush aside the fact that the schemes have been prepared in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequence to the members of the society.

We note that admittedly the complaint is filed against the appellant on the allegations of committing the offence punishable under Section 4 of the PMLA. The contention raised on behalf of the appellant that no offence under Section 24 of the SEBI Act is made out against the appellant, which is a scheduled offence under the PMLA, needs to be considered from the materials collected during the investigation by the respondents. There is no order as yet passed by a competent court of law, holding that no offence is made out against the appellant under Section 24 of the SEBI Act and it would be noteworthy that a criminal revision praying for quashing the proceedings initiated against the appellant under Section 24 of SEBI Act is still pending for hearing before the High Court. We have noted that Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. As mentioned earlier, Section 45 of the PMLA imposes two conditions for grant of bail, specified under the said Act. We have not missed the proviso to Section 45 of the said Act which indicates that the legislature has carved out an exception for grant of bail by a Special Court when any person is under the age of 16 years or is a woman or is a sick or infirm. Therefore, there is no doubt that the conditions laid down under Section 45A of the PMLA, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of bail to any person accused of committing offence punishable under Section 4 of the PMLA, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure.

We cannot brush aside the fact that the appellant floated as many as 27 companies to allure the investors to invest in their different companies on a promise of high returns and funds were collected from the public at large which were subsequently laundered in associated companies of Rose Valley Group and were used for purchasing moveable and immoveable properties. We have further noted that the High Court at the time of refusing the bail application, duly considered this fact and further considered the statement of the Assistant General Manager of RBI, Kolkata, seizure list, statements of directors of Rose Valley, statements of officer bearers of Rose Valley, statements of debenture trustees of Rose Valley, statements of debenture holders of Rose Valley, statements of AGM of Accounts of Rose Valley and statements of Regional Managers of Rose Valley for formation of opinion whether the appellant is involved in the offence of money laundering. In these circumstances, we do not find that the High Court has exercised its discretion capriciously or arbitrarily in the facts and circumstances of this case. We further note that the High Court has called for all the relevant papers and duly taken note of that and thereafter after satisfying its conscience, refused the bail. Therefore, we do not find that the High Court has committed any wrong in refusing bail in the given circumstances. Accordingly, we do not find any reason to interfere with the impugned order so passed by the High Court and the bail, as prayed before us, challenging the said order is refused. Consequently the appeal is dismissed.

KOTAK MAHINDRA BANK LTD.

v.

ANUJ KUMAR TYAGI [DEL]

RFA No. 56/2014

Rajiv Shakdher, J. [Decided on 17/12/2015]

Limitation Act, 1963 – Section 3 read with articles 55 and 113 – Grant of vehicle loan – Borrower failing to pay the EMIs – Suit filed by the bank – Trial court dismissed the suit as time barred without appreciating articles 55 and 113 – Whether the rejection of suit tenable – Held, No.

Brief facts:

The respondent had approached ICICI Bank Ltd. in July, 2007, for grant of credit facility of Rs.3.28 lacs to purchase a TATA INDICA Vehicle, which was granted. As per the loan agreement, the respondent was required to repay the sum borrowed, in 59 Equated Monthly Instalments (EMIs), amounting to Rs. 7544/- each. The first due date, as stipulated in the loan agreement, was 10.08.2007, with the date of maturity indicated as 10.06.2012. The repayment clause contained in the loan agreement provided that the due date would be the tenth day of each successive month. Additional security in the form of four post-dated cheques, was also given. The respondent also hypothecated the subject vehicle in favour of ICICI Bank Ltd., by executing an unattested deed of hypothecation. Furthermore, an irrevocable power of attorney was also executed in favour of ICICI Bank Ltd.

It appears that the loan account became irregular, as the respondent failed to adhere to the financial discipline in the payment of the EMIs. Since, the respondent, failed to regularize the account, a loan recall-cum- demand notice dated 26.06.2012 was issued to him, which was posted on 29.06.2012. By virtue of the said recallcum- demand notice, the loan agreement was terminated and the respondent was called upon to repay the entire outstanding amount, and handover possession of the subject vehicle. As, the respondent, failed to oblige, a suit for recovery was instituted against him. It is pertinent to note, that in the interregnum, ICICI Bank Ltd. had assigned the loan to an entity by the name of Asset Reconstruction Company (India) Ltd., which in turn, assigned the loan account, pertaining to the respondent vide assignment deed dated 31.12.2009, to the appellant herein.

The learned ADJ had, on a perusal of the statement of accounts (Ex. PW1/9) filed by the appellant, which is dated 31.10.2009, as per which the last transaction with the respondent took place on 11.08.2008, concluded that since, the suit was filed on 20.07.2012, it was “hopelessly” barred by limitation. Hence the present appeal.

Decision: Appeal allowed.

Reason:

To my mind, Article 55 could have possibly been made applicable, to this case as well, as the loan agreement had a tenure extending from 10.08.2007 till 10.06.2012, but for one aspect of the matter which I have adverted to in the following paragraph. In so far as Article 55 is concerned, the fact that that the respondent failed to adhere to the schedule of repayment, would not deprive the right of the appellant to treat each breach as a fresh cause of action. The last breach, quite clearly, in the instant case, would have occurred only in May-June, 2012, assuming the last instalment was to be adjusted by virtue of the respondent having paid an initial amount of Rs. 7544/- as an advance. The suit, admittedly, was instituted on 20.07.2012.

Having said so, there is, as stated above, another aspect of the matter, as regards this case, which is that, under the loan agreement, the appellant, in terms of clause 48, is conferred with the power, in an event of a default. Quite clearly, in terms of clause 48, the appellant had discretion to decide when to trigger the recall of loan upon occurrence of an event of default. The fact that EMIs were to be paid over a period spanning from 10.08.2007 till 10.06.2012, gave the appellant, under clause 48 the right to treat any of the defaulted EMI's (that is, after the due date for its payment had passed) as an event of default. Once, such an event of default occurred, the appellant under clause 48 could set in motion the process for recall of the loan. The commencement of the period of limitation, would thus be triggered, once, the said notice was issued, which in turn would relate to the defaulted EMI.

In the instant case, as noticed above, the recall-cum-demand notice dated 26.06.2012 was dispatched to the respondent, on 29.06.2012. Quite clearly, the period of limitation, would, relate back to last defaulted EMI as, vide the aforementioned notice the appellant gave a final opportunity to the respondent to repay the amount, which was due and payable on the date of notice. The right to sue would occur, in my opinion, each time when, there is a default in payment of an EMI on its due date. The appellant in terms of clause 48 is, however, at liberty to take a decision to treat the non-payment of a particular EMI, as an event of default. The period of limitation would, though, commence from the date of the last defaulted EMI, which is made the subject matter of the notice and not from the date of the notice itself. Therefore, in such a situation, Article 113 of the 1963 Act would become applicable as against Article 55.

The trial court while dismissing the suit has not alluded to any specific Article of the 1963 Act. Recourse has been taken by the trial court to Section 3 of the 1963 Act, which inter alia, only empowers a court to dismiss a suit which is barred by limitation even if limitation is not set up as a defence. The section by itself could not have helped the trial court in coming to the conclusion as to what should be the period of limitation in a case such as this. Furthermore, the reference to Article 37 in the written statement is also of no relevance as the appellant did not sue either on a promissory note or a bond.

Having regard to the above, the appeal is allowed and, consequently, the impugned judgement is set aside.

MAHANIVESH OILS & FOODS PVT LTD.

v.

DIRECTORATE OF ENFORCEMENT [DEL]

W.P. (C) 1925/2014 & CM No.4017/2014

Vibhu Bakhru, J. [Decided on 25/01/2016]

Prevention of Money Laundering Act, 2005 – Section 5 – Proceeds of crime – Property purchased before the enforcement of the Act attachment of property – Whether tenable – Held, No.

Brief facts:

On 08.05.2009, an FIR was lodged by the CBI on a written complaint made by NAFED wherein it was alleged that Mr Homi Rajvansh - the Additional Managing Director of NAFED, had hatched a conspiracy, in connivance with the directors of M/s M.K. Agri International Ltd. (hereafter 'MKAIL'), for making wrongful gains by executing Memoranda of Understanding (MOUs) with MKAIL on behalf of NAFED for import of raw sugar and selling the same by entering into three High Seas Sale (HSS) Agreements with M/s M.K. International Ltd. (hereafter 'MIL'), a sister concern of MKAIL, without charging/recovering any cost for the commodity.

MIL on 10.02.2005, through its director - Mr M.K. Agarwal issued cheques for an amount aggregating to Rs.1.5 crores in favour of its two holding companies namely, M/s Duoroyale Enterprises Ltd. and M/s Sri Radhey Trading Pvt. Ltd. Subsequently, both the said companies issued two cheques each amounting to Rs.75 lacs in favour of M/s Mahanivesh Oils & Foods Pvt. Ltd., the petitioner company, where Smt. Alka Rajvansh - wife of Mr Homi Rajvansh was a Director. On 16.02.2005 and 17.02.2005, M/s Mahanivesh Oils and Foods Pvt. Ltd., issued two cheques of `1,32,00,00/- and `10,81,000/- respectively in favour of M/s Uppal Agencies Pvt. Ltd. for purchase of the ground floor and basement of the property situated at E-14/3, Vasant Vihar, New Delhi (hereafter 'the said property').

It is alleged that Smt. Alka Rajvansh used the funds received from M/s Duoroyale Enterprises Ltd. and M/s Sri Radhey Trading Pvt Ltd. for purchasing the abovementioned property pursuant to a sale deed dated 18.03.2005 executed by Shri B.K. Uppal in favour of the petitioner company.

The property was provisionally attached by the enforcement directorate under the provisions of the Prevention of Money Laundering Act, 2005. Petitioner challenged this attachment before the High Court.

Decision: Petition allowed.

Reason:

It is not disputed that the property sought to be attached under the Act was purchased on 18.03.2005 i.e. prior to 01.07.2005 that is, prior to the Act coming into force. In the circumstances, the principal controversy to be addressed is whether any proceedings under the Act could lie in respect of the said asset. In the present case, the impugned order has been made under Section 5(1) of the Act. A conjoint reading of Section 5(1) read with Section 2(u) of the Act clearly indicates that the power to attach is only with respect to the property derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of such property.

The occurrence of a scheduled offence is the substratal condition for giving rise to any proceeds of crime and consequently, the application of Section 5(1) of the Act. A commission of a scheduled offence is the fundamental pre-condition for any proceeding under the Act as without a scheduled offence being committed, the question of proceeds of crime coming into existence does not arise. In view of the above, the contention that the Act is completely independent of the principal crime (scheduled offence) giving rise to proceeds of crime is unmerited. It is necessary to bear in mind that the substratal subject of the Act is to prevent money-laundering and confiscate the proceeds of crime. In that perspective, there is an inextricable link between the Act and the occurrence of a crime. It cannot be disputed that the offence of money-laundering is a separate offence under section 3 of the Act, which is punishable under Section 4 of the Act. However as stated earlier, the offence of money-laundering relates to the proceeds of crime, the genesis of which is a scheduled offence. In the aforesaid circumstances, before initiation of any proceeding under Section 5 of the Act, it would be necessary for the concerned authorities to identify the scheduled crime. The First Proviso to Section 5 also indicates that no order of attachment shall be made unless in relation to a scheduled offence a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person authorised to investigate the scheduled offence before a Magistrate or Court for taking cognizance of the scheduled offence. Thus, in cases where the scheduled offence is itself negated, the fundamental premise of continuing any proceedings under the Act also vanishes. Such cases where it is conclusively held that commission of a scheduled offence is not established and such decision has attained finality pose no difficulty; in such cases, the proceedings under the Act would fail.

The central issue in the present case is not on whether the scheduled offence was committed, but whether the attachment under Section 5 of the Act can be sustained where the principal offence as well as the offence of using its proceeds is alleged to have been committed prior to the Act coming into force. The Act is a penal statute and, therefore, can have no retrospective or retroactive operation. Article 20(1) of the Constitution of India expressly forbids that no person can be convicted of any offence except for the violation of a law in force at the time of the commission of the act charged as an offence. Further, no person can be inflicted a penalty greater than what could have been inflicted under the law at the time when the offence was committed. Clearly, no proceedings under the Act can be initiated or sustained in respect of an offence, which has been committed prior to the Act coming into force. However, the subject matter of the Act is not a scheduled offence but the offence of money-laundering. Strictly speaking, it cannot be contended that the Act has a retrospective operation because it now enacts that laundering of proceeds of crime committed earlier as an offence.

The next contention to be considered is whether in the given facts and circumstances, any offence or money-laundering had been made out to warrant an issuance of the impugned order. It is alleged that on 10 the February, 2005, MIL through its Director issued cheques aggregating Rs.1.5 crores in favour of its holding companies, namely, M/s Duoroyale Enterprises Ltd. and M/s Shri Radhey Trading Pvt. Ltd. and these companies in turn issued two cheques of Rs.75 lacs each in favour of the petitioner. It is suggested that these amounts were proceeds of crime received by the petitioner as a result of a criminal activity and bulk of these funds were utilized by the petitioner for paying the consideration for acquiring the property in question. It was argued that all actions of integrating the money by purchase of immovable property would fall within the definition of 'money-laundering'. In this respect it is relevant to note that the sale deed in respect of the property was executed on 18.03.2005. Thus, even if the allegations made by the respondent are assumed to be correct, the proceeds of crime had been used by the petitioner for acquisition of the property much prior to the Act coming into force. The process of activity of utilising the proceeds of crime, if any, thus, stood concluded prior to the Act coming into force. Even if it is assumed that the funds received from M/s Duoroyale Enterprises Ltd. and M/s Shri Radhey Trading Pvt. Ltd. were proceeds of crime and were properties involved in money-laundering, such funds had come into possession of the petitioner prior to the Act coming into force. Thus, funds were already projected as untainted funds unconnected with the crime for which Mr Homi Rajvansh and other persons are accused. The funds had, thus, been laundered at a time when money-laundering was not an offence and proceedings under the Act cannot be initiated.

In the present case, the respondent could not point out any material to counter the petitioner's contention that there was no material on record, which could possibly lead to a belief that the petitioner is likely to transfer or conceal the property in any manner. As indicated earlier, the concerned officer must have a reason to believe on the basis of material in his possession that the property sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings for confiscation of their property under the Act.

Although, the impugned order records that the concerned officer has reason to believe that the property in question is likely to be concealed, transferred or dealt with in a manner, which may result in frustrating the proceedings relating to confiscation of the said proceeds of crime, there is no reference to any fact or material in the impugned order which could lead to this inference. A mere mechanical recording that the property is likely to be concealed, transferred or dealt with would not meet the requirements of Section 5(1) of the Act. Consequently, the impugned order is likely to be set aside. In view of the above, the petition is allowed and the impugned order is set aside.

SANDEEP GUPTA

v.

PUNJAB NATIONAL BANK & ORS [DEL]

W.P. (C) 11879 of 2015

Rajiv Sahai Endlaw, J. [Decided on 20/01/2016]

Indian Partnership Act – Section 32 – Retiring partner's liability petitioner provided guarantee to the respondent bank – Upon retirement he sought to withdraw his guarantee – Reconstitution agreement upon which the petitioner retired and new partners inducted did not provide for the release of the guarantee – Whether guarantee could be released – Held, No.

Brief facts:

The petitioner, upon ceasing to be a partner of respondent no.2 partnership firm viz. M/s Allied Fibre Industries, seeks mandamus to the respondent no.1 Punjab National Bank to release the title deeds of the property of the petitioner and to discharge the petitioner from the guarantee furnished by the petitioner, (as the then partner of the respondent no.2) for repayment of the dues of the respondent no.2 to the respondent no.1 Bank.

In this regard it is pertinent that the petitioner had, before instituting the present petition, filed a suit against the respondents no.3&4 claiming specific performance of the agreement contained in the deed of reconstitution of partnership to have the security furnished by the petitioner substituted in which the respondent no.1 Bank is also a party to the said suit.

Decision: Petition dismissed.

Reason:

The said suit was admittedly instituted prior to the institution of this petition. The petition is not maintainable on this ground alone. The petitioner cannot maintain a petition under Article 226 of the Constitution of India for the relief for which the petitioner, prior to instituting the writ petition, has already availed of the relief under the civil law.

Supreme Court in *Jai Singh Vs. Union of India (1977)1 SCC 1* held that the appellant therein having filed a suit in which the same question as the subject matter in the writ petition was agitated could not be permitted to pursue two parallel remedies in respect of the same matter at the same time. Similarly in *Bombay Metropolitan Region Development Authority, Bombay Vs. Gokak Patel Volkart Ltd. (1995) 1 SCC 642* finding that the writ petitioner had availed of the alternative statutory remedy it was held that the writ petition should not have been entertained. Yet again in *S.J.S Business Enterprises (P) Ltd Vs. State of Bihar (2004) 7 SCC 166* it was held that if a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. This rule was held to be based on public policy. Reference in this regard can also be made to *K.S. Rashid and Son Vs. Income Tax Investigation Commission AIR 1954 SC 207, Madura Coats Limited Vs. Union of India (UOI) 112(2004) DLT622, Lal Harsh Deo Narain Singh Vs. State of U.P. MANU/UP/1143/2004, Major Jasbinder Singh Bala S/o Sri Bachan Singh Bala Vs. IInd Additional District Judge MANU/UP/1679/2005 and D.D Shah and Brothers Vs. The Union of India (UOI) MANU/RH/0268/2004.* Even otherwise, the respondent no.1 Bank which is the trustee of public monies cannot be left high and dry by granting the relief of releasing the security of the outgoing partners without the continuing / new partners substituting the said security. The petitioner prior to signing the deed of reconstitution of firm ought to have ensured that the security furnished by him is released, if that was the agreement with the respondents No.3 & 4.

TODAY HOTELS (NEW DELHI) PVT LTD.

v.

INTECTURE INDIA DESIGNS PVT LTD [DEL]

FAO (OS) No. 417/2015 & CM No. 13586/2015

Badar Durrez Ahmed & Sanjeev Sachdeva, JJ. [Decided on 13/01/2016]

Arbitration and Conciliation Act, 1996 – Section 8 – Application to refer to arbitration dismissed – Whether appeal lies against it – Held, No.

Brief facts:

The appellant/defendant has filed the present appeal impugning the order dated 21.07.2015 whereby IA No. 14371/2015 filed by the appellant under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) has been dismissed.

Decision: Appeal dismissed.

Reason:

The main question that arises for determination in the present case is whether an appeal would lie from an order passed under Section 8 of the Act allowing or refusing to allow an application under Section 8 of the Act?

[After elaborately referring to various judgements] we are in complete agreement with the view taken by the various division benches of this court and also by the full bench of the Bombay High Court in Conros Steels Pvt. Ltd v. Lu Qin (Hong Kong) Company Ltd. AIR 2015 Bom 106 (FB). The sequitur of the same is that an order passed under Section 8 is an order passed by the judicial authority/forum/court by drawing its power from section 8 of the Act and since the order is passed by drawing the power from Section 8 of the Act, the right to file an appeal being a creature of statute has also to be found in the Act. If the Act does not provide for an appeal or specifically prohibits an appeal from an order passed under Section 8, then no appeal would lie under the Act. Since the order is passed in exercise of powers conferred by the act, reliance cannot be placed for filing an appeal under section 10 of the Delhi High Court Act, 1966 or under the Letters Patent. Since Section 37 does not permit filing of an appeal from an order passed under Section 8, no appeal would lie from such an order under the Act.

In view of the above, we hold that the present appeal impugning the order rejecting the application under Section 8 of the Act, is not maintainable and is accordingly dismissed leaving the parties to bear their own costs.

LAKHMI CHAND

v.

RELIANCE GENERAL INSURANCE [SC]

Civil Appeal Nos.49-50 of 2016 (Arising out of SLP (C) Nos.37534-37535 of 2013)

T.S. Thakur & V. Gopala Gowda, JJ. [Decided on 07/01/2016]

Consumer Protection Act,1986 – Section 23 – Revision by National Commission – Accident caused due to the rash driving of the offending vehicle – Damaged vehicle was carrying excess passenger – National Commission rejected the compensation on the ground of violating the insurance contract terms – Whether correct – Held, No.

Brief facts:

The appellant was the owner of a Tata Motors goods carrying vehicle and the vehicle was insured with the respondent- Company. The risk covered in this policy was to the tune of Rs.2,21,153/-. The said vehicle met with an accident on account of rash and negligent driving of the offending vehicle bearing registration no. UP-75-J 9860. In this regard, an FIR No.66 of 2010 dated 11.02.2010 was registered with the jurisdictional Police Station. The appellant incurred expenses amounting to Rs.1,64,033/- for the repair of his vehicle and the Surveyor appointed by the respondent assessed the damage caused to the said vehicle at Rs.90,000/-. The appellant had preferred a claim for a sum of Rs.1,64,033/- with supporting bills, which was rejected by the respondent.

Aggrieved of rejection of the claim of the appellant by the respondent- Company, he filed Complaint before the District Forum, which allowed the claim. Aggrieved of the order of the District Forum, the respondent Company preferred an appeal before the State Commission urging various grounds. The State Commission allowed the appeal. The said judgment passed by the State Commission was challenged by the appellant before the National Commission, which dismissed the petition on the ground that the appellant had violated the terms of the insurance contract. Review petition was also dismissed.

Decision: Petition allowed.

Reason:

In our considered view, the concurrent findings recorded by the National Commission in the impugned judgment and order are erroneous in law for the following reasons.

It is an admitted fact that the accident of the vehicle of the appellant was caused on account of rash and negligent driving of the offending vehicle bearing registration no. UP-75-J9860. An FIR No. 66 of 2010 dated 11.02.2010 was registered against the driver of the said vehicle for the offences referred to *supra*. The vehicle of the appellant was badly damaged in the accident and it is an undisputed fact that the report of Surveyor assessed the loss at Rs.90,000/-, but the actual amount incurred by the appellant on the repair of his vehicle was Rs.1,64,033/-. The said claim was arbitrarily rejected by the respondent-Company on the ground that the damage caused to the vehicle did not fall within the scope and purview of the insurance policy, as there was a contravention of terms and conditions of the policy of the vehicle.

The National Commission upheld the order of dismissal of the complaint of the appellant passed by the State Commission. The National Commission however, did not consider the judgment of this Court in the case of *B.V. Nagaraju v. Oriental Insurance Co. Ltd Divisional Officer, Hassan, IV 2010 CPJ 315 (SC)*. In that case, the insurance company had taken the defence that the vehicle in question was carrying more passengers than the permitted capacity in terms of the policy at the time of the accident. The said plea of the insurance company was rejected. This Court held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle.

In the instant case, the respondent-Company has not produced any evidence on record to prove that the accident occurred on account of the overloading of passengers in the goods carrying vehicle. Further, as has been held in the case of B.V. Nagaraju *(supra)* that for the insurer to avoid his liability, the breach of the policy must be so fundamental in nature that it brings the contract to an end. In the instant case, it is undisputed that the accident was in fact caused on account of the rash and negligent driving of the offending vehicle by its driver, against whom a criminal case vide FIR no. 66 of 2010 was registered for the offences referred to supra under the provisions of the IPC. These facts have not been taken into consideration by either the State Commission or National Commission while exercising their jurisdiction and setting aside the order of the District Forum. Therefore, the judgment and order of the National Commission dated 26.04.2013 passed in the Revision Petition No. 2032 of 2012 is liable to be set aside, as the said findings recorded in the judgment are erroneous in law.

Accordingly, we allow these appeals and restore the judgment and order of District Forum. Further, we award a sum of Rs.25,000/- towards the cost of the litigation as the respondent-Company has unnecessarily litigated the matter up to this Court despite the clear pronouncement of law laid down by this Court on the question with regard to the violation of terms and conditions of the policy and burden of proof is on the insurer to prove the fact of such alleged breach of terms and conditions by the insured.

INDIAN MACHINERY COMPANY

v.

ANSAL HOUSING & CONSTRUCTION LTD [SC]

Civil Appeal No.557 of 2016 (Arising out of SLP(C) No.19618 of 2013)

Madan B. Lokur & R.K. Agrawal, JJ. [Decided on 27/01/2016]

Consumer Protection Act, 1986 – First complaint dismissed due to the default of non-prosecution second complaint filed but rejected as not maintainable – Whether correct – Held,No.

Brief facts:

We have heard learned counsel for the parties. The only question that has arisen in this appeal is whether a second complaint to the District Forum under the Consumer Protection Act, 1986 is maintainable when the first complaint was dismissed for default or non- prosecution. The National Commission has taken the view in the impugned order that the second complaint would not be maintainable.

Decision: Appeal allowed.

Reason:

Our attention has been drawn to a decision of this Court in New India Assurance Co Ltd v. R. Srinivasan [(2000) 3 SCC 242] wherein this precise question had arisen as mentioned in paragraph 5 of this decision. It is mentioned in that paragraph that the only question is that in view of the dismissal of the first complaint filed by the respondent therein, a second complaint on the same facts and cause of action would not lie and it ought to have been dismissed as not maintainable.

While dealing with this issue, this Court held in paragraph 16 as follows:

"This Rule [Rule 9(6) of the Tamil Nadu Consumer Protection Rules, 1988] is in identical terms with sub-rule (8) of Rule 4 and sub-rule (8) of Rule 8. Under this sub-rule, the appeal filed before the State Commission against the order of the District Forum, can be dismissed in default or the State Commission may in its discretion dispose of it on merits. Similar power has been given to the National Commission under Rule 15(6) of the Rules made by the Central Government under Section 30(1) of the Act. These Rules do not provide that if a complaint is dismissed in default by the District Forum under Rule 4(8) or by the State Commission under Rule 8(8) of the Rules, a second complaint would not lie. Thus, there is no provision parallel to the provision contained in Order 9 Rule 9(1) CPC which contains a prohibition that if a suit is dismissed in default of the plaintiff under Order 9 Rule 8, a second suit on the same cause of action would not lie. That being so, the rule of prohibition contained in Order 9 Rule 9(1) CPC cannot be extended to the proceedings before the District Forum or the State Commission. The fact that the case was not decided on merits and was dismissed in default of non-appearance of the complainant cannot be overlooked and, therefore, it would be permissible to file a second complaint explaining why the earlier complaint could not be pursued and was dismissed in default."

We have also not been shown any rule similar to Order IX, Rule 9(1) of the Code of Civil Procedure, 1908. That being so, and in view of the decision rendered by this Court, with which we have no reason to disagree, we are of the opinion that the second complaint filed by the appellant was maintainable on the facts of this case. Under the circumstances, we set aside the order passed by the National Commission and remit the matter back to the National Commission for adjudicating the disputes on merits.

EITZEN BULK A/S

v.

ASHAPURA MINECHEM LTD & ANR [SC]

Civil Appeal Nos. 5131-5133 of 2016 (Arising out of SLP (C) Nos. 2210-2212 of 2011) with two connected appeals

Fakkir Mohamed Kalifulla & S.A. Bobde, JJ. [Decided on 23/05/2016]

Arbitration and Conciliation Act, 1996 – Seat of arbitration was London and governing law of the contract was English law – Foreign award – Execution thereof in India – Whether Indian courts have jurisdiction to entertain the challenge to the execution of foreign award – Held, No.

Brief facts:

The dispute in these appeals, arises out of the Contract of Affreightment dated 18.1.2008 (hereinafter referred as `the Contract'). Eitzen Bulk A/S of Denmark (hereinafter referred to as `Eitzen') entered into the contract with Ashapura Minechem Limited of Mumbai (hereinafter referred to as `Ashapura') as charterers for shipment of bauxite from India to China. The Charter party contained an Arbitration Clause under which the seat of arbitration was London and the governing law was English law.

Disputes having arisen between the parties, the matter was referred to Arbitration by a sole Arbitrator. The Arbitration was held in London according to English Law. Ashapura Minechem was held liable and directed to pay a sum of 36,306,104 US$ together with compound interest at the rate of 3.75 % per annum. In addition they were directed to pay 74,135 US$ together with compound interest at the rate of 3.75% per annum and another sum of 90,233.66 Pounds together with compound interest at the rate of 2.5% per annum vide Award of the Sole Arbitrator dated 26.5.2009.

When Eitzen sought to enforce the award in India, Ashpura moved Gujarat High court and Bombay high court for the stay of the execution of award on the ground that Part 1 of Indian Arbitration and Conciliation Act, 1996 is not excluded. Gujarat High Court stayed the execution while Bombay High court refused to stay the proceedings holding that Part 1 of Indian Arbitration and Conciliation Act, 1996 excludes Indian courts to interfere in the execution.

We thus have, on the one hand, the decision of the Gujarat High Court holding that a Court in India has jurisdiction under Section 34 to decide objections raised in respect of a Foreign Award because Part I of the Arbitration Act is not excluded from operation in respect of a Foreign Award and on the other, a decision of the Bombay High Court holding that Part I is excluded from operation in case of a Foreign Award and thereupon directing enforcement of the Award.

The decisions of the Gujarat High Court are questioned by Eitzen by way of SLP (C) Nos.2210-2212/2011. The decisions of the Bombay High Court are questioned by Ashapura by way of SLP (C) Nos.7562-7563/2016. Interim order dated 05.10.2011 passed by the High Court of Judicature at Bombay in Notice of Motion No. 3975 of 2009 in Arbitration Petition No. 561 of 2009 is under challenge in appeal arising out of SLP (C) No. 3959 of 2012. Decision: Bombay High Court's decision upheld. Reason: Thus, the main question on which contentions were advanced by the learned counsel for the parties is whether Part I of the Arbitration Act is excluded from its operation in case of a Foreign Award where the Arbitration is not held in India and is governed by foreign law.

Clause 28, which is the Arbitration Clause in the Contract, clearly stipulates that any dispute under the Contract "is to be settled and referred to Arbitration in London". It further stipulates that English Law to apply. The parties have thus clearly intended that the Arbitration will be conducted in accordance with English Law and the seat of the Arbitration will be at London.

The question is whether the above stipulations show the intention of the parties to expressly or impliedly exclude the provisions of Part I to the Arbitration, which was to be held outside India, i.e., in London. We think that the clause evinces such an intention by providing that the English Law will apply to the Arbitration. The clause expressly provides that Indian Law or any other law will not apply by positing that English Law will apply. The intention is that English Law will apply to the resolution of any dispute arising under the law. This means that English Law will apply to the conduct of the Arbitration. It must also follow that any objection to the conduct of the Arbitration or the Award will also be governed by English Law. Clearly, this implies that the challenge to the Award must be in accordance with English Law. There is thus an express exclusion of the applicability of Part I to the instant Arbitration by Clause 28. In fact, Clause 28 deals with not only the seat of Arbitration but also provides that there shall be two Arbitrators, one appointed by the charterers and one by the owners and they shall appoint an Umpire, in case there is no agreement. In this context, it may be noted that the Indian Arbitration and Conciliation Act, 1996 makes no provision for Umpires and the intention is clearly to refer to an Umpire contemplated by Section 21 of the English Arbitration Act, 1996. It is thus clear that the intention is that the Arbitration should be conducted under the English law, i.e. the English Arbitration Act, 1996. It may also be noted that Sections 67, 68 and 69 of the English Arbitration Act provide for challenge to an Award on grounds stated therein. The intention is thus clearly to exclude the applicability of Part I to the instant Arbitration proceedings. This is a case where two factors exclude the operation of Part I of the Arbitration Act. Firstly, the seat of Arbitration which is in London and secondly the clause that English Law will apply. In fact, such a situation has been held to exclude the applicability of Part I in a case where a similar clause governed the Arbitration. In this clause 28 in the present case must be intended to have a similar effect that is to exclude the applicability of Part I of the Indian Arbitration and Conciliation Act since the parties have chosen London as the seat of Arbitration and further provided that the Arbitration shall be governed by English Law. In this case the losing side has relentlessly resorted to apparent remedies for stalling the execution of the Award and in fact even attempted to prevent Arbitration. This case has become typical of cases where even the fruits of Arbitration are interminably delayed. Even though it has been settled law for quite some time that Part I is excluded where parties choose that the seat of Arbitration is outside India and the Arbitration should be governed by the law of a foreign country.

We are thus of the view that by Clause 28, the parties chose to exclude the application of Part I to the Arbitration proceedings between them by choosing London as the venue for Arbitration and by making English law applicable to Arbitration, as observed earlier. It is too well settled by now that where the parties choose a juridical seat of Arbitration outside India and provide that the law which governs Arbitration will be a law other than Indian law, part I of the Act would not have any application and, therefore, the award debtor would not be entitled to challenge the award by raising objections under Section 34 before a Court in India. A Court in India could not have jurisdiction to entertain such objections under Section 34 in such a case.

ROTOMAC ELECTRICALS LTD.

v.

UNION OF INDIA & ANR [Del]

LPA No. 363 of 2016

G.Rohini & Sangita Dhingra Sehgal, JJ. [Decided on 08/11/2016]

Foreign Trade (Development and Regulation) Act, 1992 – Advance licence – Export obligations – Failure to discharge – Penalty proceedings – Failure to produce documents – Penalty imposed – Whether tenable – Held, yes.

Brief facts:

The appellant/writ petitioner was granted an advance licence dated 22.12.1999 under Duty Exemption Scheme under the Foreign Trade (Development and Regulation) Act, 1992 (for short 'FTDR Act'). As per the conditions of the licence, the appellant was required to complete the export obligation of Rs.1,07,58,600/- as Free On Board (FOB) value within a period of 18 months from the date of the issue of advance licence. The appellant failed to fulfil this obligation and the penal proceedings were initiated against it and penalty was imposed. The appellant challenged the imposition of the penalty.

Decision: Appeal dismissed.

Reason:

I have examined the documents and gone through the facts of the case. The appellant was granted various opportunities of personal hearing as detailed in above paras to produce requisite evidence of fulfilment of export obligation but the appellant has failed to do so. From the documents (only photocopies) submitted by the firm with their letter dated 03.09.2014 and also with their appeal, it is observed that Part-2 of DEEC Book has been not logged by Customs. They have not been able to produce shipping bills showing authorization No/File No. Further, it is observed that appellant has not produced Duplicate/Bank Certificate copy of BRC. They were repeatedly advised to provide the documents required as per Policy/Procedure but they failed to do so. From the above, it is clear that the appellant did not have the requisite documents required to prove that they have fulfilled export obligation in respect of advance licence No.0131276 dated 22.12.1999.

As rightly held by the learned Single Judge, such finding of fact recorded by the statutory authorities regarding the failure of the appellant to furnish the documents to establish the fulfilment of the export obligation warrants no interference by this Court in exercise of the writ jurisdiction under Article 226 of the Constitution of India. We have observed that the dispute was not with regard to the interpretation of clause 4.12 as to whether the exports that had taken place even before the grant of advance licence can be considered or not, but the issue was whether the appellant could produce authenticated documents to prove the fulfilment of export obligation as required under the terms and conditions of the advance licence. A categorical finding was recorded by the respondent Nos.1 & 2 that the appellant/writ petitioner failed to produce. Therefore, the respondents cannot be said to have committed any error in imposing the penalty in exercise of the powers conferred by Section 11(2) of FTDR Act, 1992.

We do not find any substance even in the contention that the show cause notices being silent about the proposed levy of penalty, it is not open to the respondents to *invoke* Section 11(2) of FTDR Act, 1992. On a perusal of the show cause notices, we found that the petitioner was put on notice that it failed to submit the documents to prove the fulfilment of export obligation. It is also relevant to note that the show cause notice dated 01.12.2009 was in fact issued under Section 14 of the FTDR Act proposing to take action under Section 11(2) for non-fulfilment of export obligation against the advance licence dated 22.12.1999. Hence, the allegation that the show cause notices were silent about the action proposed has no factual basis. Therefore, the decisions cited on behalf of the appellant, i.e., Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd. (2006) 7 SCC 592; Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd. (2007) 8 SCC 89 and Commissioner of Central Excise v. Gas Authority of India Limited(2007) 15 SCC 91 are not relevant for adjudicating the case on hand.

The contention that the Directors of the appellant company should not have been made liable also deserves no consideration since none of the Directors approached this Court. For the aforesaid reasons, the appeal is devoid of merit and the same is accordingly dismissed.

GREAVES COTTON LTD.

v.

UNITED MACHINERY & APPLIANCES [SC]

Civil Appeal No. 12066 of 2016 (Arising out of S.L.P. (C) No. 34016 of 2015)

J. Chelameswar & Prafulla C. Pant, [Decided on 14/12/2016]

Arbitration and Conciliation Act, 1996 – Section 8 – Civil suit filed by plaintiff against defendant – Defendant initially sought time to file written statement thereafter defendant filed an application seeking reference to arbitration – Trial court rejected the application – Whether correct – Held, No.

Brief facts :

Appellant Greaves Cotton are manufacturers of, inter alia, diesel engines and Respondent United Machinery and Appliances are manufacturers of diesel generator sets. An agreement containing arbitration clause was executed between them for supply of diesel engines by the appellant to the respondent for using the same in the diesel gensets. The plaintiff-respondent filed civil suit seeking money decree towards the loss and damages suffered by it on account of alleged breach of contract on the part of defendant- appellant. After receiving notice from the court, the appellant moved an application seeking extension of time for eight weeks to file written statement and also invoked the arbitration clause contained in the agreement. Thereafter, the appellant moved application under Section 5 read with Section 8 of the Arbitration and Conciliation Act, 1996 (for short “the 1996 Act”), in the suit seeking reference of the disputes between the parties forming the subject-matter of the suit, for arbitration, which was rejected by the Court on the ground that the appellant has, by moving application for extension of time to file written statement, waived its right to seek arbitration. Hence, this appeal through special leave.

Decision: Appeal allowed.

Reason:

The issue before us for consideration is whether filing of an application for extension of time to file written statement before a judicial authority constitutes – ‘submitting first statement on the substance of the dispute’ or not. In view of the law laid down by this Court, in Manna Lal Kedia& Ors v. State of Bihar & Ors AIR 2000 Pat 91; Rashtriya Ispat Nigam Ltd & Anr v. Verma Transport Co (2006) 7 SCC 275 and in Booz Allen and Hamilton Inc. v. SBI Homes Finance Ltd & Ors (2011) 5 SCC 532, we find it difficult to agree with the High Court that in the present case merely moving an application seeking further time of eight weeks to file the written statement would amount to making first statement on the substance of the dispute. In our opinion, filing of an application without reply to the allegations of the plaint does not constitute first statement on the substance of the dispute. It does not appear from the language of sub- section (1) of Section 8 of the 1996 Act that the Legislature intended to include such a step like moving simple application of seeking extension of time to file written statement as first statement on the substance of the dispute. Therefore, in the facts and circumstances of the present case, as already narrated above, we are unable to hold that the appellant, by moving an application for extension of time of eight weeks to file written statement, has waived right to object to the jurisdiction of judicial authority.

From the order impugned, it also reflects that before disposing of application under Section 8 of the 1996 Act the High Court has not looked into questions as to whether there is an agreement between the parties; whether disputes which are subject-matter of the suit fall within the scope of arbitration; and whether the reliefs sought in the suit are those that can be adjudicated and granted in arbitration. In view of the above, we think it just and proper to request the High Court to decide the application afresh in the light of law laid down by this Court in para 19 of the judgment in Booz Allen and Hamilton (supra) except the point, which has already been answered in the present case by us. Accordingly the appeal is allowed.

THOUGHTWORKS INC

v.

SUPER SOFTWARE PVT LTD & ANR [DEL]

O.M.P. No.530/2015

S. Muralidhar, J. [Decided on 12/01/2017]

Arbitration and Conciliation Act, 1996 – Section 34 – Appellant's registered trademark – Infringement thereof by the respondent in its domain name arbitrator failed to consider certain valid issues in the award – Award passed against the appellant – Whether appeal to be allowed – Held, Yes.

Brief facts:

The Petitioner is engaged in the business of IT consulting, software development services and sale of proprietary software under its coined trademark/tradename "ThoughtWorks" since 1993. The Petitioner has registered its trademark ThoughtWorks in India in 2001 under class 9.

In 2015, the Petitioner became aware that the domain name "Thoughtworks.in" was registered by Respondent No. 1 when one of the analysts of the Petitioner accessed the website of Respondent No. 1 mistaking it to be the Petitioner's website. Immediately the Petitioner filed a complaint against Respondent No. 1 before NIXI under the ".In Domain Dispute Resolution Policy ("INDRP")" and the Procedure Rules of NIXI. The Respondent contested the above complaint. The arbitrator passed an award against the petitioner, against which the present appeal has been filed.

Decision: Petition allowed.

Reason:

Indeed, the learned Arbitrator does not appear to have drawn the attention of the Petitioner to the three different addresses appearing in the petition. However, the logical sequitur would be to seek the Petitioner's clarification. For some reason, the learned Arbitrator failed to do so. Not permitting a party to clarify the factual aspect might itself lead to a grave error that is fatal to the Award in terms of what could be seen as a procedural lapse. The learned Arbitrator also appears to have made a mistake about the trademark registration not having been produced. As pointed out by the Petitioner, it was annexed to the complaint itself as Annexure F.

The Petitioner was able to show that no sooner than he came to know of the above domain name, it took prompt action by filing a complaint with NIXI. More importantly, the learned Arbitrator appears to have come to an erroneous conclusion that the trademark "ThoughtWorks" did not belong to the Petitioner. Again, no opportunity was afforded to the Petitioner. The impugned domain name contains only the Petitioner's trademark and yet no finding was returned on whether there was any similarity. The decision in Stephen Koenig v. Arbitrator, National Internet Exchange of India & Anr 186 (2012) DLT 43, which was subsequently upheld by the Division Bench of this Court because of the fact that a mere delay in lodging the complaint would not disentitle the aggrieved party from proceeding against the 'squatter'.

The Court is satisfied that in the present case, the learned Arbitrator failed to apply his mind to the facts on record. Indeed, a copy of the trademark registration certificate of the Petitioner was enclosed with the complaint and yet the learned Arbitrator failed to have noticed this fact. In any event, the complaint itself contained details of its various registrations. If there was any doubt, the learned Arbitrator ought to have sought a clarification from the Petitioner on this aspect as well. Importantly, no finding was returned on whether the use of the domain name by Respondent No. 1 would lead to confusion and deception. With the domain name taking up the entire name of the Petitioner, there could be no doubt that the use of such domain name by the Respondent would be deceptively confusing and erroneously indicate a connection of Respondent No. 1 with the Petitioner when there is none.

For all of the aforementioned reasons, the Court is satisfied that the impugned Award is opposed to the fundamental policy of India as it has numerous glaring errors which appear on the face of the Award. Consequently, the Court sets aside the impugned Award and allows the petition but, in the circumstances, with no order as to costs.

FALCON PROGRESS LTD

v.

SARA INTERNATIONAL LTD. [DEL]

EX.P.25/2014 & EX.APPL. (OS) 582/2014

Vibhu Bakhru, J. [Decided on 14/02/2017]

Arbitration and Conciliation Act, 1996 – Execution of foreign award challenge as to validity of the contract – Whether tenable – Held, No.

Brief facts:

The above captioned petition has been filed by Falcon Progress Limited (hereafter 'FPL'), a company registered under the laws of Hong Kong, for enforcement of the foreign award dated 22.11.2012 as corrected by the award dated 21.12.2012 (hereafter 'the impugned award'). The impugned award was rendered by the sole arbitrator pursuant to arbitration proceedings conducted under the rules of Singapore International Arbitration Centre (SIAC) in respect of disputes between FPL and Sara International Ltd. (hereafter 'Sara'), the Judgment Debtor.

Sara has filed the present application under Section 48 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') inter alia praying that enforcement of the impugned award be declined.

Decision: Objections dismissed.

Reason:

The principal question to be considered is whether there was a concluded contract between the parties. The undisputed facts are that on 24.04.2009 at 03:33 p.m., Ms Daisy Liu of FPL sent an e- mail to Mr Gill of Sara attaching therewith a fi nal version of the agreement for signing. The e-mail clearly stated: "Attached please fi nd the fi nal version of the contract for signing. Please kindly send us the signed contract for counter-signing today with thanks". In response to the said mail, Mr Gill of Sara sent an e-mail on 24.04.2009 at 6:23 p.m. attaching a signed copy of the agreement. Mr Gill clearly stated: "Please find enclosed herewith signed contract. Kindly let us have the counter signed & stamped copy". Admittedly, the signed agreement was attached with the said mail. Thereafter, Ms Daisy Liu sent another mail at 6:47 p.m. attaching a counter signed scanned copy of the agreement which was earlier signed and sent by Sara. The said mail, inter alia, reads as under:-

"Attached please fi nd the co-signed contract. We'll send you the LC format early next week. Please kindly nominate vessel asap so that we can determine the LC quantity and amount."

It is not disputed that the agreement attached with the mail of FPL was the same agreement which was subsequently signed on behalf of Sara and, thereafter, counter-signed on behalf of FPL. In the circumstances, the contention that the parties had only agreed to agree and there was no concluded contract between the parties is unsustainable. The Arbitral Tribunal had also considered the aforesaid contention and rejected the same.

A plain reading of the agreement indicates that all essential terms had been agreed to between the parties. The contention that since FPL had requested Sara to indicate the name of the vessel and the quantity for opening of the LC, the signed agreement attached with the mail could not be considered as a concluded contract, is unsustainable. FPL's request for nomination of the vessel and for informing the quantity of goods being shipped is not inconsistent with the terms of the agreement. Although, it is correct that FPL had agreed to open LC in favour of Sara within a period of seven days from signing of the contract to cover the entire value of shipment; the same is consistent with FPL's request to Sara to intimate the quantities to be shipped as well as the nominated vessel. In the present case, it is not disputed that the agreement attached with the emails referred hereinabove contained an arbitration clause and, therefore, the contention that there is no arbitration agreement between the parties is also devoid of any merits.

The next issue to be considered is whether the impugned award falls foul of the fundamental policy of Indian law inasmuch as the Arbitral Tribunal had awarded damages in favour of FPL. The fi nding of the Arbitral Tribunal that Sara had breached the agreement cannot be assailed in these proceedings. The said fi nding is fi nal and binding. The only issue advanced was that award of damages without suffi cient proof of loss would fall foul of the fundamental policy of Indian law.

Both the parties were ad idem that in case of breach of agreement, the damages to be awarded were to be measured in terms of Section 51(3) of the Sale of Goods Act, 1979 (UK). The controversies raised by Sara included the determination of the market value and the relevant date in reference to which the market value was to be determined. However, it is not disputed that the parties had agreed on a list of market prices on various dates which were drawn from Umetal Figures. On the basis of the said list, the Arbitral Tribunal determined the market value of the ore by making due adjustments including on account of moisture content. It is relevant to note that computation of the difference between the market value and the contracted value is not in dispute. No contentions have been advanced in this court assailing the aforesaid calculation. The only contention advanced is that since FPL had not procured the goods in question from another source at a higher value, no damages could be awarded to FPL. It was earnestly contended that FPL was a trader and, therefore, would have suffered actual loss only if it had further transacted the goods or had procured the goods at a higher price. The aforesaid contention is also unmerited. A trader is not required to show that it has procured the goods at a higher price in order to claim damages. It is suffi cient for a trader to show that the market value of the goods promised to it had increased. It is well settled that the difference in the contracted value and the market value of the goods which the seller has failed to deliver represents the amount that the buyer must obtain to put itself in the position, it would have been if the agreement was duly performed by the seller. Thus, FPL is entitled to the difference between the market price and the contracted value of the goods as representing the damages actually suffered by FPL. The fact that the goods at the contracted value were not delivered to the trader would itself indicate that it had suffered a loss of drop in value. In view of the above, the application is dismissed.

COSMO FERRITES LTD.

v.

PRAGYA ELECTRONICS PVT. LTD & ORS. [DEL]

O.M.P. (Comm) 350/2016

Vibhu Bakhru, J. [Decided on 25/05/2017]

Arbitration and Conciliation Act, 1996 – Section 31(7) (a) – Interest on award arbitrator refused to allow interest on awarded sum – Whether correct – Held, No.

Brief facts:

CFL entered into a non-exclusive distributorship agreement dated 01.04.2005 (hereafter 'the Agreement") with PEPL, respondent herein for the supply of soft ferrites. Subsequently, the parties entered into annual agreements for the years 2007, 2008 and 2009. In terms of the Agreement, PEPL placed purchase orders on CFL for supply of goods, which in turn were sold by PEPL to its customers.

Dispute arose as to the payments and the issue was referred to arbitration. Although, the arbitral tribunal found that CFL was entitled to recover the aforesaid amount, it rejected CFL's claim for interest at the rate of 12.25% p.a. on the said awarded sum.

Decision: Appeal allowed.

Reason:

The principal issue to be addressed is whether the decision of the arbitral tribunal to reject CFL's claim for interest is sustainable. It is trite law that the arbitral tribunal cannot ignore the terms of the agreement between the parties. Section 28(3) of the Act mandates that the arbitral tribunal must decide in accordance with the contract between the parties. (See: Indian Hume Pipe Company Limited v. State of Rajasthan: (2009) 10 SCC 187). In the present case, there is no dispute that the Agreement expressly provided for interest on delayed payments. The arbitral tribunal has not found the aforesaid clause to be invalid or inapplicable. The arbitral tribunal has also not indicated any reason as to why the aforesaid clause ought to be ignored. The arbitral tribunal is bound to make award in terms of the Agreement between the parties and there is no indication as to why the arbitral tribunal has rejected CFL's claim for interest. In the case of State of Haryana & Ors v. S. L. Arora & Co (2010) 3 SCC 690, the Supreme Court had expressly held as under:-

"24.2 The authority of the Arbitral Tribunals to award interest under Section 31(7) (a) is subject to the contract between the parties and the contract will prevail over the provisions of Section 31(7) (a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the Arbitral Tribunal will have to grant or refuse interest, strictly in accordance with the contract. The Arbitral Tribunals cannot ignore the contract between the parties, while dealing with or awarding pre- award interest. Where the contract does not prohibit award of interest, and where the arbitral award is for payment of money, the arbitral tribunal can award interest in accordance with Section 31(7)(a) of the Act, subject to any term regarding interest in the contract."

The aforesaid decision was overruled by the Supreme Court in its later decision in Hyder Consulting (UK) Ltd. v. Governor, State of Orissa: (2015) 2 SCC 189, albeit, only to the extent that interest under Section 31(7) (b) of the Act would also be payable on any interest included in the sum awarded under Section 31(7) (a) of the Act. However, the view that contractual stipulations as to interest cannot be ignored by the arbitral tribunal is good law and the decision of the Supreme Court in S. L. Arora (supra) continues to be a binding precedent.

Having stated the above, it is also necessary to observe that the arbitral tribunal would still have the discretion to award interest in cases where the contract is silent. However, such discretion would have to be exercised objectively keeping in view, the facts of the case. In cases where the contract expressly provides that interest would be payable on sums withheld, the arbitral tribunal would be bound to award the same unless there are good reasons to not to do so.

In the present case, the impugned award does not indicate any reason as to why CFL's claim for interest has been rejected. This Court is hard pressed to find any discernible reason from the facts and circumstances, as discussed in the impugned award, as to why interest on the amount awarded has been denied to CFL. The arbitral tribunal has also ignored the provisions of the Agreement, which expressly entitles CFL to claim interest not exceeding the rate of 14% p.a. for any delay in payment. In view of the above, the petition is liable to be allowed and the impugned award is liable to be set aside to the extent of rejection of CFL's claim for interest at the rate of 12.25% p.a. from the date of invoices till the date of the impugned award. In view of the above, the impugned award is set aside to the extent as indicated above. The petition is, accordingly, disposed of.

DELHI METRO RAIL CORPORATION LTD.

v.

DELHI AIRPORT METRO EXPRESS PVT.LTD [DEL]

FAO (OS) (COMM) 128/2017

G.S.Sistani & Vinod Goel, JJ. [Decided on 07/06/2017]

Arbitration and conciliation Act, 1966 – Award in favour of respondent – Single judge directs deposit of Rs.65 crores with the bank of Respondent to cover interest charges – Whether tenable – Held, Yes.

Brief facts:

Disputes arose between the parties in respect of the contract relating to the airport metro line. The Arbitral Tribunal has rendered an Award in favour of the respondent in the sum of Rs.4670 crores including interest till the date of the Award. The appellant DMRC, moved the High court against the award.

In the order dated 30.05.2017 (hereinafter referred to as "the impugned order") the learned Single Judge has directed the respondent/appellant herein to pay a sum of Rs.60 crores directly to Axis Bank who is stated to be the lead lending bank to the petitioner (before learned Single Judge and respondent herein) to protect the rights of the appellant herein, the respondent has been directed to furnish an unconditional bank guarantee to the extent of Rs. 65 crores which would cover the factor of interest at the rate of 12% per annum should the appellant herein succeed. The appellant challenged this order before the Division Bench.

Decision: Appeal dismissed.

Reason:

We have heard the learned counsel for the parties. We find no force in the submission of learned counsel for the appellant that the present petition under Section 9 of the Act is premature. The submission of the petitioners is premised in the language of Section 36 which stipulates that only after the expiry of time for making an application to set aside the arbitral award under Section 34 has expired, the award is deemed to be a decree of the Court. According to the learned counsel for the appellant, there is no decree as on date. This submission is not acceptable in view of the express language of Section 9 itself. From the aforegoing, it is clear that the power vested in the Court may be exercised when the proceedings before the Arbitrator are either "contemplated", "pending" or even "completed". The present case is one under the third category and the Court has the power to order interim measures after the passing of the award, but before its enforcement in accordance with Section 36 of the Act. Hence, the Court was clearly vested with the power to grant interim measures prior to the award becoming a deemed decree under Section 36 of the Act. We may notice that the order dated 30.05.2017 is only an interim order and all the issues sought to be raised by the parties have been kept open to be considered by the learned Single Judge on the next date of hearing as is evident upon reading of the order dated 30.05.2017. We find no grounds to interfere in the impugned order passed by the learned Single Judge, firstly, for the reason that order dated 30.05.2017 is an interim order by which the appellant herein has been directed to deposit Rs.60 crores out of an award in favour of the respondent in the sum of Rs.4670 crores; secondly, for the amount to be deposited, the respondent has been directed to provide the bank guarantee of Rs.65 crores which would cover the interest on Rs.60 crores to be deposited by the appellant herein; and thirdly, this amount is to be paid directly to the Axis Bank keeping in view the large sums of interest to be paid by the respondent (Rs.65 lakh per day/Rs.20 crores per month) and also for the reason that all the grounds sought to be urged have been kept open to be decided by the learned Single Judge. Accordingly, the present appeal as well as the application is dismissed.

ESSAR PROJECTS (INDIA) LTD.

v.

INDIAN OIL CORPORATION LTD & ANR [DEL]

O.M.P. (I) (COMM) 232/2017

G.S. Sistani, J. [02/06/2017]

Arbitration and Conciliation Act, 1996 – Dispute between the parties – Respondent was about to encash the bank guarantees given by petitioner – Whether respondent could be restrained from encashing the guarantees – Held, No.

Brief facts:

By the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner inter alia prays for restraining the respondents from encashing bank guarantees no.160004IBGA00036 and 16000IBGA00037 dated 28.03.2016.

Decision: Petition dismissed.

Reason:

The only ground urged before this Court is that special equities exist in favour of the petitioner entitling it to an injunction against the respondents on the grounds that extensions of time were granted by the respondent no.1, the amount due from the petitioner has not been computed and that on the contrary, IOC owes about 900 crores to the petitioner therein.

The scope of interference by courts in the invocation of the bank guarantees is no longer res integra. It has been repeatedly held that, especially in cases of unconditional bank guarantees, the court should not interfere unless the petitioner is able to establish fraud of egregious nature or is able to plead special equities. I need not burden my opinion with numerous judicial pronouncements, suffice it to reproduce the relevant paragraphs of a judgment of this very Court in CWHEC-HCIL (JV) v. Calcutta Haldia Port Road Co. Ltd. & Ors., ILR (2008) 1 Del 353.

The first question which arises for consideration is whether the two bank guarantees which are identical in nature are unconditional or not. Reading of the terms of the bank guarantee, more particularly the clauses extracted in paragraph 20 aforegoing, leave no room for doubt that the petitioner had provided unconditional bank guarantees to the respondent no.1.

As regards, the submission that the respondent no.1 has acted as an arbiter in its own cause and decided the quantum of damages unilaterally, the question, in my view, stands fully answered in the case of Hindustan Steelworks Construction Ltd. v. Tarapore & Co. and Another, (1996) 5 SCC 34. In the case, the appellant had granted a contract for construction of civil works in a steel plant to the contractor, which despite extensions was unable to complete the project within the stipulated time and the appellant rescinded the contract. As per the terms of the contract, the appellant assessed the loss/damages and invoked the bank guarantees. The contractor rushed before the Trial Court praying for an injunction restraining the appellant from invoking the bank guarantees to no avail and then approached the Andhra Pradesh High Court alleging that since the bank guarantees were given for securing due performance, the same would be encashable only after the arbitrators decide the factum of breach as well as the damage suffered. The High Court reversed the decision of the Trial Court finding that the liability to pay damages would arise only after it is established that there is a breach of contract and same could be ascertained by the arbitrator. This did not find favour with the Apex Court, which allowed the appeals by observing as under:

"We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a

case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/ Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees."

Even the other grounds urged by the learned senior counsel for the petitioner fail to establish a case of special equities. The attribution of the guilt for the delay and the consequent or other claims of the petitioner can be adjudicated before the arbitral tribunal. Further, the respondent no.1 being an instrumentality of the state, there is no danger of the petitioner being unable to recover any amounts it claims should the same be awarded to it in the arbitral proceedings. I may also note that similar grounds pertaining to outstanding bills, amounts and attribution of blame for delay in execution of project were raised before this Court in CWHEC-HCIL (JV) and were rejected (paragraphs 2-4, 19, 41 and 44).

In the present case, the petitioner has not been able to establish any special equities in claim or counter claim on behalf of the petitioner against a ground to stay the bank guarantee which is an independent document. Therefore, I find no grounds to stay the invocation of the two bank guarantees.

ANANTHESH BHAKTA

v.

NAYANA S. BHAKTA & ORS

[(2017) 5 SCC 185]

Civil Appeal No.10837 of 2016 (arising out of SLP(C) No. 31179 of 2014)

R.K. Agrawal & Ashok Bhushan, JJ. [Decided on 15/11/2016]

Arbitration and Conciliation Act, 1966 – Disputes between partners unregistered partnership – Partnership deed as well as retirement deed provided for arbitration – Whether arbitration proceedings could be refused on the ground that partnership is unregistered – Held, No.

Brief facts:

Facts are complicated and elaborate. Suffice to state that disputes arose between the partners of an unregistered partnership firm and a suit was filed to resolve the dispute, in which the defendants have filed an application seeking to refer the dispute to arbitration as the partnership deed as well as the retirement deed contained arbitration clause.

Decision: Appeal dismissed.

Reason:

After considering the submissions of learned counsel for the parties and perusing the records, the court framed the following three issues and answered them accordingly.

(1) Whether non-filing of either original or certified copy of retirement deed and partnership deed along with application I.A.No. IV dated 09.05.2014 entailed dismissal of the application as per section 8(2) of 1996 Act.

In the present case as noted above, the original Retirement Deed and Partnership Deed were filed by the defendants on 12th May and it is only after filing of original deeds that Court proceeded to decide the application I.A.No. IV. In the present case it is relevant to note the Retirement Deed and Partnership Deed have also been relied by the plaintiffs. Hence, the argument of plaintiffs that defendants' application I.A.No. IV was not accompanied by original deeds, hence, liable to be rejected, cannot be accepted. We are thus of the view that the appellants submission that the application of defendants under Section 8 was liable to be rejected, cannot be accepted.

(2) Whether the fact that all the parties to the suit being not parties to the retirement deed/partnership deed, the Court was not entitled to make the reference relying on arbitration agreement. The plaintiffs admittedly are parties to the arbitration agreement as noted above. It does not lie in their mouth to contend that since one of the defendants whom they have impleaded was not party to the arbitration agreement, no reference can be made to the arbitrator. In the facts of the present case, it cannot be said that merely because one of the defendants i.e. defendant no. 6 was not party to the arbitration agreement, the dispute between the parties which essentially relates to the benefits arising out of Retirement Deed and Partnership deed cannot be referred.

Learned District Judge has noted that defendant no.6 has not inherited any share either in Partnership deed or in the schedule property and hence there is no question of bifurcation of either cause of action or parties. We fully endorse the above view taken by Learned District Judge.

(3) Whether dispute pertaining to unregistered partnership deed cannot be referred to an arbitration despite there being arbitration agreement in the deed of retirement/partnership deed. The submission by the petitioner is that partnership being an unregistered partnership, no reference can be made to the arbitration. In the present case there is no dispute between the parties that both Retirement deed and Partnership deed contain an arbitration clause. In Retirement deed which had been signed by retiring partners, continuing partners and concurring partners, following was stated in clause 8:

"...In case of any dispute or difference arising between the parties, regarding the interpretation of the contents of this Deed of Retirement or any other matter or transactions touching the said retirement, it shall be referred to an arbitration under the provisions of the Arbitration & Conciliation Act, 1996."

When the partners and those who claim through partners agreed to get the dispute settled by arbitration, it is not open for the appellants to contend that partnership being unregistered partnership, the dispute cannot be referred.

The petitioners have not been able to show any statutory provision either in 1996 Act or in any other statute from which it can be said that dispute concerning unregistered partnership deed cannot be referred to arbitration. We thus do not find any substance in the third submission of the appellant.

In the result, we do not find any merit in this appeal which is accordingly dismissed.

NEWGEN SPECIALTY PLASTIC LTD

v.

INTEC CAPITAL LTD [DEL]

FAO No. 292 of 2017

Valmiki J.Mehta,J.[Decided on14/07/2017]

Arbitration and conciliation Act, 1996 – Section 37 – Ex parte award – Liability to repay the loan proved by evidence – Whether the award could be interfered – Held, No.

Brief facts:

The appellant/objector had obtained a loan of Rs.3 crores from the respondent for purchase of equipment for its business. Appellant also tendered a collateral security for a sum of Rs.90,00,000/-. Since the appellant failed to pay the monthly instalments on time, hence there arose dues of Rs.2,80,25,074/-, and to recover which claim the respondent/lender invoked arbitration proceedings.

Appellant/applicant appeared in the arbitration proceedings on some dates but thereafter failed to appear and hence was proceeded ex-parte and the impugned award was passed decreeing the recovery of the amount along with interest but subject to adjustment to be granted to the appellant with respect to the collateral amount of Rs.90,00,000/-

Appellant challenged the impugned award by filing objections before the court below under Section 34 of the Act, and which have been dismissed by the impugned judgment, hence the present appeal.

Decision : Appeal dismissed.

Reason :

Once, it is established by the respondent by leading evidence that appellant had taken a loan, that there was default in re- payment of the loan amount as there was default of the payment of monthly instalments, i.e. the respondent proved its claim in the arbitration proceedings, the impugned award dated 11.2.2016 could not have been interfered with by the court below under Section 34 of the Act. The court below could not have interfered with such an award not only because a court hearing objections does not sit as an appellate court to re-apprise the evidence as also findings of facts and conclusions, but also because even if the court below hearing objections was a civil court, yet the impugned award even as a decree could not have been set aside as the Respondent's entitlement was proved for recovery of the amount taken as loan (but not repaid) with the agreed rate of interest.

Learned counsel for the appellant firstly argued that it was the duty of the respondent/lender first to adjust the amount due by sale of hypothecated equipment, however when I put a query to counsel for the appellant that whether the appellant had returned the machinery to the respondent, it is conceded that the machinery/ equipment purchased by the appellant, by utilization of the loan granted, have not being returned to the respondent.

Learned counsel for the appellant then argued that the respondent is liable to adjust the security amount, and to which there is no dispute, because, arbitrator as per the impugned award while granting relief as per para 8 directed recovery of the amount due only after adjustment of the amount of Rs.90,00,000/-.

Though, learned counsel for the appellant argued that the amount of Rs.90,00,000/- had to bear interest, however, this plea could only have been taken before this Court if the appellant had taken such a plea in the arbitration proceedings, and substantiated the same, but once the appellant chooses to remain ex-parte in the arbitration proceedings, a plea on merits which is not raised before the arbitration proceedings cannot be raised before the court hearing objections under Section 34 of the Act and much less this appellate court having appeal against the dismissal of objections.

Accordingly, this Court cannot adjudicate the issues on merits which were not addressed in the arbitration proceedings. In view of the above discussion, there is no merit in the appeal and the same is hereby dismissed.

KANCHAN UDYOG LTD.

v.

UNITED SPIRITS LTD [SC]

Civil Appeal No.1168 of 2007

Ranjan Gogoi & Navin Sinha, JJ. [Decided on 19/06/2017]

Indian contract Act,1872 – Section 73 – Damages towards loss of anticipated profits – Bottling contract – Termination thereof by brand owner – Bottler filed suit claiming damages for loss of anticipated

profits – Trial court decreed the suit while High Court reversed it – Whether the plaintiff is entitled damages for loss of anticipated profits – Held, No.

Brief facts :

The appellant entered into an agreement with the respondent for establishment of a non-alcoholic beverages bottling plant. The concentrate (Essence), for preparation of the non-alcoholic beverage, was to be supplied by the respondent. The beverage was to be sold in specified districts of West Bengal, as provided for in the marketing agreement.

The bottler's agreement was terminated by the respondent. Commercial production at the plant ceased and the suit was instituted by the appellant in 1990. The learned Single Judge decreed the Suit, awarding damages towards loss of anticipated profits, and towards costs for installation of the plant, after deducting Rs.9.05 lakhs payable by the appellant to the respondent as consultancy charges. The respondent was held liable to pay to the appellant a sum of Rs.4,24,33,000/- with interest @ 10% from the date of suit till payment. The Division Bench in appeal reversed the decree, and dismissed the Suit. Hence the present appeal to the Supreme Court.

Decision : Appeal dismissed.

Reason :

In the facts of the present case, it cannot be held that the breach alone was the cause for loss of anticipated profits, much less was it the primary or dominant reason. The appellate court has adequately discussed the appellant's letter dated 04.07.1987 thanking the respondent for its advertising support. During the year 1986-87, the respondent spent Rs.2,05,13,376.14 for advertising purposes evident from its balance sheet. Similarly, in 1987-88, it spent Rs.1,65,87,158.73 towards advertisement and sale promotions. On the contrary, for the year ending 31.03.1987, the appellant spent Rs.6,68,856.00 towards advertisement and in the year 1987-88 it spent only Rs.39,288.00. The fact that it was unable to pay for the concentrates seeking deferred payment, acknowledgement on 09.05.1988 that it would continue to suffer loss for the next six years upto 1992-93 seeking long term credit for five years for supply of concentrates and its acknowledgement in letter dated 27.04.1987 that due to "many factors already discussed with you we have not been able to run the factory and the sales of our product have not picked up in the market", and not to press for payment of consultancy fees, failure to deploy adequate manpower as per its own projections demonstrates the poor financial condition of the appellant as the prime reason for its inability to run the plant and earn profits. As against a value of Rs.4,26,685.19 of raw materials in 1989, the appellant had an over draft of Rs.13,89,000.00. It had a credit entry of Rs.5,135.00 only in July, 1988 in its account with the State Bank of India. The current account with the Union Bank of India reflected a balance of Rs.1,28,619.25 on 28.03.1989. The Bank balance on 31.03.1989 reflected from its balance sheet was only Rs.43,345.38, and its loss as reflected in the balance sheet on 31.03.1987 was Rs.18,47,018.11. In the facts of the present case, it cannot be held that the breach by the respondent was the cause, much less the dominant cause for loss of anticipated profits by the appellant.

The appellate court with reference to evidence has adequately discussed that the appellant failed to take steps to mitigate it losses under the Explanation to Section 73 of the Act. We find no reason to come to any different conclusion from the materials on record. If concentrates were available from M/s. VEC, the appellant had to offer an explanation why it stopped lifting the same after having done so for nearly a year, and could have continued with the business otherwise and earned profits. It could also have taken steps to sell the unit after its closure in May, 1989 rather than to do so belatedly in 1996. No reasonable steps had been displayed as taken by the appellant for utilisation of its bottling plant by negotiations with others in the business. Nothing had been demonstrated of the injury that would have been caused to it thereby.

That leaves the question with regard to reliance loss and the expectation loss. Whether the two could be maintainable simultaneously or were mutually exclusive? In Pullock & Mulla, 14 th Edition, Volume II, page 1174, the primary object for protection of expectation interest, has been described as to put the innocent party in the position which he would have occupied had the contract been performed. The general aim of the law being to protect the innocent party's defeated financial expectation and compensate him for his loss of bargain, subject to the rules of causation and remoteness. The purpose of protection of reliance interest is to put the plaintiff in the position in which he would have been if the contract had never been made. The loss may include expenses incurred in preparation by the innocent party's own performance, expenses incurred after the breach or even pre-contract expenditure but subject to remoteness.

In view of the conclusion, that the appellant was not entitled to any expectation loss towards anticipated profits, for reasons discussed, any grant of reliance loss would tantamount to giving a benefit to it for what was essentially its own lapses. There are no allegations of any deficiency in the plant. Contrary to its claim of Rs.2.52 crores towards cost of the plant, the learned Single Judge awarded Rs.1.60 crores without any discussion for the basis of the same. Though the appellant had preferred a cross appeal, it did not press the same.

The aforesaid discussion leads to the inevitable conclusion that the appellant had failed to establish its claim that the breach by the respondent was the cause for loss of anticipated profits, that the profitability projection in its loan application was a reasonable basis for award of damages towards loss of anticipated profits. The appellant had failed to abide by its own obligations under Exhibit 'C' and lacked adequate infrastructure, finances and manpower to run its business. It also failed to take reasonable steps to mitigate its losses. The appeal lacks merit and is dismissed.

M/S DURO FELGUERA S.A

v.

GANGAVARAM PORT LIMITED [SC]

Arbitration Petition No.30 of 2016 with Arbitration Petition No.31 of 2016 and T.C. (C) NOS.25/2017, 26/2017, 27/2017 & 28/2017

R. Banumathi & Kurian Joseph, JJ. [Decided on 10/10/2017]

Arbitration and Conciliation Act, 1996 – Five different contracts and one MoU – Each contract contained arbitration clause – Whether single arbitration tribunal could be appointed to resolve all the disputes arose in these six contracts – Held, No.

Brief Facts:

The Respondent GPL intended to expand its facilities in the Port with respect to Bulk Material Handling Systems. This included Engineering, Design, Procurement of Materials, Manufacturing, Supply, Erection, Testing and Commissioning of Bulk Material Handling Systems, as well as all other associated works and integration of the same with the existing coal handling systems etc. After post-bid negotiations, the petitioner Duro Felguera and its subsidiary (FGI) were considered by GPL and Duro Felguera and FGI were selected as "the Contractors" for the work.

After discussion between the parties, the main contract i.e. Original Package No. 4 TD was divided into five different and separate Packages.Separate Letters of Award for five different Packages were issued to M/s Duro Felguera, S.A. and the Indian Subsidiary-FGI for the above said work respectively.

Each of the Packages has special conditions of contract as well as general conditions of contract. Each one of the Contract/Agreement for works under split-up Packages contains an arbitration clause namely sub-clause 20.6. Duro Felguera had also entered into a Corporate Guarantee dated 17.03.2012 guaranteeing due performance of all the works awarded to Duro Felguera and FGI. The said Corporate Guarantee had its own arbitration clause namely clause (8).

In addition, Duro Felguera and FGI have executed a tripartite Memorandum of Understanding with GPL. In the said MoU, Duro Felguera and FGI have agreed to carry out the works as per the priority of documents listed therein.

Dispute arose between the parties. GPL contended that all the five contracts are composite contract and one arbitration tribunal should be appointed. On the other hand, Petitioner contended that all five contracts are separate contracts and different arbitration tribunals should be appointed.

Decision : Different arbitration tribunals appointed.

Reason :

The learned Senior Counsel for GPL relied upon *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc. & Ors* (2013) 1 SCC 641, to contend that where various agreements constitute a composite transaction, court can refer disputes to arbitration if all ancillary agreements are relatable to principal agreement and performance of one agreement is so intrinsically interlinked with other agreements. Even though Chloro Controls has considered the doctrine of "composite reference", "composite performance" etc., ratio of Chloro Controls may not be applicable to the case in hand. In Chloro Controls, the arbitration clause in the principal agreement i.e. clause (30) required that any dispute or difference arising under or in connection with the principal (mother) agreement, which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with Rules of ICC. The words thereon "under and in connection with" in the principal agreement was very wide to make it more comprehensive. In that background, the performance of all other agreements by respective parties including third parties/non-signatories had to fall in line with the principal agreement. In such factual background, it was held that all agreements pertaining to the entire disputes are to be settled by a "composite reference".

The case in hand stands entirely on different footing. As discussed earlier, all five different Packages as well as the Corporate Guarantee have separate arbitration clauses and they do not depend on the terms and conditions of the Original Package No.4 TD nor on the MoU, which is intended to have clarity in execution of the work.

Duro Felguera being a foreign company, for each of the disputes arising under New Package No.4 and Corporate Guarantee, International Commercial Arbitration Tribunal are to be constituted. M/s. Duro Felguera has nominated Mr. Justice D.R. Deshmukh (Former Judge of Chhattisgarh High Court) as their arbitrator. Gangavaram Port Limited (GPL) has nominated Mr. Justice M.N. Rao (Former Chief Justice of Himachal Pradesh High Court). Along with the above two arbitrators Mr. Justice R.M. Lodha, Former Chief Justice of India is appointed as the Presiding Arbitrator of the International Commercial Arbitral Tribunal.

Package No.6 (Rs.208,66,53,657/-); Package No.7 (Rs.59,14,65,706/-); Package No.8 (Rs.9,94,38,635/-); and Package No.9 (Rs.29,52,85, 558/-) have been awarded to the Indian company-FGI. Since the issues arising between the parties are inter-related, the same arbitral tribunal, Justice R.M. Lodha, Former Chief Justice of India, Justice D.R. Deshmukh, Former Judge of Chhattisgarh High Court and Justice M. N. Rao, Former Chief Justice of Himachal Pradesh High Court, shall separately constitute Domestic Arbitral Tribunals for resolving each of the disputes pertaining to Packages No.6, 7, 8 and 9.

HIMANGNI ENTERPRISES

v.

KAMALJEET SINGH AHLUWALIA [SC]

Civil Appeal No. 16850 OF 2017 arising out of S.L.P. (C) No.27722/2017)

R.K.Aggarwal & A.M.Sapre, JJ. [Decided on 12/10/2017]

Arbitration and conciliation Act, 1996 – Section 8 – Tenancy contract – Arbitration clause in the contract – Landlord initiated civil proceedings for eviction – Civil court refused to refer the parties to arbitration – Whether correct – Held, Yes.

Brief facts :

The appellant is the defendant whereas the respondent is the plaintiff in a civil suit out of which this appeal arises. The respondent has filed a civil suit against the appellant in the district Court for eviction and for recovery of unpaid arrears of rent and grant of permanent injunction.

The appellant, on being served with the notice of the civil suit, filed an application under Section 8 of the Arbitration and conciliation Act, 1996 [the Act] on the ground that the suit was founded on the lease deed, which contained an arbitration clause for resolving the dispute arising out of the lease deed between the parties, and when admittedly the disputes had arisen in relation to the suit premises, the same were governed by the terms of the lease deed. The trial court rejected the application. On appeal High court also dismissed the appeal. Hence the present appeal.

Decision : Appeal dismissed.

Reason :

In our considered opinion, the question involved in the appeal remains no longer res integra and stands answered by two decisions of this Court in *Natraj Studios (P) Ltd. v. Navrang Studios & Anr, 1981(1) SCC 523* and *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors., (2011) 5 SCC 532* against the appellant and in favour of the respondent.

So far as Natraj Studio's case (supra) is concerned there also, the landlord had filed a civil suit against the tenant in the Small Causes Court, Bombay claiming therein the tenant's eviction from the leased premises. There also, the tenant was inducted pursuant to "leave and license" agreement executed between the landlord and the tenant. This Court (Three Judge Bench) speaking through Justice O. Chinnappa Reddy rejected the application filed by the tenant under Section 8 of the Act and held, inter alia, that the civil suit filed by the landlord was maintainable. It was held that the disputes of such nature cannot be referred to the arbitrator.

Yet in another case of *Booz Allen & Hamilton Inc.* (supra), this Court (two Judge Bench) speaking through R. V. Raveendran J. laid down the following proposition of law after examining the question as to which cases are arbitrable and which are non-arbitrable:

"36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes." (emphasis supplied)

Keeping in view the law laid down by this Court in aforementioned two decisions and applying the same to the facts of this case, we have no hesitation to hold that both the Courts below were right in dismissing the appellant's application filed under Section 8 of the Act and thereby were justified in holding that the civil suit filed by the respondent was maintainable for grant of reliefs claimed in the plaint despite parties agreeing to get the disputes arising therefrom to be decided by the arbitrator.

The Delhi Rent Act, which deals with the cases relating to rent and eviction of the premises, is a special Act. Though it contains a provision (Section 3) by virtue of it, the provisions of the Act do not apply to certain premises but that does not mean that the Arbitration Act, ipso facto, would be applicable to such premises conferring jurisdiction on the arbitrator to decide the eviction/rent disputes. In such a situation, the rights of the parties and the demised premises would be governed by the Transfer of Property Act and the civil suit would be triable by the Civil Court and not by the arbitrator. In other words, though by virtue of Section 3 of the Act, the provisions of the Act are not applicable to certain premises but no sooner the exemption is withdrawn or ceased to have its application to a particular premises, the Act becomes applicable to such premises. In this view of the matter, it cannot be contended that the provisions of the Arbitration Act would, therefore, apply to such premises. In view of foregoing discussion, we find no merit in the appeal, which fails and is accordingly dismissed.

INNOX WIND LTD.

v.

THERMOCABLES LTD [SC]

Civil Appeal No. 19 of 2018 (Arising out of SLP (Civil) No.31049 of 2016)

S.A. Bobde & L. Nageshwar Rao, JJ. [Decided on 05/01/2018]

Arbitration and Conciliation act, 1996 – Appointment arbitrator – Purchase orders – Standard terms and conditions containing arbitration clause attached to the purchase orders – Disputes between the parties – whether arbitrator could be appointed – Held, Yes.

Brief facts :

Two purchase orders were issued by the Appellant to the Respondent for supply of cables for their WTGs. According to the Purchase Order, the supply was to be according to the terms mentioned in the order and the Standard Terms and Conditions that were attached thereto. Apart from the other conditions, the Standard Terms and Conditions contain a clause pertaining to dispute resolution. The said clause provides for a dispute to be resolved by a sole arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The material on record indicates that the Respondent accepted all the terms and conditions mentioned in the Purchase Order except the delivery period.

As dispute arose between the parties as to the quality of the cables, Appellant invoked the arbitration clause to resolve the disputes and issued a notice dated proposing the name of a sole arbitrator in terms of the Standard Terms and Conditions. In the absence of any response, the Appellant moved the High Court of Judicature at Allahabad by filing an application under Section 11 (6) of the Act.

The High Court dismissed the said application by holding that an arbitrator cannot be appointed as the Appellant did not prove the existence of an arbitration agreement. Aggrieved, the appellant approached the Supreme Court.

Decision : Appeal allowed.

Reason :

We are of the opinion that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. In M.R. Engineers this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. In view of the development of law after the judgment in M.R. Engineers' case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from Russell on Arbitration 24th Edition (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in M.R. Engineers' case. We are in agreement with the judgment in M.R. Engineer's case with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.

In the present case, the purchase order was issued by the Appellant in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The Respondent by his letter dated 15.12.2012 confirmed its acceptance of the terms and conditions mentioned in the purchase order except delivery period. The dispute arose after the delivery of the goods. No doubt, there is nothing forthcoming from the pleadings or the submissions made by the parties that the standard form attached to the purchase order is of a trade association or a professional body. However, the Respondent was aware of the standard terms and conditions which were attached to the purchase order. The purchase order is a single contract and general reference to the standard form even if it is not by a trade association or a professional body is sufficient for incorporation of the arbitration clause.

For the aforementioned reasons, the appeal is allowed and the judgment of the High Court is set aside. Justice Sushil Harkauli is appointed as the Arbitrator to adjudicate the dispute between the parties.

INDIAN FARMERS FERTILIZER COOPERATIVE LTD.

v.

M/s.BHADRA PRODUCTS [SC]

Civil Appeal No. 824 of 2018 (Arising out of SLP (C) No.19771 of 2017)

R.F. Nariman & Navin Sinha, JJ. [Decided on 23/01/2018]

Arbitration and Conciliation Act, 1996 – Arbitrator deciding the issue of limitation – Whether an interim award amenable to challenge under appeal – Held, Yes.

Brief facts :

An interesting question arises as to whether an award delivered by an Arbitrator, which decides the issue of limitation, can be said to be an interim award, and whether such interim award can then be set aside under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

Decision : Appeal allowed.

Reason :

Tested in the light of the statutory provisions and the case law cited above, it is clear that as the learned Arbitrator has disposed of one matter between the parties i.e. the issue of limitation finally, the award dated 23rd July, 2015 is an "interim award" within the meaning of Section 2(1) (c) of the Act and being subsumed within the expression "arbitral award" could, therefore, have been challenged under Section 34 of the Act.

However, Shri Sinha has argued before us that the award dated 23rd July, 2015 being a ruling on the arbitral tribunal's jurisdiction would fall within Section 16 of the Act, and inasmuch as the decision taken on the point of limitation was rejected, the drill of Section 16must be followed in which case all other issues have to be decided first, and it is only after such issues are decided that such an award can be challenged under Section 34 of the Act. Section 16 of the Act lays down what, in arbitration law, is stated to be the Kompetenz-kompetenz principle, viz. that an arbitral tribunal may rule on its own jurisdiction. At one time, the law was that the arbitrator, being a creature of the contract, could not rule on the existence or validity of the arbitration clause contained in the contract. This, however, gave way to the Kompetenz principle which was adopted by the UNCITRAL Model Law.

In our view, therefore, it is clear that the award dated 23 rd July, 2015 is an interim award, which being an arbitral award, can be challenged separately and independently under Section 34 of the Act. We are of the view that such an award, which does not relate to the arbitral tribunal's own jurisdiction under Section 16, does not have to follow the drill of Section 16(5) and (6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.

The appeal is, accordingly, allowed and the impugned judgment is set aside. The Section 34 proceedings before the District Judge, Jagatsinghpur may now be decided. There shall, however, be no order as to costs.

TOYOTA JIDOSHA KABUSHIKI KAISHA

v.

PRIUS AUTO INDUSTRIES LTD & ORS. [SC]

Civil Appeal Nos.5375-5377 of 2017

Ranjan Gogoi & Navin Sinha, JJ. [Decided on 14/12/2017]

Trademarks Act – Prior use of trademark – Use in a particular territory – What to be established to claim prior user right – Supreme Court explains the law.

Brief facts :

The appellant is the owner of the trademarks 'TOYOTA', 'TOYOTA INNOVA', 'TOYOTA DEVICE' and the mark 'Prius' of which the plaintiff claimed to be a prior user. The dispute between the appellant and respondent with respect to the use of the above trademarks ultimately decided by the Delhi High Court which refrained the respondent to use the trademarks 'TOYOTA INNOVA', 'TOYOTA DEVICE' but allowed to use the trademark 'Prius. Aggrieved by the decision, the appellant had challenged the decision before the Supreme Court.

Decision : Appeal dismissed.

Reason :

At the very outset it must be clarified that in view of the virtual acceptance of the conditional order of injunction with regard to the 'TOYOTA', 'TOYOTA INNOVA' and 'TOYOTA DEVICE MARKS' by the defendants, the truncated scope of the present appeal would be confined to the correctness of the views of the Division Bench of the High Court with regard to the use of the name 'Prius' and specifically whether by use of the said name/ mark to market the automobile spare parts manufactured by them, the defendants are guilty of passing off their products as those of the plaintiff thereby injuring the reputation of the plaintiff in the market.

Indeed, the trade mark 'Prius' had undoubtedly acquired a great deal of goodwill in several other jurisdictions in the world and that too much earlier to the use and registration of the same by the defendants in India. But if the territoriality principle is to govern the matter, and we have already held it should, there must be adequate evidence to show that the plaintiff had acquired a substantial goodwill for its car under the brand name 'Prius' in the Indian market also. The car itself was introduced in the Indian market in the year 2009-2010. The advertisements in automobile magazines, international business magazines; availability of data in information-disseminating portals like Wikipedia and online Britannica dictionary and the information on the internet, even if accepted, will not be a safe basis to hold the existence of the necessary goodwill and reputation of the product in the Indian market at the relevant point of time, particularly having regard to the limited online exposure at that point of time, i.e., in the year 2001.

The news items relating to the launching of the product in Japan isolatedly and singularly in the Economic Times (Issues dated 27.03.1997 and 15.12.1997) also do not firmly establish the acquisition and existence of goodwill and reputation of the brand name in the Indian market. Coupled with the above, the evidence of the plaintiff's witnesses themselves would be suggestive of a very limited sale of the product in the Indian market and virtually the absence of any advertisement of the product in India prior to April, 2001. This, in turn, would show either lack of goodwill in the domestic market or lack of knowledge and information of the product amongst a significant section of the Indian population.

While it may be correct that the population to whom such knowledge or information of the product should be available would be the section of the public dealing with the product as distinguished from the general population, even proof of such knowledge and information within the limited segment of the population is not prominent. All these should lead to us to eventually agree with the conclusion of the Division Bench of the High Court that the brand name of the car Prius had not acquired the degree of goodwill, reputation and the market or popularity in the Indian market so as to vest in the plaintiff the necessary attributes of the right of a prior user so as to successfully maintain an action of passing off even against the registered owner. In any event the core of the controversy between the parties is really one of appreciation of the evidence of the parties; an exercise that this Court would not undoubtedly repeat unless the view taken by the previous forum is wholly and palpably unacceptable which does not appear to be so in the present premises.

If goodwill or reputation in the particular jurisdiction (in India) is not established by the plaintiff, no other issue really would need any further examination to determine the extent of the plaintiff's right in the action of passing off that it had brought against the defendants in the Delhi High Court. Consequently, even if we are to disagree with the view of the Division Bench of the High Court in accepting the defendant's version of the origin of the mark 'Prius', the eventual conclusion of the Division Bench will, nonetheless, have to be sustained. We cannot help but also to observe that in the present case the plaintiff's delayed approach to the Courts has remained unexplained. Such delay cannot be allowed to work to the prejudice of the defendants who had kept on using its registered mark to market its goods during the inordinately long period of silence maintained by the plaintiff.

For all the aforesaid reasons, we deem it proper to affirm the order(s) of the Appellate Bench of the High Court dated 23.12.2016 and 12.01.2017 and dismiss the appeals filed by the appellant/plaintiff.

ROYAL ORCHID HOTELS LTD.

v.

KAMAT HOTELS (INDIA) LTD & ORS [SC]

Special Leave Petition (C) No.6131 of 2015

R Banumathi & R Gogoi, JJ. [Decided on 14/12/2017]

Copyrights Act – Earlier registration under class 16 upheld – Later classification under class 42 refused – Facts proved that petitioner was not able to prove that it was the prior user of the logo- High Court held accordingly – Whether requires interference by the Supreme Court – Held, No.

Brief facts :

The petitioner – 'Royal Orchid Hotels Limited' got registration of its trademark 'Royal Orchid' and 'Royal Orchid Hotels' in class 16 sometime in the year 2005 and the dispute, between the parties, with regard to registration of the trademarks 'Royal Orchid' and Royal Orchid Hotels in class 16, therefore, has attained finality in law in favour of the petitioner.

It appears that the petitioner sometime in the year 2004 applied for registration of its aforesaid trademarks in class 42. This was refused by the Deputy Registrar of the Trademarks and ultimately by the High Court also. Aggrieved, this special leave petition has been filed.

Decision : Petition dismissed.

Reason :

A reading of the discussions by the High Court goes to show that the conclusion recorded in the impugned order is based on a detailed consideration of the materials brought on record by both the parties. The conclusion that the petitioner had not demonstrated that it was the first user of the logo/mark and that it is the respondent who is the first user was arrived at on such consideration.

The High Court was also of the view that notwithstanding the class of customers serviced by the parties before it, it cannot be said that the two logos/marks would not give rise to confusion amongst the customers using the Hotels. In this regard, the High Court observed that the view expressed by the IPAB that having regard to the class of customers serviced by the hotels (High Income) there could be no possibility of being misled cannot be accepted as a general proposition and will always depend on individual customers. As the marks/logos were largely similar, the High Court took the view that even on the second question formulated by it the writ petition has to be allowed and the order of the IPAB set aside.

If the High Court on an elaborate consideration of the materials and evidence adduced by the parties before it had thought it proper to reach a conclusion consistent with the findings of the primary authority i.e. the Deputy Registrar and the reasons for reversal of the view of the primary authority by the IPAB being summary, as noticed, the present petition really turns on the question of appreciation of the evidence on record. Having considered the matter we are of the view that the conclusions reached by the High Court cannot be said to be, in anyway, unreasonable and/or unacceptable. Rather, we are inclined to hold that the view recorded by the High Court is a perfectly possible and justified view of the matter and the conclusion(s) reached can reasonably flow from a balanced consideration of the evidence and materials on record. We will, therefore, not consider the present to be a fit case for interference with the order of the High Court. Accordingly, we dismiss the Special Leave Petition and refuse leave to appeal.

SUNDARAM FINANCE LTD.

v.

ABDUL SAMAD & ORS [SC]

Civil Appeal No.1650 of 2018

J. Chelameswar & S K Kaul, JJ. [Decided on 15/02/2018]

Arbitration and Conciliation Act, 1996 – Section 42 – Execution of award – Whether it can be filed and executed straightaway in the Court where the assets are located – Held, Yes.

Brief facts :

The divergence of legal opinion of different High Courts on the question as to whether an award under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act') is required to be first filed in the court having jurisdiction over the arbitration proceedings for execution and then to obtain transfer of the decree or whether the award can be straightway filed and executed in the Court where the assets are located is required to be settled in the present appeal.

The Petitioner is the lender and the Respondent is the borrower of a vehicle loan. Upon default of the respondent, the Petitioner instituted arbitration proceedings and award was passed in Petitioner's favour.

The case of the appellant is that the award being enforceable as a decree under Section 36 of the said Act, execution proceedings were filed in the jurisdiction of the courts at Morena, Madhya Pradesh under Section 47 read with Section 151 and Order 21 Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code'). The respondents sought to contest the proceedings inter alia on the ground that the vehicle against which the loan was obtained was stolen.

Decision : Appeal allowed.

Reason :

It is not necessary to go into further details of the proceedings but suffice to say that the trial court vide order dated 20.3.2014 return the execution application on account of lack of jurisdiction to be presented to the court of competent jurisdiction. The effect of the judgment was that the appellant was required to file the execution proceedings first before the court of competent jurisdiction in Tamil Nadu, obtain a transfer of the decree and then only could the proceedings be filed in the trial court at Morena. This view adopted by the trial court was in turn based on the judgment of the Madhya Pradesh High Court and the opinion of the Karnataka High Court while it is pleaded that the view of the Rajasthan High Court and the Delhi High Court were to the contrary. The petitioner did not approach the High Court against the said order of the trial court but straightway approached this Court by filing the Special Leave Petition on the ground that no useful purpose would be served by approaching the Madhya Pradesh High Court in light of the view already expressed by that Court in conflict with the opinions of some other High Courts.

In order to appreciate the controversy, we would first like to deal with the provisions of the said Code and the said Act. The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said code in the same manner as if it were a decree. It is, thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the arbitral tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code.

The line of reasoning supporting the award to be filed in a so-called court of competent jurisdiction and then to obtain a transfer of the decree is primarily based on the jurisdiction clause found in Section 42 of the Act. The aforesaid provision, however, applies with respect to an application being filed in Court under Part I. The jurisdiction is over the arbitral proceedings. The subsequent application arising from that agreement and the arbitral proceedings are to be made in that court alone. However, what has been lost sight of is Section 32 of the said Act, which provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings.

ORIENTAL INSURANCE COMPANY LTD.

v.

NARBHERAM POWER & STEEL PVT LTD [SC]

Civil Appeal No. 2268 of 2018arising out of S.L.P. (C) No. 33621 of 2017)

Dipak Misra (CJI), A.M. Khanwilkar & D.Y. Chandrachud, JJ. [Decided on 02/05/2018]

Arbitration and Conciliation Act, 1996 – Insurance policy – Clause stipulating disputed claim would not be referred to arbitration – Insurer repudiating the claim – Whether referable to arbitration – Held, No.

Brief facts :

The respondent had entered into a Fire Industrial all Risk Policy in respect of the factory situated in Orissa.

In October 2013, due to cyclone the respondent suffered damages which it estimated at about 4 crores. An intimation was given to the appellant-insurer and it appointed a surveyor which visited the factory premises. A series of correspondences were exchanged between the respondent and the insurer. As ultimately the claim was not settled, the respondent sent a communication intimating the appellant that it had invoked the arbitration agreement and requested it to concur with the name of the arbitrator whom it had nominated. The appellant replied to the said letter repudiating the claim made by the respondent and declined to refer the disputes to arbitration between the parties.

The respondent moved an application before the High Court for the appointment of an arbitrator, which was contested by the appellant insurer and the High Court appointed a retired Judge of the High Court as arbitrator. The said order is under assail by way of special leave in this appeal.

Decision : Appeal allowed.

Reason : When we carefully read the Clause 13, it is quite limpid that once the insurer disputes the liability under or in respect of the policy, there can be no reference to the arbitrator. It is contained in the second part of the Clause. The third part of the Clause stipulates that before any right of action or suit upon the policy is taken recourse to, prior award of the arbitrator/arbitrators with regard to the amount of loss or damage is a condition precedent. The High Court, as the impugned order would show, has laid emphasis on the second part and, on that basis, opined that the second part and third part do not have harmony and, in fact, sound a discordant note, for the scheme cannot be split into two parts, one to be decided by the arbitration and the other in the suit.

It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.

In the instant case, Clause 13 categorically lays the postulate that if the insurer has disputed or not accepted the liability, no difference or dispute shall be referred to arbitration. The thrust of the matter is whether the insurer has disputed or not accepted the liability under or in respect of the policy. The rejection of the claim of the respondent made vide letter dated 26.12.2014 ascribing reasons, submits the learned senior counsel for the respondent, does not amount to denial of liability under or in respect of the policy. On a reading of the communication, we think, the disputation squarely comes within Part II of Clause 13. The said Part of the Clause clearly spells out that the parties have agreed and understood that no differences and disputes shall be preferable to arbitration if the company has disputed or not accepted the liability. The communication ascribes reasons for not accepting the claim at all. It is nothing else but denial of liability by the insurer in toto. It is not a disputation pertaining to quantum. In the present case, we are not concerned with regard to whether the policy was void or not as the same was not raised by the insurer. The insurance-company has, on facts, repudiated the claim by denying to accept the liability on the basis of the aforesaid reasons. No inference can be drawn that there is some kind of dispute with regard to quantification. It is a denial to indemnify the loss as claimed by the respondent. Such a situation, according to us, falls on all fours within the concept of denial of disputes and non-acceptance of liability. It is not one of the arbitration clauses which can be interpreted in a way that denial of a claim would itself amount to dispute and, therefore, it has to be referred to arbitration. The parties are bound by the terms and conditions agreed under the policy and the arbitration clause contained in it. It is not a case where mere allegation of fraud is leaned upon to avoid the arbitration. It is not a situation where a stand is taken that certain claims pertain to excepted matters and are, hence, not arbitrable. The language used in the second part is absolutely categorical and unequivocal inasmuch as it stipulates that it is clearly agreed and understood that no difference or disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The High Court has fallen into grave error by expressing the opinion that there is incongruity between Part II and Part III. The said analysis runs counter to the principles laid down in the three-Judge Bench decision in The Vulcan Insurance Co. Ltd (supra). Therefore, the only remedy which the respondent can take recourse to is to institute a civil suit for mitigation of the grievances. If a civil suit is filed within two months hence, the benefit of Section 14of the Limitation Act, 1963 will enure to its benefit. In view of the aforesaid premised reasons, the appeal is allowed and the order passed by the High Court is set aside.

SHYAM SUNDER AGARWAL

v.

P. NAROTHAM RAO [SC]

Civil Appeal No. 6872 of 2018 (Arising out of SLP (Civil) No. 34591/2012)

R. F. Nariman & Indu Malhotra, JJ. [Decided on 23/07/2018]

Arbitration and Conciliation Act,1996 – Section 7 – Arbitration agreement – Dispute resolution clause in MoU used words "Mediators/Arbitrators", "any breaches" and "decision to be final" – Whether such clause is as arbitration clause/agreement – Held, No.

Brief facts :

The present dispute arises out of a Memorandum of Understanding (MoU)/Agreement executed between the parties for sale and purchase of shares of a Company called M/s Mancherial Cement Company Private Limited of which all the parties are Directors. The bone of contention in the present proceedings is as to whether Clause 12 of the said Agreement can be stated to be an arbitration clause, as in the said clause the word "decision" is used; the word "Mediators/Arbitrators" is used; the expression "any breaches" is used; and the "decision" is to be final and binding on all parties to the said Agreement.

Decision : Appeal dismissed.

Reason :

What emerges on a conspectus of reading of these clauses is that Mr. Sudhakar Rao and Mr. Gone Prakash Rao, though styled as Mediators/Arbitrators, are without doubt escrow agents who have been appointed to keep certain vital documents in escrow, and to ensure a successful completion of the transaction contained in the MOU. Indeed, the very fact that they have been referred to as "Mediators/Arbitrators" and as "Mediators and Arbitrators" would show that the language used is loose – the idea really is that the two named persons do all things necessary during the implementation of the transaction between the parties to see that the transaction gets successfully completed. This becomes even clearer when Clauses 8 and 11 are seen minutely. Clause 8 expressly declares and confirms "that for successful completion of this transaction in order to avoid any further unforeseen litigations", the two escrow agents have been appointed. Clause 11 further makes it clear that these two gentlemen are escrow agents but shall not handover certain documents till the total transaction is satisfactorily completed.

We agree that Clause 12 has to be read in the light of these Clauses of the MOU, and that, therefore, the expression "decision" used in Clause 12 is only a pro tem decision – namely, that the two escrow agents are to make decisions only during the period of the transaction and not thereafter. He has correctly contended that, to use a well- known latin expression, they are "functus officio" after the transaction gets completed. Further, the "breaches" that are referred to in Clause 12 refer, inter alia, to an undertaking given by the party of the first part which is contained in Clause 10, which, if breached, the escrow agents have necessarily to decide on before going ahead with the transaction. Therefore, when viewed as a whole, it is clear that the two escrow agents are not persons who have to decide disputes that may arise between the parties, whether before or after the transaction is completed, after hearing the parties and observing the principles of natural justice, in order to arrive at their decision. A reading of the MOU as a whole leaves no manner of doubt that the said MOU only invests the two gentlemen named therein with powers as escrow agents to smoothly implement the transaction mentioned in the MOU and not even remotely to decide the disputes between the parties as Arbitrators.

In the present case, it is clear that the wording of the Agreement, as has been held by us above, is clearly inconsistent with the view that the Agreement intended that disputes be decided by arbitration. Indeed, three of the four purchasers did not read Clause 12 as an arbitration clause, but approached the Civil Court instead, strengthening our conclusion that the subsequent conduct of the parties to the Agreement also showed that they understood that Clause 12 was not an arbitration clause in the Agreement.

M/S. NANDHINI DELUXE

v.

M/S. KARNATAKA COOPERATIVE MILK PRODUCERS FEDERATION LTD [SC]

Civil Appeal Nos. 2937-2942 of 2018

A.Bhushan & A.Sikri, JJ. [Decided on 26/07/2018]

Trademarks Act, 1999 – Section 11 – Similar tradenames “NANDHINI” and “NANDINI” in the same class but for different products – Whether registration to be rejected – Held, No.

Brief facts :

The dispute pertains to the use of mark ‘NANDHINI’. The respondent herein, which is a Cooperative Federation of the Milk Producers of Karnataka, adopted the aforesaid mark ‘NANDINI’ in the year 1985 and under this brand name it has been producing and selling milk and milk products. It has got registration of this mark as well under Class 29 and Class 30. The appellant herein, on the other hand, is in the business of running restaurants and it adopted the mark ‘NANDHINI’ for its restaurants in the year 1989 and applied for registration of the said mark in respect of various foodstuff items sold by it in its restaurants.

The mark used by the appellant is objected to by the respondent on the ground that it is deceptively similar to the mark of the respondent and is likely to deceive the public or cause confusion. According to the respondent, the appellant could not use the said mark which now belongs to the respondent inasmuch as because of its long and sustained use by the respondent, the mark ‘NANDINI’ is held to have acquired a distinctive character and is well-known to the public which associates ‘NANDINI’ with the respondent organization. Therefore, according to the respondent, it has exclusive right to use the said mark and any imitation thereof by the appellant would lead the public to believe that the foodstuffs sold by the appellant are in fact that of the respondent.

Rejecting these objections the Deputy Registrar granted registration, except for milk and milk products, to the appellant. The appeal filed by the respondent was allowed by the IPAB and on further appeal by the appellant the High court confirmed the order of the IPAB. The appellant challenged the judgement of the High court before the Supreme Court.

Decision : Appeal allowed.

Reason :

The moot question, according to us, is as to whether the appellant is entitled to seek registration of the mark ‘NANDHINI’ in respect of the goods in which it is dealt with, as noted above. Therefore, the fulcrum of the dispute is as to whether such a registration in favour of the appellant would infringe rights of the respondent. The entire case of the respondent revolves around the submissions that the adaptation of this trade mark by the appellant, which is phonetically similar to that of the respondent, is not a bona fide adaptation and this clever device is adopted to catch upon the goodwill which has been generated by the respondent in respect of trade mark ‘NANDINI’. On that premise, the respondent alleges that the proposed trade mark ‘NANDHINI’ for which the appellant applied for registration is similar trade mark in respect of similar goods and, therefore, it is going to cause deception and confusion in the minds of the users that the goods in which the appellant is trading, in fact, are the goods which belong to the respondent. Precisely, it is this controversy which needs to be addressed in the first instance.

Before we answer as to whether the approach of the IPAB and the High Court in the impugned orders is correct, as contended by the respondent or it needs to be interdicted as submitted by the appellant, some of the relevant facts about which there is no dispute, need to be recapitulated. These are as follows:

(A) Respondent started using trade mark in respect of its products, namely, milk and milk products in the year 1985. As against that, the appellant adopted trade mark 'NANDHINI' in respect of its goods in the year 1989.

(B) Though, the respondent is a prior user, the appellant also had been using this trade mark 'NANDHINI' for 12-13 years before it applied for registration of these trade marks in respect of its products.

(C) The goods of the appellant as well as respondent fall under the same Classes 29 and 30. Notwithstanding the same, the goods of the appellant are different from that of the respondent. Whereas the respondent is producing and selling only milk and milk products the goods of the appellant are fish, meat, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetables, edible oils and fats, salad dressings, preserves etc. and it has given up its claim qua milk and milk products.

(D) Insofar as application for registration of the milk and milk products is concerned, it was not granted by the trade mark registry. In fact, the same was specifically rejected. The appellant was directed to file the affidavit and Form 16 in this behalf to delete the goods 'milk and milk products' which affidavit was filed by the appellant. Further concession is already recorded above.

(E) NANDINI/NANDHINI is a generic, it represents the name of Goddess and a cow in Hindu Mythology. It is not an invented or coined word of the respondent.

(F) The nature and style of the business of the appellant and the respondent are altogether different. Whereas respondent is a Cooperative Federation of Milk Producers of Karnataka and is producing and selling milk and milk products under the mark 'NANDINI', the business of the appellant is that of running restaurants and the registration of mark 'NANDHINI' as sought by the appellant is in respect of various foodstuffs sold by it in its restaurants.

(G) Though there is a phonetic similarity insofar as the words NANDHINI/NANDINI are concerned, the trade mark with logo adopted by the two parties are altogether different. The manner in which the appellant has written NANDHINI as its mark is totally different from the style adopted by the respondent for its mark 'NANDINI'. Further, the appellant has used and added the word 'Deluxe' and, thus, its mark is 'NANDHINI DELUXE'. It is followed by the words 'the real spice of life'. There is device of lamp with the word 'NANDHINI'. In contrast, the respondent has used only one word, namely, NANDINI which is not prefixed or suffixed by any word. In its mark 'Cow' as a logo is used beneath which the word NANDINI is written, it is encircled by egg shape circle. A bare perusal of the two marks would show that there is hardly any similarity of the appellant's mark with that of the respondent when these marks are seen in totality.

When we examine the matter keeping in mind the aforesaid salient features, it is difficult to sustain the conclusion of the IPAB in its order dated 4th October, 2011 as well in the impugned order of the High Court that the mark adopted by the appellant will cause any confusion in the mind of consumers, what to talk of deception. We do not find that the two marks are deceptively similar.

Applying the aforesaid principles to the instant case, when we find that not only visual appearance of the two marks is different, they even relate to different products. Further, the manner in which they are traded by the appellant and respondent respectively, highlighted above, it is difficult to imagine that an average man of ordinary intelligence would associate the goods of the appellant as that of the respondent.

Trade and Merchandise Act, 1958 is equally applicable as it is unaffected by the Trade Marks Act, 1999 inasmuch as the main object underlying the said principle is that the proprietor of a trade mark cannot enjoy monopoly over the entire class of goods and, particularly, when he is not using the said trade mark in respect of certain goods falling under the same class. In this behalf, we may usefully refer to Section 11 of the Act which prohibits the registration of the mark in respect of the similar goods or different goods but the provisions of this Section do not cover the same class of goods.

We are not persuaded to hold, on the facts of this case, that the appellant has adopted the trade mark to take unfair advantage of the trade mark of the respondent. We also hold that use of 'NANDHINI' by appellant in respect of its different goods would not be detrimental to the purported distinctive character or repute of the trade mark of the respondent. It is to be kept in mind that the appellant had adopted the trade mark in respect of items sold in its restaurants way back in the year 1989 which was soon after the respondent had started using the trade mark 'NANDINI'. There is no document or material produced by the respondent to show that by the year 1989 the respondent had acquired distinctiveness in respect of this trade mark, i.e., within four years of the adoption thereof. It, therefore, appears to be a case of concurrent user of trade mark by the appellant. As a result, the orders of the IPAB and High Court are set aside.

DEEPAYAN MOHANTY

v.

CARGILL INDIA PVT LTD & ORS. [Del]

CS (OS) No.1157of 2014

Prathiba M. Singh, J. [Decided on 03/08/2018]

Indian Contract Act, 1872 – Section 27 – Agreement in restraint of trade – Cash portion of bonus paid but retention portion refused on the ground of joining competitor's business – Whether tenable – Held, No.

Brief facts:

The Plaintiff is the employee of Defendant Company and he was awarded a bonus for the years 2006-07, 20067-08 & 20098-09. The award of the said bonus was split 50-50. 50% comprised a cash award, which was paid to the Plaintiff and 50% was retained as a deferred incentive award. Cash portion was paid to the Plaintiff at the relevant time and the remaining was deferred over a period of three years and was to be given to him with interest. This bonus award contained a forfeiture clause, by which if an employee joins a competitor's business, the withheld bonus would be forfeited.

The Plaintiff resigned from Defendant which was accepted on the same day and he was relieved from duty. The plaintiff joined in a competitor's business. When the Plaintiff approached the Defendants for payment of the balance incentive award, he was informed that he did not comply with the terms and conditions of the incentive award and hence the payment was not liable to be made.

Decision : Suit decreed.

Reason : The first and foremost question is whether the forfeiture clause is valid and enforceable in law. The forfeiture clause is clear: If a person engages in a competing business/service within the two years period after leaving Cargill, the outstanding amount can be forfeited. It is the settled position, in India at least, that no employer has a right to restrain an employee from taking up competing employment after the term of employment.

Such a clause is invalid and unenforceable as per Section 27 of the Indian Contract Act, 1872. But what Cargill is doing in the present case is not restraining him from pursuing his competing business but refusing to disburse the balance incentive award amount to him since he allegedly engaged in a competing business. Can such a clause be held to be valid and enforceable? The answer to this question depends upon the nature of the sum being withheld. The deferred incentive is an amount which was awarded to an employee as a reward for good performance "during the course of employment". The said amount is awarded in full in favour of the employee. Only the payment is postponed partially and for the postponement of the payment, interest is also paid by Cargill to the employee. Thus, the amount belonging to the employee is being withheld by Cargill. Ideally, the entire amount ought to be disbursed at the time when it was awarded but as a part of Cargill's company policy it is being deferred.

If the deferment is to enforce a clause which is otherwise unenforceable, the forfeiture based on the said clause, is itself illegal. The amount does not belong to Cargill. It belongs to the employee and Cargill is merely making the employee agree to take the amount with interest after the period of two years. That does not mean that under the garb of paying interest, Cargill can forfeit something on the basis of an invalid and unenforceable clause in the agreement. The terms used in the clause, namely, "forfeiture", and "awarded but not yet distributed" clearly show that the amount vests in the employee and only the disbursement is deferred. The fact that interest is being paid on the unpaid incentive amount also shows that the intention of Cargill seems to be merely enforce conditions on employees which cannot otherwise be enforced in law, at least in India.

The condition in an employment contract that an employee cannot engage in competing business after employment for any period is, in restraint of trade, as is clear from a reading of *Percept D'Mark India Pvt. Ltd. v Zaheer Khan, (2006) 4 SCC 227* and *Niranjan Shankar Golikari v Century Spinning and Manufacturing (1967) 2 SCR 378*.

There is yet another dimension to the forfeiture clause: By the said clause, the company seeks to abrogate money which vests in the employee. This would also be in restraint of trade.

The factum of the award has not been disputed and the conditions of the deferred incentive are also not disputed. The resignation and the acceptance thereof are also not disputed. Under these circumstances, the court is thus not embarking on an adventure which is completely alien to the dispute in hand i.e. the payment of the outstanding deferred incentive amount. The arguments on behalf of Cargill i.e. that the conduct of the Plaintiff raises a triable issue may not be correct inasmuch as the court in this case is not adjudicating the violation of the employment contract or the alleged breach of fiduciary relationship between the Plaintiff and the Defendants. The same would have to be considered and adjudicated in appropriate proceedings if Cargill chooses to file any.

As on date, when the court enquired as to whether the Defendants took any action against the Plaintiff in respect of allegations made by them in the leave to defend application or if they had sought refund of the cash part of the incentive already given to him, the answer was a categorical no. If the cash part of the incentive has not been withdrawn and the amount has vested in the Plaintiff, there can be no reason to withhold disbursement of the same. The forfeiture clause is clearly not enforceable, as it is in restraint of trade.

M/S SHRIRAM EPC LIMITED

v.

RIOGLASS SOLAR SA [SC]

Civil Appeal No. 9515 of 2018 (arising out of SLP (C) No.13913 of 2018)

R Nariman & Indu Malhotra, JJ. [Decided on 13/09/2018]

Arbitration and Conciliation Act, 1996 read with India Stamp Act, 1889 – Sections 48 & 49 – Enforcement of foreign award – Whether stamp duty on the foreign award has to be paid for enforcement – Held, No.

Brief facts :

The Appellant had suffered a foreign award and the Respondent filed the foreign award in India for execution. The Single Judge of the Madras High Court allowed the execution of this foreign award, overruling the objection of the respondent that no stamp duty has been paid on in in India and hence it could not be enforced under Sections 48 and 49 of the Arbitration and Conciliation Act, 1996 ("1996 Act"). Appeal to the Division bench was also dismissed. Hence, the present appeal before the Supreme Court.

Decision : Appeal dismissed.

Reason :

The main bone of contention in the present appeal is whether the expression "award" would include a foreign award.

On a reading of the aforesaid provisions of the Civil Procedure Code, 1882 and the Indian Arbitration Act, 1899, it becomes clear that the only "award" that is referred to in the Indian Stamp Act, 1899 is an award that is made in the territory of British India provided that such award is not made pursuant to a reference made by an order of the Court in the course of a suit. At this point in time, it is important to note that there were several princely states in India governed by sovereign rulers which had their own laws. Arbitration laws, if any, in the aforesaid princely states, if they were to culminate in awards, would not be "awards" under either the Civil Procedure Code, 1882 or the Indian Arbitration Act, 1899. They would therefore be foreign awards insofar as British India is concerned. An award made in a princely state, or in a foreign country, if enforced by means of a suit in British India, would not be covered by the expression "award" contained in Item 12 of Schedule I of the Indian Stamp Act, 1899. Only awards which are decisions in writing by an arbitrator or umpire, made in British India, on a reference made otherwise than by an order of the Court in the course of a suit would be included.

This position continued even when the Code of Civil Procedure, 1908 contained a Second Schedule, which substituted the arbitration provisions contained in the Code of Civil Procedure, 1882. Here again, under the Second Schedule, parties to a suit may apply for an order of reference to arbitration and an award would follow.

It will thus be seen that "award" under Item 12 of Schedule I of the Indian Stamp Act, 1899 has remained unchanged till date. As has been held by us hereinabove, in 1899, this "award" would refer only to a decision in writing by an arbitrator or umpire in a reference not made by an order of the Court in the course of a suit. This would apply only to such award made at the time in British India, and today, after the amendment of Section 1(2) of the Indian Stamp Act, 1899 by Act 43 of 1955, to awards made in the whole of India except the State of Jammu and Kashmir. This being the case, we are of the view that the expression "award" has never included a foreign award from the very inception till date. Consequently, a foreign award not being includible in Schedule I of the Indian Stamp Act, 1899, is not liable for stamp duty.

SONELL CLOCKS AND GIFTS LTD.

v.

THE NEW INDIA ASSURANCE CO. LTD [SC]

Civil Appeal Nos.1217-1218 of 2017

Dipak Misra, A.M. Khanwilkar & D.Y. Chandrachud, JJ. [Decided on 21/08/2018]

Insurance Act read with Appointment of Surveyors Regulations – Claim lodged with delay of about 4 months – Insurer appointed surveyor – Later insurer repudiated the claim – Whether appointment of surveyor operates as waiver against the insurer – Held, No.

Brief facts: The appellant had taken an Insurance Policy from the respondent (Insurance Company) for a period of one year from 19th July, 2004 to 18th July, 2005, in respect of its building, plant and machinery. Due to torrential rains and floods in the entire area, the water gushed into the factory premises causing damage to the machinery as well as raw material lying therein. This event occurred on 4th August, 2004. Intimation of the loss was given to the respondent after a gap of 3 months 25 days, on 30th November, 2004. Thereafter, the respondent appointed a surveyor to assess the loss caused due to the flooding of the factory premises. The surveyor after causing inspection submitted its report to the respondent inter alia stating that the claim was not payable on account of the failure of the complainant to comply with the mandate of Clause 6 of the general conditions of the policy. Acting upon the said report, the respondent repudiated the claim.

Decision : Appeal dismissed.

Reason :

The singular question involved in these appeals is whether the respondent (insurer) had waived the condition relating to delay in intimation, by appointing a surveyor.

It is well established position that waiver is an intentional relinquishment of a right. It must involve conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. It is an agreement not to assert a right. To invoke the principle of waiver, the person who is said to have waived must be fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. There must be a specific plea of waiver, much less of abandonment of a right by the opposite party.

In the present case, it is common ground that the letter of repudiation elucidates that the claim of the appellant was rejected on the ground that neither the intimation of the loss had been given to it immediately after the loss nor were the requisite particulars of the loss conveyed within stipulated period and there was breach of terms and conditions of Clause 6 of the general conditions of the policy. Additionally, the surveyor report predicates that it was very difficult to estimate the damages for the reasons mentioned therein and that the claim of the appellant was not payable on account of breach of Clause 6 of the general conditions of the policy. That recommendation commended to the respondent. It has been so incorporated in the letter of repudiation.

The expression “duration” is of some significance which is reflective of the existence or otherwise of the policy itself. In the present case, there is no dispute about the subsistence of the policy but is one of violation of condition No.6 of the policy. Furthermore, in the present case the controversy will have to be answered on the basis of Standard Fire and Special Perils Policy relatable to condition No.6 obligating the insured to give forthwith intimation of the loss to the insurer. The two clauses are materially different and relate to two different and distinct insurance policies. In other words, Clause 5 of the Marine Insurance Policy and Clause 6 of the present policy are incomparable being qualitatively different.

To put it differently, Galada’s case (supra) was not a case which considered repudiation based on a premise or a reason similar to condition No.6 of the present policy and a specific plea taken by the insurer in that behalf in the repudiation letter itself. Notably, Clause 5 of the Marine Insurance Policy which was the subject matter in Galada’s case (supra) did not have a negative covenant as in this case in the proviso to condition No.6 of the subject policy. The fulfilment of the stipulation in Clause 6 of the general conditions of the policy is the sine qua non to maintain a valid claim under the policy.

In that, the event occurred on 4th August, 2004 but intimation was given to the insurer only on 30th November, 2004 after a gap of around 3 months 25 days. No explanation was offered for such a long gap much less plausible and satisfactory explanation. The stipulation in condition No.6 of the policy to forthwith give notice to the insurer is to facilitate the insurer to make a meaningful investigation into the cause of damage and nature of loss, if any.

Thus, the appointment of a surveyor by the respondent after receipt of intimation of the loss from the appellant, in the context of the present insurance policy, coupled with the 2000 Regulations and in particular an express stand taken in the repudiation letter sent by the respondent to the appellant after consideration of the surveyor's report, it cannot be construed to be a case of waiver on the part of the respondent.

In view of the above, we uphold the conclusion of the Commission that the respondent (insurer) had not waived the condition relating to delay stipulated in Clause 6 of the general 6 conditions of the policy, by appointing a surveyor. Accordingly, these appeals must fail.

DREDGING CORPORATION OF INDIA

v.

MERCATOR LTD [DEL]

O.M.P. (Comm) 334-336 of 2018

Navin Chawla, J. [Decided on 10/10/2018]

Arbitration and Conciliation Act, 1996 – Appeal – Seat of arbitration London – Venue changed to Delhi with parties' consent – Whether courts in Delhi have jurisdiction – Held, No.

Brief facts :

The respondent has challenged the jurisdiction of this Court to entertain these petitions under Section 34 of the Arbitration and Conciliation Act, 1996. The ground of challenge was that the seat of arbitration in the present petitions was London and therefore, Part-I and Section 34 of the Act will not be applicable to such arbitration proceedings.

The Arbitration Agreement between the parties is contained in Clause 24 of the Time Charter Party Agreement(s) under which the seat of arbitration was fixed at London. However, the parties by agreement agreed to have the venue of arbitration at New Delhi.

Decision : Petition dismissed.

Reason :

A reading of the correspondence exchanged between the parties would clearly show that the parties did not arrive at a consensus for change of 'Seat' of arbitration from London to New Delhi though this was the initial request of the respondent.

I cannot not agree with the submissions made by the counsel for the petitioner that in the above correspondence the use of word 'venue' by the parties has to be construed as 'seat'. In my opinion, the parties were very well aware of the distinction between the 'seat' and 'venue' and therefore, the respondent insisted that while the 'Seat' of arbitration shall remain at London, it is only the 'venue' which can be shifted to New Delhi. The petitioner also agreed to the same as in its opinion the change of 'venue' would not require any amendment to the Charter Party Agreement, while a change in seat would have required such amendment.

Once the Arbitration Agreement was invoked by the respondent, though the petitioner wanted such change, the respondent refused. Thereafter, the parties only agreed to a change of 'venue' of arbitration from London to New Delhi.

This was the consistent understanding of the petitioner itself, not only before the Arbitral Tribunal as recorded in its procedural order referred hereinabove, but also by its conduct of filing a petition under Section 68 of the (English) Arbitration Act, 1996 before the High Court of Justice at London.

Applying the judgment of *Union of India v. Hardy Exploration and Production (India) INC 2018 SCC Online SC 1640* to the facts of the present case, not only clause 24 of the Charter Party Agreement(s) but also the conduct of the parties, gathered from the exchange of correspondence, their conduct before the Arbitral Tribunal as also the conduct subsequent to the passing of the Impugned Award, would lead to a conclusion that the parties agreed on the 'Seat' of arbitration to be at London.

In view of the above, this Court would lack jurisdiction to entertain the present petitions under Section 34 of the Act. The same are accordingly dismissed.

GOVT OF N.C.T OF DELHI

v.

YASIKAN ENTERPRISES PVT. LTD [DEL]

O.M.P. 639 of 2008

Prathiba M Singh, J. [Decided on 16/10/2018]

Arbitration and Conciliation Act, 1996 – Arbitration agreement – Contract with proprietary concern "Yasikan Enterprise" – Arbitration invoked by "Yasikan Enterprise Pvt Ltd" a company of the proprietor – Whether tenable – Held, No.

Brief facts :

The appellant called a tender for providing sanitation and scavenger services inside and outside the building including reception services from designated places for the Delhi Sachivalaya/Secretariat, I.P. Estate, New Delhi. One M/s Yasikan Enterprises - a sole proprietary concern of Shri Jagdish Kumar submitted his offer and the work was awarded to him.

When dispute arose between the Parties, M/s. Yasikan Enterprises Pvt. Ltd the same was referred to a sole arbitrator and an award was passed against the appellant. The appellant challenged the award mainly on the ground that the arbitration agreement was with the proprietor of Yasikan Enterprises and not with Yasikan Enterprises Pvt Ltd.

Decision : Petition allowed.

Reason :

The first submission of the Petitioner is that there was no arbitration clause with the company M/s Yasikan Enterprises Pvt. Ltd. The contract was awarded to the firm M/s Yasikan Enterprises, which was a sole proprietary concern. Accordingly in the absence of an arbitration agreement, the arbitration proceedings are void ab initio and the award is liable to be set aside.

The Respondent, on this issue, submits that the reference having been made by the Lieutenant Governor on the request of M/s Yasikan Enterprises Pvt. Ltd., the same does not deserve to be set aside.

As per Section 7 of the Act, every arbitration agreement has to be in writing between the parties. It also has to be signed by the parties. In the present case, there is no arbitration agreement signed between the Petitioner and M/s Yasikan Enterprises Pvt. Ltd. The company was not awarded the contract. The offer was submitted by M/s Yasikan Enterprises as a sole proprietary firm. It was signed by Mr. Jagdish Kumar as the sole proprietor.

The company being a distinct legal entity from the sole proprietorship, the arbitration clause, does not apply devolve upon the company. Moreover, the arbitration clause is an independent clause which is not assignable. This is clear from a reading of *Delhi Iron and Steel Company Limited v. U.P. Electricity Board & Another (2002) 61 DRJ 280*.

"17. So far as the arbitration clause is concerned it was held that this contract is personal in its character and incapable of assignment on that ground. However it is a settled law that an arbitration clause does not take

away the right of a party of a contract to assign it if it is otherwise assignable.

18. While distinguishing between two clauses of assignment the Supreme Court observed that a right of obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. In other words, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

19. As observed above the petitioner had the liability to perform all contracts of Victor Cables and all benefits arising therefrom and liabilities thereunder in all or in any form. It does not mean that he had also the obligation to get the dispute settled by way of arbitration as agreed by Victor Cables. These are two different and distinguished liabilities. The former is assignable where the latter is not. Thus the undertaking by the petitioner that "all contracts of Victor Cables Corporation and all benefits arising therefrom and liabilities thereunder in all or in any form shall be of the petitioner" was in the form of discharging all the liabilities of the Victor Cables and there was nothing personal about such contracts whereas clause of arbitration was personal in its character and was even otherwise incapable of assignment.

20. In view of the foregoing reasons the unilateral reference of the alleged disputes to the respondent No.2 and unilateral appointment of respondent No.2 as arbitrator are hereby held illegal and inoperative and set aside. Petition is allowed."

Thus, the reference to arbitration was contrary to law. The award is liable to be set aside on this sole ground. However, this Court is also examining the matter on merits. After examining the merits the award was set aside on merits also.

TRUSTEE, JACOBITE SYRIAN CATHEDRAL & ANR

v.

JIPPU VARKEY [NCDRC]

Revision Petition No. 2695-2696 OF 2018

V.K. JAIN, J. [Decided on 25/10/2018]

Consumer Protection Act, 1985 – Cathedral collecting money for permitting to construct family tomb-tomb destroyed – Whether deficiency of services liable for compensation – Held, No.

Brief facts :

The case of the complainant, who is a Christian by faith, is that the petitioners, who are the Trustees of Jacobite Syrian Cathedral collected a sum of Rs.1001/- from him 31.12.1984, for granting permission to construct a family tomb in the cemetery of the said Cathedral. The family tomb was allegedly constructed by the complainant / respondent and even the mortals of his father were placed in the said tomb when he expired in the year 2004. It is alleged by the complainant that the said tomb was destroyed by the petitioners. Being aggrieved from the destruction of the tomb and claiming to be a consumer of the petitioners, the complainant approached the concerned District Forum by way of a consumer complaint, seeking reconstruction of the tomb and compensation.

The District Forum vide its order dated 31.10.2014 directed that the complainant would have every right to reconstruct the family tomb at its own cost and the petitioners were liable to extend necessary help and support to him for the said reconstruction in the cemetery of the Church.

Being aggrieved from the order passed by the District Forum, both the parties preferred separate appeals before the concerned State Commission. Vide impugned order dated 05.4.2018, the State Commission directed the petitioners to reconstruct the tomb in the cemetery of the Cathedral at their own expenses and also pay a sum of Rs.25,000/- as compensation to the complainant. Being aggrieved from the order passed by the State Commission the petitioner is before this Commission by way of the present revision petition.

Decision : Petition dismissed.

Reason :

The term 'consumer' has been defined in Section 2(1) (d) of the Consumer Protection Act and means a person who either purchases goods or avails services for a consideration. The question which arises for consideration is as to whether the complainant can be said to have hired or availed the services of the Cathedral or its Trustees, by allegedly paying Rs.1001/- to them, for obtaining permission for construction of a family tomb in the cemetery of the Cathedral .

In my opinion, the grant of permission for construction of a family tomb in the cemetery of Cathredel does not amount to rendering services within the meaning of Section 2(1) (o) of the Consumer Protection Act. At best, it is a permission granted by a religious organization to one of its devotees. Even if some amount is charged by the religious organization from the devotees for granting the requisite permission that would not amount to rendering services as is understood in the context of the Consumer Protection Act. A devotee availing such a facility from the religious organization to which he belongs cannot be said to be a consumer in terms of the Consumer Protection Act. Therefore, a consumer complaint for redressal of the grievance of the complainant was clearly not maintainable. The view taken by the fora below in this regard cannot be sustained and is liable to be set aside.

For the reasons stated hereinabove, the impugned orders are set aside and the complaint is consequently dismissed, with liberty to the complainant to avail such other remedy as may be open to him in law, including approaching a Civil Court for the redressal of his grievances.

CASE STUDY

Facts of the Case

Railway authorities enter into an agreement with Amit Service Ltd., a service providing company to engage workers for cleaning the railway platforms in a region. As per the agreement, the Service provider has to engage certain number of workers daily. The agreement can be renewed every year on mutual agreement on terms. After a few years, the agreement is terminated. Amit Services Ltd. also terminates the employment of those workers. The workers raised an industrial dispute against Railway authorities as well as Amit Services Ltd. for reinstatement claiming that their work is perennial in nature under Railway authorities and they worked consistently in Railways though under the constant supervision of Amit Services Ltd. They also substantiate their claim on the ground that Railways have engaged the services of Amit Services Ltd. without any licence required under the Contract Labour (Regulation and Abolition) act, 1970 and therefore they are direct employees of Railways.

Fact in Issue/Questions for Consideration

Based on the above facts, following are the questions for the adjudication or consideration:

1) Whether the workers are employees of Railways?
2) Whether Railways have to reinstate them?

Suggestive Solution

The facts of the case are similar to facts in the case of Airports Authority of India vs. A S Yadav & Ors (Del) decided on 28.11.2019. Based on that decision, the questions can be answered as under:

1) The workers have been employed only by Amit Services Ltd for a specific type of work under Railways. The contract by Railways was only with Amit Services Ltd and who will do the work is the decision of

Amit Services Ltd as long as the work is performed as per the contract. If Railways do not have any licence to employ contract labour, it may be actionable against Railways under the Contract Labour (Regulation and Abolition) Act, 1970 but it does not automatically make these workers direct employees of the Railways. Therefore, the workers are not direct employees of railways.

2) For the above reasons, the question of Railways reinstating the workers does not arise. It is up to Amit Services Ltd. to compensate the workers based on any existing agreement with them or to give them employment somewhere else.

NOTES

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Insolvency Law

ANAND RAO KORADA RESOLUTION PROFESSIONAL

v.

M/S VARSHA FABRICS (P) LTD. [SC]

Civil Appeal Nos. 8800 &8801 of 2019 @ SLP (C) Nos. 23349& 23350 of 2019

Indu Malhotra& R. Subash Reddy, JJ. [Decided on 18/11/2019]

Insolvency and Bankruptcy Act, 2016- moratorium fixed- High court orders sale of certain properties of the corporate debtor in writ proceedings- whether tenable- Held, No.

Brief facts: In the writ petitions filed by the workers Union, the High Court passed order directing the labour commissioner to determine the dues to the workers and accordingly labour commissioner quantified the same and certain properties of the corporate debtor was put on auction sale. Meanwhile, one financial creditor initiated corporate insolvency proceedings against the corporate debtor and the NCLT fixed the moratorium. The sale of the properties was to be made during the period of moratorium and the resolution professional challenged the orders of the High Court.

The Appellant – Resolution Professional filed the present Civil Appeals to challenge the Interim Orders dated 14.08.2019 and 05.09.2019 passed by the Odisha High Court in W.P. (Civil) No. 7939/2011 on the ground that since the CIRP against Respondent No. 4 had commenced, the proceedings before the High Court in W.P. (Civil) No. 7939/2011 ought to be stayed.

Decision: Appeal allowed.

Reason: Section 238 of the IBC gives an overriding effect to the IBC over all other laws. The provisions of the IBC vest exclusive jurisdiction on the NCLT and the NCLAT to deal with all issues pertaining to the insolvency process of a corporate debtor, and the mode and manner of disposal of its assets.

In view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the Corporate Debtor – Respondent No. 4 herein, once the proceedings under the IBC had commenced, and an Order declaring moratorium was passed by the NCLT. The High Court passed the impugned Interim Orders dated 14.08.2019 and 05.09.2019 after the CIRP had commenced in this case. The moratorium having been declared by the NCLT on 04.06.2019, the High Court was not justified in passing the Orders dated 14.08.2019 and 05.09.2019 for carrying out auction of the assets of the Respondent No. 4–Company i.e. the Corporate Debtor before the NCLT. The subject matter of the auction proceedings before the High Court is a vast chunk of land admeasuring about 330 acres, including Railway lines and buildings.

If the assets of the Respondent No. 4 – Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders. As a consequence, we set aside the impugned Interim Orders dated 14.08.2019 and 05.09.2019 passed by the Odisha High Court, as parallel proceedings with respect to the main issue cannot take place in the High Court. The sale or liquidation of the assets of Respondent No. 4 will now be governed by the provisions of the IBC.

It is open for Respondent No. 13 – Hirakud Workers' Union to file an application under Regulation 9 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 for payment of arrears, salaries and other dues before the competent authority.

DUNCANS INDUSTRIES LTD v. A.J. AGROCHEM [SC]

Civil Appeal No. 5120 of 2019

Arun Misra, M.R. Shah & B.R.Gavai, JJ. [Decided on 04/10/2019]

Sections 7,9 and 283 of the Insolvency and Bankruptcy Code,2016 read with section 16E and 16G of the

Tea Act,1953 – takeover of tea gardens of corporate debtor by the Central Government under Tea Act-operational creditor filing application under the IBC- whether maintainable-Held, Yes.

Brief facts:

The appellant Corporate Debtor is a company which owns and manages 14 tea gardens. Out of which, the Central Government has taken over the control of 7 tea gardens under the Tea Act, 1953.The respondent is an operational creditor of the appellant, used to supply pesticides, insecticides, herbicides etc. to the appellant. The respondent initiated the proceedings against the appellant corporate debtor before the NCLT under Section 9 of the IBC. NCLT dismissed the application as not maintainable as the consent of the Central Government was not obtained. However, the appeal preferred by the operational creditor was allowed by the NCLAT. Hence the present appeal by the corporate debtor.

Decision: Appeal dismissed.

Reason:

The short question which is posed for consideration of this Court is whether before initiation of the proceedings under Section 9 of the IBC, a consent of the Central Government as provided under Section 16G (1) (c) of the Tea Act, 1953 is required and/or whether in absence of any such consent of the Central Government the proceedings initiated by the respondent operational creditor under Section 9 of the IBC would be maintainable or not?

In the present case the Division Bench of the High Court of Calcutta has permitted the appellant corporate debtor to continue with the management of the said tea estates. Therefore, in the facts and circumstances of the case, and more particularly when, despite the notification under Section 16E of the Tea Act, the appellant corporate debtor is continued to be in management and control of the tea gardens/units and are running the tea gardens as if the notification dated under Section 16E has not been issued, Section 16G of the Tea Act, more particularly Section 16G (1) (c), shall not be applicable at all.

Now, so far as the main issue is concerned, at the outset, it is required to be noted that the IBC is a complete Code in itself. Section 16G (1) (c) of the Tea Act refers to the proceeding for winding up of such company or for the appointment of receiver in respect thereof. Therefore, as such, the proceedings under Section 9 of the IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only. The winding up/ liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails. Therefore, the entire "corporate insolvency resolution process" as such cannot be equated with "winding up proceedings".

Therefore, considering Section 238 of the IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of the IBC shall have an overriding effect over the Tea Act, 1953. Any other view would frustrate the object and purpose of the IBC. If the submission on behalf of the appellant that before initiation of proceedings under Section 9 of the IBC, the consent of the Central Government as provided under Section 16G (1) (c) of the Tea Act is to be obtained, in that case, the main object and purpose of the IBC, namely, to complete the "corporate insolvency resolution process" in a time bound manner, shall be frustrated. The sum and substance of the above discussion would be that the provisions of the IBC would have an overriding effect over the Tea Act, 1953 and that no prior consent of the Central Government before initiation of the proceedings under Section 7 or Section 9 of the IBC would be required and even without such consent of the Central Government, the insolvency proceedings under Section 7 or Section 9 of the IBC initiated by the operational creditor shall be maintainable.

In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed.

EXCEL METAL PROCESSORS LTD

v.

BENTELER TRADING INTERNATIONAL GMBH &ANR. [NCLAT]

Company Appeal (AT) (Insolvency) No. 782 of 2019

S. J. Mukhopadhaya, A.I.S. Cheema & Kanthi Narahari. [Decided on 21/08/2019]

Insolvency and Bankruptcy Code, 2016- operational creditor a German company- corporate debtor an Indian company agreement provides for the jurisdiction of German courts whether it can file the petition before the NCLT-Held, Yes.

Brief facts:

The Respondent, a German Company ('Operational Creditor') filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short the 'I&B Code') against Excel Metal Processors Private Limited ('Corporate Debtor') alleging that the 'Corporate Debtor' committed default in making the payment to an extent of US $1,258,219.42 inclusive of interest @ 15% per annum. The Adjudicating Authority (National Company Law Tribunal), admitted the application. The Appellant has challenged the said order.

Decision: Appeal dismissed.

Reason:

The Appellant referred to the Agreement reached between the parties and submitted that as per the Agreement and as the Office of the Respondent is in Germany, any suit or case is maintainable only in the Court at Germany. No case can be filed in any Court in India. Therefore, the Appellant has raised the question of jurisdiction of the National Company Law Tribunal, Mumbai Bench in entertaining the application under Section 9 of the I&B Code. However, we are not inclined to accept the aforesaid statement as it is now settled and decided by this Appellate Tribunal in Binani Industries Ltd v. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No.82 of 2018 etc. decided on 14th November, 2018 wherein it was held that 'Corporate Insolvency Resolution Process'/ insolvency proceedings is not a 'suit' or a 'litigation' or a 'money claim' for any litigation; No one is selling or buying the 'Corporate Debtor' a 'Resolution Plan'; It is not an auction; it is not a recovery, which is an individual effort by the creditor to recover the dues through a process that had debtor and creditor on opposite sides; and it is not liquidation. The object is mere to get resolution brought about, so that the Company do not default on dues.

Pursuant to Section 408 of the Companies Act, 2013, the National Company Law Tribunal has been constituted in different States. In terms of the said provision, the Central Government has notified and vested the power on respective National Company Law Tribunals to deal with the matter within its territory, where the registered Offices of the Companies are situated. As per Section 60(1) of the I&B Code, "The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located". As admittedly, the Registered Office of the 'Corporate Debtor' is situated in Mumbai, we hold that the National Company Law Tribunal, Mumbai Bench has the jurisdiction to entertain an application under Section 9 of the I&B Code and the Appellant cannot derive advantage of the terms of the Agreement reached between the parties.

Next, it was pointed out that the 'Corporate Debtor' was not served with the Demand Notice in terms of Section 8(1) of the I&B Code.

However, from the record we find that Demand Notice under Section 8(1) of the I&B Code was issued by the Respondent - 'Operational Creditor' on 6th March, 2018 demanding the repayment of US $971,412.98 plus ancillary obligations @ 15 % p.a. amounting to US $286.804.44 and despite receiving of the said Demand

Notice, the ‘Corporate Debtor’ had not replied, nor repaid the outstanding dues. The Adjudicating Authority has as such not accepted such plea based on record.

In spite of the same, we gave option to the Appellant to suggest whether the Appellant or the ‘Corporate Debtor’ would agree to repay the debt as payable to the ‘Operational Creditor’, but it is informed that the ‘Corporate Debtor’ or the Appellant is not in a position to do so.

For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 25th June, 2019 and in absence of any merit, the Appeal is accordingly dismissed. No cost.

AHLUWALIA CONTRACTS (INDIA) LTD

v.

RAHEJA DEVELOPERS LTD [NCLAT]

Company Appeal (AT) (Insolvency) No. 703 of 2018

S.J. Mukhopadhaya, A.I.S. Cheema & Kanthi Narahari. [Decided on 23/07/2019]

Insolvency and Bankruptcy Act, 2016- operational creditor sent demand notice to corporate debtor- corporate debtor initiated arbitration proceedings after the receipt of demand notice operational creditor filed petition before NCLT- petition rejected on the ground that arbitration proceeding is pending- whether correct Held, No.

Brief facts:

The Appellant Operational Creditor filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) against the Respondent Corporate Debtor. The Adjudicating Authority, by impugned order, after discussing the case on merit, rejected the application on the ground that the claim of the Appellant falls within the ambit of ‘disputed claim’. It is pertinent to notice that the Respondent initiated arbitration proceedings only after the receipt of demand notice from the appellant. The Adjudicating Authority also observed that the arbitration proceedings in respect of the same cause of action has been initiated.

Decision: Appeal allowed.

Reason:

In an application under Section 9, it is always open to the Corporate Debtor to point out pre-existence of dispute. It is to be shown that the dispute was raised prior to the issuance of demand notice under Section 8(1). In Mobilox Innovations Pvt. Ltd v. Kirusa Software (P) Ltd, (2017) 1 SCC Online SC 353, the Hon’ble Supreme Court held that the ‘existence of the dispute’ and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice.

From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the ‘operational debt’ is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid ‘operational debt’, the application under Section 9 cannot be rejected and is required to be admitted.

From the aforesaid findings, it is clear that ‘claim’ means a right to payment even if it is disputed. Therefore, merely the ‘Corporate Debtor’ has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute, in absence of any evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.

In the present case, it is not in dispute that the arbitration proceeding was initiated by the Respondent after about one month from the date of issuance of demand notice under Section 8(1). Therefore, the ‘Corporate Debtor’ cannot rely on arbitration proceeding to suggest a pre-existing dispute. There is nothing on the record to suggest that the ‘Corporate Debtor’ raised any pre-existing dispute relating to quality of work performed by Appellant. The ground of delay in execution of work cannot be noticed to deny admission of application under Section 9, the ‘Corporate Debtor’ having allowed the Appellant to execute the work and certified all the bills.

The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by Hon’ble Supreme Court in Innoventive Industries Ltd. v. ICICI Bank and Anr (2018) 1 SCC 407 wherein it is observed that “claim means a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4).”

The Adjudicating Authority also failed to appreciate that the arbitration proceeding was initiated on 24th May, 2018 i.e. much after the issuance of the demand notice under Section 8(1) on 28th April, 2018 thereby wrongly held that an arbitration proceeding is pending. 24. From the record as we find that the Respondent has defaulted to pay more than Rs. 1 Lakh and in absence of any pre-existing dispute, and the record being complete, we hold that the application under Section 9 preferred by the Appellant was fit to be admitted.

For the reasons aforesaid, we set aside the impugned judgment dated 19th September, 2018 and remit the case to the Adjudicating Authority for admitting the application under Section 9 after notice to the ‘Corporate Debtor’ to enable the ‘Corporate Debtor’ to settle the matter prior to the admission.

SSMP INDUSTRIES LTD

v.

PERKAN FOOD PROCESSORS PVT. LTD [DEL]

CS (COMM) 470/2016

Prathibha M Singh, J. [Decided on 18/07/2019]

Insolvency and Bankruptcy Code, 2016- section 14- moratorium on legal proceedings- plaintiff corporate debtor under IBC proceedings defendant operational creditor filed counter claim- whether the counter claim should be stayed-Held, No.

Brief facts:

An interesting issue has arisen in this matter in respect of the interpretation of Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter the “Code”). The Plaintiff has filed the present suit seeking recovery of Rs.1, 61, 47,336.44. The Defendant has filed its written statement/counter claim in which it avers that it is, in fact, entitled to recover a sum of Rs.59,51,548/- and no amount is due and payable by it to the Plaintiff. The Plaintiff Company has since gone into insolvency and a Resolution Professional has been appointed. The question has arisen as to whether the adjudication of the counter claim would be liable to be stayed in view of Section 14 of the Code.

Decision: Counter claim need not be stayed.

Reason:

The claim of the Plaintiff is much higher i.e. a sum of Rs.1, 61, 47,336.44, than what is claimed by the Defendant. The transaction between the parties would require to be adjudicated on the basis of correspondence and the agreement, which have been placed on record. This Court would have to first determine the question as to whether any amount at all is payable to the Plaintiff. Even if the counter claim is decreed fully and the claim of the Plaintiff is also allowed, the Plaintiff would, in fact, be entitled to recover and not the Defendant. The possible outcome of the suit and the counter claim is in the realm of uncertainty. The question as to the amount that would be liable to be paid by either party to the other is not something that can be predicted at this point. The entitlement of the Defendant to the amount claimed from the Plaintiff is also not concrete and settled. There is no doubt that adjudication of the plaint and counter claim are interlinked with each other.

A ld. Single Judge of this Court in Power Grid Corporation of India v. Jyoti Structures Ltd., (2018) 246 DLT 485 has held that embargo of Section 14(1)(a) of the Code would not apply in all circumstances. A perusal of the judgment shows that until and unless the proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor, it would not be prohibited under Section 14(1) (a) of the Code.

In Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd & Anr. [Company Appeal (AT) (Insolvency) No. 285/2018 Decided on 3rd August, 2018], the NCLAT has, in similar circumstances, held that until and unless the counter claim is itself determined, the claim and the counter claim deserve to be heard together and there is no bar on the same in the Code.

The Court has considered the plaint and the written statement/ counter claim. The adjudication of the plaint, defences in the written statement and the amounts claimed in the counter claim would have to be considered as a whole in order to determine as to whether the suit or the counter claim would be liable to be decreed. A counter claim would be in the nature of a suit against the Plaintiff which in this case is the `corporate debtor'. Under Section 14(1) (a) of the Code, strictly speaking, a counter claim would be covered by the moratorium which bars `the institution of suits or continuation of pending suits or proceedings against the corporate debtor". A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor i.e., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims but the counter claim would be barred under Section 14(1) (a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims.

The nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. The proceedings before NCLT are summary in nature and the RP does not conduct a trial. The RP merely determines what payment can be made towards the claims raised, subject to availability of funds. The NCLT/RP cannot be burdened with the task of entertaining claims of the Defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the Defendant is in fact entitled to any amounts, if determined by the NCLT, prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. Under these circumstances, this court is of the opinion that the Plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum. At this point, till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be stayed under Section 14 of the Code. The suit and the counter claim would proceed to trial before this Court.

LALIT MISHRA & ORS

v.

SHARON BIO MEDICINE LTD. & ORS. [NCLAT]

Company Appeal (AT) (Insolvency) No. 164 of 2018

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 19/12/2018]

Insolvency and Bankruptcy Code, 2016 – Resolution plan – Personal guarantor claimed his subrogation right – Whether tenable – Held, No.

Brief facts:

The Appellants are the promoters of 'Sharon Bio Medicine Ltd.'- ('Corporate Debtor'). In the appeal they have challenged the order passed by the National Company Law Tribunal [NCLT], whereby and where under, the 'Resolution Plan' submitted by the 3rd Respondent- 'Successful Resolution Applicant' has been approved.

The Appellants have challenged the order of approval of the 'Resolution Plan' on two counts namely –(i) The Appellants, promoters were the shareholders and for them no amount has been provided under the 'Resolution Plan'; and (ii) Some of the Appellants, promoters are also 'personal guarantors' who have been discriminated.

Decision: Appeal dismissed.

Reason:

The restructuring of the financial debt as part of the 'Resolution Plan' approved by the Adjudicating Authority under the 'I&B Code' does not envisage complete discharge of the liability of personal guarantors of the 'Corporate Debtor'. This will be evident from Clause 12 of Section 5 of the 'Resolution Plan' which deals with 'treatment of security'. Therein it is mentioned that all securities/ collaterals/ margin money/ fixed deposit with lien provided by the Company shall be deemed to be released immediately on Effective Date. It is subsequently mentioned that the personal guarantee provided by the existing promoters of the Company, shall result in no liability towards the 'Company' or the 'Resolution Applicants'. This 'treatment of security' and with regard to personal guarantee provided by the existing promoters of the Company is alleged to be in violation of Section 140 and Section 133 of the 'Indian Contract Act'.

However, the aforesaid submissions cannot be accepted, as on approval of the 'Resolution Plan', the claim of the entire stakeholders stand cleared and the 'Personal Guarantor' thereafter cannot claim that they have been discriminated. All the stakeholders have already been cleared by the 3rd Respondent- 'Successful Resolution Applicant'. It was open to them to say that the personal guarantee will not result into any liability towards the 'Company' or the 'Resolution Applicant'.

It was not the intention of the legislature to benefit the 'Personal Guarantors' by excluding exercise of legal remedies available in law by the creditors, to recover legitimate dues by enforcing the personal guarantees, which are independent contracts. It is a settled position of law that the liabilities of guarantors is co-extensive with the borrower.

This Appellate Tribunal held that the resolution under the 'I&B Code' is not a recovery suit. The object of the 'I&B Code' is, inter alia, maximization of the value of the assets of the 'Corporate Debtor', then to balance all the creditors and make availability of credit and for promotion of entrepreneurship of the 'Corporate Debtor'. While considering the 'Resolution Plan', the creditors focus on resolution of the borrower 'Corporate Debtor', in line with the spirit of the 'I&B Code'.

The present appeal has been preferred by the promoters, who are responsible for having contributed to the insolvency of the 'Corporate Debtor'. The 'I&B Code' prohibits the promoters from gaining, directly or indirectly, control of the 'Corporate Debtor', or benefiting from the 'Corporate Insolvency Resolution Process' or its outcome. The ‘I&B Code’ seeks to protect creditors of the ‘Corporate Debtor’ by preventing promoters from rewarding themselves at the expense of creditors and undermining the insolvency processes.

For the aforesaid reasons, it will be evident from the ‘I&B Code’ that the powers of the promoters as the members of the Board of Directors of the ‘Corporate Debtor’ are suspended. The voting right of the shareholders, including promoter shareholders, are suspended and shareholders’ approval is deemed to have been granted for implementation of the ‘Resolution Plan’ as apparent from explanation to Section 30(2)(f) of the ‘I&B Code’. The promoters, being ‘related parties’ of the ‘Corporate Debtor’, have no right of representation, participation or voting in a meeting of the ‘Committee of Creditors’.

Admittedly, the shareholders and promoters are not the creditors and thereby the ‘Resolution Plan’ cannot balance the maximization of the value of the assets of the ‘Corporate Debtor’ at par with the ‘Financial Creditors’ or ‘Operational Creditors’ or ‘Secured Creditors’ or ‘Unsecured Creditors’. They are also ineligible to submit the ‘Resolution Plan’ to again control or takeover the management of the ‘Corporate Debtor’.

In the aforesaid background, if no amount is given to the promoters/ shareholders and the other equity shareholders who are not the promoters have been separately treated by providing certain amount in their favour, the Appellant cannot claim to have been discriminated.

FORECH INDIA LTD.

v.

EDELWEISS ASSETS RECONSTRUCTION CO LTD & ANR [SC]

Civil Appeal No. 818 of 2018

R F Nariman & Navin Sinha, JJ. [Decided on 22/01/2019]

Insolvency & Bankruptcy Code,2016 – Section 7&11 – Financial creditor filed an insolvency petition against the corporate debtor – Appellant objecting to the admission on the ground of continuance of winding up petition under the old Act – Objection rejected – Whether correct – Held, Yes.

Brief facts:

The present matter arises from an Operational Creditor’s appeal to continue with a winding up petition that has been filed by the said creditor way back in 2014. The facts relevant for disposal of this appeal are as follows:-

A winding up petition, being No. 42 of 2014, was filed by the present appellant before the High Court of Delhi on 10.01.2014, against Respondent No. 2-Company, in which notice had been served, as is recorded by an order of the High Court of Delhi. Further orders which have been pointed out to the Court have gone on to state that there is a debt or liability which is, in fact, admitted.

It transpires that another operational creditor, viz., SKF India Ltd. had filed an application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (in short ‘the Code’), against Respondent No. 2, which was allowed to be withdrawn so that the aforesaid operational creditor could go to the High Court in a winding up petition which would then be heard along with the Company Petition No. 42/2014.

Meanwhile, Respondent No. 1, being a financial creditor of the self- same corporate debtor, moved the National Company Law Tribunal (NCLT) in an insolvency petition filed under Section 7 of the Code sometime in May/ June 2017. This petition was admitted on 07.08.2017. Against the aforesaid order, an appeal was filed by the appellant herein which was dismissed by the Appellate Tribunal, in which Section 11 of the Code was referred to, and it was held by the Appellate Tribunal that since there was no winding up order by the High Court, the financial creditor’s petition would be maintainable, as a result of which the appellant’s appeal has been dismissed.

Decision: Appeal disposed of with direction.

Reason:

The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgment which is contained in Jaipur Metals & Electricals Employees Organization vs. Jaipur Metals & Electricals Ltd. & Ors. being a judgment by a Division Bench of this Court dated 12.12.2018.

Section 11 is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.

Though, we are not interfering with the Appellate Tribunal's order dismissing the appeal, we grant liberty to the appellant before us to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code.

SWISS RIBBONS PVT LTD.

v.

UNION OF INDIA [SC]

Writ Petition (Civil) No. 99 of 2018 with batch of petitions

R F Nariman & Navin Sinha, JJ. [Decided on 25/01/2019]

Insolvency and Bankruptcy Code, 2016 – Whether constitutionally valid – Held, yes.

Brief facts:

The present petitions assail the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 ["Insolvency Code" or "Code"]. Since we are deciding only questions relating to the constitutional validity of the Code, we are not going into the individual facts of any case.

Decision: Constitutional validity upheld.

Reason:

The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.

We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have been disposed of by the Adjudicating Authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. Eighty cases have since been resolved by resolution plans being accepted. Of these eighty cases, the liquidation value of sixty-three such cases is INR 29,788.07 crores. However, the amount realized from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, the Reserve Bank of India has come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016-2017, to INR 9161.09 crores in 2017-2018, and to INR 13195.20 crores for the first six months of 2018-2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14530.47 crores in 2016-2017, to INR 18469.25 crores in 2017- 2018, and to INR 18798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter‘s paradise is lost. In its place, the economy‘s rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs.

SHALINI PUBLICITY CREATIVE PVT. LTD.

v.

DENA BANK [NCLAT]

Company Appeal (AT) (Insolvency) No. 153 of 2019

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 18/02/2019]

Insolvency & Bankruptcy Code,2016 – Section 7 – Default in repayment of loan by corporate debtor – OTS proposal failed financial creditor filed petition – NCLT admitted the petition whether correct – Held, Yes.

Brief facts:

Appellant Corporate Debtor is aggrieved of the impugned order passed by the Adjudicating Authority (NCLT), Mumbai Bench by virtue whereof application of Respondent – Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) has been admitted, moratorium slapped and Interim Resolution Professional appointed with certain directions. Before the Adjudicating Authority the Financial Creditor alleged default on the part of the Corporate Debtor in repayment of facilities granted to the Corporate Debtor to the extent of Rs.28,15,26,092/-.The Financial Creditor relied upon the ‘sanction letter’ dated 26th December, 2015 in terms whereof facilities comprising of cash credit, term loan and bank guarantee accumulated at Rs.14,69,00,000/- were granted to the Corporate Debtor, repayment whereof was secured by various security documents. Financial Creditor also relied upon the ‘statement of accounts’ substantiating its claim with regard to the amount in respect whereof default was alleged.

Decision: Appeal dismissed.

Reason:

The Adjudicating Authority taking note of the fact that the One Time Settlement (OTS) proposal made by the Corporate Debtor had been rejected by the Financial Creditor and that the 'debt' and 'default' was established, proceeded to admit the application thereby initiating Corporate Insolvency Resolution Process against the Corporate Debtor. Learned counsel for the Appellant tried to make a vain attempt to assail the impugned order raising the issue of limitation. In the first place be it seen that no such plea was raised before the Adjudicating Authority. That apart, under Article 137 of the Limitation Act, the right to sue accrues when a default occurs. The period of three years, as envisaged under aforesaid Article, would therefore have to be reckoned from the date of default unless there is a continuing cause of action. It emanates from record that the Financial Creditor relied upon various security documents connected with the sanction of loan facilities. In addition thereto reliance was also placed on notice issued under Section 13(2) of SARFAESI Act, 2002 demanding a sum of Rs.16, 31, 06,448/- as on 17th February, 2016.

Once the debt was acknowledged on 26th February, 2015 and the suit for recovery was filed before the Debts Recovery Tribunal-3, Mumbai on 19th October, 2016, the claim cannot be held to be barred by limitation. Even otherwise, the objection in regard to the claim being barred by limitation has to be determined during the Corporate Insolvency Resolution Process only. Triggering of Corporate Insolvency Resolution Process on grounds of default of a debt that's payable in law or in fact is different from admission or rejection of a claim of a creditor during such process.

Section 7 of I&B Code providing for initiation of Corporate Insolvency Resolution Process by Financial Creditor came into force on 1st December, 2016. Remedy by way of triggering of insolvency resolution process on the ground of default committed qua the financial debt was admittedly not available to a Financial Creditor prior to such date. It is not disputed by learned counsel for the Appellant that the application under Section 7 of I&B Code came to be filed by the Financial Creditor on 12th October, 2018. The triggering of Corporate Insolvency Resolution Process, therefore,` cannot be said to be beyond limitation, more so as there has been acknowledgement of debt on 26th February, 2015 and remedy for initiation of Corporate Insolvency Resolution Process in terms of Section 7 of I&B Code was not available prior to 1st December, 2016. That apart, there has been continuing cause of action as OA 1194 of 2016 filed by the Financial Creditor against the Corporate Debtor before the Debts Recovery Tribunal, Mumbai on 19th October, 2016 is still pending adjudication.

Learned counsel for the Appellant made feeble attempt to contend that the debt acknowledgement letter dated 26th February, 2015 was manipulated and fictitious and same could not be made a basis for either reckoning the period of limitation or for entertaining claim. In absence of such plea having been raised before the Adjudicating Authority besides no complaint alleging forgery, fabrication/ fudging of record being lodged, this argument must be rejected with the contempt that it deserves. On one hand the Appellant was seeking restructuring of loan in terms of RBI Guidelines seeking more time for One Time Settlement (OTS) but on the other hand alleges fabrication and manipulation. What prompted the Corporate Debtor to seek restructuring of loan through One Time Settlement is explainable on no hypothesis other than the one that the Corporate Debtor had committed default qua the outstanding amount which was payable.

For the foregoing reasons, I am of the considered opinion that the appeal is devoid of any merit. The appeal is accordingly dismissed.

COAL INDIA LTD.

v.

GULF COIL LUBRICANTS INDIA LTD & ANR [NCLAT]

Company Appeal (AT) (Insolvency) No. 807 of 2018

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 11/02/2019]

Insolvency & Bankruptcy Code, 2016 – Section 9 – Petition filed by operational creditor admitted – NCLT overlooked the fact of the payment of principal amount under a settlement – Whether correct – Held, No.

Brief facts:

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) was filed by Operational Creditor) for initiation of the 'Corporate Insolvency Resolution Process' against corporate debtor. The said application has been admitted by impugned order by the Adjudicating Authority (NCLT). While passing the impugned order, the Adjudicating authority had overlooked the factum that the principal amount has been paid and settled and no interest was required to be paid. The present appeal has been preferred by the corporate Debtor.

Decision: **Appeal allowed.**

Reason:

Learned counsel of the Operational Creditor accepts that the principal amount was paid prior to the admission of the application under Section 9 and interest has been paid and matter has been settled by agreement dated 26th January, 2019. It is submitted that such settlement has already been made prior to the constitution of the 'Committee of Creditors'.

In the case of Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors. – Writ Petition (Civil) No. 99 of 2018, the Hon'ble Supreme Court observed as follows:

> "52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case."

In view of the fact that the parties have now settled the matter prior to the constitution of the 'Committee of Creditors' and the Adjudicating Authority has failed to notice that the principal amount has already been paid and original plea of the 'Corporate Debtor' was that no interest was payable in terms of the Agreement/ Contract, we set aside the impugned order dated 19th December, 2018 passed by the Adjudicating Authority.

In effect, order (s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and the 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional' for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

AFFINITY FINANCE SERVICES PVT LTD.

v.

KIEV FINANCE LTD [NCLAT]

Company Appeal (AT) (Insolvency) No.171/2019

Bansi Lal Bhat & Balvinder Singh. [Decided on 26/04/2019]

Insolvency and Bankruptcy Code, 2016 – Corporate insolvency proceedings – Liquidation order passed – Recall rejected – Whether refusal to recall the liquidation order correct – Held, Yes.

Brief facts

The appellant, operational creditor, filed petition under Section 9 of the Insolvency & Bankruptcy Code, 2016 seeking initiation of corporate insolvency resolution process against the Respondent, Corporate Debtor for committing default in paying of its debt. The petition was admitted by the Adjudicating Authority and Interim Resolution Professional was appointed and Committee of Creditors came to be constituted. Subsequently appointment of IRP was confirmed as Resolution Professional. The COC had as many as six meetings but did not receive any resolution plan during the period of 180 days.

Resolution Professional approached the Adjudicating Authority for liquidation of the Corporate Debtor. The Adjudicating Authority passed the liquidation order qua the corporate debtor and the Resolution Professional was appointed as Liquidator.

However, subsequently an application appears to have been filed by the Liquidator seeking recall of the liquidation order, which was dismissed on the ground that the order of liquidation of corporate debtor passed by it could not be subjected to review or revocation. It was also noticed by the Adjudicating Authority that corporate debtor could be sold as an ongoing concern during the liquidation process. The application seeking review was also accordingly dismissed. Hence the present appeal.

Decision: Appeal dismissed.

Reason

After hearing learned counsel for the appellant for a while we find no merit in the instant appeal. Admittedly no resolution applicant came forward with a resolution plan during the corporate insolvency resolution process and the Resolution Professional was left with no option but to seek an order of liquidation from the Adjudicating Authority. Learned Adjudicating Authority also did not have any option but to pass order for liquidation of the corporate debtor. Even if it is accepted that any resolution applicant did intend to submit a resolution plan before the order of liquidation was passed, same could be evaluated for considering its feasibility, viability and financial matrix only during the period of Insolvency Resolution Process. The Resolution Professional, in terms of Section 30(3) is required to present to the COC for its approval such resolution plans which confirm the conditions referred to in sub-section (2) of Section 30. It is only thereafter that feasibility and viability of such resolution plan is considered by the COC and the resolution plan is subjected to vote. All this has not been done. In fact review was sought on the ground that the proposed resolution applicant intended to file a resolution plan which in fact could not be evaluated and subjected to scrutiny for determining its viability and feasibility by the COC unless the same had been submitted within the prescribed time frame. This, coupled with the fact that the order of liquidation goes un-assailed, did not justify recalling of the order of liquidation at the instance of appellant, operational creditor, who claims to be sole member of COC. The impugned order declining to recall the liquidation order does not suffer from any legal infirmity and we do not find any justifiable ground to interfere. The Adjudicating Authority has rightly pointed out in the impugned order that even during the liquidation process corporate debtor can be sold as an ongoing concern. That should allay the apprehension of the appellant, if any, with regard to fair value of the Assets of the Corporate Debtor. For the aforesaid reasons, the appeal is dismissed.

JK JUTE MILL MAZDOOR MORCHA

v.

JUGGILAL KAMLAPAT JUTE MILLS LTD & ORS [SC]

Civil Appeal No.20978 of 2017

R.F. Nariman & Vineet Saran, JJ. [Decided on 30/04/2019]

Insolvency and Bankruptcy Code, 2016 – Whether trade union is an 'operational creditor' when representing the interests of the workmen – Held, Yes.

Brief facts

The present appeal raises an important question as to whether a trade union could be said to be an operational creditor for the purpose of the Insolvency and Bankruptcy Code, 2016 ["Code"]. The facts of the present case reveal a long-drawn saga of a jute mill being closed and reopened several times until finally, it has been closed for good on 07.03.2014. Proceedings were pending under the Sick Industrial Companies (Special Provisions) Act, 1985. On 14.03.2017, the appellant issued a demand notice on behalf of roughly 3000 workers under Section 8 of the Code for outstanding dues of workers. This was replied to by respondent No.1 on 31.03.2017. The National Company Law Tribunal ["NCLT"], on 28.04.2017, after describing all the antecedent facts including suits that have been filed by respondent No.1 and referring to pending writ petitions in the High Court of Delhi, ultimately held that a trade union not being covered as an operational creditor, the petition would have to be dismissed. By the impugned order dated 12.09.2017, the National Company Law Appellate Tribunal ["NCLAT"] did likewise and dismissed the appeal filed by the appellant before us, stating that each worker may file an individual application before the NCLT.

Decision: Appeal allowed.

Reason

On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of "person" under Sections 3(23) of the Code. This being so, it is clear that an "operational debt", meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly. Further, a registered trade union recognised by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which inter alia is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

Even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. We must never forget that procedure is the handmaid of justice, and is meant to serve justice.

The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union would come within the definition of "person" under Section 3(23) of the Code. Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all. For all these reasons, we allow the appeal and set aside the judgment of the NCLAT. The matter is now remanded to the NCLAT who will decide the appeal on merits expeditiously as this matter has been pending for quite some time. The appeal is allowed accordingly.

PRANAMI TRADING PVT LTD.

v.

KIEON DEVELOPERS PVT. LTD [NCLAT]

Company Appeal (AT) (INS) No.96 of 2019

S.J. Mukhopadhaya, A.I.S. Cheema & Kanthi Narahari. [Decided on 11/06/2019]

Insolvency and Bankruptcy Code, 2016 – Section 238 – Application of Limitation Act to proceedings – Petition of operational creditor rejected by NCLT on the ground of limitation – Whether correct Held, No.

Brief facts:

The Appellant had filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the NCLT against the Respondent which came to be rejected on the ground of limitation.

The Appellant had booked a flat with the Respondent on 16th May 2012 and paid an amount of Rs.60 Lakhs and the allotment letter was issued to the Appellant. Subsequently, on 16.07.2012, an MOU (Annexure – D - Page – 42) was executed between the Appellant and Respondent and both the parties cancelled the booking on terms and conditions as laid down in the MOU. The Respondent agreed to pay the Appellant the amount of Rs.60 Lakhs within 18 months from the date of receipt of the boking amount, i.e. on or before 15th November 2013. In addition, Respondent agreed to pay Rs.8, 10,000/- every six months to the Appellant till entire booking amount was duly paid. Other conditions were also incorporated. According to the Appellant, in furtherance to the MOU and undertaking, the Respondent paid Rs.3, 24,000/- each on 16.11.2012 and 15.05.2013. Even Respondent had issued some cheques for refund of the amount but on 6th January 2014, wrote letter to the Appellant that the cheques are to be replaced. When the Appellant presented two cheques, the same bounced. The Appellant claimed that no interest had been paid on the booking amount, i.e. the principal amount of Rs.60 Lakhs after 15th May 2013 and the principal amount had also not been repaid.

The Appellant wanted to invoke second condition of the MOU with regard to the allotment of the flat, but Respondent did not comply and created third party rights which led to the Appellant filing L.C. Suit No.954 of 2014. In the written statement dated 21st July 2017, Respondent claimed that it was a pure loan transaction and accepted that the Respondent had received the money. The Appellant claims that on 16.07.2018, it filed Section 7 proceeding before the Adjudicating Authority, but it was wrongly dismissed on the ground of limitation.

The Impugned Order shows that the Adjudicating Authority took into consideration the Application filed under Section 7 and the Affidavit filed by the Corporate Debtor claiming that the amount concerned was barred by limitation. The date of default was stated to be 21.07.2017 which was date of the written statement in the Suit. The Adjudicating Authority observed that written statement filed in the Suit did not amount to acknowledgement of the debt and could not reset the limitation. Consequently, the Application was rejected.

Decision: Appeal allowed.

Reason:

Admittedly, the Appellant had paid Rs.60 Lakhs and allotment letter was issued on 16th May 2012. The Memorandum of Understanding (Annexure – D) shows that the parties mutually agreed to cancel the booking on the "terms and conditions arrived at between the two parties" as mentioned in the documents.

It appears that the Appellant received some amounts which now Appellant classifies as towards the "interest" component and thereafter, neither the principal nor interest, which was recurring, was paid and the Appellant invoked the third para of the Terms and Conditions. The Appellant –Plaintiff filed Suit (Annexure – F) seeking Decree of the flat and in the written statement dated 21.07.2017 (Annexure G – Page 73), the Respondent – Defendant accepted that the respondent had received consideration amount from the Plaintiff as per the statement and claimed that it was a loan transaction.

Thus, the provisions of the Limitation Act shall apply "as far as may be" [s.238 of IBC]. Although the Adjudicating Authority has observed that admission in the written statement will not amount to acknowledgement, we need not deliberate to settle that issue looking to the Term – 1 of the MOU which we have reproduced above. In the transaction, the term clearly shows liability of Rs.8, 10,000/- getting created every 6 months for the Respondent to pay the Appellant "till the entire booking amount has not been repaid". When the entire booking amount has not been paid, this component keeps getting attracted and liability invoked and when Section 7 Application was filed, the amount due and outstanding was clearly more than Rs.1 Lakh and thus, in our view, the Application under Section 7 could not have been rejected as time barred. There was a debt which was due, and the default was of more than Rs.1 Lakh and therefore, it was sufficient to trigger Section 7 proceeding.

Neither the parties nor the Impugned Order shows that there was any other defect in the Section 7 Application which had been moved so as to say that the Application was not complete. In that view of the matter, the Application filed before NCLT deserves to be admitted. For reasons mentioned, the Appeal is allowed. We remit back the matter to the Adjudicating Authority.

AXIS BANK

v.

SBS ORGANICS PVT. LTD & ANR [SC]

Civil Appeal No. 4379 of 2016 (Arising out of SLP (C) No. 13861/2015)

Kurian Joseph & Rohinton Fali Nariman, JJ. [Decided on 22/04/2016]

SARFASEI Act – Appeal before DRAT – Pre-deposit of 50% of contended sum- appeal withdrawn – Borrower claimed the refund of the pre-deposit sum – Bank contended it cannot be refunded – Whether the claim of the borrower tenable – Held, Yes.

Brief facts:

An appeal under Section 18 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act') before the Debt Recovery Appellate Tribunal (hereinafter referred to as 'DRAT') can be entertained only if the borrower deposits fifty per cent of the amount in terms of the order passed by the Debt Recovery Tribunal (hereinafter referred to as 'DRT') under Section 17 of the Act or fifty per cent of the amount due from the borrower as claimed by the secured creditor, whichever is less. The Appellate Tribunal may reduce the amount to twenty five per cent. What is the fate of such deposit on the disposal of the appeal is the question arising for consideration in this case. Being a pure legal issue, it may not be necessary for us to refer to the factual position in detail. The first respondent, being a borrower and aggrieved by the steps taken by the secured creditor, filed Securitisation Application No. 152 of 2010 before the Debt Recovery Tribunal, Ahmedabad. Though, initially an interim relief was granted, the same was vacated by order dated 20.01.2011. Therefore, the first respondent moved the Debt Recovery Appellate Tribunal, Mumbai under Section 18 of the SARFAESI Act. In terms of the proviso under Section 18, the first respondent made a deposit of Rs.50 lakhs before the Appellate Tribunal. During the pendency of the appeal before the DRAT, Securitisation Application itself came to be finally disposed of before the Debt Recovery Tribunal at Ahmedabad, setting aside the sale. Realising that the appeal did not survive thereafter, the first respondent sought permission to withdraw the same and also for refund of the deposit of Rs. 50 lakhs. Permission was granted, however, making it subject to the disposal of the appeal. As the appeal itself was being withdrawn, the first respondent moved the High Court of Gujarat at Ahmedabad by way of Writ Petition (Special Civil Application), aggrieved by the observation that the withdrawal would be subject to the result of the appeal. The same was disposed of by order dated 05.03.2015 by the learned Single Judge, setting aside the said condition and permitting the first respondent herein to withdraw the amount unconditionally. Aggrieved, the appellant-Bank filed an intra-Court appeal. That appeal was dismissed by order dated 01.04.2015 by a Division Bench, and thus aggrieved, the Bank has come up in appeal before the Supreme Court.

Decision: Appeal dismissed.

Reason:

Any person aggrieved by the order of the DRT under Section 17 of the SARFAESI Act, is entitled to prefer an appeal along with the prescribed fee within the permitted period of 30 days. For 'preferring' an appeal, a fee is prescribed, whereas for the Tribunal to 'entertain' the appeal, the aggrieved person has to make a deposit of fifty per cent of the amount of debt due from him as claimed by the secured creditors or determined by the DRT, whichever is less. This amount can, at the discretion of the Tribunal, in appropriate cases, for recorded reasons, be reduced to twenty- five per cent of the debt.

In the case before us, the first respondent had in fact sought withdrawal of the appeal, since the appellant had already proceeded against the secured assets by the time the appeal came up for consideration on merits. There is neither any order of appropriation during the pendency of the appeal nor any attachment on the pre-deposit. Therefore, the deposit made by the first respondent is liable to be returned to the first respondent. Though for different reasons as well, we endorse the view taken by the High Court. Thus, there is no merit in the appeal. It is accordingly dismissed. We make it clear that the dismissal of the appeal is without prejudice to the liberty available to the appellant to take appropriate steps under Section 13(10) of the SARFAESI Act read with Rule 11 of the Security Interest (Enforcement) Rules, 2002.

UCO BANK & ANR

v.

DIPAK DEBBARMA & ORS [SC]

Civil Appeal No. 11247 of 2016 (arising out of S.L.P. (C) No.36973 of 2012)

With Civil Appeal No.11250 of 2016 (arising out of S.L.P. (C) No.33671 of 2016)

Ranjan Gogoi & Abhay Manohar Sapre, JJ. [Decided on 25/11/2016]

SARFAESI Act, 2002 read with Tripura Land Revenue and land Reform Act, 1960 – Enforcement of security interest – Sale of mortgaged assets of the borrower by the bank – Whether prohibited by the provisions of the Tripura Act – Held, No.

Brief facts:

The writ petition out of which these appeals have arisen was instituted before the Agartala Bench of the Gauhati High Court. The writ petitioners, who are the respondents herein, are members of Scheduled Tribe(s) of the State of Tripura. They had contended that the Sale Notification dated 26.06.2012 issued by the appellant Bank under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act of 2002") was in infraction of Section 187 of the Tripura Land Revenue and Land Reforms Act, 1960 (hereinafter referred to as the "Tripura Act of 1960") as under the Tripura Act there is a legislative embargo on the sale of mortgaged properties by the bank to any person who is not a member of a scheduled tribe. The auction purchasers in the present case happened to be the persons who are not members of any scheduled tribe.

The High Court by the impugned order answered the writ petition in favour of the respondents/writ petitioners on the ground that the Tripura Act of 1960 being included in the Ninth Schedule to the Constitution and, therefore, enjoying the protection of Section 31-B of the Constitution, would prevail over the Act of 2002 so as to invalidate the sale Notification dated 26.06.2012, the same being contrary to the provisions of Section 187 of the Tripura Act of 1960.

Decision: Appeal allowed.

Reason:

It will not require much appreciation or scrutiny to come to the conclusion that the High Court was wholly incorrect in answering the writ petition and striking down the sale Notification dated 26.06.2012 on the above basis. Article 31-B of the Constitution, on the very face of the language contained therein, is self-explanatory and provides protection/immunity to a legislation from challenge on the ground that it violates any of the provisions of Part III of the Constitution. Inclusion of the Tripura Act of 1960 in the Ninth Schedule by itself, would, therefore, not confer immunity to the said legislation from being overridden by the provisions of a Parliamentary statute. This is a question, therefore, that this Court will have to deal with notwithstanding the fact that the proceedings before the High Court did not proceed on the aforesaid basis.

In the present case the conflict between the Central and the State Act is on account of an apparent overstepping by the provisions of the State Act dealing with land reform into an area of banking covered by the Central Act. The test, therefore, would be to find out as to which is the dominant legislation having regard the area of encroachment. The provisions of the Act of 2002 enable the bank to take possession of any property where a security interest has been created in its favour. Specifically, Section 13 of the 2002 Act enables the bank to take possession of and sell such property to any person to realise its dues. The purchaser of such property acquires a clear title to the property sold, subject to compliance with the requirements prescribed.

Section 187 of the Tripura Act of 1960, on the other hand, prohibits the bank from transferring the property which has been mortgaged by a member of a scheduled tribe to any person other than a member of a scheduled tribe. This is a clear restriction on what is permitted by the Act of 2002 for the realisation of amounts due to the bank. The Act of 2002 is relatable to the Entry of banking which is included in List I of the Seventh Schedule. Sale of mortgaged property by a bank is an inseparable and integral part of the business of banking. The object of the State Act, as already noted, is an attempt to consolidate the land revenue law in the State and also to provide measures of agrarian reforms. The field of encroachment made by the State legislature is in the area of banking. So long there did not exist any parallel Central Act dealing with sale of secured assets and referable to Entry 45 of List I, the State Act, including Section 187, operated validly. However, the moment Parliament stepped in by enacting such a law traceable to Entry 45 and dealing exclusively with activities relating to sale of secured assets, the State law, to the extent that it is inconsistent with the Act of 2002, must give way. The dominant legislation being the Parliamentary legislation, the provisions of the Tripura Act of 1960, pro tanto, (Section 187) would be invalid. It is the provisions of the Act of 2002, which do not contain any embargo on the category of persons to whom mortgaged property can be sold by the bank for realisation of its dues that will prevail over the provisions contained in Section 187 of the Tripura Act of 1960.

The decision of this Court in Central Bank of India v. State of Kerala & Ors (2009) 4 SCC 94 , holding that the provisions of the Bombay Sales Tax Act, 1959 and the Kerala General Sales Tax Act, 1963 providing for a first charge on the property of the person liable to pay sales tax, in favour of the State, is not inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions, Act 1993 (for short the "DRT Act") and also the Act of 2002 must be understood by noticing the absence of any specific provision in either of the Central enactments containing a similar/parallel provision of a first charge in favour of the bank. The judgment of this Court holding the State enactments to be valid and the Central enactments not to have any overriding effect, proceeds on the said basis i.e. absence of any provision creating a first charge in favour of the bank in either of the Central enactments.

STATE BANK OF INDIA

v.

SANTOSH GUPTA & ANR [SC]

Civil Appeal Nos. 12237-12238 of 2016 [Arising Out Of SLP (C) Nos.30884-30885 of 2015] along with batch of appeals.

Kurian Joseph & Rohinton Fali Nariman, JJ. [Decided on 16/12/2016]

SARFAESI Act read with constitution of India and constitution of Jammu & Kashmir – Whether provisions of SARFAESI Act are applicable to the State of J&K – Held, Yes – Whether Constitution of India is superior to the Constitution of J&K – Held, yes.

Brief facts:

The Constitution of India is a mosaic drawn from the experience of nations worldwide. The federal structure of this Constitution is largely reflected in Part XI which is largely drawn from the Government of India Act, 1935. The State of Jammu & Kashmir is a part of this federal structure. Due to historical reasons, it is a State which is accorded special treatment within the framework of the Constitution of India. This case is all about the State of Jammu & Kashmir *vis`- a-vis`* the Union of India, in so far as legislative relations between the two are concerned.

The present appeals arise out of a judgment dated 16.7.2015 passed by the High Court of Jammu & Kashmir at Jammu, in which it has been held that various key provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI") were outside the legislative competence of Parliament, as they would collide with Section 140 of the Transfer of Property Act of Jammu & Kashmir, 1920. The said Act has been held to be inapplicable to banks such as the State Bank of India which are all India banks. The bone of contention in the present appeals is whether SARFAESI in its application to the State of Jammu & Kashmir would be held to be within the legislative competence of Parliament.

Decision: Appeals allowed.

Reason:

It is interesting to note that the State of Jammu & Kashmir, though a state within the meaning of Article 1 of the Constitution of India, has been accorded a special status from the very beginning because of certain events that took place at the time that the erstwhile Ruler of Jammu & Kashmir acceded to the Indian Union.

Applying the doctrine of pith and substance to SARFAESI, it is clear that in pith and substance the entire Act is preferable to Entry 45 List I read with Entry 95 List I in that it deals with recovery of debts due to banks and financial institutions, *inter alia* through facilitating securitization and reconstruction of financial assets of banks and financial institutions, and sets up a machinery in order to enforce the provisions of the Act. In pith and substance, SARFAESI does not deal with "transfer of property". In fact, in so far as banks and financial institutions are concerned, it deals with recovery of debts owing to such banks and financial institutions and certain measures which can be taken outside of the court process to enforce such recovery. Under Section 13(4) of SARFAESI Act, apart from recourse to taking possession of secured assets of the borrower and assigning or selling them in order to realise their debts, the banks can also take over the management of the business of the borrower, and/ or appoint any person as manager to manage secured assets, the possession of which has been taken over by the secured creditor. Banks as secured creditors may also require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or payable to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt. It is thus clear that the transfer of property, by way of sale or assignment, is only one of several measures of recovery of a secured debt owing to a bank and this being the case, it is clear that SARFAESI Act, as a whole, cannot possibly be said to be in pith and substance, an Act relatable to the subject matter "transfer of property".

At this juncture it is necessary to point out that insofar as the

State of Jammu & Kashmir is concerned, Sections 17A and 18B of SARFAESI Act, which apply to the State of Jammu & Kashmir, substituted 'District Judge' and the 'High Court' for the 'Debts Recovery Tribunal' and the 'Appellate Tribunal' respectively. It is thus clear on a reading of these judgments that SARFAESI Act, as a whole would be referable to Entries 45 and 95 of List I. We must remember the admonition given by this Court in A.S. Krishna & Ors v. State of Madras, 1957 SCR 399, that it is not correct to first dissect an Act into various parts and then refer those parts to different Entries in the legislative Lists. It is clear therefore that the entire Act, including Sections 17A and 18B, would in pith and substance be referable to Entries 45 and 95 of List I, and that therefore the Act as a whole would necessarily operate in the State of Jammu & Kashmir.

The judgment of the High Court is wholly incorrect in referring to Entry 11A of the Concurrent List. First and foremost, as has been noted by us above, the Entry is not extended to the State of Jammu & Kashmir. From this, the counsel for the respondents sought to contend that Parliament would, therefore, have no power under the Concurrent List to legislate on the subject matter "Administration of Justice". Under Section 5 of the Jammu & Kashmir Constitution, we have seen that "Administration of Justice" would come into play only when Entries 45 and 95 of List 1 are not attracted. Even if this were not so, we have seen in the two judgments cited hereinabove, the expression "administration of justice" is general and must give way to the special laws that are enacted under Entry 95 List I when coupled with another Entry in the same List – in this case Entry 45 List I. It is rather disturbing to note that various parts of the judgment speak of the absolute sovereign power of the State of Jammu & Kashmir. It is necessary to reiterate that Section 3 of the Constitution of Jammu & Kashmir, which was framed by a Constituent Assembly elected on the basis of universal adult franchise, makes a ringing declaration that the State of Jammu & Kashmir is and shall be an integral part of the Union of India.

It is to be noted that the opening paragraph of the Constitution of India, namely "WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens…" has been wholly omitted in the Constitution of Jammu & Kashmir.

There is no reference to sovereignty. Neither is there any use of the expression "citizen" while referring to its people. The people of Jammu & Kashmir for whom special rights are provided in the Constitution are referred to as "permanent residents" under Part III of the Constitution of Jammu & Kashmir. Above all, the Constitution of Jammu & Kashmir has been made to further define the existing relationship of the State with the Union of India as an integral part thereof.

It is thus clear that the State of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India. It is therefore wholly incorrect to describe it as being sovereign in the sense of its residents constituting a separate and distinct class in themselves. The residents of Jammu & Kashmir, we need to remind the High Court, are first and foremost citizens of India. Again it is wholly incorrect to refer to Entry 11A of List 3 and to state that since it is not extended to the State of Jammu & Kashmir, Parliament would have no legislative competence to enact Sections 17A and 18B of SARFAESI Act. There are at least three errors in this conclusion. First and foremost, it is not possible to dissect the provisions of SARFAESI Act and attach them to different Entries under different Lists. As has been held by us, the whole of SARFAESI Act is referable to Entry 45 and 95 of List I. Secondly, what has been missed by the impugned judgment is that Entry 95 List I is a source of legislative power for Parliament for conferring power and jurisdiction on the District Court and the High Court respectively in respect of matters contained in SARFAESI Act. And third, the subject "Administration of Justice" is only general and can be referred to only if Entry 95 List I read with Entry 45 List I are not attracted. Most importantly, even if it is found that Section 140 of the Jammu & Kashmir Transfer of Property Act entitles only certain persons to purchase properties in the State of Jammu & Kashmir, yet, as has been held hereinabove, Rule 8(5) proviso which recognizes this provision, has been brushed aside. In any case an attempt has first to be made to harmonise Section 140 of the Jammu & Kashmir Transfer of Property Act with SARFAESI Act, and if such harmonization is impossible, it is clear that by virtue of Article 246 read with Section 5 of the Jammu & Kashmir Constitution, Section 140 of the Jammu & Kashmir Transfer of Property Act has to give way to SARFAESI Act, and not the other way around.

We fail to understand how Article 35A carries the matter any further. This Article only states that the conferring on permanent residents of Jammu & Kashmir special rights and privileges regarding the acquisition of immovable property in the State cannot be challenged on the ground that it is inconsistent with the fundamental rights chapter of the Indian Constitution. The conferring of such rights and privileges as mentioned in Section 140 of the Jammu & Kashmir Transfer of Property Act is not the subject matter of challenge on the ground that it violates any fundamental right of the Constitution of India. Furthermore, in view of Rule 8(5) proviso, such rights are expressly preserved.

We therefore set aside the judgment of the High Court. As a result, notices issued by banks in terms of Section 13 and other coercive methods taken under the said Section are valid and can be proceeded with further. The appeals are accordingly allowed with no order as to costs.

CHUNNU FASHIONS & ORS

v.

EDELWEISS ASSET RECONSTRUCTION CO LTD [DEL]

W.P(C).No. 10589/2016

Indira Banerjee & Anil Kumar Chawla, JJ. [Decided on 16/01/2017]

SARFAESI Act, 2002- sections 17 & 18 – Borrower filed appeal before DRAT against the attachment order of the secured creditor – Appeal admitted with condition of pre-deposit – Borrower failed to pay the pre-deposit amount appeal dismissed by DRAT – Whether correct – Held, Yes.

Brief facts:

This writ petition is directed against an order, passed by the Debt Recovery Appellate Tribunal (DRAT), in Appeal No.6015/2015, whereby the DRAT dismissed an appeal against an order of the Debt Recovery Tribunal, under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to as the SARFAESI Act, on the ground of non- compliance with an earlier direction issued on 13.10.2015 to the petitioner for deposit of 25% of the amount directed to be paid by the order under appeal.

Decision: Petition dismissed.

Reason:

Under Section 21 of the 1993 Debt Recovery Act, an appeal is not to be entertained by the Appellate Tribunal, unless the person preferring the appeal has deposited 75% of the amount of the debt due from him as determined by the Tribunal under Section 19. In terms of the proviso, the Appellate Tribunal may for reasons to be recorded in writing waive or reduce the amount to be deposited under the said section. Unlike Section 18 of the 1993 Debt Recovery Act, Section 18 of the SARFAESI Act does not permit full waiver.

In Narain Chandra Ghose v. UCO Bank & Ors (2011) 4 SCC 548, the Supreme Court held that the condition of pre-deposit for entertainment of an appeal being mandatory under Section 18 of the SARFAESI Act, an appeal cannot be entertained, unless the condition precedent of deposit is fulfilled. The Court also held that the condition of pre-deposit being mandatory, complete waiver of pre-deposit is beyond the provisions of the Act.

The learned DRAT has reduced the required pre-deposit of 25%, which is the minimum amount required to be deposited in view of the third proviso to Section 18 of the SARFAESI Act. In view of the verdict of the Supreme Court in Narain Chandra Ghose (supra) and the mandatory requirement of the third proviso to Section 18 of the SARFAESI Act, the writ petition cannot be entertained and the same is dismissed. All the pending applications are also dismissed.

MOBILOX INNOVATIONS PVT LTD.

v.

KIRUSA SOFTWARE PVT LTD [SC]

Civil Appeal No. 9405 of 2017

R.F. Nariman, J & S.K.Kaul, JJ. [Decided on 21/09/207]

Insolvency and Bankruptcy code,2016 – Section 8 – Operational debt – Term ‘existence of dispute’ – Meaning thereof – Explained by the Supreme Court.

Brief facts :

The present appeal raises questions as to the triggering of the Insolvency and Bankruptcy Code, 2016 when it comes to operational debts owed to operational creditors.

The appellant was engaged by Star TV for conducting tele-voting for the “Nach Baliye” program on Star TV. The appellant in turn subcontracted the work to the respondent. The respondent provided the requisite services and raised monthly invoices and also followed up with the appellant for payment of pending invoices. It is also important to note that a non-disclosure agreement (“NDA”) was executed between the parties.

More than a month after execution of the aforesaid agreement, the appellant, wrote to the respondent that they were withholding payments against invoices raised by the respondent, as the respondent had disclosed on their webpage that they had worked for the “Nach Baliye” program run by Star TV, and had thus breached the NDA.

Respondent filed an application with the NCLT under Sections 8 and 9 of the new Code stating that an operational debt of Rs.20,08,202.55 was owed by the Appellant. NCLT dismissed the application on the ground that the appellant had disputed the claim of debt alleged by the respondent. On appeal NCALT remanded the case back to NCLT. Appellant challenged the order of the NCALT before the Supreme Court.

Decision : Appeal allowed.

Reason :

The adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

It is now important to construe Section 8 of the Code. The operational creditors are those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in respect of repayment of dues arising under any law for the time being in force and payable to the Government or to a local authority. This has to be contrasted with financial debts that may be owed to financial creditors, which was the subject matter of the judgment delivered by this Court on 31.8.2017 in Innoventive Industries Ltd. v. ICICI Bank & Anr. (Civil Appeal Nos.8337-8338 of 2017). In this judgment, we had held that the adjudicating authority under Section 7 of the Code has to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor within 14 days. The corporate debtor is entitled to point out to the adjudicating authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim, is not due i.e. it is not payable in law or in fact.

This Court then went on to state:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

It is settled law that the expression “and” may be read as “or” in order to further the object of the statute and/or to avoid an anomalous situation. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist?

It is important to notice that Section 255 read with the Eleventh Schedule of the Code has amended Section 271 of the Companies Act, 2013 so that a company being unable to pay its debts is no longer a ground for winding up a company. The old law contained in Madhusudan (supra) has, therefore, disappeared with the disappearance of this ground in Section 271 of the Companies Act.

We have already noticed that in the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined “dispute” as meaning a “bona fide suit or arbitration proceedings…” In its present avatar, Section 5(6) excludes the expression “bona fide” which is of significance. Therefore, it is difficult to import the expression “bona fide” into Section 8(2)(a) in order to judge whether a dispute exists or not.

It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defence as vague, got-up and motivated to evade liability.

SURENDRA TRADING COMPANY

v.

JUGGILAL KAMLAPAT JUTE MILLS CO LTD [SC]

Civil Appeal No. 8400 of 2017

A.K. Sikri & Ashok Bhushan, JJ. [Decided on 19/09/2017]

Insolvency and Bankruptcy Code, 2016 – Proviso to section 9 (5) – 7 days’ time limit to remove defects in the application – Whether directory – Held Yes.

Brief facts :

The crux of the issue was that the appellant operational creditor filed an application before the NCLT under sections 8 and 9 of the Insolvency and Bankruptcy Code 2016 (the Code) against the respondent corporate debtor. The NCLT observed certain deficiencies in the application and directed the appellant to remove the same within 7 days as provided under section 9. The appellant removed the defects but after the expiry of 7 days. The NCLT dismissed the application. On appeal, the NCALT held that the appellant should have cured the defects within 7 days as the provision was mandatory. This is being challenged in the present appeal.

The core issue involved in the appeal was whether the 7 days prescribed in the section is mandatory or directory.

Decision : Appeal allowed.

Reason :

We make it clear at the outset that since we are dealing with the substantial issue as to whether seven days period provided for removing the defects is mandatory or not, it is not necessary to touch upon these mundane aspects. Instead, it would be better to concentrate on the substance of the matter.

As mentioned above, insofar as prescription of fourteen days within which the adjudicating authority has to pass an order under sub-section (5) of Section 9 for admitting or rejecting the application is concerned, the NCLAT has held that the same cannot be treated as mandatory. Though this view is not under challenge (and rightly so), discussion in the impugned order on this aspect has definite bearing on the other question, with which this Court is concerned. Therefore, we deem it apposite to discuss the rationale which is provided by the NCLAT itself in arriving at the aforesaid conclusion insofar as first aspect is concerned.

It is pointed out by the NCLAT that where an application is not disposed of or an order is not passed within a period specified in the Code, in such cases the adjudicating authority may record the reasons for not doing so within the period so specified and may request the President of the NCLAT for extension of time, who may, after taking into account the reasons so recorded, extend the period specified in the Code, but not exceeding ten days, as provided in Section 64(1) of the Code. The NCLAT has thereafter scanned through the scheme of the Code by pointing out various steps of the insolvency resolution process and the time limits prescribed therefor.

It is of relevance to mention here that the corporate insolvency resolution process can be initiated by the financial creditor under Section 7 of the Code, by the operational creditor under Section 9 of the Code and by a corporate applicant under Section 10 of the Code. There is a slight difference in these provisions insofar as criteria for admission or rejection of the applications filed under respective provisions is concerned. However, it is pertinent to note that after the admission of the insolvency resolution process, the procedure to deal with these applications, whether filed by the financial creditor or operational creditor or corporate applicant, is the same.

The aforesaid statutory scheme laying down time limits sends a clear message, as rightly held by the NCLAT also, that time is the essence of the Code. Notwithstanding this salutary theme and spirit behind the Code, the NCLAT has concluded that as far as fourteen days' time provided to the adjudicating authority for admitting or rejecting the application for initiation of insolvency resolution process is concerned, this period is not mandatory. For arriving at such a conclusion, the NCLAT has discussed the law laid down by this Court in some judgments.

The NCLAT has also held that fourteen days period is to be calculated 'from the date of receipt of application'. The NCLAT has clarified that date of receipt of application cannot be treated to be the date of filing of the application. Since the Registry is required to find out whether the application is in proper form and accompanied with such fee as may be prescribed, it will take some time in examining the application and, therefore, fourteen days period granted to the adjudicating authority under the aforesaid provisions would be from the date when such an application is presented before the adjudicating authority, i.e. the date on which it is listed for admission/ order.

After analysing the provision of fourteen days' time within which the adjudicating authority is to pass the order, the NCLAT immediately jumped to another conclusion, viz. the period of seven days mentioned in proviso to sub-section (5) of Section 9 for removing the defect is mandatory.

We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application.

Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the application from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the latter alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.

Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application. The aforesaid process indicated by us can find support from the judgment of this Court in *Kailash v. Nanhku & Ors., (2005) 4 SCC 480.*

In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds proviso to sub-section (5) of Section 7 or proviso to sub-section (5) of Section 9 or proviso to sub-section (4) of Section 10 to remove the defects within seven days as mandatory and on failure applications to be rejected, is set aside.

INNOVENTIVE INDUSTRIES LTD

v.

ICICI & ANR [SC]

Civil Appeal Nos. 8337-8338 of 2017

R.F.Nariman & S.K.Kaul, JJ. [Decided on 31/08/2017]

Insolvency and Bankruptcy Code, 2016 – Corporate debtor entered into CDR with 19 financial creditors – One financial creditor (respondent) invoked the provisions the Code – Application filed before the NCLT – Objections raised as to the applicability of the Code qua the Maharashtra Act and that the debt is not due under the CDR agreement – Objections rejected – Application admitted – NCALT dismissed the appeal – Whether contentions of the appellant are tenable – Held, No.

Brief facts :

The appellant is a multi-product company catering to applications in diverse sectors. It had borrowed from various financial institutions including the respondent herein. A corporate debt restructure plan (CDR) was framed between 19 lenders and the appellant in 2014 and a master restructuring agreement (hereinafter referred to as the MRA), by which funds were to be infused by the creditors, and certain obligations were to be met by the debtors. The aforesaid restructuring plan was implementable over a period of 2 years.

Ultimately, an application was made on 07/12/ 2016 by ICICI Bank Ltd., in which it was stated that the appellant being a defaulter within the meaning of the Code, the insolvency resolution process ought to be set in motion. To this application, a reply was filed by means of an interim application on behalf of the appellant, in which the appellant claimed that there was no debt legally due in as much as vide two notifications issued under the Maharashtra Relief Undertakings (Special Provisions Act), 1958 (hereinafter referred to as the Maharashtra Act), all liabilities of the appellant, except certain liabilities with which we are not concerned, and remedies for enforcement thereof were temporarily suspended for a period up to 18/07/2017.

It may be added that this was the only point raised on behalf of the appellant in order to stave off the admission of the ICICI Bank application made before the NCLT.

On 16/01/2017, a second application was filed by the appellant in which a different plea was taken. This time, the appellant pleaded that owing to non-release of funds under the MRA, the appellant was unable to pay back its debts as envisaged. Further, it repaid only some amounts to five lenders, who, according to the appellant, complied with their obligations under the MRA. In the aforesaid circumstances, it was pleaded that no default was committed by it.

The NCLT held that the Code would prevail against the Maharashtra Act and held that the Parliamentary statute would prevail over the State statute and this being so, it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared. Appeal made to the NCALT was also dismissed. Hence the present appeal.

Decision : Appeal dismissed.

Reason :

Having heard learned counsel for both the parties, we find substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the appellant is not maintainable. According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone.

Having heard both the learned counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law.

Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.

Both the Tribunal and the Appellate Tribunal refused to go into the other contentions of the Appellant viz. that under the MRA, it was because the creditors did not disburse the amounts thereunder that the appellant was not able to pay its dues. We are of the view that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before us that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.

The appeals, accordingly, stand dismissed. There shall, however, be no order as to costs.

M.D. FROZEN FOODS EXPORTS PVT. LTD.

v.

HERO FINCORP LTD [SC]

Civil Appeal No. 15147 of 2017 (Arising out of SLP(C) No.19559 of 2017)

R.F. Nariman & S.K. Kaul, JJ. [Decided on 21/09/2017]

Section 13 of the SARFESI Act read with Arbitration and Conciliation Act,1996 – Default in payment by borrower- lender invoked arbitration – Meanwhile lender became financial institution by virtue of notification – Therefore lender instituted proceeding under SARFESI Act also – Whether tenable- Held, Yes.

Brief facts :

The appellants borrowed monies for their business against security of immovable properties by the creation of an equitable mortgage by deposit of title documents (seven such properties). The financial discipline was not adhered to, apparently almost from the inception, and the account of the appellants became a 'Non-Performing Asset' ('NPA').

The lender referred the dispute of non-payment to arbitration on 16/11/2016. Before this referral, on 05/08/2016 the SARFESI act was amended and the lender was considered to be a financial institution and thus became eligible to invoke the provisions of SARFESI Act.

The lender, accordingly, issued demand notices under section 13 of the SARFESI Act, though the arbitration proceedings were going on. Further, in the arbitration proceedings lender got interim stay and the appellant was refrained from dealing with the mortgaged properties.

The appellant challenged the notices issued under the SAEFESI Act before the High court, which dismissed the petition. Hence the present appeal.

Decision : Appeal dismissed with costs.

Reason :

A perusal of the impugned order and the submissions made by learned counsel for the parties have thrown up the following legal issues for determination:

A. Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously?

B. Whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent?

C. A linked question to question (ii), whether the lender can invoke the SARFAESI Act provision where its notification as financial institution under Section 2(1)(m) has been issued after the account became an NPA under Section 2(1)(o) of the said Act?

We now proceed to examine each of the three questions of law framed:

Question A:

The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative. That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act.

The discussion in the impugned order refers to a judgment of the Full Bench of the Delhi High Court opining that an arbitration is an alternative to the RDDB Act. In that context, the learned Single Judge has rightly held that this Full Bench judgment does not, in any manner, help the appellants but, in fact, supports the case of the respondent.

We are, thus, unequivocally of the view that SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand.

Questions B & C

The SARFAESI Act certainly did not apply retrospectively from the date when it came into force. The question is whether, the Act being applicable to the respondent at a subsequent date and thereby allowing the respondent to utilize its provisions with regards to a past debt, would make any difference to this principle. We are of the view that the answer to the same is in the negative. The Act applies to all the claims which would be alive at the time when it was brought into force. Thus, qua the respondent or other NBFCs, it would be applicable similarly from the date when it was so made applicable to them.

Similarly, the date on which a debt is declared as an NPA would again have no impact. We are, thus, of the view that the provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent. We are, thus, of the view that the appeal is completely devoid of merit, and is only an endeavour to prolong the ultimate "date of judgment" for the appellants to meet their obligations.

INTERNATIONAL ASSET RECONSTRUCTION COMPANY OF INDIA LTD.

v.

OFFICIAL LIQUIDATOR OF ALDRICH PHARMACEUTICALS LTD & ORS [SC]

Civil Appeal No.16962 of 2017 (Arising out of SLP (C) No.25815 of 2013) With Civil Appeal No. 16963 of 2017(Arising out of SLP (C) No. 29534 of 2014)

Ranjan Gogoi, A.M. Sapre & Navin Sinha, JJ. [Decided on 24/10/2017]

Recovery of Debts and Bankruptcy Act, 1993 read with Limitation Act,1963 – Proceeding before the Recovery officer of the Tribunal – Order of the RO – Appeal filed after 30 days – Whether the delay could be condoned – Held, No.

Brief facts :

A common question of law arising for consideration in both appeals is whether Section 5 of the Limitation Act, 1963 (hereinafter referred to as "the Limitation Act"), can be invoked to condone the prescribed period of 30 days, under Section 30(1) of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred as the "RDB Act"), for preferring an appeal before the Tribunal, against an order of the Recovery officer.

In view of the pure question of law involved, the facts of the case need not be elucidated. Suffice to observe that pursuant to a recovery certificate issued by the Tribunal under Section 19(22) of the RDB Act, the Recovery officer passed necessary orders under Section 28 of the Act. An appeal was preferred by the aggrieved against the same before the Tribunal, beyond the prescribed period of 30 days. It was held that Section 5 of the Limitation Act not being applicable to proceedings under Section 30 of the Act, the delay beyond the prescribed period could not be condoned.

Decision : Appeal dismissed.

Reason :

Section 5 of the Limitation Act provides that the appeal or application, with the exception of Order XXI, CPC may be admitted after the prescribed period, if the applicant satisfies the court that he has sufficient cause for not preferring the application within time. The pre-requisite, therefore, is the pendency of a proceeding before a court. The proceedings under the Act being before a statutory Tribunal, it cannot be placed at par with proceedings before a court. The Tribunal shall therefore have no powers to condone delay, unless expressly conferred by the Statute creating it.

In *Sakuru vs. Tanaji, (1985) 3 SCC 590,* it was observed that:

"3…that the provisions of the Limitation Act, 1963 apply only to proceedings in 'courts' and not to appeals or applications before bodies other than courts such as quasi-judicial Tribunals or executive authorities, notwithstanding the fact the such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him. But even in such a situation the relevant special statute may contain an express provision conferring on the appellate authority, such as the Collector, the power to extend the prescribed period of limitation on sufficient cause being shown by laying down that the provisions of Section 5 of the Limitation Act shall be applicable to such proceedings. Hence it becomes necessary to examine whether the Act contains any such provision entitling the Collector to invoke the provisions of Section 5 of the Limitation Act for condonation of the delay in the filing of the appeal…"

An "application" is defined under Section 2(b) of the RDB Act as one made under Section 19 of the Act. The latter provision in Chapter IV, deals with institution of original recovery proceedings before a Tribunal. An appeal lies against the order of the Tribunal under Section 20, before the Appellate Tribunal within

45 days, which may be condoned for sufficient cause under the proviso to Section 20(3) of the Act. The Tribunal issues a recovery certificate under Section 19(22) to the Recovery officer who then proceeds under Chapter V for recovery of the certificate amount in the manner prescribed. A person aggrieved by an order of the Recovery officer can prefer an appeal before the Tribunal under Rule 4, by an application in the prescribed Form III. Rule 2(c) defines an "application" to include a memo of appeal under Section 30(1). The appeal is to be preferred before the Tribunal, as distinct from the appellate tribunal, within 30 days. Section 24 of the RDB Act, therefore, manifestly makes the provisions of the Limitation Act applicable only to such an original "application" made under Section 19 only. The definition of an "application" under Rule 2(c) cannot be extended to read it in conjunction with Section 2(b) of the Act extending the meaning thereof beyond what the Act provides for and then make Section 24 of the RDB Act applicable to an appeal under Section 30(1) of the Act. Any such interpretation shall be completely contrary to the legislative intent, extending the Rules beyond what the Act provides for and limits. Had the intention been otherwise, nothing prevented the Legislature from providing so specifically.

The RDB Act is a special law. The proceedings are before a statutory Tribunal. The scheme of the Act manifestly provides that the Legislature has provided for application of the Limitation Act to original proceedings before the Tribunal under Section 19 only. The appellate tribunal has been conferred the power to condone delay beyond 45 days under Section 20(3) of the Act. The proceedings before the Recovery officer are not before a Tribunal. Section 24 is limited in its application to proceedings before the Tribunal originating under Section 19 only. The exclusion of any provision for extension of time by the Tribunal in preferring an appeal under Section 30 of the Act makes it manifest that the legislative intent for exclusion was express. The application of Section 5 of the Limitation Act by resort to Section 29(2) of the Limitation Act, 1963 therefore does not arise. The prescribed period of 30 days under Section 30(1) of the RDB Act for preferring an appeal against the order of the Recovery officer therefore cannot be condoned by application of Section 5 of the Limitation Act. The appeals lack merit and are dismissed.

MACHHAR POLYMER PVT LTD

v.

SABRE HELMETS PVT LTD [NCLAT]

Appeal (AT) (Insolvency) No. 276 of 2017

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 27/03/2018]

Insolvency & Bankruptcy Code, 2016 – Section 9 – Application by operational creditor – Rejected as time barred – Whether correct – Held, No.

Brief facts :

This appeal has been preferred by the Appellant 'Operational Creditor' against the order passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, whereby and where under the application preferred by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been rejected on the ground that the application is barred by limitation.

Decision : Appeal allowed.

Reason :

Learned counsel for the Appellant rightly pointed out that the impugned order is against the decision of this Appellate Tribunal in *M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd.– Company Appeal (AT) (Insolvency) No. 47 of 2017*. In the said case, this Appellate Tribunal observed and held as follows:

"*68. In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.*

69. If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. Where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.

70. Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant."

For the reasons aforesaid, the impugned order is set aside. The case is remitted to the Adjudicating Authority, Mumbai Bench to consider the application under Section 9 of the 'I&B Code' preferred by the Appellant after notice to the 'Corporate Debtor'. If the application is complete, the Adjudicating Authority will admit it. On the other hand, if there is any defect, the Appellant may be allowed time to remove the defects.

NEETA CHEMICALS (I) PVT. LTD.

v.

STATE BANK OF INDIA [NCLAT]

Company Appeal (AT) (Insolvency) No. 174 of 2017

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 27/03/2018]

Insolvency & Bankruptcy Code, 2016 – Section 10 – Application by corporate applicant – No liquidation/ winding up proceedings pending against the corporate applicant – Rejected on the ground of suppression of facts – On appeal remanded back to NCLT for fresh adjudication.

Brief facts :

The Corporate Applicant filed an application under section 10 of the I&B Code. On notice and hearing the 'Financial Creditor' (State Bank of India), the Adjudicating Authority dismissed the application with cost by impugned order.

Decision : Appeal allowed.

Reason : It was submitted that the Appellant has grossly understated the outstanding amount owed to the Respondent in the Form 6, while the Appellant has admitted an amount of Rs. 324 crores as on 15th June, 2017. In fact, the Appellant owed more than the admitted amount as far back as 31st October, 2016 when the demand notice was issued by the Respondent. It was submitted that the outstanding liability amount had increased to Rs. 329,71,74,696/- as evidenced from the notice issued on 3rd August, 2017 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act").

The Appellant has highlighted the facts relating to SARFAESI proceedings and action taken thereunder. It is also stated that the Appellant has already filed a suit under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) in S.A. No. 240 of 2017 challenging the securitization proceedings initiated by the Respondent ('Financial Creditor').

Similar issue fell for consideration before this Appellate Tribunal in *M/s. Unigreen Global Private Limited Vs.*

Punjab National Bank & Ors. Company Appeal (AT) (Insolvency) No. 81 of 2017 [decided on 01/12/2017], wherein this Appellate Tribunal, after taking into consideration the provisions of Section 10 of the 'I&B Code' and other relevant provisions, held and observed the principle as to when the application could be rejected by the Adjudicating Authority.

It is not the case of the 'Financial Creditor' (State Bank of India) that a winding up proceeding under the Companies Act or liquidation proceeding under the 'I&B Code' has been initiated against the 'Corporate Debtor'. Therefore, the 'Corporate Applicant' is eligible to file application under Section 10 of the 'I&B Code', if there is a debt and default.

Further, as we find that the Adjudicating Authority has noticed the extraneous factors unrelated to the Resolution Process not required to be disclosed in terms of Section 10 or Form 6, we hold that the Adjudicating Authority erred in rejecting the application on the ground of suppression of facts.

There is nothing on record to suggest that the 'Corporate Applicant' has suppressed any fact or has not come with the clean hands. The Adjudicating Authority has also not held that the application has been filed by the Corporate Applicant "fraudulently" or "with malicious intent" for any purpose other than for the resolution process or liquidation or that the voluntary liquidation proceedings have been initiated with the intent to defraud any person. In the absence of any such grounds recorded by the Adjudicating Authority, the impugned order cannot be upheld.

For the reasons aforesaid, the impugned order is set aside. The case is remitted back to the Adjudicating Authority for admission of the application under Section 10, if the application is otherwise complete. In case it is incomplete, the Adjudicating Authority will grant time to the appellant to remove the defects.

ITC LTD.

v.

BLUE COAST HOTELS LTD.[SC]

Civil Appeal Nos. 2928-2930 of 2018 [Arising out of SLP (C) Nos. 10215-10217/2016]

S.A. Bobde & L. Nageswara Rao, JJ. [Decided on 19/03/2018]

SARFESI Act – Section 13 – Enforcement of security interest – Default by borrower – Secured creditor took symbolic possession of borrower's property – Property sold in auction by secured creditor – Whether valid – Held, Yes.

Brief facts :

Respondent is the debtor (borrower) who availed loan of Rs.150 crores from secured creditor IFCI and mortgaged its hotel property as security interest. As the borrower failed to repay the loan, the secured creditor enforced the security interest of the borrower.

After issuing a demand notice under section 13(4) of the SARFESI Act, the secured creditor took symbolic possession of the hotel property. Thereafter the secured creditor initiated recovery proceedings in DRT and sold the hotel property in public auction. The luxury hotel of the borrower was purchased by the Petitioner (auction purchaser).

The borrower challenged the recovery proceedings before the High Court which held the entire proceedings for recovery and sale of the Goa Hotel to be illegal being in violation of the Act.

Decision : Appeal allowed.

Reason : In this case, the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. The transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by Section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. Thus, the entire interest in the property not having been passed on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act.

The High Court in its judgment renders a finding that there was in fact fraud and collusion between the creditor and the auction purchaser. According to the High Court, since the measures were taken in breach of all laws, the inference of manipulation and collusion cannot be ruled out.

We fail to see how such a finding of manipulation and collusion is sustainable on account of breach of law in the present case. A risk of this kind taken up by an intending purchaser cannot lead to an inference of collusion. Mainly, the finding is based on the fact that the sale is a collusion because the auction purchaser was aware that a dispute between the parties was pending and still went ahead and made a bid for the property. It is not unusual in the sale of immovable properties to come across difficulties in finding suitable buyers for the property. We find that the property was eventually sold on the fourth auction, and all the auctions were duly advertised.

Another fact on the basis of which the High Court has observed an inference of collusion is that the property was sold and the sale was confirmed in favour of ITC Ltd. though a statement was made in the morning of 23.02.2015 before the DRT that the sale would not be confirmed till the order is passed. This seems to be recorded in the order of the DRT. However, what is overlooked is the fact that in the statement on behalf of the creditor, the creditor only agreed to not confirm the sale till 3 pm. In the absence of any finding as to what actually transpired, it is not possible for us to infer manipulation and collusion on this account. There is no dispute that the property was actually purchased by ITC Ltd in pursuance of a public auction and that the entire amount of sale consideration has been deposited by it.

We have anxiously considered the entire matter and find that the undisputed facts of the case are that a loan was taken by the debtor which was not paid, the debtor did not respond to a notice of demand and made a representation which was not replied to in writing by the creditor. The creditor, however, considered the proposals for repayment of the loan as contained in the representation in the course of negotiations which continued for a considerable amount of time. Several opportunities were in fact availed of by the debtor for the repayment of the loan after the proceedings were initiated by the secured creditor. The debtor failed to discharge its liabilities and eventually undertook that if the debtor fails to discharge the debt, the creditor would be entitled to take realize the secured assets.

As held, we are of the view that non-compliance of sub-section (3A) of Section 13 cannot be of any avail to the debtor whose conduct has been merely to seek time and not repay the loan as promised on several occasions. Therefore, the debtor is not entitled for the discretionary equitable relief under Articles 226 and 136 of the Constitution of India in the present case.

We accordingly, set aside the impugned judgment of the High Court and direct the debtor and its agents to handover possession of the mortgaged properties to the auction purchaser within a period of six months from the date of this judgment along with the relevant accounts.

J.P. ENGINEERS PVT. LTD

v.

MURTI UDYOG LTD [NCLAT]

Company Appeal (AT) (Insolvency) No. 321 of 2017

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 19/04/2018]

Insolvency & Bankruptcy Code, 2016 – Sections 9 – Corporate debtor disputed the debt and also filed civil suit against the operational creditor – Whether this is existence of dispute – Held, Yes.

Brief facts :

This appeal has been preferred by the Appellant against the order dated 8th November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, New Delhi, whereby and where under the application preferred by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been rejected on the ground that the Respondent has raised dispute with sufficient particulars.

Appellant issued the demand notice under sub-section (1) of Section 8 on 13th June, 2017. Thereafter, the amount having not paid, the application under Section 9 of the 'I&B Code' was filed on 13th September, 2017. The Respondent thereafter filed suit on 12th December, 2017 i.e. much after filing of the application under Section 9 of the 'I&B Code'. The adjudication authority dismissed the application holding that there is an 'existence of dispute'.

Decision : Appeal dismissed.

Reason : The Respondents have filed reply and further affidavit and taken plea that the amount as was due was already paid to the Appellant by cheques, the details of which were brought to the notice of the Adjudicating Authority. However, such submission has been disputed by the Appellant. According to the Appellant, the Chartered Accountant has certified that the amount has not been paid.

Admittedly, there is no 'existence of dispute' relating to supply of goods or its quality as were supplied by the Appellant. Therefore, it cannot be stated that there is an 'existence of dispute'. However, what we find that the Respondent has disputed the debt as has been claimed by the Appellant. According to them, they have already paid and satisfied the claim amount by making payment through cheques.

The scheme of the 'I&B Code' fell for consideration before the Hon'ble Supreme Court in Innovative Industries Ltd v.ICICI Bank & Anr, (2018) 1 SCC 407, wherein the Hon'ble Supreme Court taking into consideration the provisions of the Code held that the 'Corporate Debtor' is entitled to point out that default has not occurred in a sense that the 'debt', which also may include a disputed claim, is not due.

In the present case, the Adjudicating Authority having noticed that the Respondent has satisfied with the evidence that there is no default on the part of the Respondent and the 'debt' is not due, we find no ground to interfere with the finding of the Adjudicating Authority. The appeal is accordingly dismissed. No cost.

PROWESS INTERNATIONAL PVT. LTD.

v.

ACTION ISPAT & POWER PVT. LTD [NCLAT]

Company Appeal (AT) (Insolvency) No. 223 of 2017

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 26/03/2018]

Insolvency & Bankruptcy Code, 2016 – Section 61 – Appeal – Limitation period to file – Appellant filed

appeal after six months of the passing of the order – Whether delay condonable – Held, No.

Brief facts :

The appellant preferred the appeal against the judgment passed by the Adjudicating Authority rejecting the application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code"), after delay of more than six months without any application for condonation of delay. When it was pointed out, the Appellant preferred an application for condonation of delay and taken plea that there is a delay of only two days.

Decision : Appeal dismissed.

Reason :

From the record, we find that the Appellant has not explained as to what action the Appellant had taken between 15th March, 2017 and 18th August, 2017 i.e. between the Day of Judgment and the day the application for certified copy was filed.

Learned counsel for the Appellant submitted that the copy of the impugned order was not forwarded to the Appellant. However, it is accepted that the impugned order was passed on 15th March, 2017 in presence of the counsel for the Appellant.

It is desirable to refer the relevant provisions under which appeals can be preferred before this Appellate Tribunal. Against an order passed by the Tribunal under Companies Act, an appeal is maintainable under Section 421 of the Companies Act, 2013. If an appeal is preferred under Section 421 of the Companies Act, 2013, the Appellate Tribunal counts the period of limitation from the date on which a copy of the order is made available by the Tribunal in terms of sub-section (3) of Section 421 of the Companies Act, 2013.

However, for preferring appeal under Section 61 of the 'I&B Code' against an order passed by the 'Adjudicating Authority' provision for counting the period of limitation is different. As per the aforesaid provision, the appeal is required to be filed within thirty-days, means within thirty-days from the date of knowledge of the order against which appeal is preferred.

In the present case, as Appellant had knowledge of the impugned order as on the date of pronouncement of the said order i.e. 15th March, 2017. It is not the case of the Appellant that its Lawyer has not informed of the order passed by the Adjudicating Authority. The ground as taken in the application for condonation of delay being not satisfactory, it is fit to be rejected.

INDIAN BANK

v.

K. PAPPIREDDIYAR [SC]

Civil Appeal No. 6641 of 2018 (Arising out of SLP(C) No. 29268 of 2016)

Dipak Misra, A. M. Khanwilkar & D. Y. Chandrachud, JJ. [Decided on 20/07/2018]

SARFAESI ACT – Enforcement of security interest – Agricultural land – No finding of fact – Whether exempt from the provisions of the Act – Held, No.

Brief facts :

The Division Bench of the High Court of Judicature at Madras has held that the proceedings initiated by the appellant under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (the SARFAESI Act) are a nullity. The basis of this conclusion is that the Act does not apply to agricultural land. In consequence, the High Court has held that a security interest in agricultural land cannot be enforced.

Decision :

Appeal allowed.

Reason :

The statutory dictionary in Section 2 does not contain a definition of the expression “agricultural land”. Whether a particular piece of land is agricultural in nature is a question of fact. The classification of land in the revenue records as agricultural is not dispositive or conclusive of the question whether the SARFAESI Act does or does not apply. Whether a parcel of land is agricultural must be deduced as a matter of fact from the nature of the land, the use to which it was being put on the date of the creation of the security interest and the purpose for which it was set apart.

The Division Bench of the Madras High Court has failed to adjudicate on the basic issue as to whether the land in respect of which the security interest was created, was agricultural in nature. The DRT rejected the objection of the debtor that the land was agricultural. In appeal, the DRAT reversed that finding. Apart from referring to the position in law, the impugned judgment of the High Court contains no discussion of the material which was relied upon by the parties in support of their respective cases; the Bank urging that the land was not agricultural while the debtor urged that it was. Both having regard to the two-judge Bench decision in Blue Coast Hotels Limited and as explained above, the question as to whether the land is agricultural has to be determined on the basis of the totality of facts and circumstances including the nature and character of the land, the use to which it was put and the purpose and intent of the parties on the date on which the security interest was created. In the absence of a specific finding, we are of the view that it would be appropriate and proper to set aside the judgment of the High Court and to remit the proceedings for being considered afresh.

K. KISHAN

v.

VIJAY NIRMAN COMPANY PVT. LTD [SC]

Civil Appeals No. 21824 and 21825 of 2017

R.F. Nariman & Indu Malhotra, JJ. [Decided on 14/08/2018]

Insolvency and Bankruptcy Code, 2016 read with the Arbitration and Conciliation Act, 1996 – Operational debt – Arbitration award in favour of operational creditor – Corporate debtor challenged the award – Insolvency petition filed against corporate debtor based on the award as admitted debt – NCLT and NCLAT entertained the application – Whether tenable-Held, No.

Brief facts :

The present appeals raise an important question as to whether the Insolvency and Bankruptcy Code, 2016 (“the Code”) can be invoked in respect of an operational debt where an Arbitral Award has been passed against the operational debtor, which has not yet been finally adjudicated upon.

Vijay Nirman Company Pvt. Ltd. (the Respondent) entered into a sub-Contract Agreement with one M/s Ksheerabad Constructions Pvt. Ltd. (‘KCPL’) to undertake road construction work. During the course of the project, disputes and differences arose between the parties and the same were referred to an Arbitral Tribunal, which delivered its Award in favour of the respondent. KCPL challenged the award, in appeal, under section 34 of the Arbitration and Conciliation Act, 1996. Meanwhile, Respondent sent a demand notice under the I&B Code and also initiated insolvency proceedings against KCPL. In reply to the notice KCPL claimed that there is a dispute and the award has been challenged, adjudication of which is pending. NCLT as well as NCLAT admitted the insolvency petition stating that challenge of award could not be considered to be ‘existence of dispute’ under the I& B Code. This is under challenge in the present appeals.

Decision : Appeals allowed.

Reason :

A reading of Section 9(5) (ii) (d) would show that an application under Section 8 must be rejected if notice of a dispute has been received by the operational creditor. In the present case, it is clear on facts that the entire basis for the notice under Section 8 of the Code is the fact that an Arbitral Award was passed on 21.07.2017 against the Appellant. As has been pointed out by us, this clearly appears from the gist of the case that was filed along with the insolvency petition. The fact that the reply of 16.02.2017 to the notice given under Section 8 was within 10 days, and raised the existence of a dispute, also cannot be doubted.

Our recent judgment in Mobilox Innovations (supra) throws considerable light on the issue at hand. Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the Arbitral Award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the Award. Such a case would clearly come within para 38 of Mobilox Innovations (supra), being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of Rs. two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist.

We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.

We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.

We may hasten to add that there may also be other cases where a Section 34 petition may have been instituted in the wrong court, as a result of which the petitioner may claim the application of Section 14 of the Limitation Act to get over the bar of limitation laid down in Section 34(3) of the Arbitration Act. In such cases also, it is obvious that the insolvency process cannot be put into operation without an adjudication on the applicability of Section 14 of the Limitation Act. For all these reasons, we are of the view that the judgment of the Appellate Tribunal needs to be set aside and is therefore reversed.

TRANSMISSION CORPORATION OF ANDHRA PRADESH LTD.

v.

EQUIPMENT CONDUCTORS & CABLES [SC]

Civil Appeal No. 9597 of 2018

A.K. Sikri Ashok Bhushan, JJ. [Decided on 23/10/2013]

Insolvency and Bankruptcy Code, 2016 – Time barred claim rejected by arbitral council – Operational

creditor filed petition before NCLT – Corporate debtor refuted the claim – Dismissed by NCLT – On appeal allowed by NCLAT – Whether sustainable – Held, No.

Brief facts :

Respondent took two set of claims before the Arbitral Council viz claims with respect to invoices 1-53 and claims with respect to invoices 54-82. Insofar as claim under Invoice Nos. 1-53 is concerned, the same was specifically rejected by the Arbitral Council on the ground that it had become time barred. The respondent challenged the said part of the award of the Arbitral Council, but was not successful. On the basis of certain observations made by the High Court of Punjab and Haryana in its decision dated January 29, 2016, the respondent attempted to recover the amount by filing execution petition before the Civil Court, Hyderabad. However, that attempt of the respondent was also unsuccessful inasmuch as the High Court of Judicature at Hyderabad categorically held that since that particular amount was not payable under the award, execution was not maintainable. After failing to recover the amount in the aforesaid manner, the respondent issued notice to the appellant under Section 8 of the IBC treating itself as the operational creditor and appellant as the corporate debtor. The appellant specifically refuted this claim. In spite thereof, application under Section 9 was filed before the NCLT, Hyderabad which was dismissed by it vide order dated April 09, 2018. It is in appeal against the said order, the NCLAT has now passed the impugned order.

Decision : Appeal allowed.

Reason :

Though, in the first brush, it appears that matter is still at the stage of admission and the aforesaid order is an interim order, a careful reading thereof would clearly bring out that the NCLAT perceives that the appellant herein owes money to the respondent and for this reason a chance is given to the appellant to settle the claim of the respondent, otherwise order would be passed initiating Corporate Insolvency Resolution Process (for short, 'CIRP'). According to the appellant, no amount is payable and the order in question is causing serious prejudice to the appellant which is asked to settle the purported claim, failing which, to face insolvency proceedings. It may also be recorded at this stage itself that the appeal pending before NCLAT is filed by the respondent herein which is against the Orders dated April 09, 2018 passed by the National Company Law Tribunal (for short, 'NCLT'), Hyderabad. By the said order, the NCLT has dismissed the petition filed by the respondent herein under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC'). To put it briefly at this stage, the NCLT, after detailed deliberations, has come to the conclusion that the Company Petition filed by the respondent was not maintainable as the claims which were preferred by the respondent against the appellant and on the basis of which respondent asserts that it has to receive monies from the appellant are not tenable and in any case these are not disputed claims. This assertion is based on the fact that these very claims of the respondent were subject matter of arbitration and the award was passed rejecting these claims as time barred. Moreover, the company petition itself suffers various fundamental defects. On that basis, NCLT held that there is a valid dispute, rather no dispute as issue in question was substantially dealt with by various courts as mentioned in the order passed by NCLT.

The NCLAT has not discussed the merits of the case and also not stated how the amount is payable to the respondent in spite of the aforesaid events which were noted by the NCLT as well. Notwithstanding, it has given wielded threat to the appellant by giving a one chance, 'to settle the claim with the appellant (respondent herein), failing which this Appellate Tribunal may pass appropriate orders on merit'. It has also stated that though the matter is posted for admission on the next date, the appeal would be disposed of at the stage of admission itself. There is a clear message in the aforesaid order directing the appellant to pay the amount to the respondent, failing which CIRP shall be initiated against the appellant.

The only argument advanced by learned counsel for the respondent before this Court was that the High Court of Punjab and Haryana while setting aside the remand order passed by the Additional District Judge did not hold that Invoice Nos. 1-57 are time barred. Therefore, the respondent had a valid claim under those invoices.

This argument cannot be countenanced. As of today, there is no award of the Arbitral Council with respect to invoices at Sl. Nos. 1-57. There is no order of any other court as well qua these invoices. In fact, Arbitral Council specifically rejected the claim of the respondent as time barred.

It is pertinent to mention that respondent had moved an application before the Arbitral Council for determination of amount to be paid by the appellant. However, this application was specifically dismissed by the Arbitral Council as not maintainable.

In a recent judgment of this Court in *Mobilox Innovations Pvt Ltd v. Kirusa Software Private Limited (2018) 1 SCC 353*, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The aforesaid principle squarely applied to the present case.

As a result, we allow this appeal and set aside the impugned order dated September 04, 2018 passed by the NCLAT. In a normal course, the matter should have been remanded back to the NCLAT for deciding the appeal of the respondent herein filed before the NCLAT, on merits. However, as this Court has gone into merits and found that order of the NCLT is justified, no purpose would be served in remanding the case back to the NCLAT. Consequence would be to dismiss the Company Appeal (80) (Insolvency) No. 366 of 2018 and miscellaneous applications filed by the respondent before the NCLAT. No order as to costs.

RAJESH ARORA

v.

SANJAY KUMAR JAISWAL [NCLAT]

Company Appeal (AT) (Insolvency) No. 634 of 2018

S.J. Mukhopadhaya & A.I.S. Cheema. [Decided on 05/11/2018]

Insolvency and Bankruptcy Code, 2016 – Section 9 – Application admitted without issuing notice to corporate debtor – Whether correct – Held, No.

Brief facts :

This appeal has been filed by a shareholder of M/s Amira Pure Foods Pt. Ltd ('Corporate Debtor') against the order of the NCLLT which had admitted the application under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short I&BC) preferred by Ex-employee Respondent ('Operational Creditor').

Decision : Appeal allowed.

Reason :

The Appellant submits that the application under Section 9 of I&BC was admitted without any notice to the 'Corporate Debtor'. The Adjudicating Authority had not given any notice before admitting the case and the impugned order had been passed in violation of rules of Natural Justice. It is also stated that the parties have settled the matter and a draft for Rest. 2, 88,000/- has been handed over to the 'Operational Creditor' towards rest of the amount in terms of settlement.

The Respondent has not disputed the fact that the impugned order was passed by the Adjudicating Authority without any notice to the 'Corporate Debtor'. This is also clear from the impugned order.

Admittedly, impugned order was passed by the Adjudicating Authority without notice to the 'Corporate Debtor' in violation of rules of Natural Justice, we set aside the impugned order. The matter having been settled between the parties, we are not remitting the matter back to the Adjudicating Authority.

In effect, order(s) passed by the Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing account, and all other order(s) passed by the Adjudicating Authority pursuant to impugned order and action, taken by the 'Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I & B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor (Company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

NOTES

5

Competition Law

COMPETITION COMMISSION OF INDIA

v.

BHARTI AIRTEL LTD & ORS [SC]

Civil Appeal No(S). 11843 of 2018 (Arising out of SLP (C) No. 35574 of 2017) with connected appeals Bench: A.K. Sikri & Ashok Bhushan, JJ. [Decided on 05/12/2018]

Competition Act,2002 read with TRAI Act- telecom sector- allegation of cartel- investigation by CCI- whether CCI has jurisdiction – Held, Yes only after TRAI returns a finding thereto – initial jurisdiction rests with TRAI.

Brief facts:

Reliance Jio Infocomm Limited (hereinafter referred to as 'RJIL') and two other individual complainants has filed information under Section 19(1) of the Competition Act, 2002 (hereinafter referred to as the 'Competition Act') before the Competition Commission of India (for short, 'CCI') alleging anti- competitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited (Incumbent Dominant Operators) (hereinafter referred to as the 'IDOs'). These were registered by the CCI as Case Nos. 80- 81, 83 and 95 respectively. These IDO's and Cellular Operators Association of India [COAI] filed writ petitions before the High court on the ground that the CCI did not have any jurisdiction to deal with such a matter. The High Court has allowed these writ petitions and quashed/set aside the order passed by the CCI and consequently notices issued by the Director General of the CCI have also been Competition & Consumer Protection Laws LEGAL WORLD CHARTERED SECRETARY I JANUARY 2019 101 quashed. CCI appealed to the Supreme Court.

Our discussion:

Jurisdiction of the CCI is the principal issue which is the bone of contention.

In the instant case, dispute raised by RJIL specifically touches upon these aspects as the grievance raised is that the IDOs have not given POIs as per the licence conditions resulting into non- compliance and have failed to ensure inter se technical compatibility thereby. Not only RJIL has raised this dispute, it has even specifically approached TRAI for settlement of this dispute which has arisen between various service providers, namely, RJIL on the one hand and the IDOs on the other, wherein COAI is also roped in. TRAI is seized of this particular dispute.

It is a matter of record that before the TRAI, IDOs have refuted the aforesaid claim of RJIL. Their submission is that not only required POIs were provided to RJIL, it is the RJIL which is in breach as it was making unreasonable and excessive demand for POIs.

We are of the opinion that as the TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by the TRAI in the first instance. These are jurisdictional aspects. Unless the TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that the CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated September 06, 2016 that the matter related to inter-connectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated September 27, 2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated October 21, 2016 on the issue of inter-connection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that interconnectivity is not provided by the IDOs in terms of the licenses granted to them. TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIS. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned.

We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by the TRAI which would bring on record findings on the aforesaid aspects, the CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of “subscriber”, “test period”, “reasonable demand”, “test phase and commercial phase rights and obligations”, “reciprocal obligations of service providers” or “breaches of any contract and/or practice”, arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 56 and 82 above are determined by the TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage the CCI can go into the question as to whether violation of the provisions of TRAI Act amounts to ‘abuse of dominance’ or ‘anti-competitive agreements’.

This takes us to the next level of the issue, viz. whether TRAI has the exclusive jurisdiction to deal with matters involving anticompetitive practices to the exclusion of CCI altogether because of the reason that the matter pertains to telecom sector?

The matter cannot be examined by looking into the provisions of the TRAI Act alone. Comparison of the regimes and purpose behind the two Acts becomes essential to find an answer to this issue. We have discussed the scope and ambit of the TRAI Act in the given context as well as the functions of the TRAI. No doubt, we have accepted that insofar as the telecom sector is concerned, the issues which arise and are to be examined in the context of the TRAI Act and related regime need to be examined by the TRAI. At the same time, it is also imperative that specific purpose behind the Competition Act is kept in mind. This has been taken note of and discussed in the earlier part of the judgment. As pointed out above, the Competition Act frowns the anti-competitive agreements. It deals with three kinds of practices which are treated as anti-competitive and are prohibited.

The CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti-competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act.

The CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b)of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. The CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI. In Haridas Exports, this Court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act. Section 27 empowers the CCI to pass certain kinds of orders, stipulated in the said provision, after inquiry into the agreements for abuse of dominant position.

Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of the CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the 'comity' between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained.

The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.

We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified.

MAHYCO MONSANTO BIOTECH (INDIA) PVT LTD.

v.

COMPETITION COMMISSION OF INDIA & ORS [DEL]

LPA 637/2018 & CM. Nos. 47926/2018 and 47927/2018

Rajendra Menon (CJ) & V. Kameswar Rao, J. [Decided on 18/12/2018]

Competition Act, 2002 – Section 48 – Vicarious liability – Directors and officers of offending enterprise – Whether applicable to contravention of sections 3 & 4 also – Held, Yes.

Brief facts:

These appeals have been filed by the appellants challenging the order passed by the learned Single Judge whereby the learned Single has dismissed the writ petitions by relying upon the judgment of the Coordinate Bench of this Court in Cadila Healthcare Ltd. and Anr. V. Competition Commission of India, LPA No. 160/2018.

Main Issue: the main issue was "Whether Section 48 of the Competition Act, which provides for vicarious liability of persons in-charge and responsible for the conduct of business of the Company, will apply only on contravention of orders of CCI or DG under Sections 42 to 44 of the Competition Act and not to contravention of Sections 3 and 4 of the Competition Act."

Decision: Appeal dismissed.

Reason:

We may state at the outset that, we proceed to answer this issue, on the premise that Officers / Directors can be proceeded against, along with Company. We also say that the Officers / Directors can only be liable if the

CCI were to come to the conclusion that they were the key persons who were In-charge and responsible for the conduct of the business of the Company.

On a perusal of Section 27 of the Act, it is clear that it stipulates, the CCI on a finding that there is a contravention of Section 3 or Section 4, can pass orders against an 'enterprise' and a 'person' i.e. individual, who has been proceeded against, imposing penalty.

There cannot be any dispute that if the Company and the Officers/ Directors are being proceeded against for violation of Sections 3 and 4, there has to be a consequence for violation. The appellant's plea was that the word 'turnover' would not be applicable to Officers / Directors. The appellant's plea appears to be appealing on a first blush, but on a deeper consideration, if we agree with this submission then the very provision of penalty to be imposed on the Officers / Directors being 'persons' in terms of Section 27(b) would be rendered otiose / nugatory. In other words, there would not be any stipulation of penalty to be imposed on Officers / Directors even if they are found to be violating Sections 3 and 4. That cannot be the intent of Sections 27(b) and 48. Such a stipulation, surely requires a purposive interpretation.

Insofar as the plea that Section 48 as it falls under Chapter VI, only relates to the contravention of Sections 42 to 44 of the Act, is also not appealing, inasmuch as the Section contemplates "on contravention of the provisions of the Act", one shall be liable to be proceeded against and punished accordingly. The contravention of the provisions of the Act includes Sections 3 and 4, as is clear from Section 46, which is also in Chapter VI, stipulates lesser penalty for violating Section 3 in certain eventualities. If the interpretation as sought to be advanced, is to be accepted / agreed to, then Section 48 shall become nugatory, and there shall be no penalty for violating the Act.

Suffice it to state, in view of our conclusion above, the judgments so relied upon by the appellants have no applicability. We see no reason, to refer the writ petition for consideration by a larger Bench. In view of our discussion above, we are of the view, that the impugned order needs no interference. The appeals are dismissed. No costs.

JASPER LNFOTECH PVT LTD (SNAPDEAL)

v.

KAFF APPLIANCES (INDIA) PVT. LTD [CCI]

Case No. 61 of 2014

A K Gupta, Augustine Peter & U. C. Nahta [Decided on 15/01/2019]

Competition Act,2002 – Section 3 – Online market – Kitchen products heavy discount offered by online portal – Manufacturer cautioned public that products sold through the online portal was without its authorisation and counterfeit – No warranty services shall be provided by it for such products – Whether anti-competition restriction – Held, No.

Brief facts:

The Informant had displayed the OP's products on its online portal 'Sanpdeal' at a discounted price, aggrieved by which the OP displayed a caution notice on its website (hereinafter, the 'Caution Notice') alleging that the OP's products sold by the Informant through its website are without its authorization and are counterfeit. Further, the Caution Notice stated that the OP will not honour warranties on its products sold through the Informant's website and any purchase made from these websites shall be at customers' own risk.

Aggrieved by the said Caution Notice, the Informant served a legal notice (hereinafter, the 'Legal Notice') to OP for withdrawal of the said Caution Notice from its website alleging violation of the provisions of the Act. In response, the OP stated that it does not permit any online sale of its products and has not authorized any of its dealers in this regard. Furthermore, the OP stated in its Legal Notice that the Informant neglected to disclose the source of procuring such products and the name of the vendors supplying the alleged counterfeit /defective products on its website.

The Informant alleged in the information that the main grievance of the OP was not with respect to the authenticity of the products sold on Snapdeal but the discounted price at which such products were sold by the Informant through its website.

The Informant submitted that the OP was attempting to impose a price restriction in the form of Minimum Operating Price ('MOP'), on the Informant's website to make sales at a minimum price and threatened to ban online sales if such prices were not maintained. This, as per the Informant, resulted in a contravention of Section 3(4) (e) of the Act.

The Informant also stated that through this threat of not honouring warranties on products sold on the online markets/ websites, the OP attempted to cut off supplies to distributors who were aiming to sell through online channel. Such a restriction allegedly operated as an absolute ban on any internet sales by e- commerce companies, and amounted to a violation of Section 3(4) (d) of the Act.

Decision: **Complaint dismissed.**

Reason:

On a consideration of the aforesaid material, the main issue that arises for determination by the Commission in the present matter is whether the allegation of the Informant against the Opposite Party with regard to imposition of resale price maintenance, in contravention of the provisions of Section 3(4) (e) read with Section 3(1) of the Act, is established on the basis of the facts and evidence on record.

Upon a bare perusal of the provisions and the material available on record, it is evident that the Informant's online portal, i.e. Snapdeal, is offering an online distribution service to various distributors/dealers. It may also be relevant to highlight that the Commission has earlier held, though not in a case involving similar issues, that online retail portals are a part of distribution channel. The Commission, in Deepak Verma v. Clues Network (Case No. 34/2016, order dated 26.07.2016), while determining the dominance of an online retail portal, held that online and offline are not two different relevant markets, but are two different channels of distribution to the same relevant market. Similarly, in the case of Confederation of Real Estate Brokers Association of India v. Magicbricks.com & Ors.(Case No. 23/2016, order dated 03.05.2016), while determining the relevant market, the Commission held that online and offline services of brokers cannot be distinguished. Both are alternative channels of delivering the same service.

The Commission, therefore, observes that in the instant case also, when the distributors/ dealers are using the services of Informant while selling the products of the OP, it ipso facto becomes a part of distribution/vertical chain and thus, it would be incorrect to state that the Informant is only a market place facilitating interaction of the buyers and sellers online. It is not necessary in such evolving markets that any entrant in the downstream level of the value chain should join at the behest of the manufacturer or with its explicit concurrence. What may be relevant is to examine as to whether such player provides any active service to the end customer in availing the product or service involved, which given the facts of the present case can be answered in affirmative.

Based on the material available on record, the Commission is of the view that in the present case there was no AAEC. Further, the presence of a large number of dealers who were competing with each other suggests a fair degree of intra-brand competition. The data collected by the DG showed that there were 1,422 dealers selling OP's kitchen appliances all over India during the relevant time period who were found to be competing for the turnover linked incentives. Discounts were variable in nature and linked to the target being achieved. Since incentives were variable, the net landing price for each dealer was also different. This enabled different dealers to offer different prices to customers for the same product. Moreover, competition among distributors was found to be even stiffer as they were exclusively dealing with the OP's products.

Thus, the Commission is of the view that vis-à-vis the dealers the evidence did not reveal the existence of any price restriction or minimum RPM. As regards the Informant, though the existence of Caution Notice, Legal Notice and Email has been established, it has not been conclusively established that they were used as instruments for imposing a minimum RPM on the Informant. Further, since vertical agreements falling under Section 3(4) read with Section 3(1) are subjected to rule of reason analysis, even if there exists a price restriction by the OP, AAEC needs to be established. As highlighted above, the actual impact of the conduct of OP did not demonstrate any adverse effect on competition. Furthermore, the existence of intra-brand competition among dealers/distributors negate the anti-competitive impact of the OP's alleged conduct. Thus, no contravention of the provisions of Section 3(4) (e) of the Act is found against the OP, in the facts and circumstances of the present case.

For the foregoing reasons, the Commission is of the view that the evidence on record does not establish a case of contravention against the OP within the provisions of Section 3(4) (e) read with Section 3(1) of the Act. Hence, the case is hereby directed to be closed.

VEDANTA BIO SCIENCES

v.

CHEMISTS AND DRUGGISTS ASSOCIATION OF BARODA [CCI]

Case No. C-87/2009/DGIR

A K Gupta, Augustine Peter & U. C. Nahta [Decided on 15/01/2019]

Competition Act, 2002 – Section 3 – Anti-competition agreements insisting for NOC and fixing minimum margins – Cease and desist order passed along with imposition of penalty.

Brief facts:

The allegation contained in the complaint/information are as under:

- The OP, an unregistered body, is imposing unfair conditions in sale of pharmaceutical products of different companies.
- The OP has formulated guidelines for its members which require any person including a member to obtain permission/ NOC (No-Objection Certificate) prior to becoming a stockist of a particular company.
- The OP forced additional/new stockists not to sell products of a pharmaceutical company unless NOC is obtained by the existing stockist from the OP.
- The OP insists on procuring NOC from it before a pharmaceutical company launches new products, without which the company is not allowed to launch new product.
- A circular dated 02.03.2009, was issued by the OP, wherein permission has been granted to some distributors to become stockists of certain pharmaceutical companies, which indicates that procurement of such NOC is necessary.
- The OP was also engaged in fixation of margins for pharmaceutical products.

Decision: Complaint allowed. Penalty imposed.

Reason:

On a consideration of the aforesaid material, the following issues arise for determination in the present matter:

Issue 1: Whether the OP was mandating NOC prior to the appointment of stockist by pharmaceutical

Companies in contravention of the provisions of Section 3(1) read with Section 3(3) (b) of the Act?

In many past cases concerning the conduct of regional/ district/ State level chemists and druggists associations, the Commission has held that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling the supply of drugs in the market, contravening Section 3(3)(b) read with Section 3(1) of the Act. By mandating an NOC requirement as a pre-requisite for appointing a stockist by pharmaceutical companies, the chemists and druggists associations discourage new/existing stockists to enter/expand the market amounting to an entry barrier for them. Appointment of a new stockist should be the exclusive right of a pharmaceutical company, without any interference by any third party. Any influence or interference with the choice of a distributor, to take decisions based on its commercial consideration and business requirements, by a pharmaceutical company would restrict its freedom to do business with persons of its choice. Such interference not only disrupts the distribution chain, but also results in limiting and controlling the supply of drugs in the market, as many-a-time the diktats are sanctioned by consequent boycott of the pharmaceutical companies not following the directions of the association(s).

Though the present matter dates back to an information filed in 2009, nevertheless the aforesaid observations of the Commission made in later cases involving similar allegations are pertinent to this matter too. The OP has not denied the existence of the practice of seeking NOC in literal sense, but has vehemently contended that the said practice was voluntary in nature and there was no coercion by the OP on any of the stockists or pharmaceutical companies. Further, it has been submitted that the OP was acting in order to safeguard the interest of its members.

The aforesaid evidences (documents, circulars, policies, cross-examinations and other evidences), both oral and documentary, clearly reveal that indeed the OP was indulging in imposing the requirement of NOC prior to appointment of stockists. The OP had raised serious objections to the statements recorded as well as questionnaire survey conducted by the DG. During the hearing held on 13.12.2018, the learned counsel for the OP also highlighted another questionnaire survey purportedly conducted by the OP and enclosed with its earlier submissions filed on 05.05.2011. As per the OP, the results of this questionnaire survey are contradictory to the results of the survey conducted by the DG. The Commission is not fully convinced with the objections taken by the OP with regard to the questionnaire survey. However, in view of the objections raised by the OP, the Commission decides not to rely on the said questionnaire survey. Notwithstanding, the existence of cogent documentary evidence available on record establishes the case against the OP. Moreover, the Statements, along with their cross-examination, do not further the case of the OP as highlighted in the foregoing paragraphs. Though the OP has highlighted certain contradictions in relation to one or two witnesses, the Commission notes that the majority of the deponents have confirmed their original statements in the cross- examination and the veracity of which has not been whittled down in any manner. Rather they have confirmed the anti- competitive practices carried out by the OP. Based on such evidence, the Commission is of the view that the practices carried on by the OP has resulted in limiting and controlling the supply of drugs in the market in the Baroda district, in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Act.

Issue 2: Whether the OP was fixing the trade margins for wholesalers or retailers in contravention of the provisions of Section 3(1) read with Section 3(3) (a) of the Act?

The Commission notes that besides mandating the requirement of NOC prior to the appointment of stockists by pharmaceutical companies, the OP was also involved in the fixation of trade margins of the non-DPCO drugs which had the potential to determine the sale price of drugs.

The circular dated 02.03.2009 and the other evidence dealt with in Issue 1 also confirms the practice of fixation of trade margins for non-scheduled/non-DPCO products by the OP to the tune of 10% for the wholesaler and 20% for the retailers. The Commission observes that the OP has not denied fixation of such margins. Rather the OP has tried to justify the adequacy of such margins for the betterment of wholesalers/retailers. Further, it has been argued that these margins are as per industry norms and that the DG has not investigated whether such margins led to any adverse impact or not.

The Commission finds no merit in any of these contentions raised by the OP. Even if the margins are as per industry norms and for the betterment of the wholesalers/retailers, the association is not within its legitimate right to impose the said margins on wholesaler or retailers. It should be an independent commercial decision of every entity in the vertical chain to decide the margin it wants to secure or pass on from the upstream entity or the downstream entity, respectively. Further, the decisive criteria is not whether the said practice was for the benefit of wholesalers/retailers or not but whether the association replaced an entity's independent commercial decision by its own decisions. If many entities independently find a certain percentage as the appropriate margin and voluntarily decide to adopt it, it may not be a competition issue but if they collude/decide together or if an association decides on behalf of such entities and mandates that such entities are required to follow it, it will amount to a contravention of the provisions of the Act. Further, the contention that it was an industry norm and purportedly prescribed by AIOCD would not absolve the OP from its liability under the Act. Even if the trade margins of 10% (for wholesalers) and 20% (for retailers) are not fixed by the OP but were prescribed by AIOCD, there is evidence that the OP was ensuring that this anti-competitive practice is scrupulously followed by its members.

In view of the findings elucidated in the earlier part of this order, the Commission directs the OP to cease and desist from indulging in the practice of mandating NOC and fixation of trade margins, which has been held to be anti-competitive in terms of the provisions of Section 3 of the Act.

Further, it is necessary that such anti-competitive conduct is penalised to discipline the erring party for the said contravention. Accordingly, the Commission deems it appropriate to impose a penalty on the OP at the rate of 10% of its relevant income based on the income and expenditure account for three financial years filed by it for the relevant years during the earlier proceedings before the Commission.

RAVI PAL

v.

ALL INDIA SUGAR TRADE ASSOCIATION & ANR [CCI]

Case No. 25 of 2018

A.K. Gupta, U.C. Nahta & Sangeeta Verma [Decided on 22/03/2019]

Competition Act, 2002 – Section 3 – Price fixing of sugar – CCI dismisses the complaint.

Brief facts:

The Informant has alleged the following against the Ops:

(i) Collecting and disseminating pre-determined purchase price of sugar amongst the cartel members through WhatsApp and SMS;

(ii) Restrict the market for other competitors whose bids are based on market forces;

(iii) Vitiate the tender process so that an enterprise floating the tender has no option but to accept the prices determined by the OPs;

(iv) Control the supply of sugar in the market where it is sold to wholesalers and consumers; and

(v) Affecting players of the market in other states (Uttar Pradesh/ Karnataka) who are selling/supplying sugar in the same market as the OPs because the former is compelled to lower the prices of sugar due to elimination of market forces.

Decision: Dismissed.

Reason:

Bereft of too many details, the primary allegation arising from the facts, as per the Informant, is that OP-2 during the relevant period purportedly shared "price sensitive information" pertaining to sugar prices over the WhatsApp group which in turn were allegedly used to quote lower prices in the tenders floated by the sugar millers for sale of sugar, in the state of Maharashtra.

In order to buttress his argument, the Informant placed on record certain WhatsApp messages pertaining to the relevant period, allegedly for the state of Maharashtra. During the preliminary conference, the learned counsel of the Informant contended that the messages contained the sugar prices for variants of sugar, namely, S-30 and M-30 and other international future prices of sugar etc. Based on the same, it was argued that the price of sugar (as displayed in WhatsApp messages) was allegedly the price of last successful bid (bidding done on daily basis) and the same was made the basis for quoting their bids by leading traders, who were members of the WhatsApp group (mainly traders) in the subsequent tenders of millers in the state of Maharashtra.

Moreover, when the Commission inquired from the counsel of the Informant about the basis for alleging the "price sensitivity" of data by the Informant, the same could not be addressed by the Informant. It was stated by the Informant that the average prices at APMC were lower than the prices on WhatsApp messages and hence, the same could only be as a result of collusion. The Commission does not find any merit in this argument, as the Informant himself has explained, in the information filed by him, the process followed in the daily tenders and has stated that the sugar prices circulated were on the basis of last successful bids. This means that such information was already available in public domain post the award of the tender by the sugar mills and the circulation of the same, per se, does not imply that it would become sensitive information. Further, with regard to the information purportedly exchanged on WhatsApp group, the Commission observes that it is not clear from the records as to how such alleged acts can be said to have affected free play of the market forces with respect to prices of sugar. Further, the Informant has enlisted the objectives of OP-1, wherein collection of information and dissemination of information is one of the primary objectives. Therefore, unless it is indicated by the Informant, based on cogent evidence, that there was any meeting of minds amongst the OPs for placement of bids for tenders or with respect to prices to be quoted in such bids, it is not possible to form a prima facie view in the matter under Section 26(1) of the Act, warranting an investigation.

The Commission notes that the members of the WhatsApp group also comprise millers (two). There does not seem to be any rationale as to how millers (as sellers) who have an interest in getting higher prices of sugar, as against that of traders, who want to procure at lower prices, would be agreeable to sell the sugar at lower prices. As noted above, no material has been placed on record related to tenders floated by the millers during the relevant period and the bid details etc. The information is lacking in material particulars as to how there had been bid rigging or collusive bidding in any specific tender, rather the averments made are general in nature. Therefore, on account of lack of credible material and information, the Commission does not find any merit in the allegations posited by the Informant.

The Commission further notes that certain documents which were filed by the Informant (vide index dated 31.10.2018) indicating the rate at which sugar was purchased after the tender. Though the documents were not explained by the Informant during the preliminary conference, however, after perusal, it is apparent that the documents were not for the relevant period (the same are in respect of certain months of 2014 and 2015) and are, thus, inconclusive in the light of allegations raised by the Informant in respect of the relevant period.

Furthermore, the sugar commodity is subject to the provisions under the Essential Commodities Act, 1955 and orders issued thereunder and, thus, the final market price of sugar is dependent upon numerous factors. Therefore, the allegation of the Informant that the alleged practices affected the market price in the absence of any evidence is without merit and does not warrant any investigation.

After appreciation of the allegations of the Informant and documents submitted including the oral submissions made by the Informant, the Commission is of the view that no evidence has been provided by the Informant to show that there was any meeting of minds between the OPs to establish correlation between bids submitted in any specific tender with the alleged sugar prices circulated over the WhatsApp group. Presumptive inference and analysis provided by the Informant cannot be the basis for forming a prima facie opinion as to order investigation in the matter. Therefore, the Commission observes that, based on the facts stated in the information and the evidence adduced by the Informant, a prima facie case under Section 26(1) of the Act is not made out against the OPs.

Ms. DEJEE SINGH & ORS

v.

SANA REALTORS PVT LTD [CCI]

Case No. 06 of 2019

A.K.Gupta, U.C. Nahta & Sangeeta Verma [Decided on 23/04/2019]

Competition Act, 2002 – Sections 3 & 4 – Delay in handing over possession of shop – Whether constitute abuse of dominance – Held, No.

Brief facts:

The present information has been filed by the informants alleging abuse of dominant position by the OP in the real estate market for "Small Office Home Office" (hereinafter "SOHO"). As per the brochure of the OP, the SOHO units are modern architectural masterpiece that will serve as a home as well as an office. It takes care of all the basic needs so that one can work from the comfort of a home. The primary grievance of the Informant seems to stem from delay in handing over of possession of the units which was promised to be delivered by the OP by the year 2013 as per the Agreement, and which according to the Informants has violated the provisions of Section 4 (2) (a) of the Act.

Decision: Dismissed.

Reason

The Commission notes that the OP has advertised the model of Small Office Home Office as "small and affordable office space to ensure beauty and comfort catering to the needs of the corporate, small and medium enterprises". The Commission therefore is of the view that the primary use of the space, therefore, relates to office use only. Furthermore, the particulars of the place are marked as office in the Agreement as well. The only distinguishing feature of the project for office space offered by the OP is the unit for a bedroom in the proposal, allowing the comfort of a home office. Though OP has stated in his offering that this is an additional feature that might make the OP's product preferable to consumers/ buyers in a differentiated product market, the Commission notes that such an additional feature can be added by the consumer on his own in any office space he/ she prefers, as it is up to the discretion of the consumer to style his/ her office space in the way he/ she desires, subject however to any limitations under the contract or any law. The said feature, therefore, is not sufficient to qualify the product as a separate relevant product market altogether. The Commission, therefore, is of the opinion that the relevant market in the present case may be defined as "market for commercial units for office space".

Choice of a consumer for office space depends on various factors such as development of the region, supply of land, location of business establishment, etc. A buyer of office space is likely to take into account all these factors while exercising his choice, and therefore a buyer desirous of setting office in Gurugram may not be willing to establish office in areas other than Gurugram, as market conditions that exist in Gurugram can be distinguished from the conditions prevailing in the neighbouring areas. This may be due to factors like proximity of his/ her customers, better connectivity/ transport facilities/ infrastructure, etc. to name a few. Thus, geographical area of Gurugram region has to be taken as the relevant geographic market in the instant case, and "the market for commercial units for office space in Gurugram" is accordingly considered as the relevant market in the instant case.

As per information available in the public domain, there have been many established and bigger organised real estate companies such as DLF Limited, Omaxe, etc. offering their projects in the relevant market at the relevant time. The Commission notes that the presence of other players in the relevant market indicates that competing products are available to consumers in the relevant market and the OP, therefore, doesn't appear to be dominant in the relevant market as delineated above. In the absence of dominance, its conduct cannot be examined under the provisions of Section 4 of the Act.

The Commission further notes that no facts, evidence, or even appropriate provisions of Section 3 of the Act are set out in the Information. Thus no case of contravention of Section 3 of the Act is also made out in the present case. In view of the foregoing, the Commission is of the view that based on Information filed, no case of contravention of the provisions of the Act is made out against the OP and the matter is ordered to be closed.

KANHAIYA SINGHAL

v.

INDIABULLS HOUSING FINANCE LTD & ORS [CCI]

Case No. 11 of 2019 A.K. Gupta, U. C. Nahta & Sangeeta Verma. [Decided on 24/05/2019]

Competition Act, 2002 – Section 3 & 4 – Provision of housing loan change in the interest rate – Whether abuse of dominance – Held, No.

Brief facts

The present information has been filed by the Informant against OP-1 and its representatives/ employees (hereinafter, 'OP-2 to OP-18') alleging, inter alia, violation of the provisions of Section 3 and 4 of the Act.

It is stated in the information that the Informant had availed a Home Loan facility from OP-1, for which he entered into a Loan Agreement with OP-1 on 21.06.2018. Thereafter, he was extended a home loan of Rs. 1,00,00,000/- (Rupees One crore only) at a rate of interest of 8.75% p.a. repayable in 240 equated monthly instalments ('EMI') of Rs. 88,372/- (Rupees Eighty-Eight Thousand Three Hundred and Seventy-Two only).

The Informant was primarily aggrieved by increase in the rate of interest charged by OP-1 on the home loan facility availed by him and is also aggrieved with the terms and conditions of the Loan Agreement, which are alleged to be one- sided and discriminatory in nature. Further, the Informant has alluded that in-spite of RBI reducing the market interest rate, OP-1 is not passing on those benefits to the Informant. Based on the above, the Informant alleged that the conduct of OPs amount to be in violation of Sections 3(1), 3(4) and Section 4 of the Act.

Based on the above averments and allegations, the Informant has prayed that the Commission direct OPs to discontinue such practices of abuse of dominant position and to modify the Loan Agreement to an extent as may be specified by the Commission.

Decision: Dismissed.

Reason

The Commission has carefully analysed the information filed by the Informant, the documents annexed therewith, and the information available in the public domain in this regard.

Before examining the allegations, it is appropriate to examine the role of OP-2 to OP-18 in the matter. It is observed that OP-2 to OP-18 are officials / employees of OP-1. Further, the Informant has not provided any evidence to show that OP-2 to OP-18 have indulged in any conduct which are in violation of the provisions of Sections 3 and 4 of the Act.

The Commission observes that the Informant has not suggested any relevant market in the matter. From the facts and circumstances, it is evident that the main grievances of the Informant relates to increase in rate of interest charged by OP-1 on the home loan. It is observed that home loan is distinct from other types of loans such as personal loan, property loan, vehicle loan, etc. Further, home loan can be distinguished from other types of loans based on the factors such as intended use, rate of interest charged, term of payment, etc. That banks and home finance companies extend home loans and compete with each other for providing home loan services, therefore, the Commission does not deem it necessary to distinguish between home loans offered by various lending entities. Based on the above, home loan can be considered as a distinct product or service. Thus, the relevant product market in the instant case is delineated as the “market for provision of home loans.”

With regard to the relevant geographic market, the Commission observes that there are many service providers that are providing the said services in the aforesaid relevant product market and are also competing with each other for providing home loans to borrowers. There exists no distinction between one region and another with reference to availing home loan services within India. Therefore, the relevant geographic market in the instant case can be considered to be “India”. Accordingly, the relevant market in the instant matter is delineated as ‘market for provision of home loans in India’.

On the assessment of dominance, the Commission notes that home loan market in India has many providers including Banks, Non-Banking Financial Companies (NBFCs) and Housing Finance Companies (HFCs). Few prominent home loan providers are State Bank of India (SBI), Punjab National Bank (PNB), ICICI Bank, HDFC Bank and DHFL. The housing finance market in India is fragmented, with 80-plus players. The Commission further observes that as per the Report on Trend and Progress of Housing in India, 2018 published by National Housing Bank1, the outstanding housing loans disbursed by banks and HFCs was about Rs. 17,00,000 crore. As per the annual report of SBI for the year 2017-182, the housing loans disbursed by SBI were Rs. 3,13,106 crore. In other words, SBI had a market share of 18.42% in the relevant market delineated above. Further, it is observed that as per the annual report of OP-1 for the year 2017-18, it had disbursed approximately Rs. 23,329 crore as loans to the housing sector which amounts to roughly a market share of 1.37% in the relevant market delineated above. Considering the large number of players operating in the relevant market which suggests that not only the market is competitive in nature but also that OP-1 does not seem to have the ability to operate independently of the competitive forces, OP-1 is not found to be dominant in the relevant market defined supra. In the absence of dominance, the issue of abuse of dominant position against the OP-1 does not survive.

With regard to the allegations made under Section 3(1) read with Section 3(4) of the Act, the Commission observes that the Informant has not suggested existence of any agreement, as envisaged under Section 3 of the Act, involving the OPs. Be that as it may, the Commission after examining the facts of the case has not found anything that would suggest that there D 74 JUNE 2019 I CHARTERED SECRETARY exists any kind of horizontal/ vertical agreement that could be brought under the purview of Section 3 of the Act.

In light of the above analysis, the Commission finds no case of contravention of the provisions of Section 3 or Section 4 of the Act against the OPs in the instant case. The matter is thus closed forthwith in terms of the provisions of Section 26(2) of the Act.

OIL COUNTRY TUBULAR LTD.

v.

MAHARASHTRA SEAMLESS LTD [CCI]

Case No. 48 of 2018

A.K. Gupta, U. C. Nahta & Sangeeta Verma. [Decided on 23/05/2019]

Competition Act, 2002 – Section 3 & 4 – Refusal to supply – Tender for green pipes – Informant placing orders of supply at the eleventh hour – Supply could not be made before the tender closing date whether non-supply results in refusal to supply – Held, No.

Brief facts:

It is the case of the Informant that in respect of a tender floated by ONGC (Tender No. ZNCVC18004), it approached to MSL by way of e-mail dated 17.10.2018 stating its requirement therein in detail for procurement of green pipes and had also requested for a price quote. The Informant has alleged that MSL did not respond to its said e-mail. Further, the Informant has alleged that it also sent 3 more e-mails on 25.10.2018, 26.10.2018 and 01.11.2018 to obtain competitive prices for green pipes. However, it was submitted by the Informant that MSL did not respond to these e-mails as well.

In the aforesaid backdrop, the Informant has filed the instant Information alleging that MSL will not supply green pipes to it in respect of the tender floated by ONGC for procurement of seamless casing pipes. It has been pointed out that MSL has not responded to the e-mails of the Informant in respect of its requirement for procurement of green pipes. Accordingly, the Informant has alleged contravention of Section 4(2)(c) and Section 4(2)(a)(i) read with Section 4(1) of the Act. Contravention of Section 3(4)(d) read with Section 3(1) of the Act is also alleged.

Decision: Complaint dismissed.

Reason:

The Commission has perused the information and the documents filed therewith besides holding preliminary conference with the parties. The parties have also filed their respective written submissions.

In this regard, it is observed that though the Informant has stated in the Information that it approached to MSL by way of an e-mail on 17.10.2018 in respect of the tender floated by ONGC, from the tender documents, it appears that the original date for submission of tenders was 17.10.2018 itself. Thus, it is evident that the Informant kept on waiting till the last date of submission of tenders to write an e-mail to MSL. Even thereafter, when the last date for submission of tenders was extended up to 31.10.2018, the Informant sent its reminders on 25.10.2018 and 26.10.2018 only. In fact, the Informant's reminder sent on 01.11.2018 was post the extended date of submission of bid i.e. 31.10.2018.

In the aforesaid backdrop, having perused the material on record and after hearing the learned counsel for the parties, the Commission notes that the conduct of the Informant in approaching MSL at such a belated stage for supply of green-pipes, does not seem to be diligent. Such a conduct does not appear to be consistent with the ordinary course of business behaviour. Accordingly, the Commission is of the view that the conduct of the Informant in writing e-mails to MSL lacked bonafide. MSL categorically pointed out that the Informant never approached it for supply of green pipes before October 2018.

Moreover, MSL has sought to explain non-response to such e-mails of the Informant by referring to the Integrity Pact which prohibits such discreet arrangements between the bidders. It is not in dispute that both the Informant and MSL were potential competitors in respect of the tender floated by ONGC.

Be that as it may, the Commission is of the opinion that the claim of the Informant that the conduct of MSL amounted to refusal to deal besides denial of market access, stands falsified from the sequence of events as adumbrated above and material available on record.

From the submissions made by MSL, the Commission also notes that the Steel Policy of 2017 which restricts import of green pipes, itself provides for waivers where supply requirement in the government procurement cannot be met through domestic sources. In fact, MSL has pointed out that an exemption from restriction under the Steel Policy was granted for one of the ONGC's tenders bearing No. ZNCKC16005 and a copy of the minutes dated 22.08.2017 of the second meeting of Grievance Committee on Domestically Manufactured Iron & Steel Products containing details of such exemptions has been annexed in support of the contention.

The Commission also takes on record the submission made by MSL that it has no market presence in the upstream market which has been defined by the Informant as the relevant market in as much as it manufactures green pipes only for its captive consumption as raw material required for processing casing pipes. It has been categorically pointed out by MSL that it does not supply green pipes to any other entity in India, neither does it export any green pipes, as claimed by the Informant during the hearing. It has also been highlighted that contrary to the oral submissions made on behalf of the Informant, MSL usually does not have any surplus green- pipes which can be supplied to other entities.

In view of the foregoing, the Commission is of the opinion that it is unnecessary to dilate anything further on the other issues raised by the parties regarding the delineation of the relevant market and dominant position. No case of contravention of the provisions of Section 4 or Section 3 of the Act is made out against the Opposite Party and the Information is ordered to be closed forthwith.

DEPUTY CHIEF MATERIALS MANAGER, RAIL COACH FACTORY, KAPURTHALA, PUNJAB

v.

FAIVELEY TRANSPORT INDIA LTD & ORS. [COMPAT]

Appeal No. 10 of 2016 and I.A. No. 29 of 2016

G.S. Singhvi, J. (Chairman) &Rajeev Kher, Member [Decided on 17/02/2016]

Competition Act, 2002 – Sections 3 & 4 – Quoting of identical price by bidders – Whether, by ipso facto, constitutes cartel – Held, No.

Brief facts:

This appeal is directed against order dated 08.09.2015 passed by the Competition Commission of India (for short, the ‘Commission’) in reference Case No. 06 of 2013, whereby it was held that the evidence relied upon by the Director General (DG) is not sufficient for holding that the Opposite Parties (Respondents herein) are in contravention of the provisions of the Act and closed the case. The respondents are the suppliers of “Axle Mounted Disk Brake System (AMDBS)”to the appellant railways to be fitted in the LHB coaches. The railways floated tenders for the supply of AMDBS and the respondents were the successful bidders. They quoted identical rate which was accepted by the railways.

The appellant made a complaint to the CCI alleging that the respondents have formed a cartel and thereby violated the provisions of sections 3 & 4 of the Competition Act. The matter was referred to the director of investigation who submitted a report stating that there was a cartel as alleged. However, after examining the issues, the CCI dismissed the complaint. Hence this appeal.

Decision: Appeal dismissed.

Reason:

The question whether identical price quoted by the bidders can be made the sole basis for recording an affirmative finding on the issue of cartel formation was considered by the Supreme Court in Union of India v. Hindustan Development Corporation and others, which has been reported in two parts of the Supreme Court Cases. The first part which contains the facts of that case and conclusions recorded by the Supreme Court is reported in (1993) 1 SCC 467.

The second part which contains detailed reasons in support of various conclusions is reported in (1993) 3 SCC 499. It is significant to note that the respondents are the only approved supplier of Item Nos. 1 and 2 of AMDBS and the attempts made by the Railways to procure supply from other sources have failed. In paragraph 5.20 of the impugned order, the Commission has also noted that the Respondent No. 1 had quoted the price in EP1 at the suggestion of the appellant and this was not controverted by the latter convincingly. In para 5.16 of the impugned order, the Commission has referred to the efforts made by the Railways to get the supply of AMDBS from Escorts, which failed because even before the product supplied by Escorts could be tested, the conditions of eligibility was changed and on that account Escorts was no longer eligible. It is also important to note that due to delayed finalization of the rates quoted in response to first regular tender, the Tender Committee issued EP1, EP2 and EP3. In EP1 and EP2 both the respondents quoted identical price. In EP3 there was substantial similarity of the price, but the Tender Committee did not suspect any cartelisation and decided to place orders with the respondents. A comparative study of the rates quoted in EP4 and EP5 also show that the same were not identical. The rates quoted in response to the regular tenders, were also not identical. Therefore, the Commission was right in concluding that the evidence collected by the Jt. DG is not sufficient to return an affirmative finding on the issue of cartel formation.

We are in complete agreement with the reasons assigned by the Commission for not approving the conclusion recorded by the Jt. DG on the issue of cartel formation by the respondents and by applying the ratio of the Supreme Court judgment in Union of India v. Hindustan Development Corporation and others (1993) 3 SCC 499] and order dated 18.12.2015 passed by the Tribunal in Appeal Nos. 13, 15 and 20 of 2014, we hold that the Commission did not commit any illegality by refusing to approve the findings recorded by the Jt. DG on the issue of formation of cartel/bidrigging by the respondents and violation of Section 3(3)(d) read with Section 3(1) of the Act.

We may add that in an oligopolistic market like the one in question, the identity of price quoted by the bidders is not an unusual feature. The players in a limited market are aware of the price quoted by each other in one or the other bid and it is a normal tendency to quote the same price in response to the next tender. Therefore, identical price quoted by the respondents for the items of AMDBS did not constitute sufficient evidence of cartel formation and in the absence of other plus-factors, it is not possible to record a finding that the respondents had acted in violation of Section 3(3) (d) read with Section 3(1) of the Act.5

BELARANI BHATTACHARYYA

v.

ASIAN PAINTS LTD. [CCI]

Case No. 102 of 2015

S.L. Bunker, Sudhir Mital, Augustine Peter, U.C. Nahta, M.S. Sahoo, &G.P. Mittal.[Decided On: 27.01.2016]

Competition Act, 2002 – Sections 3 & 4 – Painting services – Done through agent – Whether constitutes violation of section 3 & 4 of the Act – Held, No.

Brief facts:

The Opposite Party brings out several advertisements in various daily newspapers promising various services relating to painting of house such as painting by trained painters with supervision, one year warranty in respect of jobs done etc. to the public at large. Attracted by such advertisements and brand name of the Opposite Party and expecting high quality and smooth service, the Informant opted to avail the services of the Opposite Party for painting of her residential premises. The Informant placed orders for interior painting of the ground floor portion and total exterior painting of the premises. Two estimates amounting to Rs. 37,574/- & Rs. 62,081/- on the aforesaid dates were given by the Opposite Party. Thereafter, two more estimates to the tune of Rs. 62,490/- and Rs. 13,120/- dated 29.03.2010 and 30.04.2010 were given for painting of ceiling, walls of master bedroom and second bathroom for which full payments were made in advance with due acknowledgement. The Informant was shocked to find that there were no receipt vouchers from the Opposite Party pertaining to various jobs undertaken rather they were in the name of Colour Concepts. The Informant for the first time was made aware of the tie up which the Opposite Party seems to have entered into with Colour Concepts. As per the Informant, for the said painting works no colour plan was approved by her rather the Opposite Party went ahead with its own colour plan. It is averred that even after receiving the payments from time to time, the painting jobs were not up to the mark as the paint was peeling out at number of places and all the painting works were not completed.

The Informant inter alia has alleged that the following activities of the Opposite Party are anti-competitive:

- The consumers are drawn through misleading advertisements and its brand name.
- The painting estimates were given through its intermediary even though the advertisement contained no such reference.
- The market for selling of paints and the market for providing painting service cannot be separated since both constitute a single service under a distinct brand name. When name like Asian Paint Home Solutions appear in the advertisements, the consumers are likely to draw the conclusion that both purchase of paints and the service of painting will be provided by a single entity i.e. the Opposite Party.
- If a customer chooses to avail the services of painting from the Opposite Party then the raw materials produced by the Opposite Party are used for the painting works. Thus, the criteria for a tie-in arrangement under section 3(4)(a) of the Act stand satisfied.
- Due to the agreement between the Opposite Party and Color Concepts not only the consumer's interest is affected due to poor quality of service but also other suppliers are denied entry into the market.
- The Opposite Party is a dominant player in the market and it abuses its position of dominance in terms of section 4 of the Act.

Decision: Case closed.

Reason:

The Commission has perused the information and material available on record and also heard the counsel appearing on behalf of the Informant.

The gravamen of the Informant stem from the fact that the Opposite Party has not provided appropriate painting services to the Informant and has also not completed the painting works at her residential premises, as promised through various advertisements. The Informant has alleged violation of the provisions of sections 3 and 4 of the Act in the matter. At the outset, the Commission takes note of the fact that the Informant had earlier filed similar information with the Commission in case No. 08 of 2011 against the same the Opposite Party which was closed under section 26(2) of the Act. The Commission held that none of the provisions of either section 3 or section 4 of the Act were violated by M/s. Asian Paints Ltd. The Commission held that there was no case of any agreement between Asian Paints and other paint companies or practice adopted by any association of painting companies operating in the relevant market, thus section 3(3) of the Act does not apply to the facts of the case. Also, it was held that none of the clauses of section 3(4) read with section 3(1) is applicable to the facts of the case. With regard to the allegation of violation of section 4 of the Act the Commission held that the Opposite Party was not in a dominant position in the relevant market of 'providing home solution services for painting homes in geographical area of Kolkata' because all the major companies such as Berger, Nerolac, etc. are providing home solution services for painting homes.

The Commission observes that the Informant has not submitted any additional material or evidences with the information in the instant case so as to draw a different conclusion from case No. 08 of 2011 regarding contravention of the provisions of sections 3 and 4 of the Act. As the facts and allegations remain the same, the Commission is of the view that no case of contravention of any of the provisions of either section 3 or section 4 of the Act is made out against the Opposite Party in the instant case.

In the light of the above analysis, the Commission finds that none of the provisions of either section 3 or section 4 is violated by the Opposite Party in the instant matter. Accordingly, the matter is closed in terms of the provisions of section 26(2) of the Act.

PRASAR BHARATI (BROADCASTING CORPORATION OF INDIA)

v.

TAM MEDIA RESEARCH PRIVATE LTD [CCI]

Case No. 70 of 2012

S. L. Bunker, U. C. Nahta & M. S. Sahoo. [Decided on 25/02/2016]

Competition Act, 2002 – Sections 3 & 4 – TRP rating service – Rural areas excluded – Whether constitutes discriminatory conditions – Held, No.

Brief facts:

Informant provides public broadcasting services through Doordarshan which is free to air covering the length and breadth of the country, including rural and remote areas, and can be accessed through an ordinary roof top antenna.

OP/TAM, provides television audience measurement services. OP is the only entity which measures the television viewership in India in form of Television Rating Points (TRP)/ Television Viewership Ratings (TVR) since 2011. To measure viewership, it uses an electronic gadget called 'People Meter' which is connected to each TV set in the select sample households to monitor what is being viewed on the TV set and for how long. It has installed about 8,000 meters, which represent a very narrow statistical base. Further, these are installed in cities with population of more than one lakh. The TRP/TVR generated by OP, therefore, underestimates the actual viewership of Informant, as it excludes the rural viewership.

Non-inclusion of rural areas by OP in television viewership measurement gives an undue advantage to the broadcasters who have programmes for the urban areas only over the broadcasters who have programmes for both rural and urban areas and have a pan India presence. This encourages urban centric programmes and amounts to imposition of discriminatory conditions on those broadcasters who cater to the rural areas also. This limits the market for measuring television viewership as well as the technological and scientific development relating to such services to prejudice of the consumers, broadcasters and a section of advertisers. This conduct of OP is abusive in contravention of the provisions of section 4 of the Act.

Decision: Case closed.

Reason:

The Commission has perused the material available on record, besides hearing the counsel appearing for Informant and OP. The following issues need to be determined:

Is OP in a dominant position?

The Commission is in agreement with the DG's finding that OP holds 100% market share in the relevant market since August, 2011, indicating market power of OP in the relevant market. As regard the issue of entry barrier, the Commission is of the opinion that the DG is correct in concluding that the technical and capital requirements in installing and measuring the device 'People Meter' in each sample household across the country may prove to be difficult for new players wanting to enter the market. It may be noted that since OP has no competitor in the market, the analysis on commercial advantage over other players as enumerated by the DG in the report has no significance in assessing the dominance. However, the Commission is of the opinion that the concept of network effects is applicable in this case. Network effect means that a product/service become valuable with the increase of the number of users. Therefore, this may act as entry barrier for new players because of OP's long standing association with the advertising industry for the past two decades and the number of subscriptions it has all over the country. Moreover, OP's parent companies, Nielson and Kantar apart from being the financial strength of OP, have the access to key inputs, skills, knowledge, technology, etc. which a new entrant may not have. This level of advantage which OP has in the market may also act as a barrier or difficulty for new competitors to effectively compete on par with OP.

In view of the above forgoing, the Commission is of the view that OP has the strength to operate independent of competitive forces prevailing and has the ability to impede or influence effective competition in the relevant market. Therefore, in consonance with the findings of the DG, the Commission holds the view that OP is in a dominant position in the market in the provision of services for audience measurement for channels and programmes on television in India.

b. Is OP imposing unfair or discriminatory condition in supply of its services in violation of section 4(2) (a) (i) of the Act?

The Commission is in agreement with the contention of OP that it is not involved in the negotiations between advertisers and broadcasters and its data only serves as a key parameter in determining the cost and price of advertising slots. Therefore, the Commission is of the view that OP is not imposing any discriminatory or unfair condition on broadcasters.

c. Is OP imposing unfair or discriminatory price in sale of its services in violation of section 4(2) (a) (ii) of the Act?

The Commission also finds force in the argument put forth by OP that if same rates are offered to differently placed consumers, i.e., the broadcasters and advertisers/ advertising agencies; it would lose its subscribers and it would no longer remain profitable to conduct its business. Further, with regard to non- supply of RLD by OP to the broadcasters, the Commission is of the view that the possibility of tampering of information may result in skewed view in favour of the broadcaster's programme(s) thereby impeding effective competition in the market. Therefore, the justification offered by OP in this regard appears to be a valid one. In view of the above, the Commission is of the opinion that no case of imposition of unfair or discriminatory price is made out against OP.

d. Is OP limiting or restricting technical or scientific development relating to its services to the prejudice of its customers?

In this regard, the DG has observed that OP is procuring expensive 'People Meters' from the group company of one of it promoters. The Commission is of the view that the OP can choose to procure the said device from any supplier which meets its criteria. Therefore, the justification provided by OP for procuring the said device from its own promoters because of the superior quality and competitive price appears to be tenable. Therefore, the OP is not limiting scientific and technical development in manufacturing of 'People Meters' and hence no competition concern arises in this aspect.

MERU TRAVEL SOLUTIONS PVT LTD

v.

UBER INDIA SYSTEMS PVT. LTD & ORS [CCI]

Case No. 96 of 2015

S. L. Bunker, Sudhir Mital, Augustine Peter, U.C. Nahta, M.S. Sahoo & Justice G.P. Mittal. [Decided on 10/02/2016]

Competition Act, 2002 – Sections 3 & 4 – Radio taxi service – OP offering services at reduced rate and also gives more discount – Whether this constitutes anti competition practice and abuse of dominance – Held, No.

Brief facts:

The Informant has alleged that owing to its dominant position, the Uber Group has devised certain abusive practices which inter alia, include unreasonable discounts amounting to abysmally low/predatory pricing to consumers etc. to adversely affect and oust its competitor from the relevant market. It is alleged that under its business arrangement, UBER is giving the whole trip amount received from the passengers to the respective taxi drivers along with additional incentives in order to get them attached exclusively with the UBER network. It is alleged that UBER's incentive policy is not based upon any economically justified consideration, but solely to gain and maintain the fidelity of the taxi owners and to prevent passengers/ customers from obtaining radio taxi services from other radio taxi services operators. The loyalty inducing incentive schemes have or are likely to have an exclusionary effect in the relevant market to the detriment of other competitors. In addition to the payments to drivers, UBER is said to be offering huge discounts and benefits to its consumers which are difficult for similarly placed players to match. Further, the Informant has also alleged that UBER enters into exclusive contract with taxi owners in violation of Sections 3(1), 3(2) and 3(4) of the Act whereby the taxi drivers are restrained from getting attached on to any other competing "radio taxi operator" network.

Decision: Complaint dismissed.

Reason:

The definition of relevant geographic market in the radio taxi services market has been dealt with by the Commission in many previous cases, namely Case nos. 06 of 2015, 74 of 2015 and 81 of 2015. The Commission is of the view that the relevant geographic market in the instant case will be "Delhi". Accordingly, the relevant market in the present case would be market for "Radio Taxi Services in Delhi".

The Commission has considered the Tech Sci research report and it is a matter of fact that Uber Group was not interviewed during the collection of data in the Tech Sci report. Thus, the doubts raised by OP 1 regarding the inaccuracy of data have some merit. The reliability of the data contained in the Tech Sci report is further weakened due to the existence of another research report i.e. 6Wresearch report, with contradictory results, pertaining to the same relevant market received by the Commission in another case i.e. Case No. 82 of 2015. The Tech Sci research report submitted by the Informant shows the market share of UBER on the basis of different parameters to be 44.42% (fleet size), 41.38% (active fleet size) and 50.1% (number of trips) as opposed to the market share figures of the next competitor i.e. OLA (along with Taxi For Sure) which are 32% (fleet size), 27% (active fleet size) and 23.1% (number of trips). The 6Wresearch report, on the other hand, shows the market share of OLA to be 52.9% (fleet size), 54.3% (active fleet size), 52.3% (monthly revenue) and 57.5% (number of daily trips) as opposed to UBER"s market share which is stated to be 17.6% (fleet size), 7.8% (active fleet size) and 3.8% (monthly revenue).

Evidently, there are glaring differences in the data and results depicted by the two research reports i.e. 6W research report and TechSci report; casting a serious doubt on their authenticity and neutrality. The conflicting results indicate that either the data relied upon in the said reports is not accurate or the data has been selectively collected and relied upon to reach some predetermined results. Therefore, despite the Informant's attempt to discredit the results of the 6Wresearch report, the Commission is apprehensive in drawing conclusions with regard to the market share of UBER on the basis of such contradictory research reports. It may be pertinent to point out here that the Commission is conscious of the fact that the findings in the 6Wresearch report and Tech Sci report relate to the market shares for the Delhi-NCR market whereas the Commission has delineated the relevant geographic market as only Delhi. However, notwithstanding such fact, it seems unlikely that the market shares of the various players on different parameters used in these reports would have changed substantially had these reports been prepared for the radio taxi services market in Delhi alone. Hence, despite the deficiencies observed above, a conclusion may be drawn from a combined reading of both these research reports that there exists stiff competition, at least between OLA and UBER, with regard to the radio taxi industry in Delhi. Further, both the research reports have acknowledged the presence of other major players in the market, apart from UBER and OLA.

Further, the fluctuating market share figures of the various players show that the competitive landscape in the relevant market is quite vibrant and dynamic. Based on the foregoing, the Commission is of the view that the radio taxi services market in Delhi is competitive in nature and UBER does not appear to be holding a dominant position in the relevant market. Since Uber group does not seem to be dominant in the relevant market, there is no need to go into the examination of its conduct in such relevant market.

Based on the aforesaid, the Commission is of the view that no case of contravention is made out against Uber Group.

TAMIL NADU CONSUMER PRODUCTS DISTRIBUTORS ASSOCIATION

v.

BRITANNIA INDUSTRIES LTD & ORS [CCI]

Case No. 106 of 2015

Devender Kumar Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, M. S. Sahoo & Justice G. P. Mittal, [Decided on 29/03/2016]

Competition Act – Section 4 – Abuse of dominance – Restrictive conditions in distributorship agreement – Whether constitute abuse of dominance – Held, No.

Brief facts:

The main concern of the Informant relates to the conditions imposed by Opposite Parties (OPs) on their distributors and termination of distributorship whenever those conditions are not adhered to. The purported conditions imposed by OPs, taking advantage of their dominant position, are indicated as abuse of dominant position under Section 4 of the Act. The brief details of the allegations are as follows:

- OPs never allow their distributors to deal with any other biscuit manufacturing company even through their sister concerns;
- OPs have orally restricted each and every distributor to operate business with retailers within the area demarcated by them. Further, the area of operation of distributors was reduced from time to time;
- OPs unfairly force their distributors to use gadgets and software introduced by them. This was emphasised to monitor the business of the distributor with retailers in their respective territory;
- OPs have dumped stocks on the distributors beyond their requirement by making automatic dispatches. Further, OPs realize the entire amount against dispatched goods by encashing the blank cheques issued by the distributors;
- OPs offer special rates to firms like Reliance Mart, Big Bazar, etc. As a result, the products of OPs are available to whole sale shops at rates (price) below the cost price of the distributors. Further, OPs transfer/provide slow/less selling stocks for general trading of the distributors;
- OPs require their distributors to maintain infrastructure like godown space, vans, employees, computers, software etc. and also force distributors to extend credit to retailers;
- OPs make their product available at rates below the cost rates of authorised distributors thereby humiliating the distributors before the retailers.
- It has also been submitted that OPs cancel the distributorship of agencies that do not abide by the aforesaid stipulations.

Decision: Case closed.

Reason:

For the purposes of examining the allegations of the Informant under the provisions of Section 4 of the Act, it is necessary to determine the relevant market at the first instance. The purpose of delineating the market is to ascertain whether OPs enjoy a position of strength required to operate independent of the market forces in the relevant market. Only when such a position is enjoyed by OPs, it is imperative to examine whether the impugned conduct(s) amounts to abuse.

As per the details available on their website, OPs are engaged in manufacture/production of a variety of bakery and dairy products such as biscuits, breads, cakes, rusk, milk, butter and cheese. It is observed that the biscuits segment constitutes the major component of the business of OPs and hence has been considered from the perspective of defining relevant market. The nature of other products manufactured and supplied by OPs under the categories of dairy products, breads and cakes could be distinguished from biscuits in terms of their characteristics, taste and price. More particularly, these products have lesser shelf-life than that of biscuits. Accordingly, the market for biscuits appears to constitute a separate and distinct relevant product market. As regards the relevant geographic market, it appears that the conditions of competition are homogeneous across India. In the absence of any material on record brought by the Informant to suggest heterogeneity in the conditions of competition across India, the whole of India is considered as the relevant geographic market. Resultantly, the relevant market in the instant case is the ‘market for biscuits in India’.

Further, the other bakery and dairy products supplied by OPs viz. cakes, rusk, milk, ghee, cheese, butter, etc. face intense competition from organised and un-organised local players; and the business of OPs in these segments appear to be relatively insignificant. Accordingly, it does not merit making assessment of dominant position in respect of these products and it can reasonably be presumed that the conduct of OPs in relation to these products cannot be considered as contravention of the provisions of the Act.

As regards the relevant market, the Commission notes that Britannia is a prominent biscuit brand in India. However, the biscuits industry in India has always evidenced the presence of other organised and unorganised players. The other organised players in the market include ITC, Parle and Priya Gold. The market for manufacture and sale of biscuits in India has also witnessed recent entries by foreign brands such as ‘Unibic’ and ‘Mc Vities’. These competitors of OPs have comparable size and resources; and also offer different categories/range of biscuits. Presence of such players indicates that the buyers have options to choose in the relevant market. Thus, it is found that market for biscuits, including each of the segments therein, exhibits intense competition and OPs do not possess sufficient market power to act independently of the competitive forces prevailing in the relevant market. Notwithstanding this, the Commission also notes that market-segmentation and offering special rates/discounts on the basis of sale volumes per se cannot be regarded as anti-competitive.

In view of the foregoing, no case of contravention of the provisions of Section 4 of the Act is made out against OPs. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

DEPARTMENT OF SPORTS

v.

ATHLETICS FEDERATION OF INDIA [CCI]

Case No. 01 of 2015

Sudhir Mital, Augustine Peter, U. C. Nahta, M. S. Sahoo & Justice G. P. Mittal, [Decided on 16/03/2016]

Competition Act – Section 3 & 4 – Abuse of dominance – OP restricting state marathons which are without its permission – Whether constitute abuse of dominance – Held, Yes.

Brief facts:

Informant is stated to be aggrieved by the decision taken by AFI in its Annual General Meeting (AGM) held on 11-12 April, 2015 to take action against the state units/ officials/ athletes who encourage unauthorised marathons without taking permission of AFI. The relevant excerpt from the minutes of the said meeting of Opposite Party (OP) is produced below:

Informant has alleged that the above decision of OP is anti-competitive and is not conducive for development of the sport of athletics at the grass-root level. It is averred that such a decision of AFI will have an adverse impact on promotion of sports and protection of the interest of sports persons and will prohibit healthy competition. Accordingly, Informant has requested the Commission to initiate action against AFI under various Sections of the Act.

Decision: Investigation by DG ordered.

Reason:

The Commission has perused the available material on record and heard Informant and OP through their representatives.

The assessment of whether an entity is an 'enterprise' or not is to be done based on the activities of the entity under consideration. It is observed that in the instant case, the entity in question i.e. AFI has been engaged in organizing various national and international athletic events and generating revenue out of such activities through various means such as royalty, sponsorship, etc. The said activities of AFI can be aptly termed as economic activities and hence, AFI stands covered within the meaning of 'enterprise' in terms of the provisions of Section 2(h) of the Act.

Since the allegations of Informant pertain to the conduct of OP in providing services relating to organisation of athletic events, the relevant product market in the instant case would be the market for ''provision of services relating to organisation of athletics/ athletic activities''. It is observed that provision of services relating to organisation of athletic events is distinct and cannot be substituted with any other related products/ services. The relevant geographical market in this case may be taken as 'India' because OP organises various national and international athletic events throughout India. Accordingly, the relevant market in the instant case is the market for 'provision of services relating to organisation of athletics/ athletic activities in India'.

The Commission observes that OP being the apex body for managing athletics in India and by virtue of its association with IAAF, AAA and Indian Olympic Association, it is controlling athletic activities in the entire country. Further, OP also conducts national, international athletic meets in the country. Also, it has thirty two affiliated state units and institutional units and it conducts national championships and selects Indian Athletics Teams for various international competitions. Thus, in relation to organisation of athletic activities in India, OP is the supreme authority having control over all such events and activities. Therefore, the Commission is of the view that OP is dominant in the relevant market of 'provision of services relating to organization of athletics/ athletic activities in India'.

It appears that by virtue of its dominance in the relevant market, OP is trying to impose discriminatory conditions like mandatory permission for conducting national and international marathon meets and it is thereby restricting the entry of new entrants into the relevant market. The said conduct of OP prima facie appears to be abuse of dominant position by OP in terms of the provisions of Section 4 of the Act.

With regard to contravention of the provisions of Section 3 of the Act in the matter, the Commission observes that the information does not disclose any kind of agreement which can be termed as anti-competitive in terms of any of the provisions of Section 3 of the Act.

Based on the above, the Commission is of the view that there exists a prima facie case of contravention of provisions of Section 4 of the Act by OP, and that it is a fit case for investigation by the Director General (the

'DG'). Accordingly, under the provisions of Section 26(1) of the Act, the Commission directs the DG to cause an investigation into the matter and to complete the investigation within a period of 60 days from the receipt of this order.

REGISTRARS ASSOCIATION OF INDIA

v.

NSDL & ORS [CCI]

Case No. 104 of 2015

Devender Kumar Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, M. S. Sahoo & Justice G. P. Mittal, [Decided on 29/03/2016]

Competition Act, 2002 – Sections 3 & 4 – NSDL proposed to enter the share transfer agency segment through its subsidiary – Whether it constitutes abuse of dominance by NSDL being a depository to also become a share transfer agent – Held, No.

Brief facts:

Informant is an association representing Registrars to an Issue and Share Transfer Agents ('RTI'/'STA'). The members of Informant are acting as an intermediary between the issuer (the entity/ company issuing securities) and the depository and, inter alia, providing services such as dematerialisation, initial public offers (IPO) and corporate actions in securities marketin India. National Securities Depository Ltd ('NSDL'/ 'OP 1') is the largest depository in India and is engaged in the business of providing depository services like dematerialisation and it handles all securities held and settled in dematerialised form in the National Stock Exchange. NSDL Database Management Limited ('NDML'/ 'OP 2'), a wholly owned subsidiary of OP 1, is providing integrated services including information technology, process design, operations and administrative infrastructure etc. relating to securities market. Securities and Exchange Board of India ('SEBI'/ 'OP 3') is a regulator formed to safeguard the interest of the investors and to promote/ develop the securities market in India.

The members of the Informant are operating in the participant market as RTI/ STA wherein OP 1 acts as a regulator. Informant has stated that OP 2 has filed an application before OP 3 for being registered as a RTI/ STA i.e., to enter into the participant market. It is the case of the Informant that OP 1, through its wholly owned subsidiary OP 2, is trying to enter into the participant market i.e. RTI/ STA market wherein it acts as a regulator. As per the Informant, OP 1, being a regulator of the participant market, has all the information/ details about the said market and no new entrant in the market could match the infrastructure and muscle power of OP 2. Being a regulator in the participant market, it is apprehended that OP 1 would favour OP 2 as the preferred service provider. Informant has alleged that the said conduct of OPs would create business uncertainties for other players in the participant market and would lead to consolidation in the securities market where the two markets such as depository services market and participant market (as envisaged in the Depositories Act, 1996) would merge, thereby creating a monopoly situation in the market.

Further, it is alleged that the said conduct of OPs is also likely to cause an anti- competitive effect in the market in contravention of the provisions of Sections 3 and 4 of the Act as the proposed entry of OP 2 into RTI/ STA market would discourage competition and hamper innovation in this segment. In view of the above, Informant has, inter alia, prayed before the Commission to institute an inquiry against OPs under Section 26(1) of the Act.

Decision: Case closed.

Reason:

The Commission observes that the Informant has filed this information based on the apprehension that OP 2's efforts to enter into RTI/ STA market may cause injury to the interest of its members as the parent company of OP 2 i.e., OP 1 is the largest depository in India and is handling all the securities traded on National Stock Exchange. The Commission notes that the allegations made by the Informant are premature as the application of OP 2 is at the preliminary stage of processing before SEBI. It may be noted that an action for an alleged anticompetitive conduct can be initiated by the Commission in terms of either the provisions of Section 3 or Section 4 of the Act only

if the alleged anti-competitive conduct has already taken place. In the instant matter, entry of OP 2 in the participant market is a mere proposal. Since OPs are not operating in the participant market as of now, the alleged anti-competitive conduct of Ops in that market cannot be examined in terms of the provisions of Sections 3 or 4 of the Act at this stage.

It may also be noted that there is nothing binding on OP 1 to not engage in any activities relating to the participant market through its subsidiary OP 2. SEBI in its comments/ views has categorically stated that there are no restrictions on the activities that can be carried out by a subsidiary of a depository. SEBI has stated that RTI/ STA functions are commonly performed by Central Securities Depository (CSD) in a number of countries around the world and there are several jurisdictions where there is a single registrar in the market which is often the CSD. SEBI has also forwarded Thomas Murray Report wherein it is stated that in a number of jurisdictions, the market for registrar services is a competitive market wherein CSDs also compete.

Based on the above analysis, the Commission is of the view that the allegations levelled against OPs do not raise any competition concern in the market at this stage. Thus, the Commission finds that no case of contravention of the provisions of the Act is made out against OPs in the instant matter and the matter is closed in terms of the provisions of Section 26(2) of the Act.

CONFEDERATION OF REAL ESTATE BROKERS ASSOCIATION OF INDIA

v.

MAGICBRICKS.COM & ORS [CCI]

Case No. 23 of 2016

Devender Kumar Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, Dr. M. S. Sahoo & Justice G. P. Mittal. [Decided on 03/05/2016]

Competition Act, 2002 – Section 4 – Abuse of dominance – Real estate broking through internet portals – Offer of less brokerage commission – whether constitutes abuse of dominance – Held, No.

Brief facts:

The information in the present matter was filed by Confederation of Real Estate Brokers' Association of India ('Informant') under Section 19(1)(a) of the Competition Act, 2002 (the 'Act') against Magicbricks.com ('OP 1'), 99acres.com ('OP 2'), Housing. com ('OP 3'), Commonfloor.com ('OP 4') and Nobroker.in ('OP 5') [collectively, hereinafter 'OPs'] alleging, inter alia, contravention of the provisions of Section 4 of the Act.

The Informant is a confederation of thirty five real estate brokers' association, having combined membership of approximately 20,000 real estate brokers. OPs are various online portals engaged in the activities of real estate listing, property finder solution, etc. OPs run and manage their respective websites and property services division by acting as commission agents in real estate transactions.

The Informant primarily appears to be aggrieved by the conduct of OPs in indulging NBP or charging much less as brokerage fee compared to the traditional brokerage fee of 2% of the sale/purchase value of a property while undertaking a real estate transaction or public auctioning of properties. It is averred that due to such practice of

OPs traditional real estate brokers are getting eliminated from the market. The Informant has alleged that OPs are dominant and have contravened of the provisions of Section 4 of the Act.

Decision: Complaint dismissed.

Reason:

The Commission observes that India is one of the fastest growing e-commerce markets. With the growth of e-commerce, the number of online portals engaged in the activities of real estate listing, property finder solution, etc. have been increasing. It is observed that, besides OPs, there are also many other real estate listing sites which are offering similar services, providing various options to the consumers. Besides the online platforms, real estate brokerage business in India is also undertaken by the traditional brokers in a large scale. Both the online platforms and the off-line traditional brokers are offering similar services to the customers. Accordingly, the Commission is of the view that on-line and off-line services of brokers cannot be distinguished while defining the relevant product market in the instant case. Both are alternative channels of delivering the same service. So, the market for 'the services of real estate brokers/ agents' is considered as the relevant product market in the present case. With regard to the relevant geographic market the Commission observes that the traditional brokers/ agents provide services within their respective localities whereas OPs offer their services anywhere in India. The services offered by OPs on the supply side enables real estate properties located anywhere in India to be listed for sale/ purchase/ renting whereas on the demand side OPs through their website enable consumers to purchase/ rent any property in their localities or anywhere in India. Further, Ops provide services regarding details of properties such as value, area, locality etc. to the real estate brokers as well as to the consumers throughout India. Therefore, the relevant geographic market in this case is considered as 'India'.

In view of the relevant product market and the relevant geographic market defined supra, the relevant market in the instant case is delineated as market for 'the services of real estate brokers/ agents in India'. On the issue of dominance it is observed that based on the claims of OPs on their respective websites and in their advertisements, ranking of websites by Alexa.com, and market capitalisation data of OP 2 and OP 3; the Informant has submitted that OPs are dominant real estate portals/ websites. However, the Commission has considered the relevant market as 'the services of real estate brokers/ agents in India', which is different and broader than the relevant market conceived by the Informant. The Commission observes that in the said market, there are large number of players operating, both through online and off-line channels. It is so because presently, in India, no licence or registration is required to undertake the brokerage business in real estate sector. Thus, the presence of a large number of listing sites and traditional brokers in the said relevant market pose competitive restraint on each other and hence no specific player can act independently of the market forces and affect the consumers or other players in its favour. The Commission has also perused the website ranking figures of Alexa.com as submitted by the Informant and is of the view that based on the said figures it is not possible to gauge the dominance of any of the OPs in the relevant market because the ranking is limited to only the websites/ portals and does not include the off- line brokers. Further, the said rankings are based on traffic attracted by the websites which keep on changing regularly based on the number of page views. Furthermore, it is observed that based on the said ranks none of the websites (i.e., OP 1 to OP 4) has either been able to secure a rank within top 10 or even able to secure a rank within top 100. Also, there exist wide disparities in ranking amongst OP 1 to OP 4. Accordingly, the Commission is of the opinion that none of the OPs are dominant in the relevant market.

In the absence of dominance of any of the OPs in the relevant market, the Commission is of the view that, no case of

contravention of the provisions of Section 4 of the Act is made out against any of the OPs in the present case and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

XYZ

v.

REC POWER DISTRIBUTION COMPANY LTD [CCI]

Case No. 33 of 2014

S. L. Bunker, Sudhir Mittal, Augustine Peter, U. C. Nahta, Dr. M. S. Sahoo & Justice G. P. Mittal. [Decided on 05/05/2016]

Competition Act, 2002 – Sections 3 & 4 – Abuse of dominanceholding company financing of rural electrification projectssubsidiary company focuses on developing and investing in electricity distribution and related activities – Whether abuse of dominance – Held, No.

Brief facts:

Rural Electrification Corporation Limited (hereinafter, 'REC') was incorporated in the year 1969 with the main objective to finance and promote rural electrification projects in the private and public sector in India. It finances rural electrification projects across India and also provides loans to Central/State Sector Power Utilities, State Electricity Boards, Rural Electric Cooperatives, NGOs and Private Power Developers. RECPDCL, a wholly owned subsidiary of REC, was set up in the year 2007 with specific focus on developing and investing in electricity distribution and related activities.

The Informant has alleged that RECPDCL has been leveraging its association with REC for securing work related to consultancy services in relation to proposed rural electrification projects, mainly preparation of Detailed Project Report (DPR), by giving verbal assurance of securing approvals for the financing of such projects by REC. It has been alleged that RECPDCL has secured various orders relating to consultancy services in case of rural electrification projects from the state distribution utilities under the Rajiv Gandhi Grameen Vidyutikaran Yojana (RGGVY) scheme on the pretext that REC is the nodal agency for implementation of RGGVY. It has thus, distorted competition in the market for consultancy services related to the said project. The Informant was further aggrieved because of the awarding of DPR preparation work to RECPDCL on nomination basis by various state utilities without following the tendering process in complete disregard to the CVC guidelines and competition law principles. This allegedly amounted to denial of market access to the competitors of RECPDCL in the consultancy market. Thus, as per the information, the manipulation of competition by RECPDCL under the aegis of REC amounted to contravention of the provisions of Sections 4(2) (c) and 4(2) (e) of the Act.

Decision: Case closed.

Reason:

The Commission has perused the DG report and the replies/objections filed by the Informant and the OP, along with the material available on record, besides hearing the counsels appearing for the parties.

Issue I: Leveraging of Dominant Position:

The DG concluded that REC's dominance in rural electrification financing was directly translating into the award of consultancy work by the PIAs to RECPDCL. In the absence of any evidence to support the contrary, the DG relied on these circumstantial evidence to establish that REC group was using its position of dominance in the market of financing of rural electrification projects in India under RGGVY/DDUGJY to protect the market for consultancy services for rural electrification projects under RGGVY/DDUGJY in India in violation of Section 4(2) (e) of the Act.

The Commission has considered the findings of the DG and the submissions of the parties on the issue of leveraging. The leveraging doctrine applies when a firm has sought to use its dominance in one relevant market to enter into or protect the second market without competing on merits in that market. In the instant case, the DG's investigation reveals that RECPDCL garnered a significant share of the secondary relevant market in the first year of its operation, i.e. 2013-14. It also brings out the fact that award of DPRs during the period of investigation was mainly on nomination basis.

In this regard, the Commission notes that the DG has relied upon the responses of various competitors and consumers of RECPDCL to conclude that OP group was using its dominant position in the first relevant market to ensure that DPR work was awarded to RECPDCL in the second relevant market. Such work was awarded on nomination basis, the reason for which, as per the DG was not sufficiently explained by the Discoms/consumers. The Commission, therefore, looked into the evidence relied upon by the DG to examine whether the conclusions so drawn are in accordance with the responses of the aforesaid parties or not. Having considered the statements made by the competitors of OP, the Commission is of the view that there is no clear evidence on record to infer that the OP group leveraged its dominant position to ensure awarding of work to OP.

Thus, it is apparent that there is no evidence on record either to show that REC has leveraged its dominant position in the first relevant market to enter into or protect the second relevant market or to show that REC has given any assurance to Discom's that their decision to appoint RECPDCL as a consultant for the preparation of DPRs would lead to approval of the project. The Commission is, therefore, of the view that there is no concrete evidence on record to establish that OP group has leveraged its dominant position in the first relevant market to enter into or protect the second relevant market. Therefore, the allegation of violation of the provisions of Section 4(2) (e) of the Act does not stand established.

Issue 2: Denial of Market Access:

The second element in the enquiry of a case under denial of market access is with regard to the anti-competitive effect/distortion in the market because of such conduct. The Commission notes that the DG has primarily relied upon the award of DPRs on nomination basis to RECPDCL. During 2013-14, RECPDCL was awarded 70 DPRs on nomination basis out of total 189 DPRs prepared by the consultants i.e. 37% of the total market. Further, the market share of RECPDCL in the second market, including all DPRs prepared by it for 2013-14, is approximately 40%. The Commission notes that although the entry of RECPDCL in the second market has led to a reduction in the market share for the other consultancy firms, the market was nevertheless contestable. The responses from the Discoms (i.e. the consumers of RECPDCL) have clearly revealed the reasons for their preference for appointing RECPDCL. Thus, in the absence of a conduct on the part of OP group, the reduction in the market share for some of the players cannot be relied upon to infer anti-competitive conduct on the part of OP group. Further, the data submitted by RECPDCL depicts that the percentage of DPRs prepared by it has decreased in the year 2015-16 to approximately 36% which further weakens the allegation regarding denial of market access. With more than 60% market shared by the other consultancy firms and in absence of any evidence regarding OP group's influence on the Discoms' decision to follow the nomination route, the Commission is of the view that contravention of Section 4(2) (c) cannot be made out in the instant case.

Thus, the evidence on record is not sufficient to establish that REC, as the nodal agency for implementation of the RGGVY scheme and as one of the appraising authorities of rural electrification projects under the scheme, exercised undue influence on the PIAs or meted out any discriminatory treatment to the competitors of its subsidiary RECPDCL in order to enter into or protect the relevant market of preparation of DPRs. In view of the above discussion, the Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the OP group and the matter is ordered to be closed forthwith.

SOUTHWEST INDIA MACHINE TRADING PVT LTD

v.

CASE NEW HOLLAND CONSTRUCTION EQUIPMENT INDIA PVT LTD [CCI]

Case No. 97 of 2015

Devender Kumar Sikri, S. L. Bunker, Sudhir Mittal, Augustine Peter, U. C. Nahta, Dr. M. S. Sahoo & Justice G. P. Mittal. [Decided on 03/05/2016]

Competition Act, 2002 – Sections 3 & 4 – Abuse of dominancecontract for sale of machinery – Seller refuses to sell on the ground of misuse by the buyer- whether abuse of dominance – Held, No.

Brief facts:

The Informant had issued two purchase orders for the purchase of the 50 units Backhoe Loader and 10 units of Soil Vibratory Compactor on OP. Later on the informant place another optional purchase order for the purchase of 100 units of Backhoe Loader and 80 units of Soil Vibratory Compactor.

It appears that the informant had sold these equipment in auction and exported the same. The OP after supplying 35 units out of the 50 units of the Backhoe Loaders, stopped further supplies and informed the informant that it will take appropriate legal actions against it for selling the equipment in auction and exporting the same thereby jeopardising the market of it in these countries. According to the Informant, such conduct of OP amounts to entering into anti-competitive agreement in contravention of the provisions of Section 3 of the Act. It has been further alleged that through such conduct, OP had: (i) directly or indirectly imposed an unfair and discriminatory condition in the sale or purchase of goods; (ii) limited and restricted the market for goods and denied market access; (iii) sought to impose supplementary obligations which have no bearing with the subject matter of the contract; and (iv) used its dominant position in one relevant market to protect other relevant market. For these purported reasons, it has been alleged by the Informant that the conduct of OP is in contravention of the provisions of Section 4 of the Act as well.

Decision: Case closed.

Reason:

The Commission is of the view that the instant case concerns the following two relevant markets: (a) market for manufacture and sale of Backhoe Loaders in India; and (b) market for manufacture and sale of Vibratory Soil Compactors in India.

The Informant had portrayed OP as a top-tier player in the Backhoe Loaders Segment. However, it could not provide any material which could establish dominance of OP in this relevant market. It is relevant to note that the Commission, in its order dated 11th March 2014 in Case No. 105/2013, had prima facie found JCB to be in a dominant position in the relevant market for manufacturing and sale of Backhoe Loaders in India. Given these facts and circumstances, the Commission is of the view that OP cannot be regarded as a dominant enterprise in the relevant market for manufacture and sale of Backhoe Loaders in India.

As regards the market for manufacture and sale of Vibratory Soil Compactors in India, the Commission observes the presence of other players such as JCB, Volvo, Escorts, Dynapac, Greaves, etc. in the soil compactors business in India, indicating availability of choice to consumers. Given the materials available on record, OP cannot be regarded as dominant in the relevant market for manufacture and sale of Vibratory Soil Compactors in India as well. In view of the foregoing, it emerges that OP does not enjoy dominant position either in the market for manufacture and sale of Backhoe Loaders in India or in the market for manufacture and sale of Vibratory Soil Compactors in India. In the absence of OP being dominant in any of the relevant markets as delineated supra, the Commission does not see a case of contravention under Section 4 of the Act.

The Commission further notes that the case does not involve any agreement between persons engaged in similar/identical business. Thus, no case under Section 3 of the Act is also discernible from the facts presented in the information. In light of the above analysis, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

PICASSO ANIMATION PRIVATE LTD

v.

PICASSO DIGITAL MEDIA PVT LTD [CCI]

Case No. 75 of 2016

D.K.Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, & G. P. Mittal [Decided on 25/10/2016]

Competition Act, 2002 – Abuse of dominance – Allegations as to violation of copyright in brand name "Picasso" – Whether constitutes abuse of dominance – Held, No.

Brief facts:

The Informant was mainly aggrieved by the use of its brand name "Picasso" by OP as well as OP's claim to be associated with Maharishi Group. The Informant had alleged that this illegal conduct of OP has caused loss of goodwill and business to the Informant. The Informant had also alleged that the said conduct of the OP amounts to abuse of dominant position by contravening the provisions of Section 4 of the Act.

Decision: Complaint rejected.

Reason:

After a careful perusal of the information and material available on record, the Commission notes that both the Informant and OP are engaged in the business of offering various animation related services which includes offering certification and diploma courses in animation. As per the OXFORD dictionary, 'animation' is a technique of photographing successive drawings or positions of puppets or models to create an illusion of movement when the film is shown in sequence. As per the CAMBRIDGE dictionary, 'animation' means moving images created from drawings, models, etc. that are photographed or created by the computer. There is no certain definition of the term but it can be safely inferred that "animation" generally means and includes drawings and moving images created through photography or with the help of computer. Animation courses are not generally substitutable with other vocational courses offered by institutions in view of their peculiarity. The selection of any course is a personal choice of the candidates which is based on various factors such as individual taste, inclination and interest. Further courses also differ on the fee charged. In view of the above mentioned characteristics, vocational course such as animation is not generally substitutable with other vocational courses viz., web designing, internet marketing, electrical and electronics, hardware and software repair and maintenance, mobile repair, etc. and other streams or courses such as, law, arts, hotel management, finance, banking, insurance, engineering or other courses. Thus, the relevant product market is "Market for providing animation related education services".

The Commission observes that there are many colleges and institutions which are providing degrees, certifications and diploma courses in the field of animation at pan India level. Some of the institutions are even providing online courses. Further, the conditions of competition in animation related education services are homogenous throughout India in the absence of any evidence to the contrary. Hence, the relevant geographic market is the territory of India.

In view of the above discussion, the Commission holds that the relevant market in the present matter is "Market of providing animation related education services in India".

It is further noted that apart from the OP, there are many other institutions providing online and offline trainings in animation courses. Prominent amongst them are Arena Animation, Maya Academy of Advanced Cinematic (MAAC), Zee Institute of Creative Arts (ZICA), Global School of Animation, Whistling Woods International Institute, Tekno Point Multimedia, Apeejay Institute of Design, Toonz Webel Academy (TWA) and Massco Media. The relevant market seems to be quite competitive with a number of institutions offering animation courses to the students. Though the market shares of these institutions are not available in the public domain, however, it can safely be inferred that the OP does not have dominance in the relevant market in view of the competitive scenario and owing to the presence of many reputed institutions.

In the absence of dominance of the OP in the relevant market, there is no need to look into the allegations regarding abuse of dominance in contravention of the provisions of Section 4 of the Act. Further, we do not find any breach under Section 3 of the Act.

RAKESH SANGHI

v.

BENNETT, COLEMAN & COMPANY LTD & ANR [CCI]

Case No. 89 of 2016

Devender Kumar Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, Justice G. P. Mittal. [Decided on 05/12/2016]

Competition Act, 2002 – Publication of legal notices in newspapers – OP charging higher fees than other newspapers – Whether abuse of dominance – Held, No

Brief facts:

As per the information, the Informant is a lawyer practicing in the city of Hyderabad. It is stated that the Informant is required to publish notices on behalf of his clients for certain purposes such as transactions of land/real estate, cautioning prospective purchasers against buying disputed properties etc. It is averred that the Informant wanted to publish a caution notice in the Hyderabad edition of the newspapers published by the OPS. The rates charged by the OPs was around Rs.1,00,000/-. The Informant has averred that the rate quoted by the OPs for the said advertisement is much higher than the rates for similar advertisement in other newspapers circulated in Hyderabad and Secunderabad. As per the information, OP 1 is charging two different rates for commercial and non-commercial advertisements in its newspaper. It is stated that for commercial advertisements, it is charging more as compared to non-commercial advertisements. The Informant has averred that OP 1 has converted his legal notice, which falls under non-commercial advertisement, into a commercial advertisement as merely the name of a Private Limited Company has been mentioned in the said legal notice.

Decision: Complaint dismissed.

Reason:

The Commission has perused the information and the materials available on record. It is observed that the Informant is aggrieved by the conduct of OPs of quoting exorbitant rates for advertising legal/public notices in their newspapers in the twin cities of Hyderabad and Secunderabad in the State of Telangana. The Commission notes that the Informant is an Advocate practicing in the Courts of Hyderabad and on instruction of his clients, he publishes public/legal notices in the newspapers of the OPs in order to give them wide publicity. Thus, the provision of services relating to publication of advertisements including public/ legal notices etc. in newspapers may be considered as the relevant product market in this case. With regard to the relevant geographic market, the Commission observes that the geographic area of Hyderabad and Secunderabad may be considered as the relevant geographic market in this case. It is so because the Informant had proposed to publish the said notice in the newspapers in the geographical area of Hyderabad and Secunderabad. Accordingly, ‘the provision of services related to publication of advertisements including public/ legal notices etc. in the newspapers in Hyderabad and Secunderabad' may be considered as the relevant market in this case.

With regard to dominance, the Commission observes that in the twin cities of Hyderabad and Secunderabad, the major Telugu daily newspapers such as Eenadu, Sakshi, Vaartha, Andhrajyothi, Surya, Prajasakti, Andhrabhoomi, Andhra Prabha and Namaste Telangana; the major English daily newspapers such as The Times of India, The Hindu, The Deccan Chronicle, Business Standard and The Economic Times; the major Urdu daily newspapers such as The Siasat Daily, The Munsif Daily, The Etemaad and Rahnuma-i Decca; and the Hindi daily The Daily Milap are in circulation. Besides, there are a number of local newspapers also in circulation in the aforesaid relevant geographical market. Therefore, the presence of a large number of other English newspapers and regional dailies in Hyderabad and Secunderabad prevents the OPs from exercising any kind of market power independent of market forces and the presence of such large number of other newspapers in the aforesaid market also provides more choices to the Informant which are substitutable in nature.

Therefore, the Commission is of the view that neither OP 1 nor OP 2 possess the market power to act independently of competitive forces in the relevant market as defined supra or to affect its competitors or consumers or the relevant market in its favour. Therefore, neither OP 1 nor OP 2 is found to be dominant in the relevant market. In the absence of dominance of OP 1 or OP 2 in the relevant market, the question of abuse of dominance by them in terms of Section 4 of the Act does not arise.

In the light of the above analysis, the Commission finds that no case of contravention of the provisions of Section 4 of the Act is made out against any of the OPs in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.

VEER PRATAP NAIK

v.

AVEVA INFORMATION TECHNOLOGY INDIA PVT LTD [CCI]

Case No. 67 of 2016

Devendra Kumar Sikri, Sudhir Mital, Augustine Peter, U. C. Nahta. [Decided on 05/12/2016]

Competition Act, 2002 – Software licence contracts – Restrictive clauses – Whether constitutes anti-competition practice and abuse of dominance – Held, No

Brief facts:

As per the information, the Informant is engaged in the business of providing engineering support in the form of 3D modeling and preparation of structural steel fabrication drawings to engineering, procurement and construction (EPC) companies in India as well as globally.

It is stated that the Informant entered into an agreement with BOCAD Services International S.A. Belgium on 26th August, 2010 to purchase 30 'BOCAD licenses' over a period of the next 3 years for a total consideration of 10,000 Euros each. It is averred that 20 of these licenses were purchased before BOCAD got acquired by AVEVA i.e. before May, 2012.

It is averred that, after the merger, AVEVA's representatives had contacted the Informant and insisted that the Informant buy the balance 10 licenses of BOCAD as per their earlier agreement. Thereafter, OP also offered 6 licenses of the 'Plant Design Management System (PDMS) Software' along with the balance 10 BOCAD licenses. In this regard, the Informant entered into an agreement with the OP vide Licenses Agreement CA-AP1102 dated 1st January, 2014.

It is stated that the OP had concealed the information that the licenses of its products were also available on a monthly rental basis, and it had collected the first year Annual Maintenance Contract (AMC) fee of Rs 10,710,000/- on a yearly basis from the Informant. It is further alleged that there were fundamental differences between the terms

of agreement entered with BOCAD vis-a-vis the agreement entered with the OP and that OP had abused its dominance and stipulated restrictive conditions in the licenses.

Decision: Complaint dismissed.

Reason:

The dispute between the Informant and the OP in the present case emanates from an agreement entered into between BOCAD and the Informant for supply of 30 BOCAD 3D licenses. It is observed that after BOCAD was acquired by AVEVA, the Informant had entered into a new agreement with the OP for supply of 3D software. From the information available in the public domain, it is observed that 3D modelling engineering software is used in industries like 3D architecture, interior design, printing, animation etc. These software tools allow for building and customising structural models from scratch. Based on the above, the Commission notes that the relevant product market in this case may be defined as the market for ‘3D modelling software’. With regard to the relevant geographic market, it is noted that since the market for 3D modelling software exhibits distinctly homogenous market conditions in the territory of India, the relevant geographic market in this case may be considered as the ‘territory of India’. As such, the relevant market in this case may be defined as the market for ‘3D modelling software in India’. With regard to dominance of OP in the relevant market defined supra, from the information available in the public domain, it is observed that there are other 3D software companies which are making and selling 3D software products which are substitutable with the software being manufactured by OP.

During the course of the hearing, OP has submitted that even in the markets for Engineering Design Tools (EDT), EDT Plant Design or EDT AEC, it does not have any market power. OP has further submitted a report of ARC Advisory Group (report) on “Engineering Design Tools for Plant and Infrastructure” which reveals that in 2014, it had a market share of 9.5% in the market for EDT, 16.7%, in the market for EDT Plant Design and 1% in the market for EDT AEC, on a worldwide basis. Further, according to the said report, AVEVA faces stiff competition from players such as Autodesk (having a market share of 36% in EDT and 53.4% in EDT - AEC), Intergraph (having a market share of 30.4% in EDT - Plant Design and 16.5% in EDT) and Bentley (having a market share of 18.7% in EDT and 24.3% in EDT AEC).

Based on the above, the Commission observes that the OP does not enjoy a position of strength which would enable it to operate independent of market forces in the relevant market. Therefore, OP cannot be considered as a dominant player in the relevant market. The Commission notes that in the absence of dominance of OP in the relevant market, the question of abuse of dominant position by the OP does not arise. Thus, no case of contravention of any of the provisions of Section 4 of the Act is made out against OP in the instant case. With regard to the contravention of Section 3 of the Act in the matter, the Commission notes that the allegation of the Informant does not hold any ground as the information does not disclose any kind of agreement which can be termed as anti-competitive in terms of any

of the provisions of Section 3 of the Act.

In the light of the above analysis, the Commission finds that no case of contravention of any of the provisions of either Section 3 or 4 of the Act is made out against the OP in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.

ASHUTOSH BHARDWAJ

v.

DLF LTD & ORS [CCI]

Case No. 01 of 2014 with Case No.93 of 2015

Devender Kumar Sikri, S. L. Bunker, Augustine Peter, U. C. Nahta & G. P. Mittal
[Decided on 04/01/2017]

Competition Act, 2002 – Section 4 – Abuse of dominance – Restrictive clauses in the flat buyer's agreement – Delay in completion of projects – Whether constitutes abuse of dominance – Held, Yes.

Brief facts:

Informants in both the cases have booked flats in the OP's housing project in Gurgaon. Informants booked flats and entered into flat buyer's agreement with OP. Even after making the payment flats were not handed over to them on the stipulated time. Further the progress of construction was also tardy. On the contrary, the OP's demanded further higher sums from the informants. In these circumstances the informants filed complaint before the CCI alleging abuse of dominance by the OP Group.

Decision: Cease & desist order passed.

Reason:

The Commission has perused the material available on record and heard the counsels of the OPs and the Informant. The issue before the Commission for consideration and determination is whether the OP Group has contravened the provisions of Section 4 of the Act or not.

Reference may be made to Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012 wherein the Commission has categorically opined that the technicality on the relevant product market need not be dwelled into if the dominance of the enterprise remains the same even in alternative relevant market definitions. The relevant Para is extracted herein below for reference:

'6.20 The Commission notes that determination of relevant market is important for assessing dominance of the Opposite Party. But defining relevant market is not an end in itself. If the primary reason for defining relevant market is assessment of dominance of a particular enterprise/ market player with regard to that relevant market, the Commission is of the opinion that such exercise can be dispensed with when such assessment remains unchanged in different alternative relevant market definitions. Therefore, when under possible alternative relevant market definitions, the conclusion on dominance remains the same; the Commission finds no reason to get into the technicalities of precisely defining relevant market.'

In the above case, the Commission has further opined that even secondary market will be not considered while defining relevant product market by referring to Belaire's case. The relevant extract in Belaire's case is provided herein below:

'12.35 .....While secondary market may have some bearing on the demand and supply variables, it certainly cannot form a part of the relevant market for the simple reason that the primary market is a market for service- while the secondary market is a market for immoveable property. Moreover, while building an apartment, a builder performs numerous development activities like landscaping, providing common facilities, apart from obtaining statutory licenses while a sale in secondary market merely transfers the ownership rights. An individual who is selling an apartment he or she has purchased cannot be considered as a competitor of DLF Ltd. or any other builder/developer. Nor is he or she providing the service of building/developing. The dynamics of such sale or purchase are completely different from those existing in the relevant market under consideration. The value added or the value reduced due to usage or otherwise does not even leave the apartment as the same one as had been built or developed by the builder/developer...'

Drawing inference from the above, the Commission hereby reiterates that when the dominance of an enterprise remains unchanged in a market even with an alternative market definition, technicality of the product market need not be dwelled further. At the same time, the Commission sees no reason to deviate from the product market definition taken in earlier cases dealing with similar issues and project i.e., Case No. 13 and 21 of 2010 and 55 of 2012 where the relevant product market was defined as the market for the 'provision of services for development/sale of residential apartments'. With regard to the relevant geographic market, the Commission agrees with the DG's view that Gurgaon would be the geographic region for the purpose of the present cases. Reference is made to the observation made by the Commission in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012 where Belaire's case was yet again referred to define the relevant geographic market. The relevant extract is provided herein below:

> *'6.23....The 'geographic region of Gurgaon' has gained relevance owing to its unique circumstances and proximity to Delhi, Airports, golf courses, world class malls. During the years it has evolved as a distinct brand image as a destination for upwardly mobile families. As it has been reasoned out in the order passed by this Commission in the Belaire case, a person working in NOIDA is unlikely to purchase an apartment in Gurgaon, as he would never intend to settle there. Thereafter, the Commission in that order distinguished between buyers looking for residential property out of their hard earned money or even by taking housing loans and those buyers who merely buy such residential apartments for investment purposes; stating clearly that the Commission was not looking at the concerns of speculators, but of genuine buyers. It was therefore, observed that a small 5% increase in the price of an apartment in Gurgaon, would not make a person shift his preference to Ghaziabad, Bahadurgarh or Faridabad or the peripheries of Delhi or even Delhi in a vast majority of cases. The COMPAT's order, dated 19.05.2014 passed while disposing of the appeals filed against the Commission's order in the Belaire case, upheld the Commission's finding on the relevant geographic market to be 'geographic region of Gurgaon'.....'*

Based on the above, the Commission is of the view that geographic region of 'Gurgaon' is the appropriate relevant geographic market and not the entire NCR as contended by the OPs.

On the dominance of OP Group, there is no doubt that the strength which the OP Group possesses in residential real estate segment in the geographic region of Gurgaon is incomparable. In the order dated 12.05.2015 in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012, the Commission has dwelled into details on the aspect of dominance of the OP Group and has thoroughly assessed the DG's findings. Thereafter, it was finally concluded that the OP Group held a dominant position in the relevant market. The assessment done by the Commission in the previous orders will also apply in the present matters since the issues, the relevant period and the OPs involved are the same. Therefore, it is opined that the OP Group holds a dominant position in the market for the 'provision of services for development/sale of residential apartments in Gurgaon'.

With regard to the issue of abuse of dominance, the Commission notes that the same has already been dealt with by the Commission in its previous orders. It was held that those terms and conditions imposed through the Agreement were abusive being unfair within the meaning of Section 4(2)(a)(i) of the Act. For the sake of brevity, the analysis on the alleged abusive terms is not provided herein. Considering the assessment done in the previous cases including Belaire's case, the Commission is of the view that the terms and conditions imposed on the allottees in the instant matters as analysed by the DG in detail are abusive in nature and the OP Group has contravened Section 4(2)(a)(i) of the Act.

In view of the above, and in exercise of powers under Section 27(a) of the Act, the Commission directs the OP Group to cease and desist from indulging in the conduct which is found to be unfair and abusive in terms of the provisions of Section 4 of the Act.

With regard to penalty the Commission is of the view that since a penalty of Rs. 630 crores has already been imposed on the OP Group in the Belaire's case for the same time period to which the present cases belong, no financial penalty under Section 27 of the Act is required to be imposed. In view of the totality and peculiarity of the facts and circumstances, the Commission does not deem it necessary to impose any penalty on the OP Group in these cases.

INDIAN COMPETITION REVIEW

v.

GATEWAY TERMINALS INDIA PVT LTD & ORS [CCI]

Case Nos. 47 and 56 of 2016

D.K. Sikri, U. C. Nahta, & G. P. Mittal. [Decided on 08/02/2017]

Competition Act, 2002 – Sections 3 and 4 – Anti competition agreements and abuse of dominance – Container terminal service at Port – Limiting the services of CFSs at JNP, denying market access to the CFSs which are not owned by it, compelling shipping lines to either use the services of its own or select CFSs at JNP and use the services of OP 4 as well as its own CFSs at Pipavav port – Whether constitutes anti-competitive restrictions and abuse of dominance – Held, No.

Brief facts:

The Informants have alleged that OP 1 is abusing its dominant position in the market of container terminal services. The Informants appear to be aggrieved by the alleged abusive conduct of OP 1 in limiting the services of CFSs at JNP, denying market access to the CFSs which are not owned by it, compelling shipping lines to either use the services of its own or select CFSs at JNP and use the services of OP 4 as well as its own CFSs at Pipavav port, and using its dominant position in the market of container terminal services at JNP to protect the market of container terminal services at Pipavav port in contravention of the provisions of Section 4 of the Act. Further, the Informants are aggrieved by the alleged conduct of OP 1 in tying the services of its preferred CFSs along with container terminal services at JNP and refusing to deal with shipping lines that are not willing to travel towards Pipavav port in contravention of the provisions of Section 3(4) of the Act.

Based on the above submissions, the Informants have prayed the Commission to initiate an investigation into the matters under Section 26 (1) of the Act and pass a cease and desist order against the OPs for their above said alleged anti- competitive activities.

Decision: Complaint dismissed.

Reason:

With regard to the services of CFSs, which is a part of container terminal services, the Commission observes that besides two CFSs being operated by OP 1, there are 33 other players including GDL CFS, PUNJAB CONWARE CFS, BALMER LAWRIE CFS, ULA CFS, SEABIRD CFS and, CONTINENTAL CFS operating at JNP. The presence of such a large number of CFSs indicate that the consumers/shipping lines have multiple options for the services of CFS at JNP and the presence of such a large number of CFSs act as a competitive constraint upon the CFSs of OP 1 from acting independently of the market forces in the relevant market. Based on the above, OP 1 is not found to be in a dominant position in the relevant market as delineated above. In the absence of dominance, the Commission is of the view that the alleged conduct of OP 1 need not be examined. In view of the above facts, no case of contravention of any of the provisions of Section 4 of the Act is made out against OP 1 in the present case.

With regard to the allegations of the Informants that OP 1 has been tying the services of its preferred CFSs along with container terminal services at JNP and refusing to deal with shipping lines that are not willing to travel towards Pipavav port, the Commission observes that the relationship between the consignees/ shipping lines and CFSs is a purely commercial arrangement and based on contractual understanding between the parties. In this regard, it may be noted that Notifi cation No. 69/2011 dated 03.05.2011 of the Customs Department of the Government of India stipulates that the usage of a particular CFS facility is entirely the prerogative of a consignee and in the absence of the consignee making this choice, the shipping lines may nominate the CFS facility. Thus, the selection of CFS service providers at ports does not always lie with the shipping lines. Further, from the submissions made by OP 1, the Commission notes that OP 1 has also started to provide ‘Direct Port Delivery’ (DPD) facility to accredited and approved consignees. The aforesaid facility enables OP 1 to directly deliver goods to the consignees without intervention of any CFS operator. Moreover, the Commission observes that, except bald allegations of vertical anti-competitive agreement in the matters, the Informants have not provided any cogent material/documentary evidence in this regard. Accordingly, the Commission is of the view that no case of contravention of any of the provisions of Section 3(4) of the Act is made out against any of the OPs as well.

In the light of the above analysis, the Commission if nds that no case of contravention of the provisions of either Section 3(4) or Section 4 of the Act is made out against any of the OPs in the instant matters. Accordingly, the matters are closed under the provisions of Section 26(2) of the Act.

ONICRA CREDIT RATING AGENCY OF INDIA LTD

v.

INDIABULLS HOUSING FINANCE LTD [CCI]

Case No. 43 of 2016

S. L. Bunker, Augustine Peter & U. C. Nahta. [Decided on 03/02/2017]

Competition Act, 2002 – Sections3 & 4 – Anti competition agreements and abuse of dominance – Mortgage property loan – Penalty for pre-closure whether constitutes abuse of dominance – Held, No.

Brief facts:

The gravamen of the allegations in the instant case relate to imposition of pre-payment penalty levied by the Opposite Party on the Informant for premature closure of the mortgage loan. The Informant has alluded that the pre-payment penalty clause in the mortgage Loan Agreement locks-in a borrower with the lender and its imposition amounts to an aftermarket abuse.

Decision: Complaint dismissed.

Reason:

The Commission notes that the arguments of the Informant regarding the purported aftermarket and the abuse therein are misplaced as the loan services of the nature impugned herein do not involve any aftermarket as alleged by the Informant. Availing additional loan or migration of a loan from one lender to another are independent services and availing additional loan or migration from one lender to another cannot be considered as an aftermarket. An aftermarket is a special kind of antitrust market consisting of unique replacement parts, post warranty service or other consumables specific to some primary product. The term, therefore, refers to markets for complementary goods and services such as maintenance, upgrades, and replacement parts that may be needed after the consumer has purchased a durable good. Further, an independent secondary aftermarket would generally exist if consumers are not able to ascertain the life time cost of the primary product/service at the time of its purchase, there is a high switching cost to shift to substitutes and the manufacturer/service provider of the primary product/service has the ability to substantially hike the price of the good/service offered in the secondary market (i.e. aftermarket) inspite of reputational concerns. The Informant has not shown the presence of any of above factors in the instant case and those are also not discernible from the facts presented in the information. By contrast, the terms and conditions of the loan including the rate of interest, term of repayment, rate of prepayment penalty, etc. were made certain to the Informant at the time of availing the loan itself, which enables the Informant to ascertain the life time cost of the loan facility including the cost of migration of the loan to other lenders. In view of the above, the Commission notes that facts of the case do not involve any aftermarket.

Coming to the examination of the facts under Section 3 of the Act, the Commission notes that neither the Informant has made any submission/ allegation nor do the facts presented suggest existence of any horizontal agreement or vertical restraints of the nature culpable under Section 3(3) or Section 3(4) of the Act. The Informant claims that the pre-payment penalty clause under the mortgage Loan Agreement is anti-competitive and amounts to contravention of Section 3(1) of the Act. It has been submitted that prepayment penalty restricts migration of loans from one bank/financial institution to another, which in-turn discourages competition and innovation. This according to the Informant causes appreciable adverse effect on competition. As noted earlier, the market for loan against property is competitive and fragmented with the presence of several players including prominent players like State Bank of India, Punjab National Bank, HDFC Bank and ICICI Bank. In such a market scenario, the Commission does not see any appreciable adverse effect on competition caused by the pre-payment penalty clause in the mortgage Loan Agreement. Consequently, no prima facie case of contravention of the provisions of Section 3 of the Act is made out against the Opposite Party.

In view of the foregoing, the Commission is of the view that there exists no prima facie case of contravention of the provisions of Sections 3 or 4 of the Act. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

SATYENDRA SINGH

v.

GHAZIABAD DEVELOPMENT AUTHORITY [CCI]

Case No. 86 of 2016

S. L. Bunker, Sudhir Mittal, U. C. Nahta & G. P. Mittal [Decided on 02/02/2017]

Competition Act, 2002 – Section 4 – Abuse of dominance – EWS housing scheme – Unilateral price increase from Rs.2 lakhs to Rs.7 lakhs – Whether constitutes abuse of dominance – Held, Yes.

Brief facts:

The Informant is an allottee of a fl at under the Pratap Vihar residential housing scheme for the Economically Weaker Sections (EWS) ('Scheme') being developed by the OP in Ghaziabad.

From the facts of the case, it appears that the grievance of the Informant relates to the letter dated 27.11.2015 of the OP demanding a higher price of Rs. 7,00,000/- for a EWS fl at allotted to the Informant under the aforesaid scheme as compared with the price of Rs. 2,00,000/- as declared in the scheme's initial brochure and intimated to the Informant vide allotment letter dated 04.05.2009. It is the case of the Informant that the OP has abused its dominant position by arbitrarily increasing the price of the said flat in contravention of the provisions of Section 4 of the Act.

Decision: Investigation to be made by DG.

Reason:

The Commission observes that the allegations raised by the Informant in the instant matter relate to the allotment of low cost residential flats under the Pratap Vihar residential housing scheme announced by the OP for the benefit of EWS. Thus, the relevant product in question is low cost residential flats under affordable housing schemes for EWS. The Commission is of the view that other categories of residential flats available in the market for sale cannot be considered as substitute with the low cost residential flats/ houses under affordable housing schemes for EWS as there is a considerable difference in prices of both types of flats as well as in their features. It may be noted that a consumer of flats under the affordable housing scheme will not consider other residential flats available in the market as substitutable. Further, the market of low cost residential flats under affordable housing scheme for EWS is limited to people falling under a specific income group and other consumers are not eligible for allotment of flats under such housing schemes. Thus, based on the above, the Commission delineates the relevant product market in the instant case as 'the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for economically weaker sections'.

In view of the relevant product market and the relevant geographic market delineated above, the Commission defines the relevant market as "the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for economically weaker sections in Ghaziabad" in this case.

Having delineated the relevant market, the next issue is to determine whether the OP is dominant in the said relevant market. In this regard, the Commission observes that in the said relevant market the OP appears to be in a dominant position. Other than OP, very few other players are there in the relevant market who are developing and selling low cost residential fl ats targeted for economically weaker sections of the society. As per the submissions of the OP, till 2015, it has developed/ constructed a total of 10,419 EWS flats whereas, as per the information available in the public domain, no other player in the market has developed EWS flats on a comparable scale. Further, the size and resources of GDA are huge and it being a statutory authority, the buyers/allottees are completely dependent on it and there are a very few other options available in the relevant market for such buyers as substitutes of this relevant product. Based on the above, the Commission, prima facie, holds that the OP is in a dominant position in the relevant market.

The Commission observes that the conduct of OP in unilaterally raising the sale price of flats under the said scheme from Rs. 2,00,000/- to Rs. 7,00,000/-, without any enabling stipulation in the brochure of the scheme or in the allotment letter, appears to be abusive. The Commission is of the view that the above said conduct of the OP, emanating from its dominant position in the relevant market, amounts to imposition of unfair price on the Informant and other allottees of flats under the aforesaid scheme which is anti-competitive in terms of Section 4(2) (a) (ii) of the Act.

In the light of the above analysis, the Commission finds that a prima facie case of contravention of provisions of Section 4 of the Act is made out against the OP in the instant matter and it is a fit case to be investigated by the Director General (DG). Accordingly, the Commission directs the DG to cause an investigation into the matter. The Commission directs the DG to complete the investigation and file a report on the same within a period of 60 days from the date of receipt of this order.

COMPETITION COMMISSION OF INDIA

v.

CO-ORDINATION COMMITTEE OF ARTISTS AND TECHNICIANS OF W.B. FILM AND TELEVISION & ORS [SC]

Civil Appeal No. 6691 of 2014

A.K. Sikri & Abhay Manohar Sapre, JJ. [Decided on 07/03/2017]

Competition act, 2002 – Section 3 – Ban against the telecast of dubbed version of 'Mahabharat' in WB – Agitator coordination committee – Whether an enterprise – Held, Yes. Whether the ban imposed by the coordination committee is violative of section 3(3) – Held, yes.

Brief facts:

This appeal raises an interesting and important question of law touching upon the width and scope of jurisdiction of the Competition Commission of India (for short, the 'CCI') under Section 3 of the Competition Act, 2002 (hereinafter referred to as the 'Act').The Hindi tele serial 'Mahabharat' was dubbed in Bangla and the dubbed version was telecasted in the State of West Bengal. The respondents coordination committee objected this and started agitation which forced the broadcasters to stop the serial. Nevertheless the broadcasters approached the CCI and alleged that the coordination committee, which comprises film and TV artists and technicians, has entered into an anticompetitive agreement to ban the telecast of the dubbed version of the serial. The CCI, per majority, held that the coordination committee's act was violative of section 3(3) of the Act. On appeal, the Competition Appellate Tribunal reversed the judgment stating that coordination committee is not an 'enterprise' under the Act but merely a trade union of film and TV artists and not covered by section 3(3) of the Act. CCI appealed to the Supreme Court challenging the decision of the Tribunal.

Decision: Appeal allowed.

Reason:

In the instant case, the geographic market is the State of West Bengal and to this extent there is no quarrel inasmuch as activities of the Coordination Committee were limited to the said State. The dispute is as to whether relevant market would cover 'broadcast of TV serial' or it would take within its sweep 'film and TV industry of the State of West Bengal'. TV serial in question was produced in Hindi. It was thereafter dubbed in Bangla. When the two channels, namely CTVN+ and Channel 10, decided to broadcast this TV serial in dubbed form, i.e. in Bangla language, this move was opposed by the Coordination Committee and EIMPA. The Tribunal has upheld the minority view of CCI in saying that nature of the information does not show anything which could even be distinctly connected with the whole 'film and television industry in the State of West Bengal'. The information is only against showing the dubbed serial on the television and it has no relation whatsoever with production, distribution, etc. of any film or any other material on the TV channels.

We feel that this is a myopic view taken by the Tribunal which ignores many other vital aspects of this case, most important being the width of the effect of the aforesaid cause on which the agitation was led by the Coordination Committee. The effect is not limited to the telecast or broadcast of the television serial. No doubt, the Coordination Committee was against the 'broadcast of the television serial 'Mahabharat' on the aforesaid two channels, in the dubbed form. However, even as per the agitators, the said broadcast was going to adversely affect the TV and Film Industry of West Bengal and the alleged purport behind the threats was to save the entire TV and Film Industry.

The relevant market was, therefore, not limited to the broadcasting of the channel but entire film and television industry of West Bengal. Whether it was the misgiving of the Coordination Committee that telecast of dubbed version of 'Mahabharat' is going to affect Bengali film and television industry or it was a genuine concern, is not the relevant factor while defining the 'relevant market'. It is the sweep of the aforesaid action which is to be considered. Even in the perception of the Coordination Committee, telecast of Bengali dubbed version of 'Mahabharat' was going to affect the whole Television and Film Industry. In view thereof, it was hardly a matter of debate as to what would be the relevant market.

With this we advert to the central issue that bogs the parties, namely, whether the activities in which the Coordination Committee indulged in can be treated as 'agreement' for the purpose of Section 3 of the Act.

At the outset, it may be noticed that the entities which are roped in, whose agreements can be offending, are enterprise or association of enterprises or person or association of persons or where the agreement is between any person and an enterprise. The expression 'enterprise' may refer to any entity, regardless of its legal status or the way in which it was financed and, therefore, it may include natural as well as legal persons. This statement gets further strengthened as the agreement entered into by a 'person' or 'association of persons' are also included and when it is read with the definition of 'person' mentioned in Section 2(l) of the Act. Likewise, definition of 'agreement' under Section 2(b) is also very widely worded. Not only it is inclusive, as the word 'includes' therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as 'agreement'. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by legal proceedings or not. Therefore, the Coordination Committee would be covered by the definition of 'person'.

However, what is important is that such an 'agreement', referred to in Section 3 of the Act has to relate to an economic activity which is central to the concept of Competition Law. Economic activity, as is generally understood, refers to any activity consisting of offering products in a market regardless of whether the activities are intended to earn a profit. Some examples may be given which would not be covered by Section 3(3) of the Act. An individual acting as a final consumer is not an enterprise or a person envisaged, as he is not carrying on an economic activity. We may also mention that the European Union Competition Law recognises that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in Section 3. The reason is obvious. The 'agreement' or 'concerted practice' is the means through which enterprise or association of enterprises or person or association of persons restrict competition. These concepts translate the objective of Competition Law to have economic operators determine their commercial policy independently. Competition Law is aimed at frowning upon the activities of those undertakings (whether natural persons or legal entities) who, while undertaking their economic activities, indulge in practices which effect the competition adversely or take advantage of their dominant position. The notion of enterprise is a relative one. The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an enterprise when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering activities carried out by non- profit-making organisations or public bodies. These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits. Thus, any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade.

In the instant case, admittedly the Coordination Committee, which may be a 'person' as per the definition contained in Section 2(l) of the Act, is not undertaking any economic activity by itself. Therefore, if we were to look into the 'agreement' of such a 'person', i.e. Coordination Committee, it may not fall under Section 3(1) of the Act as it is not in respect of any production, supply, distribution, storage, acquisition or control of goods or provision of services. The Coordination Committee, which is a trade union acting by itself, and without conjunction with any other, would not be treated as an 'enterprise' or the kind of 'association of persons' described in Section 3. A trade union acts as on behalf of its members in collective bargaining and is not engaged in economic activity. In such circumstances, had the Coordination Committee acted only as trade unionists, things would have been different. Then, perhaps, the view taken by the Tribunal could be sustained. However, what is lost in translation by the Tribunal i.e. in applying the aforesaid principle of the activity of the trade union, is a very pertinent and significant fact, which was taken note of by the DG as well as the CCI in its majority opinion. It is this: The Coordination Committee (or for that matter even EIMPA) are, in fact, association of enterprises (constituent members) and these members are engaged in production, distribution and exhibition of films. EIMPA is an association of film producers, distributors and exhibitors, operating mainly in the State of West Bengal. Likewise, the Coordination Committee is the joint platform of Federation of Senior

Technician and Workers of Eastern India and West Bengal Motion Pictures Artistes Forum. Both EIMPA as well as the Coordination Committee acted in a concerted and coordinated manner. They joined together in giving call of boycott of competing members i.e. the informant in the instant case and, therefore, matter cannot be viewed narrowly by treating Coordination Committee as a trade union, ignoring the fact that it is backing the cause of those which are 'enterprises'. The constituent members of these bodies take decision relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business of production, distribution or exhibition of the films. Decision of these two bodies reflected collective intent of the members. When some of the members are found to be in the production, distribution or exhibition line, the matter could not have been brushed aside by merely giving it a cloak of trade unionism. For this reason, the argument predicated on the right of trade union under Article 19, as professed by the Coordination Committee, is also not available. When the lenses of the reasoning process are duly adjusted with their focus on the picture, the picture gets sharpened and haziness disappears. One can clearly view that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus, the CCI rightly observed that the protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; albeit for a brief period. It also hindered competition in the market by barring dubbed TV serials from exhibition on TV channels in the State of West Bengal. It amounted to creating barriers to the entry of new content in the said dubbed TV serial. Such act and conduct also limited the supply of serial dubbed in Bangla, which amounts to violation of the provision of Section 3(3) (b) of the Act.

ADITYA AUTOMOBILE SPARES PVT. LTD & ORS

v.

KOTAK MAHINDRA BANK LTD [CCI]

Case No. 103 of 2016

Devender Kumar Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, G. P. Mittal.
[Decided on 15/03/2017]

Competition Act, 2002 – Section 4 – Abuse of dominance – Banking services – Credit facilities – Request for reduction of interest rate refused by OP – Takeover of loan by other bank – Delay in handing over title documents by OP – Whether abuse of dominance – Held, No.

Brief facts:

The Informants belong to Aditya Group. Informant No. 1 is an original equipment manufacturer (OEM) of Bajaj, Hero Honda and TVS and also an authorised dealer for Kinetic, LML and Yamaha. Informant No. 2, an authorised stockist of Maruti Udyog Limited, is engaged in the sale and marketing of Maruti Suzuki's spare parts in Tamil Nadu and Puducherry. The Informant No. 3 is engaged in the sale of spare parts of 4-wheeler and light commercial vehicles and Informant No. 4 is engaged in the sale of lubricant oil.

The Informants are primarily aggrieved by the conduct of the OP in denying enhancement of various credit limits, reduction in interest rates and delay in the handing over of the documents/ title deeds mortgaged with it back to the Informants for making a switch over to the Syndicate Bank for availing various banking services/facilities. The Informants are also aggrieved with the conduct of the OP in debiting Rs. 32,41,750/- as penal interest in an arbitrary manner without informing them. The Informants have alleged contravention of the provisions of Section 4(2)(a)(ii) and 4(2)(c) of the Act in the matter.

Decision: Complaint rejected.

Reason:

The Commission observes that the allegations raised in the instant matter relates to various types of banking services/facilities viz. cash credit, bank guarantee and term loan facility availed by the Informants from the OP. It is observed that the allegations in the instant case do not relate to any specific banking facilities availed by the Informants from the OP, but rather to a broader spectrum of banking services/facilities offered by the OP. Thus, the relevant product market in this case cannot be narrowed down to a specific banking service/facility such as term loan, bank guarantee, cash credit etc. Rather, it should be the broader market of banking services. Further, it is pertinent to note that the impugned banking services are provided by the OP not only to the Informants but also to different corporate entities for their business operations. It may be noted that the banking services provided to corporate entities cannot be considered as a substitute with the banking services available for the retail/ general customers. Even though the nomenclature of the banking services/facilities provided to the retail/ general customers and corporate entities are same, the characteristics of the banking services/facilities differ between the two groups. It may be noted that banks on the basis of various verticals or indicators like demand requirements, credit worthiness, expected profitability of the proposed business venture etc. make a clear-cut distinction between corporate customers and general customers. Even if two entities are operating a similar class of account, say current account, the facilities offered to such accounts differ from customer to customer. Further, the accounts used for business purposes/corporate entities also differ from the accounts used by normal customers. In view of the above, the relevant product market in the present case may be considered as the market for the "provision of banking services for corporate entities".

With regard to the relevant geographic market, the Commission is of the view that the conditions of competition for availing banking services by the corporate entities throughout India are homogenous. A corporate entity can avail the banking services/facilities from any bank operating anywhere in India. Further, core banking facility enables the bank customers to operate their accounts from any place in India without any hurdle. Therefore, the Commission is of the view that the relevant geographic market in this case may be taken as 'India'.

Based on the above, the Commission defines the relevant market in this case as the market for the "provision of banking services for corporate entities in India".

With regard to assessment of the position of dominance of the OP in the relevant market as defined above, the Commission observes that banking services for corporate entities is a subsegment of the larger market of banking services. It is observed that the Informants have not provided any information relating to the allegation of dominance of the OP in the relevant market. Also, no information is available in the public domain with regard to the position of dominance of the OP in the market of banking services for corporate entities. However, Commission deems it appropriate to examine the information available in the public domain to assess the position of the OP in the larger market of banking services in India and to draw a conclusion regarding the position of dominance of OP in the relevant market defined above.

The Commission observes that in terms of net-worth value for the year 2015-16, the OP had a very small and insignificant market share of nearly 3% in banking services. Further, players like State Bank of India (with a market share of 15.21% in terms of net-worth value for 2015-16), Bank of Baroda (with a market share of 3.80% in terms of net-worth value for 2015-16), Punjab National Bank (with a market share of 3.74% in terms of net-worth value for 2015-16), Bank of India (with a market share of 2.77% in terms of net-worth value for 2015-16) and others are providing banking services on a larger scale in comparison to the OP. Also, in terms of total assets for the financial year 2015-16, the asset portfolio of the OP is much smaller as compared to State Bank of India (SBI) and other banks. Furthermore, in terms of net sales, net profit and market capitalisation also the OP is lagging behind other banks like SBI and Punjab National Bank. In view of the above, the OP does not appear to be dominant in the banking services market, which makes it highly unlikely for it to be in a dominant position in the market of provision of banking services to corporate entities in India. Accordingly, the Commission is of the view that the OP is not in a dominant position in the relevant market as defined in para 17 above. Since the OP is not in a dominant position in the relevant market, its conduct need not be examined in terms of the provisions of Section 4 of the Act.

Based on the above analysis, the Commission is of the view that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OP in the present case and the matter is hence, ordered to be closed.

VIDHARBHA INDUSTRIES ASSOCIATION

v.

MSEB HOLDING COMPANY LTD [CCI]

Case No. 12 of 2014

D.K.Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta & Justice G. P. Mittal [Decided on 21/04/2017]

Competition Act, 2002 – Section 4 – Abuse of dominance – Distribution of electricity in Maharashtra – Allegations against State PSU – CCI dismissed the complaint.

Brief facts:

The information in the present matter was filed the 'Informant' against MSEB Holding Company Ltd ('OP 1'), Maharashtra State Power Generation Company ('OP 2'), Maharashtra State Transmission Company Ltd ('OP 3') and Maharashtra State Electricity Distribution Company Ltd ('OP 4') alleging contravention of the provisions of Section 4 of the Act. The allegations of the Informant in the instant case are four fold: firstly, OP 4 buys the entire electricity produced by OP 2 even if at a higher rate which results in denial of market access to other power producers; secondly, OP 4 is buying power at a higher cost from OP 2 which is cost inefficient in comparison to other power generating companies resultantly, the competition in electricity generation sector has been affected and the consumers of OP 4 are compelled to pay higher tariff for electricity; thirdly, OP 4 is denying open access to consumers for availing electricity from other sources; and fourthly, OP 2, through its decision to shut down four units of Koradi Thermal Power Plant, has limited/ restricted the output of electricity. Thus, the Informant has alleged that OP 4 is imposing unfair prices on the consumers and denying market access to other power generating companies and consumers for distribution of electricity in contravention of the provisions of Section 4(2)(a)(ii) and 4(2) (c) of the Act respectively and OP 2 is limiting the electricity output in contravention of the provisions of Section 4(2)(b)(i) of the Act.

Decision: Complaint dismissed.

Reason:

The Commission observes that the allegations of the Informant in the instant matter are primarily directed towards the abusive conduct of OP 2 and OP 4. However, OP 1 and OP 3 have been made pro-forma parties to the case. With regard to the allegation of shutting down of four units of Koradi Thermal Plant and consequent limitation of output by OP 2, the Commission, from the submissions made by OP 2, notes that the aforesaid four units of Koradi Thermal Plant had rendered service for more than 35 years and had become commercially unviable and harmful to the environment. Therefore, the Commission is of the view that the allegation of the Informant that OP 2 has limited/restricted the output of electricity through the above said conduct in violation of Section 4(2)(b)(i) of the Act is misplaced and does not hold ground.

Thus, in order to arrive at a decision in this matter, the only issue to be determined is whether OP 4 has infracted provisions of Section 4 of the Act. The Commission is of the view that the relevant market in the present matter may be considered as the market for the 'provision of services for distribution of electricity in the State of Maharashtra except Mumbai'.

From the DG investigation report, the Commission observes that OP 4 has 100% market share in the relevant market as defined in para 13 because it is the sole licensee to distribute electricity in the State of Maharashtra except Mumbai and as such, there is no competitor of OP 4 in the relevant market. Further, since there is no competitor of OP 4 in the relevant market, the consumers are completely dependent on OP 4 for electricity supply. Thus, the Commission is of the view that OP 4 is in a dominant position in the relevant market as defined above. The issues pertaining to abuse of dominant position by OP 4, as emerging from the facts of the instant matter, can be looked into on the following three counts:

Whether OP 4 purchases the entire electricity generated by OP 2 irrespective of the price which results in denial of market access to other power producers?

In this regard, the Commission observes that first of all, usually power from public sector undertakings is purchased under long term PPAs through MOU route only whereas power from other sources is purchased through open bidding. Secondly, OP 4 has categorically justified the long term PPAs with OP 2 by stating that the aforesaid PPAs were entered into between OP 2 and OP 4 during difficult circumstances of shortage of electricity and prevalent load shedding of power in the State of Maharashtra. As competitive bidding mechanism was in a nascent stage during that time and ensuring stable and continuous supply of electricity was the top priority, long term PPAs were signed through MOU route and also through competitive bidding process with Rattan India for Amravati power plant. The Commission is of the view that the justification offered by OP 4 for entering long term PPAs with OP 2 looks plausible. Further, the allegation of the Informant that the long term PPAs entered into between OP 4 and OP 2 hinder competition in the relevant market by restricting OP 4 from purchasing electricity from the sources other than OP 2 is not found to be correct as OP 4 purchases 59% of its power requirements from the sources other than OP 2 and the entire power produced by OP 2 and purchased by OP 4 constitutes only 41% of the power requirement of OP 4. In view of the above analysis, the Commission is of the opinion that by purchasing the entire electricity produced by OP 2 and entering into long term PPAs with OP 2, OP 4 has not denied market access to other power generating company as alleged by the Informant.

Whether OP 4 has purchased power from OP 2 at a higher cost that resulted in imposition of unfair price on the consumers?

On this issue, the Informant has alleged that inefficiency of power generation by OP 2 is reflected in its high cost which in turn is reflected in the high cost structure and revenue forecast submitted by OP 4 to MERC. As a result of the same, higher tariffs are decided by the MERC and the consumers in the end in the relevant geographical market are paying the highest electricity tariff compared to all other states in India. The Commission in this regard, observes that the purchase price of electricity of OP 4 from power generating companies is determined by the Central/State Electricity Regulatory Commission, as the case may be, for each year in accordance with the statutory power vested in it under the Electricity Act, 2003 and relevant regulations thereunder.

With regard to the issue of long term PPAs, OP 4 is purchasing power from OP 2 by executing PPAs through MOU route whereby tariff is determined by MERC under Section 62 of the Electricity Act, 2003 and same is based on the MOD principle i.e. the least cost power should be dispatched in preference to the more costly power. The Maharashtra State Load Dispatched Centre (MSLDC) which is the apex body to ensure integrated operations of the power system of the state does optimum scheduling under the MOD principle and OP 4 has no role to play in this regard. It is reported that the long term PPAs between OP 2 and OP 4 were executed pursuant to approval of MERC and tariffs charged from the ultimate consumers are determined by the MERC through the tariff orders issued from time to time. Therefore, OP 4 cannot arbitrarily impose price on the consumers in violation of the provisions of Section 4(2)(a)(ii) of the Act. Whether OP 4 has denied open access to consumers for availing electricity from other power generating companies for distribution of electricity?

The Commission is of the opinion that in the absence of explicit provision in the Open Access Regulations of 2005, OP 4 was unable to grant permission for open access through IEX. However, some open access applicants approached the MERC with petition on the issue of non-grant of open access through IEX and consequently, eight applicants have been given permission for open access during the period. In view of this, the Commission is of the view that the conduct of OP 4 regarding open access through IEX is not violative of Section 4(2)(c) of the Act.

On non-grant of open access permission for sourcing power excluding IEX, the DG has reported that due to certain legal issues, the same was not conceded. The Commission considered the aforesaid three cases for non-grant of Open Access excluding IEX and is of the view that the explanation submitted by OP 4 in respect of the above cases is quite reasonable and here again, as in the case of IEX, the Commission does not find any contravention of Section 4(2) (c) by OP 4 as alleged by the Informant.

Since, no case of contravention of any of the provisions of Section 4 of the Act is made out against OP 4, the matter relating to this information is disposed of accordingly and the proceedings are closed forthwith.

BIOCON LTD & ORS

v.

F. HOFFMANN-LA ROCHE AG & ORS [CCI]

Case No. 68 of 2016

D.K. Sikri, S.L. Bunker, Sudhir Mital, Augustine Peter, U.C. Nahta, & Justice G.P. Mittal. [Decided on 21/04/2017]

Competition Act,2002 – Section 4 – Pharma products – Biosimilars – Abuse of dominance – Denial of market access – CCI finds Roche involved in denial of market access to competitors – Investigation ordered.

Brief facts:

The Informants are primarily aggrieved by the Roche Group's conduct whereby, it has allegedly denied market access to its competitors in contravention of Section 4(2) (c) of the Act. Besides, the Informants have also alleged violation of Section 4(2)(a)(ii) for imposition of unfair prices, Section 4(2)(a)(i) for imposition of unfair conditions, Section 4(2)(e) of the Act for leveraging and Section 4(2)(b)(i) for limiting or restricting the market.

Decision: Investigation ordered as to the allegation of denial of market access.

Reason:

The Commission is cognizant that the Informants' drugs have received approvals from DCGI, despite the attempts made by Roche Group and they were able to enter the market. The same, however, does not rule out the possibility of Roche's actions amounting to denial of market access. The denial of market access within the meaning of Section 4(2)(c) of the Act, need not be complete and absolute in nature. Even a partial denial of market access that takes away the freedom of a substitute to compete effectively and on merits in the relevant market, may amount to a contravention of Section 4(2)(c) of the Act. With regard to the Informants' market shares, which Roche Group has claimed is substantial, the Commission observes that, at this stage, it is very difficult to ascertain the impact of Roche Group's strategies on the market shares of the Informants. It is a subject matter of investigation as to whether their market shares could have been higher absent the alleged anti-competitive strategies adopted by Roche Group.

We are dealing with a case which involves a highly sensitive sector, where the safety of the patient is of paramount importance. Thus, creating any iota of doubt in the minds of doctors can adversely affect the market for biosimilars, which is prescription induced, beyond repair. Such disparagement may also have ripple effects within the medical community. In this scenario, those biosimilar manufacturers who do not have strong marketing channels amongst doctors may be forced out of the market because of abusive denigration by a dominant player.

The Commission further notes that a dominant enterprise is endowed with a special responsibility not to allow its conduct to impair undistorted competition in the relevant market. The Act places special responsibility on such enterprise not to conduct its business in a manner which is prohibited under Section 4(2) of the Act. Prima facie, it appears to the Commission that Roche Group has shirked such responsibility and indulged in abusive conduct. With regard to the Informants' allegation on unfair pricing under Section 4(2) (a) (ii) of the Act, the

Commission is prima facie not convinced that a case is made out against the Roche Group. Being the innovator, it might have invested huge sums on research and development of Trastuzumab. Thus, initial high prices can be attributable to being the reward for innovation. Further, it subsequently introduced cheaper versions in the market viz. BICELTIS/HERCLON. The Informants have also alleged leveraging on the part of Roche Group. In this regard, the Commission notes that it has taken the prima facie view that the relevant market in the instant case is 'market for biological drugs based on Trastuzumab, including its biosimilars in India' and the impugned conduct of Roche Group therein amounts to contravention of Section 4(2) (c) of the Act. Thus, at this stage, the Commission does not find it relevant to deal with the alleged contravention of Section 4(2)(e) of the Act, which would arise only in case of delineation of narrower relevant markets as defined in the information i.e. 'market of sale for biological drugs (including biosimilars) used in the targeted therapy of HER-2 positive metastatic breast cancer within the territory of India', 'market of sale for biological drugs (including biosimilars) used in the targeted therapy of HER-2 positive early breast cancer within the territory of India' and 'market of sale for biological drugs (including biosimilars) used in the targeted therapy of HER-2 positive metastatic gastric cancer within the territory of India'. However, the prima facie determination of the Commission in this order regarding the relevant market and abuse therein shall not preclude the DG from delineating narrower relevant markets on the basis of investigation into relevant facts and also examine whether the impugned conduct of Roche Group constitutes a contravention of Section 4(2) (e) of the Act. With regard to the Informants' allegation under Section 4(2)(a)(i) of the Act, Roche Group has claimed that it is its prudent business strategy not to import 150 mg vials of BICELTIS / HERCLON. The Commission agrees with the assertion made by Roche Group and hence, prima facie, does not find any imposition of unfair condition in that and accordingly, does not find any contravention under Section 4(2)(a)(i) of the Act.

Based on the foregoing analysis, the Commission is of the considered view that prima facie, the contravention with regard to Section 4(2) (c) of the Act is made out against Roche Group, which warrants detailed investigation into the matter. The DG is, thus, directed to carry out a detailed investigation into the matter, in terms of Section 26(1) of the Act, and submit a report to the Commission, within 60 days.

FX ENTERPRISE SOLUTIONS INDIA PVT. LTD

v.

HYUNDAI MOTOR INDIA LTD [CCI]

Case Nos. 36 & 82 of 2014

D.K.Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, Justice G. P. Mittal [Decided 14/06/2017]

Competition Act, 2002 – Section 3 – Anti competition agreements – Resale price maintenance through discount control mechanism – Cease and desist order passedpenalty also imposed on HMIL.

Brief facts:

The Informants alleged the following violations against HMIL. The OP enters into exclusive dealership arrangements with its dealers, and dealers are required to obtain prior consent of the OP before taking up dealerships of another brand. It is further alleged that HMIL's dealers are bound to procure spare parts, accessories and all other requirements, either directly from OP or through vendors approved by the OP. It is further alleged that the OP also imposes a "Discount Control Mechanism" through which dealers are only permitted to provide a maximum permissible discount and the dealers are not authorised to give discount which is above the recommended range. This is alleged to amount to "resale price maintenance" in contravention of Section 3(4) (e) of the Act. It is also alleged that HMIL is responsible for price collusion amongst competitors through a series of "hub - and - spoke" arrangements.

Informant-1 has alleged that HMIL perpetuates hub and spokes arrangement, wherein bilateral vertical agreements between supplier and dealers and horizontal agreements between dealers through the role played by a common supplier, results in price collusion. Finally, it is alleged that HMIL has control over the sources of supply for the dealer's products and ties the purchase of desired cars to the sale of high-priced and unwanted cars to its dealers and HMIL designates sources of supply for complementary goods for dealers as well as, which result in a "tie-in" arrangement in violation of Section 3(4)(a) of the Act.

Decision:Cease and desist order passed. Penalty imposed.

Reason:

The Commission is of the considered view that HMIL has contravened the provisions of Section 3(4)(e) read with Section 3(1) of the Act through arrangements which resulted into Resale Price Maintenance. Such arrangements also included monitoring of the maximum permissible discount levels through a Discount Control Mechanism. Further, HMIL has contravened the provisions of Section 3(4)(a) read with Section 3(1) of the Act in mandating its dealers to use recommended lubricants/ oils and penalising them for use of non-recommended lubricants and oils.

Accordingly, HMIL is directed to cease and desist from indulging in conduct that has been found to be in contravention of the provisions of the Act, as noted above. So far as imposition of monetary penalty is concerned, the Commission notes the submissions made on behalf of HMIL on the issue of quantum of penalty. It was argued that penalty should be proportionate to the contravention established. It was pointed out that the automobile sector currently witnesses robust competition and does not warrant intervention. No supra-normal profits have been made by HMIL during this period. It was also canvassed that the principle of relevant turnover while penalising is to be considered. Lastly, it was highlighted that HMIL already has put in place a competition law compliance program and HMIL is a first time offender with no previous valid orders against it. Coming to the facts of the present case, the Commission notes that the infringing anti-competitive conduct of HMIL in the instant case included putting in place arrangements, which resulted into Resale Price Maintenance by way of monitoring of maximum permissible discount level through a Discount Control Mechanism and a penalty mechanism for non-compliance of the discount scheme. Such conduct pertains to and emanates out of sale of motor vehicles. Hence, for the purposes of determining the relevant turnover for this infringement, revenue from sale of motor vehicles alone has to be taken into account. On a careful consideration of the nature of the contraventions made and the points urged by HMIL for mitigation, the Commission decides to impose penalty on HMIL at the rate of 0.3 % of its average relevant turnover of the last three financial years.

Accordingly, the Commission imposes a penalty of Rs. 87 crore on HMIL for the impugned conduct in contravention of the provisions of Section 3(1) read with Section 3(4) of the Act, as detailed in the order.

BHARTI AIRTEL LTD

v.

RELIANCE INDUSTRIES LTD & ANR [CCI]

Case No. 03 of 2017

D.K.Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, Justice G. P. Mittal [Decided 09/06/2017]

Competition Act, 2002 – Section 4 – Abuse of dominance- providing free services for a specified period to promote sales – Whether abuse of dominance – Held, No.

Brief facts:

The primary concern of the Informant relates to the free services being offered by OP-2 since the inception of its business i.e. from 5th September, 2016 under one offer or the other. This according to the Informant amounts to predatory pricing, in contravention of the provisions of Section 4(2) (a) (ii) of the Act. Further, OP-1 is alleged to be in contravention of Section 4(2) (e) of the Act as it has allegedly used its financial strength in other markets to enter into the telecom market through OP-2.

Decision: Complaint dismissed & Case closed.

Reason:

The gravamen of the allegations of the Informant concerns free services provided by OP-2 since the inception of its business i.e. from 5th September 2016 under one offer or the other. This has been alleged as contravention of the provisions of Section 4(2)(a)(ii) of the Act by OP-2. In order to examine the impugned free services under the provisions of Section 4 of the Act, it needs to be ascertained whether OP-2 enjoys a dominant positon in any relevant market. Only when such a position is established as being enjoyed by OP-2, it will be imperative to examine as to whether its impugned conduct amounts to an abuse or not. The Commission is of the view that the relevant product market in the facts and circumstances of the present case is the market for 'provision of wireless telecommunication services to end users' and accordingly, the relevant market in the instant case is the market for 'provision of wireless telecommunication services to end users in each of the 22 circles in India'.

Coming to the assessment of dominant position, the Commission notes that after the opening up of telecommunication market to private players, this market has witnessed entry of a number of players competing with each other resulting in decrease of tariffs and constant improvements in quality and variety of services. As per the TRAI press release dated 17th February, 2017, the wireless subscriber base of private telecommunication players at pan-India level constitutes 91.09% as against 8.91% held by public sector undertakings. The market is led by the Informant with a market share of 23.5% followed by Vodafone (18.1%), Idea (16.9%), BSNL (8.6%), Ariel (8%), RCOM (7.6%), OP-2 (6.4%), Telenor (4.83%), Tata (4.70), Sistema (0.52%), MTNL (0.32%) and Quadrant (0.27%). Further, in none of the 22 telecommunication circles, the Opposite Party has a market share higher than 7%. As may be seen, the market is characterised by the presence of several players ranging from established foreign telecom operators to prominent domestic business houses like TATA. Many of these players are comparable in terms of economic resources, technical capabilities and access to capital. Further, the market is characterised by the presence of several players resulting in sufficient choice to consumers who can shift from one service provider to another and that too with ease. This implies that dependence of consumers on any single telecom operator is not of any significant extent. Against this background, it is difficult to construe dominant position being possessed by OP-2 with 6.4% market share, which presupposes an ability to operate independently of the market forces to affect its consumers or competitors.

The Commission notes that financial strength is relevant but not the sole factor to determine dominant position of an enterprise. Considering comparable investments and financial strengths of competitors, the success of OP-2 in managing large scale investments does not suggest dominant position being enjoyed by OP-2. The Commission does not find it appropriate to hold OP-2 dominant in a scenario where its customers constitute less than 7 per cent of the total subscriber base at pan-India level, various functions of telecom service providers are regulated and entrenched players have been in existence for more than a decade with sound business presence, comparable financial positon, technical capabilities and reputation. Even if one were to consider 4G LTE services as the relevant product market, OP-2 is not likely to hold dominant position in such market on account of the presence of the Informant, Vodafone, Idea, etc., who derive commercial and technical advantages due to their sustained and sound business presence in other telecom services. It needs to be appreciated that OP-2 is a new entrant, who has commenced its business recently i.e. from 5th September, 2016.

In the absence of any dominant position being enjoyed by OP-2 in the relevant market, the question of examining the alleged abuse does not arise. Notwithstanding this, the offers of OP-2 do not appear to raise any competition concern at this stage. In view of the foregoing discussion, the Commission is of the considered view that no prima facie case of contravention of Section 4(2) (a) (ii) of the Act is made out against OP-2.

The Informant has also made contradictory submissions of the impugned free services of OP-2 as being an outcome of leverage of dominant position by OP- 1 as well as an outcome of alleged anticompetitive agreement between OP-1 and OP-2. The Commission notes that no agreement of the nature prohibited under Section 3 of the Act is discernible from the facts and allegations levelled by the Informant. As noted earlier, the impugned conduct of OP-2 has not been found as *prima facie* contravening the provisions of the Act prohibiting unfair pricing including predatory pricing. In the absence of any finding of anti-competitive conduct by OP-2, OP-1 cannot be held to be in contravention of Section 4(2) (e) of the Act just because it has made huge investments in OP-2. Mere investments cannot be regarded as leverage of dominant position, particularly when OP-1 itself is not engaged in business of providing telecom services or any activities incidental thereto. If one were to construe such investment as anti-competitive, the same would deter entry and/or expansion and limit the growth of markets. In view of the above, no *prima facie* case of contravention of Section 3(1) or Section 4(2) (e) of the Act is made out against the Opposite Parties.

The Commission, therefore, is of the view that no *prima facie* case of contravention of the provisions of Sections 3 or 4 of the Act is made out against the Opposite Parties. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

SHRI RATHI STEEL (DAKSHIN) LTD

v.

GAIL (INDIA) LTD [CCI]

Case No. 2 of 2017

D.K.Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, G. P. Mittal.[Decided on 14/07/2017]

Competition Act, 2002 – Section 4 – Abuse of dominance – Premier gas supplier having 60% market share – Imposition of take or pay liability – Whether triggers abuse of dominance provision – Held, es.

Brief facts:

The Informant has alleged abuse of dominant position by the Opposite Party on account of incorporation of unfair terms and conditions in the GSA and for imposition of take or pay liability (hereinafter referred to as “ToP liability”) by it despite intimation to it by the Informant that due to regular increase in the prices of Re-gasified Liquefied Natural Gas (hereinafter referred to as ‘RLNG’), the Informant has been forced to reduce its daily contracted quantity.

Decision: Investigation ordered.

Reason:

As per the GSA, the Informant is required to take 90% of the contracted quantity every year failing which it will be obliged to pay for the quantities not taken. Such liability is termed as ToP liability. With experience from the earlier cases [Cases No. 16 to 20 of 2016], the Commission notes that the GSAs of the Opposite Party largely envisage such liability upon all customers located across different regions. All these GSAs examined by the Commission are long term contracts with a term of 20 years. This would mean that: (a) potential buyers have to estimate their demand for gas for the next two decades to procure gas from the Opposite Party; (b) a contracted buyer has limited flexibility of 10% and it has to pay Take or Pay charges if consumption of gas by it is less than 90% of the contracted quantity although the buyer could request for the unlifted quantity later as Make Good Gas; and (c) a buyer who is locked into a contract with the Opposite Party cannot terminate the contract if the price of gas becomes economically unviable for it or it wants to shift to other cheaper alternatives as breach of obligation under the GSA would trigger ToP liability.

It has already been noted by the Commission in its earlier order dated 3rd October, 2016 passed in Cases No. 16 to 20 of 2016 that take or pay liability has been imposed by the Opposite Party only from the year 2015 and there was no such imposition earlier. In the case of the Informant, the Opposite Party, vide letter dated 27th February, 2015, has demanded Rs. 6.39/- crores as ToP charges for the calendar year 2014 as against ToP liability of Rs.16.7 crores. In 2015, the Opposite Party issued another letter dated 31st August, 2015 to the Informant demanding Rs.10.3 crores as ToP charges for the period January 2015 to July 2015. This time, full charges were demanded from the Informant and strangely, the demand seems to have been raised for a part of the year and even before issuing the annual statement of settlement.

The conduct of Opposite Party in implementing such ToP liability from the year 2015 appears to be a modus to ensure de facto exclusivity of the contractual arrangement. This, besides prohibiting the buyers from shifting to alternatives or terminating the GSA in the event of closure of their business, also appears to create entry barriers for alternative suppliers to enter the market or build up a viable customer base. It is observed that while imposition of ToP liability as per contractual terms cannot per se be regarded as abuse of dominant position, the same being imposed in an exploitative manner without justification or to ensure de facto exclusivity thereby hurdling potential entries or expansion of competitors warrants investigation under the provisions of the Act prohibiting abuse of dominant position. The Commission is, hence, convinced that the facts presented in the instant information prima facie suggest contravention of Section 4(2) (a) and Section 4(2) (c) of the Act.

The Commission is already seized with the issue of unfair imposition of ToP liability by the Opposite Party in Cases No. 16 to 20 of 2016. In those cases, the Opposite Party's stand was that take or pay liability, as imposed on the customers, was only to neutralize the losses borne by the Opposite Party due to non off-take or under-drawal by the customers as per the respective GSAs, and was not to make any profits on account of take or pay deficiency. The same also formed basis of reduction in the take or pay claim by the Opposite Party. However, in the instant matter, full ToP liability has been imposed on the Informant for the calendar year 2015. In the earlier cases, the Opposite Party also contended that it faces ToP obligation under its contracts with certain upstream suppliers. In this regard, the Commission finds it relevant to inquire into: the different sources of gas procurement by the Opposite Party and the nature of arrangements with each supplier including price and ToP liability under each such arrangement; whether the gas supplied to the customers of the Opposite Party is supplied from a commingled stream, in which case, what is the basis for price determination/ revision from time to time; whether ToP liability was imposed on the Opposite Party by its upstream suppliers for the contract year 2015; whether the Opposite Party has suffered any loss on account of non off-take or under-drawl of gas by its contracted customers during the contract year 2015; what were the total ToP liabilities levied by the Opposite Party on all its customers located across India for the contract year 2015; whether the Opposite Party had adopted any discriminatory practice in imposition of ToP liability upon its customers located across India; whether the Opposite Party imposed full ToP liability only in cases where the concerned buyer contested the legality of the ToP claim or resorted to litigation/ arbitration proceedings; and the policy, if any, of the Opposite Party regarding imposition of different liability upon different class of customers. It would also be relevant to appreciate the rationale behind the Opposite Party committing ToP liability to its upstream suppliers for a long period i.e. whether the Opposite Party took into consideration the potential inclusions and exclusions in its customer base, fluctuations in prices, different modes of risk management etc.

In view of the above, the Commission deems it fit to order an investigation in the present case.

COCHIN PORT TRUST

v.

CONTAINER TRAILER OWNERS COORDINATION COMMITTEE [CCI]

Case No. 06 of 2014

D.K. Sikri, Sudhir Mital, U. C. Nahta, G.P. Mittal. [Decided on 01/08/2017]

Competition Act, 2002 – Section 3 – Unilateral fixation of price through Turn Up system – Constitutes anti-competitive practice – Cease and desist order passed.

Brief facts:

The main issue before the Commission in this case was whether there was any collusive/anti-competitive conduct on the part of the OPs which amounted to a contravention of the provisions of Section 3(3) read with Section 3(1) of the Act. The DG, on the basis of the observations recorded earlier, has found that OP-1, along with its four participating association (i.e. OP-13 to OP-16), introduced and implemented a 'Turn System' under which they not only unilaterally fixed the prices for coastal container services, but also led to limiting and controlling of such services at the Informant Port.

Decision: Cease and desist order passed.

Reason:

The Commission has perused the investigation report, the suggestions/objections filed by the OPs and the oral submissions made by the respective learned counsel for the parties.

The allegation in the present case is regarding anti-competitive understanding between various sub-associations under the aegis of OP-1. All these associations are operating in the same market or at the same level. The members of all these associations, some of which are also arraigned as OPs, are container trailer transporters and are similarly placed in the market in which they are ideally expected to compete for obtaining bookings from the prospective users/consumers. During the year 2014, from January 2014 till September 2014, the members of these associations (i.e. OP-13 to OP-16) were admittedly providing their services to the users of the container trailer services through a Turn System.

There is enough evidence on record to establish the existence of the Turn System e.g. Circular dated 13th January 2014, letter dated 25th April, 2014 sent by OP-1 in response to the notice dated 21st April, 2014 sent by the Informant Port justifying the imposition of the Turn System etc. Further, there are emails on record (emails dated 7th February, 2014 and 8th February, 2014) which were sent by OP-1 to the members asking for their cooperation for the implementation of the Turn System. Moreover, this Turn System was admittedly followed by the members of the participating associations. All the OPs have admitted the existence of the Turn System from January 2014 to September 2014. Thus, it can be safely inferred that this arrangement was agreed upon by them through their respective associations. This Turn System, being in nature of a horizontal arrangement, needs to be assessed under the provisions of Section 3(3) read with Section 3(1) of the Act.

The present case before us is peculiar, in the sense that the existence of the agreement i.e. the Turn System or the fixation of price, vide a rate list, is not challenged by any of the OPs. Rather they have admitted the existence of the Turn System and have sought to justify it by citing the prevailing circumstances at the time when such Turn System came into existence and also by citing various reasons why the adoption or implementation of such system should not be considered as an anti-competitive arrangement under the Act. Thus, what is relevant in the present case is to see whether the burden of proof, which has now shifted on the OPs, to prove that their arrangement/agreement had no AAEC on the markets in India, has been successfully discharged or not.

In the present case, it has already been highlighted above that OP-1 and its participating four associations were indulging in anti-competitive conduct. The platform of the OP-1 association was apparently used to conclude anti- competitive arrangement. Thus, the contention of the OPs that right to form an association is a fundamental right, is acknowledged but found to be an inadequate defense in light of the facts and circumstances of the present case.

Further with regard to the legality of the Turn System, suffice to say that though there can be efficiency justifications for introducing a turn system in a particular trade, the OPs have failed to demonstrate any such efficiency or redeeming virtue which could have come to their rescue and would have helped them to rebut the presumption of AAEC in the market. Neither they were able to appropriately justify why they resorted to unilateral price fixation for dealing with issues prevailing during the relevant time when the Turn System was imposed nor were they able to sufficiently explain the reasons for increased rates during the Turn System as compared to the pre/post Turn System period.

Thus, in the event of the OPs not being able to rebut the presumption of AAEC that has arisen because of the price fixation under the Turn System being in the nature of a horizontal agreement/arrangement specifically recognised under Section 3(3) of the Act, the Commission has no hesitation in holding that OP-1, along with its four participating associations (namely, OP-13 to OP-16), indulged in the anti-competitive conduct of unilateral price fixation during the Turn System, in contravention of Section 3(3)(a) read with Section 3(1) of the Act.

For the reasons recorded herein above, there was no rebuttal of presumption to hold otherwise. Thus, the OP associations (OP-1 OP-13, OP-14, OP-15 and OP-16) are held to be in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

In view of the above and having regard to the fact that the OPs have already ceased the anti-competitive conduct, the Commission directs the erring OPs to desist from indulging in the anti-competitive conduct in future which has been found to be in contravention of the provisions of the Act.

With regard to the imposition of penalty, the Commission is of the view that there are certain mitigating circumstances which exist in favour of the OPs in the present case. The Turn System, during which the alleged rate list was followed by the OP associations and their members, was in operation for a very limited time period, i.e. from January 2014 to September 2014 and the Turn System was discontinued even before the investigation was ordered in this case. The purpose of imposing monetary penalties can be two-fold-- first, for disciplining the erring party for its anti-competitive conduct and, second, for creating deterrence to stall future contraventions. Considering that the contravention discontinued long-back and the parties are not indulging in such behaviour any more, the Commission does not find it appropriate to impose any monetary penalty in the present case. The direction of the Commission to desist from indulging in such anti-competitive conduct, in future, would meet the ends of justice.

WESTERN COALFIELDS LTD

v.

SSV COAL CARRIERS PVT LTD & ORS [CCI]

Case No. 34 of 2015

D.K.Sikri, Sudhir Mital, Augustine Peter, G. P. Mittal, [Decided on 14/09/2017]

Competition Act, 2002 – Bid rigging – OPs quoting identical prices- whether results in bid rigging - Held, Yes.

Brief facts:

The Informant is one of the eight subsidiary companies of Coal India Limited and has mining operations spread over various States. It is a major supplier of coal to industries located in various States. The OPs are engaged in the business of providing ancillary services in colliery areas including of sand and coal transportation in the areas of operation of the Informant.

The Informant hence, alleged that the aforesaid conduct of the OPs in submitting identical bids at higher rates is a blatant act of bid-rigging, which is in clear violation of the provisions of the Act and prayed for initiation of an investigation against the OPs in the matter.

Decision: Cease and desist order passed. Penalty levied.

Reason:

The Commission observes that all the identical quotes were above the updated estimated and justified cost and mostly below ESM rates. These similarities prima facie indicate that there was some kind of an arrangement amongst the Opposite Parties to collude by aligning the prices for the sand and coal transportation tenders. Further, the fact that such identical rates in the four tenders were much above the average estimated costs portray that the same could not have been the result of independent decision making.

From the facts on record, it appears that the Opposite Parties were coordinating and fixing the prices of their services with the object of distorting the fair bidding process. The identical price quotations submitted by the Opposite Parties appear to have actuated by mutual understanding/arrangement or in other words agreement amongst them. Although some of the Opposite Parties had quoted different rates, their rates were too close to the identical rates as quoted by others, which could not be a mere coincidence.

In view of the foregoing, the Commission is of the view that the Opposite Parties have contravened the provisions of Section 3 (1) read with Section 3 (3) (d) of the Act. Though the Commission has considered the submissions made by the Opposite Parties whereby they have denied collusion, the evidence on record suggest that prima facie they had colluded for aligning the prices for the sand and coal transport tenders.

The Commission hence, observes that, in a case of alleged bid-rigging, if a holistic, not isolated, assessment of the evidence on record points to the fact that identical prices quoted by the bidders are not a result of any market force but a consequence of consensus amongst them, the same is conclusive of contravention of Section 3 (3) (d) read with Section 3 (1) of the Act. Further, as noted by the Hon'ble Supreme Court in Excel Crop Care Limited (supra), quoting of identical prices in tenders is a strong evidence of bid-rigging and the same cannot be taken as a mere coincidence unless a plausible explanation is given in a clear and cogent manner.

On a holistic consideration of all these factors along with identical pricing despite different cost structures, apparently last minute filling of price bids; existence of earlier financial dealings amongst the OPs as well as identical price quotes even in previous tenders floated by the Informant, the Commission has no hesitation whatsoever but to conclude that quoting of identical prices by OP-1, OP-2 and OP-4 are not a mere co-incidence but the result of clear understanding amongst OP-1, OP-2, OP-3 and OP-4 to fix prices in the tenders floated by the Informant, resulting in rigging the bids in the impugned tenders for sand transportation.

Since the agreement amongst OP-1 to OP-4 stands established, the statutory presumption of appreciable adverse effect on competition automatically follows. The Commission notes that the Hon'ble Supreme Court in Excel Crop (supra) has held that agreements mentioned in Section 3(3) of the Act, including bid-rigging, would be treated as ipso facto causing appreciable adverse effect on competition.

The Court further held that once an agreement amongst the bidders is established, heavy onus is on the bidders to justify the conduct. Thus, it is erroneous on the part of OP-2, OP-3 and OP-4 to argue that the DG has not taken any effort to establish appreciable adverse effect on competition resulting from the alleged agreement.

The Informant being a mining PSU has continuous requirement of transportation services, which it procures through tendering process only. Under these circumstances, collusion to fix prices by rigging the bids in the tenders floated by the Informant most definitely has an adverse impact on the price paid by the Informant for procuring such transportation services. Such conduct in public procurements besides defeating the tendering process also has an adverse impact on the process of competition resulting in deprivation of efficient outcomes that would have followed otherwise. Thus, bid-rigging in tenders floated by the Informant is a brazen defiance of the responsibility cast under the Act. In view of the above, the Commission finds the contentions of OP-1 to OP-4 concerning absence of appreciable adverse effect on competition misconceived and the same are thus, rejected. In relation to the above-discussed factors, OP-5 to OP-10 also advanced arguments/ defences similar to those of OP-1 to OP-4, which have already been dealt with in the earlier section of this order.

On a holistic consideration of the these factors along with the quoting identical prices ; having different cost structures; last minute filling of price schedule in the office of the Informant; existence of financial dealings amongst the OPs; identity of price quotes even in previous tenders floated by the Informant; and the efforts of CIMTA for upward revision of rates offered by the Informant, the Commission concludes that quoting of identical prices by OP-5, OP-7, OP-9 and OP-10 in Tender No. 3, not only for one job but for all five different jobs and by OP-5, OP-6 and OP-7 in Tender No. 4, for each of the three different jobs, up to the last decimal points is a result of clear consensus/ understanding amongst OP-5 to OP-10.

The OPs and their respective office bearers are directed to cease and desist from indulging into practices, which are found to be in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act.

The Commission finds the present case fit for imposition of penalty. The Commission notes that the infringing anti-competitive conduct of the OPs is bid-rigging in the tenders floated by the Informant for transportation. Since the impugned conduct emanates from transportation services offered by the OPs, the relevant turnover for this infringement would be their revenue from the said services. Having dealt with the nature of contravention as well as the mitigating factors, the Commission proceeds to impose penalty on the OPs at the rate of 4% of its average relevant turnover for the last three financial years.

INTERNATIONAL AIR TRANSPORT ASSOCIATION

v.

AIR CARGO AGENTS ASSOCIATION OF INDIA [CCI]

Case No. 29 of 2017

D. K. Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta, G. P. Mittal. [Decided on 12/09/2017]

Competition Act, 2002 – Implementation of cargo accounts settlement system (CASS) in India – OPs boycotted business with informant – Whether results in boycott – Held, No.

Brief facts:

The Informant is stated to be an international non-profit trade association comprising of 265 member airlines belonging to 118 nations across the globe with its headquarters in Montreal, Canada. In India, the Informant is present through a wholly owned subsidiary i.e. IATA (India) Private Limited and a branch office in Mumbai. It is submitted that the role of the Informant is solely that of a facilitator for the aviation industry as a whole. Further, the airlines are not bound to become a member of the Informant and it is a voluntary decision on the part of the airlines to seek membership of the Informant.

It is alleged that the OPs are colluding and collectively boycotting business with airlines that seek to implement Cargo Accounts Settlement System ("CASS") in India. It is averred that the OPs are exerting undue influence on its member agents taking advantage of such position of power. The OPs actively encourage and pressurize the member cargo agents to collectively boycott airlines implementing CASS, despite the benefits of CASS being acknowledged universally. The OPs, in their attempt to derail the implementation of CASS, are also persuading airlines to refrain from asking agents to join CASS in India. It is further alleged that the OPs are threatening to take action against airlines who seek to implement the same. The Informant has referred to certain emails and letters written by OP 1 to establish its allegations.

Based on the above facts and allegations, the Informant has inter alia prayed before the Commission to institute an inquiry against the OPs under Section 26(1) of the Act.

Decision: Dismissed.

Reason:

The Commission has carefully perused and considered the information and material available on record. The Commission notes that the Informant is aggrieved by the conduct of the OPs in allegedly trying to create disruptions in the implementation of CASS in India, through collective boycott and cartelization against the Informant and its constituent members. It is alleged that such conduct of taking a decision to boycott those airlines that introduce CASS, results in limiting the provision of services of air transport cargo in India in violation of Section 3(3) (b) of the Act.

The Commission notes that an independent decision by an enterprise to offer or not to offer services at prevailing conditions does not raise antitrust concerns per se. However, an agreement among competitors not to offer services at prevailing conditions will raise antitrust concerns.

The Commission also notes that the Informant has not produced any evidence to establish that OP 1 has taken coercive action against any of its members who have agreed to participate in the CASS implementation. The Commission observes that though three members of OP 1 wrote similar letters to the airlines but the Informant has not provided any additional evidence to prima facie establish that this is a result of any concerted action on their part. The only additional evidence, which may be considered in this regard, is the emails written by OP 1 to its members circulating the draft letter. However, as already stated, the said emails are only recommendatory in nature and there is no direction from OP 1 to its member agents to mandatorily write to the airlines. Thus, it appears that OP 1 is not forcing its member agents to send the emails but has left the decision to the free will of the member agents. On the basis of available documents, it cannot be concluded that the letters written by member cargo agents of OP 1 was the result of a collective decision.

In the instant case, the Informant has not provided any data which shows the negative impact on the business of the member airlines of the Informant which can be attributed to the activities of the OPs. This is despite the fact that the alleged conduct happened in 2014 while the information has been filed in 2017.

The Commission notes that the Informant has failed to furnish any material that could prima facie suggest an agreement amongst the OPs, in contravention of Section 3(3) (b) read with Section 3(1) of the Act. The Commission, therefore, is of the view that no prima facie case of contravention of the provisions of Section 3 of the Act is made out against the OPs. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

AKHIL R. BHANSALI

v.

SKODA AUTO INDIA PVT. LTD. & ANR [CCI]

Case No. 44 of 2017

D.K.Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta & G. P. Mittal.
[Decided on 03/10/2017]

Competition Act, 2002 – Section 4 – Car manufacturer having its own authorised service centre-deficiency in car servicing- whether constitutes abuse of dominance – Held, No.

Brief facts:

The Informant has alleged abuse of dominant position by the OPs in terms of Section 4(2) (b) of the Act for limiting and restricting provision of services by appointing only limited number of dealers, making spare parts available only at select and exclusive dealership, etc. However, on careful perusal of the facts and allegations in the matter, it is observed that the primary grievance of the Informant relates to the quality of service being provided by the authorised dealer of OP-1 in Chennai i.e. Gurudev Motors Pvt. Ltd.

Decision: Dismissed.

Reason:

The Commission has perused the information and the material available on record. The allegations pertaining to abuse of dominance appear to have been made by the Informant to project an issue of consumer grievance as competition issue. The Informant has filed no substantive evidence to support its contentions of contravention of the provisions of the Act by the OPs. In case the services provided by the dealer had been to the satisfaction of the Informant, the Informant would not have had any reason to file this information with the Commission. In any event, the allegations pertaining to abuse of dominance against the OPs have already been dealt with and decided upon by the Commission in Case No. 03 of 2011 (In Re: Shri Shamsher Kataria and Honda Siel Cars India Ltd. and Ors.).

Thus, based on the facts and circumstances of the case, the Commission observes that the allegations in the instant matter appear to be a case of deficiency in after sales services by the authorised dealer of OP-1 at Chennai which is a case of an individual consumer dispute and there is no competition issue involved in the matter. It may be noted that similar issues have arisen in various other cases before the Commission wherein it has been observed that the consumer disputes such as deficiency in services would fall under the Consumer Protection Act, 1986. In Case No. 32 of 2012, filed by Subhash Yadav against Force Motor Limited and Ors., the Commission has held that:

"It may be noted that the aim and object of the Act, is to prevent the practices having adverse effect on the competition, to promote competition and thereby to protect the interest of the customers. In a nutshell, the purpose of this Act is to protect and promote fair competition in the markets in India. However, for the protection of individual consumer interest, there is another statute already in existence known as Consumer Protection Act, 1986 ('the Act of 1986') which mainly deals with protection of consumer interest against the deficiencies in services or goods being purchased by the consumers from sellers."

In light of the above analysis, the Commission is of the view that the allegations of the Informant do not give rise to any competition concern. Accordingly, the Commission finds that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OPs in the instant case and the matter is closed forthwith in terms of the provisions of Section 26(2) of the Act.

MAHARASHTRA ELECTRICAL ENGINEERS ASSOCIATION

v.

MAHARASHTRA INDUSTRIAL DEVELOPMENT CORPORATION & ANR [CCI]

Case No. 52 of 2017

Sudhir Mital, Augustine Peter, U. C. Nahta & G. P. Mittal. [Decided on 09/10/2017]

Competition Act, 2002 – Section 3 – Anti competition agreement – Awarding tenders – Members of the association were excluded – Whether constitutes anti competition practice – Held, No.

Brief facts:

The Informant which is an association of electrical contractors has filed the instant information against MIDC (OP-1) alleging that it is favouring OP-2 in award of tenders to the exclusion of the members of the association. The Informant has alleged that OP-1 is not adhering to its own circular which provided for the qualification of the contractors and also the laid down conditions for the tender.

In support of the allegations, the Informant has pointed out a few instances where tenders have been awarded by OP-1 to OP-2 even though OP-2 was not allegedly eligible as detailed in the information. The Informant has alleged that such conduct of OP-1 is in contravention of the provisions of Section 3 and 4 of the Act.

The Informant has also sought an interim relief in terms of the provisions of Section 33 of the Act by way of an ad interim ex parte stay to restrain OP-1 from allotting/ awarding any further tender in favour of OP-2 till the adjudication of the instant information.

Decision: Dismissed.

Reason:

The Commission has perused the information and the documents filed therewith. On a careful perusal of the information and the documents filed therewith, the Commission is of opinion that the instant information does not disclose any material which may attract the provisions of Section 3 or Section 4 of the Act.

It may be observed that under the scheme of the Act, the Commission may examine the agreements which cause or are likely to cause appreciable adverse effect on competition within India in terms of the provisions contained in Section 3 of the Act. Similarly, the Commission may also examine the abusive conduct indulged in by a dominant enterprise in the relevant market as provided under Section 4 of the Act.

As narrated earlier, the allegations made by the Informant at best indicate non- observance of the tender conditions/ circulars by OP-1 in award of its contracts in favour of OP-2. The Informant has not placed any agreement which can be examined under Section 3 of the Act. Similarly, no term of any tender has been pointed out which can be examined under Section 4 of the Act. Rather, the grievance of the Informant emanates out of the alleged non- adherence to tender conditions and circulars by OP-1. The information has been filed making generalized allegations against MIDC in respect of award of contracts in favour of OP-2. The Informant has to avail its remedies in respect of its grievances highlighted herein in respect of the tendering process elsewhere. Without commenting upon the merits of such allegations, the Commission is of opinion that the entire thrust of the information does not reveal any competition issue whatsoever.

In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

ASSOCIATION OF REGISTRATION PLATES MANUFACTURERS OF INDIA.

v.

SHIMNIT UTSCH INDIA PRIVATE LTD & ORS [CCI]

Case No. 58 of 2017

D.K.Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U. C. Nahta & G. P. Mittal.
[Decided on 14/11/2017]

Competition Act, 2002 – Section 3 & 4 – HSRP contracts – Cartelisation and collusive bidding – Tailor made pre eligibility criteria – Whether charge is proved – Held, No.

Brief facts:

The sum and substance of the allegations made by the Informant Association against the OPs essentially centres around the tendering process of various States in awarding HSRP contracts.

The Informant has stated that the OP companies have formed a cartel to engage in collusive bidding in various States to get HSRP contracts. It is alleged that OPs have been rigging bids with the connivance of officials of Transport Departments to come up with "tailor-made pre-eligibility criteria" which ensured erection of artificial barriers at the pre-qualification stage for other manufacturers.

Further, the Informant has shown through charts the rates at which tenders were awarded to the OPs in different States over time. Initially, when tenders were floated with "tailor-made" conditions, the OPs were awarded tenders at exorbitant rates in case of north-eastern States whereas after open NITs (i.e. without "tailor-made" tender conditions) were floated, the OPs re-strategized their modus operandi and started quoting unreasonably lower/ predatory rates for securing contracts.

Decision: Complaint dismissed.

Reason: The Commission has perused the information and the documents filed therewith. From the above detailed factual matrix, it is evident that the substratum of allegations made by the Informant rests upon "tailor-made" tender conditions which have been allegedly incorporated in the tenders floated by various State Governments for awarding HSRP contracts. These conditions are stated to be included with the connivance of officials of Transport Departments. The process for initiation of CBI investigation in this regard appears to have been set in motion.

The Commission notes that the Informant has made unique allegations against the OPs. Initially, when these companies quoted exorbitant rates, the Informant alleged cartel formation by them. Subsequently, when the tender conditions were eased, the Informant has alleged that they started abusing their dominant position through predatory pricing.

From the averments made in the information, it is observed that the OP companies succeeded in getting contracts initially when tender conditions were favourable to them and most of such tenders pertain to the year 2009 or earlier period. In fact, the Informant has mentioned that some of such contracts were subsequently cancelled by the respective State Governments. Post- relaxing of norms, prices have fallen and other manufacturers have got contracts as well.

On a careful consideration of the matter, the Commission is of the opinion that the allegation made by the Informant does not make out any specific case of bid rigging in any State tender post-2009. No conduct nor any evidence amongst the OPs post-2009 has been detailed in the information. The allegations, at the most, may indicate misconduct by public officials in connivance with some of the persons associated with bidding entities as also hawala transactions through shell/ front companies, however, same does not concern the Commission and cognizance of the same has already been taken by the Government and the CBI.

In view of the above, the Commission holds that no case of contravention of the provisions of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

VIJAY MENON

v.

MAHARASHTRA STATE POWER GENERATION CO LTD [CCI]

Case No. 61 of 2017

S.L.Bunker, Sudhir Mital, U. C. Nahta & G. P. Mittal. [Decided on 30/11/2017]

Competition Act, 2002 – Section 3 – Disqualification conditions for bidders – Bidders against whom an inquiry is pending before the Commission or who have been already penalised – Whether constitutes entry barrier – Held, No.

Brief facts:

The gravamen of the information filed by the Informant emanates out of the qualifying requirement put by MAHAGENCO in its tender floated in the month of September 2017 for appointment of supervision, monitoring and coordination agency for the work of supervision of rake movement, coal quality monitoring and loading of quality coal and movement of sized coal for various thermal power stations of MAHAGENCO by rail mode from coal companies.

The impugned condition, as excerpted earlier, inter alia seeks to disqualify bidders against whom an inquiry is pending before the Commission or who have been already penalised. The Informant has stated that such condition is illegal, baseless and against the spirit of the Act as it seeks to disqualify an otherwise qualified bidder merely because an inquiry is pending before the Commission. It has been also argued that such condition is in the nature of barrier to entry and hence, a major restraint on the dynamics of competition.

Decision: Complaint dismissed.

Reason:

The Commission has perused the information and the documents filed therewith. On a careful perusal of the information and the documents filed therewith, the Commission is of the opinion that the issue projected in the information is purely administrative in nature as the procurer, being a consumer, retains the discretion to disqualify the bidders as per the experience gained and the exigency of the requirement. No competition issue is revealed from the facts alleged in the information.

The Commission is of the considered opinion that a consumer/ procurer must be allowed to exercise choice and to frame the terms and conditions of the tender documents so as to best secure an optimal outcome. This right of consumer's choice must be sacrosanct in a market economy because it is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility of the product or service for the consumer. For an individual, that consumer's choice is based on personal assessment of competing products or services, their relative prices or personal preferences. For any other type of consumer, this process of decision making in exercise of consumers choice is more structured and reflected in the procurement procedures. Such a consumer may use experts or consultants to advise, do its own technical assessment, take advice of others it may trust or even purchase from known and reliable sources. Each of the purchase process is acceptable and valid so long as it does not restrict market entry and allows vendors to freely compete in the procurement process. In case of public entities, there are administrative mechanisms in place for carrying on the due process of exercising consumer's choice on behalf of the public. Of course, there could be competition concerns in rare cases where a monopoly buyer exercises the option in an anti-competitive manner but the present case does not appear to be in that category.

In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

GURGAON INSTITUTIONAL WELFARE ASSOCIATION

v.

HARYANA URBAN DEVELOPMENT AUTHORITY [CCI]

Case No. 94 of 2016

D.K. Sikri, S.L. Bunker, Sudhir Mital, Augustine Peter, U.C. Nahta & G.P. Mittal
[Decided on 31/10/2017]

Competition Act, 2002 – Section 4 – HUDA monopoly right to allot plots – Allotment of institutional plot on free hold basis by HUDA – Agreement containing restriction to transfer plot without the permission of HUDA – Whether constitutes abuse of dominance requiring investigation – Held, Yes.

Brief facts:

The main grievance of the Informant is that the Opposite Party has restricted its right to transfer the title of plot and building constructed over it without the prior permission of the Opposite Party. It has been argued that since the institutional plots were offered on free hold basis, the complete ownership must vest in the allottees after paying the entire consideration. The Opposite Party has not denied the existence of such condition. Rather it has argued that the members of the Informant/allottees were already aware about the said restriction at the time of allotment and none of them ever raised any objection to the said restriction. The Opposite Party also argued that its actions are legal under the relevant laws and regulation applicable to the allotment of such plots and thus, Commission should not intervene.

Decision: Investigation ordered.

Reason:

The Informant has annexed various allotment letters and conveyance deeds with the information highlighting the inconsistency between the standard format provided under the HUDA Regulations and the clauses appearing in the conveyance deeds executed by the Opposite Party. A conveyance deed dated 02nd July, 2010 contained the following as Clause 2:

"The Vendor shall have a first and paramount charge over the said site for the unpaid portion of the sale price and the Transferee shall have no right to transfer by way of sale, gift, mortgage or otherwise the land or any right, title or interest therein (except by way of lease on a monthly basis) without the previous permission in writing of the Estate Officer. The Estate Officer while granting such permission may impose such conditions as may be the Chief Administrator from time to time."

The aforesaid condition is inconsistent with the language contained in Form 'D' of the Haryana Urban Development (Disposal of Land and Buildings) Regulations, 1978 ('HUDA Regulations').

At the preliminary conference held with the parties, the Opposite Party could not explain the inconsistency between the stipulation appearing in the conveyance deed executed by it and the one appearing in the HUDA Regulations. The Commission, vide order dated 28th June, 2017, directed the Opposite Party to specifically provide information on various queries in writing and to appear for a preliminary conference scheduled on 09th August, 2017. On 09th August, 2017, the Opposite Party appeared before the Commission but did not file the information on queries sought by the Commission. During the hearing, the learned counsel for the Opposite Party undertook to file a response to all the queries raised by the Commission. However, the response filed by the Opposite Party did not contain specific answers to the queries which were posed by the Commission. Instead, the Opposite Party chose to take shelter under the HUDA Act and regulations to justify its actions.

The condition of seeking prior permission of the Estate Officer, even for plots where sale consideration is fully paid seems to be apparently unfair. The Informant has cited an instance of mortgage in the information wherein one V&S International Pvt. Ltd. mortgaged the institutional plot allotted by the Opposite Party to HDFC while raising a loan. It is stated that the Opposite Party allowed the said mortgage. However, when V&S International Pvt. Ltd. failed to repay the loan and the institutional plot was sold out in an auction by the lending bank, namely HDFC Bank, to Four Aces Electronics Pvt. Ltd., the Opposite Party failed to transfer the property in favour of the buyer Four Aces Electronics Pvt. Ltd., despite repeated requests. This instance prima facie indicates that the provision of seeking permission from the Estate Officer for transfer of rights in the property is not being used in favour of the allottees. Thus, contrary to claims of the Opposite Party, that it allows for transfer of rights in the property, the Commission notes that prima facie the material on record suggest that it imposes restriction on transfer of rights in the institutional plots allotted by it.

To ascertain whether the Opposite Party undertook any actions to modify the terms and condition which were allegedly anti-competitive/unfair by virtue of the relevant provisions of the Act coming into force, the Commission had asked the Opposite Party, vide order dated 28th June, 2017, to furnish information. However, the Opposite Party did not provide any answer to this query. Despite being given an opportunity, the Opposite Party failed to provide valid justification for its conduct.

In view of the aforesaid discussion, the Commission finds that a prima facie case of abuse of dominant position within the meaning of Section 4(2) (a) (i) has been made out against the Opposite Party. This case needs to be sent for investigation to the Director General (the ‘DG’) under the provisions of Section 26(1) of the act. The DG is directed to carry out a detailed investigation into the matter and submit a report to the Commission, within 60 days.

It is, however, made clear that nothing stated herein shall tantamount to an expression of final opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observations made herein.

DWARIKESH SUGAR INDUSTRIES LTD

v.

WAVE DISTILLERIES & BREWERIES LTD & ORS [CCI]

Case No. 47 of 2014

D.K. Sikri, S. L. Bunker, Sudhir Mital, Augustine Peter, U.C. Nahta & G.S.Mittal. [Decided on 29/12/2017]

Competition Act, 2002 – Sections 3 and 4 – Supply of reserved molasses under the government policy – Informant supplied reserved molasses at negotiated price to OPs – Whether OPs formed cartel and forced informant to sell reserved molasses at less price – Held, No.

Brief Facts:

The Informant is engaged in the manufacturing of crystal sugars through vacuum pan process. The OPs are Uttar Pradesh based manufacturers of country liquor.

It was stated that molasses is a natural by-product in the process of sugar manufacturing which is a basic raw material for manufacturing of alcohol based products, including potable liquor. The control, storage, gradation, regulation of supply and distribution of molasses in the State of Uttar Pradesh is governed by the U.P. Sheera Niyantran Adhiniyam, 1964 and the Molasses Policy ('the Policy') issued thereunder by the Controller of Molasses, Government of Uttar Pradesh.

That the Policy so issued mandates the sugar mills (like the Informant) to sell/ supply certain percentage of their molasses to the manufacturers of country liquor ('reserved molasses') within the State of Uttar Pradesh and rest of the molasses can be sold freely in the open market ('unreserved molasses').

It was alleged that the OPs are in a dominant position in the relevant market of reserved molasses in the State of Uttar Pradesh and have also been abusing the same by determining the purchase price of molasses at unreasonably low rates. The price at which reserved molasses was sold was 9 to 10 times lower than that of the unreserved molasses. The Informant, being bound by the State's policies, had no other option but to accept the price offered by the OPs, which was unreasonably low as compared to the open market price.

Decision: Complaint dismissed.

Reason:

On a careful perusal of the information, the report of the DG and the submissions made by the parties thereon and other materials available on record, the following issue arises for consideration and determination in the matter:

Whether there was an agreement between the OPs which directly or indirectly determined the purchase price of reserved molasses in violation of the provisions of Section 3(3) (a) read with Section 3(1) of the Act?

The Commission is of the considered opinion that the Informant has not sold its reserved molasses to the OPs at the prices offered by them but it further entered into a process of negotiation with the OPs and ultimately sold its reserved molasses at the market determined and mutually negotiated varying prices to different OPs and third parties. No evidence of coordination amongst the OPs is found with regard to the purchase price of reserved molasses. The DG did not find any evidence to conclude that an agreement was entered into amongst OPs to directly or indirectly determine the purchase price of reserved molasses.

In view of the above discussion, the Commission is of the opinion that the allegations made by the Informant that the OPs have entered into an agreement to determine the purchase price of reserved molasses are not substantiated. Hence, no contravention of the provisions of Section 3(3) (a) read with Section 3(1) of the Act is made out and the Commission is in agreement with the DG in this regard. Further, with regard to the allegations of the Informant regarding abuse of dominance by the OPs in contravention of the provisions of Section 4 of the Act, the Commission is of the view that the concept of collective dominance does not find a place under the Act. Hence, no case of contravention of Section 4of the Act is also made out against the OPs.

It may, however, be pointed out that there is a need to review the controls over molasses' distribution and dismantle them in a phased manner so that the industry can realize its full potential, emerging more competitive and competitive neutral. There is a need to do Competition Impact Assessment of the U.P. Sheera Niyantram Adhiniyam, 1964 and the attendant Rules and Policy governing the entire value chain. A copy of this order hence, be forwarded. to Chief Secretary of Government of Uttar Pradesh.

C.P. PAUL

v.

KERALA STATE ELECTRICITY BOARD & ANR [CCI]

Case No. 74 of 2017

D.K. Sikri, S. L. Bunker, Sudhir Mital & U.C. Nahta. [Decided on 29/12/2017]

Competition Act, 2002 – Section 4 – Electricity supply – Billing dispute – Whether involves any competition issue – Held, No.

Brief facts:

The Informant who is a proprietor of a Hotel claimed that as per the prevailing industrial policy of the Government of Kerala, his Hotel was entitled to receive power supply from KSEBL at industrial tariff rates under LT-IV category as his hotel had been classified as a star hotel by the Tourism Department w.e.f 01.08.1988 for a period of 3 years. It is alleged that while the Informant's application for renewal of star classification was pending, KSEBL raised a bill dated 09.03.1998 charging the Informant's hotel at a higher tariff under LT-VII category instead of the applicable LT- IV category, for the month of February, 1998. It has, however, been pointed out that w.e.f. May, 1999 the Government of Kerala changed its Policy and tariffs under LT-VII category and was made applicable for all hotels. Subsequently, it seems that KSEBL disconnected the power supply of the Informant's premises on 25.07.2005 and later dismantled the power connection itself on 16.05.2006 for non-payment of the arrears and surcharge - which have been disputed by the Informant.

Based on the above averments and allegations, the present information has been filed by the Informant against the Opposite Parties alleging contravention of the provisions of Section 4 of the Act.

Decision: Complaint dismissed.

Reason:

A bare reading of the information reveals that the Informant has taken out various proceedings before various fora impugning the demand raised by KSEBL.

The Informant is, aggrieved of the fact that despite the direction issued by the Hon'ble High Court, KSEBL did not take any step to get the matter decided afresh by the Ombudsman. It was pointed out that KSEBL was well aware that the alleged arrears were barred under Section 56(2) of the Indian Electricity Act, 2003. Further, KSEBL in violation of the direction of High Court issued a demand letter to the Informant demanding Rs. 4,46,97,799/- towards arrears and to remit the amount within 30 days. The said amount was not paid by the Informant being non est in the eyes of law.

In the aforesaid backdrop of the factual information giving rise to the filing of the instant information before the Commission, it is evident that the Informant essentially seeks to impugn the demands raised by KSEBL which have been not only disputed by the Informant but the same have also been challenged by the Informant before various fora, as adumbrated supra. The dispute essentially is centred around the applicable rates for supply of electricity to the Informant's hotel.

Having considered the allegations made in the information, the Commission is of the considered opinion that no competition issue whatsoever is involved in the matter or is otherwise made out in the present case which can be said to be abusive in terms of the provisions of Section 4 of the Act. The original demand was raised by KSEBL on 09.03.1998 and looking at the background of the litigation between the parties, it is a clear case of forum shopping and hunting by the Informant to rake up the stale disputes under the garb of competition law.

In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

HPCL-MITTAL PIPELINES LTD

v.

GUJARAT ENERGY TRANSMISSION CORPORATION LTD & ORS [CCI]

Case No. 39 of 2017

D. K. Sikri, S.L. Bunker, Sudhir Mital, Augustine Peter & U.C. Nahta. [Decided on 31/01/2018]

Competition Act, 2002 – Section 4 – Electricity supply – Abuse of dominance- denial to open access – Whether falls under the ambit of section 4 of the Act – Held, Yes.

Brief facts:

The 'Informant had filed the present information, against the Opposite parties alleging, inter alia, contravention of the provisions of Section 4 of the Act. The Informant is primarily aggrieved with the denial of open access and, consequently, the right to choose its electricity supplier which, according to the Informant, is guaranteed under EA03. This denial has been alleged to be an abusive exercise of the dominant position held by OP-2 in the relevant market, wherein open access applications made by the Informant have been persistently denied by OP-2.

Decision: Investigation ordered.

Reason:

The Commission observes that as per the Hon'ble COMPAT's view in M/s Kansan News Private Ltd. Case, denial of market access is a competition law issue only when such denial is occasioned to a competitor. In this regard, it is relevant to note that although Informant is only a consumer in the present case and as such not competing with OP-1 or OP-2, the denial of market access is exclusionary to the 'source/electricity supplier' through which the Informant was planning to access its power requirement. Further, such 'source/electricity supplier', was competing with OP-2's group entity, OP-3, which was a group entity of OP-1 (the holding company of OP-2) and was the licensee distributor for the Informant during the relevant time when open access permission was denied. Prima facie, it appears that the denial of open access permission to the Informant has resulted in a violation of Section 4(2) (c) of the Act.

Further, this denial of market access under Section 4(2) (c) also seems to be a consequent violation of Section 4(2) (e), in the present case. It appears that OP-2 has leveraged its dominant position in the relevant market to adversely affect the competition in the downstream market, where it is present through its group entity OP-3. The structural linkages between the OPs as depicted in the diagram illustrated earlier also points toward the conflict of interest that exists in the present case. Thus, given the conflict of interest situation that exists in the present case, anti-competitive motive behind such denial by OP-2 cannot be ruled out and may need to be tested in detailed investigation.

Based on the foregoing analysis, the Commission is of the considered view that prima facie, the contravention with regard to Section 4(2) (b) (i), Section 4(2) (c) and Section 4(2) (e) of the Act is made out against OP-2, which warrants detailed investigation into the matter. The DG is, thus, directed to carry out a detailed investigation into the matter, in terms of Section 26(1) of the Act, and submit a report to the Commission, within 60 days.

During the course of investigation, if involvement of any other party/entity is found, the DG shall investigate the conduct of such other party/entity(s) who may have indulged in the said contravention. It is, however, made clear that nothing stated herein shall tantamount to an expression of final opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observations made herein.

INDUSTRIES & COMMERCE ASSOCIATION

v.

COAL INDIA LIMITED & ORS [CCI]

Case No. 60 of 2017

D.K.Sikri, Sudhir Mital, Augustine Peter & U. C. Nahta [Decided on 6/02/2018]

Competition Act, 2002 – Section 4 – Allocation of coal by e-auction – Whether abuse od dominance – Held, No.

Brief facts:

The Informant Association comprising of 72 small scale industries that are involved in the manufacture and sale of hard coke, has filed the instant information against CIL and its subsidiary BCCL alleging contravention of the provisions of Section 4 of the Act.

Since the introduction of NCDP in 2008, the members of the Informant Association have entered into two consecutive FSAs with BCCL of five years each. The first FSA expired in 2013 and the second FSA is due to expire in 2018. The real trigger for filing the present information appears to be a paradigm change in the policy framework effected by the Government of India whereby and where under coal linkages are proposed to be auctioned for non-regulated sector through competitive bidding (after expiry of the existing FSAs in 2018) instead of granting the same through extant administrative dispensation method.

The Informant submits that the process of e-auction is in respect of a scarce and otherwise essential commodity, like coking coal, in the context where the price of the end product is not controlled. Accordingly, e- auction of such a commodity by a dominant enterprise, being monopolist, can only yield the highest price, which has the effect of imposition of unfair and excessive prices upon the purchasers and the end consumers. Thus, it is alleged that such conduct of the dominant entity that results in imposition of unfair and excessive prices upon the purchasers and the end consumers is ex-facie exploitative in nature.

Decision: Complaint dismissed.

Reason:

The Commission is of opinion that the entire approach and reasoning adopted by the Informant is tenuous. While formulating policies, MoC is not engaged in any of the activities specified in Section 2(h) of the Act which defines 'enterprise'. Formulation of policies does not fall in the realm of commercial or economic activity as envisaged under the definition of the term 'enterprise' as given thereunder. Hence, it is unnecessary to examine as to whether MoC, CIL and BCCL constitute 'Group' for the purposes of Section 4 read with Explanation (b) to Section 5 of the Act.

The challenge by the Informant to model FSA is also highly premature. The auctions for grant of linkages are yet to be conducted. Thus, at this stage, any examination of the terms of Model FSA would be a speculative exercise until the FSAs are executed by the successful bidders in the e- auction and the final terms are concretized.

For the reasons given above, the Commission is of the opinion that the change in policy by Ministry of Coal for grant of linkages through e- auction is not amenable within the purview of the Act. Consequently, the challenge to model FSA proposed thereunder is also speculative and premature.

In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith.

EXPRESS INDUSTRY COUNCIL OF INDIA

v.

JET AIRWAYS (INDIA) LTD. & ORS [CCI]

Case No. 30 of 2013

D.K.Sikri, Sudhir Mital, Augustine Peter & U. C. Nahta. [Decided on 07/03/2018]

Competition Act, 2002 – Section 3 – Anti competition agreement/conduct – Concerted action by airlines in charging fuel surcharge – Whether results in cartel – Held, Yes.

Brief facts:

It has been alleged in the information that in May 2008, certain domestic Airlines in India connived to introduce a 'Fuel Surcharge' (FSC) for transporting cargo. This surcharge was fixed at a uniform rate of Rs. 5/ Kg and came into force on May 15, 2008. It was further alleged that although there does not appear to be any legal provision under which such FSC could have been levied by the Airlines, the ostensible reason given was to mitigate the volatility of fuel prices. It has been further stated that the very fact of levying FSC at a uniform rate from the same date itself constitutes an act of cartelization covered under Section 3 of the Act. The said cartel of the Airlines is stated to be continuing till date.

Decision: Cease and desist order passed. Penalty imposed.

Reason:

The core issue was whether OPs have operated in concerted manner while fixing FSC and thereby violated the provisions of Section 3(1) read with Section 3(3) of the Act?

The Commission notes that OPs have stated that each airline takes into account several factors to determine FSC, yet by their own admissions, the reason provided by OPs for introduction of FSC was 'sharp volatility' in ATF (Aviation Turbine Fuel) prices. It appears that OPs, while trying to justify the changes in FSC, have paid no heed to the purpose admitted by them for levying FSC and have now provided reasons which go far beyond the avowed objective behind introduction of such a levy. In fact, from the reasons adduced by OPs, Commission has no hesitation in holding that the very purpose of introduction of FSC to cushion the volatility in ATF prices has been relegated to the margins long back and, instead, all sorts of reasons have now been offered to explain the continuous and coordinated revisions in FSC by the airlines. Thus, far from being a cushion to hedge the volatility in ATF prices, FSC has become a tool to seek rent from the potential users of cargo services in the garb of various reasons which have nothing to do with the stated objective.

There are also serious loopholes in the justifications provided by OPs. The OPs have associated random factors to FSC prices, without having a systematic mechanism to arrive at these prices. For example, it may be noted that OP-1 has explained that it was due to increase in ATF price coupled with increase in dollar exchange rate, that FSC was increased. However, there have been instances when the correlation between the ATF price and USD exchange rate vis-à-vis FSC rate has been missing.

The Commission notes that each OP has stated various factors that determine FSC. Inspite of citing diverse factors that determine the change in FSC, all OPs have increased FSC by the same amount. It is difficult to comprehend as to how even after considering variety of factors determining the change in FSC rates, all OPs could have reached a similar rate to affect an increase in FSC rates on various occasions.

To sum up, the Airlines were unable to furnish any data/ calculation/methodology or costing of any kind whatsoever in support of the determination of FSC rates. Even the authorized representatives of OPs could not furnish the rationale for revision of FSC on certain occasions when questioned in front of the DG. Merely providing factors which are not correlated to the FSC is a futile exercise conducted by the OPs. This is unable to justify the concerted acts of the OPs.

It may be noted that a parallel conduct is legal only when the adaptation to the market conditions are done independently and not on the basis of information exchanged between the competitors, the object of which is to influence the market. One of the elements that indicates concerted action is the exchange of information between the enterprises directly or indirectly. Price competition in a market encourages an efficient supply of output/ services by companies. Any company is free to change/ revise its prices taking into consideration the foreseeable conduct of its competitors. That however is not suggestive of the fact that it cooperates with the competitors. Such coordinated course of action relating to a change of prices ensures its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date, etc.

In view of the foregoing, it is opined that the OPs have acted in parallel and the only plausible reason for increment of FSC rates by the airlines was collusion amongst them. Such a conduct has, in turn, resulted into indirectly determining the rates of air cargo transport in terms of the provisions contained in Section 3 (3)(a) of the Act.

As these OPs are engaged in similar business and are therefore operating at the same level of the production chain, allegations of anti-competitive agreements, decisions or practices among them squarely stand covered within the ambit of Section 3(3) read with Section 3(1) of the Act.

Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that OP-1, OP-2 and OP- 3 have acted in a concerted manner in fixing and revising the FSC rates and thereby contravened the provisions of Section 3(1) read with Section 3(3) (a) of the Act. The Commission, however, does not deem it appropriate to proceed against OP-4 and OP-5.

Based on the above discussion, the Commission is of that opinion that the impugned acts/ conduct of OP-1, OP-2 and OP-3 are found to be in contravention of the provisions of Section 3(3) (a) read with Section 3(1) of the Act. Accordingly, OP-1, OP-2 and OP-3 are directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act.

The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty as well. Accordingly, the Commission imposes a sum of Rs. 39.81 crore on OP-1, Rs. 9.45 crore on OP-2, Rs. 5.10 crore on OP-3 as penalties for their impugned conduct which has been held to be in contravention of the provisions of Section 3(1) read with Section 3(3) (a) of the Act.

VISHAL PANDE

v.

HONDA MOTORCYCLE AND SCOOTER INDIA PVT LTD [CCI]

Case No. 17 of 2017

D.K. Sikri, Sudhir Mital, Augustine Peter, U. C. Nahta, G.P.Mittal. [Decided on 14/03/2018]

Competition Act,2002 – Distributor ship agreement – Automobile industry – Sale of Scooters – Restrictive clauses in agreement – Whether constitutes anti-competition agreement and abuse of dominance – Held, Yes.

Brief facts:

The Informant is one of the authorised dealer of two wheelers of the OP for a period of 15 years. The Informant acquired dealership and service centre of the OP in Aurangabad through a non-exclusive standard form of agreement between the parties ("Dealership Agreement"). The Informant alleged that the OP has imposed the following restrictive conditions in the said dealership agreement:

- Purchase of oils and consumables only from OP nominated two vendors.
- Forced to maintain stock of authorised accessories like mats, side stand, mud-guard, number plate, side-step, etc., classified as genuine accessories.
- Prohibiting the Informant from dealing in any manner with any competing product.
- Forced selling of the AMC, EW and RSA authorised only by the OP.
- Deliberate deduction from dealer's account to fund advertising expenses.
- Compulsory off-loading of stock and slow moving models.
- Compulsory billing of merchandise.
- Restriction regarding the sale of batteries.
- Exclusive arrangements with financers and insurance partners.
- Re-sale price maintenance and discount control mechanism.
- Fixation of limits of geographic operation.
- Enforcing hub and spokes arrangement by negatively evaluating dealers.
- Termination of dealership and refusal to take back stock.

The Informant has, inter-alia, prayed before the Commission to initiate an inquiry against the OP for contravention of the provisions of Sections 3 and 4 of the Act and issue an appropriate direction.

Decision: Investigation directed.

Reason:

With regard to the dominant position, it would be relevant to look into the sale data of the OP and its competitors in both the relevant markets. The OP is at the third place with a market share varying between 7.14 percent and 12.63 percent. Considering the market share of the OP in this relevant market, prima-facie, it does not appear to enjoy a dominant position in this relevant market 'market for manufacture and sale of motorcycles in India'. Accordingly, it does not merit investigation for abuse in this market.

In the 'market for manufacture and sale of scooters in India', the Commission observes that, the OP is consistently leading in this relevant market with a high market share ranging between 43.30 percent and 56.82 percent followed by TVS Motor Co Ltd. whose market share is ranging between 21.44 percent and 14.76 percent. Further, the relevant market appears to exhibit entry barriers due to huge capital cost involved in setting up a manufacturing facility. At prima-facie stage, these considerations suggest that the OP enjoys a dominant position in the 'market for manufacture and sale of scooters in India'.

The Commission has given a careful examination to the alleged imposition of several unfair conditions on the Informant through the Dealership Agreement which merit examination as abuse of dominant position in the 'market for manufacture and sale of scooters in India'.

Based on above, the Commission is prima-facie satisfied that the restrictions imposed by the OP for sale of oil, lubricants and batteries are unfair and in contravention of Section 4(2) (a) (i) of the Act. Similarly, the condition for mandatory purchase of accessories, merchandise items, forceful billing of slow moving vehicles, compulsory deduction of advertising expenses, restrictions on insurance and finance options, making purchase of AMC, EW and RSA contingent upon purchase of booklets from Corporate India Warranties (I) Private Limited, termination of dealership without prior notice and refusal for stock buyback appear to be unfair and suggest prima-facie contravention of Section 4(2) (a)(i) of the Act. The Commission is also prima-facie satisfied that the Dealership Agreement has been concluded with the said supplementary obligations which, by their nature or commercial usage, have no connection with the subject of the contract. Thus, the Commission is of the prima-facie view that the conduct of the OP merits examination under Section 4(2) (d) of the Act.

The Commission also notes that the mandatory requirement imposed by the OP on its dealers for purchase of oil and consumables, genuine accessories, AMC, EW and RSA, advertising services, merchandise items, batteries, insurance and finance options, from designated sources; resale price maintenance and discount control mechanism; allocation of any area or market for the disposal or sale of the goods; and exclusive supply agreement/refusal to deal; also appear to be in the nature of anti-competitive restraints covered under section 3(4) of the Act.

In view of above discussion, prima-facie, a case of contravention of the provisions of Section 4 and 3(4) of the Act is made out against the OP. The Director General (DG) is directed to cause an investigation to be made into the matter and to complete the investigation within a period of 60 days from receipt of this order.

IN RE: CARTELISATION IN RESPECT OF ZINC CARBON DRY CELL BATTERIES MARKET IN INDIA AGAINST EVEREADY INDUSTRIES INDIA LTD & ORS [CCI]

Suo Motu Case No. 02 of 2016

D.K. Sikri, Sudhir Mital, Augustine Peter, U. C. Nahta & G. P. Mittal [Decided on 19/04/2018]

Competition Act, 2002 – Section 3 – Zinc-carbon dry cell batteries – Cartelisation – Cease and desist order passed. Penalty imposed.

Brief facts:

The instant case was taken up by the Competition Commission of India suo motu, pursuant to the Lesser Penalty Application submitted by OP.3 stating therein that there existed a cartel amongst OP-1, OP-2, and OP-3, [Manufacturers] which were all engaged in the business of, inter alia, manufacture and supply of zinc-carbon dry cell batteries, to control the distribution and price of zinc-carbon dry cell batteries in India, in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act. It was also disclosed that the Manufacturers were members of OP-4 which is a trade association, namely, Association of Indian Dry Cell Manufacturers which facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers.

Decision: Penalty imposed. Cease and desist order passed.

Reason:

The Commission has considered the Lesser Penalty Applications filed by the Manufacturers, the investigation report of the DG and the submissions of OPs and their individuals. It is noted that all the Manufacturers have admitted the fact that they were involved in the cartelisation of zinc-carbon dry cell batteries.

From the information and evidence furnished by OPs and the investigation by the DG, it is observed that the Manufacturers indulged in anticompetitive conduct of price coordination, limiting production/ supply as well as market allocation. The price coordination amongst the Manufacturers encompassed not only increase in the MRP of the zinc carbon dry call batteries but also exclusion of ‘price competition’ at all levels in the distribution chain of zinc- carbon dry cell batteries to ensure implementation of the agreement to increase price. In addition, the Manufacturers also agreed to control supply in the market to establish higher prices and indulged in market allocation by requesting each other to withdraw their products from the market. For these purposes, the Manufacturers exchanged amongst themselves confidential and commercially sensitive information about pricing as well as other information such as production and sales data.

In order to increase price of the zinc carbon dry call batteries, the Manufacturers mutually agreed on the implementation modalities of MRP. They not only decided the schedule of start of production of units with new

MRP but also the start of billing as well as availability of products, with revised rates in the market.

The evidence gathered during investigation and submission of OPs shows that the individuals of the Manufacturers regularly discussed and agreed when to give effect to the price increase during the personal / AIDCM meetings. OP-1 being the market leader would take lead by issuing press release to announce increase in price of its zinc-carbon dry cell batteries. Thereafter, OP-2 and OP- 3 would respond to it immediately with corresponding increase in price of their batteries on the pretext of following the market leader.

Further, evidence collected during investigation shows that price coordination agreement amongst the Manufacturers was not limited to deciding and implementing increase in MRP of zinc-carbon dry cell batteries alone but extended to include monitoring and controlling of prices at all levels so as to exclude 'price competition' in the entire distribution chain of zinc-carbon dry cell batteries.

Notably, in the distribution chain, the Manufacturers sold the batteries to the distributors/ wholesalers and through them to the retailers on 'principal to principal' basis. Once the batteries were sold to wholesalers/ retailers they pushed sales of the batteries by offering attractive margins/ incentives. At the same time, sales staff of the companies tried to promote sales performance of their products by resorting to promotional schemes - like scratch coupons, gifts, combo offers, festival offerings etc. All this resulted in 'price competition' at various levels. For instance, if wholesalers / retailers of OP-1 tried to boost sale of OP-1's products, by offering incentives to the consumers, it would result in lower sales for OP-2 and OP-3.

Since the 'price competition' in the distribution chain, as stated above, could have rendered the agreement/ understanding reached among the Manufacturers ineffective, they entered into agreement/ understanding/ coordination amongst themselves to cover all other elements of the price structure besides MRP, comprising trade discount, wholesale price, dealer/ stockist landing cost, open market rates, retailers' margin, sales promotion schemes etc.

The evidence on record shows that despite the above agreement/ understanding/ coordination, the Manufacturers faced problem in actual implementation of increased MRP in the market. Since deviation from the agreed stand by any of the Manufacturers could result in drop of sales volume of others, they would bring to one another's notice concerns about slow implementation of the mutually agreed decisions and would seek corrective action if deviations from the agreement were observed in the market. Besides, they would regularly share amongst them information regarding operating margin rates, wholesale offer price etc. prevailing in various states/ cities/ towns collected by the sales staff and would even control supply in the market to establish higher prices of batteries.

The e-mails exchanged amongst the Manufacturers show that there was also an understanding amongst them to allocate market based on geographical area and types of batteries. They would often request each other to withdraw their products from a particular geographical area such as a state or town or city.

Apart from all this, Manufacturers in their meetings held under the aegis of AIDCM, would share common concerns about low rates of batteries offered by other maverick players, mostly importers/ traders, as this occasionally caused constraints in raising/ maintaining the higher market price of their battery products. The evidence gathered by the DG shows that on one occasion in AIDCM meeting on 10 February 2012, the Manufacturers deliberated the impact of alkaline and rechargeable batteries on the market of the zinc-carbon dry cell batteries and contemplated reduction in MRP of AA and AAA size batteries by reducing trade margins. Also, the Manufacturers discussed the low rates at which their batteries were being sold by the modern retail channels like 'Walmart' and 'Metro Cash & Carry' etc. and agreed on the strategy to counter such issues. The Commission observes that while it may be legitimate for enterprises engaged in the same line of business to share common concerns, the Manufacturers in the instant case used the platform of AIDCM to coordinate their actions, inter alia, on pricing.

The top management of the Manufacturers played an active role in this collusion. It is observed that the coordination amongst the Manufacturers took place at the highest level in these companies. The top managerial personnel discussed various aspects of coordination in the meetings of AIDCM (reflected in the minutes of such meetings), on the sidelines of meetings of AIDCM (reflected in the hand-written notes and agenda points prepared by the individual members for the meeting) and in private meetings. Moreover, there were frequent direct email/ fax communications amongst the individuals of OPs, which show their close personal and friendly relations and the underlying deep commitment to adhere to 'gentlemen's agreement'.

There is further evidence to show that by collating and disseminating crucial business data of the competitors, AIDCM facilitated better coordination amongst the Manufacturers. The monthly data on production and sales of the Manufacturers collected by AIDCM was used to compare/ assess the impact of the overall arrangement on pricing and other business strategies, on their market shares over a period.

The Commission finds that practice by AIDCM of compiling and disseminating commercially sensitive data was greatly helpful to the Manufacturers to monitor the outcome of overall 'agreement/ understanding' reached at amongst them with regard to pricing, output, sale/ supply, allocation of market, etc. In fact, comparison of the market shares of OPs for the past six years i.e. from 2010-11 to 2015-16 based on their sales of zinc carbon dry cell batteries shows that market share of each of the OPs remained stable over these years. This is a clear indicator of the effectiveness of the cartel arrangement.

In view of the foregoing, the Commission finds that OP-4 through its practices, decisions and conduct of the office bearers i.e. individuals of OP-4, facilitated anti-competitive agreement/ understanding and concerted action amongst its members in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

In view of the foregoing, the Commission is of the opinion that OP-1, OP-2 and OP-3 have been involved in cartelisation of zinc-carbon dry cell batteries in India which has been facilitated by OP-4, in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act. Further, the individuals of OPs have also been actively involved in the said cartelisation in the domestic market.

CREDAI-NCR

v.

DEPARTMENT OF TOWN AND COUNTRY PLANNING, HARYANA & ORS [CCI]

Case No. 40 of 2017

Sudhir Mittal, Augustine Peter, U. C. Nahta & G. P. Mittal [Decided on 06/04/2018]

Competition Act, 2002 – Section 4 – Abuse of dominance-development of real estate in Haryana – Licence to developers – Restrictive and onerous clauses – Whether abuse of dominance – Held, Yes. Investigation ordered.

Brief facts:

It is alleged in the information that some of the terms and conditions of the Sohna License, Sohna LOI (Letter of Intent) and Sohna Agreement are unfair and discriminatory. It is averred that through the Sohna LOI, the OPs impose unfair and extensive obligations on the developers in terms of the development works that the developer must carry out in the specified territory and the charges levied on them are also required to be paid within tight timelines. Further, the conditions therein obligate the developers to pay EDC as and when demanded. However, no claim for damages lies against the OPs for delay in provision of development facilities.

It is further alleged that the charges and payment schedule in the Sohna Master Plan has been decided by the OPs unilaterally without making available the basis of calculation of these charges or implementation schedule of the development work.

The Informant has further alleged that under the terms of the Sohna License, EDC are subject to revision as per the actual charges incurred including any enhanced land acquisition costs, which is to be worked out later and the developer is liable to pay an additional amount as and when directed. Furthermore, the assumption on costs or timelines with respect to the development of infrastructure are also not disclosed.

In addition, the Sohna LOI obligates the developers to pay interest on delayed payment of EDC and IDC to the OPs. It is alleged that the OPs are levying an exorbitant rate of interest on EDC and IDC on developers onerously without any authority under the Haryana Development Act. Further, the developers are forced to accept fulfilment of such supplementary obligations of payment of interest, which has not been contemplated in the Haryana Development Act.

Further, it is alleged that no activity on infrastructure development has been initiated by the OPs, which has further delayed the development of the projects. But under the license agreement, the charges and interest continue to be levied on the developers causing undue hardship in the development of their respective projects. It is alleged that in the light of inaction by the OPs, the developers are faced with the impossible task of fulfilling their obligations under the Sohna LOI, Sohna Agreement and Sohna License within strict timelines and potential penalties covering land that has not even been acquired by the OPs.

In view of the above facts, the Informant has prayed the Commission to direct the Director General (hereinafter, the 'DG') to cause an investigation into the affairs of the OPs in performing their obligations under the HUDA Act and Haryana Urban Development Act and abuse of their position in the State of Haryana; restrain the OPs from invoking the bank guarantee against the developers pending adjudication of this information; restrain the OPs and direct them to cease and desist from compelling developers to pay any pending EDC and IDC or any increase thereof along with interest; direct the OPs to renegotiate the licenses and bilateral agreements with realistic time- schedules based on mutually agreeable development milestones and payment schedules; direct the OPs to return interest on EDC and IDC paid in advance by the developers in territories where they have carried out no development work; direct the OPs to revise the EDC and IDC as mutually feasible and as per reasonably acceptable development schedule; impose penalty on the OPs for abusing their dominant position to the prejudice of the developers; and pass such other and further order, as the Commission may deem fit and proper in the circumstances of the case.

Decision: Investigation ordered.

Reason:

It has been submitted that the OPs do not fall within the definition of 'enterprise' and, therefore, the present information against them is not maintainable. In the instant case, it is observed that even if the activity of issuing licenses by OP-1 were to be construed as exercise of sovereign power, the levy of EDC/IDC by it on the developers and consequently upon the end-consumers i.e. allottees/ home-buyers, cannot be construed as such. Clearly, the activities of OP-1 in the form of levying of EDC/ IDC have a direct economic/commercial impact. In other words, OP-1 is performing actions relating to economic/commercial activities, which in turn is affecting provision of development and construction services by the developers. Thus, in view of foregoing, the Commission is of the opinion that OP-1 is covered within the ambit of the term 'enterprise' as defined in the Act.

Another contention raised by OP-1 is that the developers are not consumers under the Act. In this regard, the Commission observes that the OPs here are engaged in provision of commercial/economic services, which are being availed by the developers on payment of requisite fee and charges levied on them. Thus, the Commission finds that the developers in this case are covered within the definition of 'consumer' under the Act.

Having considered the submissions of the Informant and the response of OP-1 thereto, the Commission is of the opinion that even though the terms of Sohna LOI, Sohna Agreement and Sohna Licence relating to EDC/ IDC emanate largely from the statutory provisions of the relevant statutes, prima facie the terms of these documents appear to be one-sided and in favour of the OPs. Further, the alleged conduct of the OPs such as failure to adhere to its obligations under the Sohna Master Plan in a time-bound manner and imposing onerous obligations on the developers to pay EDC/ IDC, prima facie, appears to be abusive. In response to the allegations, OP-1 has not denied that it has not provided External Development Works in accordance with the Sohna Master Plan, rather it has justified that it is not possible to provide such services unless the entire EDC/ IDC amount is paid by the developers along with interest and penal interest. The Commission finds that the conduct of the OPs whereby they have not undertaken any External Development Works related to the Sohna project is ultimately affecting the end consumers i.e. the allottees/ home-buyers, as because of non- development by the OPs, the completion of the project is getting delayed and the same is rendered uninhabitable. Thus, in view of foregoing, the Commission is of the opinion that the conduct of the OPs prima facie appears to be in contravention of the provisions of Section 4(2)(a)(i) of the Act.

Accordingly, the DG is directed to cause an investigation into the matter, complete the investigation within a period of 60 days from the receipt of this order and submit its report.

INDIA GLYCOLS LTD

v.

INDIAN SUGAR MILLS ASSOCIATION & ORS [CCI]

Case No. 94 of 2014

D.K.Sikri, Augustine Peter, U.C. Nahta, G. P. Mittal. [Decided on 11/05/2018]

Competition Act, 2002 – Section 3 – Anti competition practices – Complaint with respect to supply of ethanol at an artificially higher price – CCI dismissed the complaint.

Brief facts:

The present information has been filed by India Glycols Ltd. ('the Informant') against Indian Sugar Mills Association ("Opposite Party-1"/ OP-1/ ISMA), National Federation of Cooperative Sugar Factories Ltd.("Opposite Party-2"/ OP-2/ NFCSF), Indian Oil Corporation Ltd. ("Opposite Party-3"/ OP-3/ IOCL), Hindustan Petroleum Corporation Ltd. ("Opposite Party-4"/ OP-4/ HPCL) and Bharat Petroleum Corporation Ltd. ("Opposite Party-5"/ OP-5/ BPCL) (collectively, "the OPs") alleging contravention of the provisions of the Act.

As per the Informant, OP-1 and OP-2 hold the entire market for sugar mills in India and supply ethanol to chemical industries and to OP-3 to OP-5. It has been alleged that OP-1 is forcing the PSU OMCs to purchase ethanol at an artificially higher price and the same amounts to violation of Section 4 of the Act. It has also been alleged that the role of OP-2 is equally anti-competitive since it has colluded with OP-1 in artificially raising the price of ethanol in contravention of the provisions of Section 3 (3) (a) of the Act.

The Informant is also aggrieved at the mandatory Ethanol Blending Programme (EBP) promulgated by the Ministry of Petroleum and Natural Gas ('MoPNG') vide its notification dated 02.01.2013 whereby the OMCs were directed to sell only petrol blended with ethanol with percentage of ethanol upto 10%. It is alleged that such a programme has created anti-competitive conditions in the market for supply of ethanol by encouraging members of OP-1 and OP-2 to rig bids and to artificially increase the prices of ethanol. Thus, while seeking discontinuance of such a programme, the Informant has sought that joint tender mechanism of PSU OMCs be scrapped and the same be replaced by independent tendering by all the OMCs including private OMCs for procurement of ethanol at market-driven prices so that proper competition amongst all the OMCs is ensured and the Informant and other buyers of ethanol are also benefited by fair competition in the market for sale and purchase of ethanol.

Decision: Complaint dismissed.

Reason:

Issue No.I: Whether the process of mandatory EBP notified by MoPNG as well as procurement of ethanol by the OMCs at fixed notified prices contravene any provision of the Act?

It needs no emphasis that a policy or pricing strategy of the Government cannot be examined in abstract by the Commission unless the same falls within the framework of the Act. The Commission observes that policy formulation is the prerogative of the Government. It is in its domain to effect a change in the extant policy by shifting the focus or changing the economic policies. No doubt, such changes could result in adversely affecting some of the existing interests, yet the same cannot be a ground to challenge them before the Commission. It is not for the Commission to consider the relative merits of different economic policies or the pricing mechanisms of the Government and decide as to whether a more wise or a better alternative can be evolved. The Commission is of the considered opinion that formulation of policies falls in the domain of the Executive and the Commission is not the appropriate forum to sit in appeal over such decisions unless such policies contravene any provision of the Act and can be examined within the existing regulatory framework.

Issue No.II: Whether OP-1 has abused its dominant position in the market for supply of ethanol to the PSU OMCs in violation of the provisions of Section 4 of the Act?

The primary activities of ISMA are to provide a platform to its constituent members to discuss matters of common interest relating to the sugar industry besides making representations to the government authorities and agencies to espouse the cause of its members in respect of the matters of policy and procedures governing the sugar industry. Since ISMA is not undertaking any activity which is economic or commercial activity pertaining to production and supply of ethanol, allegations made by the Informant in this regard do not survive. As a result, question of ISMA being dominant in such a market does not arise. The argument of the Informant that ISMA is involved in business of 'provision of services' to its members to bring it within the scope of 'enterprise' is disingenuous. It needs no further analysis as the allegations made by the Informant are in respect of production and supply of ethanol and not in respect of the alleged services provided by ISMA to its members. It would indeed be a subversion of law if ISMA is held to be an 'enterprise' for providing its platform to the members as 'services' and to hold it guilty for altogether different activity i.e. production and supply of ethanol.

In view of the above, the Commission is of the considered opinion that ISMA cannot be considered to be an 'enterprise' within the meaning of the term as defined in Section 2 (h) of the Act and as such, the issue of abuse of dominant position by ISMA in respect of production and supply of ethanol does not arise.

Issue No.III: Whether OP-1 and OP-2 acted in collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol to force the PSU OMCs to purchase ethanol at an artificially higher price in contravention of the provisions of Section 3 of the Act?

When the DG examined the production and supply data of the three main sugar mills which produce and supply about 75-80% of the total ethanol supplied to the OMCs in State of U.P., the same revealed that the production and utilisation pattern of these mills of different derivatives of alcohol during financial years 2012-13 to 2014-15 significantly differ. It indicates that the sugar mills are independently taking decisions on their production mix and its utilisation including ethanol and such decisions seem to be market driven. It seems that these sugar mills are producing and supplying different derivatives of alcohol as per the demand and supply commitments made by each one of them looking to the market forces.

Further, the DG also alluded to several reports and studies undertaken by various government agencies and organizations working on policy matters, which seemed to unanimously indicate that production and supply of ethanol for EBP is at a lower level which is due to the fact that production of sugarcane in the country is inconsistent. Therefore, supply of molasses in the country is also not only inconsistent but limited too. Under such a scenario, it will be logical and prudent to compare and see the production and supply of ethanol in connection with the production and availability of molasses. In the light of these facts and analysis, the investigation came to the conclusion that the production, availability and supply of molasses in the country has a huge and decisive impact on the production and supply of ethanol and that OP-1 and OP-2 cannot be said to be in any collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol at low level which may force the OMCs (OP-3 to OP-5) to purchase ethanol at an artificially higher price.

For the reasons adumbrated, the Commission is of the opinion that no contravention of the provisions of Section 3 (3) (a) and 3 (3) (b) of the Act is made out against ISMA (OP-1) and NFCSF (OP-2).

In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against OP-3 to OP-5 on the aforesaid count. Based on the above discussion, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the OPs.

In Re: ANTI-COMPETITIVE PRACTICES PREVAILING IN BANKING SECTOR [CCI]

Suo Motu Case No. 01 of 2015

D.K.Sikri, U.C. Nahta & G. P. Mittal. [Decided on 24/04/2018]

Competition Act, 2002 – Allegation of cartelisation by banks – Savings bank interest rates and service charges – CCI concludes that there is no cartelisation.

Brief facts:

The instant matter concerns Savings Bank Interest Rates ('SBIRs') and service charges on Automated Teller Machines ('ATMs') transactions, offered/ charged by banks. Considering the similarity of these rates across different banks, the Commission took up the matter on a suo moto basis.

Decision: No cartelisation in banking services.

Reason:

At the outset, it is observed that out of the Sample Banks, BOB, BOI, CB and Axis did not discuss SBIRs in any of their meetings. ALCOs of the other Sample Banks viz. SBI, ICICI, HDFC, PNB, UBI and CBI had discussion regarding SBIRs but for different reasons chose not to change the SBIRs. Soon after deregulation, CBI was the first bank to discuss the issue of SBIR in its meeting dated 28th October, 2011. From the minutes of its ALCO meeting, it is seen that CBI considered the impact of an increase of fifty basis points (bps) i.e. half a percent in SBIR on the cost of funds and estimated a rise to result in increased cost by more than seven percent, which would have to be recovered from the borrowers of retail loans. Therefore, CBI deliberately decided not to enhance the SBIR. PNB considered SBIR in its meeting dated 29th October, 2011 and decided not enhance the same as no other major bank did so. PNB also believed that SB Accounts were more influenced by customer service and were not sensitive to interest rate to a large extent. Similarly, SBI in its meeting held on 3rd December, 2011 took note of certain smaller banks increasing SBIR but no impact on the growth of SB deposits in SBI was felt. Therefore, it decided to maintain the same SBIR i.e. four (4) percent. In its meeting held on 31st October, 2011, ICICI noted that unlike smaller banks, increase in SBIR by one hundred bps would have a significantly negative impact on the net interest income and therefore, it decided not to increase the SBIR. The in-depth investigation by the DG did not reveal any incriminating material suggesting cartel amongst the banks. Thus, the Commission is of the view that SBIRs offered by the banks are an outcome of their independent assessment of market conditions and not of any collusive arrangement.

On the issue of similarity in service charges, it is noted that rates of SCBs for different types of services varied significantly. The studies of BCSBI, which covered public, private and foreign banks, suggest that there was no similarity in charges levied by different banks for various services like account maintenance, account closure, issue and cancellation of DDs, POs, BCs, ATM transactions, SMS alerts etc. They also reveal that very few SCBs conducted costing exercise, in addition to considering the charges levied by peer banks, for imposing/ revising service charges. As similarity of service charges across banks is not observed, Commission is of the view that there has not been any collusion amongst the SCBs for determining service charges as well.

As regards role of the IBA, investigation could not bring forth any material indicating use of its platform to decide or implement similar SBIRs by banks. This is further reinforced by the fact that private SCBs such as Yes Bank, Kotak, IndusInd Bank are offering higher SBIRs despite being members of IBA. Even on the recommendation of BCSBI to IBA for issuance of guidelines on certain service charges, IBA took the stance that it will not prescribe any standard service charges and the same should be determined by individual banks having due regard to their costs and other relevant factors. Thus, it is difficult to draw an inference that IBA was used as a platform or was instrumental in determining similar SBIRs or coordinating service charges.

In view of the foregoing, Commission is of the view that there is no reason to disagree with the findings of the DG as the material on record does not suggest any cartelisation amongst banks and/or IBA, during 2011 to 2016, to determine SBIRs or service charges. Accordingly, no case of contravention of the provisions of Section 3(3) of the Act is made out.

PARSOLI MOTOR WORKS PVT. LTD

v.

BMW INDIA PVT. LTD & ORS [CCI]

Case No. 11 of 2018

D.K.Sikri, Sudhir Mital, U.C. Nahta & G. P. Mittal. [Decided on 30/05/2018]

Competition Act, 2002 – Sections 4 – Dealership contract – Refusal to renew the contract – Whether such refusal constitute abuse of dominance – Held, No.

Brief facts:

The Informant was a dealer for BMW vehicles for the territory of the State of Gujarat under a dealership agreement with OP-1 since 2007 which was being renewed from time to time. However, vide letter dated 07.12.2017, BMW India intimated the Informant for not renewing the existing dealership agreement which was to expire on 31.12.2017. Feeling aggrieved by the decision of BMW in not renewing the agreement, the Informant has filed the instant information alleging abuse of dominance by the OPs. The Informant is also aggrieved of the fact that BMW India has not given sufficient time to the Informant to exit from the business.

The Informant has also alleged that contrary to its own policy, BMW India is allowing dealers based outside the State of Gujarat to sell BMW cars to customers based in the State of Gujarat. Such acts on the part of OP-1 have caused financial losses to the Informant besides defrauding the State exchequer by not paying entry tax on such sales.

Decision: Dismissed.

Reason:

In the present case, from the information available in the public domain, it appears that BMW India has negligible share in the passenger car segment in India which is dominated by a number of players. As a result, in the dealership network also, BMW India would not have spread much as compared to that of Maruti, Hyundai, Tata etc, who command a significant market share. In such a market construct, BMW India cannot be said to be a dominant player and as such the question of abuse of dominant position will not arise. The Commission also notes that the Informant has not provided any document or data wherefrom the dominance of the OPs can even be prima facie established in any relevant market. Even otherwise, as discussed below, the instant information does not disclose any infringement of the provisions of the Act.

On perusal of the information and the documents filed therewith, the Commission observes that the existing dealership agreement between the Informant and OP-1 was renewed for a period of one year commencing from 01.01.2017 and was to expire on 31.12.2017. As such, the Informant was fully cognizant of the fact that the existing agreement would expire on 31.12.2017. In these circumstances, the Commission does not find any reason whereby the letter dated 07.12.2017 of BMW intimating the Informant about not renewing the agreement beyond 31.12.2017, can be faulted, as the existing dealership agreement between the Informant and OP-1 stood expired by efflux of time on 31.12.2017 due to non-renewal thereof. The Informant has not challenged any term of the now expired dealership agreement.

The Informant has also made allegations in the information about evasion of entry tax by BMW in respect of the vehicles which were allowed to be sold to the customers of the State of Gujarat from its dealers based outside the State of Gujarat. The Commission is of opinion that such issue does not raise any competition concern.

In view of the foregoing, the Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith.

JAIDEEP UGRANKAR

v.

CLIENT ASSOCIATES [CCI]

Case No. 08 of 2018

D.K.Sikri, Sudhir Mital, Augustine Peter & U.C. Nahta [Decided on 01/06/2018]

Competition Act,2002 – Sections 3 & 4 – Employment contract – Post employment obligations – Employer deducted incremental salary paid at the time of resignation – Whether such deduction and post-employment obligations constitute abuse of dominance – Held, No.

Brief facts:

The Informant was in the employment of the Opposite Party, which provides wealth management services to its clients. After a period of 10 years the Informant resigned from the services of the OP. At the time of his resignation incremental salary paid to him was deducted from his final settlement dues and the appointment contract contained non-solicit and non0-competre clauses. Aggrieved by the acts of the OP the Informant had filed the present complaint alleging violation of sections 3 and 4 of the Competition Act, 2002 by the OP.

The Informant has prayed to the Commission that the Opposite Party be directed to (i) withdraw the post-employment obligations and (ii) release the agreed revised salary for the months of April to September, 2017 along with agreed requisite bonus.

Decision: Complaint dismissed.

Reason:

Having perused the information available on record, the Commission observes that the grievance of the Informant relates to imposition of arbitrary post-employment obligations upon the Informant and the act of the Opposite Party in recovering the revised salary from his current salary post resignation.

Although, Informant has alleged contravention of the provisions of Section 3 of the Act, no allegation has been specifically mentioned in the information. Further, the facts of the matter do not suggest any conduct on the part of Opposite Party that could be a subject matter of scrutiny under Section 3 of the Act. Accordingly, the facts of the case are being examined from the perspective of the provisions of Section 4 of the Act.

The overall market of private wealth management services is very wide and presence of the Opposite Party would be relatively marginal. There are numerous firms like Opposite Party which procure the kind of services offered by the Informant. Thus, the Commission is of the view that the Opposite Party cannot be held to enjoy dominant position in the relevant market as a procurer or consumer of such professional services.

Since, the Opposite Party is not dominant, the Commission does not deem it appropriate to analyse the abuse. Based on the above analysis, Commission is of the, prima facie, view that no case of contravention of the provisions of either Section 3 or Section 4 of the Act is made out against the Opposite Party in the instant matter.

M/S. B. HIMMATLAL AGRAWAL PARTNER

v.

COMPETENT COMMISSION OF INDIA & ANR [SC]

Civil Appeal No. 5029 of 2018

A.K.Sikri & Ashok Bushan, JJ. [Decided on 18/05/2018]

Competition Act, 2002 – Section 53B – Appeal to tribunal against the order of CCI – Conditional stay granted – Petitioner could not make the deposit – Main appeal dismissed on tis ground – Whether correct – Held, No.

Brief facts:

A neat question of law which arises for consideration in this appeal is as to whether the order of the National Company Law Appellate Tribunal (‘NCLAT”) dismissing the main appeal itself of the appellant herein for non-compliance of the direction to deposit the amount as a condition for grant of stay, is justified and legal.

A complaint was filed against the appellant firm before the Competition Commission of India (“CCI”) alleging that the appellant firm was involved in anti-competitive and unfair trade practices in collusion with nine other firms. The appellant firm filed its reply. The CCI after considering the same imposed penalties on the appellant firm as well as nine parties. Insofar as appellant is concerned, penalty of Rs.3.61 crores has been imposed.

The appellant filed the statutory appeal against the above order before NCLAT along with a stay application. NCLAT admitted the appeal. NCLAT granted stay with a condition that 10% of the penalty should be deposited. The appellant could not fulfil the said condition of deposit. NCLAT dismissed the appeal for non-fulfilment of deposit.

Decision: Appeal allowed.

Reason:

A pure legal submission which is advanced by the learned counsel for the appellant is that even if the appellant could not comply with orders dated December 4, 2017 vide which conditional stay was granted directing the appellant to deposit 10% of the penalty amount, the maximum effect thereof was to vacate the stay granted and the Appellate Tribunal was not legally justified in dismissing the appeal itself. This submission of the appellant commends acceptance, having due force and substance in law.

From the facts narrated above, it is apparent that order of the CCI was challenged by filing appeal under Section 53B of the Act. Along with this appeal, the appellant had also filed application for stay of the operation of the order of the CCI during the pendency of the appeal. Appeal was admitted insofar as stay is concerned, which was granted subject to the condition that the appellant deposits 10% of the amount of penalty imposed by the CCI. It needs to be understood, in this context, that the condition of deposit was attached to the order of stay. In case of non- compliance of the said condition, the consequence would be that stay has ceased to operate as the condition for stay is not fulfilled. However, non-compliance of the conditional order of stay would have no bearing insofar as the main appeal is concerned.

The aforesaid provision, thus, confers a right upon any of the aggrieved parties mentioned therein to prefer an appeal to the Appellate Tribunal. This statutory provision does not impose any condition of pre-deposit for entertaining the appeal. Therefore, right to file the appeal and have the said appeal decided on merits, if it is filed within the period of limitation, is conferred by the statute and that cannot be taken away by imposing the condition of deposit of an amount leading to dismissal of the main appeal itself if the said condition is not satisfied. Position would have been different if the provision of appeal itself contained a condition of pre-deposit of certain amount. That is not so. Sub- section (3) of Section 53B specifically cast a duty upon the Appellate Tribunal to pass order on appeal, as it thinks fit i.e. either confirming, modifying or setting aside the direction, decision or order appealed against. It is to be done after giving an opportunity of hearing to the parties to the appeal. It, thus, clearly implies that appeal has to be decided on merits. The Appellate Tribunal, which is the creature of a statute, has to act within the domain prescribed by the law/statutory provision. This provision nowhere stipulates that the Appellate Tribunal can direct the appellant to deposit a certain amount as a condition precedent for hearing the appeal. In fact, that was not even done in the instant case. It is stated at the cost of repetition that the condition of deposit of 10% of the penalty was imposed insofar as stay of penalty order passed by the CCI is concerned. Therefore, at the most, stay could have been vacated. The Appellate Tribunal, thus, had no jurisdiction to dismiss the appeal itself.

Accordingly, we allow this appeal and set aside that part of the impugned order whereby the appeal of the appellant is dismissed and restore the appeal which shall be decided by the Appellate Tribunal on merits. We, however, make it clear that as far as stay of the penalty order is concerned, that stood vacated for non-compliance of the condition of deposit of 10% of the penalty and, thus, there is no stay of the CCI order in favour of the appellant.

STARLIGHT BRUCHEM LTD

v.

FLORA AND FAUNA HOUSING & LAND DEVELOPMENTS PVT LTD& ORS [CCI]

Case No. 53 of 2017

D.K.Sikri, Sudhir Mital, Augustine Peter & U.C.Nahatra. [Decided on 09/07/2018]

Competition act, 2002 – Section 4 – Abuse of dominance-procurement of liquor – Preferential purchase by OP firms specific manufacturers – Whether an act of abuse of dominance requiring investigation – Held, yes.

Brief facts:

The Informant has alleged that OP-1 to OP-4 have been following a non-transparent policy of procurement, based on an arrangement, agreement or understanding to buy from only certain manufacturers who belong to the same group, or from some ‘favoured’ manufacturers. Since the manufacturers/ distillers cannot sell liquor directly to the retailer or end- consumer, such conduct of denial of market access to the other manufacturers from selling their produce has resulted in the other manufacturers facing severe losses and in many cases shutting down their units.

Further, it is alleged that OP-5, which owns or controls OP-1 to OP-4, has used its dominant position in wholesale of liquor to enter into and enhance its market share for manufacturing country liquor by setting up/ acquiring Wave Distilleries and Breweries Ltd. and Lords Distilleries Ltd., from which OP-1 to OP-4 buy bulk of their requirements.

Decision: Investigation ordered.

Reason:

The Commission has noted the rival arguments of the parties and also perused the material on record. With respect to allegations made about contravention of Section 3 of the Act, the Commission notes that the same are based merely on conjectures. There is no credible evidence on record, which shows existence of any agreement amongst OP-1 to OP-4 in support of the contentions made by the Informant. Accordingly, such allegations are found to be devoid of merit.

The Commission now proceeds to examine the allegation of discrimination and denial of market access in procurement of country liquor. It is observed that each of OP-1 to OP-4 have been procuring country liquor from more than one distillery; however, significant percentage i.e. around 25 to 55%, of the procurement by OP-1, OP-3 and OP-4 in this period was from two distilleries, namely, Wave Distilleries and Breweries Limited and Lords Distilleries Limited, which are group companies of OP-5. It is further observed that in the years 2015-16 and 2016-17, OP-2 procured more than 50% from these distilleries and OP-1, OP-2 and OP-4 procured between 30 to 55% from them. Such trend of procurement by OP-1 to OP-4 shows that they are giving preference to these two distilleries over other distillers/ manufacturers. The OPs have not been able to provide any plausible justification for according such preferential treatment.

With respect to the contention of the OPs that a distillery is required to place request for indent on an OP which is the wholesale license holder of that zone, it is observed that the data provided by the OPs regarding their procurement of country liquor from various distilleries itself contradicts their argument. Thus, in light of foregoing facts, the Commission is of the view that the reasons given by the OPs appear to be merely an attempt to subvert the fact that procurement from various distillers/ manufacturers was being made by them in an arbitrary and discriminatory manner, resulting in denial of market access to certain distillers/ manufacturers like the Informant.

Based on above, the Commission is of the opinion that the conduct of the OPs is prima facie in contravention of the provisions of Section 4, particularly Section 4(2) (a) (i) and 4(2) (c) of the Act. Accordingly, the DG is directed to cause an investigation into the matter and submit this report within a period of 60 days from the receipt of this order. The DG is also directed to investigate into the allegation of the Informant regarding OP-1 to OP-5 being a group and contravening the provisions of Section 4 of the Act as such.

XYZ

v.

INDIAN OIL CORPORATION LTD. & ORS [CCI]

Case No. 05 of 2018

D.K. Sikri, Sudhir Mital & Augustine Peter. [Decided on 04/07/2018]

Competition Act, 2002 – Sections 3 & 4 – Service of oil tank trucks – Joint tendering by oil marketing companies – Whether an act of anti-competitive restriction and abuse of dominance – Held, No.

Brief facts:

The case pertains to alleged joint tendering/collusive tendering by the OPs i.e. the Oil Marketing Companies (IOCL, BPCL and HPCL) while procuring the services of the Tank Trucks for transportation of the LPG Cylinders. The Informants have alleged these to be in the nature of price fixing, limitation/restriction of output/services and market allocation thereby in contravention of Section 3 of the Act. Further, the Informants have also alleged abuse of dominant position collectively by the OPs.

Decision: Dismissed.

Reason:

At the outset, it may be highlighted that collective dominance is not recognised by the Act. Rather the existence of two strong players in the market is indicative of competition between them, unless they have agreed not to compete, which also can be only be looked into under Section 3 of the Act, not Section 4. Thus, the Commission notes that the allegation of the Informants related to collective dominance does not hold good under the provisions of Section 4 of the Act and requires no further deliberation.

With regard to Section 3 of the Act, the Commission notes that in the present case the Informants have alleged an existence of a buyer/purchase cartel. However, generally cartels are comprised of the sellers who agree to fix prices and/or output and since such agreement is to raise the price above the competitive levels or bring the output below the competitive levels, the same is considered to be anti-competitive. It needs to be recognised that the creation of 'buyer power' through joint purchasing agreements may rather lead to direct benefits for consumers in the form of lower prices bargained by the buyers. Thus, though the Act covers buyers' cartel within the purview of Section 3(1) read with Section 3(3) of the Act, treating buyers' arrangement/cartel at par with sellers' cartel may not be appropriate. For assessment of such cases, it is imperative to first, look at the potential theories of harm and then the conditions necessary for infliction of competitive harm need to be examined.

The Commission has, accordingly, analysed the allegations of the Informants in order to ascertain whether a case of anti-competitive cartel conduct is made out.

As pointed out by the OPs that they have not fixed the prices but only prescribed a price band within which the bidders can compete. Such price band is calculated upon incorporation of cost of various necessary components and includes a profit margin. The bidders get a window of around ten percent to give their quotations. The OPs clarified that they suggest a price floor to ensure that the bidders do not unnecessarily quote an unviable quotation which may lead to delay or irregular services in future. The OPs have also submitted that it is the prerogative of bidder to quote within the said price band which gives them enough margin to compete with other bidders. The Commission finds merit in the justification offered by the OPs.

With regard to the fleet/loyalty card, the Commission notes that the issuance of such cards comes with commercial justification as well as advantages, not only for the OPs but also for the TT owners/drivers. Further, such fleet/loyalty cards come with various benefits e.g. secured parking, cooking facilities, rest room and accommodation facilities, laundry and drying facilities, health check-ups including eye check-ups, loyalty rewards, accident insurance etc. Also, such cards deal with the problem of the substantial lapse of time between the fuel cost incurred by transporter and the final receipt of reimbursement. Thus, the facts or material on record does not suggest any anti- competitive element involved in the issuance of such fleet/loyalty cards by the OPs.

Further, the Commission finds no merit in the allegation regarding a preference given to tank trucks registered in a particular State for participating in tenders in that State. Under the impugned tenders, there is no bar on quoting bids for TTs that are registered in a State other than the State for which tender is floated, i.e. the location of the bottling plant. It only states that TTs registered in the State where the tender is floated will be given preference provided bids are in the lower rate of price band for that State. Such condition does not appear to be arbitrary as long as registration in one State does not restrict from participation in the tender process in other States. The OPs have clarified that no such restriction has been placed on the bidders and the only objective of the preferential treatment accorded to State registered TTs is to discourage registrations clustered in a particular State like Nagaland. Based on these considerations, the conduct of the OPs is not found to have any adverse bearing on competition.

In Re: CARTELISATION BY BROADCASTING SERVICE PROVIDERS

v.

ESSEL SHYAM COMMUNICATION LTD & ORS [CCI]

Suo Motu Case No. 02 of 2013

D.K.Sikri, Sudhir Mital, Augustine Peter, U. C. Nahta & G. P. Mittal. [Decided on 11/07/2018]

Section 46 of the Competition Act, 2002 (Act) read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 – Cartel & bid rigging- lesser penalty allowed.

Brief facts:

The present case emanated from a Lesser Penalty Application filed by Globecast India Private Limited (OP-2) and Globecast Asia Private Limited (OP-3) [OP-2 and OP-3 collectively referred to as Globecast], providing information in relation to its bid- rigging arrangement with Essel Shyam Communication Limited (OP-1/ ESCL) in the market for provision of broadcasting services.

As per the information received, there was exchange of commercial and confidential price sensitive information between ESCL and Globecast through Mr. Bharat K. Prem (OP-4/ Bharat), an employee of OP-2, which resulted in bid rigging of tenders for procurement broadcasting services of various sporting events, especially during the year 2011-12. It was alleged that OP-4 had clandestinely entered into a Consultancy Agreement with ESCL, under which Bharat, though an employee of OP-2, used to work for ESCL for a fixed remuneration and a share in profits from the contracts obtained through bid rigging. Jason Yeow (OP-5/ Jason), an employee of OP-3, was also alleged to be involved with ESCL and Bharat in this case.

Decision: Lesser Penalty allowed.

Reason: Having made an event-wise analysis, the Commission finds that for each of the events examined above, Globecast and ESCL were ostensibly competing with each other for provision of broadcasting services for these events. However, there was exchange of commercially sensitive information related to bidding between the two, which enabled them to co-ordinate their bids. As a result, they did not effectively compete in the bidding process and gave a pretence of competition to the broadcasters. Such conduct adversely affected and manipulated the competitive process for bidding by eliminating/ reducing the competition for bids.

It is observed that for all events the exchange of commercially sensitive information related to bidding took place through Bharat of Globecast and Mr. Lalit Jain, Mr. Atul Gupta and Mr. M. N. Vyas of ESCL. In case of all events, except IPL 2012 (Sony's Feed - India Rights) where Globecast had entered into a teaming arrangement with ESCL on a profit sharing basis, Globecast has averred that Bharat was not authorised to share the bidding information with any person and that he did so in his personal capacity in breach of his employment contract. Further, during the period when bid rigging took place Bharat had entered into a consultancy agreement with ESCL. On this aspect, the Commission finds that although Bharat played a key role in the exchange of information of Globecast, the fact remains that he was an employee of Globecast and was authorised to act on its behalf in participating in the bidding process, Globecast has also admitted this fact. If there was any breach of contractual obligation by Bharat, Globecast always had the option to initiate separate proceedings against him. In fact, it is noted from the records that Globecast had initiated such proceedings in India against Bharat and against Jason in Singapore. During the hearing, Globecast submitted that such proceedings were no longer being pursued. Be that as it may, the Commission finds that as Bharat was an employee of Globecast at the time of contravention of the provisions of the Act and was responsible for submission of bids on its behalf, Globecast is liable for the conduct that took place through Bharat and which resulted in bid rigging.

Another contention raised by Globecast is that out of fourteen events that were investigated by the DG, it won only two events, while ESCL won ten events. Even if sub-contracts are included, Globecast provided services for four events, while ESCL provided services for eleven events showing that ESCL primarily benefited from the conduct under investigation. On the other hand, ESCL has submitted that Globecast preferred to take only those contracts where there was no risk of payment and where Globecast could sell its own satellite bandwidth on its own terms. The profits/ amounts involved in contracts bagged by Globecast were much more than profitability/ amount involved in the contracts won by ESCL. It has been submitted by ESCL that Globecast through a well devised strategy ensured that ESCL acted as per its (Globecast's) design.

The Commission finds that the above arguments of ESCL and Globecast are irrelevant, particularly, in light of the fact that in case of IPL 2012 (Sony's Feed - India Rights), there is a categorical admission from both parties that they entered into a teaming arrangement for 50-50 profit sharing which was not made known to the broadcasters. A collusion for even one event is sufficient for the purposes of establishing contravention of the provisions of the Act by ESCL and Globecast and when collusion is established, it is immaterial which OP derived higher benefit from the collusion. In any case, in the instant matter, both OPs have derived benefit from the cartel and won contracts for one or more events.

In view of the foregoing analysis, the Commission is of the opinion that ESCL and Globecast operated a cartel in the above sporting events held during the period 2011-2012. They exchanged information and quoted bid prices as per their arrangements from July 2011 to May 2012. As a result, they have committed an infringement of the provisions of Section 3(3) (d) read with Section 3(1) of the Act during this period.

The Commission has considered the above mitigating factors elaborated upon by ESCL and Globecast. It is noted that at the outset, both ESCL and Globecast have contended that as they approached the Commission under the lesser penalty provisions and made a complete and true disclosure extending full cooperation with the Commission/ DG's investigation, their conduct should be considered as a mitigating factor. It is observed that all such submissions relate to grant of lesser penalty under the Lesser Penalty Regulations. Accordingly, the same have been taken into consideration while evaluating the lesser penalty applications of ESCL and Globecast in succeeding Para 127 to 132 of this order. Apart from stating such factors, ESCL has contended that setting up of compliance programme after the conduct should be considered as a mitigating factor. In this regard, it is pertinent to mention that the existence of a compliance programme and violation occurring inspite of a vibrant compliance programme is normally considered as a mitigating factor. In the instant case, what is argued is initiation of a compliance programme, which is not eligible as a mitigating factor. Moreover, although subsequent conduct can be considered a mitigating factor, it cannot absolve the infringing entity from liability. Also, carrying out a forensic audit after receipt of DG notice cannot be considered as mitigating factor. With respect to Globecast, it is noted that apart from making assertion of cooperation and full disclosure under Lesser Penalty Regulations, the other factors contended as mitigating factors are the factum of its liability arising from the conduct of its employee and not directly and benefit of cartel being derived by ESCL and not Globecast. These contentions of Globecast have already been dealt in Para 90 to 92 of this order. Further, it is pointed out that mere fact that a party is being investigated for the first time by the Commission and has not previously contravened the Act cannot be considered as a mitigating factor, as has been claimed by Globecast.

Thus, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on ESCL and Globecast under by taking into consideration their total profit as per the financial statements filed by them at 1.5 times of the profit for the period of contravention.

As mentioned earlier, the Commission received Lesser Penalty Applications from ESCL as well as Globecast in the present matter. Keeping in view the sequence in which they approached the Commission, First Priority Status to Globecast and Second Priority Status to ESCL is granted. Based on the aforesaid evaluation of the evidences and information furnished by Globecast and ESCL, the Commission decides to grant 100% (Hundred percent) reduction in leviable penalty to Globecast and 30% (Thirty Percent) reduction in leviable penalty to ESCL.

RAJENDRA AGARWAL

v.

SHOPPERS STOP LIMITED [CCI]

Case No. 21 of 2018

Sudhir Mital, Augustine Peter, U. C. Nahta & G. P. Mittal. [Decided on 30/07/2018]

Competition Act, 2002 – Section 3 – Gift coupon-redemption based on certain minimum value purchase – Whether tenable – Held, Yes.

Brief facts:

The Informant had purchased a gift item from OP and pursuant to the said transaction, the Informant was offered two discount coupons of Rs. 500/- each by the OP, which could be redeemed/used in a subsequent purchase. However, while offering the said discount coupons, the OP did not convey to the Informant that in order to redeem such coupons, the amount of the subsequent purchase should be at least of Rs. 4000 (Rs. Four Thousand).

The Informant subsequently visited the OP along with his wife where they made purchases worth Rs. 1,404/-. At the time of making the payment the Informant was not allowed to redeem the said discount coupons and was compelled by the OP to pay the entire amount of Rs. 1404/-. Based on the above, the Informant has alleged that the conduct of the OP is in contravention of the provisions of Section 3 of the Act and that the OP has resorted to unfair trade practices.

Decision: Dismissed.

Reason: The Commission has carefully perused the information and the material available on record. From the facts and circumstances of the present case, the Commission observes that the said dispute between the Informant and the OP regarding non redemption of two discount coupons is an individual consumer dispute rather than a matter of competition concern and the same also does not cause any adverse effect on competition.

In this regard, it is apposite to mention that the Commission has earlier dealt with issues related to individual consumer disputes in plethora of cases and has ordered closure of the same. The Commission in Case no. 17 of 2012, Sanjeev Pandey vs. Mahindra & Mahindra, held that delay in delivery of vehicle in a specific state cannot be termed as a violation of the provisions of the Act. Similarly, the Commission in *Case no. 32 of 2012, Subhash Yadav vs. Force Limited & Ors*, has categorically stated that the main object of the Act is to prevent practices having adverse effect on competition and to promote competition.

In the light of the aforesaid discussion, the Commission is of the prima facie opinion that the present dispute between the Informant and the OP is a consumer dispute and does not raise any competition concern. Hence, no prima facie case is made out against the OP under Section 3 of the Act. Thus, the instant case is ordered to be closed under Section 26(2) of the Act.

IN RE: ANTICOMPETITIVE CONDUCT IN THE DRY-CELL BATTERIES MARKET IN INDIA AGAINST PANASONIC CORPORATION, JAPAN & ORS [CCI]

Suo Motu Case No. 02 of 2017

Sudhir Mital, Augustine Peter, U. C. Nahta & Js. G.P. Mittal. [Decided on 30/08/2018]

Competition Act, 2002 – Cartel in dry cell battery in India – Leniency petition by member of the cartel – Petition allowed.

Brief facts:

The present case was initiated by the Commission suo motu pursuant to receiving a leniency application ("LP Application") from Panasonic Corporation, Japan ["OP-1"] filed by it on behalf of itself, the enterprises controlled by it.

In the LP Application, it was disclosed by the Applicants that there existed a bi-lateral ancillary cartel between OP-2 and Geep Industries (India) Private Limited (hereinafter "OP-3") in the institutional sales of dry cell batteries. This cartel existed from at least 2013 till late 2015 to early 2016. OP-2 was the supplier of batteries to OP-3, as part of its institutional sales. OP-2 had a primary cartel with Eveready Industries India Ltd. (hereinafter "Eveready") and Indo National Limited (hereinafter "Nippo") whereby the three of them co-ordinated the market prices of zinc-carbon dry-cell batteries. Hence, OP-2 had the fore-knowledge about the time of price increase to be affected by this primary cartel. This fore- knowledge was used by OP-2 as leverage to negotiate and increase the basic price of the batteries being sold by it to OP-3. OP-2 would lead OP-3 to believe that the Market Operating Price (hereinafter "MOP") and Maximum Retail Price (hereinafter "MRP") of all the major manufacturers would increase in the near future, and OP-3 would be in a position to pass on the increase in the basic price to the consumers by such increased MOP/ MRP.

Also, it was disclosed that OP-2 and OP-3 used to agree on the market price of the batteries being sold by them, so as to maintain price parity in the market. They used to monitor the MOP of each other and of other manufacturers, and inform each other in cases of any discrepancy noticed. Such price parity was in consonance with the prices determined by the primary cartel. E-mail communications between OP-2 and OP-3 with regard to such monitoring were provided by the Applicants with their submissions. Also, such an understanding between the two of them was recorded in Clause 4.3 of the agreement entered into between OP-2 and OP-3 on 01.10.2010, a copy of which was given.

Further, it was disclosed that as per Clause 2 of the afore-said agreement, OP-2 used to pack the batteries as per instructions of OP-3 and make supplies. Such packaging had to be changed whenever the MRP increased. The dates on which the packaging was changed by OP-2 for OP-3 when compared with a corresponding list for OP-2's own products shows that price increase in OP-3's products were even within one month of price increase in OP-2's products. Such simultaneous price increase is also evident of a pre-meditated arrangement.

Based on the fore-going, the Applicants submitted that contravention of Section 3 (3) read with Section 3 (1) of the Act has been committed by OP-2 and OP-3.

Decision: Leniency petition allowed.

Reason:

In view of the foregoing, the Commission holds that OP-2 and OP-3 have contravened of the provisions of Section 3 (3) (a) read with Section 3 (1) of the Act by indulging in cartelisation and for such contravention, Mr. S. K. Khurana and Mr. Parimal Vazir of OP-2 and Mr. Jainuddin Thanawala, Mr. Joeb Thanawala and Mr. Pushpa M. of OP-3 are also liable under Section 48 of the Act.

Therefore, in terms of Section 27 (b) of the Act, the Commission is empowered to impose upon such companies as well as their persons, appropriate penalties. In the case of OP-2, penalty of up to three times of its profit for each year of the continuance of the cartel may be imposed as the said figure is higher while in case of OP-3, penalty of up to ten percent of its turnover for each year of the continuance of the cartel may be imposed as the said figure is higher. Thus, the Commission decides to impose upon OP-2, penalty @ 1.5 times the profit for each year of the continuance of the cartel which amounts to Rs.73,93,25,600/-.

On the other hand, with regard to OP-3, there is no gain saying that OP-3 was not entitled to breach the law even on the plea of compulsion as taken before the DG; however, keeping in mind that OP-2, being the manufacturer of dry-cell batteries and supplier of OP-3, was in the position to influence and dictate the terms of the anti-competitive PSA to OP-3 and OP-3, being a very small player having insignificant market share in the market for dry-cell batteries was not in a bargaining/ negotiating position vis-a-vis OP-2, the Commission decides to impose upon OP-3, penalty @ 4% of the turnover for each year of the continuance of the cartel which amounts to Rs. 9,64,06,682/-.

As far as the persons held liable under Section 48 of the Act are concerned, the Commission may impose upon them, a penalty of up to ten percent of the average of their income for the three preceding financial years. Keeping all the factors in mind, the Commission, in the present case, deems it appropriate to impose penalty @ 10 % of the average of their income for the three preceding financial years, upon such persons, which is calculated as under:

At this stage, the Commission takes into account the fact that OP-1, on behalf of itself, OP-2 and their Directors, officers and employees had filed an LP Application in the matter. The Commission observes that in the LP Application, vital disclosures had been made by submitting evidence of the alleged cartel which enabled the Commission to form a prima facie opinion regarding existence of the cartel. At the time the LP Application was filed, the Commission had no evidence to form such an opinion. Further, through the application, the Commission could get vital evidences which disclosed the modus operandi of the cartel such as the PSA and the e-mail communications exchanged between OP-2 and OP-3. These evidences were found crucial in establishing contravention of the provisions of Section 3 of the Act in the matter.

The Commission finds that OP-2 and its representatives had provided genuine, full, continuous and expeditious cooperation during the course of investigation. Thus, full and true disclosure of information and evidence and continuous co-operation so provided, not only enabled the Commission to order investigation into the matter, but also helped in establishing the contravention of Section 3 of the Act. On the basis of the foregoing, the Commission decides to grant 100% reduction in the penalty amount leviable under the Act, to OP-2 and its Directors, officers and employees identified above to be liable under the provisions of Section 48 of the Act.

M/S COUNFREEDISE

v.

TIMEX GROUP INDIA LTD [CCI]

Case No. 55 of 2017

Sudhir Mital, Augustine Peter, U. C. Nahta & Js. G.P. Mittal. [Decided on 14/08/2018]

Competition Act, 2002 – Sections 3 & 4 – Complaint by dealer against watch manufacturer – Complaint dismissed.

Brief facts:

The gist of allegations of the Informant is that the OP stopped doing business with it on account of non-compliance of RPM diktat of the OP and the OP is said to be discriminating against the Informant vis-a-vis other online retailers like Cloudtail, XL Retail etc. Moreover, the OP has allegedly failed to provide after-sale services to the customers who purchased the wrist watches of the OP from the Informant through online platform. Through such conduct, the OP is alleged to have contravened Section 3(3), 3(4) and Section 4 of the Act.

Decision: Dismissed.

Reason:

The Commission has perused all the material available on record. Considering the oral and written submissions of the parties and taking into account all other material available on record, the Commission observes as under:

Given the presence of such a major player like Titan in the relevant market along with other reputed foreign brands, there seems to be enough competitive constraints upon the OP in the relevant market. Thus, the OP does not appear to be a dominant player in the relevant market. In the absence of dominance, no case of contravention of Section 4 of the Act is made out.

Even though the Commission has concluded that the OP is not dominant in the relevant market, yet the Commission proceeds to examine the allegations of the Informant pertaining to abusive conduct by the OP. The Informant has alleged that the OP has instituted false litigation against the Informant. The Commission takes cognizance of the contentions of the OP that it is facing the menace of counterfeit products, especially on account of online retailers. After conducting its internal verification, the OP initiated legal action against such sellers, including the Informant, to restrain them from manufacturing and/or selling counterfeit products. The Commission observes that the holder of an Intellectual Property has the right to protect it, and therefore, reasonable actions and restrictions imposed in this regard cannot be found at fault under the competition law. Thus, the Commission does not find substance in the allegation of the Informant that the OP has initiated sham litigation against the Informant on account of not abiding by RPM and/or discount policy of the OP.

With regard to the allegation of RPM, the Commission observes that mere mention of the term 'control discount' in a single isolated email to a single seller, without any adverse consequence to the other online sellers including the Informant, is not sufficient to infer any anti-competitive conduct on the part of the OP. The Commission notes that for RPM to be effective in the form of discount control, it has to be imposed on all the online retailers and not just the Informant. The Informant has itself stated that the OP has not taken any action against entities like Cloudtail and XL Retail for offering even more discounts on OP's product on the online platforms. This also negates the contention of the Informant that the OP was indulging in RPM. Further, any agreement in the nature of RPM, in order to be termed as anti-competitive, has to meet the test of causing an appreciable adverse effect on competition (hereinafter, the 'AAEC'). The Commission notes that even if a manufacturer controls the prices of its products in the market, such conduct would not result into an AAEC unless such a manufacturer holds significant market power. The Commission observes that in the instant case, the OP is just one of the many players in the wrist watch market in the organised sector and players like Titan etc. are way ahead of the OP. Moreover, the Informant is only one of the intermediaries of the OP in the online space, and online sales account for less than one-seventh of the total sales of the OP. The Commission notes that the Informant has failed to place on record any evidence to establish that the OP enforced RPM across the distribution channel so as to be able to cause an AAEC in the relevant market. Therefore, the Commission does not find any merit in the allegations of the Informant that the OP has contravened the provisions of Section 3(4) (e) of the Act.

With regard to the contention of the Informant that it is a key player and refusal to deal by the OP with the Informant will cause AAEC in the relevant market, the Commission observes that the sales by the OP to the Informant is not significant compared to the total sales of the OP. In addition, the revenue derived by the Informant from the sale of watches of the OP is also not significant to infer that the Informant is dependent on the OP. Thereafter, the allegations under Section 3(4) of the Act are examined on the basis of rule of reason approach, and the Commission do not find that there is AAEC as a result of the OP's denial to deal with the Informant, more so when the OP is apprehensive of dilution of its brand as a result of counterfeits being sold in the online market.

In light of the above analysis, the Commission finds that no prima facie case of contravention of the provisions of either Section 3 or Section 4 of the Act is made out against the OP in the instant matter. Accordingly, the matter is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

RAJASTHAN CYLINDERS & CONTAINERS LTD

v.

UOI & ORS [SC]

Civil Appeal No. 3546 of 2014 with batch of appeals

Ashok Bhushan & A.K.Sikri, JJ. [Decided on 01/10/2018]

Competition Act, 2002 – Sections 3 & 4 – Cartelisation and bid rigging – Supply of gas cylinders to oil companies – Oligopoly market – Identical price or similar price quoted by cylinder suppliers – CCI imposed heavy penalty – COMPAT reduced the penalty- whether constitutes collusive bidding – Held, No.

Brief facts:

All these appeals are filed against the orders passed by the Competition Appellate Tribunal ('COMPAT'). The COMPAT by the said judgment has upheld the findings of the Competition Commission of India ('CCI') that the appellants/suppliers of Liquefied Petroleum Gas (LPG) Cylinders to the Indian Oil Corporation Ltd. ('IOCL') had indulged in cartilisation. The CCI, as a result, imposed severe penalties in the form of fines.

While maintaining the order of the CCI insofar as it found the appellants guilty of contravention of Section 3(3) (d) and also under Section 3(3) (a) of the Act, the COMPAT has reduced the amount of penalty. These suppliers have filed the instant appeals on the ground that there was no cartilisation and they have not contravened the provisions of the Act. On the other hand, CCI has also come up in appeal challenging latter part of the order whereby penalties inflicted on the suppliers stand reduced. For the sake of convenience these suppliers will be referred to as the appellants hereinafter.

Decision: Appeals allowed.

Reason:

In these appeals, the Court is concerned with the alleged agreement entered into between the appellants falling in clause (d) of sub-section (3) of Section 3, which talks of bid rigging or collusive bidding.

We may point out at the outset that all these appellants are manufacturing gas cylinders of a particular specification having capacity of 14.2 kg which are needed for use by the three oil companies in India, namely, IOCL, Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL) [all public sector companies]. It is also a matter of record that apart from the aforesaid three companies there are no other buyers for these cylinders manufactured by the appellants. Insofar as IOCL is concerned, it is a leading market player in LPG as its market share is 48%. Thus, in case a particular manufacturer is not able to supply its cylinders to the aforesaid three companies, there is no other market for these cylinders and it may force that company to exit from its operations.

According to us, the real question in the present case is as to whether there was a possibility of such an agreement having regard to market conditions even when we proceed on the basis that meeting did take place. Possibility of such an agreement has been inferred by the CCI on the grounds that identical bidding takes place thereafter and various suppliers gave such a bid despite varying cost and also that they have appointed common changes etc. as pointed out above.

It is clear that as far as CCI is concerned, it has come to the conclusion that there was a cartelisation among the appellants herein and a concerted decision was taken to rig the bids which were submitted pursuant to the tenders issued by IOCL. On the other hand, the appellants argue that there was no such agreement and even if the bids of many bidders were identical in nature, the bids were driven by market conditions. Their plea is that there was a situation of oligopsony and the modus which was adopted by IOCL in floating the tenders and awarding the contracts would show that the determination of price was entirely within the control of the IOCL. As per them, the way price was determined for supply of these cylinders, it had become an open secret known to everybody. Therefore, there was no question of any competition and no possibility of adversely affecting that competition by entering into any contract.

We may say at the outset that if these factors are taken into consideration by themselves, they may lead to the inference that there was bid rigging. We may, particularly, emphasise the fact that there is an active trade association of the appellants and a meeting of the bidders was held in Mumbai just before the submission of the tenders. Another very important fact is that there were identical bids despite varying cost. Further, products are identical and there are small number of suppliers with few new entrants. These have become the supporting factors which persuaded the CCI to come to the conclusion that these are suggestive of collusive bidding.

However, that is only one side of the coin. The aforesaid factors are to be analysed keeping in mind the ground realities that were prevailing, which are pointed out by the appellants. These attendant circumstances are argued in detail by the counsel for the appellants which have already been taken note of.

Thus, the appellants appear to be correct when they say that all the participants in the bidding process were awarded contracts in some State or the other which was aimed at ensuring a bigger pool of manufacturers so that the supply of this essential product is always maintained for the benefit of the general public. Had IOCL left some manufacturers empty handed, in all likelihood, they would have shut their shops. However, IOCL wanted all manufacturers to be in the fray in its own interest. Therefore, it was necessary to keep all parties afloat and this explains why all 50 parties obtained order along with 12 new entrants.

The manner in which tendering process takes place would show that in such a competitive scenariao, the bid which the different bidder would be submitting becomes obvious. It has come on record that just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. In a scenario like this, that obviously becomes a guiding factor for the bidders to submit their bids.

When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, become valid explanations to the indicators pointed out by the CCI. We have already commented about the market conditions and small number of suppliers. We have also mentioned that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50. Identical products along with market conditions for which there would be only three buyers, in fact, would go in favour of the appellants. The factor of repetitive bidding, though appears to be a factor against the appellants, was also possible in the aforesaid scneario. The prevailing conditions in fact rule out the possibility of much price variations and all the manufacturers are virtually forced to submit their bid with a price that is quite close to each other. Therefore, it became necessary to sustain themselves in the market. Hence, the factor that these suppliers are from different region having different cost of manufacture would lose its significance. It is a situation where prime condition is to quote the price at which a particular manufacturer can bag an order even when its manufacturing cost is more than the manufacturing cost of others. The main purpose for such a manufacturing would be to remain in the fray and not to lose out. Therefore, it would be ready to accept lesser margin. This would answer why there were near identical bids despite varying cost.

To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, quoting almost the same rates in their bids.

On a holistic view of the matter, we find that the appellants have been able to discharge the onus by referring to various indicators which go on to show that parallel behaviour was not the result of any concerted practice.

In Dyestuffs, the European Court held that parallel behaviour does not, by itself, amount to a concerted practice, though it may provide a strong evidence of such a practice. Nevertheless, it is a strong evidence of such a practice. However, before such an inference is drawn it has to be seen that this parallel behaviour has led to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, size and volume of the undertaking of the said market. Thus, we examine the matter from the stand point of market economy where question of oligopsony assumes relevance. Whenever there is a situation of oligopsony, parallel pricing simplicitor would not lead to the conclusion that there was a concerted practice there has to be other credible and corroborative evidence to show that in an oligopoly a reduction in price would swiftly attract the customers of the other two or three rivals, the effect upon whom would be so devastating that they would have to react by matching the cut.

After taking note of the test that needs to be applied in such cases, which was laid down in Dyestuffs and accepted in Excel Crop Care Limited, we come to the conclusion that the inferences drawn by the CCI on the basis of evidence collected by it are duly rebutted by the appellants and the appellants have been able to discharge the onus that shifted upon them on the basis of factors pointed out by the CCI. However, at that stage, the CCI failed to carry the matter further by having required and necessary inquiry that was needed in the instant case.

We are emphasising here that in such a watertight tender policy of IOCL which gave IOCL full control over the tendering process, it was necessary to summon IOCL. This would have cleared many aspects which are shrouded in mystery and the dust has not been cleared.

We, thus, arrive at a conclusion that there is no sufficient evidence to hold that there was any agreement between the appellants for bid rigging. Accordingly, we allow these appeals and set aside the order of the Authorities below. As a consequence, since no penalty is payable, appeals of the CCI are rendered infructuous and dismissed as such. All the pending applications stand disposed of.

TAMIL NADU CONSUMER PRODUCTS DISTRIBUTORS ASSOCIATION

v.

FANGS TECHNOLOGY PVT LTD & ANR [CCI]

Case No. 15 of 2018

Sudhir Mital, Augustine Peter & U. C. Nahta. [Decided on 04/10/2018]

Competition Act, 2002 – Sections 3 & 4 – Sale of mobile phones – Restrictions in dealership contract – Whether constitute anti-competition in mobile market – Held, No.

Brief facts:

The Informant alleged the following against the OP:

- Distributors are not allowed to give any discount to the retailers and are forced to strictly comply with the pricing of OP-1, which is disclosed to the distributors from time to time.
- Distributors are not allowed to sell mobile phones /smartphones directly to corporate customers and have to seek the prior intimation / written consent from OP-1 to undertake such sales.
- Distributorship Agreement prohibits the distributors from doing business in Oppo and Honor brand of mobile phones, not only within the designated territory but also elsewhere.
- While sales of OP-1 has grown by 100 crores in a period of 2 years, the commission shared with the distributors has been reduced by 33%.

Based on the above submissions, the Informant has alleged that various clauses in the Distributorship Agreement are causing appreciable adverse effect on competition, resulting in foreclosure of competition by creating barrier to new entrant. Thus, as per the Informant, the conduct of the OPs have contravened the provisions of Section 3 (4) and Section 4 of the Act.

Decision: Dismissed.

Reason:

Based on the figures available in the GFK report1 for the year 2017-18, relied by the parties, it is observed that the market for smartphones in India is highly competitive with the presence of several competitors. There are several smartphone manufacturers such as Samsung, Micromax, Intex, Redmi, Lava, Oppo, Gionee, Lenovo, Motorola, Apple, HTC, Microsoft / Nokia, Sony / Sony Ericsson, LG, Huawei / Honor, and Xiaomi / MI etc. operating in the aforesaid relevant market. Given the presence of such large number of players in the relevant market along with reputed foreign brands, there is enough competitive constraints upon the OP-1 in the relevant market. Accordingly, OP-1 does not seem to have the ability to operate independently in the aforesaid relevant market and therefore, OP-1 does not seem to be dominant in the relevant market as delineated above. In the absence of dominance, no case of contravention of Section 4 of the Act is made out against OP-1.

With regard to the allegation of resale price maintenance (RPM) under provisions of Section 3(4) of the Act, the Commission observes that the Informant has not submitted any evidence to prove that OP-1 has imposed RPM on the members of the Informant. The Commission observes that the market share of OP-1 has declined from 14.4% to 12.1% during the period 2017 to 2018. The turnover of OP-1 seems to be lower when compared to its competitors. Further, the presence of many smartphone brands in the relevant market defined supra indicates that the degree of inter-brand competition is intense. Taking into account the above mentioned aspects, OP-1 does not seem to possess significant market power in order to impose competitive restraints vertically. Therefore, the Commission does not find any merit in the allegations of the Informant that OP-1 has contravened the provisions of Section 3(4) (e) of the Act.

On the issue of restriction imposed on its distributors in doing business with Oppo and Honor, OP-1 has submitted that this clause has been included in the Distributorship Agreement to avoid leakage of intellectual property and technical know-how of Vivo. OP-1 has also stated that the said restriction has been put only against the two aforesaid brands as these brands are familiar with the know-how and functioning of Vivo and they are its competitors not only in China but also at the global level. Further, OP-1 has submitted that its distributors are free to do business with other competing brands and that several distributors engaged by the OP-1 are dealing in other competing brands. In view of the said submission of OP-1, the Commission is of the view that the conduct of OP-1 does not appear to be anti-competitive. Therefore, the allegation of violation of the provisions of Section 3(4) (b) of the Act does not stand established.

ALL INDIA ONLINE VENDORS ASSOCIATION

v.

FLIPKART INDIA PRIVATE LIMITED & ANR [CCI]

Case No. 20 of 2018

Sudhir Mital, Augustine Peter Member & U.C. Nahta. [Decided on 06/11/2018]

Competition Act, 2002 – Section 4 – Abuse of dominance – Online retailer Flipkart – Abuse of dominance alleged – Rejected on facts.

Brief facts:

The Informant Company is a group of more than 2000 sellers selling on e- commerce marketplaces such as Flipkart, Amazon, Snapdeal etc.OP-1, a company, is engaged in wholesale trading/ distribution of books, mobiles, computers and related accessories. OP-2 is also a company engaged in e-commerce marketplace business under the brand name Flipkart.com.

The Informant alleged that OP-1 sells goods to companies like WS Retail Services Private Limited, which was owned by founders of OP-2 till 2012, at a discounted price and thereafter, these are sold on the platform operated by OP-2, which practices amounted to preferential treatment to certain sellers. Further, it was apprehended that unfair trade practices are being carried and corporate veil on it is required to be lifted to assess the economic nexus and the wrongdoings being committed. The Informant averred that OPs have a direct conflict of interest with other manufacturers selling on their platform and their own brands like ‘Smartbuy’ and ‘Billion’.

Based on the above averments and allegations, the present information has been filed by the Informant against the Opposite Parties alleging contravention of the provisions of Section 4 of the Act.

Decision: Complaint dismissed.

Reason:

In view of the above discussion, the relevant product market in this case may be considered as “Services provided by online marketplace platforms”. Resultantly, the relevant market in the instant case may be defined as “Services provided by online marketplace platforms for selling goods in India”.

On the issue of dominance, the Informant has stated that the OPs hold over 40% market share. In this regard, it is observed that the Informant has not given any credible source for the market share data. Moreover, there are multiple players in the online marketplace platforms. As per the data available in the public domain, it appears that presently Flipkart and Amazon are the bigger competitors; moreover, there are other players like Paytm Mall, SnapDeal, Shopclues etc. No doubt, the size and resources of Flipkart are large; yet, it cannot be disputed that the closest competitor to Flipkart is Amazon which has a valuation of around 700 billion dollars and has a global presence. With regards to entry barriers, it has to be noted that it is possible for new entrants to create online marketplace platforms, but the advantage gained by incumbents due to network effects may be difficult to breach. However, Flipkart has pointed out that there are several new players which have entered or propose to enter the e-commerce segment, such as Paytm Mall, thus indicative of low entry barriers.

Be that as it may, looking at the present market construct and structure of online marketplace platforms market in India, it does not appear that any one player in the market is commanding any dominant position at this stage of evolution of market.

As discussed earlier, Flipkart India is not dominant in the relevant market of “Services provided by online marketplace platforms for selling goods in India”; therefore, the issue of abuse of dominant position does not arise. The Commission, however, deems it appropriate to take on record the submissions made by Flipkart denying abusive conduct by its entities.

The Commission also observes that so far as the issue of preferential treatment given by OP-1 to exclusive seller (WS Retail Services Private Limited) which is stated to be owned by OP-2, suffice to point out that the Informant itself has admitted in the Information of such structural link between OP-2 and WS Retail existed only till 2012. Hence, no such concern is present today.

On the other allegations also, the Informant has not placed any material to substantiate the same. With reference to abusive conduct attributable to Flipkart Internet, it was submitted that the terms and conditions on which sellers access the Flipkart marketplace are standard and the incentive are based on objective criteria such as quality of product and volume and value of sales. Any person/ entity desirous of selling its products through the Flipkart marketplace can register on it, subject to satisfaction of standard terms and conditions.

In view of the foregoing, the Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the Opposite Parties and the Information is ordered to be closed forthwith.

Lastly, the Commission observes that the marketplace based e-commerce model is still a relatively nascent and evolving model of retail distribution in India and the Commission is cognizant of the technology-driven nature of this model. Recognizing the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the Commission is of the considered opinion that any intervention in such markets needs to be carefully crafted lest it stifles innovation.

MEET SHAH & OTHER

v.

UNION OF INDIA, MINISTRY OF RAILWAYS & ORS [CCI]

Case No. 30 of 2018

Sudhir Mital, Augustine Peter Member & U.C. Nahta. [Decided on 06/11/2018]9

Competition Act, 2002 – Abuse of dominance – Railway ticket booking – Online ticket booking – Fare rounding off to nearest Rs.5 – Whether abuse of dominance – Held, Yes.

Brief facts:

The Informants are stated to be the individuals residing in Ahmedabad and Rajkot, respectively. The Opposite Party No.1 is the Ministry of Railways, which controls Indian Railways, a departmental undertaking of the Government of India which is administered by the Railway Board. The Opposite Party No.2, IRCTC is a public sector and is stated to be an extended arm of Indian Railways. The Opposite Party No.2 is, inter-alia, engaged in online ticketing operations of Indian Railways.

It has been averred by the Informants that as per the pricing policy of the Opposite Parties published on the Official Website, rounding off to the next higher multiple of Rs. 5 is included in base fare. Base fare has two components, i.e. actual fare (the base fare arrived at before rounding off to the nearest multiple of Rs. 5) and total base fare (the base fare arrived at after rounding off to the nearest multiple of Rs.5).

Based on the above, the Informants have alleged that the Opposite Parties round off the actual base fare to the nearest higher multiple of Rs.5 to arrive at the total base fare. For example, as per the Official Website, the total fare per passenger of the Sleeper Class of Ashram Express from Ahmedabad to Delhi is Rs.475. The actual base fare for the aforesaid journey can be Rs.421, Rs.422, Rs.423 or Rs.424. The total base fare for the said journey is 425 (after rounding off to the next multiple of 5).

Decision: Investigation ordered.

Reason:

The Commission notes that the Informant has alleged contravention of the provisions of Section 4 of the Act. The Commission has given a careful examination to the alleged conduct of the Opposite parties of rounding up of actual fares to the nearest higher multiple of Rs.5 which according to the Informants is unfair and a discriminatory condition imposed on the Informants which merit examination as abuse of dominant position in the 'market for sale of tickets by railways in India'.

The Commission has considered rival submission of the parties. The Opposite Parties have not been able to convince the Commission as to why the policy of rounding off of actual base fares to the next higher multiple of Rs.5 is applicable to the sale of online tickets, when it may be possible for the Opposite Parties to transfer even one paisa electronically. Further, during the preliminary conference, the Opposite Parties could not explain why rounding off is done separately for each passenger even when more than one tickets are booked through one account of the same time for a journey.

At this juncture, it appears that the Opposite Parties are rounding off the actual base fares for the online bookings without any plausible justification for the same. In view of the foregoing, the Commission is of the view that the practice of rounding off actual base fares to the next higher multiple of Rs. 5 by the Opposite Parties, prima-facie amount to an imposition of unfair condition in the market for sale of rail tickets in India, particularly for online booking of rail tickets, in contravention of provisions of Section 4 (2) (a) (i) of the Act.

Based on above discussion, prima-facie, a case of contravention of the provisions of Section 4 of the Act is made out against the Opposite Parties. Accordingly, the Director General (the DG) is directed to cause an investigation into the matter and submit his report within a period of 60 days from the receipt of this order.

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6

Business Strategy and Management

SWOT ANALYSIS : THE FULCRUM OF STRATEGIC DECISION MAKING

Introduction

All businesses have goals that involve creating a sustainable competitive advantage over their competitors. This requires companies to develop effective business strategies that exploit their operational advantages over competitors, while minimizing their disadvantages. SWOT Analysis is very important tool for starting of new projects, ensuring their proper progress by monitoring their stages of development and implementing changes in the project, whenever required. This tool allows multidimensional analysis of the current subject's conditions of a business organisation as well as internal (usually controllable) and external (usually uncontrollable or difficult to control) factors to maximize the benefits minimize negative consequences of certain actions and, the most importantly to ascertain that whether the objective is attainable or not. An effective strategic development procedure that links internal organizational strengths and weaknesses, with external opportunities and threats, is SWOT (strengths, weaknesses, opportunities, and threats) analysis.

SWOT Analysis is a technique which helps to gain insight into the past and find solutions for sake of current or future blemish, useful for an existing company as well as a new plan. SWOT analysis helps to reduce weaknesses, while maximizing strong sides of the company.

Strategic planning and Decision making – How SWOT works

A SWOT analysis is a useful tool for brainstorming, strategic planning and decision making. Strategic decision-making is the process of charting a course of action based on long-term goals and a longer term vision. Strategic decision making aligns short-term objectives with long-term goals, and a mission that defines the company's bigger picture of the purpose of its existence. Short term goals are expressed in quantifiable milestones that assist in gauging the success and in ensuring adherence to the organisation's vision.

It is to be noted that SWOT analysis does not cover the entire business, so management should be cautious at the time of strategic decision making. To be successful, businesses must utilize their strengths, improve upon their weaknesses, and guard against their external threats and residual, internal vulnerabilities. Simultaneously, companies need to evaluate their external environment to identify and exploit new opportunities before their competitors. The brief components of SWOT analysis are as under:

Building on Strengths

The first step in conducting a SWOT analysis involves identifying the strengths a company possesses relative to its competitors. Strengths come from the knowledge, abilities, and resources available to the firm that gives it a comparative advantage in the industry. The capability to obtain resources, the quality of those resources, and the effective and efficient allocation of resources plays a pivotal role in creating a competitive advantage. Moreover, a company's ability to adapt to environmental changes in order to maintain sustainable growth, and to create or penetrate new markets can be its potential strengths. Some of the major strengths are excellent sales staff with strong knowledge of existing products, good relationship with customers, good internal communications, successful marketing strategies, and reputation for innovation etc.

Minimising Weaknesses

Second, a business needs to identify the vulnerabilities within its organization that competitors could exploit. Weaknesses are any limitation or deficiency in the firm's resources and competencies that could hinder its performance. Common sources of a company's weaknesses include ineffective management, insufficient resources, inefficient processes, and obsolete technology, high rental costs, obsolete market research data, Cash flow problems, holding too much stock, poor record keeping etc.

Seizing Opportunities

The third step requires a business to determine potential opportunities to be pursued in the industry. There may be plentiful business opportunities in an industry that may call for pondering over the opportunities by the management of a company while evaluating their effectiveness. A company must clearly define the type of goods or services it proposed to offer, the targeted market for the goods or services, resources and other facilities needed for production of goods or services, projected returns and the magnitude of risk involved. Potential opportunities can result from identifying an overlooked market segment, changing industry regulations, advancements in technology, and improvements in buyer or supplier relations, loyal customers, high customer demand of the company's product etc. Moreover, a business can exploit the weaknesses of the competitors by targeting and attacking their frail positions to gain market share.

Counteracting Threats

Finally, every SWOT analysis requires a business to identify its potential threats. Any situation that puts a company in an unfavourable position or impedes its efficient operations can be classified as a threat. To adequately identify these situations, the organization needs to evaluate its industry's macro-environment and assess the industry's social, economic, political, technological, natural, and international segments. For instance, changes in consumer preferences or advancements in technology can render a product or service obsolete. Additionally, economic and regulatory changes or the exhaustion of natural resources can make production infeasible. Global competitors are entering in to the company's market which tends to increase competition in domestic market.

Objectives of SWOT Analysis

- To make a summary analysis of external and internal factors.
- To prepare strategic options with reference to the risks and problems to be addressed.
- To conduct a sales forecast in agreement with market conditions and study the capabilities of the company in general.
- To identify key items for the management of the organization, which involves establishing priorities for actions which in turn helps in strategic decision making.
- Thoroughly diagnose the company: strengthen the positive points, improvement areas and growth opportunities etc.
- Internal environment (Strengths and Weaknesses) – the integration and standardization of processes, the elimination of inefficiencies and focus on the core aspects of the business.
- External environment (Opportunities and Threats) – to have reliable and trustworthy data, to receive information quickly to support management in strategic decision making and to reduce errors.

The SWOT analysis is one of the most popular tool for defining an organisation's strategic action. The beauty of SWOT is its internal scrutiny of the organisation's capabilities, followed by environmental scanning to identify appropriate opportunities and threats. However, it has its flaws:

- No straightforward methodology has been proposed to identify strengths and weaknesses.
- There is no indication of causality among the strengths and weaknesses, nor are they ranked into any hierarchy.
- The SWOT analysis is typically a one-time event lacking mechanisms for acting upon and monitoring the changes in strengths and weaknesses over the longer term.

Case Study

Gujarat Cooperative Milk Marketing Federation Ltd. (GCMMF) is India's largest food product marketing organisation. It is the apex organisation of the Diary Cooperatives of Gujarat popularly known as AMUL which aims to provide remunerative returns to the farmers and also serve the interest of consumers by providing quality products. AMUL is considered as one of the most well recognized and iconic brands in the country. It operates through 61 sales offices and has a network of 10000 dealers and 10 lakh retailers. Its product range comprises milk, milk powder, health beverages, ghee, butter, cheese, Pizza Cheese, Ice cream, Paneer, chocolates and traditional Indian sweets etc.

Based on the above information, do the SWOT analysis of AMUL?

SWOT Analysis of a Renowned Dairy Business - AMUL

Following is the SWOT analysis of AMUL, a strong and dominant brand in the dairy business.

Investment in Technology; Market Share, Production Capacity, Quality, Brand value, Large Consumer Base **Strength**	**High Operational Costs, Lack of success in portfolio expansion, legal issues** **Weakness**
High Milk Consumption, Global Expansion, Product Portfolio Expansion **Opportunities**	**Increasing Competition, growing trends of veganism** **Threats**

Strengths of AMUL

Investment in Technology

Amul has experienced exponential growth in the last few decades. The company is continually investing in adaptive and revolutionary technologies within the dairy industry.

Market Share

Amul has transformed itself into the market leader of milk and dairy products in the country. Amul has expanded its ice cream product and business portfolio by opening standalone Amul ice cream stores all over the country.

Production Capacity

Amul is one of the largest manufacturers of milk and dairy products in the world. The company is managed by the Gujarat Co-operative Milk Marketing Federation Limited, which is a dairy producers cooperative which supplies the company with almost 18 million liters of milk daily.

Quality

One of the primary reasons for Amul being one of the most trusted brands in Indian and having a strong and loyal consumer base is its quality. Amul has never faced any significant issues pertaining to its quality within the Indian market. The company has also maintained transparency concerning its quality control practices.

Strong Brand Value

Amul is one of the most recognizable and valuable brands in India. The Amul girl, the company's mascot which features on its advertisements is one of the oldest and most iconic brand mascots which Amul uses even today.

Large Consumer Base

The company has a large consumer base which spreads across the urban and rural regions of the country.

This wide-reaching consumer base has allowed the company to maintain distinct leverage over its competitors

Weaknesses of AMUL

High Operational Cost

Amul has a high operational cost due to its massive size and complex structure. This can become problematic for the company if the company experiences fall in demand.

The company also heavily depends on the dairy unions and communities for its supply of milk. As the needs of the dairy community are changing with them demanding higher prices for their produce. These issues can add up to the operational cost of the company and lower its profit margins.

Lack of Success in Certain Areas of Portfolio Expansion

Amul has expanded its product portfolio to add products such as butter, ghee, buttermilk, flavored milk, ice cream, chocolates, cheese, creams, sweets and more.

However, not every product of Amul within its portfolio has same amount of success.

Frequent Legal Issues

The company has faced legal issues in the recent past wherein Amul chose to advertise its products while disparaging the brand and products of its rivals. This caused the company a lot of embarrassment and has also contributed to tarnishing the public image of the company.

Opportunities for AMUL

High per capita Milk consumption

India is a high milk consuming nation with milk and dairy products being an essential component of the Indian diet. India has 130 crore population which is only increasing. This growth in population and high milk consumption opens up opportunities for AMUL to expand its production capacities and acquire new consumers.

International Expansion

AMUL can serve global markets. The brand can expand into overseas markets such as the Middle-East and the Asian markets by aggressively targeting Indian expats living in these countries.

Expansion of Product Portfolio

AMUL can invest in research and development or adopt a mergers and acquisition strategy to expand its product line. AMUL has an extensive distribution network which can be used to sell its new products into the market, and the substantial brand value and trust of the consumers will also enable easier acceptance from the consumers.

Threats for AMUL

Increasing Competition

AMUL is facing increasing competition in milk and dairy products sector from brands such as Mother Dairy, Kwality Ltd, HUL and other local players. AMUL is also facing increasing competition within the ice cream market from Kwality Walls, Baskin Robins, Havmor, London Dairy and other domestic brands.

Growing trend of Veganism in India

Many people in India are turning towards veganism, which implies that these people do not consume dairy or dairy products. This can impact the demand for Amul’s milk and dairy products if the popularity of veganism increases and spreads across different parts of the country.

Findings of SWOT Analysis of AMUL

As per the SWOT analysis of AMUL, the company can easily identify and analyse the internal and external factor which help it to take the strategic decisions. The company can achieve a dominant global position by maintaining its quality standards, investing in advertising and promotions and localizing products as per the taste of the international markets. Thus, it has the opportunity to go 'Glocal', i.e. *think globally but act locally*.

What are the quick tips, you will suggest for a successful SWOT analysis?

Following are the tips for a successful SWOT analysis

- Keep SWOT short and simple, but remember to include important details. For example, if the staff in an organisation is a strength, include specific details, such as specific skills and experience possessed by the concerned staff members, as well as why they are strengths and how they can help to meet the goals of the organisation.
- When SWOT analysis is completed, prioritise the results by listing them in order of the most significant factors that affect the business to the least.
- Obtain multiple perspectives for those SWOT analysis that have been given a final shape and implemented; Ask for input from various stakeholders like employees, suppliers, customers and partners.
- Apply SWOT analysis to a specific issue, rather than to the entire business. Then after conduct separate SWOT analysis on individual issues and combine them.
- Look at where business is now and think about where it might be in the future.
- Consider the competitors and have a realistic assessment of the organisation's competitive strength in the industry.
- Think about the factors that are essential to the success of an organisation and the products or any other services, like superior after sale services, free delivery, warranty / guarantee etc. an organisation can offer customers that may exert an impact on the competitors, in order to have a competitive advantage. It is essential to take into consideration the factors relating to competitive advantage while conducting the SWOT analysis.
- Use goals and objectives from overall business plan in SWOT analysis.

Conclusion

The business world is highly competitive, traditional industries are getting shocked by the rise of the technology businesses, thousands of start-ups blooming every day while thousands of businesses withering every day. The key to the survival of the business is the strategy an organisation adopts and implements.

SWOT analysis helps the organisation to specify the objectives of the business venture or project and identifying the internal and external factors that are favourable and unfavourable to achieve that objectives. Identification of **SWOT** is important because they may be of immense assistance in chalking out the business plan to meet the objectives of the business.

The significance of SWOT analysis is that it provides a good way for companies to examine both positive and negative attributes within a single analysis, determining how best to compete in the market at large. SWOT assists the management to map out the best possible opportunity well in advance which helps business to begin planning to deliver a quality solution and to make a marketing plan.

References:

- *https://blog.advisor.lk/wp/2017/09/21/strategic-planning-decision-making-swot/*
- *https://www.superheuristics.com/swot-analysis-of-amul/*
- *https://www.heflo.com/blog/swot/purpose-of-swot-analysis/*
- *https://ceopedia.org/index.php/Importance_of_swot_analysis*
- *https://www.business.qld.gov.au/starting-business/planning/market-customer-research/swot-analysis/uses*

FUNCTIONAL LEVEL STRATEGIES –AN EFFECTIVE TOOL TO ACHIEVE ORGANIZATIONAL GOALS

Introduction

In a highly competitive business environment and unattainable economic situation managers are increasingly seeking for strategies, approaches to accomplish, improve and sustain organizational performance and competitive advantage. Strategy and its formulation play a vital part in the firm's management process. The strategy gives the direction that a business has in mind and which way they want to achieve their goals. Amongst the many strategies implemented in firms, competitive strategy has been proven as an essential tool globally for any business to remain in the competitive market environment and become stronger. Competitive strategy means consciously choosing to carry out activities differently or to perform different activities than competitors to survey a unique mix of value.

Present business environment is characterized by high levels of competition, dynamism and technological sophistication. This is especially challenging to organizational managers since they have to design and implement strategies that can achieve and sustain competitive advantages. Consequently, the topic functional level strategy plays a pivotal role as organizations aim at gaining industry leadership.

Case Study

In 2017, a chain of coffee retailer, closed a decade of astounding financial performance. Sales had increased from $700 million to $8 billion and net profits from $40 million to $600 million. In 2017, The Company' was earning a return on invested capital of 25 %, which was impressive by any measure, and the company was forecasted to continue growing earnings and maintain high profits through to the end of the decade. How did this come about?

Thirty years ago Company was a single store in its local Market selling premium roasted coffee. Today it is a global roaster and retailer of coffee with more than 12,000 retail stores, some 3,000 of which are to be found in 40 countries outside its Home Country. The Company set out on its current course in the 1980s when the company's director of marketing, Srinivas Santharaman, came back from a trip to Italy enchanted with the Italian coffeehouse experience. Srinivas Santharaman, who later became CEO, persuaded the company's owners to experiment with the coffeehouse format – and the Coffee House experience was born.

Santharaman basic insight was that people lacked a "third place" between home and work where they could have their own personal time out, meet with friends, relax, and have a sense of gathering. The business model that evolved out of this was to sell the company's own premium roasted coffee, along with freshly brewed espresso- style coffee beverages, a variety of pastries, coffee accessories, teas, and other products, in a coffeehouse setting. The company devoted, and continues to devote, considerable attention to the design of its stores, so as to create a relaxed, informal and comfortable atmosphere.

Underlying this approach was a belief that Santharaman was selling far more than coffee— it was selling an experience. The premium price that the Company charged for its coffee reflected this fact.

From the outset, Santharaman also focused on providing superior customer service in stores. Reasoning that motivated employees provide the best customer service, Company executives developed employee hiring and training programs that were the best in the restaurant industry. Today, all Company's employees are required to attend training classes that teach them not only how to make a good cup of coffee, but also the service oriented values of the company. Beyond this, Company provided progressive compensation policies that gave even part- time employees stock option grants and medical benefits – a very innovative approach in an industry where most employees are part time, earn minimum wage, and have no benefits.

Unlike many restaurant chains, which expanded very rapidly through franchising arrangement once they have established a basic formula that appears to work, Santharaman believed that Company needed to own its stores. Although, it has experimented with franchising arrangements in some countries, and some situations its home country such as at airports, the company still prefers to own its own stores wherever possible.

This formula met with spectacular success in the Country, where Company went from obscurity to one of the best known brands in the country in a decade. As it grew, Company found that it was generating an enormous volume of repeat business.

Today the average customer comes into a Company' store around 20 times a month. The customers themselves are a fairly well- healed group – their average income is about $85,000.

As the company grew, it started to develop a very sophisticated location strategy. Detailed demographic analysis was used to identify the best locations for Company's stores. The company expanded rapidly to capture as many premium locations as possible before imitators. Astounding many observers, Company would even sometimes locate stores on opposite corners of the same busy street— so that it could capture traffic going different directions down the street.

By 2005 with almost 700 stores across the Country, Starbucks began exploring foreign opportunities. First stop was Japan, where Starbucks proved that the basic value proposition could be applied to a different cultural setting (there are now 600 stores in Japan). Next, Companys embarked upon a rapid development strategy in Asia and Europe. By 2011, the magazine *Bigdemandchannel* named Company one of the ten most impactful global brands, a position it has held ever since. But this is only the beginning. In late 2016, with 12,000 stores in operation, the company announced that its long term goal was to have 40,000 stores worldwide. Looking forward, it expects 50% of all new store openings to be outside of its Home Country.

Case Discussion Questions

1. What functional strategies help the company to achieve superior financial performance?
2. Identify the resources, capabilities, and distinctive competencies of Company?
3. How do Company's resources, capabilities, and distinctive competencies translate into superior financial performance?
4. Why do you think Company prefers to own its own stores wherever possible?
5. How secure is Company competitive advantage?

USING AIMS AND OBJECTIVES TO CREATE A BUSINESS STRATEGY : A KELLOGG'S CASE STUDY

I. INTRODUCTION

When preparing a strategy for success, a business needs to be clear about what it wants to achieve. It needs to know how it is going to turn its desires into reality in the face of intense competition. Setting clear and specific aims and objectives is vital for a business to compete. However, a business must also be aware of why it is different to others in the same market. This case study looks at the combination of these elements and shows how Kellogg's prepared a successful strategy by setting aims and objectives linked to its unique brand.

Branding

One of the most powerful tools that organisations use is branding. A brand is a name, design, symbol or major feature that helps to identify one or more products from a business or organisation.

The reason that branding is powerful is that the moment a consumer recognises a brand, the brand itself instantly provides a lot of information to that consumer. This helps them to make quicker and better decisions about what products or services to buy.

Product positioning

Managing a brand is part of a process called product positioning. The positioning of a product is a process where the various attributes and qualities of a brand are emphasised to consumers. When consumers see the brand, they distinguish the brand from other products and brands because of these attributes and qualities.

Focused on Kellogg's, this case study looks at how aims and objectives have been used to create a strategy which gives Kellogg's a unique position in the minds of its consumers.

II. THE MARKET

The value of the UK cereals market is around £1.1 billion per year. Kellogg's has a 42% market shareof the value of the UK's breakfast cereal market. The company has developed a range of products for the segments within this market, targeted at all age groups over three years old. This includes 39 brands of cereals as well as different types of cereal bars. Consumers of cereal products perceive Kellogg's to be a high quality manufacturer.

As the market leader, Kellogg's has a distinct premium position within the market. This means that it has the confidence of its consumers.

Developing an aim for a business

Today, making the decision to eat a healthy balanced diet is very important for many consumers. More than ever before people want a lifestyle in which the food they eat and the activities they take part in contribute equally to keeping them healthy.

Research undertaken for Kellogg's, as well as comprehensive news coverage and growing public awareness, helped its decision-takers to understand the concerns of its consumers. In order to meet these concerns, managers realised it was essential that Kellogg's was part of the debate about health and lifestyle. It needed to promote the message 'Get the Balance Right'.

Decision-takers also wanted to demonstrate Corporate Responsibility (CR). This means that they wanted to develop the business responsibly and in a way that was sensitive to all of Kellogg's consumers' needs, particularly with regard to health issues. This is more than the law relating to food issues requires. It shows how Kellogg's informs and supports its consumers fully about lifestyle issues.

Any action within a large organisation needs to support a business direction. This direction is shown in the form of a broad statement of intent or aim, which everybody in the organisation can follow. An aim also helps those outside the organisation to understand the beliefs and principles of that business. Kellogg's aim was to reinforce the importance of a balanced lifestyle so its consumers understand how a balanced diet and exercise can improve their lives.

III. CREATING BUSINESS OBJECTIVES

Having set an aim, managers make plans which include the right actions. These ensure that the aim is met. For an aim to be successful, it must be supported by specific business objectives that can be measured.

Each of the objectives set for Kellogg's was designed to contribute to a specified aim. Kellogg's objectives were to:

- encourage and support physical activity among all sectors of the population.
- use resources to sponsor activities and run physical activity focused community programmes for its consumers and the public in general.
- increase the association between Kellogg's and physical activity.
- use the cereal packs to communicate the 'balance' message to consumers.
- introduce food labelling that would enable consumers to make decisions about the right balance of food.

SMART objectives

Well-constructed objectives are SMART objectives. They must be:

- Specific
- Measurable
- Achievable or Agreed
- Realistic
- Time-related.

Each of the objectives set by Kellogg's was clear, specific and measurable. This meant Kellogg's would know whether each objective had been achieved. The objectives were considered to be achievable and were communicated to all staff. This made sure that all staff agreed to follow certain actions to achieve the stated aims. The objectives were set over a realistic time-period of three years. By setting these objectives Kellogg's set a direction that would take the business to where it wanted to be three years into the future.

IV. STRATEGY

Having created an aim and set objectives, Kellogg's put in place a process of planning to develop a strategy and a series of actions. These activities were designed to meet the stated aim and range of business objectives.

Supporting improved food labelling

In the area of food labelling, Kellogg's introduced the Kellogg's GDAs to its packaging, showing the recommended Guideline Daily Amounts. These GDAs allow consumers to understand what amount of the recommended daily levels of nutrients is in a serving of Kellogg's food.

Working with a group of other major manufacturers, Kellogg's introduced a new format in May 2006, with GDAs clearly identified on brand products and packages. These GDAs have been adopted by other manufacturers and retailers such as Tesco.

Sponsoring swimming programmes

For many years Kellogg's has been working to encourage people to take part in more physical activity. The company started working with the Amateur Swimming Association (ASA) as far back as 1997, with whom it set some longer term objectives. More than twelve million people in the UK swim regularly.

Swimming is inclusive as it is something that whole families can do together and it is also a life-long skill. The ASA tries to ensure that 'everyone has the opportunity to enjoy swimming as part of a healthy lifestyle'. As a lead body for swimming, the ASA has been a good organisation for Kellogg's to work with, as its objectives match closely those of the company.

Kellogg's became the main sponsor of swimming in Britain. This ensured that Kellogg's sponsorship reached all swimming associations so that swimmers receive the best possible support. Kellogg's sponsors the ASA Awards Scheme with more than 1.8 million awards presented to swimmers each year. This relationship with the ASA has helped Kellogg's contribute in a recognisable way to how individuals achieve an active healthy balanced lifestyle. This reinforces its brand position.

Promoting exercise

Working with the ASA helped Kellogg's set up links with a number of other bodies and partners. For example, Sustrans is the UK's leading sustainable transport organisation. Sustrans looks at the different ways that individuals can meet their transport needs in a way that reduces environmental impact. It is the co-ordinator of the National Cycle Network.

This provides more than 10,000 miles of walking and cycle routes on traffic-free paths throughout the UK. To meet its business objective of encouraging and supporting physical activity Kellogg's is developing a promotion for a free cyclometer which will be advertised on television in 2007.

Walking is one of the easiest ways for people to look after themselves and improve their health. To encourage people to walk more often, Kellogg's has supplied a free pedometer through an offer on All-Bran so that individuals can measure their daily steps.

During 2006 more than 675,000 pedometers were claimed by consumers. From a research sample of 970 consumers, around 70% said they used the pedometer to help them walk further. Kellogg's Corn Flakes Great Walk 2005 raised more than £1 million pounds for charity on its way from John O'Groats, through Ireland and on to Land's End. In 2004, 630,000 people took part in the Special K 10,000 Step Challenge.

Kellogg's in the community

Kellogg's has also delivered a wide range of community programmes over the last 20 years. For example, the Kellogg's Active Living Fund encourages voluntary groups to run physical activity projects for their members. The fund helps organisations like the St John's Centre in Old Trafford which runs keep-fit classes, badminton and table tennis.

Since 1998 Kellogg's has invested more than £500,000 to help national learning charity ContinYou to develop nationwide breakfast club initiatives. These include start-up grants for new clubs, the Breakfast Club Plus website, the Kellogg's National Breakfast Club Awards and the Breakfast Movers essential guide.

Breakfast clubs are important in schools because they improve attendance and punctuality. They help to ensure that children are fed and ready to learn when the bell goes. Kellogg's promotes breakfast via these clubs, not Kellogg's breakfast cereals. Together Kellogg's and ContinYou have set up hundreds of breakfast clubs across the UK, serving well over 500,000 breakfasts each year.

V. COMMUNICATING THE STRATEGY

Effective communication is vital for any strategy to be successful. Kellogg's success is due to how well it communicated its objectives to consumers to help them consider how to 'Get the Balance Right'. It developed different forms of communication to convey the message 'eat to be fit' to all its customers.

External communication

External communication takes place between an organisation and the outside world. As a large organisation, Kellogg's uses many different forms of communication with its customers.

For example, it uses the cartoon characters of Jack & Aimee to communicate a message that emphasises the need to 'Get the Balance Right'. By using Jack & Aimee, Kellogg's is able to advise parents and children about the importance of exercise. These characters can be found on the back of cereal packets. The company has also produced a series of leaflets for its customers on topics such as eating for health and calcium for strong bones. These are available on its website.

Internal communication

Internal communication takes place within an organisation. Kellogg's uses many different ways to communicate with its employees. For example, Kellogg's produces a house magazine which is distributed to everybody working for Kellogg. The magazine includes articles on issues such as getting the balance of food and exercise right. It also highlights the work that Kellogg's has undertaken within sport and the community. To encourage its employees to do more walking, Kellogg's supplied each of its staff with a pedometer. Such activities have helped Kellogg's employees to understand the business objectives and why the business has created them. It also shows clearly what it has done to achieve them.

VI. CONCLUSION

Research undertaken by Kellogg's as part of the 2005 Family Health Study emphasised that a balanced diet as well as regular exercise were essential for good all round health and wellbeing. Kellogg's is demonstrating good corporate responsibility by promoting and communicating this message whenever it can and by investing money in the appropriate activities. This was the broad aim. To achieve this aim, Kellogg's set out measurable objectives. It developed a business strategy that engaged Kellogg's in a series of activities and relationships with other organisations. The key was not just to create a message about a balanced lifestyle for its consumers. It was also to set up activities that helped them achieve this lifestyle.

This case study illustrates how consumers, given the right information, have made informed choices about food and living healthily.

CASE STUDY – MCDONALD'S CORPORATION MICHAEL PORTER FIVE FORCES MODEL

Objective:

The objective of this case is to understand the application of competitive forces prevailing in the burger market.

Introduction:

McDonald's Corporation expands internationally through strategies that account for the external factors in the industry environment, as identifiable through a Five Forces analysis of the business. Michael E. Porter's Five Forces Analysis model provides valuable information to support strategic management, especially in addressing relevant issues in the external environment of the business. These issues are based on external factors that represent the degree of competitive rivalry in the industry, the bargaining power of customers or buyers, the bargaining power of suppliers, the threat of substitution, and the threat of new entrants.

Application of Porter's Five Forces Model

In this Five Forces analysis of McDonald's, the forces are mainly within the fast food restaurant industry. As the leading restaurant chain business in the world, the company is an example of effective strategic management, especially in dealing with competition in different markets worldwide. This status shows that McDonald's strategic direction is appropriate to the external factors, such as the ones identified in this Five Forces analysis.

In addressing the external factors determined in this Five Forces analysis, McDonald's Corporation ensures that its strategies are appropriate to combat external forces. The company faces pressure from various competitors, including large multinational firms and small local businesses. McDonald's Corporation's generic strategy and intensive growth strategies satisfy business needs in competing against such firms as Burger King, Wendy's, Subway, and Dunkin' Donuts, as well as food and beverage businesses like Starbucks Coffee Company.

In this Five Forces analysis, McDonald's experiences the effects of external factors at varying intensities, based on the variations among markets around the world. For example, the U.S. market presents a competitive landscape different from that of the European market. The company must implement strategies to meet these external factors and minimize their negative impacts. Considering the combination of market conditions, this Porter's Five Forces analysis of McDonald's establishes the following intensities of the five forces:

1. Competitive rivalry or competition – High
2. Bargaining power of buyers or customers – High
3. Bargaining power of suppliers – Low
4. Threat of substitutes or substitution – High
5. Threat of new entrants or new entry – Moderate

Competitive Rivalry or Competition with McDonald's (High)

McDonald's faces tough competition because the fast food restaurant market is saturated. This element of the Porter's Five Forces analysis model tackles the effects of competing firms in the industry environment. In McDonald's case, the strong force of competitive rivalry is based on the following external factors:

- High number of firms – Strong Force
- High aggressiveness of firms – Strong Force
- Low switching costs – Strong Force

The fast food restaurant industry has many firms of various sizes, such as global chains like McDonald's and local mom-and-pop fast food restaurants. This external factor strengthens the force of rivalry in the industry. Also, the Five Forces analysis model considers firm aggressiveness a factor that influences competition. In this business case, most medium and large firms aggressively market their products. This factor increases the intensity of competitive rivalry that McDonald's Corporation experiences. In addition, low switching costs make it easy for consumers to transfer to other restaurants, such as Wendy's and Burger King. This external factor adds to the force of competition. Thus, this element of the Five Forces analysis of McDonald's shows that competition is among the most significant external forces for consideration in the strategic management of the business.

Bargaining Power of McDonald's Customers/Buyers (High)

McDonald's must address the power of customers on business performance. This element of the Five Forces analysis deals with the influence and demands of consumers, and how their decisions impact businesses. In McDonald's case, the following are the external factors that contribute to the strong bargaining power of buyers:

- Low switching costs – Strong Force
- Large number of providers – Strong Force
- High availability of substitutes – Strong Force

The ease of changing from one restaurant to another (low switching costs) enables consumers to easily impose their demands on McDonald's. In the Five Forces analysis model, this external factor strengthens the bargaining power of customers. In relation, because of market saturation, consumers can choose from many fast food restaurants other than McDonald's. This condition makes the bargaining power of buyers a strong force in affecting the company's external environment. Moreover, the availability of substitutes is relevant in this external analysis. In this case, the availability of many substitutes adds to the bargaining power of customers. For example, substitutes include food kiosks and outlets, and artisanal bakeries, as well as microwave meals and foods that one could cook at home. Based on this element of Porter's Five Forces analysis, it is crucial to develop strategies to increase customer loyalty, especially in the face of the sociocultural trends outlined in the PESTEL/PESTLE analysis of McDonald's Corporation.

Bargaining Power of McDonald's Suppliers (Low)

Suppliers influence McDonald's in terms of the company's production capacity based on the availability of raw materials. This element of the Five Forces analysis model shows the impact of suppliers on firms and the fast food restaurant industry environment. In McDonald's case, the weak bargaining power of suppliers is based on the following external factors:

- Large number of suppliers – Weak Force
- Low forward vertical integration of suppliers – Weak Force
- High overall supply – Weak Force

The large population of suppliers weakens the effect of individual suppliers on McDonald's Corporation. This weakness is partly based on the lack of strong regional and global alliances among suppliers. In relation, most of McDonald's suppliers are not vertically integrated. This means that they do not control the distribution network that transports their products to firms like McDonald's. In Porter's Five Forces analysis model, such low vertical integration weakens the bargaining power of suppliers. Also, the relative abundance of materials like flour and meat reduces individual suppliers' influence on the company. Thus, this element of the Five Forces analysis shows that external factors combine to create the weak supplier power, which is a minimal issue in strategic management. McDonald's corporate social responsibility strategy and stakeholder management approaches help in addressing this force from suppliers.

Threat of Substitutes or Substitution (High)

Substitutes are a significant concern for McDonald's Corporation. This element of Porter's Five Forces analysis model deals with the potential effects of substitutes on firm growth. In McDonald's case, the following external factors make the threat of substitution a strong force:

- High substitute availability – Strong Force
- Low switching costs – Strong Force
- High performance-to-cost ratio of substitutes – Strong Force

There are many substitutes to McDonald's products, such as products from artisanal food producers and local bakeries. Also, consumers can cook their food at home. In the Five Forces analysis model, this external factor contributes to the strength of the threat of substitution in the fast food service industry. In addition, it is easy to shift from McDonald's to substitutes because of the low switching costs. For example, shifting from the company to substitutes typically involves insignificant or minimal disadvantages, such as slightly higher costs per meal in some cases, or additional time consumption for food preparation. Moreover, substitutes are competitive in terms of quality and customer satisfaction (high performance-to-cost ratio). In this element of the Five Forces analysis of McDonald's Corporation, external factors make substitutes a major strategic issue that requires approaches like product quality improvement. In relation, the company's efforts include encouraging people to eat in fast food restaurants instead of resorting to substitutes. Such efforts are evident in McDonald's corporate mission and vision statements.

Threat of New Entrants or New Entry (Moderate)

New entrants can impact McDonald's market share and financial performance. This element of the Five Forces analysis refers to the effects of new players on existing firms. In McDonald's case, the moderate threat of new entry is based on the following external factors:

- Low switching costs – Strong Force
- Highly variable capital cost – Moderate Force
- High cost of brand development – Weak Force

The low switching costs allow consumers to easily move from McDonald's toward new fast food restaurant companies. In Porter's Five Forces analysis model, this external factor strengthens the threat of new entrants. Also, variable capital costs of establishing a new restaurant empowers new businesses to enter the global fast food restaurant industry. For example, small restaurant businesses involve low capital costs compared to major corporations in the market. This external factor leads to the moderate threat of new entry against McDonald's. On the other hand, it is expensive to build a strong brand in the industry. Many small and medium businesses lack the resources to create a strong brand to match the McDonald's brand. Thus, the external factors in this element of the Five Forces analysis shows that the threat of new entrants is a considerable but not the most important strategic issue.

Recommendations:

The results of this Five Forces analysis show that McDonald's Corporation needs to prioritize the strategic issues related to competition, consumers, and substitutes, all of which exert a strong force on the company and its external environment. The other forces (the bargaining power of suppliers and the threat of new entrants) are also significant to the business, although to a lower extent. In this regard, a recommendation is to strengthen the business by building on the strengths of the business. The company's managers must focus on reducing the effects of competitors and substitutes on revenues and market share. Studying the McDonald's marketing mix or 4Ps partly supports such effort. Also, it is recommended that McDonald's make its product innovation process more aggressive. While the food service industry is saturated with aggressive firms, new products can attract new customers and retain more customers. In relation, based on this Porter's Five Forces analysis, McDonald's can implement higher quality standards to address the forces of competition and substitution.

References

- Burke, A., van Stel, A., & Thurik, R. (2010). Blue ocean vs. five forces. Harvard Business Review, 88(5), 28-29.
- Dobbs, M. (2014). Guidelines for applying Porter's five forces framework: A set of industry analysis templates. Competitiveness Review, 24(1), 32-45.
- Grundy, T. (2006). Rethinking and reinventing Michael Porter's five forces model. Strategic Change, 15(5), 213-229.
- Maybury, M. T., & Belardo, S. (1992, January). Five forces. In System Sciences, 1992. Proceedings of the Twenty-Fifth Hawaii International Conference on (Vol. 4, pp. 579-588). IEEE.
- www.mcdonaldsindia.com McDonald's Corporation's Website.
- Roy, D. (2011). Strategic Foresight and Porter's Five Forces. GRIN Verlag.

NOTES

7

Interpretation of Law

NEVADA PROPERTIES PVT LTD

v.

THE STATE OF MAHARASHTRA [SC]

Criminal Appeal No.1481 of 2019 [@ S L P (CRL) No. 1513 of 2011]

Ranjan Gogoi, Deepak Gupta & Sanjeeev Khanna, JJ. [Decided on 24/09/2019]

Criminal Procedure Code, 1973- section 102- police officer's power of seizure- whether extends to immovable property Held, No.

Brief facts:

Section 102 of the Cr.P.C. provides for power of police officer to seize certain property. Whether the term 'any property' includes immovable property also was answered affirmatively by some High courts and negatively by some. A Division Bench of Supreme Court , vide order dated November 18, 2014, noticing that the issues that arise have far reaching and serious consequences, had referred the aforesaid appeals to be heard by a Bench of at least three Judges. After obtaining appropriate directions from Hon'ble the Chief Justice, these appeals have been listed before the present Bench.

Decision & Reason:

Having held and elucidated on the power of the Criminal Court, we find good ground and reason to hold that the expression 'any property' appearing in Section 102 of the Code would not include immovable property. We would elucidate and explain.

Section 102 postulates seizure of the property. Immovable property cannot, in its strict sense, be seized, though documents of title, etc. relating to immovable property can be seized, taken into custody and produced. Immovable property can be attached and also locked/sealed. It could be argued that the word 'seize' would include such action of attachment and sealing. Seizure of immovable property in this sense and manner would in law require dispossession of the person in occupation/possession of the immovable property, unless there are no claimants, which would be rare.

Language of Section 102 of the Code does not support the interpretation that the police officer has the power to dispossess a person in occupation and take possession of an immovable property in order to seize it. In the absence of the Legislature conferring this express or implied power under Section 102 of the Code to the police officer, we would hesitate and not hold that this power should be inferred and is implicit in the power to effect seizure. Equally important, for the purpose of interpretation is the scope and object of Section 102 of the Code, which is to help and assist investigation and to enable the police officer to collect and collate evidence to be produced to prove the charge complained of and set up in the charge sheet.

The Section is a part of the provisions concerning investigation undertaken by the police officer. After the charge sheet is filed, the prosecution leads and produces evidence to secure conviction. Section 102 is not, per se, an enabling provision by which the police officer acts to seize the property to do justice and to hand over the property to a person whom the police officer feels is the rightful and true owner. This is clear from the objective behind Section 102, use of the words in the Section and the scope and ambit of the power conferred on the Criminal Court vide Sections 451 to 459 of the Code. The expression 'circumstances which create suspicion of the commission of any offence' in Section 102 does not refer to a firm opinion or an adjudication/finding by a police officer to ascertain whether or not 'any property' is required to be seized.

The word 'suspicion' is a weaker and a broader expression than 'reasonable belief' or 'satisfaction'. The police officer is an investigator and not an adjudicator or a decision maker. This is the reason why the Ordinance was enacted to deal with attachment of money and immovable properties in cases of scheduled offences. In case and if we allow the police officer to 'seize' immovable property on a mere 'suspicion of the commission of any offence', it would mean and imply giving a drastic and extreme power to dispossess etc. to the police officer on a mere conjecture and surmise, that is, on suspicion, which has hitherto not been exercised.

We have hardly come across any case where immovable property was seized vide an attachment order that was treated as a seizure order by police officer under Section 102 of the Code. The reason is obvious. Disputes relating to title, possession, etc., of immovable property are civil disputes which have to be decided and adjudicated in Civil Courts. We must discourage and stall any attempt to convert civil disputes into criminal cases to put pressure on the other side. Thus, it will not be proper to hold that Section 102 of the Code empowers a police officer to seize immovable property, land, plots, residential houses, streets or similar properties. Given the nature of criminal litigation, such seizure of an immovable property by the police officer in the form of an attachment and dispossession would not facilitate investigator to collect evidence/material to be produced during inquiry and trial.

As far as possession of the immovable property is concerned, specific provisions in the form of Sections 145 and 146 of the Code can be invoked as per and in accordance with law. Section 102 of the Code is not a general provision which enables and authorises the police officer to seize immovable property for being able to be produced in the Criminal Court during trial. This, however, would not bar or prohibit the police officer from seizing documents/ papers of title relating to immovable property, as it is distinct and different from seizure of immovable property. Disputes and matters relating to the physical and legal possession and title of the property must be adjudicated upon by a Civil Court.

In view of the aforesaid discussion, the Reference is answered by holding that the power of a police officer under Section 102 of the Code to seize any property, which may be found under circumstances that create suspicion of the commission of any offence, would not include the power to attach, seize and seal an immovable property.

INTERTEK INDIA PVT LTD

v.

PRIYANKA MOHAN [DEL]

C.R.P. No. 215 of 2019

Sanjeev Sachdeva, J. [Decided on 27/10/2019]

Civil procedure code, 1908- suit for declaration and damages-termination of employee- employer moved application for rejection of suit-whether sustainable-Held, No.

Brief facts:

Respondent/Plaintiff is an ex-employee of the Petitioner/ defendant and was employed as a Business Development Manager with the petitioner-company. Her services were terminated and being aggrieved, she filed the subject suit, inter-alia, claiming a declaration that termination of her services was null and void and further sought a decree of damages on account of mental harassment, loss of reputation, etc. Petitioner/ Defendant filed application under Order 7 Rule 11 (d) of the CPC contending that the contract of services being a terminable contract, no suit would lie for re-instatement of services. The trial court by the impugned order dismissed the application. Hence the present petition before the High Court.

Decision: Petition dismissed.

Reason:

I am unable to accept the contention of learned counsel for the petitioner. Respondent had filed the subject Suit claiming that termination is illegal. In paragraph 1 of the plaint respondent had described herself as an ex-employee which indicates that respondent had accepted that she is no longer in services. The respondent throughout the plaint has made averment that her services were terminated illegally. Reference in particular may be had to paragraphs 1, 24 and 27 where she has categorically stated that the notice of termination is illegal.

No doubt, the expression ‘null and void’ would imply non-est, however, if prayer (a) were to be interpreted in the manner in which learned counsel for the petitioner contends, the same would imply that the termination is non-est and respondent/plaintiff continues in services, but that is not what the Respondents seeks.

A meaningful reading of the Plaint shows that the respondent has not sought any re-instatement in service but had claimed that the termination is illegal and hence null and void. Learned counsel for the respondent before the trial court categorically stated that the respondent did not seek any re- instatement. Even if prayer (a), as framed, could not be granted, respondent could claim damages etc. for wrongful termination in case respondent is able to establish that the termination is illegal or contrary to any settled principles and that is what the respondent has sought in prayers (b) to (d).

In case the contentions of learned counsel for the petitioner were to be accepted, then respondent/plaintiff would be left remediless. On the one hand, as an employee, she cannot claim the relief of reinstatement and on the other hand as the employee she is stated to be barred from claiming any damages. That can never be the intention of the law.

Further contention of the learned counsel for the petitioner is that trial court has erred in holding that all reliefs, claimed by the respondent are maintainable and as such prejudice is likely to be caused to the petitioner at the final stage. The apprehension expressed by learned counsel for the petitioner is misplaced. The advocate for the respondent has very categorically made a statement, as is recorded by the Trial Court, that respondent has not sought a contract for personal service, i.e., re-employment in the petitioner company. In view of the above, I find no merit in the petition. The petition is accordingly dismissed.

RAVINDER KAUR GREWAL

v.

MANJIT KAUR [SC]

Civil Appeal No.7764 of 2014 with connected appeal

Arun Mishra & S. Abdul Nazeer, JJ. [Decided on 07/08/2019]

Limitation Act, 1963- Article 65- adverse possession- whether can be used by a plaintiff in a title suit- Held, Yes.

Brief facts:

The question of law involved in the present matters is quite significant. Whether a person claiming the title by virtue of adverse possession can maintain a suit under Article 65 of Limitation Act, 1963 (for short, “the Act”) for declaration of title and for a permanent injunction seeking the protection of his possession thereby restraining the defendant from interfering in the possession or for restoration of possession in case of illegal dispossession by a defendant whose title has been extinguished by virtue of the plaintiff remaining in the adverse possession or in case of dispossession by some other person? In other words, whether Article 65 of the Act only enables a person to set up a plea of adverse possession as a shield as a defendant and such a plea cannot be used as a sword by a plaintiff to protect the possession of immovable property or to recover it in case of dispossession. Whether he is remediless in such a case? In case a person has perfected his title based on adverse possession and property is sold by the owner after the extinguishment of his title, what is the remedy of a person to avoid sale and interference in possession or for its restoration in case of dispossession?

Decision: Suit can be filed on the basis of adverse possession.

Reason:

We are not inclined to accept the submission that there is no conferral of right by adverse possession. Section 27 of Limitation Act, 1963 provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished. The concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor, which has been extinguished and not more than that. For a person to sue for possession would indicate that right has accrued to him in presenti to obtain it, not in futuro. Any property in Section 27 would include corporeal or incorporeal property. Article 65 deals with immovable property.

We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/ owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant under Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.

When we consider the law of adverse possession as has developed vis-à-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In Such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession.

ANIL KHADKIWALA

vs

THE STATE GOVT. OF NCT OF DELHI [SC]

Criminal Appeal No(s).1157 of 2019 [@ SLP (Crl.) No. 2663 of 2017]

Ashok Bhushan & Navin Sinha, JJ. [Decided on 30/07/2019]

Criminal Procedure Code- section 482- quashing of complaint- whether more than one applications could be filed-Held, Yes.

Brief facts:

The application preferred by the appellant under Section 482, Cr.P.C. to quash the summons issued in complaint case no.3403/1/2015 was dismissed by the High Court opining that since the earlier Crl. M.C. No.877 of 2005 for the same relief had already been dismissed, the second application was not maintainable.

Respondent no.2 filed a complaint against the appellant who was the Director of M/s. ETI Projects Ltd., the Company in question. It was alleged that the accused person had issued cheques dated 15.02.2001 and 28.02.2001, which were dishonoured upon presentation. The appellant had preferred Crl.M.P. No.1459 of 2005 for quashing the same. He took the defence, without any proof that he had already resigned from the Company on 20.12.2000, which was accepted by the Board of Directors on 20.01.2001. The application was dismissed on 18.09.2007 after noticing the plea of resignation, solely on the ground that the cheques were issued under the signature of the appellant.

The appellant then preferred a fresh application under Section 482 giving rise to the present proceedings. The High Court noticing the reliance on Form 32 issued by the Registrar of Companies, under the Companies Act, 1956, in proof of resignation by the appellant prior to the issuance of the cheques, issued notice, leading to the impugned order of dismissal subsequently.

Decision: Appeal allowed.

Reason:

Learned counsel for the appellant submitted that there was no bar to the maintainability of a second application under Section 482, Cr.P.C. in the peculiar facts and circumstances of the case, relying on Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Mohan Singh and Ors., AIR 1975 SC 1002.

Learned counsel for respondent no.2 relied upon order dated 06.05.2019 of this Court in Atul Shukla vs. The State of Madhya Pradesh and another (Criminal Appeal No.837 of 2019) to contend that such an application was not maintainable. The cheques being post-dated, the appellant cannot escape its answerability.

We have considered the respective submissions on behalf of the parties and are of the opinion that the appeal deserves to be allowed for the reasons enumerated hereinafter.

The complaint filed by respondent no.2 alleges issuance of the cheques by the appellant as Director on 15.02.2001 and 28.02.2001. The appellant in his reply dated 31.08.2001, to the statutory notice, had denied answerability in view of his resignation on 20.01.2001. This fact does not find mention in the complaint. There is no allegation in the complaint that the cheques were post-dated. Even otherwise, the appellant had taken a specific objection in his earlier application under Section 482, Cr.P.C. that he had resigned from the Company on 20.01.2001 and it had been accepted. From the tenor of the order of the High Court on the earlier occasion it does not appear that Form 32 issued to the Registrar of Companies was brought on record in support of the resignation. The High Court dismissed the quashing application without considering the contention of the appellant that he had resigned from the post of the Director of the Company prior to the issuance of the cheques. The High Court in the fresh application under Section 482, Cr.P.C. Initially was therefore satisfied to issue notice in the matter after noticing the Form 32 certificate. Naturally there was a difference between the earlier application and the subsequent one, inasmuch as the statutory Form 32 did not fall for consideration by the Court earlier. The factum of resignation is not in dispute between the parties. The subsequent application, strictly speaking, therefore cannot be said to a repeat application squarely on the same facts and circumstances.

The Company, of which the appellant was a Director, is a party respondent in the complaint. The interests of the complainant are therefore adequately protected. In the entirety of the facts and circumstances of the case, we are unable to hold that the second application for quashing of the complaint was not maintainable merely because of the dismissal of the earlier application. The impugned order of the High Court is set aside. The appeal is allowed and the proceeding

THOMAS CHACKO

v.

THE CHIEF MANAGER, BANK OF INDIA & ORS [KER]

OP (DRT).No. 45 of 2018

Dama Seshadri Naidu, J. [Decided on 01/11/2018]

Constitution of India – Article 227 – Supervisory powers of the High court – DRT having seat at Ernakulum – DRAT having seat at Chennai – matter emanating from Ernakulum – Whether High Court of Kerala has jurisdiction to direct DRAT at Chennai – Held, Yes.

Brief Facts:

A wary purchaser of a secured asset is caught in the litigious cross fire between the borrowers and the banker. Spent his money, burnt his fingers (as he claims), and now wants to salvage the situation. The purchaser wants to withdraw from the sale and get his money back. But he faces uncertainty. After suffering an adverse order before the DRT, the Bank has filed an appeal before the DRAT, Chennai. And its disposal assumes importance for the purchaser to press his claim for refund. He wants the Appellate Tribunal to dispose of the appeal early. Now the question is, Can this Court, in Kerala, assume supervisory jurisdiction over the Appellate Tribunal in Chennai, Tamil Nadu?

A question of territorial jurisdiction must be resolved.

Decision: Petition allowed.

Reason:

Plainly read, Article 227 confers on every High Court superintendence over all courts and tribunals throughout the “territories” over which the High Court exercises its jurisdiction. Then, should we reckon “territories” in the literal, geographical sense or in the figurative, legal sense as fiction.

In Ambica Industries v. Commissioner of Central Exercise (2007) 6 SCC 769, the appellant carried on business at Lucknow. A dispute involving the appellant, however, arose before the CESTAT, New Delhi. The Tribunal exercises its jurisdiction over the cases from the State of Uttar Pradesh, National Capital Territory of Delhi, and the State of Maharashtra. Against the Tribunal’s order, the appellant filed an appeal under Section 35G of the Central Excise Act before the Delhi High Court. A Division Bench held that it had no territorial jurisdiction; it dismissed the appeal. So the matter reached the Supreme Court.

In the above factual backdrop, Ambica Industries has held that as for Article 227 of the Constitution of India, as also Clause (2) of Article 226, the High Court exercises its discretionary jurisdiction over the orders passed by the Subordinate Courts within its territorial jurisdiction. And even if any part of the cause of action has arisen within its territory that will suffice. But this principle cannot be applied, holds Ambica Industries, when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State. Then, “the High Court situated in the State where the first court is located” should be the proper forum.

Without much ado, I may hold that Ambica Industries’s assertion clinches the issue: when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State, then the High Court in the State where the first court is located should be the proper forum. Indeed, here the first or the primary forum is the DRT, Ernakulum. So this Court can eminently exercise its supervisory jurisdiction over the DRAT, Chennai. Here, the petitioner wants a direction to the Appellate Tribunal to dispose of the appeal early.

That said, this Court cannot be oblivious to the docket pressure the Appellate Tribunal faces. Nor can it set impracticable deadlines, for adjudication is not akin to answering a multiple-choice question paper. It is much more. A back-breaking, brain-racking exercise.

So I queried with the learned Central Government Counsel about the Appellate Tribunal’s convenience and the feasibility of an early disposal. He has, presumably on instructions, submitted that the Appellate Tribunal will dispose of the AIR (SR) No.460 of 2017 in three months’ time.

Under these circumstances, I hold that the DRAT, Chennai, will dispose of the AIR (SR) No.460 of 2017 expeditiously in three months.

CEMENT WORKERS MANDAL

v.

GLOBAL CEMENTS LTD (HMP CEMENTS LTD) & 0RS [SC]

Civil Appeal No.5360 of 2010

A M Sapre & Dinesh Maheshwari, JJ. [Decided on 14/02/2019]

Constitution of India – Article 226 – Writ jurisdiction of High court – A Kolkatta based company had a cement unit in Porbandar in Gujarat – Unit became sick and wages were not paid – Labour court passed award in favour of workers – Lender in Kolkata attached company's properties and sold in public auction – Workers filed writ before Gujarat High Court seeking deposit of 50% of their dues by the lender – Single judge overruled the jurisdiction issue in favour of workers while division bench allowed the objection – Whether correct – Held, No.

Brief facts:

Respondent Company having its registered office at Calcutta, have a cement factory at Porbandar in the State of Gujarat. The appellant is a Union of workers. These workers (as many as 500), were working, at all relevant time, in the cement factory of respondent at Porbandar. Respondent, however, closed the cement factory somewhere in the year 1998 for myriad reasons without paying the wages to its workers.

A dispute, therefore, arose between the appellant Union and Respondent Company (employer) regarding the non-payment of outstanding wages payable to the workers. The Labour Court directed Respondent Company to pay a sum of Rs.81, 50,744/ with a cost of Rs.50,000/ to the workers. This was followed by issuance of recovery certificate dated 04.09.2000 for Rs.60, 35,379/ by the Collector, Junagadh as arrears of land revenue. The said certificate, however, has remained unexecuted.

Meanwhile, Respondent Bank had initiated recovery proceedings against Respondent Company, for the recovery of loan before the Debt Recovery Tribunal (for short "the DRT) at Calcutta, which was allowed. The DRT also appointed one Receiver to take appropriate steps in this regard. The Receiver informed the appellant-Union accordingly.

The appellant Union filed a petition (Special Civil Application No.12212 of 2004) in the High Court of Gujarat, inter-alia, praying therein to direct the respondent Bank to deposit the 50% amount of the sale proceeds of the Porbandar H.M.P. Cement with the District Collector, Porbandar, and the District Collector be directed to pay by account payee cheque to each of the workmen proportionately towards the part payment of the legal dues to the individual workman concerned.

The respondents raised an objection that the High court of Gujarat has no territorial jurisdiction inasmuch as no part of the cause of action in relation to the subject matter of the SCA has arisen in the State of Gujarat. The Single Judge overruled the preliminary objection and held that the Gujarat High Court has the territorial jurisdiction to entertain the SCA. On appeal by the Respondent Company, the Division Bench set aside the order of the Single Judge and dismissed the SCA. The Division Bench held that the Gujarat High Court has no territorial jurisdiction to entertain the SCA in question because no part of the cause of action has accrued to file such petition (SCA) in the Gujarat High Court.

It is against this order of the Division Bench, the Union (petitioner in SCA) felt aggrieved and has filed the present appeal in this Court after obtaining the special leave to appeal.

Decision: **Appeal allowed.**

Reason:

The short question, which arises for consideration in this appeal, is whether the Division Bench was justified in holding that the SCA filed by the appellant was not maintainable for want of territorial jurisdiction of the Gujarat High Court.

Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned order of the Division Bench restore the order of the Single Judge.

In our considered opinion, the Division Bench erred in not noticing Article 226(2) of the Constitution of India while deciding the question arising in this case. In other words, the question as to whether the Gujarat High Court has territorial jurisdiction to entertain the appellant›s petition (SCA) or not, should have been decided keeping in view the provisions of Article 226(2) of the Constitution read with Section 20 of the Code of Civil Procedure, 1908 (for short, "CPC").

Article 226(2) of the Constitution, in clear terms, empowers the High Court (let us say "A" High Court) to entertain the writ petition if the cause of action to file such writ petition against the respondents of the said writ petition has arisen wholly or in part within the territorial jurisdiction of "A" High Court.

Clause (2) further empowers a High Court to issue any order, directions or writ as provided in clause (1) of Article 226 of the Constitution in such writ petition notwithstanding that seat of such Government or the Authority or the residence of such person against whom the writ petition is filed does not fall within the territories of the "A" High Court but falls in the territories of the "B" High Court.

Coming to the facts of this case, we find from the averments of the petition(SCA) that firstly, Respondent Company has its factory at Porbandar, which is a part of State of Gujarat; Second, the Labour Court, Junagadh, which is also a part of State of Gujarat, entertained the dispute between the appellant Union and respondent Company and passed a recovery order; and Third, one of the reliefs claimed in the petition(SCA) pertains to non-payment of outstanding wages payable to the workers by respondent Company.

In the light of these three reasons, we are of the view that the part of the cause of action as contemplated in Article 226 (2) of the Constitution has arisen within the territorial jurisdiction of the Gujarat High Court for filing the petition(SCA) to claim appropriate reliefs in relation to such dispute against respondent No.1Company.

In our considered opinion, the expression "the cause of action, wholly or in part, arises" occurring in Article 226(2) of the Constitution has to be read in the context of Section 20(c) of CPC which deals with filing of the suit within the local limits of the jurisdiction of the Civil Courts.

In the light of the foregoing discussion, we are of the view that the appellant›s petition(SCA) was maintainable in the Gujarat High Court inasmuch as the part of the cause of action to file such petition did accrue to the appellant herein (petitioner) within the territorial jurisdiction of the Gujarat High Court. In these circumstances, the SCA was required to be decided on merits by the Gujarat High Court.

In view of the foregoing discussion, the appeal succeeds and is hereby allowed.

M/S SCIEMED OVERSEAS INC

v.

BOC INDIA LIMITED & ORS [SC]

Special Leave Petition (C) No. 29125 of 2008

Madan B. Lokur & R.K. Agrawal, JJ. [Decided on 11/01/2016]

Petitioner filed false affidavit in judicial proceedings – High court imposed cost of Rs.10 lakhs – Whether correct – Held, Yes.

Brief facts:

The facts are complicated. Suffice to mention that the appellant was the successful bidder in a work contract which was challenged by the respondent. In the proceedings, the appellant filed an affidavit to the effect that nearly 85% of the work had been completed. However, the High court found the statement made in the affidavit to be false after causing an inspection by an advocate. Then the High court imposed a cost of Rs.10 lacs on the appellant for filing a false affidavit.

Decision: Appeal dismissed.

Reason:

The only question for our consideration is whether the High Court was correct in imposing costs of Rs. 10 lakhs on the petitioner for filing a false or misleading affidavit in this Court. In our opinion, the imposition of costs, although somewhat steep, was fully justified given that the High Court also held that the contract in favour of the petitioner was awarded improperly and was of a commercial nature, the last two findings not being under challenge.

A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This 'trend' is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair. While impugning the order passed by the High Court, it was submitted by Sciemed that in fact the statement made in the affidavit filed in this Court was not a false statement but was bona fide and not a deliberate attempt to mislead this Court. It was also submitted that the allegedly false or misleading statement had no impact on the decision taken by this Court and should, therefore, be ignored. We are unable to accept either contention raised.

The correctness of the statement made by Sciemed was examined threadbare not only by the learned Single Judge but also by the Division Bench and it was found that a considerable amount of work had still to be completed by Sciemed and it was not as if the work was nearing completion as represented to this Court. Additionally, the Report independently given by the learned advocate appointed to make an assessment, also clearly indicated that a considerable amount of work had still to be performed by Sciemed. The Report was not *ex parte* but was carefully prepared after an inspection of the site and discussing the matter with Shailendra Prasad Singh the proprietor of Sciemed and an engineer of Sciemed as well as officers from the RIMS.

In the first instance, the work order was issued to Sciemed on 25th July, 2007 but this was not disclosed to the High Court when it disposed of W.P. (C) No.4203 of 2007 on 31st July, 2007. Had the factual position been disclosed to the High Court, perhaps the outcome of the writ petition filed by BOC would have been different and the issue might not have even travelled up to this Court. Furthermore, apparently to ensure that work order goes through, a false or misleading statement was made before this Court on affidavit when the matter was taken up on 14th March, 2008 to the effect that the work was nearing completion. It is not possible to accept the view canvassed by learned counsel that the false or misleading statement had no impact on the decision rendered by this Court on 14th March, 2008. We cannot hypothesize on what transpired in the proceedings before this Court nor can we imagine what could or could not have weighed with this Court when it rendered its decision on 14th March, 2008. The fact of the matter is that a false or misleading statement was made before this Court and that by itself is enough to invite an adverse reaction. In *Muthu Karuppan v. Parithi Ilamvazhuthi (2001) 5 SCC 289* this Court expressed the view that the filing of a false affidavit should be effectively curbed with a strong hand. It is true that the observation was made in the context of contempt of Court proceedings, but the view expressed must be generally endorsed to preserve the purity of judicial proceedings. This is what was said: "Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a *prima facie* case of "deliberate falsehood" on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge." On the material before us and the material considered by the High Court, we are satisfied that the imposition of costs by the High Court was justified. We find no reason to interfere with the impugned judgment and order. The petition is dismissed.

VILLAYATI RAM MITTAL (P) LTD

v.

SHAMBHAVI CONTRACTORS PVT LTD [DEL]

I.A. No.5595/2009 in CS (OS) No. 2192 of 2008

Valmiki J. Mehta, J. [Decided on 14/01/2016]

Code of Civil Procedure, 1908 – Section 10 – Defendant filed suit against plaintiff in Shimla for recovery and injunction – Plaintiff filed suit against defendant in Delhi for recovery based on the sub contract – Whether both the suit are based on same cause of action so that the later suit can be stayed – Held, No.

Brief facts:

This is an application under Section 10 of CPC filed by the defendant in the suit for stay of the present suit on the ground that between the parties a suit involving the same issues is pending in the High Court of Shimla.

The suit filed in Shimla is a suit for recovery of moneys by the present defendant against the present plaintiff for work done. In the suit filed at Shimla, the reliefs which are prayed by the present defendant are recovery of Rs.45,54,924/-, damages and injunction. A reference to the present suit shows that the suit is for a recovery of Rs.3.25 crores on account of the sub contract, pertaining to enhanced costs and escalation claimed by the plaintiff from the defendant on account of defendant failing to perform its contractual obligations.

Decision: Application dismissed.

Reason:

The law with respect to Section 10 CPC is well settled and which is that a later suit between the same parties cannot proceed to trial if issues involved in the later suit are already a subject matter of issues in the previously instituted litigation. Of course, it is not necessary that each and every issue arising in the earlier litigation and the later litigation must be identical, and what is really required is that the main issues or the substantial issues which arise and would be decided in the earlier suit would be the same as the issues in the later suit. Putting it in another words, one of the principles which has been laid down for applicability of Section 10 CPC is that the decision in the first suit will operate as *res judicata* for the issues in the later suit. Also if parties to the earlier suit are different then the later suit cannot be stayed under Section 10 CPC, though this aspect is not relevant in this case as the parties to the present suit are not different than the parties to the earlier suit i.e. there are no parties to this suit who are not parties to the earlier suit.

On these principles, let us examine as to whether the present suit can be stayed and which is filed after around two months of the suit which is filed by the defendant in the High Court of Shimla.

The suit filed in Shimla is a suit for recovery of moneys by the present defendant against the present plaintiff for work done. Between the parties in the present suit there was a sub-contract with the defendant as a sub-contractee on account of the plaintiff having been granted a contract for construction of a military hospital in Shimla by the Union of India. Disputes and difference have arisen between the parties with respect to this sub-contract. In the earlier suit the present defendant as the plaintiff has also sought reliefs effectively for specific performance for continuing with the contract.

A reading of the relief clauses and the cause of action of the earlier suit filed by the defendant at Shimla shows that the defendant is claiming recovery of moneys for the work done and that in the earlier suit injunctions are sought which are in the nature of seeking specific performance of the sub-contract. In the suit at Shimla, this Court is informed, that the pleadings are complete and suit has been set down for trial.

A reference to the present suit shows that the suit is for a recovery of Rs.3.25 crores no doubt on account of the sub contract, however, the aspect which differentiates the present suit from the suit filed at Shimla is that the present suit basically seeks recovery of amounts from the defendant under a different head that the defendant is pleaded to have failed to perform its obligations under the contract which resulted in the plaintiff having been caused escalation in costs and expenditure for completion of the project of the hospital in Shimla whereas the suit in Shimla is based on the cause of action of value of work done by the present defendant for the plaintiff and amounts for which work done is claimed in the Shimla suit.

It bears note that once the issue with respect to most claims of the plaintiff in the present suit for recovery of Rs.3.25 crores pertains to enhanced costs and escalation claimed by the plaintiff from the defendant on account of defendant failing to perform its contractual obligations, and that is not an issue in the previously instituted suit at Shimla, the decision in the previously instituted suit at Shimla will not operate as *res judicata* with respect to issues in the present suit pertaining to the claim of the plaintiff for recovery of moneys of the damages on account of higher costs and escalation.

In view of the above, since the major part of the present suit claim falls outside the subject matter of the scope of the previously instituted suit at Shimla, and consequently there is no identity of the main claim and the issues of the present suit with the previously instituted suit at Shimla, this application under Section 10 CPC will not lie and is accordingly dismissed.

SAVELIFE FOUNDATION & ANR

v.

UNION OF INDIA & ANR [SC]

Writ Petition (C) No. 235 of 2012

V. Gopala Gowda & Arun Mishra, JJ. [Decided on 30/03/2016]

Right to live – Victims of road accident – Good Samaritan law – SC approves the guidelines and makes it law

Brief facts:

The petition has been filed under Article 32 of the Constitution of India in public interest for the development of supportive legal framework to protect Samaritans i.e. bystanders and passers-by who render the help to the victims of road accidents. These individuals can play a significant role in order to save lives of the victims by either immediately rushing them to the hospital or providing immediate lifesaving first aid.

Accident cases require fastest care and rescue which could be provided by those closest to the scene of the accident. Bystanders' clear support is essential to enhance the chances of survival of victim in the 'Golden Hour' i.e. the first hour of the injury. As per the WHO India Recommendations, 50% of the victims die in the first 15 minutes due to serious cardiovascular or nervous system injuries and the rest can be saved through by providing basic life support during the 'Golden Hour'. Right to life is enshrined under Article 21 which includes right to safety of persons while travelling on the road and the immediate medical assistance as a necessary corollary is required to be provided and also adequate legal protection and prevention from harassment to good Samaritans.

The people have the notion that touching the body could lend them liable for police interrogation. Passer-by plays safe and chose to wait for the police to arrive whereas injured gradually bleeds to death. People are reluctant to come forward for help despite, desperate attempts to get help from passer-by, by and large they turn blind eyes to the person in distress. Sometimes those who help are rebuked due to ignorance by the others on touching the scene. In the case of a convoy even when there are several vehicles in the convoy, people wait for the ambulance to arrive and also for the concerned police help. There are several desisting factors which are required to be taken care of such as fear of legal consequences if once action is ineffective or harmful to victim, fear of involvement in subsequent prolonged investigation and visit to the police station. There is need to evolve the system by promptly providing effective care system with certain ethical and legal principles. It is absolutely necessary that Good Samaritans feel empowered to act without fear of adverse consequence. There is need to provide certain incentives to Good Samaritans. There is also dire need to enact a Good Samaritan Law in the country since there is a felt need of legislation for affording protection to Good Samaritans. The Ministry of Road Transport and Highways has issued a notification containing guidelines on 12.5.2015 for protection of good Samaritans and a further Notification has been issued on 21.1.2016 framing standard operating procedures. It has been mentioned in the affidavit filed by Ministry of Road Transport and Highways, Government of India that in the absence of any statutory backing, it is felt that it will be difficult to enforce these guidelines issued on 12.5.2015 and standard operating procedures as notified on 21.1.2016.

Prayer has been made on the part of the Ministry of Road Transport and Highways of Government of India that the guidelines notified on 12.5.2015 and the standard operating procedure notified on 21.1.2016 may be declared to be enforceable by this Court so that it is binding on all the States and Union Territories until the Union Government enacts a law to this effect.

Decision: Guidelines enforced.

Reason:

After referring to various judgements and elaborately discussing on the power of the judiciary to lay down laws the Supreme Court held as under: In view of the aforesaid discussion, it is apparent that guidelines and directions can be issued by this Court including a command for compliance of guidelines and standard operating procedure issued by Government of India, Ministry of Road Transport and Highways, till such time as the legislature steps in to substitute them by proper legislation. This Court can issue such directions under Article 32 read with Article 142 to implement and enforce the guidelines which are necessary for protection of rights under Article 21 read with Article 14 of the Constitution of India so as to provide immediate help to the victims of the accident and at the same time to provide protection to Good Samaritans. The guidelines will have the force of law under Article 141. By virtue of Article 144, it is the duty of all authorities – judicial and civil – in the territory of India to act in aid of this Court by implementing them.

We have carefully gone through the notification dated 12.5.2015. However, as per the guidelines contained in para 13, the ‘acknowledgement’ if so desired by Good Samaritans, has to be issued as may be prescribed in a standard format by the State Government. In our opinion, till such time the format is prescribed, there should be no vacuum hence we direct that acknowledgement be issued on official letter-pad etc. and in the interregnum period, if so desired by Good Samaritan, mentioning the name of Samaritan, address, time, date, place of occurrence and confirming that the injured person was brought by the said Samaritan.

We have also gone through the notification dated 21.1.2016 with respect to the examination of Good Samaritan by the Police as contained in para 2(vii) which we modify and be read in the following manner : “The affidavit of Good Samaritan if filed, shall be treated as complete statement by the Police official while conducting the investigation. In case statement is to be recorded, complete statement shall be recorded in a single examination.” Remaining guidelines in the notifications dated 12.5.2015 and 21.1.2016 are approved and it is ordered that guidelines with aforesaid modifications made by us be complied with by the Union Territories and all the functionaries of the State Governments as law laid down by this Court under Article 32 read with Article 142 of the Constitution of India and the same be treated as binding as per the mandate of Article 141.

We also direct that the court should not normally insist on appearance of Good Samaritans as that causes delay, expenses and inconvenience. The concerned court should exercise the power to appoint the Commission for examination of Good Samaritans in accordance with the provisions contained in section 284 of the Code of Criminal Procedure, 1973 *suo motu* or on an application moved for that purpose, unless for the reasons to be recorded personal presence of Good Samaritan in court is considered necessary.

RAMESH RAJAGOPAL

v.

DEVI POLYMERS PVT. LTD [SC]

Criminal Appeal No. 133 of 2016 (Arising out of SLP(Crl) No. 2554 of 2011)

S. A. Bobde & Amitava Roy, JJ. [Decided on 19/04/2016]

Company having 3 different units – Consultancy business headed by director – Development of separate website for consultancy business of the company – Prosecution of director under IPC and IT Act – Whether tenable – Held,No.

Brief facts:

The appellant is a Director in Devi Polymers Private Limited ["DPPL"].DPPL has three Units – A, B and C. Unit 'C' is being headed by the appellant. It is not disputed that the Unit 'C' primarily renders consultancy services. However, all the three Units are units of one entity i.e. DPPL.

In the course of business, the appellant thought of improving the consultancy services and apparently contacted consultants, who apparently advised the creation of a separate entity known as Devi Consultancy Services and accordingly, in the web page that was created by the consultant, this name occurred. The invoices raised by the consultants were paid from the funds of DPPL, as advised by the appellant. It is significant that no amount has been paid or received by Unit C separately, independently of DDPL.

The relationship being strained between the respondent and the appellant, who are relatives, several proceedings seem to have been initiated in the Company Law Board. However, in the course of disputes and the pending proceedings, the respondent initiated the instant criminal complaint against the appellant. The appellant was prosecuted by the respondent under Sections 409, 468 and 471 of the Indian Penal Code (in short 'the IPC') read with Sections 65 and 66 of the Information Technology Act, 2000 read with Section 120(b) of the IPC.

Decision: Appeal allowed.

Reason:

Having given our anxious consideration to the dispute, we find that none of the aforesaid circumstances can lead to an inference of commission of an offence under the IPC at any rate none of the offence alleged. As far as the website is concerned, though undoubtedly, Devi Consultancy Services (DCS) is mentioned, it is made clear in the website itself that DCS is a part of DPPL which is apparent from a link, in the website itself, where they are shown as DPPL as the main Company and DCS as a sister Company. Similarly, in the website of DPPL, which was moved by the consultant, there is a link which shows that DCS is a sister concern and it is stated that viewers may visit that site. The address of DCS is shown to be the same address as that of DDPL. We are satisfied that there is no attempt whatsoever to project the DCS as a concern or a Company which is independent and separate from DDPL, to which both the parties belong. In any case it is not possible to view the act as an act of forgery.

It might have been possible to attribute some criminal intent to the projection of the Unit-C as DCS in the website, if as a result of such projection, the appellant had received any amounts separate from the DDPL, but a perusal of the complaint shows that this is not so. Not a single rupee has been received by the appellant in his own name or even separately in the name of Unit-C, which he is heading. All amounts have been received by DDPL. It is not possible to view the contents of the website showing the DCS as a concern which is separate from DDPL in view of the contents of the website described above. Moreover, it is not possible to impute any intent to cause damage or injury or to enter into any express or implied contract or any intent to commit fraud in the making of the said website. The appellant has not committed any act which fits the above description. Admittedly, he has not received a single rupee nor has he entered into any contract in his own name on the basis of the above website.

In the absence of any act in pursuance of the website by which he has deceived any person fraudulently or dishonestly, induced any one to deliver any property to any person, we find that it is not possible to attribute any intention of cheating which is a necessary ingredient for the offence under Section 468. We find that the allegations that the appellant is guilty of an offence under the aforesaid section are inherently improbable and there is not sufficient ground of proceedings against the accused. The proceedings have been initiated against the appellant as a part of an ongoing dispute between the parties and seem to be due to a private and personal grudge.

As regards the commission of offences under the Information Technology Act, 2000 the allegations are that the appellant had, with fraudulent and dishonest intention on the website of DCS i.e. www.devidcs.com that the former is a sister concern of Devi Polymers. Further, that this amounts to creating false electronic record. In view of the finding above we find that no offence is made out under Section 66 of the I.T. Act, read with Section 43. The appellant was a Director of DDPL and nothing is brought on record to show that he did not have any authority to access the computer system or the computer network of the company. That apart there is nothing on record to show the commission of offence under Section 65 of the I.T. Act, since the allegation is not that any computer source code has been concealed, destroyed or altered. We have already observed that the acts of the appellant did not have any dishonest intention while considering the allegations in respect of the other offences. In the circumstances, no case is made out under Sections 65 and 66 of the I.T. Act, 2000.

We find that the criminal proceedings initiated by the respondent constitute an abuse of process of Court and it is necessary to meet the ends of justice to quash the prosecution against the appellant.

RESERVE BANK OF INDIA

v.

ONICRA CREDIT INFORMATION CO LTD [DEL]

LPA 370/2016

Badar Durrez Ahmed & Sanjeev Sachdeva, JJ. [Decided on 31/05/2016]

Credit Information Companies (Regulations) Act, 2005 – Section 5(3) – Determination of number of credit information agencies – Whether determination is mandatory before granting certificate of registration – Held, No.

Brief facts:

The appellant (RBI) under Section 5(2) of the Credit Information Companies (Regulations) Act, 2005 (hereinafter referred to as 'the said Act') rejected the application of the respondent for a Certificate of Registration as a Credit Information Company. The appellate authority also rejected the appeal of the respondent. The respondent filed the writ petition challenging the above two orders.

The learned Single Judge, by virtue of the impugned judgment, after hearing counsel for the parties, disposed of the petition, by directing the respondent to file a fresh application and the appellant to determine the number of credit information companies under section 5(3) of the Act. RBI challenged this direction before the Division Bench.

Decision: Partly allowed.

Reason:

According to the learned counsel for the appellant, the impugned judgment is contrary to the statutory provisions of the said Act. In particular, the grievance is that the direction given to the appellant to consider the application of the respondent without there being any determination under Section 5(3) of the said Act and without using the same as a ground for rejecting the said application, is contrary to the scheme of the Act. According to the learned counsel for the appellant, the appellant is required to first determine the total number of Credit Information Companies which may be granted Certificates of Registration under Section 5(3) of the said Act and it is only thereafter that the application of the respondent can be considered.

This argument was also raised before the learned Single Judge and, in our view, the learned Single Judge has rightly repelled the same. This is so because there is no mandate under Section 5(3) requiring the Reserve Bank of India to prescribe the total number of Credit Information Companies. That is a discretion which has been given to the Reserve Bank of India and the same is evidenced by the use of the word "may". The use of the word "may" is not always determinative of whether a provision is mandatory or discretionary. But, in the present context, we read Section 5(3) as a discretion which has been vested in the Reserve Bank of India.

The point that is to be considered is whether an application can be moved by a prospective registrant under Section 4(1) and the same has to be considered by the Reserve Bank of India on the principles stipulated in Section 5(1) and Section 5(2) thereof? As long as there is no maximum number of Credit Information Companies stipulated and there do not exist that number of companies, any prospective Credit Information Company can move an application under Section 4(1) of the said Act and the same has to be disposed of in accordance with law. However, there is also no bar on the Reserve Bank of India in simultaneously considering the application and also determining the total number of Credit Information Companies which may be granted a certificate under Section 5(3) when an application by a prospective Credit Information Company is moved under Section 4(1) of the said Act.

In view of this interpretation to the said provision, we feel that the impugned directions given in paragraph 20 of the impugned judgment only needs to be tweaked. The only change that would be necessary, in our view, would be a change in direction No. (iv). Instead of the existing (iv), the following (iv) be substituted:-

"(iv) The respondent RBI can simultaneously while considering the application of the respondent, if it so deems necessary, also enter upon a determination under Section 5(3) of the said Act." The appeal is partly allowed to the aforesaid extent.

JET AIRWAYS (INDIA) LTD.

v.

DHANUKA LABORATORIES LTD [DEL]

RSA No.295/2016

Valmiki J Mehta, J. [Decided on 30/09/ 2016

Carriage By air Act, 1972 – Liability thereunder – Carrier fails to deliver the consignment – Goods appeared to have been stolen – Carrier fails to lead evidence – Whether carrier is liable for the loss – Held, Yes.

Brief facts:

The appellant/defendant is a carrier of goods. Respondent/ plaintiff received an order from a buyer in Bangladesh, which was executed by the respondent/plaintiff by shipping the goods by air through the appellant/defendant. The goods on being handed over to the appellant/defendant for transportation were thereafter further transferred by the appellant/defendant to its agent for carriage/transportation viz M/s Biman Bangladesh Airlines. The goods did not reach the consignee of the Airway bill and M/s Biman Bangladesh Airlines issued a short landing letter. The respondent/plaintiff thereafter filed the subject suit. The respondent/plaintiff led evidence in support of its case by proving the value of the goods transported as also the wilful misconduct/ misappropriation of goods by the appellant/defendant through its agent carrier, but the appellant/defendant has led no evidence whatsoever in the trial court. Therefore the suit had to be and was decided only as per the evidence which was led by the respondent/plaintiff. The trial court decreed the suit and in the first appeal the judgement of the trial court was confirmed. The singular issue to be decided in this second appeal is as to whether the liability of the appellant/defendant is limited as per Rule 22 of the Rules under the Carriage by Air Act, 1972 or whether the appellant/defendant cannot get benefit of this Rule 22 of limited liability because the appellant/defendant is guilty of wilful misconduct as provided in Rule 25 of the said Rules and which provision overrides the provision of Rule 22.

Decision: Appeal dismissed.

Reason:

It is settled law that benefit of the provision of the limited liability of a carrier such as the appellant/ defendant under Rule 22 is subject to Rule 25 and which states that the benefit of limited liability cannot be given to a carrier in case the carrier is found guilty of wilful misconduct or conduct equivalent to wilful misconduct. A statement by respondent/plaintiff that goods have been misappropriated is not only a case of wilful misconduct but such act is even more than the case of wilful misconduct, and it is this case of the respondent/plaintiff which was proved that on account of the goods not having been traced and thus in fact the goods have been misappropriated. Obviously, misappropriation cannot be by a legal entity such as the appellant/defendant or its agent airline company, but by its employees or agents who have been dealing with the goods. There are judgments of various courts which hold that once goods are not traced and there is an averment of the same being misappropriated, the case then falls under Rule 25 that there is wilful misconduct or conduct equivalent to wilful misconduct. One such judgment of this Court is in the case of Vij Sales Corporation v. Lufthansa, German Airlines AIR 2000 Del 220. Of course, whether or not there is wilful misconduct would depend on facts of each case with, of course the onus being really on the carrier such as the appellant/defendant who is in control and possession of the goods to show that there is no wilful misconduct because a consignor such as the respondent/plaintiff can only step into the witness box and state so in the examination-in-chief. It is also required to be noted that similar principle with respect to strict liability of a carrier exists under the Carriers Act, 1865 and therefore onus is really upon the appellant/defendant/carrier to show that there is no wilful misconduct. The judgment under the Carriers Act holding strict liability of the carrier is the judgment of the Supreme Court in the case of Nath Bros. Exim International Ltd. v. BEST Roadways Ltd. (2000) 4 SCC 553 and which specifies the strict liability of a carrier and how a carrier cannot take benefit of a clause of limited liability.

In my opinion, once the appellant/defendant has admittedly led no evidence whatsoever, and the respondent/ plaintiff has led evidence proving the value of the goods and the case as set up in the plaint, the appellant/defendant cannot be said to have discharged the onus upon it that there was no wilful misconduct or misappropriation as was the case of the respondent/plaintiff. Without leading evidence and merely by cross-examination of the witnesses of the respondent/plaintiff/shipper/consignor, a carrier cannot say that it has discharged its onus of proof because onus of proof is discharged by leading positive evidence, with the aspect that positive evidence also ordinarily does not absolve a carrier because liability of a carrier is a strict liability equal to that of an insurer.

Therefore, once the present case is laid out by the respondent/ plaintiff as per the plaint as a case falling as a case of wilful misconduct or equivalent to wilful misconduct i.e. misappropriation of goods, the case will have to be decided as per Rule 25 and not Rule 22 as argued on behalf of the appellant/defendant.

BHUPINDER SINGH BAWA

v.

ASHA DEVI [SC]

Civil Appeal No. 9941 of 2014 [(2016) 10 SCC 209]

Shiva Kirti Singh & R. Banumathi, JJ. [Decided on 08/11/2016]

Delhi Rent Control Act, 1954 – Eviction of tenant – Bonafide requirement of the landlord – Landlord has several other properties – Whether eviction could be denied on this ground – Held, No.

Brief facts:

The suit scheduled premises comprises of two big rooms and one small room. Appellant/tenant was inducted as tenant in the suit scheduled premises by the erstwhile owner of the premises. Subsequently, the respondent/landlady acquired the premises under a registered sale deed. The respondent sought eviction of the appellant from the suit premises on the ground of *bona fide* requirement that her son required the premises for running his separate business of sanitary and hardware products as the suit premises has a prime location for the said business.

The appellant controverted the claim of *bona fide* requirement set up by the respondent on various grounds including that there are several other properties available for the respondent landlord to give to her son for his business.

On a proper appreciation of facts and evidences available on record, the Additional Rent Controller passed an eviction order in favour of the respondent which was upheld by the High Court. Hence the present appeal by the appellant tenant.

Decision: Appeal dismissed.

Reason:

Both the courts below have allowed the eviction petition filed by the respondent against the appellant on the ground of *bona fide* requirement under Section 14(1) (e) of Delhi Rent Control Act, 1958 by recording concurrent findings. First and foremost, the landlordtenant relationship between the parties is not in dispute. The only dispute relates to *bona fide* requirement of the respondent for business of her son and availability/ non-availability of alternative suitable accommodation.

The concurrent findings recorded by the courts below are as follows: Firstly, It was held that the fact that respondent's son is engaged as Director in the family company M/s. Jaishree Granites Pvt. Ltd. and earns a salary of Rs.50,000/- cannot be an impediment to his running a separate business of sanitary and hardware. The courts held that the The writ petition is allowed in terms of the directions in the preceding paragraph even while upholding the liability to pay capital gains tax. No costs. law does not provide that if a landlord/landlady requires the premises for running business of his/her young son who is an MBA, and is already engaged in some other business, he is acting malafidely and thus, no relief should be granted to him/her. Secondly, the courts below considered the suitability of every alternative accommodation suggested by the appellant which can preferably be occupied by the respondent's son for running his business.

The appellant had suggested alternative premises. The courts found that the properties in the name of family company, M/s. Jaishree Granites Pvt. Ltd. viz. Property nos. 43, 44, 45 and 46 situated at Block-A-1, W.H.S. Kirti Nagar, New Delhi and Property No. D- 12, Rajouri Garden, Ring Road, New Delhi were not located in a market area and thus, they were unsuitable for occupation especially when other suitable premises was available in the market area.

The property No. 285-B which was owned by the husband of the respondent was found already in occupation as a retail outlet for marble and granite run by the husband of the respondent. The courts considered the allegation of the appellant that property No. 285-B is owned by the respondent and not by her husband. The appellant had produced a copy of Income Tax Returns of the respondent for establishing his claim. However, the High Court rejected the said claim on finding that the alphabet 'B' appearing after number 285 under the head of rental incomes was wrongly written in the Income Tax Return of the respondent. Moreover, the High Court found that the appellant had himself stated in his pleadings that property no. 285-B belonged to the husband of the respondent and not to the respondent. Also, with regard to property No. A-2/53 at Kirti Nagar which is also owned by the husband of the respondent, the courts found that it is being used by M/s. Jaishree Granites Pvt. Ltd. as godown for the stock of the marble and granite.

So far as property bearing No. D-201, Mansarovar Garden, New Delhi is concerned, the appellant made a case that the entire property including the ground floor of property No. D-201 was available to the respondent which could have been suitably used for running her son's business as it was located on the main road and in a market area also. The courts noted that the appellant has admitted in his crossexamination that the first floor and second floor of the property No. D-201 is in occupation of brother-in- law (Devar) of the respondent who is carrying on his business in the said premises. The court also noted that in his cross examination, the appellant has suggested that if not on the first or second floor, respondent's son can occupy the basement of property No. D-201. Having so noted, the High Court has observed that the appellant impliedly admitting that the husband of the respondent is not the owner of the ground floor of property No. D-201. The courts also noted that the appellant has not specifically pleaded in his written submissions that the ground floor of property No. D-201 is owned by the husband of the respondent. In such facts and circumstances, the courts recorded concurrent finding of fact that ground floor of property No. D-201 does not belong to husband of the respondent and thus the question of its suitability as an alternate accommodation does not arise in the present case.

In light of the above, Additional Rent Controller and the High Court rightly concluded that no alternative premise was lying vacant for running business of respondent's son. The High Court rightly relied on the ratio of Anil Bajaj & Anr v. Vinod Ahuja 2014 (6) SCALE 572 to hold that it is perfectly open to the landlord to choose a more suitable premises for carrying on the business by her son and that the respondent cannot be dictated by the appellant as to from which shop her son should start the business from.

The concurrent findings recorded by the courts below are based on evidence and materials on record, we do not find any infirmity warranting interference with the impugned judgment.

INNOVATIVE TECH PACK LTD.

v.

SPECIAL DIRECTOR OF ENFORCEMENT [DEL]

[Criminal Appeal. No.952/2012

Mukta Gupta. [Decided on 11/01/2017]

FERA, 1973 – Prosecution of directors for non-filing of exchange control copy of the bill of entry to substantiate the outward remittances against import of materials – Proceedings initiated after lapse of 6 years – Whether sustainable- Held, No.

Brief facts:

Show cause notice was issued, under FERA, to the appellant alleging that though foreign exchange was remitted in four imports however, the appellant failed to submit exchange control copy of Bill of Entry for confirmation of having imported the material for which the amount was remitted, thus he had violated Section 8 (3) and Section 8(4) of the FERA read with Chapter 7A.20 (i) of the Exchange Control Manual, 1995. Out of the nine imports alleged, the Adjudicating Authority was satisfied with six and as no bill of entry was by the appellant for three remittances, a penalty of Rs.15 lakhs was levied on the appellant.

Aggrieved by the order of the Adjudicating Authority, the appellant preferred an appeal before the Appellate Tribunal wherein though pre- deposit penalty was dispensed with however, the appeal was dismissed. Hence the present appeal.

Decision: Appeal allowed.

Reason:

Thus the Courts have repeatedly held that in quasi criminal proceedings the penalty should not be imposed merely because it is lawful to impose the penalty. Whether penalty should be imposed or not is a matter of discretion to be exercised judicially and on consideration of all the relevant circumstances. Further simpliciter from the non-compliance of placing on record no inference can be drawn that the foreign remittance was not used for the purpose of import. It is trite law that to impose a penal liability compliance should be sought within a reasonable time and a person cannot be penalised for not retaining the documents for a period of 13 years. During the course of the present appeal, exchange copy of Bill of Entry qua transaction at Sr. No. 2 has already been placed however, despite best efforts the appellant could not locate the exchange copies of Bills of Entry qua other two transactions.

In view of the belated show cause notice being served on the appellant, the defence of the appellant that it was not in possession of the copies of Bill of Entry for the two transactions is plausible. It cannot be held that the respondent has proved its allegation beyond reasonable doubt and the copies of the Bills of Lading probablise that the remittances were utilised for import. Consequently, the impugned orders passed by the Appellate Tribunal and the Adjudicating Authority are set aside.

MGR INDUSTRIES ASSOCIATION & ANR

v.

STATE OF U P & ORS [SC]

Civil Appeal No. 1362 of 2017(Arising out of SLP(C) No.25529 of 2014)

Ranjan Gogoi & Ashok Bhushan, JJ. [Decided on 03/02/2017]

Section 12A of the U.P. Industrial Area Development Act, 1976 read with article 243Q of the constitution of India – Industrial area not notified panchayat levied tax – Whether tenable – Held, Yes.

Brief facts:

Appellant No.1 is an Industries Association whose members are running small industries in Hapur. Zila Panchayat, Hapur initiated proceedings for realisation of tax for members of the appellant Association which was objected to byway of a representation, before the State Government, on the ground that it is an industrial area under the U.P. Industrial Area Development Act, 1976 (the Act) and therefore no panchayat tax could be recovered from them. On the contrary, the State Government held that although the area has been declared as industrial area under the Act, but no notifi cation having been issued as industrial township within the meaning of Article 243- Q (1) proviso of the Constitution, the Zila Panchayat/Nagar Panchayat is entitled to realise tax and appellants cannot claim exemption from taxation by local authority. Aggrieved by the above order of the State Government, appellants challenged the decision before the High Court under a writ, which was dismissed by upholding the decision of the State Government. Aggrieved by the judgment of the High Court, the appellants have fi led this appeal.

Decision: Appeal dismissed.

Reason:

In the case before us, it has not been pleaded that any notifi cation referable to proviso to Article 243(Q) (1) has yet been issued. It shall also be relevant to refer the judgment of this Court in Saij Gram Panchayat v. State of Gujarat and others, 1999 (2) SCC 366, where this Court had occasion to consider the proviso to Article 243-Q sub-clause (1) in the context of Gujarat Industrial Development Act, 1962. After insertion of Part IX-A in the Constitution, the Gujarat Municipalities Act, 1962 was also amended by adding Section 264-A. It was provided under Section 264-A that notifi ed area means an urban area or part thereof specifi ed to be an industrial township area under the proviso to Article 243-Q(1) of the Constitution of India. Paragraphs 10 and 11 of the judgment are extracted below:

"10. The Gujarat Municipalities Act, 1962 was amended on 20- 8-1993 in view of the insertion of Part IX-A in the Constitution. Section 264-A was substantially amended. It now provided: "264-A. For the purpose of this chapter, notifi ed area means an urban area or part thereof specifi ed to be an industrial township area under the proviso to clause (1) to Article 243-Q of the Constitution of India."

Thus, as a result of this amendment in the Gujarat Municipalities Act, as industrial area under the Gujarat Industrial Development Act, which is notifi ed under Section 16 of the Gujarat Industrial Development Act, would become a notifi ed area under the new Section 264-A of the Gujarat Municipalities Act and would mean an industrial township area under the proviso to clause (1) of Article 243-Q of the Constitution of India.

11. On 7-9-1993, the Government of Gujarat issued a notification under Section 16 of the Gujarat Industrial Development Act declaring Kalol Industrial Area as a notifi ed area under Section 264-A of the Gujarat Municipalities Act. By another notifi cation of the same date 7-9-1993, the Government of Gujarat excluded the notifi ed area from Saij Gram Panchayat under Section 9(2) of the Gujarat Panchayats Act, 1961."

Thus, for treating industrial area as Industrial Township notifi cation under proviso to Article 243-Q (1) was contemplated which the statutory scheme under the 1976 Act is also. In view of the foregoing discussion, we are of the view that it was rightly held by the High Court that exemption under Article 12-A of the 1976 Act was not available in the facts of the above case. The appellants were not entitled for the reliefs claimed in the writ petition. In the result, the appeal is dismissed.

D.M.ORIENTAL INSURANCE CO. LTD.

v.

SWAPNA NAYAK & ORS [SC]

Civil Appeal No.3862 of 2013 with Civil Appeal Nos.3863-3864 of 2013

J. Chelameswar & Abhay Manohar Sapre, JJ. [Decided on 23/01/2017]

Accident compensation- tribunal allowed compensation for victims – High court reduced the same – Appeal to Supreme Court – Insurer sought further reduction in compensation while complainant asked for enhancement – Whether allowable – Held, No.

Brief facts:

Mathurananda Nayak, a resident of U.S.A., and his mother Jita Nayak along with two others while coming from Cuttack collided with a truck. As a result of the said accident, Mathurananda Nayak, Jita Nayak along with driver of the car sustained injuries and later succumbed to the injuries on the same day.

The legal heirs of Mathurananda Nayak and Jita Naik fi led two separate claim applications before the Tribunal. By a common Award the Tribunal allowed the applications. For the death of Mathurananda Naik the Tribunal awarded a total sum of Rs.4,36,95,740/- to the claimants and for the death of Jita Naik awarded a sum of Rs.1,29,500/- with interest at the rate of 7.5% p.a.

The Insurance Company challenged the award before the High Court and the claimants also challenged the award before the High Court for enhancement of compensation amount awarded to them by the Tribunal. By impugned common judgment, the High Court reduced the compensation to Rs.3,75,00,000/-.

Challenging the said judgment of the High Court, the Insurance Company has filed C.A. No. 3862 of 2013 seeking further reduction in the award of compensation whereas the claimants have fi led C.A. Nos. 3863-3864 of 2013 seeking enhancement in the compensation.

Decision: Appeals dismissed.

Reason:

Having heard the learned counsel for the appellant (Insurance Company) and on perusal of the entire record of the case, we have formed an opinion to dismiss both the appeals and, in consequence, are inclined to uphold the order of the High Court which, in our view, does not call for any interference.

On perusal of the decisions cited at the bar and further having regard to the totality of the facts and circumstances of the case and the concurrent fi ndings of two courts and on material issues such as the determination of annual income of the deceased, his age, the number of dependents etc., we do not fi nd any good ground to interfere in the impugned order. In our view, such fi ndings, apart from being concurrent, cannot be said to be, in any way, arbitrary and nor they result in awarding a bonanza or a windfall to the claimants so as to call for further reduction in the compensation awarded by the High Court.

In other words, in our view, what has been eventually awarded to the claimants by the High Court appears to be just and reasonable compensation within the meaning of Section 166 of the Act and there does not appear any good ground for further enhancement under any of the heads including under the head of future prospects as claimed by the claimants in their appeal and nor any case is made out for further reduction by applying the lesser multiplier or to make further deduction in the salary component of the deceased as claimed by the Insurance Company. When we fi nd that under one head, reasonable amount has been awarded and under another head, nothing has been awarded though it should have been so awarded and at the same time, we notice that eventual fi gure of the award of compensation payable to the claimants appears to be just and reasonable then in such eventuality, we do not consider it proper to interfere in such award in our appellate jurisdiction under Article 136 of the Constitution. In other words, if by applying the tests and guidelines, we fi nd that overall award of compensation is just and fair, then, in our view, such award deserves to be upheld in claimants' favour. We fi nd it to be so in the facts of this case having taken note of all relevant facts and circumstances of the case.

In the light of foregoing discussion, we fi nd no merit in the appeals, i.e., the appeal fi led by the Insurance Company seeking further reduction in the compensation and the appeals fi led by the claimants seeking enhancement in the compensation and accordingly dismiss the appeals and, in consequence, uphold the order of the High Court calling no interference therein.

FARIDABAD COMPLEX ADMINISTRATION

v.

IRON MASTER INDIA (P) LTD [SC]

Civil Appeal No.1182 of 2007

R.K. Agrawal & Abhay Manohar Sapre, JJ. [Decided on 07/03/2017]

Code of Civil Procedure,1908 – Section 100 – Suit against levy of house taxtrial court dismissed the suit – First appellate court allowed the suit – Second appeal before the High Court – Dismissed in liminie on the ground that no substantial question of law is involved – Whether tenable – Held, No.

Brief facts:

The respondent filed a civil suit seeking permanent injunction against the appellant restraining them from recovering the House Tax for the years 1991-92, 1992-93 and 1993-94 from the respondent on their properties. The appellant also sought a declaration that demand raised by the appellant calling upon the respondent to pay the House Tax on their properties is illegal. The Trial Court dismissed the Suit. On appeal, the Additional District Judge set aside the judgment and decree of the Trial Court and decreed the respondent's suit against the appellant. Felt aggrieved, the appellant (defendant) filed second appeal before the High Court wherein the appellant had proposed several substantial questions of law arising in the case. The High Court, however, dismissed the second appeal in limine by impugned judgment/order holding that the second appeal does not involve any substantial question of law. It is against this judgment, the appellant (defendant) has filed this appeal.

Decision: Appeal allowed.

Reason:

Having heard learned senior counsel for the respondent and on perusal of the record of the case, we are inclined to allow the appeal and remand the case to the High Court for deciding the second appeal afresh on merits in accordance with law. We do not agree with the reasoning and the conclusion arrived at by the High Court in the impugned order. In our considered view, the appeal did involve the substantial question of law and, therefore, the High Court should have admitted the appeal by first framing proper substantial questions of law arising in the case, issued notice to the respondent for its final hearing as provided under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") and disposed it of on merits.

As a matter of fact, having regard to the nature of controversy involved in the suit and the issues arising in the case, the questions raised in the second appeal did constitute substantial questions of law within the meaning of Section 100 of the Code. Indeed, in our considered view, the questions, viz., whether the suit seeking a declaration that the demand of House Tax raised under the Act is maintainable, whether such suit is barred and, if so, by virtue of which provision of the Act, whether plaintiff has any alternative statutory remedy available under the Act for adjudication of his grievance and, if so, which is that remedy, and lastly, whether the plaintiff has properly valued the suit and, if so, whether they have paid the proper Court fees on the reliefs claimed in the suit were legal questions arising in the appeal and involved jurisdictional issues requiring adjudication on merits in accordance with law. The High Court unfortunately did not examine any of these issues much less in its proper perspective in the light of relevant provisions of the Act governing the controversy.

The High Court thus, in our view, committed jurisdictional error when it dismissed the second appeal in limine. We cannot countenance the approach of the High Court. In view of foregoing discussion, the appeal succeeds and is allowed. The impugned order is set aside. The case is now remanded to the High Court for deciding the appeal on merits in accordance with law.

JSW INFRASTRUCTURE LIMITED & ANR

v.

KAKINADA SEAPORTS LIMITED & ORS [SC]

Civil Appeal No. 3422 of 2017 (Arising out of SLP(C) No.23241 of 2016)

Madan B. Lokur & Deepak Gupta, JJ. [Decided on 01/03/2017]

Awarding contract to operate berth – Successful bidder was already operating a berth in the port – High court cancelled the award – Whether correct – Held, No.

Brief facts:

Out of the four who participated in the bid process by submitting RFQ, only two parties, i.e., the first consortium and the second consortium submitted the RFP to Paradip Port Trust. The bid quoted by the first consortium of the appellants JSW Infrastructure Limited and South West Port Limited was 31.70% as against 28.70% bid quoted by the second consortium comprising of M/s Kakinada Seaports Limited, M/s Bothra Shipping Service Pvt. Ltd.,M/s MBG Commodities Pvt. Ltd. Since the first consortium were the highest bidders their proposal was recommended for acceptance by the tender committee of the Paradip Port Trust on 26.02.2016. At this stage, on 27.02.16 the second consortium submitted objections to the consideration of the application of the first consortium on the ground that in terms of the Policy Clause against creation of monopoly the appellants were not entitled to take part in this entire bidding process since they were already operating one berth for dry cargo.

Aggrieved by this action, the second consortium filed a writ petition before the Orissa High Court. The submission of unsuccessful bidders was that since the first consortium was already operating a berth for dry cargo it could not have submitted its application to bid for the berth in question which is also admittedly meant for dry cargo. It was contended that as per the policy quoted above, if a private operator is operating a berth he cannot be allowed to bid for the next berth for handling the same cargo in the same port. This contention of the original writ petitioners was accepted by the Orissa High Court which interpreted the Policy clause by holding that the word “next” in the Clause indicated that a private operator cannot take part or bid for next successive berth for the same cargo. The High Court, therefore, held that the application for the first consortium JSW Infrastructure Limited, was wrongly considered and consequently set aside the award of Letter of Award in favour of the first consortium and further directed that the Paradip Port Trust may either accept the single remaining bid of the second consortium of Respondent Nos. 1-3 after negotiating the price which should not be less than the price offered by the consortium of JSW Infrastructure, or it may invite fresh bids for the berth in question. Aggrieved by the judgment of the High Court the first consortium and the Paradip Sea Port have filed the two appeals.

Decision: Appeal allowed.

Reason:

On a bare reading of the Policy Clause some weightage and meaning has to be given not only to the word “next” as done by the High Court but also to the words “only one private operator” appearing in the opening part of the Clause. The words “only one private operator” cannot be treated as surplusage. The entire clause has to be read as a whole in the context of the purpose of the policy which is to avoid and restrict monopoly. In our opinion, this Clause will apply only when there is one single private operator in a port. If this single private operator is operating a berth, dealing with one specific cargo then alone will he not be allowed to bid for next berth for handling the same specific cargo. The High Court erred in interpreting the clause only in the context of the word “next” and ignored the opening part of the Clause which clearly indicates that the Clause is only applicable when there is only one private berth operator. It appears to us that the intention is that when a port is started, if the first berth for a specific cargo is awarded in favour of one private operator then he cannot be permitted to bid for the next berth for the same type of cargo. However, once there are more than one private operators operating in the port then any one of them can be permitted to bid even for successive berths. In the present case, as pointed out above there already 5 private operators other than the first consortium.

Strong reliance has been placed on behalf of the second consortium on the judgment rendered in APM Terminals B.V. v. Union of India & Another (2011) 6 SCC 756 . We are of the considered view that the said judgment cannot be applied to the present case because in that case this court considered the clauses of the contract. The policy which was applicable in APM Terminal, was not the policy of 2010 but the policy of 2007, the wording of which is totally different. True it is, that in the said judgment reference has also been made to the new policy but that was not specifically dealt with by the Court, and the matter was decided on an interpretation of the terms of the contract and the policy of 2007.

In view of the above discussion we are clearly of the view that the High Court erred in interpreting the Clause in the manner which it is done. As explained above, the Clause will apply only when there is single private operator operating a single berth. Once there are more than one private operators then the Clause will not apply. The decision taken by Paradip Port Trust could not be termed to be arbitrary, perverse or mala fide. Therefore, the High Court was not justified in setting aside the same. In this view of the matter, both the Civil Appeals are allowed. The Judgment of the High Court is set aside and the writ petition filed by the second consortium before the High Court is dismissed.

THE MAHARASHTRA STATE COOPERATIVE HOUSING FINANCE CORPORATION LTD

v.

PRABHAKAR SITARAM BHADANGE [SC]

Civil Appeal No. 1488 of 2017

A.K. Sikri & R.K. Agrawal, JJ. [Decided on 30/03/2017]

Cooperative Societies law – Jurisdiction of cooperative court – Dispute between employee and society – Whether cooperative court has jurisdiction to try – Held, No.

Brief facts:

The appellant, Maharashtra State Cooperative Housing Finance Corporation Limited (hereinafter referred to as the ‘Corporation’), is a cooperative society registered under the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as the ‘Act’). The respondent had joined the services in the appellant Corporation in the year 1975 as an Inspector. He was promoted to the post of Branch Manager (Class-I) in the year 2000. For certain acts of misconduct allegedly committed by the respondent, he was put under suspension vide orders dated July 11, 2003. Thereafter, a charge-sheet was served upon him and the departmental inquiry conducted, which resulted in dismissal order dated April 28, 2006 passed by the Corporation, dismissing the respondent from service. His departmental appeal having dismissed, the respondent approached the Cooperative Court at Aurangabad, which is set up under the Act, on April 19, 2007 challenging the orders of dismissal from service as well as the order rejecting the departmental appeal by filing Dispute No. 61 of 2007. On receiving the notice in the said dispute petition, the Corporation filed an application for rejection of the petition of the respondent on the ground that the Cooperative Court set up under the Act did not have the jurisdiction to entertain and decide the service dispute between the employer and the employee, inasmuch as the dispute in question did not touch upon the business of the society and was not covered by the provisions of Section 91 of the Act. The Cooperative Court dismissed the said application holding that it had the requisite jurisdiction to decide the dispute. Order of the Cooperative Court was challenged by the appellant before the Cooperative Appellate Court in the form of an appeal. This appeal was dismissed confirming the orders of the Cooperative Court. Further challenge was laid by the appellant by filing a writ petition before the High Court of Judicature at Bombay, Aurangabad Bench. This writ petition has also been dismissed vide judgment dated January 21, 2014. Present appeal assails the said judgment of the High Court.

Decision: Appeal allowed.

Reason:

The issue that needs to be decided is as to whether the Cooperative Court established under the Act has the requisite jurisdiction to decide ‘service dispute’ between a cooperative society established under the Act and its employees. A reading of the provisions of Section 91 would show that there are two essential requirements for conferment of exclusive jurisdiction on the Cooperative Court which need to be satisfied:

(I) the first requirement is that disputes should be ‘disputes touching’ the constitution of the society or elections or committee or its officers or conduct of general meetings or management of society, or business of the society; and

(ii) the second requirement is that such a dispute is to be referred to the Cooperative Court by 'enumerated persons' as specified under sub- section (1) of Section 91.

When we read the provision in the aforesaid manner, we arrive at a firm conclusion that service dispute between the employees of such cooperative society and the management of the society are not covered by the aforesaid provision. The context in which the word 'officers' is used is altogether different, namely, election of the committee or its officers. Thus, the word 'officers' has reference to elections. It is in the same hue expression 'officer' occurs second time as well.

It was, however, argued by the learned counsel for the respondent that disputes touching the 'management or business of a society' would include the dispute between the management of the society and its employees.

There are plethora of judgments of this Court holding that the expression 'business of the society' would not cover the service matters of employer and employee. In Coop. Central Bank Ltd. v. Addl. Industrial Tribunal (1969) 2 SCC 43, this Court held that the expression 'touching the business of the society' would not cover the disputes pertaining to alteration of conditions of service of workman.

We now advert to the question as to whether such a dispute can be treated as dispute relating to 'management of the society'. On this aspect as well, there is a direct judgment of this Court in Gujarat State Cooperative Land Development Bank Ltd. v. P.R. Mankad & Ors (1979) 3 SCC 123 wherein the expression 'management of the society' was clearly explained. It, thus, clearly follows that the dispute raised by the respondent is not covered within the meaning of Section 91 of the Act and, therefore, the Cooperative Court does not have the jurisdiction to entertain the claim filed by the respondent.

As a result, this appeal is allowed, the order of the High Court is set aside and the Division Bench judgment, on which reliance is placed by the High Court in the impugned judgment, is overruled. As a consequence, it is held that the petition filed by the respondent before the Cooperative Court is not maintainable. It would, however, be open to the respondent to file a civil suit. Needless to mention, in such a civil suit filed by the respondent, he would be at liberty to file application under Section 14 of the Limitation Act, 1963 in order to save the limitation.

M.C. MEHTA

v.

UNION OF INDIA & ORS [SC]

I.A.No. 487/2017, I.A. No. 491/2017, I.A. No. 494/2017, I.A. No. 489/2017, I.A. No. 495/2017 in Writ Petition(Civil) No.13029/1985

Madan B. Lokur & Deepak Gupta, JJ. [Decided on 29/03/2017]

Pollution control – Supreme Court bans registration of BV III stage vehicles further directions.

Brief facts:

The seminal issue in these applications is whether the sale and registration and therefore the commercial interests of manufacturers and dealers of such vehicles that do not meet the Bharat Stage-IV (for short 'BS-IV') emission standards as on 1st April, 2017 takes primacy over the health hazard due to increased air pollution of millions of our country men and women. The answer is quite obvious.

Decision: Directions given.

Reason:

The controversy relates to the sale and registration (on and after 1st April, 2017) of such vehicles lying in stock with the manufacturers and dealers that meet the Bharat Stage III emission standards (for short BS-III standards) but do not meet the BS-IV emission standards.

Briefly, according to the manufacturers, they are entitled to manufacture such vehicles till 31st March, 2017 and they have done so. In so doing, they say that they have not violated any prohibition or any law. Hence, the sale and registration of such vehicles on and from 1st April, 2017 ought not to be prohibited. They say that they will not be manufacturing any vehicle that does not comply with the BS-IV emission standards from and after 1st April, 2017 and therefore the only issue is the sale and registration of the existing stock of such vehicles that comply with BS-III emission standards. They say that they may be given reasonable time to dispose of the existing stock of such vehicles. On the other hand, according to the learned Amicus, permitting such vehicles to be sold or registered on or after 1st April, 2017 would constitute a health hazard to millions of our country men and women by adding to the air pollution levels in the country (which are already quite alarming). It is her submission that the manufacturers of such vehicles were fully aware, way back in 2010, that all vehicles would have to convert to BS-IV fuel on and from 1st April, 2017 and therefore, they had more than enough time to stop the production of BS-III compliant vehicles and switch over to the manufacture of BS-IV compliant vehicles. In fact, the major manufacturer of 4 wheeler vehicles, Maruti Suzuki had completely switched over to the manufacture of BSIV compliant vehicles a few years ago. However, for reasons best known to manufacturers of such vehicles and entirely at their peril, they did not make a complete switch (though a partial switch has been made) even though they had the technology and technical know-how to do so. Therefore, keeping the larger public interest in mind and the potential health hazard to millions of our country men and women due to increased air pollution, there is no justification for any of the manufacturers not shifting to the manufacture of BS-IV compliant vehicles well before 1st April, 2017.

It has been brought to our notice that on 5th January, 2016 the learned Solicitor General on behalf of the Government of India had submitted before this Court that requisite quality fuel for BS-IV compliant vehicles would be available (all over the country) with effect from 1st April, 2017.[1] This was confirmed and reiterated by the learned Solicitor General during the course of hearing and he stated that now from 1st April, 2017 requisite quality fuel for BS-IV compliant vehicles would be available all over the country. He also pointed out that the refineries of the Government of India had incurred an expenditure of about Rs.30,000 crores for producing requisite fuel for BS-IV compliant vehicles.

On balance, in our opinion, the submission of the learned Amicus deserves to be accepted keeping in mind the potential health hazard of such vehicles being introduced on the road affecting millions of our people in the country. The number of such vehicles may be small compared to the overall number of vehicles in the country but the health of the people is far, far more important than the commercial interests of the manufacturers or the loss that they are likely to suffer in respect of the so-called small number of such vehicles. The manufacturers of such vehicles were fully aware that eventually from 1st April, 2017 they would be required to manufacture only BS-IV compliant vehicles but for reasons that are not clear, they chose to sit back and declined to take sufficient pro-active steps.

Accordingly, for detailed reasons that will follow, we direct that:

(a) On and from 1st April, 2017 such vehicles that are not BSIV compliant shall not be sold in India by any manufacturer or dealer, that is to say that such vehicles whether two wheeler, three wheeler, four wheeler or commercial vehicles will not be sold in India by any manufacturer or dealer on and from 1st April, 2017.

(b) All the vehicle registering authorities under the Motor Vehicles Act, 1988 are prohibited for registering such vehicles on and from 1st April, 2017 that do not meet BS-IV emission standards, except on proof that such a vehicle has already been sold on or before 31st March, 2017.

CONSORTIUM OF TITAGARH FIREMA ADLER S.P.A. TITAGARH WAGONS LTD.

v.

NAGPUR METRO RAIL CORPORATION LTD [SC]

Civil Appeal Nos. 1353-1354 OF 2017 arising out of S.L.P. (C) Nos. 35104-35105 OF 2016.

Dipak Misra & Amitava Roy, JJ. [Decided on 09/05/2017]

Holding Company bids on the experience of its subsidiaries – Whether consideration of the bid by the owner is correct – Held, Yes.

Brief facts:

Nagpur Metro Rail Corporation Ltd., the 1st respondent herein, issued a Notice Inviting Tender (NIT) on 25.01.2016 for the work of design, manufacture, supply, testing, commissioning of 69 passenger rolling stock (Electrical Multiple Units) and training of personnel at Nagpur Metro Rail Project. The said project is being funded by KfW Development Bank, Germany. As per the clause ITS 35.8 at all stages of bid evaluation and contract, award would have to be subject to no-objection from KfW Development Bank. In response to the said NIT, three bidders submitted their bids. One was found technically disqualified and thus, only the appellant and the respondent No. 2 remained in contest. Appellant quoted Rs.852 crores while Respondent No.2 quoted Rs.851 crores. Contract was awarded to Respondent No.2. Appellant challenged this award of contract before the High Court, which eventually dismissed the Writ Petition.

Decision: Appeal dismissed.

Reason:

What is urged before this Court is that the respondent No. 2 could not have been regarded as a single entity and, in any case, it could not have claimed the experience of its subsidiaries because no consortium or joint venture with its subsidiaries was formed.

We have to see, how the 1st respondent has perceived the offer of the respondent No. 2 in the backdrop of the tender conditions. It is not in dispute that the project in question has been funded by KfW Development Bank, Germany and as per Clause ITB 35.8, it is necessary at all stages of bid evaluation and contract award has to be subject to no-objection from KfW Development Bank. Emphasis has been laid on the approach of the High Court which has taken note of the fact that the respondent No. 2 had been awarded the tender by the Delhi Metro Rail Corporation. It has also been highlighted that the papers relating to the financial bid along with report were forwarded to KfW which gave its noobjection. Be it noted, the appellants have been quite critical about the acceptance of the offer and the 1st respondent has given a number of reasons to justify the same. As indicated earlier, we are only concerned with the eligibility criteria and not with the fiscal aspect.

Respondent No. 2, as is evident, is a company owned by the People's Republic of China and, therefore, it comes within the ambit of Clause 4.1 of the bid document as a Government owned entity. We have already reproduced the said clause in earlier part of the judgment. As perceived by the 1st respondent, a single entity can bid for itself and it can consist of its constituents which are wholly owned subsidiaries and they may have experience in relation to the project. That apart, as is understood by the said respondent, where the singular or unified entity claims that as a consequence of merger, all the subsidiaries form a homogenous pool under its immediate control in respect of rights, liabilities, assets and obligations, the integrity of the singular entity as owning such rights, assets and liabilities cannot be ignored and must be given effect. While judging the eligibility criteria of the second respondent, the 1st respondent has scanned Article164 of the Articles of Association of the respondent No. 2 which are submitted along with the bid from which it is evincible that the Board of Directors of the respondent No. 2 has been entrusted with the authority and responsibility to discharge all necessary and essential decisions and functions for the subsidiaries as well. According to the 1st respondent, the term "Government owned entity" would include a government owned entity and its subsidiaries and there can be no matter of doubt that the identity of the entities as belonging to the Government when established can be treated as a Government owned entity and the experience claimed by the parent of the subsidiaries can be taken into consideration.

With regard to the satisfaction of the 1st respondent, it has been highlighted before us that the said respondent had thoroughly examined the bid documents and satisfied itself about of the capability, experience and expertise of the respondent No. 2 and there has been a thorough analysis of the technical qualification of the respondent No. 2 by the independent General Consultant and the reports of the Appraisal and Tender Committee of the 1st respondent and also the no-objection has been received from KfW Development Bank, Germany which is funding the entire project.

As is noticeable, there is material on record that the respondent No. 2, a Government company, is the owner of the subsidiaries companies and subsidiaries companies have experience. The 1st respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the concerned Committee and the financing bank. We are disposed to think that the concept of "Government owned entity" cannot be conferred a narrow construction. It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a consortium. In the obtaining fact situation, the interpretation placed by the 1st respondent in the absence of any kind of perversity, bias or mala fide should not be interfered with in exercise of power of judicial review. Decision taken by the 1st respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court.

Resultantly, the appeals, being devoid of merit, are dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

MAHARISHI MARKANDESHWAR MEDICAL COLLEGE & HOSPITAL

v.

STATE OF HIMACHAL PRADESH & ORS [SC]

Civil Appeal No. 5198 of 2017(Arising out of SLP (Civil) No. 9837 of 2017)

Dipak Misra, A.M. Khanwilkar & Mohan M. Shantanagoudar, JJ. [Decided on 28/04/2017]

Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 read with Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010 – Whether a medical college affiliated to a private university under the 2010 Act is required to obtain affiliation with Government university under the 2006 Act- Held, No.

Brief facts:

This appeal emanates from the judgment of the High Court of Himachal Pradesh at Shimla dated 20.12.2016, passed in CWP No.4773 of 2015. The High Court dismissed the writ petition filed by the Appellants challenging the validity of Sections 3(6), 3(6a) and 3(6b) of the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 (for short "2006 Act") as amended vide amendment Act No.24 of 2015.

Appellant No.1 is an unaided private medical college established by the Appellant No.3 - University Trust as a constituent of the Appellant No.2 - University. The Appellant No.2 - University has been established under the Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010 (for short "2010 Act"). Before the said Act was enacted, on the basis of the Essentiality Certificate issued under Section 4(2) of the 2006 Act, the Appellant No.3 - University Trust established the medical college as a constituent unit of the proposed private University and made necessary investments in that regard.

In 2012 the Appellant No.2 - University requested the Principal Secretary (Health) to the Government of Himachal Pradesh for grant of an “Essentiality Certificate” to establish a new medical college at Kumarhatti, Solan “under” the Appellant No.2 – University.

The State Government, in exercise of its powers under Section 3(3) of the 2006 Act, issued a notification on 14.08.2013, regarding admission procedure and fee structure for admission to MBBS Course in the Appellant No.1 - College. The new law required the appellant No.1 College to seek affiliation with Himachal Pradesh University at Shimla.

Decision: Appeal allowed.

Reason:

After considering the rival submissions, we are in agreement with the Appellants that the High Court has not touched upon the core issue relating to the autonomy of the Appellant No. 2 – University including its authority to start a constituent medical college, as prescribed by the 2010 Act. Admittedly, the Appellant No. 2 – University has been established under the 2010 Act. In the present case, it has been asserted that the Appellant No. 1 – College is a constituent of the Appellant No. 2 – University. In such a situation, it is unfathomable that the requirement of taking affiliation from another University (Himachal Pradesh University) established under a separate State Legislation, can and ought to be insisted upon. If insisted, it would, inevitably, entail in making an inroad into the autonomy of the Appellant No. 2 – University. True it is that Section 7 of the 2010 Act does not empower the Appellant No. 2 – University to affiliate or otherwise admit to its privileges any other institution. But that will have no application to the case on hand. For, the Appellant No. 1 - College is none other than a constituent college of Appellant No. 2 – University itself. The Medical Council of India as well as the Union Government have, therefore, justly stated that it was not necessary for the Appellant No.1 - College to take affiliation from the Himachal Pradesh University.

A priori, we have no hesitation in taking the view that the amended provisions, in particular Section 3(6a), would impinge upon the autonomy of an independent University established under a separate State Legislation. Further, the field of affiliation is governed by the State legislation under which the respective Universities have been established. The power of granting affiliation to colleges under the control of the concerned University, must vest with the respective University to which the college will be affiliated. That power of granting affiliation, by the University concerned, therefore, cannot be whittled down by the 2006 Act or amendments made thereto. Understood thus, the amended provisions of Section 3 (6a) of the 2006 Act, cannot be sustained as the same are unreasonable, irrational and in conflict with the special State Legislation under which the Appellant No.2 – University has been established, namely the 2010 Act. We shall now examine the possibility of reading down the impugned provision in Section 3 (6a) of the Act so as to save it from being unconstitutional. The expression “Private Medical Educational Institution” includes a Private Medical Educational Institution established by or affiliated to a private University. We find force in the argument of the Appellants that the definition of Private Medical Educational Institution, as amended, can be extended to the Appellants in relation to other matters governed by the 2006 Act, except the mandate of requiring the Appellant No.1 - College (a constituent college of the Appellant No.2 – University) to take affiliation from the Himachal Pradesh University. That requirement springs from Section 3 (6a). Indisputably, there is no other private medical University in the State except the Appellant No.2 - University. Therefore, we explored the possibility of omitting the words “Himachal Pradesh” from the amended Section 3 (6a) to save the whole of that provision from being invalid, as was contended. However, we find that if the words “Himachal Pradesh” alone were to be struck down, the remaining Section 3 (6a) may create some confusion. It would then mean that Private Medical Institutions in the State must take affiliation from the “concerned” University. To wit, Himachal Pradesh University or the Appellant No. 2 – University, as the case may be. In other words, the concerned University can exercise power to affiliate a private medical institution set up in the State. However, the Appellant No. 2 is not authorised to affiliate a private medical college (not its constituent) by virtue of Section 7of the 2010 Act, which prohibits the

Appellant No.2 – University from affiliating or otherwise extending to its privileges any other institution. Therefore, the appropriate course to avoid any confusion is to strike down Section 3(6a) of the 2006 Act, as amended.

As noted earlier, since the Appellant No.1 – College is a constituent of the Appellant No. 2 – University, the question of compelling it to take affiliation from another University (Himachal Pradesh University) cannot be countenanced.

The impugned judgment of the High Court of Himachal Pradesh dated 20.12.2016 in CWP No.4773 of 2015 is set aside. We also strike down Section 3(6a) of the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006, being irrational, unreasonable, ultra vires and unconstitutional.

GLAXO SMITHKLINE PHARMACEUTICAL LTD

v.

UNION OF INDIA [SC]

Civil Appeal No.6178 of 2009

R. F Nariman & S.K.Kaul,JJ. [Decided on 18/07/2017]

Brief facts:

The appellant manufacturer claimed exemption as provided under paragraph 28 of the Drugs (Prices Control) Order, 1987, read with exemption notification dated 28th February, 1992. The respondent UOI refused to grant exemption on the ground that the sale price of the drug manufactured by the appellant was higher than the controlled price. After crossing all the departmental and courts, the issue landed before the Supreme Court.

Decision: Appeal allowed.

Reason:

The appellant, has placed great emphasis on the fact that both paragraph 28 as well as the exemption order, read with the Central Government Guidelines of 14th February, 1989, lead to only one conclusion that it is “manufacture” and not sale that is relevant.

The sheet anchor of appellant’s case is a judgment delivered by this Hon’ble Court in *Union of India v. Ranbaxy Laboratories Ltd & Ors, (2008) 7 SCC 502* in which the self-same problem arose before this Court under pari materia provisions of the DPCO of 1995. This Court has unequivocally held in favour of the construction suggested by Shri Ganesh, namely that all manufacturers of exempted goods, upto the last date of exemption, would be entitled, at any subsequent point of time, to charge a price which is not controlled by the DPCO.

The Union of India, has tried to support the High Court’s judgment, and has referred us to Guideline No. (viii) of the Central Government Guidelines, and paragraph 16(3) of the DPCO of 1987. According to UOI, a subsequent judgment of this Court in *Glaxosmithkline Pharmaceuticals Ltdv. Union of India &Ors* (2014) 2 SCC 753 has correctly distinguished the earlier judgment in Ranbaxy’s case, and would therefore, squarely cover the present facts.

Having heard learned counsel for the parties, the point with which we are concerned is in a very narrow compass. If paragraph 28, which is set out hereinabove is perused, it is clear that the exemption relates to drug manufacturing units or classes of such units. The very exemption order which has also been set out by us (supra) again refers only to bulk drugs and formulations based thereupon which are “manufactured” by the company. Further, a reading of the guidelines of 1989 also makes it clear that the exemption only relates to manufacture and has no reference to sale whatsoever.

We are of the view that the matter is no longer res-integra. In Ranbaxy's case, the relevant exemption provision under the DPCO of 1995, referred to in paragraph 19 of the judgment, is almost a verbatim reproduction of the earlier exemption provision i.e. paragraph No.28 of the DPCO of 1987, with which we are directly concerned. Even the exemption notification mentioned in paragraph 20 of the aforesaid judgment, like the exemption notification in the present case, refers only to bulk drugs and formulations "manufactured" by the company.

Not to be deterred by the plain language of the aforesaid judgment, Shri Mukherjee referred us to a later judgment in the Glaxosmithkline case, referred to hereinabove.The issue in that case concerns a price notification issued under the later DPCO of 1995.

It can be seen that the issue that arose in the Glaxosmithkline case was completely different from the issue that arose in Ranbaxy's case and the present case. Ranbaxy's case and the present case are directly concerned only with an exemption notification, and not a notification for fixation of price. Also, what is relevant for an exemption notification is the manufacture of drugs, whereas what is relevant for a price fixation notification relates to sale and not manufacture. Obviously, therefore, the Glaxo-smithkline decision would have no relevance to the facts of the present case.

APOLLO TYRES LTD.

v.

PIONEER TRADING CORPORATION & ANR [DEL]

CS (OS) 2802/2015

Vipin Sanghi, J. [Decided on 17/08/2017]

Designs Act – Tread pattern of truck tyre – Whether entitled to copyright protection – Held, Yes.

Brief facts :

The Plaintiff manufactures truck tyre Endurance LD 10.00 R20, with a peculiar tread patters over which it had claimed proprietary rights. The defendant also manufactures truck tyre HI FLY with similar tread pattern of the Plaintiff.

Plaintiff filed a suit against the Defendant for infringement of its proprietary rights and an interim injunction was granted in favour of the Plaintiff. Defendant moved an application to vacate the stay.

Decision : Interim stay confirmed.

Reason :

I have set out hereinabove the manner in which the tyres of the plaintiff and the other manufacturers are displayed in the course of marketing, advertisement etc. They clearly show that the tread patterns are utilized by the manufacturers including by the plaintiff, in respect of its tyre in question, as a source identifier, i.e. as a trademark.

No doubt, the tread pattern adopted by the plaintiff in respect of its tyre also serves the purpose which the treads on any tyre serve. However, if the same function can be achieved through numerous different forms of tread patterns, then the defence of functionality must fail. It was essential for the defendant to, at least, prima facie, establish that the tread pattern of the plaintiff was the only mode/ option, or one of the only few options, which was possible to achieve the functional requirements of the tyre. The position which emerges on a perusal of the documents placed on record by the plaintiff is that there are innumerable different and unique tread patterns in existence, adopted by different manufacturers of tyres, which achieve the same objective.

It cannot be said that the unique tread pattern adopted by the plaintiff is attributable only to the technical result, namely, of providing grip and stability to the vehicle on which the tyre of the plaintiff is used. The same function can be performed by any other tyre with a different tread pattern.

The manner in which the tyres of different manufacturers are advertised and marketed leaves no manner of doubt that the tread pattern on the tyre of the manufacturer is prominently displayed, apart from the brand name of the manufacturer. It is also not uncommon to see the customer - interested in buying a tyre, being shown the tyres by the vendor with the tread pattern in a vertical position i.e. by showing the “face” of the tyre, such that the tread pattern is the first thing that strikes and appeals to the eye of the customer. It is also not uncommon to see that even when tyres are wrapped in covering, the vendor removes the covering while displaying his tyres to the customers. Pertinently, the defendant does not display its tyres in question under the brand “HI FLY” in a wrapped condition in its advertisements. The defendant is displaying its tyre in question under the brand “HI FLY” in an unwrapped condition, and prominently showing the tread pattern on the tyre. This itself shows that the wrapping of the tyre does not inhibit the display and marketing of the tyre, by prominently displaying the tread pattern on the tyres.

Thus the submission that the tread pattern adopted by the plaintiff is functional and, therefore, not capable of protection, cannot be accepted. This submission is rejected.

The tread pattern on a tyre, in my view, is such a prominent feature - and is so prominently displayed and advertised, that the added matter, namely the brand name on the sides of the tyre, is not sufficient to distinguish the goods of the defendant from those of the plaintiff. Similarly, the inclusion of the tyre-tube and flap in the plaintiffs tyre, and only the flap along with the tyre in the defendants tyre - minus the tube, is not sufficient to distinguish the plaintiff’s tyre from that of the defendants. It is not in dispute that both tyres of the plaintiff and the defendant in question are tyres meant for trucks. Therefore, some change of specifications between the two is of no consequence, when it comes to the aspect of confusion in the mind of the customer. I may also observe that the customers of the truck tyres, by and large, are semi-literate middle class truck owners, operators and drivers, from whom it is difficult to expect a detailed examination, threadbare, of all the differences in the tyres of the plaintiff and that of the defendant before the purchase of the tyre is made.

In view of the aforesaid, I am inclined to confirm the injunction granted in favour of the plaintiff till the disposal of the suit. Accordingly, the plaintiff’s application, i.e. I.A. No. 19350/2015 is allowed and the ex- parte ad interim order of injunction dated 15.09.2015 is confirmed till the disposal of the suit.

METERS AND INSTRUMENTS PVT. LTD & ANR v. KANCHAN MEHTA [SC]

Criminal Appeal No. 1731-33 of 2017

A.K. Goel & U.U.Lalit, JJ. [Decided on 05/10/2017]

Negotiable Instruments Act – Section 138 – Dishonour of cheque – Compounding of offence – Principles explained and guidelines laid down.

Brief facts :

These appeals have been preferred against the order of the High Court of Punjab and Haryana where the High Court rejected the prayer of the appellants for compounding the offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act) on payment of the cheque amount and in the alternative for exemption from personal appearance.

Decision : Appeal disposed of.

Reason :

The Supreme Court elaborately examined the scheme of the Act and held as under. From the above discussion following aspects emerge:

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank’s slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the accused. If e-mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant . If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily.

It will be open to the High Courts to consider and lay down category of cases where proceedings or part thereof can be conducted online by designated courts or otherwise. The High Courts may also consider issuing any further updated directions for dealing with Section 138 cases in the light of judgments of this Court. The appeals are disposed of. It will be open to the appellants to move the Trial Court afresh for any further order in the light of this judgment.

ATMA RAM PROPERTIES PVT LTD.

v.

THE ORIENTAL INSURANCE CO. LTD [SC]

Civil Appeal No.20913 of 2017(Arising out of S.L.P. (Civil) No.17117 of 2016)

J. Chelameswar & S. Abdul Nazeer, JJ. [Decided on 06/12/2017]

NDMC Act, 1994 read with Delhi Rent Control Act, 1958 – Collection of property tax as arrears of rent – Non-payment of property tax by tenant – Eviction sought by landlord under Rent Act – Whether tenant could be evicted as failure to pay rent – Held, No.

Brief facts :

This appeal involves an important question of law as to whether property tax recoverable from the tenant under Section 67(3) of the New Delhi Municipal Council Act, 1994 (for short 'NDMC Act') as arrears of rent by the landlord/owner can be considered to be forming part of the rent for the purpose of seeking eviction or ejectment of such tenant who defaults in payment of such recoverable tax as rent and when the rent including recoverable tax in respect of the tenanted premises exceeds Rs.3500/- per month, thereby losing protection of the Delhi Rent Control Act, 1958 (for short 'Rent Act').

Decision : Appeal dismissed.

Reason :

The issue which arises for consideration in the present matter is regarding the interplay of Section 67(3) of the NDMC Act vis-à-vis Section 7(2) of the Rent Act. Under Section 67(3) the landlord has been given the right to recover the house tax from the tenant as if the same were rent whereas under Section 7(2) of the Rent Act, there is a specific bar to recover any tax as rent from the tenant.

The object of the Rent Act is to provide protection to tenants who under common law, including Transfer of Property Act could be evicted from the premises let out to them at any time by the landlord on the termination of their tenancy. It restricts the right of the landlord to evict the tenant at their will. It is a special law in relation to landlord and tenant issue. Therefore, the Rent Act has to prevail insofar as landlord and tenant issue is concerned.

Therefore, we are of the view that though the Rent Act is an earlier Act when compared to the NDMC Act, it is a special enactment with regard to the matter in issue and has a non-obstante clause. The NDMC Act is not a special enactment insofar as landlord-tenant issue is concerned and it contains Section 411 which provides that other laws not to be disregarded. Section 67(3) of the NDMC Act merely gives a right to recover the tax in respect of the premises as rent. It does not override the Rent Act insofar as obviating the effect of Section 7(2) of the Rent Act. In our opinion, the tax recoverable from the tenant under Section 67(3) of the NDMC Act as arrears of rent by the appellant cannot be considered to be forming part of the rent for the purpose of seeking eviction/ejectment of the respondent who defaults in payment of such recoverable tax as rent.

CANARA BANK & ANR

v.

LALIT POPLI (THRIUGH LRs) [SC]

Civil Appeal No. 9666 of 2010

Arun Mishra & M M Shantanagoudar, JJ. [Decided on 06/12/2017]

Disciplinary action – Bank clerk fraudulently withdrew money from customer's account – Dismissed from service – Retirement benefits withheld by bank and adjusted against the loss caused – Net amount paid to him – Whether correct – Held, Yes.

Brief facts :

The respondent who was a clerk, and two other persons i.e. manager and special assistant, all are bank employees, were found guilty of fraudulently withdrawing an amount of Rs.1,07,000/- from the saving account of a customer. The manager and special assistant were censured for their negligence and some recovery were made from them while the respondent was dismissed from service.

The respondent's appeal challenging the order of dismissal was allowed by learned Single Judge against which the appellant – Bank filed an appeal against the said order. During the pendency of the appeal, bank withheld an amount of Rs.74,180.09, payable to the respondent, which included the gratuity and provident fund(employer's contribution) and to keep the same in a fixed deposit with a view to adjust the said amount towards any loss caused to the bank by the respondent. Appeal was allowed by the Division Bench of the High Court and the order of dismissal was restored.

Thereafter, the bank adjusted Rs.1,07,000/- out of Rs.1,08,923/- (the maturity value of Rs.74,180.09), towards loss caused to the bank by the respondent and remaining amount of Rs.1,923/- was released in favour of the respondent.

Being aggrieved by such action of the bank, the respondent approached the High Court, which allowed the writ. The order of the learned Single Judge is affirmed by the Division Bench, which is impugned before this Court in this appeal.

Decision : Appeal allowed.

Reason :

This Court in the first round of litigation by its judgment dated 18.02.2003 had given a categorical finding that it was the respondent who committed forgery which ultimately led to the loss caused to the bank. Thus, his case stood on a different footing from the other three employees. Since the amount recovered from the other three employees, who were imposed penalty of 'censure', is refunded to them, the bank had to recover the amount of loss caused to it from the person who was the author of the forgery.

Looking to the material on record, we find that the other three officials were held to be negligent in their duty and as held by this Court in its judgment dated 18.02.2003, that it was the respondent, who committed forgery of the signature of the account holder, consequent upon which the bank had suffered loss to the tune of Rs.1,07,000/-

Therefore, the bank has taken an equitable decision to recover the entire amount from the respondent and to refund the amount already recovered from the other three officials, because they were only found to be negligent in their duty.

Rule 12 of the Canara Bank Employees' Gratuity Fund Rules (for short, 'Gratuity Rules'), Clause 19 of the Canara Bank Staff Provident Fund Regulations, 1994 (for short, Provident Fund Regulations) and Rule 3(4) of Chapter VIII of the General Conduct Rules, governing the services of the employees fully support the action taken by the bank against the respondent in withholding the amount of gratuity and employer's contribution towards provident fund.

Special Rules relating to gratuity, mentioned supra, makes it amply clear that the employee who has been dismissed for his misconduct and if such misconduct has caused financial loss to the bank, he shall not be eligible to receive the gratuity to the extent of financial loss caused to the bank. So also, Clause 19 of the Provident Fund Regulations permits the bank to deduct the payment of provident fund to the extent of financial loss caused to the bank from the bank's contribution. Both the aforementioned Clauses are plain and simple. They are unambiguous. Since Rule 12 of the Gratuity Rules and Clause 19 of the Provident Fund Regulations permit the bank to withhold gratuity and deduct the bank's contribution towards provident fund, in such matters, the bank was justified in recovering the amount of financial loss sustained by it, which was caused by the respondent, from out of the gratuity and employer's contribution towards provident fund payable to the respondent/employee.

Thus, in our considered opinion, the High Court was not justified in setting aside the decision of the bank to recover the amount of loss sustained by it from the respondent, particularly when the bank is empowered to do so, as discussed supra. Accordingly, the instant appeal is allowed.

B SUNITHA

v.

STATE OF TELANGANA &B ANR [SC]

Criminal Appeal No. 2068 of 2017 (Arising out of SLP (Crl.) No.10700 of 2015)

A K Goel & U U Lalit, JJ. [Decided on 05/12/2017]

Negotiable Instruments Act, 1881 – Advocate obtaining blank fee cheque from client – Later fills up and presented into the bank – Cheque dishonoured – Complaint filed – Accused sought quashing of proceeding on th ground that there was no enforceable debt – High Court declined to quash the proceeding – Whether correct – Held, No.

Brief facts :

This appeal has been preferred against the order of the High Court of Judicature at Hyderabad Court which declined to quash the proceedings initiated against the appellant under Section 138 of the Negotiable Instruments Act, 1881('the Act').

The proceedings were initiated by the respondent who is an advocate in whose favour the appellant executed a cheque allegedly towards his fee. The same was dishonoured. The stand of the appellant is that Section 138 of the Act is not attracted as there was no legally enforceable debt. The appellant having already paid a sum of Rs.10 lakhs towards fee, the cheque was taken from the appellant by way of abuse of position and the transaction was void under Section 23 of the Indian Contract Act, 1872 ('Contract Act'). Claim for fee based on percentage of the decretal amount was unethical. It was submitted that the appellant, as a client, being in fiduciary relationship, burden to prove that the fee was reasonable and had been voluntarily agreed to be paid was on the Advocate. The Advocate by using his professional position could not be allowed to exploit a client by taking signatures on a cheque and no presumption of enforceable debt arises, especially when no account maintained in regular course of business was furnished.

Decision : Appeal allowed.

Reason :

The main contention raised on behalf of the appellant is that charging percentage of decretal amount by an advocate is hit by Section 23 of the Contract Act being against professional ethics and public policy, the cheque issued by the appellant could not be treated as being in discharge of any liability by the appellant. No presumption arose in favour of the respondent that the cheque represented legally enforceable debt. In any case, such presumption stood rebutted by settled law that claim towards Advocate's fee based on percentage of result of litigation was illegal. Signing of the cheque was by way of exploitation of fiduciary relationship of Advocate and the client.

Thus, mere issuance of cheque by the client may not debar him from contesting the liability. If liability is disputed, the advocate has to independently prove the contract. Claim based on percentage of subject matter in litigation cannot be the basis of a complaint under Section 138 of the Act.

In view of the above, the claim of the respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed.

We may note that after the hearing was concluded, learned counsel for Respondent No.2 mentioned the matter to the effect that Respondent No.2 wanted to withdraw the complaint. An e-mail to this effect was also handed over to Court. The same has been kept on the record. However, we did not permit this prayer. Having committed a serious professional misconduct, the respondent No.2 could not be allowed to avoid the adverse consequences which he may suffer for his professional misconduct. The issue of professional misconduct may be dealt with at appropriate forum.

Thus, while proceedings against the appellant will stand quashed, the issue of professional misconduct is left to be dealt with at the appropriate forum.

ASIAN RESURFACING OF ROAD AGENCY PVT. LTD & ANR

v.

CENTRAL BUREAU OF INVESTIGATION [SC]

Criminal Appeal Nos. 1375-1376 of 2013 with batch of appeals.

A.K.Goel, Navin Sinha & R.F. Nariman, JJ. [Decided on 28/03/2018]

Principles of granting stay of lower court proceedings – Should not exceed a period of 6 months – Extension of stay should be by way of a speaking order – Supreme Court lays down new guidelines.

Brief facts :

Facts are immaterial to appreciate the ratio of this case. Whenever charges are framed, the same is challenged before the High Court and stay used to be granted and the proceedings in the trial court used to remain stayed for quite a long period. In this case the Hon'ble Supreme Court examined the law extensively and laid down the rule as to the grant of stay and its operation both in criminal as well as in civil proceedings.

Decision : Appeals disposed of.

Reason :

Though the question referred relates to the issue whether order framing charges is an interlocutory order, we have considered further question as to the approach to be adopted by the High Court in dealing with the challenge to the order framing charge.

Thus, even though in dealing with different situations, seemingly conflicting observations may have been made while holding that the order framing charge was interlocutory order and was not liable to be interfered with under Section 397(2) or even under Section 482_Cr.P.C. Order framing charge may not be held to be purely a interlocutory order and can in a given situation be interfered with under Section 397(2) Cr.P.C. or 482 Cr.P.C. or Article 227 of the Constitution which is a constitutional provision but the power of the High Court to interfere with an order framing charge and to grant stay is to be exercised only in an exceptional situation.

We have thus no hesitation in concluding that the High Court has jurisdiction in appropriate case to consider the challenge against an order framing charge and also to grant stay but how such power is to be exercised and when stay ought to be granted needs to be considered further.

It is well accepted that delay in a criminal trial, particularly in the Prevention of Corruption Act cases, has deleterious effect on the administration of justice in which the society has a vital interest. Delay in trials affects the faith in Rule of Law and efficacy of the legal system. It affects social welfare and development. Even in civil or tax cases it has been laid down that power to grant stay has to be exercised with restraint. Mere prima facie case is not enough. Party seeking stay must be put to terms and stay should not be incentive to delay. The order granting stay must show application of mind. The power to grant stay is coupled with accountability.

Wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned and concluded within two-three months.

In view of above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.

Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 Cr.P.C. or Article 227 of the Constitution.

However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to re-appreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period.

Though no mandatory time limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated.

SHIV SINGH

v.

STATE OF HIMACHAL PRADESH & ORS [SC]

Civil Appeal No.4414 of 2018 [Arising out of SLP (C) No.7981 of 2017]

R.K. Agrawal & A. M. Sapre, JJ. [Decided on 25/04/2018]

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Land acquisition – Objections not considered-whether the award is tenable – Held, No.

Brief facts :

The dispute in this case relates to acquisition of the land belonging to the appellants which is sought to be acquired under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the Act").

By notification dated 08.12.2015 issued under Section 11 of the Act, the State of Himachal Pradesh sought to acquire the appellants' land measuring around 1-00-49 Hectares along with the lands of other landowners. The acquisition was for public purpose, namely, "construction of road from Bus Stand Ruhil to Upper Ruhil via Kuper". The appellants (writ petitioners) had filed their objections to the proposed acquisition on 05.01.2016 well within the time prescribed under Section 15 of the Act. Without considering the objections the collector passed the award and the High Court had confirmed the same. Hence the present appeal to the Supreme Court.

Decision : Appeal allowed.

Reason :

Under the scheme of the Act, once the objections are filed by the affected landowners, the same are required to be decided by the Collector under Section 15(2) of the Act after affording an opportunity of being heard to the landowners, who submitted their objections and after making further inquiry, as the Collector may think necessary, he is required to submit his report to the appropriate Government for appropriate action in the acquisition in question.

In this case, we find that the Collector neither gave any opportunity to the appellants as contemplated under Section 15(2) of the Act and nor submitted any report as provided under Section 15(2) of the Act to the Government so as to enable the Government to take appropriate decision. In other words, we find that there is non-compliance of Section 15(2) of the Act by the Collector. In our view, it is mandatory on the part of the Collector to comply with the procedure prescribed under Section 15(2) of the Act so as to make the acquisition proceedings legal and in conformity with the provisions of the Act.

The aforementioned aspect of the case does not appear to have been taken note of by the High Court, resulting in dismissal of the appellants' writ petition requiring interference by this Court.

It is for this reason and without going into any other issue arising in the case, we are inclined to allow the appeal, set aside the impugned judgment and allow the appellants' writ petition in part.

We hereby direct the respondent No.2 herein (Collector, Winter Field, Shimla-3 HP) to decide the objections filed by the appellants on 05.01.2016 keeping in view the requirements of Section 15(2) of the Act and pass appropriate orders.

STATE OF MAHARASHTRA

v.

SAYYED HASSAN SAYYED SUBHAN [SC]

Criminal Appeal No.1195 of 2018 [Arising out of Special Leave Petition (Criminal) No.4475 of 2016] with batch of appeals

S. A. Bobde & L.Nageshwar Rao, JJ. [Decided on 20/09/2018]

Food and Safety Standards Act, 2006 read with Indian Penal Code, 1860 – Offences under food Act – whether prosecution under IPC could be initiated – Held, Yes.

Brief facts :

First Information Reports (FIRs) were registered for transportation and sale of Gutka/Pan Masala for offences punishable under Sections 26 and 30 of the Food and Safety Standards Act, 2006 (hereinafter referred to as the 'FSS Act') and Sections 188, 272, 273 and 328 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). The Respondents in the above appeals filed Criminal Writ Petitions and Criminal Applications in the High Court of Bombay for quashing the FIRs. The High Court quashed the criminal proceedings, initiated under the IPC, against the Respondents and declared that the Food Safety Officers can proceed against the Respondents under the provisions of Chapter X of the FSS Act. Aggrieved thereby, the State of Maharashtra is before us.

Decision : Appeals allowed.

Reason :

There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence *[T.S. Baliah v. T.S.Rengachari– (1969) 3 SCR 65]*. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time, an offence under any other law *[State of Bihar v. Murad Ali Khan – (1988) 4 SCC 655*.

In State of Rajasthan v. Hat Singh (2003) 2 SCC 152] this Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the Respondent therein for offences under the Mines and Minerals (Development and Regulation) Act 1957 and Indian Penal Code, this Court in *State (NCT of Delhi) v. Sanjay (2014) 9 SCC 772* held that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the IPC merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point.

Regarding the second point as to whether offences under Section 188, 272, 273 and 328 have been made out against the Respondents, we have considered the submissions made by the learned Additional Solicitor General for the State of Maharashtra and the learned Senior Counsel appearing for the Respondents. Without going into details of the submissions made, we find that points that were not argued before the High Court were raised by both sides. We suggested to the parties that the matters have to be considered afresh by the High Court by permitting both sides to raise all contentions which were canvassed before us. There was no serious objection by both sides to the remand of the matters back to the High Court. The only request made by the learned Senior Counsel for the Respondents is that no coercive action should be taken against the Respondents during the pendency of Criminal Writ Petitions and the Criminal Applications before the High Court. We remand the matters to the High Court to consider the Criminal Writ Petitions and Criminal Applications afresh in respect of the second point framed.

COUNCIL OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

v.

GURVINDER SINGH [SC]

Civil Appeal No. 11034 of 2018 (Arising out of SLP (C) No. 19564/2017)

R F Nariman & N Sinha, JJ. [Decided on 16/11/2018]

ICAI Act – Professional misconduct – Other misconduct – Member transferring shares in his own name – Council restrained him from practice for 6 months – Whether correct – Held, Yes.

Brief facts :

The present appeal arises out of a complaint dated 16.03.2005 against Respondent No.1, who is a Chartered Accountant, relating to sale of 100 shares in 1999, which were transferred to the Chartered Accountant's own name. The matter has ultimately been settled between the Complainant and the Chartered Accountant, despite which the Disciplinary Committee took up the case and ultimately found that the conduct of the Respondent No.1-Chartered Accountant was derogatory in nature and highly unbecoming and held him guilty of 'Other Misconduct' under Section 22 read with Section 21 of the Chartered Accountants Act, 1949 (hereinafter referred to as 'the Act').

The Council of the Institute of Chartered Accountants of India [ICAI], therefore, made its recommendation to the High Court to remove the aforesaid Chartered Accountant for a period of six months from the rolls. The High Court, declined to do so. Hence, the present appeal to the Supreme Court by ICAI.

Decision : Matter remanded to High Court.

Reason :

We are afraid that the High Court has not correctly appreciated Section 21(3) of the Chartered Accountants Act, 1949. The Disciplinary Committee has, on facts, found the Chartered Accountant guilty of a practice which was not in the Chartered Accountant's professional capacity.

This, it was entitled to do under Schedule I Part-IV sub- clause(2) if, in the opinion of the Council, such act brings disrepute to the profession whether or not related to his professional work.

This being the case, it is clear that the impugned judgment is incorrect and must, therefore, be set aside. We thus remand the matter to the High Court to be decided afresh leaving all contentions open to both parties.

Case Study

The AS Limited (Appellant) and the KS Limited (1st Respondent) entered into a Memorandum of Understanding (MOU) under which the Appellant was to sell the property to the 1st Respondent. However, the Appellant sold the property to the 2nd Respondent, instead to the 1st Respondent.

Therefore, the 1st Respondent filed civil suits against the Appellant and the 2nd Respondent for interim relief sought interim injunction against the Appellant to part with the property. The trial court granted injunction and the High Court affirmed it on the ground that the MOU was a concluded contract between the Appellant and 1st Respondent. Appellant challenged the impugned order of the High Court before the Supreme Court.

Decide whether injunction granted by High Court is valid.

Case Study

Kishore was arrested for murder of four persons with whom he had financial dealings. He was convicted and death sentence was awarded to him by Sessions Court which was confirmed by High Court. He has appealed to Supreme Court and the appeal is pending. During his confinement in jail he has written his auto biography mentioning his close connection with many Government officials and Police authorities. He has given this book to his wife with the knowledge of jail authorities and in the presence of his advocate desiring that it should be published. The publisher makes a public announcement about the future release of the work. When the officials who were implicated in the book became aware of this, they put extreme pressure on Kishore not to publish the same on the pretext that the matters contained in it were false. The person who intended to publish and the authorities who were implicated (falsely according to them) moved the court for an order to restrain the publication.

Decide whether Government can restrain publication of defamatory but true material?

Case Study

Mr. Suresh was accused of taking bribe during his service. He was prosecuted before Lok Ayukta. The charges could not be proved. He was then acquitted by the Lok Ayukta. In the meantime, the employer of Mr. Suresh initiated domestic inquiry proceedings against Suresh. He was found guilty and dismissed from service. Suresh now challenges the decision of the employer on the ground that he has been acquitted by a criminal court and cannot now be dismissed.

Once a criminal court decides, does a departmental inquiry have any legal credibility? Discuss.

8

Governance Issues

Case Study - 1

Dr. Sen, an industrial chemist with 15 years of experience, has recently been appointed to the post of Chief Executive Officer (CEO) of Pharma Ltd., a listed company. He has previously been employed in the company as Research Director. In preparation for his new assignment he has been trying to get to grips with the concept of corporate governance and all that it entails.

The board of Pharma Ltd. comprises of total ten directors (including one women director), six non-executive directors and five were considered independent. The board is responsible for overseeing strategy, approving major corporate initiatives and reviewing performance. There are three board committees - the Audit Committee, Remuneration Committee and Investors Grievance Committees. However, there is no Nomination Committee.

As the Company Secretary and Compliance Officer of Pharma Ltd, he is seeking your assistance to clarify some issues of concern.

You have been asked to prepare a brief report in which you:

(a) Provide Dr. Sen with a robust definition of corporate governance and a brief explanation of what you understand corporate governance to be.

(b) Comment on the board composition of Pharma Ltd. with respect to the Companies Act, 2013 and SEBI LODR Regulations, 2015. Also comment whether Dr. Sen should be Chairman of the Company.

(c) Explain whether Nomination Committee is mandatory under Companies Act, 2013 and what should be the role of Nomination Committee.

Suggested Solution- Case Study-1

(a) Corporate Governance has a broad scope. It includes both social and institutional aspects. Corporate Governance encourages a trustworthy, moral, as well as ethical environment. In other words, the heart of corporate governance is transparency, disclosure, accountability and integrity. It is to be borne in mind that mere legislation does not ensure good governance. Good governance flows from ethical business practices even when there is no legislation.

Good corporate governance promotes investor confidence, which is crucial to the ability of entities listed to compete for capital. Good corporate governance is is essential to develop added value to the stakeholders as it ensures transparency which ensures strong and balanced economic development. This also ensures that the interests of all shareholders (majority as well as minority shareholders) are safeguarded. It ensures that all shareholders fully exercise their rights and that the organization fully recognizes their rights.

Some other good definitions are given hereunder for better understanding:-"Corporate Governance is the application of best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility for sustainable development of all stakeholders."

The Institute of Company Secretaries of India

"Corporate Governance is concerned with the way corporate entities are governed, as distinct from the way business within those companies are managed. Corporate governance addresses the issues facing Board of Directors, such as the interaction with top management and relationships with the owners and others interested in the affairs of the company".

Robert Ian (Bob) Tricker

(b) **Board Composition:** Section 149(1) of the Companies Act 2013 provides that every company shall have a Board of Directors consisting of individuals as directors and shall have—

- A minimum number of three directors in the case of a public company,
- Atleast two directors in the case of a private company, and
- Atleast one director in the case of a One Person Company; and
- A maximum of fifteen directors provided that a company may appoint more than fifteen directors after passing a special resolution.

Section 149(4) provides that every public listed company shall have at- least one third of total number of directors as independent directors.

Regulation 17(1)(a) of SEBI LODR Regulations, 2015 provides that Board of directors shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty per cent of the board of directors shall comprise of non-executive directors.

The board of Pharma Ltd. comprises of total ten directors, six non-executive directors and five were considered independent. The total number of directors is more than the minimum required directors and at- least one third of total number of directors are independent directors.

Also as per SEBI Regulations, more than fifty per cent of the board of directors comprises of non-executive directors and one women director. Therefore, the board composition of Pharma ltd. is optimum as per the laws and regulations.

Separation of Chairman and CEO: First proviso to Section 203(1) of the Companies Act, 2013 provides for the separation of role of Chairman and Chief Executive Officer subject to conditions thereunder. It specifies that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,–

(a) the articles of such a company provide otherwise;

(b) the company does not carry multiple businesses:

Regulation 17(1B) of SEBI (LODR) Regulations, 2015 provides that effect from April 1, 2020, the top 500 listed entities shall ensure that the Chairperson of the board of such listed entity shall -

(a) be a non-executive director;

(b) not be related to the Managing Director or the Chief Executive Officer as per the definition of the term “relative” defined under the Companies Act, 2013:

Also, it is perceived that separating the roles of chairman and chief executive officer (CEO) increases the effectiveness of a company’s board. It is the board’s and chairman’s job to monitor and evaluate a company’s performance. A CEO, on the other hand, represents the management team. If the two roles are performed by the same person, then there is less accountability. A clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/CEO promotes balance of power. The benefits of separation of roles of Chairman and CEO can be:

- **Director Communication**: A separate chairman provides a more effective channel for the board to express its views on management
- **Guidance**: A separate chairman can provide the CEO with guidance and feedback on his/her performance
- **Shareholders’ interest**: The chairman can focus on shareholder interests, while the CEO manages the company

- **Governance**: A separate chairman allows the board to more effectively fulfill its regulatory requirements
- **Long-Term Outlook**: Separating the position allows the chairman to focus on the long-term strategy while the CEO focuses on short-term profitability
- **Succession Planning**: A separate chairman can more effectively concentrate on corporate succession plans.

Therefore, on the basis of above mentioned laws and regulations and the potential benefits of separating Chairman and CEO, Dr. Sen should not be made Chairman of the Company as he is already CEO of the Company.

(c) Yes, it is mandatory under the Companies Act, 2013 to constitute the Nomination and Remuneration Committee. Section 178(1) of the Act read with rule 6 of the Companies (Meetings of the Board and its Powers) Rules, 2014 and Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that the board of directors of following classes of companies is required to constitute a Nomination and Remuneration Committee of the Board-

- every listed public companies;
- All public companies with a paid up capital of 10 crore rupees or more;
- All public companies having turnover of 100 crore rupees or more;
- All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.

Since Pharma Ltd. Is a listed company, it is mandatory to the Nomination and Remuneration Committee which shall perform following functions:

- Identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance [Section 178(2)]
- Formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. [Section 178(3)]

Case Study - 2

In the year 2014, Chief Executive Mr. Roy of Sunny Ltd, a global internet communications company, announced an excellent set of results. Mr. Roy announced that, compared to 2013, sales had increased by 50%, profits by 100% and total assets by 80%. The dividend was to be doubled from the previous year.

Three months later, Mr. Roy called a press conference to announce a restatement of the 2014 results. He said this was necessary because of some ‘regrettable accounting errors’. He also disclosed that in fact the figures for 2014 were increases of 10% for sales, 20% for profits and 15% for total assets. The proposed dividend would now only be a modest 10% more than last year.

Later that month, the company announced that following an internal investigation, there would be further restatements, all dramatically downwards, for the years 2012 and 2013. This caused another mass selling of shares of Sunny Ltd resulting in a final share value the following day of $1. This represented a loss of shareholder value of $12 billion from the peak share price.

Mr. Roy resigned and SEBI ordered an investigation into what had happened at Sunny Ltd. The shares were suspended by the stock exchange. A month later, Sunny Ltd. was declared bankrupt. Nothing was paid out to shareholders whilst suppliers received a fraction of the amounts due to them.

The Chief Executive confessed to having orchestrated an accounting fraud for several years. He admitted to manipulating the firm's accounts to report profits that were more than 10 times the actual figures and reported a cash balance of US$1 billion that was non-existent. Sunny Ltd. has also committed systemic fraud in its worldwide regulatory filings. For a multinational company with the illustrious Board and significant foreign and institutional shareholding, one would expect corporate governance of highest order; however, the reality was different.

Based on the above fact, answer the following:

(a) Is the given case an example of intentional fraud by the top executive of the Company? Can such frauds be reported under the Companies Act 2013? What are the penalties for not reporting of frauds under Companies Act 2013?

(b) Can independent directors be held liable for frauds perpetrated by or with the support of the top management? Critically examine.

(c) A number of directors resigned from the company after the fraud became public. Examine the role directors could have played to protect shareholders' interests?

(d) What is the role of audit committee in fraud risk oversight? Draft some questions which the audit committee consider to effectively manage fraud risks.

Suggested Solution- Case Study-2

(a) Yes, above case is an example of intentional fraud by the top executives of the Company. Since the Chief Executive himself confessed to having orchestrated an accounting fraud for several years. He admitted to manipulating the firm's accounts to report profits that were more than 10 times the actual figures and reported a cash balance of US$1 billion that was non-existent.

Fraud is a deliberate action to deceive another person with the intention of gaining some things. Fraud can loosely be defined as "any behavior by which one person intends to gain a dishonest advantage over another". In other words, fraud is an act or omission which is intended to cause wrongful gain to one person and wrongful loss to the other, either by way of concealment of facts or otherwise.

Section 25 of the Indian Penal Code, 1860 defines the word, "Fraudulently", which means, a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

The Companies Act 2013 has also explained fraud. Explantion to Section 447 defines "fraud", which reads as under: "fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

Reporting of fraud under the Companies Act, 2013: Frauds by executives in the company can be reported under the Act under the Section 143(12) of the Companies Act, 2013 which requires the statutory auditors or cost accountant or company secretary in practice to report to the Central Government about the fraud/suspected fraud committed against the company by the officers or employees of the company. It includes only fraud by officers or employees of the company and does not include fraud by third parties such as vendors and customers.

Consequence of non-compliance: Sub-section 15 of section 143 states that if any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.

(b) Schedule IV of the Companies Act 2013 provides that the independent directors shall have certain duties like-

- seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company;
- participate constructively and actively in the committees of the Board in which they are chairpersons or members;
- where they have concerns about the running of the company or a proposed action, ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting;
- keep themselves well informed about the company and the external environment in which it operates;
- not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;
- ascertain and ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use;
- report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;
- ["act within their authority"], assist in protecting the legitimate interests of the company, shareholders and its employees etc.

So, it is expected from independent directors that they perform duties properly. However, Section 149(12) of the Companies Act 2013 provides that an independent director and a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Regulation 25(5) of SEBI (LODR) regulations, 2015 provides that an independent director shall be held liable, only in respect of such acts of omission or commission by the listed entity which had occurred with his knowledge, attributable through processes of board of directors, and with his consent or connivance or where he had not acted diligently with respect to the provisions contained in these regulations.

(c) A director is "bound to take such precautions and show such diligence in their office as a prudent man of business would exercise in the management of his own affairs." The Duties and Responsibilities can be broadly classified into two categories:

- The duties, liabilities and responsibilities which promotes corporate governance through the sincerest efforts of directors in efficient management and swift resolution of critical corporate issues and sincere and mature decision making to avoid unnecessary risks to the corporate entity and its shareholders.
- Keeping the interests of company and its stakeholders ahead of personal interests.

The following duties of the directors have been provided under Section 166 of the Companies Act, 2013 and apply to all types of directors-

- A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
- A director of a company shall not assign his office and any assignment so made shall be void.
- If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Clearly, the fraud could not have been gone un-noticed, if the directors have discharged their duties diligently. Directors certainly could have played a major role in highlighting the discrepancies in the financial statements long before declaring the company bankrupt and could have protected the shareholders' interests.

(d) The audit committee must be equipped to assess, monitor and influence the tone at the top to aim at enforcing a zero-tolerance approach to fraud. The audit committee should be sensitive to the various business pressures on management – to meet earnings estimates and budget targets, meeting incentive compensation targets, hiding bad news, etc. – and how small adjustments can trigger bigger problems. The audit committee's objective should be to ensure that arrangements are in place for the receipt and proportionate independent investigation of alleged or suspected fraudulent actions and for appropriate follow-up action.

Some of the Symptoms of potential fraud are –

- ➢ Overly complex and / or opaque corporate structures.
- ➢ Overly dominant senior executives with unfettered powers and highly leveraged reward schemes.
- ➢ Frequent changes in finance, other key personnel or auditors.
- ➢ Implausible explanations as to surpluses, or projections those are "too good to be true".
- ➢ Organisations significantly outperforming the competition.
- ➢ Aggressive accounting policies and frequent changes thereto.

Key questions for audit committees to consider:

- ➢ Is management taking sufficient responsibility for the fight against fraud and misappropriation?
- ➢ Is the tone from the top unequivocal in insisting on an anti-fraud culture throughout the organisation?
- ➢ Do record-keeping policies and procedures minimise the risk of fraud?
- ➢ Are appropriate diagnostic assessments of fraud risks performed and updated periodically?
- ➢ Are all significant fraud risks properly included in the enterprise risk management approach, linked to relevant internal controls and monitored?
- ➢ Do codes of conduct contain adequate, user-friendly and up-to-date behavioural guidelines in respect

of fraud and other misconduct?

- Are they adopted across the organisation and do they apply evenly to business partners and subcontractors?
- What is the level of assurance gained related to the effectiveness of anti-fraud controls by management, internal and/or external audit and is it appropriate in the circumstances?
- Are anti-fraud controls designed to detect or prevent financial reporting fraud from the early stage (i.e. before small adjustments snowball into bigger issues)?
- Are fraud-tracking and -monitoring systems and fraud response plans in place and are they fit for purpose?
- Do staff members at all levels have appropriate skills to identify the signs of fraud and do they receive fraud awareness training relevant to their role?

Case Study – 3

You are the company secretary of a listed food manufacturing company. Your chairman informs you that he has been asked to meet with two major shareholders of the company. These are institutional investors who together own about 6% of the company's equity shares. Both of them have stated publicly their policy of socially responsible investment and the purpose of the meeting will be to discuss social and environmental issues and the company's policy on corporate social responsibility.

As a company secretary you are required to write a briefing note for the chairman including a discussion of the following issues:

(a) Role of institutional investors in good corporate governance.

(b) The socially responsible investment principles for institutional investors and the ways in which institutional investors may pursue a socially responsible investment strategy.

Suggested Solution- Case Study-3

(a) Institutional investors are those financial institutions which accept funds from other parties for investment by the institution in its own name but on their clients/beneficiaries behalf. The different kinds of institutional investors are banks, development financial institutions, insurance companies, mutual funds, foreign institutional investor, provident funds and proposed private fund managers. They are now significant players in the global economy.

Institutional investors are entrusted with funds from the public and most of the household income is with these institutional investors. They are safe keepers of public money and act in a fiduciary capacity. They are obligated to take decisions which best serve the companies' interests and steer the company to function in an ethical manner.

There is a mutual relationship between institutional investors and the good corporate governance of a company. The corporate governance practices followed by a company are very important to determine the number of institutional investors who would like to invest in the firm and the extent to which they would like to invest.

Most governance sensitive institutional investors would like to invest in firms which already have their governance mechanisms in place. Institutions with corporate governance mechanisms in place are better to invest in as this would mean decreased monitoring costs. The institutional investors would not have to play a proactive role in monitoring the practices followed by the company.

(b) The Institutional investors generally follow the given six Principles for Responsible Investment

- Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.
- Principle 2: We will be active owners and incorporate ESG issues into ownership policies and practices.
- Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which they invest.
- Principle 4: We will promote acceptance and implementation of the Principles within the investment industry.
- Principle 5: We will work together to enhance effectiveness in implementing the Principles.
- Principle 6: We will each report on their activities and progress towards implementing the Principles.

Institutional Investors activities may include

- Monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration.
- Engagement in purposeful dialogue with companies on major issues.
- Decision-making on matters such as allocating assets, awarding investment mandates, designing investment strategies, and buying or selling specific securities.
- They set the tone for stewardship and may influence behavioural changes that lead to better stewardship by asset managers and companies.
- Asset managers, with day-to-day responsibility for managing investments, are well positioned to influence companies' long-term performance through stewardship.

Case Study – 4

A multinational manufacturing company Alpha Ltd. had developed a complex governance structure to hide its fraudulent accounting activities. Each department had its own Finance unit which would report to a central Finance team headed by the CFO. Each unit was unaware of the performance of other departments. The top management consisted of a few professionals and family members. Also all top executives were allotted large quantities of shares to ensure that they had incentives to take actions that would help boost the stock price.

Alpha Ltd. had a whistleblower policy supervised by the Audit Committee. Ms. Xia, a senior qualified accountant working in the company had approached the finance director with her concerns about the financial statements but she failed to get the answers she needed and had threatened to tell the press. When her threat came to the attention of the board, she was intimidated to keep quiet.

Another employee had written to an independent director stating that the books of the firm had been manipulated. Although this letter was circulated among the board, no action was taken. The audit committee also failed to take any action.

Later that year, the fraud became public and the company was declared bankrupt eroding the shareholders value and interest.

Based on the above fact, answer the following:

(a) Explain the role of audit committee for effective oversight of matters pertaining to whistleblower complaints?

(b) What are the challenges of effective implementation of a whistleblower policy in a company such as Alpha Ltd.?

(c) As a Company Secretary provide some pointers for audit committee to consider regarding whistle blowing possibilities in the Company.

Suggested Solution- Case Study-4

(a) While the ultimate responsibility of vigil mechanism is with the board as a whole, audit committees are tasked with the principal oversight of whistle-blowing systems, with the direct responsibility for antifraud efforts generally residing with management including internal audit. Whistle-blowing procedures are a major line of defence against fraud and audit committees should ensure such procedures are effective. By focusing on whistle-blowing channels and considering it within the context of the organisation's overall approach to enterprise risk management – the audit committee can help strengthen internal controls, financial reporting and corporate governance.

The audit committee must be properly informed and actively engaged in overseeing the process while avoiding taking on the role or responsibilities of management. To this end, it should seek input from the legal counsel, internal and/ or external audit.

The audit committee should seek to ensure that management has considered all risks that are likely to have a significant financial, reputational or regulatory impact on the organisation. For any such risks, a rigorous assessment of the relevant internal controls – including their ability to detect or prevent fraud – should be made. Effective monitoring of these internal controls and periodic re-assessments of their effectiveness are key elements to stay abreast, together with management's active engagement in the process. The audit committee should consider whether effective fraud awareness programmes are in place, updated as appropriate and effectively communicated to all employees.

(b) Some of the barriers to effective whistle blowing are-

- Operational like is the whistle blowing process fully embedded within the organisation? Do all staff members know what to do, what to look for? Do the hotlines and reporting lines actually work?
- Emotional and cultural barriers like Whistle blowers are commonly viewed as snitches, sneaks, grasses and gossips. This perception can make it difficult to blow the whistle even though individuals recognise that it is good for the company, employees, shareholders and other stakeholders.
- Potential whistle blowers often fear reporting incidents to management. Areas such as legal protection, fear of trouble and potential dismissal all play a part when an individual is considering whistle blowing.

(c) Some pointers for audit committee to consider regarding whistle blowing possibilities in the Company-

- Are whistle-blowing policies and procedures documented and communicated across the organisation?
- Does the whistle-blowing policy ensure that it is both safe and acceptable for employees to raise concerns about wrongdoing?
- Were the whistle-blowing procedures arrived at through a consultative process? Do management and employees "buy into" the process? Are success stories publicised?
- Are concerns raised by employees responded to within a reasonable time frame?
- Are procedures in place to ensure that all reasonable steps are taken to prevent the victimisation of whistleblowers and to keep the identity of whistle- blowers confidential?
- Has a dedicated person been identified to whom confidential concerns can be disclosed? Does this person have the authority and statute to act if concerns are not raised with, or properly dealt with, by line management and other responsible individuals?

- Does management understand how to act if a concern is raised? Do they understand that employees (and others) have the right to blow the whistle?
- Has consideration been given to the use of an independent advice centre as part of the whistle-blowing procedures?
- In cases where no instances are being reported though the whistle-blowing channel did management reassess the effectiveness of the procedures?

Case Study – 5

Hotsun Company is a medium-sized listed company. Mr. Mohan is a wealthy business entrepreneur and the original founder of the company. He owns 28% of the ordinary shares and is the major shareholder, but he is no longer a member of the board of directors, having resigned several years ago when the company obtained its stock market quotation.

Although he is no longer a director, Mohan continues to show considerable interest in the business affairs of the company. Recently he has been demanding that the board should consult him on issues of business strategy and dividend policy. He also believes that at least two non-executive directors should resign because they contribute nothing of value to the board. Two members of the board agree, and argue that Mohan should be consulted regularly on important issues, given his success in leading the company in the past. However, the majority of the board members are hostile and resent Mohan's continual interference.

After a recent argument with the chairman, Mohan has threatened to sue members of the board for gross dereliction of their duties as directors. He has also demanded the resignation of a board member who is the owner of a property company that has just sold a property to Hotsun Company at a price that Mohan considers excessive. The chairman was unaware of this matter.

Required

As company secretary, prepare a report for the chairman advising him about

(a) the powers of the board under the Companies Act, 2013

(b) the appropriate measures for dealing with Mohan and responsibility of the board towards Mohan.

(c) the provisions of RPT considering the allegations made by Mohan.

Suggested Solution- Case Study-5

(a) **Powers of the Board:** As per Section 179(3) read with Rule 8 of Companies (Meetings of Board and its Powers) Rules, 2014, the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—

- to make calls on shareholders in respect of money unpaid on their shares;
- to authorise buy-back of securities under section 68;
- to issue securities, including debentures, whether in or outside India;
- to borrow monies;
- to invest the funds of the company;
- to grant loans or give guarantee or provide security in respect of loans;
- to approve financial statement and the Board's report;
- to diversify the business of the company;

- to approve amalgamation, merger or reconstruction;
- to take over a company or acquire a controlling or substantial stake in another company;
- to make political contributions;
- to appoint or remove key managerial personnel (KMP);
- to appoint internal auditors and secretarial auditor.

(b) Mr. Mohan was one of the founder directors of the Company and a major shareholder of the company holding 28% of the shares. A responsible business acts with care and loyalty towards its shareholders and in good faith for the best interests of the corporation. Business therefore has a responsibility to:

- Apply professional and diligent management in order to secure fair, sustainable and competitive returns on shareholder investments.
- Disclose relevant information to shareholders, subject only to legal requirements and competitive constraints.
- Conserve, protect, and increase shareholder wealth.
- Respect shareholder views, complaints, and formal resolutions.

(c) According to Section 2(76) of Companies Act 2013, "related party", with reference to a company, means –

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager is a member or director;

(v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. (2%) of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act: Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is –

- a holding, subsidiary or an associate company of such company; or
- a subsidiary of a holding company to which it is also a subsidiary;

Section 188 (1) of the Companies Act 2013 deals with the related party transactions with respect to:

- Sale, purchase or supply of any goods or materials
- Selling or otherwise disposing of, or buying, property of any kind
- Leasing of property of any kind
- Availing or rendering of any services
- Appointment of any agent for purchase or sale of goods, materials, services or property

- Related party's appointment to any office or place of profit in the company, its subsidiary company or associate company, and
- Underwriting the subscription of any securities or derivatives thereof, of the company.

Also, Section 188(1) of the Companies Act 2013 provides that a company shall enter into any contract or arrangement with a related party with respect to Related party transactions only with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to certain conditions as prescribed under Rule 15 of the Companies (Meetings of board and its Powers) Rules, 2014.

Here, one of the board members had sold his property to Hotsun Ltd. at a price which Mohan considers excessive. The board member is related party as per Section 2(76) of Companies Act 2013 and selling property of any kind is a related party transaction as per Section 188 (1) of the Companies Act 2013.

The law in India does not prohibit RPTs. Instead, the law puts into place a system of checks and balances, such as requirements for approval from the board of directors/shareholders, timely disclosures and prior statutory approvals, to ensure that the transactions are conducted within appropriate boundaries. RPTs are required to be managed transparently, so as not to impose a heavy burden on a company's resources, affect the optimum allocation of resources, distort competition or siphon off public resources.

Therefore, if the related party transaction has taken place with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to certain conditions as prescribed under Rule 15 of the Companies (Meetings of board and its Powers) Rules, 2014, then it is allowed as per the laws and regulations and the allegations of Mr. Mohan will not hold much significance.

Case Study – 6

You are the Company Secretary of a large Indian multinational company operating in the energy sector. Your company has operations in 25 different countries, some of which are developing economies, and it has raised debt finance, as well as equity finance, in 15 of these countries. You are aware that there have been protests from environmental lobby groups in several areas regarding oil pipelines. There have also been demonstrations about the impact of operations on local communities.

Your company has an internal audit committee, an audit committee, and a reasonably well-developed system of internal control system. However, the board has decided that perhaps it should form a new committee, a 'risk committee', which will deal with risk management and internal control specifically.

Accordingly, the board has asked you to prepare a briefing paper which summarises following-

(a) the main risks facing the business at present and the relative importance of managing these risks to the business.

(b) legal provisions and role and functions of risk management committee.

(c) draft a risk management policy for the company.

Suggested Solution - Case Study – 6

(a) Various financial risk and non-financial risk are present in any situations which need to be managed and understood. The risk which has some direct financial impact on the entity is treated as financial risk. This risk may be Market risk, Credit risk, and Liquidity risk, Operational Risk, Legal Risk and Country Risk. The following chart depicts some of the various types of financial risks. This type of risks do not usually have direct and immediate financial impact on the business, but the consequences are very serious and later do have significant financial impact if these risks are not controlled at the initial stage. This type of risk may include, Business/Industry & Service Risk, Strategic Risk, Compliance Risk, Industry Fraud Risk, Reputation Risk, Transaction risk, Disaster Risk.

- *Business risk:* This is risk arising from the possibility of unexpected developments in the business environment for oil companies. There is a business risk arising from potential variations in the price of oil. This creates huge difficulties for oil companies. When oil prices fall to a very low level, it may be difficult to operate at a profit. The variations in price were linked to the condition of the global economy and the demand for oil.
- *Environmental risk:* Oil companies face environmental risk, which is the risk of changes in environmental conditions that could affect the company. An obvious risk is the limit to the supply of oil and gas as natural resources, and the problems of finding new sources of supply. There are also risks from environmental pollution in the extraction and movement of oil, which could expose the company to heavy fines.
- *Combination of business risk and environmental risk:* Climate change is bringing a demand for renewable sources of energy. Multinational oil companies are aware of this, and are investing in green technology. This will create major business opportunities in the future, but there is also the risk that a competitor will be more successful in developing products and technologies based on renewable energy. The combination of business risk and environmental risks are therefore possibly the biggest risks facing the company.
- *Health and safety risk and legal risk:* The risks from failure to comply with health and safety requirements. Injuries to employees or the general public from accidents at processing plants could result in high penalties.
- *Political risk:* Oil companies operate in many countries where the government may be unstable, or where the government is challenged by rebel groups. There is a risk of government action against companies, for example, the risk of nationalisation or part-nationalisation, or by political groups or local populations opposed to central government. At least one offshore oil platform of a major multinational has been attacked by regional “bandits”.
- *Financial risks:* The company operates in 25 countries and has raised finance in 15 countries (an unusually large number of countries). It operates globally, and presumably has raised money in a variety of different currencies. It is therefore exposed to a variety of financial risks. These are risks of losses or threats to the stability of the business from unexpected changes in financial conditions, such as major changes in interest rates or foreign exchange rates.

Risk management plays vital role in strategic planning. It is an integral part of project management. An effective risk management plan focuses on identifying and assessing possible risks. Some of the key advantages of having risk management are as under:

- Risk Management in the long run always results in significant cost savings and prevents wastage of time and effort in firefighting. It develops robust contingency planning.
- It can help plan and prepare for the opportunities that unravel during the course of a project or business.
- Risk Management improves strategic and business planning. It reduces costs by limiting legal action or preventing breakages.
- It establishes improved reliability among the stake holders leading to an enhanced reputation.
- Sound Risk Management practices reassure key stakeholders throughout the organization.

(b) **Risk Management committee:** Regulation 21 of the SEBI (LODR) 2015 deals with the Risk Management Committee and provides as under:

(1) The board of directors shall constitute a Risk Management Committee.

(2) The majority of members of Risk Management Committee shall consist of members of the board of directors.

(3) The Chairperson of the Risk management committee shall be a member of the board of directors and senior executives of the listed entity may be members of the committee.

(3A) The risk management committee shall meet at least once in a year.

(4) The board of directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit (such function shall specifically cover cyber security).

(5) The provisions of this regulation shall be applicable to top 500 listed entities, determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

(c) Model Risk Management Policy: A risk management policy serves two main purposes: to identify, reduce and prevent undesirable incidents or outcomes and to review past incidents and implement changes to prevent or reduce future incidents. A risk management policy should include the following sections:

- Risk management and internal control objectives (governance)
- Statement of the attitude of the organisation to risk (risk strategy)
- Description of the risk aware culture or control environment
- Level and nature of risk that is acceptable (risk appetite)
- Risk management organisation and arrangements (risk architecture)
- Details of procedures for risk recognition and ranking (risk assessment)
- List of documentation for analysing and reporting risk (risk protocols)
- Risk mitigation requirements and control mechanisms (risk response)
- Allocation of risk management roles and responsibilities
- Risk management training topics and priorities
- Criteria for monitoring and benchmarking of risks
- Allocation of appropriate resources to risk management
- Risk activities and risk priorities for the coming year

Case Study – 7

A company Surya Ltd. has been mis-reporting its financial statements since more than 10 years which none of the stakeholders noticed for years. When the situation of the Company went from bad to worse and it had no option but to declare it bankrupt, the company issued a press statement that there is disparity between actual and reported results due to accounting errors.

The first question from shareholders of the Company was why the auditors had not spotted and corrected the fundamental accounting errors?

The auditor of the Company, WNC partnership (one of the largest audit firm in the country), had compromised its independence by a large audit fee and also consultancy income worth several times the audit fee. Because Surya Ltd. was such an important client for WNC, it had knowingly signed off inaccurate accounts in order to protect the management of the Company. The investigation also found a number of significant internal control deficiencies including no effective management oversight of the external reporting process and a disregard of the relevant accounting standards.

Based on the above fact, answer the following:

(a) Does the case highlight importance of independence of auditors? Explain provision under the Companies Act 2013 which promotes independence of auditors.

(b) Can such situations be voided with the provision of rotation of auditors? Critically examine

(c) NFRA constituted under the Companies Act 2013 has been vested with powers for action against the auditors. Explain powers and functions of NFRA.

Suggested Solution - Case Study – 7

(a) Yes, the given case very much highlights the importance of independence of directors. If directors had been independent and not under the influence of the client they would have performed their duties more diligently rather than signing inaccurate accounts statements.

Section 141 of the Companies Act 2013 provides that to maintain independence of the auditors the following cannot be appointed Auditors -

1 ● An officer or employee of the company.

2 ● A person who is partner or who in the employment, of an officer or employee of the company.

3 ● A person who or his relative or partner

➢ Who is holding any security or interest in the company or the subsidiary or the holding? Anyway latest can hold security or interest in the company of the face value which should not exceed Rupees 1 lakh.

➢ Who has indebted to the company or a subsidiary to hold and Associate Company is subsidiary or such holding company.

➢ Who has provided the guarantee for any security in the connection with if the indebtness of any third person of the company arises.

4 ● "A person or a firm who (whether directly or indirectly) has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company".

5 ● A person whose relative is a director or is in the employment of the company as a director or any other key managerial post.

6 ● A person who is in full time employment elsewhere or a person or a partner of a firm holding employment as its auditor, if such person or partner is at the date of such appointment, holding appointment as auditor of more than 20 companies.

7 ● A person who has been convicted by the court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction.

8 ● Any person whose subsidiary or associate company or any other form of entity is engaged as on the date of appointment in consulting and specialized services as provided in Section 144 (auditors not to render certain services).

Auditor's Remuneration and Non- Audit Services: Though Companies Act, 2013 does not specify any restrictions on auditor's remuneration it should be reasonable, adequate but not excess, keeping the scope of the audit and auditors capabilities in mind. Excess Remuneration is an incentive to retain the client and reduces their objectivity. Non – audit services may affect the independence of the auditor hence the following are prohibited under Section 144.

- accounting and book keeping services;
- internal audit;
- design and implementation of any financial information system;
- actuarial services;
- investment advisory services;
- investment banking services;
- rendering of outsourced financial services;
- management services; and
- any other kind of services as may be prescribed.

Oversight of Auditors: To ensure independence and effectiveness of statutory auditors, the audit committee will review and monitor the auditor's independence, the audit scope and process, and performance of the audit team and accordingly recommend appointment, remuneration and terms of appointment of auditors of the company.

(b) Another important issue highlighted by the case is rotation of auditors. If the auditors have been changed after 4- 5 years, they would have different opinion on the financial statements. Since same auditors were continuing for a long time, the company was able to mis-report financial statement for more than 10 yrs. A mandatory audit rotation rule which sets a limit on the maximum number of years an audit firm can audit a given company's financial statements is a means to preserve auditor independence and possibly to increase investors' confidence in financial reports.

Mandatory audit firm rotation is defined in the Sarbanes-Oxley (SOX) Act as the imposition of a limit on the period of years during which an accounting firm may be the auditor of record. Mandatory audit firm rotation is often discussed as a potential way to improve audit quality – typically gaining attention when public confidence in the audit function has been eroded by events such as corporate scandals or audit failures.

When the same auditors continue in the same company for years and years, it results in a close relationship between management and auditors which increases the chances of fraud. Section 139(2) read with Rule 5 of the Companies (Audit and Auditors) Rules, 2014 provides that no listed company or a company belonging to the following classes of companies excluding one person companies and small companies:-

I ● all unlisted public companies having paid up share capital of rupees 10 crore or more;

II ● all private limited companies having paid up share capital of rupees 20 crore or more;

III ● all companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crore or more

shall appoint or re-appoint –

- an individual as auditor for more than one term of five consecutive years; and
- an audit firm as auditor for more than two terms of five consecutive years.

Also, an individual auditor who has completed his term of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term. An audit firm which has completed two terms of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term. Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

(c) Since auditors are guilty of signing false accounts statement, there should be some authority to take action against defaulting auditors. The National Financial Reporting Authority (NFRA) is an independent regulator established under Section 132 of the Companies Act, 2013 to oversee the auditing profession. It is similar to the Public Company Accounting Oversight Body set by in the USA by the Sarbanes Oxley Act 2002. NFRA has the investigative and disciplinary powers. NFRA can:

- investigate either suo moto or on the reference made to it by Central Government into the matters of professional or other misconduct, committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949.
- impose penalties of not less than 1 lakh which may extend to five times of the fees received, in case of individuals professionals and of not less than 10 lakhs which may extend to ten times of the fees received, in case of professional firms; if the misconduct is proved.
- debarring the member or the firm from engaging himself or itself from practice as the member of the Institute of Chartered Accountant of India for a minimum period of six months which may extend to a period of 10 years.
- NFRA has also been vested with the same powers as are vested in civil courts under the Code of Civil Procedure, 1908 while trying a suit, relating to:
  - discovery and production of books of account and other documents, as may be specified by the National Financial Reporting Authority;
  - summoning, enforcing the attendance of persons and examination them on oath;
  - issuing commissions for the examination of witnesses or documents;
  - inspection of any books, registers and other documents of any person to whom NFRA has summoned, enforced the attendance and examined on oath;

It is also being provided in section 132 of the Act that no other institute or body shall initiate or continue any proceedings in such matters of misconduct where the NFRA has initiated an investigation under this section. However, any person aggrieved by any order of the NFRA may appeal before the Appellate Authority constituted for this purpose.

The NFRA have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of **chartered accountants.** And no other institute or body shall commence or continue any proceedings in such matters of delinquency or misconduct where the National Financial Reporting Authority has initiated an investigation.

Case Study - 8

Ms. Jaya is a director of finance for a charitable organisation. Aspiring to improve standards, she has worked hard to introduce tighter internal systems and to enhance inter-departmental relationships, and this has helped mould the finance staff into a more effective and dedicated team.

Two years ago she recruited a deputy, Dev, who, while technically competent, has increasingly sapped her own job satisfaction. Some of her longer-serving staff has commented informally to her that they find it irritating how Dev often seems unwilling to share information without being pressed. Some volunteers and staff have also told her that his attitude to them has made them consider resigning. However, no staff has formally complained or yet left the organisation.

There is tension between herself and Dev. He seems to resent any suggestions that she offers and to be incapable of receiving even mild criticism without taking offence. He has implied, several times, that he feels he is being unfairly harassed and bullied.

Jaya has discussed this situation informally with the chief executive. Although she has found Dev sometimes awkward and defensive, and she knows that another director also considers him somewhat abrasive, she has identified nothing that would warrant disciplinary action. Dev informs Jaya that he has been shortlisted for director of finance at another charity and he believes he is a strong candidate.

Quietly, Jaya feel elated at the prospect that he might be leaving. The following day she receives a letter from Dev's prospective new employer. (Dev has offered her name as referee without seeking her agreement.) The letter asks questions concerning the ability of the candidate to work in teams, to motivate volunteers and to accept advice.

For several reasons, Jaya would very much like Dev to be offered the position with the other charity. However, she is concerned that an honest response to the enquiries would jeopardise his chances of success, as such a response can only be negative.

Based on the above fact, answer the following:

(a) Discuss and highlight the key issues regarding the inherent ethical dilemmas.

(b) Discuss the fundamental ethical principles and the dilemma of Jaya?

(c) Briefly explain the course of action Jaya can take.

Suggested Solution - Case Study - 8

(a) The ethical dilemma consideration takes us into the grey zone of business and professional life, where things are no longer black or white and where ethics has its vital role today. A dilemma is a situation that requires a choice between equally balanced arguments or a predicament that seemingly defies a satisfactory solution.

An ethical dilemma is a moral situation in which a choice has to be made between two equally undesirable alternatives. Dilemmas may arise out of various sources of behaviour or attitude, as for instance, it may arise out of failure of personal character, conflict of personal values and organizational goals, organizational goals versus social values, etc. A business dilemma exists when an organizational decision maker faces a choice between two or more options that will have various impacts on the organization's profitability and competitiveness; and its stakeholders. In situations of this kind, one must act out of prudence to take a better decision.

Some of the key issues regarding the inherent ethical dilemmas in business are –

Fundamental Ethical Issues: The most fundamental or essential ethical issues that businesses must face are integrity and trust. A basic understanding of integrity includes the idea of conducting business affairs with honesty and a commitment to treating every customer fairly. When customers think a company is exhibiting an unwavering commitment to ethical business practices, a high level of trust can develop between the business and the people it seeks to serve.

Diversity and the Respectful Workplace: An ethical response to diversity begins with recruiting a diverse workforce, enforces equal opportunity in all training programs and is fulfilled when every employee is able to enjoy a respectful workplace environment that values their contributions. Maximizing the value of each employees' contribution is a key element in your business's success.

Decision-Making Issues: A useful method for exploring ethical dilemmas and identifying ethical courses of action includes collecting the facts, evaluating any alternative actions, making a decision, testing the decision for fairness and reflecting on the outcome. Ethical decision-making processes should center on protecting employee and customer rights, making sure all business operations are fair and just, protecting the common good, and making sure the individual values and beliefs of workers are protected.

Compliance and Governance Issues: Businesses are expected to fully comply with environmental laws, federal and state safety regulations, fiscal and monetary reporting statutes and all applicable civil rights laws.

(b) The four fundamental ethical principles are-

- **The Principle of Respect for autonomy:** Autonomy is Latin for “self-rule” We have an obligation to respect the autonomy of other persons, which is to respect the decisions made by other people concerning their own lives. This is also called the principle of human dignity. It gives us a negative duty not to interfere with the decisions of competent adults, and a positive duty to empower others for whom we’re responsible.
- **The Principle of Beneficence:** We have an obligation to bring about good in all our actions. We must take positive steps to prevent harm. However, adopting this corollary principle frequently places us in direct conflict with respecting the autonomy of other persons.
- **The Principle of nonmaleficence:** We have an obligation not to harm others: “First, do no harm. Corollary principle: Where harm cannot be avoided, we are obligated to minimize the harm we do. Corollary principle: Don’t increase the risk of harm to others. Corollary principle: It is wrong to waste resources that could be used for good. Each action must produce more good than harm.
- **The Principle of justice:** We have an obligation to provide others with whatever they are owed or deserve. In public life, we have an obligation to treat all people equally, fairly, and impartially. Corollary principle: Impose no unfair burdens.

Jaya should think of her actions in terms of the fundamental ethical principles given above and provide her feedback accordingly.

(c) The course of action available for Jaya is described below –

(i) **Analyse the available options:** List the alternative courses of action available.

(ii) **Consider the consequences:** Think carefully about the range of positive and negative consequences associated with each of the different paths of action available.

- Who/what will be helped by what is done?
- Who/what will be hurt?
- What kinds of benefits and harms are involved and what are their relative values?
- What are the short-term and long-term implications?

(iii) **Analyse the actions:** Actions should be analysed in a different perspective i.e. viewing the action per se disregard the consequences, concentrating instead on the actions and looking for that option which seems problematic. How do the options measure up against moral principles like honesty, fairness, equality, and recognition of social and environmental vulnerability? In the case you are considering, is there a way to see one principle as more important than the others?

(iv) **Make decision and act with commitment:** Now, both parts of analysis should be brought together and a conscious and informed decision should be made. Once the decision is made, act on the decision assuming responsibility for it.

(v) **Evaluate the system:** Think about the circumstances which led to the dilemma with the intention of identifying and removing the conditions that allowed it to arise.

Case Study - 9

Flora Garments is a large clothes retailer and exporter in India. Its business strategy is based around vigorous cost leadership and it prides itself on selling fashionable garments for men, women and children at very low prices compared to its main rivals. For many years, it has achieved this cost leadership through carefully sourcing its garments from countries where labour is cheaper and where workplace regulation is less.

As a company with a complex international supply chain, the board of Flora Garments regularly reviews its risks. It has long understood that three risks are of particular concern to the Flora Garments shareholders: exchange rate risk, supply risk and international political risk. Each one is carefully monitored and the board receives regular briefings on each, with the board believing that any of them could be a potential source of substantial loss to the shareholders.

For the past decade or so, Flora Garments has bought in a substantial proportion of its supplies from Country X, a relatively poor developing country known for its low labour costs and weak regulatory controls. Last year, 65% of Flora Garments's supplies came from this one country alone. Country X has a reputation for corruption, including government officials, although its workforce is known to be hard-working and reliable. Most employees in Country X's garment industry are employed on 'zero hours' contracts, meaning that they are employed by the hour as they are needed and released with no pay when demand from customers like Flora Garments is lower.

Half of Flora Garments' purchases from Country X are from Gloria Company, a longstanding supplier to Flora Garments. Owned by the Fusilli brothers, Gloria outgrew its previous factory and wished to build a new manufacturing facility in Country X for which permission from the local government authority was required. In order to gain the best location for the new factory and to hasten the planning process, the Fusilli brothers paid a substantial bribe to local government officials.

The Fusilli brothers at Gloria felt under great pressure from Flora Garments to keep their prices low and so they sought to reduce overall expenditure including capital investments. Because the enforcement of building regulations was weak in Country X, the officials responsible for building quality enforcement were bribed to provide a weak level of inspection when construction began, thereby allowing the brothers to avoid the normal Country X building regulations.

In order to save costs, inferior building materials were used which would result in a lower total capital outlay as well as a faster completion time. In order to maximise usable floor space, the brothers were also able to have the new building completed without the necessary number of escape doors or staff facilities. In each case, bribes were paid to officials to achieve the outcomes the Fusilli brothers wanted. Once manufacturing began in the new building, high demand from Flora Garments meant that Gloria was able to increase employment in the facility. Although, according to Country X building regulations, the floor area could legally accommodate a maximum of 500 employees, over 1,500 were often working in the building in order to fulfil orders from overseas customers including Flora Garments. After only two years of normal operation, the new Gloria building collapsed with the loss of over 1,000 lives. Collapsing slowly at first, the number of people killed or injured was made much worse by the shortage of escape exits and the large number of people in the building. As news of the tragedy was broadcast around the world, commentators reported that the weakness in the building was due to the 'obsession with cheap clothes'.

Flora Garments was severely criticised in the local as well as international platform for being part of the cause, with many saying that if retailers pushing too hard for low prices, was one consequence of that. In response, Flora Garments' public relations department said that it entered into legal contracts with Gloria in order to provide its customers with exceptional value for money. Flora Garments said that it was appalled and disgusted that Gloria had acted corruptly and that the Flora Garments board was completely unaware of the weaknesses and safety breaches in the collapsed building.

Jessica, who was also the leader of a national pressure group ‘Protect workers’ rights’ (PWR) lobbying the Country X government for better working conditions and health and safety practices for workers in the country questioned whether multinational companies such as Flora Garments should be allowed to exert so much economic pressure on companies based in developing countries. Jessica also wrote a letter to the board of Flora Garments, stating that Flora Garments was an unethical company because it supplied a market in its home country which was obsessed with cheap clothes. As long as its customers bought clothes for a cheap price, she believed that no-one at Flora Garments cared about how they were produced. She said that large international companies such as Flora Garments needed to recognise they had accountabilities to many beyond their shareholders and they also had a wider fiduciary duty in the public interest.

The defective Gloria factory in Country X, she argued, would not have existed without demand from Flora Garments, and so Flora Garments had to recognise that it should account for its actions and recognise its fiduciary duties to its supply chain as well as its shareholders. At the same time as events in Country X unfolded, the business journalists reporting on the events and Flora Garments’ alleged complicity in the tragedy also became aware of a new innovation in business reporting called integrated reporting, an initiative of the International Integrated Reporting Council (IIRC).

The board of Flora Garments discussed the issues raised by the well-publicised discussion of Jessica’s open letter and the comments from business journalists about integrated reporting. The board was, in principle, a supporter of the integrated reporting initiative and thought it would be useful to explain its position on a range of issues in a press release.

Required:

(a) How this case has affected reputation of Flora Garments? Provide some suggestions for reputation risk management to the company.

(b) Draft a statement for the board of Flora Garments explaining the role of Flora Garments’s as a ‘corporate citizen’ given its international supply chain.

(c) Explain the concept of sustainable development to Flora Garments and also state the principles provided by the National Guidelines on Responsible Business Conduct (NGRBC), 2019

(d) Describe the basic framework of integrated reporting, and the potential benefits to Flora Garments’ reporting on different capital types.

Suggested Solution - Case Study - 9

(a) Reputation Risk as the risk arising from negative perception on the part of customers, counterparties, shareholders, investors, debt-holders, market analysts, other relevant parties or regulators that can adversely affect a bank’s ability to maintain existing, or establish new, business relationships and continued access to sources of funding (eg. through the interbank or securitization markets).

Reputational risk is multidimensional and reflects the perception of other market participants. Furthermore, it exists throughout the organisation and exposure to reputational risk is essentially a function of the adequacy of the bank’s internal risk management processes, as well as the manner and efficiency with which management responds to external influences on bank-related transactions.

The reputation of Flora Garments was badly damaged after the incident of building collapsed. Flora Garments was severely criticised in the local as well as international platform for being part of the cause, with many saying that if retailers pushing too hard for low prices, was one consequence of that.

Jessica, who was also the leader of a national pressure group 'Protect workers' rights' (PWR) lobbying in the Country X government for better working conditions and health and safety practices for workers in the country questioned whether multinational companies such as Flora Garments should be allowed to exert so much economic pressure on companies based in developing countries. She also wrote a letter to the board of Flora Garments, stating that Flora Garments was an unethical company because it supplied a market in its home country which was obsessed with cheap clothes. Flora Garments' loss of reputation may have long lasting damages like:

- It destroys the Brand Value
- Steep downtrend in share value.
- Ruined of Strategic Relationship
- Regulatory relationship is damaged which leads to stringent norms.
- Recruitment to fetch qualified staff as well the retention of the old employees becomes difficult.

Some of the suggestions for effectively managing the reputation risk include following-

- Integration of risk while formulating business strategy.
- Effective board oversight.
- Image building through effective communication.
- Promoting compliance culture to have good governance.
- Persistently following up the Corporate Values.
- Due care, interaction and feedback from the stakeholders.
- Strong internal checks and controls
- Peer review and evaluating the company's performance.
- Quality report/ newsletter publications
- Cultural alignments

(b) Corporate citizenship is a commitment to improve community well-being through voluntary business practices and contribution of corporate resources leading to sustainable growth. Corporate responsibility is achieved when a business adapts CSR well aligned to its business goals and meets or exceeds, the ethical, legal, commercial and public expectations that society has of business.

The term corporate citizenship implies the behaviour, which would maximize a company's positive impact and minimize the negative impact on its social and physical environment. It means moving from supply driven to more demand led strategies; keeping in mind the welfare of all stakeholders; more participatory approaches to working with communities; balancing the economic cost and `benefits with the social; and finally dealing with processes rather than structures. The ultimate goal is to establish dynamic relationship between the community, business and philanthropic activities so as to complement and supplement each other. Corporate citizenship is being adopted by more companies who have come to understand the importance of the ethical treatment of stakeholders.

As a good corporate citizen, Flora Garments is required to focus on the following key aspects:

- Absolute Value Creation for the Society
- Ethical Corporate Practices
- Worth of the Earth through Environmental Protection

- Equitable Business Practices
- Corporate Social Responsibility
- Innovate new technology/process/system to achieve eco-efficiency
- Creating Market for All
- Switching over from the Stakeholders Dialogue to holistic Partnership
- Compliance of Statutes
- Effective supply chain management

(c) Sustainable development is a broad concept that balances the need for economic growth with environmental protection and social equity. It is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations. Sustainable development is a broad concept and it combines economics, social justice, environmental science and management, business management, politics and law.

The goal of sustainable development is to maintain economic growth without environment destruction. Sustainable Development indicates development that meets the needs of the present generation without compromising with the ability of the future generations to meet their needs. The principle behind it is to foster such development through technological and social activities which meets the needs of the current generations, but at the same time ensures that the needs of the future generation are not impaired. For example, natural energy resources, like Coal and Petroleum etc., should be prudently used avoiding wastage so that the future generation can inherit these energy resources for their survival also.

The contribution of sustainable development to corporate sustainability is twofold. First, it helps set out the areas that companies should focus on: environmental, social, and economic performance. Secondly, it provides a common societal goal for corporations, governments, and civil society to work towards ecological, social, and economic sustainability. However, sustainable development by itself does not provide the necessary arguments for why companies should care about these issues. Those arguments come from corporate social responsibility and stakeholder theory.

Corporate sustainability encompasses strategies and practices that aim at meeting the needs of the stakeholders today while seeking to protect, support and enhance the human and natural resources that will be needed in the future.

The nine thematic pillars of business responsibility provided by the National Guidelines on Responsible Business Conduct (NGRBC), 2019 are:

(d) Integrated reporting is a new approach to corporate reporting which is rapidly gaining international recognition. Integrated reporting is founded on integrated thinking, which helps demonstrate interconnectivity of strategy, strategic objectives, performance, risk and incentives and helps to identify sources of value creation. Integrated reporting is a concept that has been created to better articulate the broader range of measures that contribute to long-term value and the role, organisations play in society. Central to this is the proposition that value is increasingly shaped by factors additional to financial performance, such as reliance on the environment, social reputation, human capital skills and others. This value creation concept is the backbone of integrated reporting.

In addition to financial capital, integrated reporting examines five additional capitals that should guide an organisation's decision-making and long-term success — its value creation in the broadest sense. While integrated reports benefit a broad range of stakeholders, they're principally aimed at long-term investors. Integrated reporting starts from the position that any value created as a result of a sustainable strategy – regardless of whether it becomes a tangible or intangible asset — will translate, at least partially, into performance. Market value will therefore be impacted.

Integrated Reporting is one step ahead of sustainability reporting and its set to become the way companies report their annual financial and sustainability information together in one report. The aim of an integrated report is to clearly and concisely tell the organization's stakeholders about the company and its strategy and risks, linking its financial and sustainability performance in a way that gives stakeholders a holistic view of the organization and its future prospects.

Conceptually, integrated reporting would build on the existing financial reporting model to present additional information about a company's strategy, governance, and performance. It is aimed at providing a complete picture of a company, including how it demonstrates stewardship and how it creates and sustains value.

The primary purpose of an integrated report is to explain to providers of financial capital how an organisation creates value over time. An integrated report benefits all stakeholders interested in an organisation's ability to create value over time, including employees, customers, suppliers, business partners, local communities, legislators, regulators and policy-makers.

International Integrated Reporting Framework (IIRC) has developed an International Integrated Reporting Framework to establish Guiding Principles and Content Elements that govern the overall content of an integrated report, and to explain the fundamental concepts that underpin them.

Benefits of integrated reporting to Flora Garments on different capital types:

As a business owner or manager, securing your customers', suppliers', finance providers', and other external stakeholders' trust is paramount. Using trust in the business is built by succinctly highlighting what drives value. Through integrated thinking, Flora Garments can build a better, more concrete understanding of the factors that determine its ability to create value over the short, medium, and long term.

Integrated Reporting uses the term "capitals" and a multi-capital model to recognize the fact that value is not stored in financial capital alone, but in all sorts of capitals. Just like financial capital, when these other capitals are properly understood and managed, they can continue to release value over time, while simultaneously growing in their capacity to continue to drive value in the future. Integrated reporting identifies these other capitals as manufactured, intellectual, human, social and relationship, and natural.

- *Financial capital* – the equity, debts, and grants available to Flora Garments to be used in the provision of goods or services.
- *Manufactured capital* – the tangible goods and infrastructure that Flora Garments owns, leases, or has access to that are used in the provision of goods or services.
- *Intellectual capital* – the knowledge, intellectual property, systems, and processes that Flora Garments has at its disposal that provide it with a competitive advantage and positively affect its future earning potential.
- *Human capital* – the skills, experience, and motivation that employees and management in Flora Garments possess that provide the foundation for future development and growth.
- *Social and relationship capital* – Flora Garments' brands and reputation, including its relationships with the community in which it operates, its customers, and business partners and others in its value chain, such as various government agencies.

- *Natural capital* – Flora Garments' access to environmental resources that it can use to provide a return and/or that it affects through its activities or the goods and services it creates.

Case Study – 10

Growmart, a grocery and general merchandise store and the global retailer has more than 5000 retail units in 20 different countries. In 2017, Growmart was caught using child labour in a developing country X-Land. At the end of year, media made public the news that Growmart was using child labour at two factories in X-Land. Children aged 10-14 years old were found to be working in the factories for less than $50 a month making products of the Growmart brand for export. The company had zero tolerance policy for underage workers and ceased business with the two factories immediately and alleged that despite its effort to inspect all factories, it is difficult to enforce its own corporate code of conduct with thousands of subcontractors around the world.

Now, on the basis of advice from an NGO from country X-Land that if Growmart cuts business with these factories, many workers could be laid off for lack of production, suppliers will hide abuses and workers will not tell the truth to auditors in order not to lose their jobs; Growmart resumed operations with two factories after giving warning that if underage workers were found or the company did not make corrections, the factory would be permanently banned from Growmart's production. Growmart has a strict corporate code of conduct in the industry but according to investigations Growmart is not able to enforce its code in developing countries.

Thus, Growmart changed its zero tolerance child labour policy due to NGO advice. Now, instead of immediately cutting business relationships with suppliers hiring up to two underage workers, they receive a warning and are obliged to take corrective measures for the next audit. Only when the supplier has hired more than two underage workers and has not corrected the situation does Growmart permanently terminate business relationships. This new policy was adopted in order assure that suppliers report the reality of working conditions.

Also, Growmart requires its suppliers who produce toys in China to sign up to the ICTI CARE Process. The ICTI CARE Process was created by the international toy industry to achieve a safe and human working environment for toy factory workers worldwide. In addition, Growmart conducts internal validation audits by Growmart's Ethical Sourcing team. These validation audits ensure that the ICTI CARE process is properly implemented and that it meets Growmart's Standards for Suppliers.

Growmart has updated policies against discrimination. Its GRI Report emphasizes gender equality, a diverse workforce and appointing women to top management positions. The report even dedicates a separate paragraph on 'Empowering women at Growmart'.

Based on the above case:

(a) Explain the concept of CSR and why successful companies like Growmart should adopt CSR in its strategy of growth?

(b) Explain triple bottom line approach of CSR.

(c) Highlight the factors which affect CSR with the examples from the given case.

Suggested Solution - Case Study - 10

(a) Business entity is expected to undertake those activities, which are essential for betterment of the society. Every aspect of business has a social dimension. Corporate Social Responsibility means open and transparent business practices that are based on ethical values and respect for employees, communities and the environment. It is designed to deliver sustainable value to society at large as well as to shareholders.

Corporate Social Responsibility is nothing but what an organisation does, to positively influence the society in which it exists. It could take the form of community relationship, volunteer assistance programmes, special scholarships, preservation of cultural heritage and beautification of cities. The philosophy is basically to return to the society what it has taken from it, in the course of its quest for creation of wealth. With the understanding that businesses play a key role of job and wealth creation in society, CSR is generally understood to be the way a company achieves a balance or integration of economic, environmental, and social imperatives while at the same time addressing shareholder and stakeholder expectations.

CSR is generally accepted as applying to firms wherever they operate in the domestic and global economy. The way businesses engage/involve the shareholders, employees, customers, suppliers, Governments, non-Governmental organizations, international organizations, and other stakeholders is usually a key feature of the concept. While an organisation's compliance with laws and regulations on social, environmental and economic objectives set the official level of CSR performance, it is often understood as involving the private sector commitments and activities that extend beyond this foundation of compliance with laws. Essentially, Corporate Social Responsibility is an inter-disciplinary subject in nature and encompasses in its fold:

- Social, economic, ethical and moral responsibility of companies and managers,
- Compliance with legal and voluntary requirements for business and professional practice,
- Challenges posed by needs of the economy and socially disadvantaged groups, and
- Management of corporate responsibility activities.

Even successful companies like Growmart should incorporate CSR because it is very important strategy as wherever possible, consumers want to buy products from companies they trust; suppliers want to form business partnerships with companies they can rely on; employees want to work for companies they respect; and NGOs, increasingly, want to work together with companies seeking feasible solutions and innovations in areas of common concern.

Growmart's reputation had gone down because of employing child labour. The company adopted CSR approach towards the issue and gave warning to the supplier instead of immediately cutting business relationships with suppliers. Thus, CSR is a tool in the hands of corporate like Growmart to enhance the market penetration of their products, enhance its relation with stakeholders. CSR activities carried out by the enterprises affects all the stakeholders, thus making good business sense, the reason being contribution to the bottom line. The social responsibility of business can be integrated into the business purpose so as to build a positive synergy between the two.

- CSR creates a favourable public image, which attracts customers.
- It builds up a positive image encouraging social involvement of employees, which in turn develops a sense of loyalty towards the organization, helping in creating a dedicated workforce proud of its company.
- Society gains through better neighborhoods and employment opportunities, while the organisation benefits from a better community, which is the main source of its workforce and the consumer of its products.
- The company's social involvement discourages excessive regulation or intervention from the Government or statutory bodies, and hence gives greater freedom and flexibility in decision-making.
- The good public image secured by one organisation by their social responsiveness encourages other organizations in the neighborhood or in the professional group to adapt themselves to achieve their social responsiveness.

- The atmosphere of social responsiveness encourages co-operative attitude between groups of companies. One company can advise or solve social problems that other organizations could not solve.

(b) Triple Bottom Line (TBL) is based on the premise that business entities have more to do than make just profits for the owners of the capital, only bottom line people understand. "People, Planet and Profit" is used to succinctly describe the triple bottom lines. **"People"** (Human Capital) pertains to fair and beneficial business practices toward labor and the community and region in which a corporation conducts its business. **"Planet"** (Natural Capital) refers to sustainable environmental practices. It is the lasting economic impact the organization has on its economic environment A TBL company endeavors to benefit the natural order as much as possible or at the least do no harm and curtails environmental impact. **"Profit"** is the bottom line shared by all commerce. The need to apply the concept of TBL is caused due to –

- Increased consumer sensitivity to corporate social behaviour
- Growing demands for transparency from shareholders/stakeholders
- Increased environmental regulation
- Legal costs of compliances and defaults
- Concerns over global warming
- Increased social awareness
- Awareness about and willingness for respecting human rights
- Media's attention to social issues
- Growing corporate participation in social upliftment

While profitability is a pure economic bottom line, social and environmental bottom lines are semi or non-economic in nature so far as revenue generation is concerned but it has certainly a positive impact on long term value that an enterprise commands. But discharge of social responsibilities by corporates is a subjective matter as it cannot be measured with reasonable accuracy.

The current generation people are well aware of what goes on around them. People today know a lot about environment, how it affects them, how things we do affects the environment in turn. For the aware and conscientious consumers today, it is important that they buy products that do not harm the environment. They only like to deal with companies that believe and do things for the greater good of planet earth.

(c) Many factors influence CSR activities of companies:

- Globalization – Growmart was a global company and supplier's activities in some other developing part of the world made it to change its policy and work together with suppliers. Thus, focus on cross-border trade, multinational enterprises and global supply chains is increasingly raising CSR concerns related to human resource management practices, environmental protection, and health and safety, among other things.
- Governments and intergovernmental bodies, such as the United Nations, the Organisation for Economic Co-operation and Development and the International Labour Organization have developed compacts, declarations, guidelines, principles and other instruments that outline social norms for acceptable conduct. In the given case advise of NGO was important factor in changing the CSR policy of Growmart.
- Advances in communications technology, such as the Internet, cellular phones and personal digital assistants, are making it easier to track corporate activities and disseminate information

about them. Non-governmental organizations now regularly draw attention through their websites to business practices they view as problematic.

- Consumers and investors are showing increasing interest in supporting responsible business practices and are demanding more information on how companies are addressing risks and opportunities related to social and environmental issues.
- Numerous serious and high-profile breaches of corporate ethics have contributed to elevated public mistrust of corporations and highlighted the need for improved corporate governance, transparency, accountability and ethical standards.
- Citizens in many countries are making it clear that corporations should meet standards of social and environmental care, no matter where they operate.
- There is increasing awareness of the limits of government legislative and regulatory initiatives to effectively capture all the issues that corporate social responsibility addresses.
- Businesses are recognizing that adopting an effective approach to CSR can reduce risk of business disruptions, open up new opportunities, and enhance brand and company reputation.

Case Study – 11

Ms. Sania, a fund manager at institutional investor - Investo House, was reviewing the annual report of one of the major companies in her portfolio. The company, Sunway Ltd, had recently undergone a number of board changes as a result of a lack of confidence in its management from its major institutional investors of which Investo House was one.

The problems started two years ago when a new chairman at Sunway Ltd started to pursue what the institutional investors regarded as very risky strategies whilst at the same time failing to comply with a stock market requirement on the number of non-executive directors on the board.

Sania rang Sunway Ltd's investor relations department to ask why it still was not in compliance with the requirements relating to non-executive directors. Also when she asked how its board committees could be made up with an insufficient number of nonexecutive directors, the investor relations manager said he didn't know and that Sania should contact the chairman directly. She was also told that there was no longer a risk committee because the chairman saw no need for one.

Sania telephoned the chairman of Sunway Ltd. She began by reminding him that Investo House was one of Sunway Ltd's main shareholders and currently owned 17% of the company. She went on to explain that she had concerns over the governance of Sunway Ltd's and that she would like him to explain his noncompliance with some of the requirements of SEBI LODR Regulations, 2015 and also why he was pursuing strategies viewed by many investors as very risky.

The chairman reminded Sania that Sunway Ltd had outperformed its sector in terms of earnings per share in both years since he had become chairman and that rather than questioning him, she should trust him to run the company as he saw fit. He thanked Investo House for its support and hung up the phone.

Required:

(a) Explain what an 'agency cost' is and discuss the problems that might increase agency costs for Investo House in the case of Sunway Ltd.

(b) Describe, with reference to the case, the conditions under which it might be appropriate for an institutional investor to intervene in a company whose shares it holds.

(c) Evaluate the contribution that a risk committee made up of non-executive directors could make to Sania's confidence in the management of Sunway Ltd.

Suggested Solution - Case Study - 11

(a) **Definition of agency costs:** Agency costs arise from the need of principals (here shareholders) to monitor the activities of agents (here the board, particularly the chairman). This means that principals need to find out what the agent is doing, which may be difficult because they may not have as much information about what is going on as the agent does. Principals also need to introduce mechanisms to control the agent over and above normal analysis. Both finding out and introducing mechanisms will incur costs that can be viewed in terms of money spent, resources consumed or time taken.

Problems with agency costs in Sunway Ltd.

- **Attitudes to risk**: The first reason for increased agency costs is that the company's attitude to risk is a major area of concern on which Investo House requires more information, since the risk appetite appears significantly greater than what would normally be expected in this sector.
- **Unwillingness of chairman to be monitored**: Agency costs will certainly increase because he is unwilling to supply any information about the reasons for his policies, certainly indicating arrogance and also a lack of willingness to accept accountability. This means that Investo will have to find out from other sources, for example any nonexecutive directors who are on the board. Alternatively they may contact other investors and take steps to put more pressure on Chairman, for example by threatening to requisition an extraordinary general meeting.
- **Inadequacy of existing mechanisms**: Agency costs will also increase because existing mechanisms for communicating concerns appear to be inadequate. There are insufficient non-executive directors on the board to exert pressure on the Chairman. There is no risk management committee to monitor risks. The investor relations department is insufficiently informed and unhelpful. The Chairman has abruptly dismissed the one-off phone call. Because of the seriousness of the concerns, ideally there should be regular meetings between Chairman and the major shareholders, requiring preparation from both parties and increasing agency costs.

(b) The conditions under which it might be appropriate for an institutional investor to intervene in a company whose shares it holds are-

- Institutional shareholders may intervene if they perceive that management's policies could lead to a fall in the value of the company and hence the value of their shares.
- There could be concerns over strategic decisions over products, markets or investments or over operational performance. Although they can in theory sell their shares, in practice it may be difficult to offload a significant shareholding without its value falling.
- Institutional investors may intervene because they feel management cannot be trusted like in the case Chairman has done away a key component of the control system (the risk committee) without good reason.
- Institutional investors may take steps if they feel that there is insufficient influence being exercised by nonexecutive directors over executive management.
- Intervention would be justified if there were serious concerns about control systems.
- Even if there is no question of dishonesty, there may be intervention if institutional investors feel that management is failing to address their legitimate viewpoints.

(c) **Importance of Risk Management Committee**: Risk committees are considered to be good practice in most worldwide governance regimes; particularly in situations like this where there are doubts about the attitudes of executive management. A risk committee staffed by non-executive directors can provide an independent viewpoint on Sunway Ltd.'s overall response to risk; a significant presence of non-executive directors, as required by governance guidelines, would be able to challenge Chairman's attitudes.

- The committee can pressurize the board to determine what constitutes acceptable levels of risk to reduce the incidence and impact on the business.
- Once the board has defined acceptable risk levels, the committee should monitor whether Sunway Ltd. is remaining within those levels, and whether earnings are sufficient given the levels of risks that are being borne.
- There should be a regular system of reports to the risk management committee covering areas known to be of high risk, also one-off reports covering conditions and events likely to arise in the near future. This should facilitate the monitoring of risk.
- The committee should monitor the effectiveness of the risk management systems, focusing particularly on executive management attitudes towards risk and the overall control environment and culture.
- A risk management committee can judge whether there is an emphasis on effective management or whether insufficient attention is being given to risk management due to the pursuit of high returns.

POONA EMPLOYEES UNION

v.

FORCE MOTORS LIMITED & ANR [SC]

Civil Appeal Nos. 10130-10131 of 2010

V. Gopala Gowda & Amitava Roy, JJ. [Decided on 01/12/2015]

Trade Union Act, 1926 – Section 19 – Recognition of trade union – Appellant union claiming to command 85% of the workforce of the company sought recognition – Existing union BKS and the company opposed – Industrial court granted recognition without appreciating the facts properly – Whether recognition to be accorded to the appellant union – Held, No.

Brief facts:

The Company, Force Motors Limited, earlier named as Bajaj Tempo Limited, has its office at Akurdi, Pune. The respondent No. 2- union i.e. Bhartiya Kamgar Sena ("the BKS") is the recognized union of the company. The appellant union in its bid to be adjudged as the recognized union in place of BKS, filed an application on 6.9.2003 before the Industrial Court, Pune, as required under the provision of the Act. It insisted that almost all the employees members of BKS had meanwhile tendered their resignation, and had expressed their desire to discontinue their membership therewith. It claimed that majority of the employees had become its members, so much so that in the month of January, 2003, it had in its fold 1973 employees members. Claiming that it was a union registered under the Trade Unions Act, 1926 (for short, hereinafter to be referred to as "1926 Act") on 20.7.1986 with a valid certificate to that effect, it asserted that with the exodus of the employees members from BKS to its ranks, it had the holding of 85% of the total employees of the company.

The company resisted the application by pleading, amongst others, that the appellant union was not duly registered under the 1926 Act. It denied as well that it did have, at that point of time, 30% membership of the employees of the company and that it did comply with the imperatives of Section 19 of the Act. Dismissing the appellant union's claim of majority membership to be a bogey, it refuted its claim of having larger membership of the employees of the company compared to BKS.

BKS, as well, joined the fray in similar lines with the company. Apart from reiterating that the appellant union was not duly registered under the 1926 Act and thus it had no locus standi to claim the status of a recognized union, it categorically controverted its clam of holding 30% membership of the company as compared to it (BKS). The Industrial Court allowed the application of the appellant union but on appeal the High court reversed the decision of the Industrial court. Hence the present appeal.

Decision: Appeal dismissed.

Reason:

We have extended our anxious consideration to the rival pleadings and the arguments based thereon. The documents available on record have also received our attention.

On a conjoint reading of the provisions of the Trade Unions Act, it is abundantly and predominantly clear that the exercise of examining an application of a union in an undertaking seeking the status of recognized union whether by replacing an existing recognized union or not, is neither a routine ritual nor an idle formality. Not only the applicant- union has to be eligible to apply as per the prescriptions with regard to the extent of membership it has to command for the relevant period, its application has to be bona fide in the interest of the employees and it must not have indulged in any activity of instigating, aiding or assisting, the commencement or continuation of a strike during the said period. The detailed procedure in both the eventualities, as contemplated in Sections 12 and 14 of the Act, enjoins a participating enquiry to verily ascertain the membership pattern of the rival unions, and also the existence or otherwise of the disqualifying factors as stipulated by the Act.

Section 9(2) of the Act, to reiterate, makes it incumbent on the Investigating Officer to assist the Industrial Court in matters of verification of membership of unions and also to assist the Industrial and Labour Courts investigating into the complaints relating to the unfair labour practice. Axiomatically, thus the enquiry to be undertaken by the Industrial Court, has to strictly comport to the prescripts of the relevant provisions and cannot be repugnant to the letter and spirit thereof. Indubitably, the burden would be on the applicant union to decisively establish its eligibility and suitability for being conferred the status of a recognized union to be adjudged by the legislatively enjoined parameters. Though the enquiry envisages participation of the rival union(s), employers and employees, having regard to the ultimate objective of installing a representative union to secure genuine, effective and collective negotiations, catering to industrial cohesion, harmony and growth, no compromise or relaxation in the rigours of the requirements of the enquiry can either be contemplated or countenanced.

The factual conspectus, albeit, not wholly identical herein, the fact remains that though it had been undertaken by the appellant union that if permitted to file its affidavits, the same would not be utilized to decide the issue of membership and was endorsed as well by the Industrial Court, its decision would clearly reveal that the contents of the affidavits not only had been taken note of by it but also relied upon along with the other materials on record, to eventually hold that the appellant union held in its ranks, the majority membership of the employees of the undertaking. To this extent, we are constrained to hold that the approach of the Industrial Court in deciding the issue of membership cannot be sustained being in derogation of the letter, spirit and objectives of the procedure prescribed by the Act to determine the issue of majority of membership for the purpose of identifying the recognized union of an industrial establishment. To recall, the common averment made in the 1556 affidavits filed by the appellant union is that the employees concerned had resigned from BKS on 12.12.2002 as it did not defend the interest of the workers and had functioned as per the directions of the company. It was further affirmed that the deponent did not pay union subscription to BKS since last year and that he/she had instead accepted the membership of the appellant union i.e. Puna Employees Union on 12.12.2002 and that concludes to be its member on the date of the execution of the affidavit. It was stated further that in view of the resignation of the deponent and others, BKS did not have majority of the membership since 1.1.2003 and that thus its recognition be revoked.

Adverting to the evidence, dehors the affidavits, suffice it to state that the report of the Investigating Officer clearly reveals that the contribution collected from the members of the appellant union had not been deposited in its bank account. This finding, to reiterate, is based on a scrutiny of the original records of the appellant union. Though the then President of the appellant union, in his testimony claimed that the membership fee had been duly deposited in the bank, he conceded that no complaint had been made against the Investigating Officer for incorporating a finding contrary thereto. No overwhelming evidence was also produced to counter this finding. This witness admitted as well that the accounts of the appellant union were not being audited by a Chartered Accountant, appointed by the Government which per se is also in repudiation of the mandate of Section 19(iv) of the Act. This witness in course of the cross- examination was also confronted with the annual return submitted by the union for the period January to December, 2003 in which he admitted that the columns No. 10, 13, 15 and 17 of the prescribed form had been left blank.

Not only, in the comprehension of this Court, the report of the Investigating Officer based on a scrutiny of all relevant records of the appellant union including the list of employees, membership receipt book, register of membership, cash book, bank pass books etc. does not as such admit of any doubt about its credibility, even some of the affiants, in their cross-examinations, on their affidavits filed in support of the claim of membership of the appellant union, had stated that they had affirmed the same because they were promised by the appellant union that their deducted wages for the go-slow tactics would be reimbursed. Though the respondents have nursed a remonstrance that the permission granted by the Industrial Court to cross-examine only 100 of the affiants out of 1556 deponents did denude them of a valuable right of defence, in our estimate, nothing much turns thereon. To reiterate, these affidavits could not have been, in the facts and circumstances of the case, and more particularly in view of the undertaking given by the appellant union and also the order to that effect by the Industrial Court that the same would not be used to decide the issue of membership, acted upon for this purpose. It had throughout been in the understanding of all concerned that the contents of the affidavits would be used only for relevant and ancillary purpose but divorced from the issue of membership. The Industrial Court however, in concluding that the appellant union did have more than 30% of the membership of the total employees, took cognizance of these affidavits and relied on the same. The contents of the affidavits, referred to hereinabove, which are identical and in a format are to the effect that the deponents had not paid subscription to the BKS for the last two years and that they had accepted the membership of appellant union on 20.12.2002 and that BKS does not have majority of the membership since 1.1.2003. These affidavits taken on their face value, irrefutably testified on the aspect of membership of the two unions and though the Industrial Court did endeavour to construe the same for the purpose of ascertaining the intention of the affiants to support the appellant union, it indeed had a decisive bearing on its ultimate conclusion of its majority membership.

In the facts of the present case, in our estimate, the analysis and evaluation of the materials on record as undertaken cannot be denounced as illogical, irrational or uncalled-for and the view recorded in the impugned judgment and order is one permissible on the basis thereof.

We have perused the impugned judgment and order. In the above presiding backdrop of facts and law, we are of the unhesitant opinion that the view taken by High Court is plausible and rational being based on a logical analysis of the materials on record and the law applicable does not merit any interference at our end. Having regard to the paramount objectives of the Act and in the interest of industrial orderliness, stability, peace and overall wellbeing as well, we find no persuasive reason to intervene at this distant point of time. The appeals fail and are, accordingly, dismissed. No costs.

MANAGEMENT OF THE BARARA COOPERATIVE MARKETING-CUMPROCESSING SOCIETY LTD.

v.

WORKMAN PRATAP SINGH [SC]

Civil Appeal No. 7 of 2019 [Arising out of SLP (C) No. 17975 of 2014]

A.M. Sapre & Indu Malhotra, JJ. [Decided on 02/01/2019]

Industrial Disputes Act, 1947 – Section 25H – Workman accepted the compensation in lieu of his right of reinstatement in service – Later workman seeking reemployment – Whether tenable – Held, No.

Brief facts:

This appeal is directed against the final judgment and order passed by the High Court of Punjab & Haryana whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the judgment passed by the Single Judge of the High Court by which the respondent herein was ordered to be reinstated into service with back wages.

Decision: **Appeal allowed**.

Reason:

In our considered opinion, there was no case made out by the respondent (workman) seeking re-employment in the appellant's services on the basis of Section 25 (H) of the ID Act.

In the first place, the respondent having accepted the compensation awarded to him in lieu of his right of reinstatement in service, the said issue had finally come to an end; and Second, Section 25 (H) of the ID Act had no application to the case at hand.

In order to attract the provisions of Section 25(H) of the ID Act, it must be proved by the workman that firstly, he was the "retrenched employee" and secondly, his ex-employer has decided to fill up the vacancies in their set up and, therefore, he is entitled to claim preference over those persons, who have applied against such vacancies for a job while seeking reemployment in the services.

The case at hand is a case where the respondent›s termination was held illegal and, in consequence thereof, he was awarded lump sum compensation of Rs.12, 500/ in full and final satisfaction. It is not in dispute that the respondent also accepted the compensation. This was, therefore, not a case of a retrenchment of the respondent from service as contemplated under Section 25(H) of the ID Act.

That apart and more importantly, the respondent was not entitled to invoke the provisions of Section 25 (H) of the ID Act and seek re employment by citing the case of another employee (Peon) who was already in employment and whose services were only regularized by the appellant on the basis of his service record in terms of the Rules. In our view, the regularization of an employee already in service does not give any right to retrenched employee so as to enable him to invoke Section 25 (H) of the ID Act for claiming re employment in the services. The reason is that by such act the employer do not offer any fresh employment to any person to fill any vacancy in their set up but they simply regularize the services of an employee already in service. Such act does not amount to filling any vacancy.

In our view, there lies a distinction between the expression ‘employment’ and ‘regularization of the service”. The expression ‘employment’ signifies a fresh employment to fill the vacancies whereas the expression ‘regularization of the service’ signifies that the employee, who is already in service, his services are regularized as per service regulations.

In our view, the Labour Court was, therefore, justified in answering the reference in appellant›s favour and against the respondent by rightly holding that Section 25(H) of the ID Act had no application to the facts of this case whereas the High Court (Single Judge and Division Bench) was not right in allowing the respondent’s prayer by directing the appellant to give him reemployment on the post of Peon.

In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. Impugned order is set aside and the award of the Labour Court is restored.

EMPLOYEES STATE INSURANCE CORPORATION

v.

VENUS ALLOY PVT. LTD. [SC]

Civil Appeal No. 1464 of 2019 (arising out of SLP(C) No. 12812 of 2015)

A M Sapre & Dinesh Maheshwari, JJ. [Decided on 01/06/2019]

ESI Act, 1948 – Section 2 – Director – Whether an employee – Held, Yes.

Brief facts:

The short question calling for determination in this appeal is as to whether the Directors of respondent-Company, who are receiving remuneration, come within the purview of “employee” under sub-section (9) of Section 2 of the Employees’ State Insurance Act, 1948 (‘the ESI Act’)?

Decision: Appeal allowed

Reason:

In the case of Employees’ State Insurance Corporation v. Apex Engineering Pvt. Ltd. 1997 (77) F.L.R. 878, the Board of Directors of respondent-Company resolved to elect one of its Directors as Managing Director of the Company and to grant him annual remuneration of Rs. 12,000/- for rendering services as Managing Director. The question was as to whether the said Managing Director was an “employee” within the meaning of Section 2(9) of the ESI Act? Though the High Court and the ESI Court had answered this question against the

Corporation, but this Court allowed the appeal and, inter alia, held that the Managing Director, even when to be treated as principal employer, could also be an employee and could carry such dual capacity.

We are clearly of the view that what has been observed and held by this Court in Apex Engineering (supra), in relation to the Managing Director of a Company, applies with greater force in relation to a Director of the Company, if he is paid the remuneration for discharge of the duties entrusted to him.

It is noticed that in the present case, the appellant-Corporation in its impugned order dated 06.04.2005 specifically asserted that the Directors of the Company were paid remuneration at the rate of Rs. 3,000/- p.m. and they were falling within the definition of "employee" under the ESI Act and hence, contribution was payable in regard to the amount paid to them. Interestingly, even while seeking to challenge the aforesaid order dated 06.04.2005 by way of proceedings under Section 75 of the ESI Act, the respondent-Company chose not to lead any evidence before the Court. Hence, there was nothing on record to displace the facts asserted on behalf of the appellant-Corporation in its order dated 06.04.2005; rather the factual assertions in the said order remained uncontroverted. The order dated 06.04.2005 had been questioned by the respondent-Company only on the contention that the Directors do not fall within the category of "employee" but no attempt was made to show as to how and why the remuneration paid to its Directors would not fall within the purview of "wages" as per the meaning assigned by subsection (22) of Section 2 of the ESI Act?

The ESI Court cursorily attempted to distinguish the decision of this Court in Apex Engineering (supra) only with reference to the fact that therein, the amount was being received by the Managing Director. The High Court, on the other hand, overlooked the said decision of this Court and relied only on the decisions of the Bombay High Court though the propositions in the referred decisions of the Bombay High Court stood effectively overruled by the decision in Apex Engineering (supra) where this Court held in no uncertain terms that the High Court was in error in taking the view that the Managing Director of the Company was not an employee within the meaning of Section 2 (9) of the ESI Act. The said decision directly applies to the present case and we have no hesitation in concluding that the High Court in the present case has been in error in assuming that the Director of a Company, who had been receiving remuneration for discharge of duties assigned to him, may not fall within the definition of an employee for the purpose of the ESI Act. There had been no reason to interfere with the order dated 06.04.2005 as issued by the appellant- Corporation.

DELHI TRANSPORT CORPORATION

v.

SATNARAIN [DEL]

W.P. (C) 2405 of 2017 Rekha Palli, J. [Decided on 19/02/2019]

Industrial dispute – Conductor dismissed from service – Labour court directed to reinstate him with service continuity and consequential benefits – Employer reinstated the workman but did not pay the benefits – Whether tenable – Held, No.

Brief facts:

The respondent who was working as a Conductor in the DTC, was issued a charge-sheet alleging that he had failed to deposit the wage bill for the cash received by him. The respondent was thereafter removed from service based on the findings of a domestic inquiry held against him. Upon the respondent raising an industrial dispute, a reference was made to the learned Labour Court regarding the validity of the respondent's termination. The learned Labour Court, after considering the material produced on record, passed an Award directing reinstatement of the respondent with continuity of service and all other consequential benefits, excluding back wages.

After the dismissal of the petitioner's writ petition, the respondent was reinstated in service on 13.12.2014, without being granted any benefits for the period from 06.09.2010, i.e., the date of publication of the Award, till his reinstatement, thereby compelling the respondent to move the Labour Court seeking release of wages from the period from 6th September, 2010 to 12th December, 2014 along with interest. The said application was allowed by the learned Labour Court vide its impugned order. The present writ petition has been filed by the petitioner/ DTC impugning the above said order.

Decision: Petition dismissed.

Reason:

I have heard the learned counsel for the parties and with their assistance, perused the record. In my view, even though the learned counsel for the petitioner has raised two contentions, the same are inter-related. The only question which really needs to be determined by this Court is as to whether the petitioner having filed a writ petition, thereby preventing the respondent from joining service, can the petitioner still deprive the respondent of the wages for the said period during which he was very much willing and ready to join back his duties.

In my view, once an employee is prevented from joining duties not because of his fault/inaction but because of the employer not permitting him to join duties, he would be certainly entitled to get the benefit for the said period. Once the petitioner's writ petition was dismissed, it is evident that this Court did not find any infirmity in the impugned Award directing the petitioner's reinstatement. In these circumstances, it would be most unjust to deprive the respondent of the benefits under the Award which has ultimately been upheld by this Court. There is no merit in the petitioner's contention that merely because this Court, while dismissing the writ petition, did not pass any specific order directing payment of wages for the said to the respondent for the period that the petition remained pending, the respondent would not be entitled to wages for the period during which he has admittedly not worked. The aforesaid contention overlooks the fact that this Court, while dismissing the writ petition, found no infirmity in the impugned Award where under the respondent was entitled to be reinstated and therefore, once it is evident that the respondent was denied reinstatement only because the petitioner chose to file a misconceived writ petition, he cannot be denied the benefit for the period he was willing to re-join his duties but could not for no fault of his own.

I also do not find any merit in the petitioner's submission that as there was no predetermination of the amount towards wages for the period from 06.09.2010 till 12.12.2014, the learned labour Court could not have entertained the application under Section 33(C)(2) of the Act. In my view, once the amount of wages to which the respondent would have been eligible had he been reinstated in terms of the Award, is not in dispute, it cannot be said that the amount being claimed by the respondent under the Application, was not quantifiable and therefore, I find no reason as to why the application was filed was not maintainable.

For the aforesaid reasons, I find absolutely no perversity or infirmity in the impugned order. The writ petition being meritless, is dismissed along with pending application.

CENTRAL BOARD OF TRUSTEES

v.

STANDING CONFERENCE OF PUBLIC ENTERPRISES [DEL]

W.P. (C) No.1663 of 2017 Rekha Palli, J. [Decided on 14/02/2019]

Employees Provident funds and miscellaneous Provisions Act,1952 – Section 7A – Scope of enquiry – Employees employed through contractors – Liability of principal employer – No examination of contractors during the enquiry – Whether determination of liability tenable – Held, No.

Brief facts:

The petitioner initiated proceedings [through the concerned PF commissioner] under Section 7-A of the Act against the respondent for determination of the provident fund dues payable by the respondent towards the employees engaged through by its contractors. Without examining the contractors, the PF commissioner determined the contribution dues and directed the respondent to deposit the contribution for workers of the contractors also. On appeal this order was set aside and remanded back to the PF commissioner to decide the issue after making proper enquiry and examining the witness of the contractors. The petitioner challenged this judgement of the appellate tribunal.

Decision: Petition dismissed.

Reason:

I have heard the learned counsel for the parties at length and with their assistance, perused the records.

The issue in the present case is as to whether merely because it is the duty of the principal employer to comply with the provisions of the Act, even qua the employees employed through its contractors, can the competent authority while conducting an inquiry under the provisions of Section 7-A of the Act, simply claim the amount from the principal employer without even making at least a bona fide attempt to determine the contributions made by the contractors and thereafter determine the shortfall, if any, required to be deposited by the principal employer.

The facts of the present case reveal that the petitioner, had initiated proceedings under the Act after an inordinate delay of twelve years which in itself would have made it very difficult for the respondent to obtain the requisite information from its contractors and in these circumstances, in my view, there was no reason as to why the petitioner ought not to resort to its statutory powers under Section 7-A of the Act to enforce the presence of the contractors in order to make a proper assessment of the dues which were payable by the respondent towards the employees engaged through the contractors. Even though the petitioner may be under no obligation to approach the contractors engaged by the respondent, but once a specific request for summoning the contractors, was made by the respondent, the petitioner by issuing summons to the contractors on a solitary occasion and by recording the statement of the sole contractor i.e. M/s A.P.Bansal & Company, who had appeared before the Enforcement Officer, had merely offered lip service to its statutory duty under Section 7-A of the Act by not making any bona fide efforts to enforce the presence of the other contractors. Merely because it is the respondent’s duty to ensure compliance with the provisions of the Act in respect of the employees engaged through the Contractors also, cannot absolve the petitioner/organization of its statutory duty to carry out an enquiry as envisaged under the Act. There is a reason as to why section 7A of the Act gives such vide powers to the Provident Fund Commissioner while making an inquiry under the Act and the reason obviously is to ensure that a proper and just assessment is made by collecting all available evidence.

Thus, the question would not only be as to whether the principal employer produces relevant material but it would also be whether the provident fund commissioner who is the statutory authority, has exercised the powers vested in him to collect the relevant evidence before determining the payable amount.

I have also considered the decisions relied on by the petitioner. These decisions, however, do not deal with the issue arising in the present petition which pertains to the scope of the statutory enquiry, required to be conducted before passing an assessment order. On the other hand, the decision relied upon the respondent, deals with exactly the same question as arising in the present case wherein while dealing with a somewhat similar fact situation.

In the light of the aforesaid decision of the Supreme Court in Food Corporation of India v. The Provident Fund Commissioner& Ors. 1990 (60) F.L.R. 15, that there can be no doubt about the fact that it was incumbent upon the petitioner while making an inquiry in accordance with Section 7A of the Act to take all possible steps as set out in the Act to make a correct and proper assessment of the dues. It needs no reiteration that while making such an inquiry, the Commissioner has ample powers not only to summon any witness but also has powers to enforce the attendance of any person or summon him on oath. In these circumstances, once the tribunal found that the petitioner, had not taken adequate steps to summon all the contractors, by enforcing their attendance and that too in a case where the petitioner had initiated proceedings after an inordinate delay of twelve years, which in itself would have made it very difficult for the respondent to obtain information from its erstwhile contractors as also the fact that the assessment order itself is made on the basis of ad hoc calculations, I find absolutely no infirmity in the order of the tribunal directing the petitioner to summon all the contractors and then carry out the requisite assessment.

THE REGIONAL PROVIDENT FUND COMMISSIONER

v.

VIVEKANANDA VIDYAMANDIR & ORS [SC]

Civil Appeal No. 6221 of 2011 connected with batch of appeals

Arun Misra & Navin Sinha, JJ. [Decided on 28/02/2019]

EPF Act – Definition of basic wages – Special allowances – Whether becoming part of basic wages – Held, Yes.

Brief facts:

The appellants with the exception of Civil Appeal No. 6221 of 2011, are establishments covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"). The appeals raise a common question of law, if the special allowances paid by an establishment to its employees would fall within the expression "basic wages" under Section 2(b)(ii) read with Section 6 of the Act for computation of deduction towards Provident Fund. The appeals have therefore been heard together and are being disposed by a common order.

Decision: Department's appeal allowed and appeals of establishments dismissed.

Reason:

Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The aforesaid provisions fell for detailed consideration by this Court in Bridge and Roof Co. (India) Ltd. v. Union of India, (1963) 3 SCR 978 when it was observed as follows:

> "8. Then we come to clause (ii). It excludes dearness allowance, house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", S.6 then provides for inclusion of dearness allowance for purposes of contribution. But that

is clearly the result of the specific provision in s.6 which lays down that contribution shall be 61/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in S.6. It seems that the basis of inclusion in S.6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under S.6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in S.6; but house rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of «basic wages», even though the basis of payment of house rent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from «basic wages». Similarly, commission or any other similar allowance is excluded from the definition of «basic wages» for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in S.6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by S.6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through S.6."

Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "basic wages" was considered in Muir Mills Co. Ltd., Kanpur Vs. Its Workmen, AIR 1960 SC 985 observing:

"11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"…"

The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4 SCC 37, it was observed as follows:

"10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance."

That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8 SCC 90.

Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

Resultantly, Civil Appeal No. 6221 of 2011 is allowed. Civil Appeal Nos. 396566 of 2013, Civil Appeal Nos. 396768 of 2013, Civil Appeal Nos. 396970 of 2013 and Transfer Case (C) No.19 of 2019 are dismissed.

MODERN TRANSPORTATION CONSULTATION SERVICES PVT. LTD. & ANR.

v.

C.P.F. COMMISSIONER [SC]

Civil Appeal No. 7698 of 2009

A M Sapre & D Maheshwari, JJ. [Decided on 26/03/2019]

EPF Act – Section 2(f) – Excluded employee – Employees retiring from Railways – Withdrawing their accumulated contribution – Joined another establishment – Whether to be treated as excluded employee – Held, No.

Brief facts:

The basic question arising for determination in this appeal is as to whether the retired employees of Railways, who had withdrawn all the superannuation benefits, including full amount of accumulations in their provident fund accounts, are to be treated as "excluded employees" in terms of Paragraph 2(f) of the Scheme of 1952? If to be treated as "excluded employees", the said retired employees of Railways, on being re-employed by the appellants, may not be required to join the Fund created under the said Scheme of 1952 and consequently, the appellants may not be obliged to make any contribution in that regard.

Decision: **Appeal dismissed.**

Reason:

It is not a matter of much debate in this case that the appellants otherwise answer to the description of "employer" under the Act of 1952 and their establishment is covered thereunder. The basic contention urged in this matter on behalf of the appellants is that the persons engaged by them had been the members of General Provident Fund while working as the employees of Railways and had withdrawn the full amount of accumulations in GPF and are, therefore, to be treated as "excluded employees". This contention has fundamental shortcomings as pointed out infra.

The crucial aspect to be considered in this matter is as to whether the definition of "excluded employees" in Paragraph 2(f) as also the stipulation in Paragraphs 26 and 69 of the Scheme of 1952 refer to any provident fund or only to the Fund under the Scheme of 1952? As noticed above, in the setup and structure of the Act of 1952, specific distinction is maintained between the Fund, which is created by the Central Government under Section 5(1) of the Act and any other provident fund, which is created by an employer. Significantly, clause (f) of Paragraph 2 of the Scheme of 1952 refers to "the Fund" and not to "any Fund"; and Paragraphs 26 and 69 also refer to "the Fund" and not to "any Fund". The determiner "the", as occurring in Paragraph 2(f) as also Paragraph 69 before the expression "Fund" makes it clear that the reference therein is only to the Fund which is created under the Scheme of 1952 and it is not a general reference to any Fund. The requirement of joining the Fund under Paragraph 26 ibid. is also of joining that Fund which is created under the Scheme of 1952. In other words, obviously and undoubtedly, the Fund referred to in Paragraphs 2(f), 26 and 69 of the Scheme of 1952 is that Fund, which is created under the Scheme of 1952 and the reference is not to any other Fund. Thus, to be covered under the expression "excluded employee" by virtue of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) ibid., the employee must be such who was a member of the Fund established under the Scheme of 1952 and who had withdrawn full amount of his accumulations in the said Fund on retirement from service after attaining the age of 55 years.

On the plain interpretation aforesaid, we have not an iota of doubt that the retired Railway employees, who had withdrawn their accumulations in General Provident Fund or any other Fund of which they were members, could not have been treated as "excluded employees" for the purpose of the Scheme of 1952 for the reason that such a withdrawal had not been from the Fund established under the Scheme of 1952. In fact, there was no occasion for them to make any withdrawal from the Fund established under the Scheme of 1952 because they were never the members of the said Fund. In other words, the employees in question were not answering to the requirements of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) of the Scheme of 1952 and hence, were not the "excluded employees". The Division Bench of the High Court has rightly rejected the contention of appellants that every employee, who had withdrawn full amount from any provident fund, should be treated as an "excluded employee". In our view, the answer by the Division Bench of the High Court is in accord with law and deserves to be approved.

To summarise, in the framework and setup of the Scheme of 1952, the concept remains plain and clear that if a person is member of the Fund created thereunder i.e., under the Scheme of 1952 and withdraws all his accumulations therein, he may not be obliged to be a member of the same Fund under the Scheme of 1952 over again and could be treated as an "excluded employees". However, such is not the relaxation granted in relation to an employee who was earlier a member of any other Fund but later on joins such an establishment where he would be entitled to membership of the Fund created under the Scheme of 1952. This framework of the provisions and stipulations appears to be best serving the interest of employees, while providing them with continued financial security. Therefore, we find no reason to take any view different than the one taken by the Division Bench of the High Court in this case.

DELHI TRANSPORT CORPORATION

v.

JASBIR SINGH [SC]

W.P.(C). No. 3451 of 2017

Vipin Sanghi & Rekha Palli, JJ. [Decided on 28/03/2018]

Employee dismissed for causing accident – Admitted his guilt and paid compensation in the criminal court – Tribunal directing reinstatement with 50% back wages – Whether correct as to reinstatement – Held, Yes. Whether correct as to 50% back wages – Held, No.

Brief facts:

The respondent was appointed as a driver and while he was on probation, he was involved in an accident. The petitioner Delhi Transport Corporation (DTC) assails the order passed by the Central Administrative Tribunal, which has allowed the Original Application preferred by the respondent and set aside the show cause notice, termination order, and the appellate orders. The Tribunal has directed reinstatement of the respondent with 50 % back wages.

Decision: Appeal partially allowed.

Reason:

Having heard learned counsels, we are of the view that the direction issued by the Tribunal for payment of Rs. 50% back wages were not justified in the facts and circumstances of the case. The respondent was also responsible for the state in which he found himself. While on probation, he was involved in an accident and he went ahead and confessed before the Court with regard to his guilt. He also compounded the offence under by depositing a fine of Rs. 50,000/-. The aforesaid being the position and considering the fact that the respondent had not actually served - post his termination, in our view, there is no justification in directing payment of 50% back wages.

To that extent, the impugned order is set aside. We direct the petitioner to reinstate the respondent positively within two weeks. In case, this direction is not complied with, the respondent shall be entitled to wages from the last date fixed for his reinstatement.

GLOBE GROUND INDIA EMPLOYEES UNION

v.

LUFTHANSA GERMAN AIRLINES & ANR [SC]

Civil Appeal Nos. 4076-4077 of 2019 [Arising out of S.L.P. (C) Nos.25341-42 of 2017]

R. Banumathi & R. S. Reddy, JJ. [Decided on 23/04/2019]

Industrial Disputes Act,1947 – Section 10 – Employees of subsidiary company raised dispute over retrenchment – Impleadment of the holding company sought – Whether permissible – Held, No.

Brief facts:

Globe Ground India Private Ltd [Respondent No.2 herein] is subsidiary of Lufthansa German Airlines [Respondent 1 herein]. Appellant is the employees union representing the employees of Respondent No.2.

The appellant raised the industrial dispute which was referred by the Central Government to Industrial Tribunal-cum-Labour Court. In the proceedings the appellant sought to implead the respondent No.1 also as it was the holding company of respondent No.2. The impleadment application was allowed by the Tribunal, which was on appeal reversed by the High Court. Hence the present appeal before the Supreme Court seeking the impleadment of the respondent No.1 holding company in the industrial reference made against the subsidiary Respondent No.2 Company.

Decision: Appeal dismissed.

Reason

Having heard learned counsel on both sides, we have perused the material placed on record. The only question which is required to be considered is whether, the first respondent – Lufthansa German Airlines is to be impleaded as a party respondent or not, in adjudication proceedings to answer the reference referred by the Central Government to the Industrial Tribunal-cum-Labour Court vide order dated 4.2.2010. From a reading of the reference, which is referred to Industrial Tribunal, it is clear that the reference which is required to be answered by the Industrial Tribunal is that, whether the action of the Management of M/s Globe Ground India (Pvt.) Limited, in closing down their establishment on 15.12.2009 and retrenching the services of 106 workmen is justified and legal. At this stage, it is apt to refer to Section 10 of the Industrial Disputes Act. It is clear from the above said section, whenever, the appropriate Government refers the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points only and matters incidental thereto.

Whenever, an application is filed in the adjudication proceedings, either before the Industrial Tribunal in a reference made under the Industrial Disputes Act, 1947 or any other legal proceedings, for impleadment of a party who is not a party to the proceedings, what is required to be considered is whether such party which is sought to be impleaded is either necessary or proper party to decide the lis. The expressions “necessary” or “proper” parties have been considered time and again and explained in several decisions. The two expressions have separate and different connotations. It is fairly well settled that necessary party, is one without whom no order can be made effectively. Similarly, a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings.

Reverting back to the facts of the case on hand it is clear that the first respondent had a subsidiary, namely, Globe Ground Deutschland GmbH, which was holding 51% shares along with 49% shares held by the Bird Group in the second respondent company. Further, it is clear that the Bird Group had floated another company, Bird Worldwide Flight Services Ltd. to provide ground handling and ancillary services which started from the month of January, 2009. It is the allegation of the appellant’s union that even after the formation of a new company, such new company is utilizing same equipment and vehicles belonging to the second respondent. It is also the allegation of the appellant that after the formation of the new company, it has retained most of the employees, except the trade union activists. The appellant workers’ union does not seek employment of the alleged retrenched workers in the first respondent.

Further, we are of the view that even in a subsidiary company which is an independent corporate entity, if any other company is holding shares, by itself is no ground to order impleadment of parent company per se. In the case at hand, it is clear that the second respondent itself is a company in which the subsidiary of the first respondent, namely, Globe Ground Deutschland GmbH, was holding 51% shares and 49% shares were held by the Bird Group. As per the case of the appellant, the Bird Group has floated another company and started handling services from the month of January, 2009 by uitlizing the same equipments and vehicles belonging to the second respondent. Further, having regard to limited scope of adjudication, to answer the reference, which is circumscribed by Section 10(4) of the Industrial Dispute Act, 1947, we are of the view that the first respondent is neither necessary nor proper party, to answer the reference by the Industrial Court. Further, we do not find any error in the order passed by the learned Single Judge or in the order of the Division Bench passed by the High Court of Delhi in the impugned judgment, so as to interfere with such reasoned and concurrent findings recorded by the courts. Thus, these civil appeals are devoid of merits and the same are accordingly dismissed, with no order as to costs.

THE STATE BANK OF INDIA & ORS.

v.

P. SOUPRAMANIANE [SC]

Civil Appeal No. 7011 of 2009

L. Nageshwar Rao & M.R.Shah, JJ. [Decided on 26/04/2019]

Banking service – Messenger – Convicted for assault and later discharged on probation – Dismissed from service for moral turpitude – Whether tenable – Held, No. What is moral turpitude-explained.

Brief facts

The Respondent who was working as a Messenger in the State Bank of India at Puducherry was discharged from service by an order dated 15.05.1986 on the ground of his conviction by a criminal court for an offence involving moral turpitude. The respondent was convicted for the offence committed under section 324 of the IPC [assault] and sentence of 3 months imprisonment was given. The appellate court released him under section 360 of the CrPC on probation on the ground that the Respondent was employed as a Messenger in a Bank and any sentence of imprisonment would affect his career.

The appeal filed by the Respondent against the order of discharge was dismissed and the Staff Union took up the cause of the Respondent and made a representation on his behalf which was also rejected. Challenging the aforementioned orders, the Respondent filed a Writ Petition in the High Court of Judicature at Madras which was dismissed by a learned Single Judge. Aggrieved thereby, the Respondent filed a Writ Appeal which was allowed by the Division Bench of the Madras High Court. The order of discharge of the Respondent from service was set aside and the Appellants were directed to reinstate the Respondent. The Appellants were directed to pay 1/4th of the salary from the date of discharge till the date of reinstatement as back wages. Now the appellant bank is before the Supreme Court.

Decision: Appeal dismissed.

Reason

We do not agree with the reasons given by the High Court for setting aside the order of discharge and directing the reinstatement of the Respondent in service. A showcause notice was issued to the Respondent in which it was categorically mentioned that the Respondent cannot continue in service after his conviction in a criminal case involving moral turpitude in view of Section 10(1) (b) (i) of the Banking Regulation Act, 1949. After considering the explanation of the Respondent, an order of discharge was passed. The High Court is not right in holding that no reasons had been given by the bank for discontinuing the Respondent from service. The High Court committed an error in holding that the order of discharge should be set aside on the ground that the provision of law under which the Respondent was discharged was not mentioned in the order. Yet another reason given by the High Court for interference with the order of discharge is that the criminal court released the Respondent on probation only to permit him to continue in service. The release under probation does not entitle an employee to claim a right to continue in service. In fact the employer is under an obligation to discontinue the services of an employee convicted of an offence involving moral turpitude. The observations made by a criminal court are not binding on the employer who has the liberty of dealing with his employees suitably.

Though we do not agree with the reasons given by the High Court for setting aside the order of discharge of the Respondent from service, it is necessary to examine whether Section 10 (1) (b) (i) of Banking Regulation Act is applicable to the facts of the case. Conviction for an offence involving moral turpitude disqualifies a person from continuing in service in a bank. The conundrum that arises in this case is whether the conviction of the Respondent under Section 324 IPC can be said to be for an offence involving moral turpitude.

There can be no manner of doubt about certain offences which can straightaway be termed as involving moral turpitude e.g. offences under the Prevention of Corruption of Act, NDPS Act, etc. The question that arises for our consideration in this case is whether an offence involving bodily injury can be categorized as a crime involving moral turpitude. In this case, we are concerned with an assault. It is very difficult to state that every assault is not an offence involving moral turpitude. A simple assault is different from an aggravated assault. All cases of assault or simple hurt cannot be categorized as crimes involving moral turpitude. On the other hand, the use of a dangerous weapon which can cause the death of the victim may result in an offence involving moral turpitude. In the instant case, there was no motive for the Respondent to cause the death of the victims. The criminal courts below found that the injuries caused to the victims were simple in nature. On an overall consideration of the facts of this case, we are of the opinion that the crime committed by the Respondent does not involve moral turpitude. As the Respondent is not guilty of an offence involving moral turpitude, he is not liable to be discharged from service.

For the aforementioned reasons, we affirm the judgment of the High Court. The Appeal is dismissed accordingly.

REGIONAL MANAGER, U.P.S.R.T.C. & ANR

v.

MASLAHUDDIN (DEAD) [SC]

Civil Appeal No. 3959 of 2019 [Arising out of SLP (C) No. 29305 of 2008] with connected appeals.

L. Nageshwar Rao & M.R. Shah, JJ. [Decided on 16/04/2019]

Superannuation of employees – Initially employed in category D – Retirement age 60 years – Subsequently placed in category C with retrospective effect – Retirement age 58 years – Accordingly retired at 58 years – Employees claimed they are entitled service up to 60 years – Whether tenable – Held, No.

Brief facts:

As common question of law and facts arise in these appeals, as such, arising out of the impugned judgment and order passed by the High Court, all these appeals are being disposed of by this common judgment and order.

Respondents were appointed as drivers by the appellant Corporation and placed them under category D, for which the retirement age is 60 years. During the course of their service their pay scale have been revised and due to this they have been placed under category C, for which the retirement age is 58 years. The appellant retired them at the age of 58 years and the respondents raised a dispute over this and the labour court as well as the High Court held that the respondents' retirement age should be 60. Hence the present appeal of the appellant Corporation.

Decision: Appeals allowed.

Reason

We have heard the learned counsel appearing on behalf of the respective parties at length. The issue in the present appeals is in a very narrow compass. The short question which is posed for consideration by this Court is whether the respective respondents Drivers would fall in Group "D" or Group "C"?

It is required to be noted that all those employees who were getting the salary less then Rs.200/ would fall in Group "D" category. As per the Rules prevailing at the relevant time, the employees getting salary more than Rs.200/ would fall in Group "A", "B" or "C" as per the classification and those who would not fall in either Group "A", "B" or "C" category, they would fall in Group "D" category. As per the Rules prevailing at the relevant time, the age of superannuation of Group "D" employees was 60 years and for the others, i.e. Group "A", "B" and "C", the age of retirement was 58 years.

It appears, (from the affidavit of the appellant), that at the time when the respective respondents Drivers were appointed, they were in the pay scale of Rs.185/- and under the normal circumstances they would fall in Group "D" category and therefore their age of superannuation would be 60 years. However, in the year 1982 the pay scale of all the employees of the Corporation was revised, including the Drivers, and the pay scale of the Drivers of the Corporation was revised to Rs.335/- from Rs.200/-. That the pay scale of the respondents was also revised to Rs.335/ w.e.f. the date of their initial appointment and they were also paid the arrears from the date of their initial appointment till August, 1981. That, in the year 1984, it was resolved to fix the age of superannuation of the Drivers and Conductors as 58 years and place them in Group "C". In the year 1985, the Board of Directors resolved that the classification of posts of all the employees would be revised in view of the recommendations of the Second Pay Commission and that the pay scale of the Drivers and Conductors was again revised to Rs. 335/- and above and that they would be placed in Group "C". That the above resolution was notified on 10.06.1985 and it was also clarified that the revision in classification will be applicable while determining the age of retirement of the employees.

There is no further counter on behalf of the respondents to the rejoinder filed on behalf of the appellant Corporation. Therefore, the averments in the rejoinder on behalf of the appellant Corporation had gone uncontroverted.

In view of the above, both the Labour Court as well as the High Court have committed a grave error in holding that the respective respondents Drivers were in Group "D" category and that their age of superannuation would be 60 years. As the pay scale of the respective respondents Drivers was revised to Rs.335 with retrospective effect and in fact they were paid the arrears also, thereafter it was not open for the respondents Drivers to contend that as per their original pay scale, their salary was less than Rs.200/-, they would be in Group "D" category. Once having taken the advantage of the revised pay scale retrospectively and that their pay scale was revised to Rs. 335 /- with retrospective effect and they were paid the arrears which the respective respondents accepted, in that case, they would fall in Group "C" category and, therefore, considering the Rules, their age of superannuation would be 58 years and not 60 years, as contended on behalf of the respective respondents Drivers. Therefore, the appellant Corporation rightly retired/superannuated the respective respondent Drivers on completion of 58 years of age.

In view of the above and the reasons stated above, all these appeals succeed and the impugned common judgment and order passed by the High Court is hereby quashed and set aside. In the facts and circumstance of the case, there will be no order as to costs.

EMPLOYEE STATE INSURANCE CORPORATION

v.

BATRA HOSPITAL & MEDICAL RESEARCH CENTRE & ORS [DEL]

CRL.M.C. No.3213 of 2013

Suresh Kait, J. [Decided on 15/01/2016]

ESI Act – Section 85 – Inspection of establishment – Respondent establishment was not covered under the Act-respondent establishment refused to produce records for inspection – Whether could be prosecuted – Held,No.

Brief facts:

The officials of the petitioner visited the establishment of the respondent for inspection of the records. However, respondent establishment has not provided the records. Since, the respondent did not provide the record, therefore, petitioner filed complaint against the respondent. The complaint was dismissed and the respondent was discharged. The order of the trial court is assailed in the present petition.

Decision: Petition dismissed.

Reason:

The Supreme Court in *Srinivasa Rice Mills v ESI Corporation (2007) 1 SCC 705* while dealing with identical issue observed as under:-

"17. Admittedly, the rice mills are situated within the Narsimhapuram area. The appointed day therefor was 1-8-2000. The factories of Appellants were inspected prior to that date. Prior to that date, therefore, Appellants were not bound to comply with the provisions of the Act. They could appoint employees at their own sweet will. But the period wherefor the provisions of the Act would be applicable is 12 months preceding the said date, viz., from 1-8-1999 to 31-7- 2000. Compliance of the requirements of the statutes on the part of the employer, however, would begin from the appointed day, viz., 1-8-2000. 20. The scheme of the Act does not suggest that all the employees would come within the purview of the said Act. Those employees who draw wages as is defined in Section 2(22) of the Act would be the employees who would be covered thereunder. As noticed hereinbefore, inspection of the factories was carried out prior to the date of coming into force of the Act. Such inspections, thus, could have been carried out only in terms of the provisions contained in Section 45 of the Act, which could mean that the Inspector would be appointed for the purpose of the Act. He is authorized under the Act to enquire into the correctness of any of the particulars stated in any return referred to in Section 44 or for the purpose of ascertaining whether any of the provisions has been complied with. It is, therefore, evident that any action taken prior to or in furtherance of a report made on an inspection, prior to coming into force of the Act, would be *ultra virus* Section 45(2) of the Act. Once the inspection is held to be illegal, Respondent could not have taken any statutory action for imposition of penalty."

It is admitted fact that respondent establishment came under the provisions of the said Act only with effect from 01.04.2011 and before that the said establishment was not covered under the said Act. It is not in dispute the petitioner issued the notice on 26.12.2007 to the hospital and not to any particular department. Therefore, the respondent is not liable to be prosecuted under the provisions of the said Act. The petitioner itself is not clear whether the respondent hospital is maintaining equipment maintenance department or not and that the records sought to be produced by the official of the respondent pertained to such department only or with respect to entire hospital. Admittedly, respondent was not covered under the said Act in the year 2007, therefore, learned Trial Court has rightly rejected the case of the petitioner and discharged the respondent.

NANDRAM

v.

GARWARE POLYSTER LTD [SC]

Civil Appeal No. 1409 of 2016 (Arising out of SLP (C) No. 33917 of 2011)

Kurian Joseph&Rohinton Fali Nariman, JJ. [Decided on 16/02/2016]

Industrial Disputes Act, 1954 – Company having registered office at Aurangabad – Workman appointed in Aurangabad and later transferred to Pondicherry – Pondicherry establishment closed – Workman was terminated – Workman raised dispute and filed complaint at Aurangabad – Rejected on the ground of lack of jurisdiction – Whether correct – Held, No.

Brief facts:

The appellant was employed by the respondent initially as Boiler Attendant in the year 1983 in the Company in Aurangabad. Thereafter he was promoted as Junior Supervisor in the year 1987 and worked in the Aurangabad plant only. In the year 1995, he was again promoted as Senior Supervisor and continued in Aurangabad. However, by proceedings dated 21.10.2000, the appellant was transferred to Silvasa in Gujarat. By another order dated 20.12.2001 he was transferred from Silvasa to Pondicherry. While so, by proceeding dated 12.04.2005, appellant was terminated from service w.e.f. 15.04.2005 on account of closure of the establishment at Pondicherry. It is not in dispute that the registered office of the Company is in Aurangabad and the decision to close the establishment at Pondicherry was taken by the Company at Aurangabad.

Aggrieved by the termination, appellant moved the Labour Court at Aurangabad in complaint ULP No.56 of 2005. Despite the objection taken by the respondent that the Labour Court lacked jurisdiction, the Court held in favour of the complainant.

Aggrieved, the respondent-Company took up the matter before the Industrial Court at Aurangabad in revision. The Industrial Court at Aurangabad vide order dated 04.07.2009 set aside the order passed by the Labour Court and dismissed the complaint of the appellant holding that the Labour Court at Aurangabad did not have territorial jurisdiction to entertain the complaint of the appellant, since the termination took place at Pondicherry. The appellant moved the High Court of Judicature of Bombay at Aurangabad in Writ Petition No. 4968 of 2009. The High Court by judgment dated 07.06.2011 affirmed the view taken by the Industrial Court and held that the situs of employment of the appellant being Pondicherry, the Labour Court at Aurangabad did not have territorial jurisdiction to go into the complaint filed by the appellant. Thus aggrieved, the appellant is before this Court.

Decision: Appeal allowed.

Reason:

In the background of the factual matrix, the undisputed position is that the appellant was employed by the Company in Aurangabad, he was only transferred to Pondicherry, the decision to close down the unit at Pondicherry was taken by the Company at Aurangabad and consequent upon that decision only the appellant was terminated. Therefore, it cannot be said that there is no cause of action at all in Aurangabad. The decision to terminate the appellant having been taken at Aurangabad necessarily part of the cause of action has arisen at Aurangabad. We have no quarrel that Labour Court, Pondicherry is within its jurisdiction to consider the case of the appellant, since he has been terminated while he was working at Pondicherry. But that does not mean that Labour Court in Aurangabad within whose jurisdiction the Management is situated and where the Management has taken the decision to close down the unit at Pondicherry and pursuant to which the appellant was terminated from service also does not have the jurisdiction. In the facts of this case both the Labour Courts have the jurisdiction to deal with the matter. Hence, the Labour Court at Aurangabad is well within its jurisdiction to consider the complaint filed by the appellant. Therefore, we set aside the order passed by the High Court and the Industrial Court at Aurangabad and restore the order passed by the Labour Court, Aurangabad though for different reasons. The Labour Court shall consider the complaint on merits and pass final orders within six months from today. The parties are directed to appear before the Labour Court on 08.03.2016.

JAYA BISWAL & ORS

v.

BRANCH MANAGER, IFFCO TOKIO GENERAL INSURANCE COMPANY LTD & ANR [SC]

Civil Appeal No.869 of 2016 (Arising out of S.L.P.(C) No. 1903 of 2015)

V. Gopala Gowda & Uday Umesh Lalit, JJ. [Decided on 04/02/2016]

Employees Compensation Act, 1923 – Truck driver died due to accident while on proceeding to deliver the goods on the way – Whether accident arose in the course of employment – Held, yes.

Brief facts:

The present appeal arises out of the impugned judgment and order dated 13.08.2014 passed in F.A.O. No. 472 of 2013 by the High Court of Orissa at Cuttack, wherein the learned single Judge

reduced the amount of compensation awarded to the appellants by the learned Commissioner for Employees'

Compensation from Rs.10,75,253/ – to Rs.6,00,000/ – and also waived the award of 50% penalty with interest.

The elder son of appellant Nos. 1 and 2 worked as a truck driver with one Bikram Keshari Patnaik (respondent no. 2 herein). On 19.07.2011, he met with an accident while on his way to deliver wheat bags in the truck from Berhampur, Orissa to Paralakhemundi, Andhra Pradesh. He sustained severe injuries on the back of his head and died on the spot.

The appellants filed Employee's Compensation petition before the Commissioner, who allowed a compensation of Rs. 10,75,253/-. Aggrieved by the same, the Insurance Company filed an appeal under Section 30 of the E.C. Act before the High Court of Orissa at Cuttack. The learned single Judge allowed the appeal and set aside the award passed by the learned Commissioner and reduced the compensation to Rs.6,00,000/-.

The present appeal has been filed by the appellants challenging the correctness of impugned judgment and order passed by the High Court.

Decision: Appeal allowed.

Reason

We have heard the learned counsel appearing on behalf of both the parties. We are unable to agree with the contentions advanced by the learned counsel appearing on behalf of the respondent Insurance Company.

The E.C. Act is a welfare legislation enacted to secure compensation to the poor workmen who suffer from injuries at their place of work. This becomes clear from a perusal of the preamble of the Act which reads as under: "An Act to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident." This further becomes clear from a perusal of the Statement of Objects and Reasons, which reads as under: "……The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible, from hardship arising from accidents.

An additional advantage of legislation of this type is that by increasing the importance for the employer of adequate safety devices, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection. Further, the encouragement given to employers to provide adequate medical treatment for their workmen should mitigate the effects to such accidents as do occur. The benefits so conferred on the workman added to the increased sense of security which he will enjoy, should render industrial life more attractive and thus increase the available supply of labour. At the same time, a corresponding increase in the efficiency of the average workman may be expected." (Emphasis laid by this Court) Thus, the E.C. Act is a social welfare legislation meant to benefit the workers and their dependents in case of death of workman due to accident caused during and in the course of employment should be construed as such.

In order to succeed, it has to be proved by the employee that (1) there was an accident, (2) the accident had a causal connection with the employment and (3) the accident must have been suffered in course of employment. The learned counsel appearing on behalf of the appellants has also rightly placed reliance on the decision of this Court in the case of Mackinnon Mackenzie (supra). In the facts of the instant case, the deceased was on his way to deliver goods during the course of employment when he met with the accident. The act to get back onto the moving truck was just an attempt to regain control of the truck, which given the situation, any reasonable person would have tried to do so. The accident, thus, fairly and squarely arose out of and in the course of his employment.

The next contention which needs to be dispelled is that the appellants are not entitled to any compensation because the deceased died as a result of his own negligence. We are unable to agree with the same. Section 3 of the E.C. Act does not create any exception of the kind, which permits the employer to avoid his liability if there was negligence on part of the workman. The E.C. Act does not envisage a situation where the compensation payable to an injured or deceased workman can be reduced on account of contributory negligence. It has been held by various High Courts that mere negligence does not disentitle a workman to compensation.

While no negligence on part of the deceased has been made out from the facts of the instant case as he was merely trying his best to stop the truck from moving unmanned, even if there were negligence on his part, it would not disentitle his dependents from claiming compensation under the Act. Thus, what becomes clear from the preceding discussion is that the deceased died in an accident which arose in and during the course of employment.

In the light of the well-reasoned and elaborate order of award of compensation, the High Court could not have reduced the compensation amount by more than half by merely mentioning that it is in the 'interest of justice'. It was upon the High Court to explain how exactly depriving the poor appellants, who have already lost their elder son, of the rightful compensation would serve the ends of justice.

Since neither of the parties produced any document on record to prove the exact amount of wages being earned by the deceased at the time of the accident, to arrive at the amount of wages, the learned Commissioner took into consideration the fact that the deceased was a highly skilled workman and would often be required to undertake long journeys outside the state in the line of duty, especially considering the fact that the vehicle in question had a registered National Route Permit.

In view of the foregoing, the judgment and order of the High Court suffers from gross infirmity as it has been passed not only in ignorance of the decisions of this Court referred to supra, but also the provisions of the E.C. Act and therefore, the same is liable to be set aside and accordingly set aside.

Appeal is accordingly allowed. The respondent-Insurance Company is directed to deposit the amount within six weeks from today with the Employees Compensation Commissioner. On such deposit, he shall disperse the same to the appellants..

ESIC

v.

A.K. ABDUL SAMAD & ANR [SC]

Criminal Appeal Nos.1065-1066 of 2005

Dipak Misra & Shiva Kirti Singh, JJ. [Decided on 10/03/2016]

Employees State Insurance Corporation Act – Section 85 – Prosecution- punishment of 6 months imprisonment and a fine of Rs.5,000/- whether the quantum of the fine could be reduced – Held, No.

Brief facts:

The case arises out of criminal proceedings initiated by the appellant Corporation under Section 85 of the Act for conviction and punishment of the respondents for failure to pay contributions required by the Act. Both the respondents faced trial before the Special Court for Economic Offences, Bangalore and were found guilty and were inflicted with imprisonment till rising of the Court and fine of Rs.1000/-. According to appellant, the fine amount could not have been reduced and ought to have been Rs.5000/- as per mandate of law. Hence the Corporation preferred Revision Petitions before the High Court of Karnataka at Bangalore. By the impugned judgment and order under appeal dated 09th January 2004, the Division Bench of the High Court dismissed Criminal Revision Petition. Therefore, the appellant corporation challenged the above impugned judgement in this appeal.

Decision: Appeal allowed.

Reason:

The question of law deserving adjudication in these appeals arises out of Section 85(a) (i) (b) of the Employees'

State Insurance Corporation Act (for brevity, 'the Act'). The aforesaid statutory provision prescribes punishment for a particular offence as imprisonment which shall not be less than six months and the convict shall also be liable to fine of five thousand rupees. The proviso however empowers the court that it may, "for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term." The question to be answered is whether the court has been given judicial discretion only to reduce the sentence of imprisonment for any term lesser than six months or whether it also has discretion to levy no fine or a fine of less than five thousand rupees.

As noticed earlier, the interpretation given by Patna High Court in the case of Tetar Gope v. Ganauri Gope AIR 1968 Pat 287, on which learned counsel for the respondents has placed reliance has already been over-ruled by this Court in the case of Zunjarrao Bhikaji Nagarkar v. Union of India (1999) 7 SCC 409. The remaining judgment in the case of Sebastian @ Kunju v. State of Kerala 1992 Cri LJ 3642 also arose out of conviction under Section 302 of the IPC. In paragraph 11 of that judgment, the Kerala High Court has placed reliance upon judgment of Patna High Court in the case of Tetar Gope (supra). In our considered view, the clause "shall also be liable to fine", in the context of Indian Penal Code may be capable of being treated as directory and thus conferring on the court a discretion to impose sentence of fine also in addition to imprisonment although such discretion stands somewhat impaired as per the view taken by this Court in the case of Zunjarrao Bhikaji Nagarkar (supra). But clearly no minimum fine is prescribed for the offences under the IPC nor that Act was enacted with the special purpose of preventing economic offences as was the case in Chern Taong Shang v. S.D. Baijal (1988) 1 SCC 507. The object of creating offence and penalty under the Employees' State Insurance Act, 1948 is clearly to create deterrence against violation of provisions of the Act which are beneficial for the employees. Non-payment of contributions is an economic offence and therefore the Legislature has not only fixed a minimum term of imprisonment but also a fixed amount of fine of five thousand rupees under Section 85(a) (i) (b) of the Act. There is no discretion of awarding less than the specified fee, under the main provision. It is only the proviso which is in the nature of an exception where under the court is vested with discretion limited to imposition of imprisonment for a lesser term. Conspicuously, no words are found in the proviso for imposing a lesser fine than that of five thousand rupees. In such a situation the intention of the Legislature is clear and brooks no interpretation. The law is well settled that when the wordings of the Stature are clear, no interpretation is required unless there is a requirement of saving the provisions from vice of unconstitutionality or absurdity. Neither of the twin situations is attracted herein.

Hence the question is answered in favour of the appellant and it is held that the amount of fine has to be Rupees five thousand and the courts have no discretion to reduce the same once the offence has been established. The discretion as per proviso is confined only in respect of term of imprisonment. Accordingly the appeals are allowed. The respondents shall now be required to pay a fine of Rupees five thousand. If they have already paid the earlier imposed fine of Rs.1000/-, they shall pay the balance or otherwise the entire fine of Rs.5000/- within six weeks and in default the fine shall be realised expeditiously in accordance with law by taking recourse to all the available machinery.

ROYAL WESTERN INDIA TURF CLUB LTD

v.

E.S.I.C & ORS [SC]

Civil Appeal No.49 of 2006

V. Gopala Gowda & Arun Mishra, JJ. [Decided on 29/02/2016]

Employees State Insurance Act, 1948 – Section 2(9) – Casual workers engaged by race club – Whether they are covered under the scheme – Held, Yes.

Brief facts:

The questions involved for decision in these appeals are whether casual workers are covered under definition of employee as defined in Section 2(9) of the Employees State Insurance Act, 1948 (hereinafter referred to as 'ESI Act') and pertaining to period for which Turf Club is liable to pay from 1978-79 or from 1987.

Decision: Appeal dismissed.

Reason:

First we take up the question whether casual employees are covered within the purview of ESI Act. The definition of "employee" is very wide. A person who is employed for wages in the factory or establishment on any work of, or incidental or preliminary to or connected with the work is covered. The definition brings various types of employees within its ken. The Act is a welfare legislation and is required to be interpreted so as to ensure extension of benefits to the employees and not to deprive them of the same which are available under the Act.

A bare reading of the provisions of Sections 2(22) and 2(23) dealing with wages and wage period makes it clear that it would cover the "casual employees" employed for a few days on a work of perennial nature and wages as defined in section 2(22) and wage period as defined in section 2(23) does not exclude the wages payable to casual workers. They cannot be deprived of the beneficial provisions of the Act.

This Court in Regional Director, Employees' State Insurance Corporation, Madras v. South India Flour Mills (P) Ltd, AIR 1986 SC 1686 has held that Section 39(4) and Section 42(3) clearly envisage the case of casual employees. In other words, it is the intention of the Legislature that the casual employees should also be brought within the purview of the Act.

TAMILNADU TERMINATED FULL TIME TEMPORARY LIC EMPLOYEES ASSOCIATION

v.

S.K. ROY, THE CHAIRMAN, LIC [SC]

Contempt Petition (C) No. 459 of 2015 in Civil Appeal No. 6950 of 2009 along with batch of review petitions.

V. Gopala Gowda & C. Nagappan, JJ. [Decided on 09/08/2016]

LIC directed to pay backwages and compensation to all badly workmen whose services were terminated in 1988.

Brief facts:

These Review Petitions arise from the impugned judgment and order dated 18.03.2015 passed by this Court in Civil Appeal No. 6950 of 2009 and connected appeals, whereby it was held that the Award passed by Central Government Industrial Tribunal, New Delhi (CGIT) in I.D. No. 27 of 1991 is legal and valid and the same be restored and implemented by the Life Insurance Corporation of India (hereinafter referred to as the "LIC") by absorbing the concerned workmen in the permanent posts. It was further held that the Corporation would be liable to pay all consequential benefits including monetary benefits taking into consideration the revised pay scale in the cases of those workmen who had attained the age of superannuation. Decision: Impugned judgment modified.

Reason:

The learned Attorney General further submits that as on 31.03.2015, LIC had 55,427 Class III employees and 5,190 Class IV employees. If LIC is directed to consider the absorption of the workmen to the advertisement, then the number of Class III employees will increase by 11.14% and Class IV employees by 56.65% and the same will affect the employee's ratio in addition to the increase in its financial burden and that the same will be contrary to the interests of the policyholders. The learned Attorney General estimates the financial liability for implementing the order of this Court at approximately Rs.7087 crores, with the annual liability at around Rs.728 crores per year and that this will be a huge financial burden for LIC to bear. On the other hand, the learned counsel appearing on behalf of the respondents-workers submit that it becomes clear from a perusal of the Review Petitions filed by LIC that it is trying to re-agitate the case on merits. For the limited purpose of modifying the relief granted in the Civil Appeal only with regard to the Back wages, we directed Mr. Ashok Panigrahi, the learned counsel appearing on behalf of the review petitioner-LIC to submit a document containing the pay scales indicating the basic pay and other emoluments payable to the concerned workmen. The same were furnished with the periodic revisions in the years 1992, 1997, 2002, 2007 and 2012, without furnishing the other component figures which would be the gross salary of the different classes of workmen in the present dispute. These periodic revisions of pay of basic salary, along with other component figures comprising the gross salary including Dearness Allowance, House Rent Allowance etc. etc., as applicable, must be accounted for while computing the amount due to the workmen towards the back wages. The temporary and badli workers of LIC, who are entitled for regularisation as permanent workmen in terms of the impugned judgment and order dated 18.03.2015 passed by this Court, by applying the terms and conditions of the modified award dated 26.08.1988 passed by Justice Jamdar, are held to be entitled to full back wages as well. However, keeping in mind the immense financial burden this would cause to LIC, we deem it fit to modify the relief only with regard to the back wages payable and therefore, we award 50% of the back wages with consequential benefits. The back wages must be calculated on the basis of the gross salary of the workmen, applicable as on the date as per the periodical revisions of pay scale as stated supra. The computation must be made from the date of entitlement of the workmen involved in these cases, that is, their absorption, till the age of superannuation, if any concerned workman has attained the age of superannuation as per the regulations of the review petitioner-LIC, as applicable to the concerned workman. With the above modifications to the judgment and order sought to be reviewed, these review petitions are disposed of in the terms as indicated above. Since the judgment and order is passed in favour of workmen and their dispute is being litigated for nearly twenty five years, the directions contained in the judgment and order dated 18.03.2015 with the above modifications shall be complied with by the review petitioner-LIC within eight weeks of the receipt of the copy of this order.

PEPSU ROADWAYS TRANSPORT CORPORATION

v.

S.K.SHARMA & ORS [SC]

Civil Appeal No. 4703 of 2009

Shiva Kirti Singh & R. Banumathi, JJ.[Decided on 08/08/2016]

Transfer of employees from PEPSU roadways PEPSU corporation – Workmen retired after taking all retiral benefits in 1991 – Pension scheme revised in 1992 – Retired workmen claimed benefits under the pension scheme also – Whether tenable – Held, No.

Brief facts:

The respondents who were the employees of PEPSU Roadways were transferred to PEPSU Road Transport Corporation (hereinafter referred to as the ‘Corporation’), due to the take-over of PEPSU Roadways by the corporation, on the prevailing terms and conditions till the approval of new terms and conditions by the Corporation.

The respondents got promotions etc. and continued to serve the Corporation till they all retired between 1989 and 1991. Much after the retirement of the respondents, the Corporation framed PRTC Employees Pension/ Gratuity and General Provident Fund Regulations, 1992 (hereinafter described as ‘Regulations of 1992’). Under these Regulations, for the first time pension was introduced in the Corporation. Soon after the enforcement of Regulations of 1992 the respondents who had already received their retiral benefits, filed a writ petition claiming that they continued to be employees of the State in the department of PEPSU Roadways till PEPSU State was reorganized and from 01.11.1956, the date of reorganization they became employees of State of Punjab with right to pension as available to Government servants. The Single Judge allowed the writ petition on the premise that the respondents had simply been transferred from the parent department to serve in the Corporation and therefore they continued to be Government servants because there was no order passed for their absorption in the Corporation. The Letters Patent Appeal preferred by the appellants was dismissed by the judgment and order dated 24.04.2006 which is under challenge in this appeal.

Decision: Appeal allowed.

Reason:

The main controversy in this case is whether the claim of the respondents, a group of twenty one employees of PEPSU Roadways that in spite of transfer of that department to the Corporation they continue to be actually Government servants and therefore entitled to retiral benefits instead of CPF is acceptable or not. In this controversy, a judgment of this Court though rendered in slightly different factual matrix is substantially relevant and helpful. In D.R. Gurushantappa v. Abdul Khuddus Anwar & Ors (1996) 3 SCC 325, an issue arose in the context of election of the Mysore Legislative Assembly as to whether the respondent was holding office of profit under the Government. The respondent no. 1 of that case was initially a Government servant but subsequently the Government concern where he was working was taken over by a company registered under the Indian Companies Act, 1956. The shares of the company were fully owned by the Government but after the Government undertaking was taken over by the company, the employees were no longer governed by the Mysore Civil Services Regulations, their conditions of service came to be determined by the standing orders of the company. The first contention against respondent no. 1 was that since he was initially a Government servant, even after the concern was taken over by the company he would continue to be in the service of the Government. While dealing with this issue in paragraph 3, this Court rejected the contention in the following words: “3. So far as the first point is concerned, reliance is placed primarily on the circumstance that, when the concern was taken over by the Company from the Government there were no specific agreements terminating the Government service of Respondent 1, or bringing into existence a relationship of master and servant between the Company and Respondent 1. That circumstance, by itself, cannot lead to the conclusion that Respondent 1 continued to be in government service. When the undertaking was taken over by the Company as a going concern, the employees working in the undertaking were also taken over and since, in law, the Company has to be treated as an entity distinct and separate from the Government, the employees, as a result of the transfer of the undertaking, became employees of the Company and ceased to be employees of the Government.” In the facts of the case, we have no hesitation to hold that the High Court erred in allowing the writ petition and second appeal of the respondents and in dismissing the Letters Patent Appeal of the appellants. The judgments on which the respondents have relied upon for advancing the submission that they cannot lose the status of a Government servant till they are absorbed in the Corporation after offering an option in favour of such absorption is entirely misconceived and inapplicable in the facts of the present case. The stand of the respondents could have been acceptable had there been no decision of the PEPSU State as evidenced by the letter of Chief Secretary dated 16.10.1956 which finds mention and reiteration by way of admission by the Corporation in order dated 30.11.1956. There can be no such belated challenge to the decision of PEPSU State whereby PEPSU Roadways, one of the departments came into and merged with the Corporation lock, stock and barrel before the merger of PEPSU with Punjab on 01.11.1956. Hence, the provisions of the States Reorganization Act ceased to have any significance in the matter because the respondents ceased to be employees of State Government of PEPSU prior to 01.11.1956. They accepted such merger and alteration of their service conditions without any protest. Since 1957, under the Regulations of the Corporation they participated and contributed to the scheme of CPF and obtained the benefits of retirement from the Corporation between 1985 and 1991 without any protest. The High Court clearly erred in ignoring such conduct of the respondents, the effect of the Chief Secretary's letter dated 16.10.1956 containing decision of PEPSU State and its acceptance by the Corporation reflected by the order dated 30.11.1956. The High Court further erred in relying upon law which is applicable when there is no merger of Government concern with the private concern but only individual employees are transferred on deputation or on Foreign Service to other organizations/services. The ordinary rules providing for asking of option or issuance of letters of absorption depend upon nature of stipulations which may get attracted to a case of deputation. There may be similar stipulations in case of merger by transfer. But if there are no such stipulations like in the present case then the transferee concern like the Corporation has no obligation to ask for options and to issue letters of options to individual employees who become employees of the transferee organization simply by virtue of order and action of transfer of the whole concern leading to merger. No doubt in case of any hardship, the affected employees have the option to protest and challenge either the merger itself or any adverse stipulation. However, if the employees choose to accept the transition of their service from one concern to another and acquiesce then after decades and especially after their retirement they cannot be permitted to turn back and challenge the entire developments after a gap of decades. On the basis of laws and facts discussed above, we are constrained to hold that the respondents had accepted to continue as employees of Corporation pursuant to order of merger/ transfer of PEPSU Roadways with effect from 16.10.1956 and on completing their service under the Corporation and reaching the age of retirement they were entitled to receive only the benefits of CPF and gratuity as admissible to them under then prevailing regulations of the Corporation. Since they accepted those retiral benefits there is no relationship left between the Corporation and the respondents and in such a situation further claim against the Corporation that it should treat the respondents to be Government servants and adjust their retiral benefits accordingly was totally untenable and wrongly allowed by the High Court. The impugned judgment of the High Court granting relief to the respondents is therefore set aside. The second appeal and the writ petition of the respondents shall stand dismissed. This appeal is accordingly allowed but the parties are left to bear their own costs.

INDUSTRIAL PROMOTION & INVESTMENT CORPORATION OF ORISSA LTD

v.

NEW INDIA ASSURANCE CO. LTD & ANR [SC]

Civil Appeal No. 1130 of 2007

Anil R. Dave & L. Nageswara Rao, JJ. [Decided on 22/08/2016]

Insurance law – Claim against theft and burglary – No forcible house breaking – Whether compensation is payable – Held, No.

Brief facts:

The Appellant exercising its power under Section 29 of the State Finance Corporation Act, 1951, took over the assets of M/s. Josna Casting Centre Orissa Private Limited, which had been insured with Respondent No. 1 for a sum of Rs. 46,00,000/- under the Miscellaneous Accident Policy, Rs. 60,40,000/- under the Fire Policy and Rs. 46,00,000/- under the Burglary and House Breaking Policy. The seized assets were put to auction by the Appellant, at which point of time it was detected that some parts of the plant and machinery were missing from the factory premises. A claim was lodged with Respondent No. 1 for an amount of Rs. 34,40,650/- under the Burglary and House Breaking Policy. The claim of the Appellant was repudiated by Respondent No. 1 on the ground that the alleged loss did not come within the purview of the insurance policy. The Appellant filed compensation application No. 45 of 2001 under Section 12-B read with Section 36-A of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, which was rejected by the MRTP Commission, New Delhi by its Order dated 17-08- 2005. Aggrieved by the said Order, the Appellant has preferred the present Appeal.

Decision: Appeal dismissed.

Reason:

Having considered the submissions made on both sides, we are of the opinion that there is no error committed by the MRTP Commission in rejecting the Claim of the Appellant. It is clear from the facts of the present case that the Appellant has made out a case of theft without a forcible entry. The case of the Appellant is that forcible entry is not required for a claim to be made under the policy. Following the well- accepted principle that a contract of insurance which is like any other commercial contract should be interpreted strictly, we are of the opinion that the policy covers loss or damage by burglary or house breaking which have been explained as theft following an actual, forcible and violent entry from the premises. A plain reading of the policy would show that a forcible entry should precede the theft, and unless they are proved, the claim cannot be accepted. It is well-settled law that there is no difference between a contract of insurance and any other contract, and that it should be construed strictly without adding or deleting anything from the terms thereof. On applying the said principle, we have no doubt that a forcible entry is required for a claim to be allowed under the policy for burglary/house breaking. This court in General Assurance Society Ltd. v. Chandmull Jain and Anr., reported in [1966] 3 SCR 500 held that there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberima fides, i.e., good faith on the part of the insured and the contract is likely to be construed contra proferentes, i.e., against the company in case of ambiguity or doubt. It was further held in the said judgment that the duty of the Court is to interpret the words in which the contract is expressed by the parties and it is not for the Court to make a new contract, however reasonable. For the aforementioned reasons, we uphold the order of the MRTP Commission and dismiss the Appeal with no order as to costs.

ELECTROTHEM (INDIA) LTD

v.

PATEL VIPULKUMAR RAMJIBHAI & ORS [SC]

Civil Appeal No. 7222 of 2016 (Arising out of SLP (C) No.16860 of 2012)

T.S. Thakur, R. Banumathi & Uday Umesh Lalit, JJ. [Decided on 02/08/2016]

Environment laws- projects – Environment clearance – Clearance certificate issued without holding public hearing – Whether tenable – SC directs of post – Clearance public hearing.

Brief facts:

This appeal challenges the judgment and order dated 11.05.2012 passed by the High Court of Gujarat allowing Special Civil Application No.5986/2010 setting aside the Environmental Clearance dated 27.01.2010 and directing that the operations of the entire plant of the Appellant be stopped and that the operations could be continued only after fresh Environmental Clearance was accorded in its favour by the Ministry of Environment and Forests and Union of India. Environment clearance was accorded to the petitioner without conducting public hearing. The High Court, on a PIL, restrained the petitioner from operating the plant and also ordered to close it down. On appeal to the Supreme Court, the only question for the consideration of the court was whether the Environmental Clearance dated 27.1.2010 can be termed as illegal in the absence of public consultation or public hearing as mandatorily provided by Notifications dated 2006.

Decision: Petition partly allowed.

Reason:

In the affidavit filed on behalf of CPCB it was stated *inter alia* that pursuant to the order dated 22.04.2014 passed by this Court, a joint inspection was carried out as directed and that the industry of the Appellant had complied with most of the recommendations, though there were still certain shortcomings. The facts on record are clear that while granting Environmental Clearance on 20.02.2008, public consultation/public hearing was undertaken on 12.06.2007. As on that date the status of the project was that the capacity of Pig Iron Plant was to be 350 TPD, Power Plant to be 24 MW, the total cost of the project was 90.00 crores and the total Water requirement was 650 MT/Day. The High Court was absolutely right that after expansion the capacity of the plant was to increase three-fold. The tabular chart given in Environmental Clearance dated 27.01.2010 itself shows the tremendous increase in the capacity. Consequently, the pollution load would naturally be of greater order than the one which was contemplated when the earlier public consultation/ public hearing was undertaken on 12.08.2007. Further, the water requirement had also risen from 650 MT/Day to 2165 MT/Day. The increase in pollution load and water requirement were certainly matters where public in general and those living in the vicinity in particular had and continue to have a stake. Public consultation/public hearing is one of the important stages while considering the matter for grant of Environmental Clearance. The minutes of the meetings held on 9-11 February 2009 show that the request of the Appellant for exemption from the requirement of public hearing was accepted by the Committee. The observations of the Committee suggest that there would be no additional land requirement, ground water drawl and certain other features. However the water requirement, which is a community resource, was definitely going to be of greater order in addition to the fact that the expansion of the project would have entailed additional pollution load. It must be stated here that after EIA Notification of 2006 a draft Notification was issued on 09.01.2009 wherein an amendment was suggested in paragraph 7(ii) of EIA Notification dated 14.09.2006 to the effect that in cases of expansion of projects involving enhancement by more than 50% holding of public consultation/public hearing was essential; implying thereby that in cases where expansion was less than 50% public consultation/public hearing could be exempted. Without going into the question whether public consultation/public hearing could be so exempted, it is relevant to note that this idea in the draft Notification was not accepted, after a Committee constituted to advice in the matter had given its report on 30.10.2009 to the contrary. As a result, the final Notification dated 01.12.2009 did not carry or contain the amendment that was suggested by way of draft Notification. Consequently, no exemption on that count could be given when the Environmental Clearance came to be issued on 27.01.2010. In the case of Lafarge Umiam Mining Private Limited - T.N. Godavarman Thirumulpad Vs. Union of India and Others 2011 (7) SCC 338, public consultation/public hearing was considered and found to be mandatory requirement of the Environmental Clearance process by this Court. In terms of the principles as laid down by this Court in the case of Lafarge (supra), we find that the decision making process in doing away with or in granting exemption from public consultation/public hearing, was not based on correct principles and as such the decision was invalid and improper. At the same time, we cannot lose sight of the fact that in pursuance of Environmental Clearance dated 27.01.2010, the expansion of the project has been undertaken and as reported by CPCB in its affidavit filed on 07.07.2014, most of the recommendations made by CPCB are complied with. In our considered view, the interest of justice would be sub-served if that part of the decision exempting public consultation/public hearing is set aside and the matter is relegated back to the concerned Authorities to effectuate public consultation/public hearing. However, since the expansion has been undertaken and the industry has been functioning, we do not deem it appropriate to order closure of the entire plant as directed by the High Court. If the public consultation/ public hearing results in a negative mandate against the expansion of the project, the Authorities would do well to direct and ensure scaling down of the activities to the level that was permitted by Environmental Clearance dated 20.02.2008. If public consultation/public hearing reflects in favour of the expansion of the project, Environmental Clearance dated 27.01.2010 would hold good and be fully operative. In other words, at this length of time when the expansion has already been undertaken, in the peculiar facts of this case and in order to meet ends of justice, we deem it appropriate to change the nature of requirement of public consultation/public hearing from pre- decisional to post-decisional. The public consultation/public hearing shall be organized by the concerned authorities in three months from today. This appeal therefore stands disposed of with the aforesaid modifications. No order as to costs.

GEN SECRETARY, COAL WASHERIES WORKERS UNION, DHANBAD

v.

EMPLOYERS IN RELATION TO MANAGEMENT OF DUGDA WASHERY OF M/s.BCCL [SC]

Civil Appeal No. 9278 of 2014

T.S. Thakur, A.M. Khanwilkar & D.Y. Chandrachud, JJ. [Decided on 23/09/2016]

Industrial Disputes Act, 1947 – Industrial tribunal awards reinstatement and back wages – High court allows lump sum compensation and rejects reinstatementwhether correct – Held, Yes.

Brief facts:

The appellant raised an industrial dispute which was referred to the Central Government Industrial Tribunal at Dhanbad, for adjudication. The Industrial Tribunal vide award dated 17th June 1997, answered

the reference in favour of the appellant and directed the Management to reinstate and regularize the concerned 35 workmen w.e.f. 1st July 1990, with payment of 30% full back wages. The High Court on appeal by the respondent- Management affirmed the view taken by the Tribunal. The respondent carried the matter in appeal by way of Letters Patent Appeal before the Division Bench.

The Division Bench modified the award by refusing the reinstatement and allowing Rs.50,000/- compensation, in addition to whatever has been paid to the workmen. Hence this appeal by workmen.

Decision: Appeal disposed of.

Reason:

It is not in dispute that the Management has paid wages to the workmen in terms of the order passed on an application under Section 17(B) of the Industrial Disputes Act, 1947 during the pendency of proceedings before the High Court. The question is: whether an amount of Rs.50,000/- determined by the Division Bench of the High Court to be paid to the workmen in addition to whatever amount has been paid to them under Section 17(B) of the Industrial Disputes Act, 1947 is adequate.

Considering the arguments of both sides, in our opinion, the Division Bench was right in observing that, in the facts of the present case, an order of reinstatement must be eschewed, being inequitable. The workmen, however, must be compensated in lieu of reinstatement. Applying the principle underlying the decisions of this Court in Ruby General Insurance Co. Ltd. v. P.P. Chopra (1969) 3 SCC 653 and the recent case of Delhi International Airport (P) Ltd. v. Union of India (2011) 12 SCC 449, in our considered opinion, interest of justice would be met by enhancing the amount of compensation in lieu of reinstatement/absorption and regularisation quantified at Rs.1,50,000/-(Rupees One Lakh Fifty Thousand) to each workman. For, the workmen have already received wages from October 2004 to January 2012 in terms of the order under Section 17(B) of the Industrial Disputes Act, 1947 without any work assigned to them. The respondent paid minimum wages to the concerned workmen during the relevant period as the workmen were not able to produce any document in support of their last drawn wages.

This lump sum compensation amount of Rs.1,50,000/- to each workmen would be in full and final settlement of all the claims of the concerned workmen and substitute the order passed by the Tribunal to that extent, without any further enquiry as to whether the concerned workmen was gainfully employed during the relevant period or not.

The respondent shall deposit the amount payable in terms of this order to the workmen before the Central

Government Industrial Tribunal, Dhanbad, within three months from today, failing which, shall be liable to pay interest thereon at the rate of 10% p.a. from today till the amount is deposited or paid to the concerned workmen, whichever is earlier. The Central Government Industrial Tribunal, Dhanbad, shall cause to disburse the amount to the concerned workmen subject to verification.

DELHI TRANSPORT CORPORATION

v.

RAJENDER KUMAR [DEL]

LPA 250/2016

Indira Banerjee & V. Kameswar Rao, JJ. [Decided on 30/ 09/2016]

Dismissal of workman on the ground of unauthorised absenteeism – Whether dismissal tenable – Held, Yes.

Brief facts:

The respondent-Workman was appointed as a sweeper/cleaner with the appellant-Corporation. A charge sheet was issued to the respondent for availing leave without pay for 118 days between the period November 1987 to October 1988. The charge sheet stated that the aforesaid act of the respondent amounted to misconduct within the meaning of para 4(ii) and 19(h) of the Standing Orders governing the conduct of DTC employees. The charge sheet also stated that the respondent’s past record would also be taken into account at the time of passing of the order. The past record of the respondent showed that he was punished with stoppage of one increment with cumulative effect on three occasions for availing excessive leave. After holding disciplinary proceedings, the workman was dismissed from services on the ground of absenting without authorised leave. The respondent raised an industrial dispute. The Labour Court passed an Award in favour of the respondent. The appellant challenged the said Award before the High court and the single judge dismissed the appeal. Hence this second appeal under the Letters Patent.

Decision:Appeal allowed.

Reason:

Having heard the learned counsel for the parties, the only question arises for consideration is whether against 118 days leave 41 days was against medical certificates; the submission of the leave application for some period and no leave application for 37 days, and the charge in the charge sheet that the respondent had taken 143 days excessive leave in the year 1986 and 103 days leave in the year 1987 and out of four adverse entries, three adverse entries are about availing of leave without pay, the Labour Court could have interfered with and set aside the penalty of removal imposed on the respondent as upheld by the learned Single Judge.

The position of law is well settled in the case of DTC v. Sardar Singh (2004) 7 SCC 574, the Supreme Court has held that when an employee absents himself from duty, even without sanctioned leave for a very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Orders relates to habitual negligence of duties and lack of interest in the Authority’s work. When an employee absents himself from duty without sanctioned leave the Authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and has exhibited lack of interest in the employer’s work. Conclusion regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when the same is unauthorized. It also held that an order passed treating absence as leave without pay after passing an order of termination is only for the purpose of maintaining correct record of service. It relied upon its judgment in the case of State of M.P v. Harihar Gopal (1969) 3 SLR 274 (SC).

The charge in the case in hand, is absence without obtaining leave in advance. The plea of the respondent was, the leave he had taken was for his as well as his children's illness. Against 118 days, medical certificates for 41 days was submitted, still 77 days of leave was unaccounted for. It is not the case of the respondent that the leave for those days was taken in advance. This sufficiently reveals that the conduct of the employee is nothing but irresponsible and can hardly be justified and in view of the Standing Orders, unauthorized leave can be treated as misconduct.

On a perusal of para 4 of the Standing Orders, it is clear, that it shows the seriousness attached to habitual absence. Clause (i) shows, there is a requirement for prior permission. Non-observance of clause (i) renders the absence unauthorized.

From the order of the labour court, above, it is noted that the Labour Court has only noted that the medical certificates for the period June 11, 1988 to June 20, 1988; August 10, 1988 to September 12, 1988 and October 1988 were produced. The total period is of 41 days, as has come on record. The Labour Court also notes that, against 37 days, the workman had not submitted any leave application. That apart, the Labour Court notes that for the rest of the period, leave applications were given by the respondent. Mere submitting the leave application would not meet the requirement of para 4 of the Standing Orders. It is the case of the respondent that he had taken leave for his children's illness as well. Assuming that the medical certificates submitted was for his illness, surely for the illness of his children, he could have sought prior permission from the Authorities. In any case, for against 37 days, there was no leave application. Hence, to that extent charge stands proved. In other words, the conclusion of the Labour Court that the charges as framed by the Management are not proved completely before the Court, may not be tenable. Hence, the case of the respondent gets covered under para 4 of the Standing Orders. The past conduct of the respondent, also reveals absence for a very long duration of 143 days (1986), 103 days (1987) and three adverse entries are about availing leave without pay. The circumstances does suggest that the respondent was guilty of the misconduct under para 4 and 19 of the Standing Orders and the case in hand is squarely covered by the law laid down by the Supreme Court in the case of Sardar Singh (supra). Further, the position of law with regard to Section 11A of the Industrial Disputes Act, 1947 is very clear, inasmuch as the Labour Court may interfere with the quantum of punishment awarded by the employer but ordinarily discretion exercised by employer should not be interfered with. It is not a case where the penalty of removal is unjustified. The Labour Court could not have set aside the order of removal.

Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorized. Burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials.

The Tribunal proceeded in all these cases on the basis as if the leave was sanctioned because of the noted leave without pay. Treating as leave without pay is not same as sanctioned or approved leave. It is a case where the Labour Court has failed to follow the law laid down by the Supreme Court the Award is an erroneous exercise of jurisdiction vested in it. Consequently, the learned Single Judge has erred in upholding the order of the Labour Court.

M/S SILVER TOUCH ENTERPRISES

v.

RADHA SHARMA & ANR [DEL]

FAO 212/2016

Sunil Gaur, J. [Decided on 28/09/2016]

Employee's Compensation Act, 1923 – Retired workman dies in the employers premises – Commissioner awards compensation – Whether tenable – Held, No.

Brief facts:

The appellant is the employer, who has been directed to pay compensation of Rs.6,67,984/- with interest in proceedings under the Employee's Compensation Act, 1923 while holding that deceased had died during the course of employment. The challenge to the impugned order of 4th March, 2016 in this appeal is on the ground that three months prior to her death, Smt. Laxmi Lachho had resigned and on the day of incident, she had come to appellant's premises to visit her friend and she had died natural death whereas the case of the respondents-claimants is that due to the work pressure, the deceased was under tremendous pressure and because of the excessive stress and strain of her employment, she had died at her work place.

Decision: Remanded for fresh adjudication.

Reason:

Upon hearing and on perusal of the impugned order, I find that even the issues have not been correctly reproduced in the impugned order, what to talk of the findings on the issues. The plea of resignation has not been dealt at all in the impugned order. In the considered opinion of this Court, the impugned order discloses utter non-application of mind and so, it deserves to be set aside with direction to the Commissioner, under The Employee's Compensation Act to permit the parties to lead evidence on the issue of resignation and thereafter return the finding about existence of relationship of employer-employee on the date of incident. Since, it is the case of appellant that deceased had come to the premises of the appellant to meet her friend, therefore, the necessary ingredient of 'accident taking place during the course of employment' has to be considered by the trial court in right perspective, after the evidence is led by the parties.

In view of the aforesaid, the impugned order is hereby set aside and the matter is remanded back to the Commissioner, under the Employee's Compensation Act to proceed further in terms of the directions issued in this judgment.

In view of mandate of Section 25A of the Employee's Compensation Act, 1923, the Commissioner under aforesaid enactment shall make all endeavours to decide the claim petition within the time stipulated in the aforesaid provision. The amount deposited by the appellant be refunded forthwith.

JORSINGH GOVIND VANJARI

v.

DIVISIONAL CONTROLLER MAHARASHTRA STATE ROAD TRANSPORT CORPORATION [SC]

Civil Appeal No. 11807 of 2016 (Arising out of SLP(C) No. 26366 of 2016)

Kurian Joseph & Rohinton Fali Nariman, JJ. [Decided on 06/12/2016]

Industrial Disputes Act, 1947 – Dismissal of workman – Superannuation before the announcement of the award – Labour court awarded all service benefits and 50% of back wages in lieu of reinstatement – High Court modified the award by allowing only 50% of the back wages – Whether tenable – Held, No.

Brief facts:

The appellant, aggrieved by the termination from service, raised an industrial dispute leading to the award in Reference IDA No. 42 of 2007 dated 20.06.2013 of the Labour Court, Jalgaon, Maharashtra.

The Labour Court set aside the dismissal order dated 26.08.2002. However, noticing that the appellant had already crossed the date of superannuation, viz., 31.05.2005, it was ordered that from the date of termination to the date of superannuation, the appellant would be entitled to all service benefits except back wages which were limited to 50 per cent.

The respondent challenged the award before the High Court of Bombay, which modified the award by granting only a one-time compensation of an amount equivalent to 50 per cent of the back wages as awarded by the Labour Court. Thus aggrieved, the appellant is before this Court.

Decision: Appeal allowed.

Reason:

Heard Learned Counsel appearing on both sides. On facts, it is clear that the High Court has gone wrong in holding that the Labour Court did not follow the procedure. It is seen from the award that the management had not sought for an opportunity for leading evidence. And despite granting an opportunity, no evidence was adduced after the Labour Court held that the findings of the inquiry officer were perverse. Therefore, the Labour Court cannot be faulted for answering the Reference in favour of the appellant. The Labour Court, on the available materials on record, found that the termination was unjustified on the basis of a perverse finding entered by the inquiry officer. There was no attempt on the part of the management before the Labour Court to establish otherwise. It appears that the High Court itself has granted compensation since the Court felt that the termination was unjustified and since reinstatement was not possible on account of superannuation. In case, the High Court was of the view that termination was justified, it could not have ordered for payment of any compensation. In order to deny gratuity to an employee, it is not enough that the alleged misconduct of the employee constitutes an offence involving moral turpitude as per the report of the domestic inquiry. There must be termination on account of the alleged misconduct, which constitutes an offence involving moral turpitude.

Thus, viewed from any angle, the judgment of the High Court cannot be sustained. It is hence set aside. The appeal is allowed. The award of the Labour Court is restored. Consequently, the appellant shall be entitled to gratuity in respect of his continuous service from his original appointment till the date of his superannuation.

LANCO ANPARA POWER LTD

v.

STATE OF UTTAR PRADESH & ORS [SC]

Civil Appeal No. 6223 of 2016 with batch of appeals [(2016) 10 SCC 329)]

A.K. Sikri & N.V. Ramana, JJ. [Decided on 18/10/2016]

Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and Buildings And Other Construction Workers Welfare Cess Act, 1996 read with Factories Act, 1948 – Construction of factory building – Whether the provisions of BOCW Act are applicable – Held, Yes.

Brief facts:

These appeals are filed by the appellants challenging the orders passed by different High Courts i.e. High Court of Allahabad, High Court of Orissa, High Court of Madhya Pradesh and High Court of Karnataka. These High Courts, however, are unanimous in their approach and have reached the same conclusion.

In all these cases, appellants were issued show cause notices by the concerned authorities under the provisions of the Building And Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as 'BOCW Act') and Buildings And Other Construction Workers Welfare Cess Act, 1996 (hereinafter referred to as 'Welfare Cess Act'). They had challenged those notices by filing writ petitions in the High Courts on the ground that the provisions of BOCW Act or Welfare Cess Act were not applicable to them because of the reason that they were registered under the Factories Act, 1948.

It may be mentioned that at the relevant time no manufacturing operation had commenced by the appellants. In fact, all these appellants were in the process of construction of civil works/factory buildings etc. wherein they had planned to set up their factories. As the process of construction of civil works was undertaken by the appellants wherein construction workers were engaged, the respondent authorities took the view that the provisions of the aforesaid Acts which were meant for construction workers became applicable and the appellants were supposed to pay the cess for the welfare of the said workers engaged in the construction work.

The appellants had submitted that Section 2(d) of the BOCW Act which defines ‘building or other construction work’ specifically states that it does not include any building or construction work to which the provision of the Factories Act, 1948 or the Mines Act, 1952 apply. Since the appellants stood registered under the Factories Act, they were not covered by the definition of building or other construction work as contained in Section 2(d) of the Act and, therefore, said Act was not applicable to them by virtue of Section 1(4) thereof. All the High Courts have negated the aforesaid plea of the appellants on the ground that the appellants would not be covered by the definition of factory defined under Section 2(m) of the Factories Act in the absence of any operations/ manufacturing process and, therefore, mere obtaining a licence under Section 6 of the Factories Act would not suffice and rescue them from their liability to pay cess under the Welfare Cess Act. This is, in nutshell, the subject matter of all these appeals.

Decision: Appeals dismissed.

Reason:

We have bestowed our due and serious consideration to the submissions made of both sides, which these submissions deserve. The central issue is the meaning that is to be assigned to the language of Section 2(d) of the Act, particularly that part which is exclusionary in nature, i.e. which excludes such building and construction work to which the provisions of Factories Act apply.

Keeping in view the objective of the respective Acts, we now deal with the scope and ambit of Section 2(d) of BOCW Act. As noticed above, one of the submissions of the appellants is that literal interpretation needs to be given to the said provision as it categorically excludes those building or construction work to which Factories Act apply. In this very hue, it is argued that as the benefit under the Factories Act are already given to the construction workers who are involved in the construction work, there is no need for covering the construction workers who are engaged in building or construction work of the appellants under BOCW Act or Welfare Cess Act.

On the conjoint reading of the aforesaid provisions [s.2(m) “factory”, s.2(k) “manufacturing process” & 2(l) “worker”], it becomes clear that “factory” is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of ‘worker’ under the Factories Act. On these two aspects there is no cleavage and both parties are at *ad idem*. What follows is that these construction workers are not covered by the provisions of the Factories Act.

Having regard to the above, if the contention of the appellants is accepted, the construction workers engaged in the construction of building undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of BOCW Act and Welfare Cess Act as well. Could this be the intention while providing the definition of ‘building and other construction work’ in Section 2(d) of BOCW Act? Clear answer to this has to be in the negative. We now advert to the core issue touching upon the construction of Section 2(d) of the BOCW Act. The argument of the appellants is that language thereof is unambiguous and literal construction is to be accorded to find the legislative intent. To our mind, this submission is of no avail. Section 2(d) of the BOCW Act dealing with the building or construction work is in three parts. In the first part, different activities are mentioned which are to be covered by the said expression, namely, construction, alterations, repairs, maintenance or demolition. Second part of the definition is aimed at those buildings or works in relation to which the aforesaid activities are carried out. The third part of the definition contains exclusion clause by stipulating that it does not include 'any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), applies'. Thus, first part of the definition contains the nature of activity; second part contains the subject matter in relation to which the activity is carried out and third part excludes those building or other construction work to which the provisions of Factories Act or Mines Act apply.

It is not in dispute that construction of the projects of the appellants is covered by the definition of "building or other construction work" as it satisfies first two elements of the definition pointed out above. In order to see whether exclusion clause applies, we need to interpret the words 'but does not include any building or other construction work to which the provisions of the Factories Act ……..... apply'. The question is as to whether the provisions of the Factories Act apply to the construction of building/project of the appellants. We are of the firm opinion that they do not apply. The provisions of the Factories Act would "apply" only when the manufacturing process starts for which the building/project is being constructed and not to the activity of construction of the project. That is how the exclusion clause is to be interpreted and that would be the plain meaning of the said clause. This meaning to the exclusion clause ascribed by us is in tune with the approach adopted by this Court in Organo Chemical Industries v. Union of India, (1979) 4 SCC 573.

The aforesaid meaning attributed to the exclusion clause of the definition is also in consonance with the objective and purpose which is sought to be achieved by the enactment of BOCW Act and Welfare Cess Act. As pointed out above, if the construction of this provision as suggested by the appellants is accepted, the construction workers who are engaged in the construction of buildings/projects will neither get the benefit of the Factories Act nor of BOCW Act/Welfare Cess Act. That could not have been the intention of the Legislature. BOCW Act and Welfare Cess Act are pieces of social security legislation to provide for certain benefits to the construction workers.

Purposive interpretation in a social amelioration legislation is an imperative, irrespective of anything else. How labour legislations are to be interpreted has been stated and restated by this Court time and again. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions.

In taking the aforesaid view, we also agree with the learned counsel for the respondents that 'superior purpose' contained in BOCW Act and Welfare Cess Act has to be kept in mind when two enactments – the Factories Act on the one hand and BOCW Act/ Welfare Cess Act on the other hand, are involved, both of which are welfare legislations. Here the concept of 'felt necessity' would get triggered and as per the Statement of Objects and Reasons contained in BOCW Act, since the purpose of this Act is to take care of a particular necessity i.e. welfare of unorganised labour class involved in construction activity, that needs to be achieved and not to be discarded.

THE MANAGEMENT OF STATE BANK OF INDIA

v.

SMITA SHARAD DESHMUKH & ANR [SC]

Civil Appeal No. 3423 of 2017 (Arising out of SLP(C) No. 33070/2013)

Kurian Joseph & A.M. Khanwilkar, JJ. [Decided on 01/03/2017]

Employee furnishing a forged certificate as to higher qualification – Drawn additional emoluments on the basis of the forged certificate – Management after conducting disciplinary proceedings dismissed the employee - Labour tribunal confirmed the dismissal – High court set aside the dismissal - Whether correct – Held, No.

Brief facts:

The appellant (hereinafter referred to as “the Management”) is aggrieved by the impugned judgment of the High Court whereby the first respondent (hereinafter referred to as “the employee”) was directed to be reinstated in service with 50 per cent back wages, reversing the order passed by the Industrial Tribunal-cum- Labour Court. The employee, while working with the Management, submitted a certificate purportedly issued by the Indian Institute of Bankers claiming that she had passed the CAIIB Part-II Examination, and on that basis, started drawing additional monetary benefits. The Disciplinary Authority, based on the finding in a domestic enquiry that the certificate was a forged one, dismissed her from service on 01.08.2003. The punishment was upheld by the Appellate Authority vide order dated 10.06.2006. The Industrial Tribunal-cum-Labour Court declined to grant any relief. However, the High Court ordered reinstatement with 50 per cent back wages, and thus aggrieved, the Management has filed the appeal.

Decision: Appal allowed.

Reason:

The only ground on which the High Court interfered with the award was that the Management had not established, by leading evidence, that the employee was aware of the fact that the certificate produced before the Management was forged.

We find it difficult to appreciate the strange stand taken by the High Court. The Labour Court had clearly analysed the entire evidence and had come to the conclusion that the employee was fully aware of the forgery. The Tribunal took note of the fact that she had produced a copy of the postal receipt of dispatching the certificate from the Institute of Bankers in her evidence but failed to explain the source of the postal receipt. It also took note of the fact that the alleged certificate of having passed the examination is dated 04.09.2000. If that be so, there was no occasion for asking for any re-verification of the marks by filing an application dated 08.09.2000. Still further, the Court extensively referred to the reply furnished by the Institute of Bankers and came to the conclusion that the certificate was a forged one.

The evidence led by the employee, as rightly appreciated by the Industrial Tribunal, would clearly show that she had the knowledge that the document she produced was a forged one. Therefore, there was no requirement on the part of the Management to establish whether she had known, at the time of submission of the document, that it was a forged one.

It is a well-settled principle that the High Court will not re-appreciate the evidence but will only see whether there is evidence in support of the impugned conclusion. The court has to take the evidence as it stands and its only limited jurisdiction is to examine, whether on the evidence, the conclusion could have been arrived at.

In the case before us, it is an admitted position that the certificate produced by the employee is a forged one. It has been categorically found by the Industrial Tribunal, on the basis of evidence, that the employee was fully aware of the fact that the document was a forged one. In such circumstances, there is no basis at all for the stand taken by the High Court that the Management did not establish that the employee had knowledge about the certificate being a forged one.

Though learned counsel for the employee made a persuasive attempt for modification of punishment on the ground of disproportionality, in view of the conduct of the employee which we have referred to above, we are not inclined to take a different view from that taken by the Disciplinary Authority, Appellate Authority and the Industrial Tribunal-cum-Labour Court.

ALL ESCORTS EMPLOYEES UNION

v.

THE STATE OF HARYANA [SC]

Civil Appeal Nos. 12843-12844 of 2017 (arising out of SLP (C) Nos. 27020-27021 of 2015)

A.K. Sikri & Ashok Bhushan, JJ. [Decided on 14/09/2017]

Trade Union Act – Amendment of membership clause to include workmen working in other industry – Whether permissible – Held, No.

Brief facts:

The appellant-Union was formed way back in the year 1968. It is a registered Trade Union which was representing the employees of Escorts Group of Industries and is duly recognised by the employers as well. Some of the Establishments of Escorts Group were Escorts Ltd., Escorts Yamaha Ltd., Escorts JCB Ltd., Escorts Class Ltd. and Escorts Hospital. It is an undisputed fact that the workmen from all these industries were members of the appellant-Union. As far as Escorts Yamaha Ltd. is concerned, it was a joint venture of Escorts Management and Yamaha Motor Company, Japan. In the year 2001, this company was taken over by Yamaha Motor Company, Japan and its name was changed to Yamaha Motor India Private Limited (hereinafter referred to as the 'Yamaha'). After this separation, the workmen working in Yamaha ceased to be the members of the appellant-Union, in view of Clause 4 of its Constitution which spelled out who could be the members of the Union.

With an intention to take them within its fold again, the appellant-Union amended Clause 4 of its Constitution. This amendment was sent to the Registrar, Trade Union, Haryana for its record and approval. The Registrar, Trade Union did not approve the amendment. Challenging the decision of the Registrar, writ petition was filed in the High Court of Punjab & Haryana, which was also been dismissed by the High Court vide impugned judgment. Hence the present appeal.

Decision: Appeal dismissed.

Reason:

As per Clause 4 as originally stood, only those workmen who were employed in Escorts Group of Industries could become members of the appellant-Union. This Clause also made it clear that the membership of a workman who ceases to be employee of Escorts Group shall automatically be terminated. It was, thus, clear that the appellant-Union wanted only those workmen to be its members who are the employees of the Establishment in question, namely, the Escorts Group. After the hiving off motorcycle manufacturing unit from the Escorts Group and take over thereof by Yamaha, this unit has no common interest with the workers of the Escorts Group. This becomes clear as the workers of the two plants of the said motorcycle unit were taken over by Yamaha vide notice dated June 23, 2001. These workers have thereafter become the workers of Yamaha. Thus, by virtue of original/unamended Clause 4, they no longer remain members of the appellant-Union.

From the definition of Trade Union contained in Section 2(h) of the Act, it becomes apparent that such a Union is formed primarily for the purpose of regulating the relations between workmen and employers (which is the instant case) or it can be between workmen and workmen or between employers and employers. It includes any federation of two or more Trade Unions also though we are not concerned with it. When we keep in mind the aforesaid objective of formation of a Trade Union, namely, regulating the relations between the workmen and its employer, normally such a Union of workmen would be of those workmen who work in a particular Establishment. This gets further strengthened when we peruse the definition of Trade Dispute contained in Section 2(g) of the Act. The Trade Unions of workmen while regulating their relations between the employers would normally have negotiations representing its workmen before the employer and in case those negotiations do not result in amicable settlement or resolution of disputes, such Trade Unions would raise trade dispute with its employer. Section 6 of the Act mandates a Trade Union to have its Constitution/ Bye-Laws/Rules by incorporation of the provisions contained therein i.e. under Section 6. Clause (e) deals with admission of ordinary members and specifically provides that ordinary members should be those persons who are actually engaged or employed in an industry with which the Trade Union is connected. This provision implicitly confines the membership to those who are the workmen of the industry where they are employed.

The moot question here is as to whether such a Trade Union which primarily has the membership of the worker of particular Establishment or industry can broaden its scope by opening the membership even to those who are not the employees of the Establishment in respect of which the said Trade Union has been formed.

At this juncture, it becomes pertinent to note that the workers of Yamaha have formed their own separate Union, known as Yamaha Motor Employees Union. This Union is duly registered by the Registrar, Trade Union, Kanpur (Uttar Pradesh) having Registration No. 7179. It is this Union which now stands recognised by the Management of Yamaha. In these circumstances, the very purpose in amending Clause 4 in the manner it seeks to do stands frustrated. In any case, Clause 4 was amended in the year 2007 and that amendment has been approved by the Registrar, Trade Union. Therefore, issue of amendment in Clause 4, as carried out in June, 2001, becomes a non-issue.

In view of the aforesaid, it is not necessary to deal with the issue raised in these appeals as the issue does not survive. Thus, leaving the question of law open, these appeals are dismissed.

EMPLOYEES STATE INSURANCE CORPORATION

v.

MANGALAM PUBLICATIONS (INDIA) PVT. LTD [SC]

Civil Appeal No. 4681 of 2009

Arun Mishra & M M Shantanagoudar, JJ. [Decided on 21/09/2017]

ESI Act – Wages – Interim wages paid to employees – No contribution was made on this – Whether interim wages included in the term ‘wages’ under the Act – Held, Yes.

Brief facts:

The respondent is an establishment covered by the provisions of the ESI Act, engaged in the business of printing and publishing of a daily Malayalam newspaper called “Mangalam”. The premises of the respondent-company was inspected by the Insurance Inspector of the appellant-Corporation on 13.06.2000, wherein it was found that the respondent had not paid any contribution on the interim wages paid by it to its employees during the period from 01.04.1996 to 31.03.2000. The contention of the respondent was that it was not required to pay any contribution on the interim relief paid by it to its employees in view of Central Government’s office memorandum dated 19.08.1998. Since the contribution was not paid by the respondent, as mentioned supra, a notice dated 18.07.2000 was issued by the appellant to the respondent to pay contribution of the afore-mentioned amount for the afore-mentioned period.

The demand was unsuccessfully challenged before the ESI court, and was carried on to the High Court, which allowed the appeal of the respondent. Hence the present appeal by the corporation.

Decision: Appeal allowed.

Reason:

A plain reading of the definition of Section 2(22) of the ESI Act makes it amply clear that "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of the employment, expressed or implied, were fulfilled and includes other additional remuneration, if any, paid at intervals not exceeding two months. But payments made on certain contingencies under Clauses (a) to (d) of Section 2(22) of the ESI Act, do not fall within the definition of "wages". The interim relief paid to the employees of the respondent in the matter on hand, as mentioned supra, will definitely not fall within the excluded part of clauses (a) to (d) of Section 2(22) of the ESI Act, inasmuch as such payment is not travelling allowance or the value of any travelling concession, contribution paid by the employer to any pension fund or provident fund; sum paid to an employee to defray special expenses entailed on him by the nature of his employment; or any gratuity payable on discharge.

The inclusive part and exclusive portion of the definition of "wages" clearly indicate that the expression "wages" has been given wider meaning. As mentioned supra, under the definition, firstly whatever remuneration is paid or payable to an employee under the terms of the contract of the employment, expressed or implied, is "wages". Secondly, whatever payment is made to an employee in respect of any period of authorized leave, lock-out etc. is "wages". Thirdly, other additional remuneration, if any, paid at intervals not exceeding two months is also "wages". Any ambiguous expression, according to us, should be given a beneficent construction in favour of employees by the Court. If the definition of "wages" is read in its entirety including the inclusive part as well as the exclusive portion, it appears that inclusive portion is not intended to be limited only of items mentioned therein, particularly, having regard to the objects and reasons for which the Employees' State Insurance Act is enacted.

The High Court while allowing the appeal filed by the respondent has mainly relied upon the office memorandum dated 19.08.1998 issued by the Department of Public Enterprises, Ministry of Industry, New Delhi, which is not applicable to the facts of this case. The said notification makes it abundantly clear that the instructions contained in the said office memorandum are applicable to Central Public Sector Enterprises (PSES) only. Admittedly, the respondent is a private limited company and hence the instructions contained in office memorandum dated 19.08.1998 are not applicable to the respondent company. In the matter on hand, the appellant claimed ESI contribution only on the amount paid by the respondent as interim relief to its employees, treating the same as "wages" as per Section 2(22) of the ESI Act. The amount paid as interim relief by the respondent to its employees definitely falls within the definition of "wages" as per Section 2(22) of the ESI Act. On the other hand, the High Court has strangely observed that the interim relief paid for the period from 01.04.1996 to 31.03.2000 can only be treated as "ex-gratia payment" paid by the employer to its employees and cannot be treated as "wages" for the purpose of ESI contribution. In our considered opinion, the High Court has ignored to appreciate that the effect of ESI Act enacted by the Parliament cannot be circumvented by the department office memorandum. The High Court has also failed to appreciate that the payment of interim relief/wages emanates from the provisions contained in terms of the settlement, which forms part of the contract of employment and forms the ingredients of "wages" as defined under Section 2(22) of the ESI Act and that the respondent paid interim relief, as per a scheme voluntarily promulgated by it as per the notification dated 20.04.1996, issued by the Government of India, in view of the recommendations of "Manisana' Wage Board, pending revision of rates of wages. It was not an ex-gratia payment.

The interim relief paid by the respondent to its employees is not a "gift" or "inam", but is a part of wages, as defined under Section 2(22) of the ESI Act. In view of the above, we hold that the payment made by way of interim relief to the employees by the respondent for the period from 1.04.1996 to 31.03.2000 comes within the definition of "wages", as contained in Section 2(22) of the ESI Act, and hence the respondent is liable to pay ESI contribution.

UTTARAKHAND TRANSPORT CORPORATION& ORS.

v.

SUKHVEER SINGH [SC]

Civil Appeal No. 18448 of 2017 (Arising out of SLP(C) No.4012 of 2017)

Arun Mishra & L. N. Rao, JJ. [Decided on 10/11/2017]

Industrial Disputes Act – Dismissal of employee – Misappropriation charges – Driver in connivance with conductor allowed passengers to travel without tickets – Whether dismissal is too harsh – Held, No.

Brief facts:

The Respondent was appointed as a driver with the Appellants- Road Transport Corporation in the year 1989. On 27th October, 1995 while driving a vehicle on Karnal-Haridwar route, the Respondent did not stop the vehicle when the inspection team signalled. The inspection team had to follow the vehicle which was stopped six kilometres away from where it was signalled to stop. On verification, it was found that 61 passengers were travelling without a ticket. The Respondent was placed under suspension on 31st October, 1995 and disciplinary proceedings were initiated by issuance of a charge sheet on 3rd November, 1995.

After prolonged disciplinary proceeding and inquiry he Respondent was dismissed from services.

The Respondent challenged the award of the labour court in the High Court, which allowed the writ petition and set aside the dismissal order. The High Court directed that the Respondent should be deemed to be in service with all consequential benefits. Assailing the legality of the said judgment of the High Court, the Appellants have approached this Court.

Decision: Appeal dismissed.

Reason:

It is contended on behalf of the Appellants that the impugned judgment is contrary to the law laid down in *Managing Director ECIL Hyderabad & Ors. v. B. Karunakar & Ors. (1993) 4 SCC 727*. It is further submitted that a copy of the inquiry report was in fact supplied to the Respondent. The other point that was canvassed by the Appellants is that the Respondent neither pleaded nor proved that any prejudice was caused to him by the non-supply of the inquiry report prior to the issuance of show cause notice. The counsel for the Respondent supported the judgment of the High Court by submitting that it was incumbent upon the disciplinary authority to supply the inquiry report prior to the issuance of the show cause notice as per the judgment of this Court in *Managing Director ECIL Hyderabad & Ors. v. B. Karunakar & Ors.* (supra). He also relied upon certain findings in the inquiry report which were in favour of the Respondent. He finally submitted that the punishment of dismissal from service is disproportionate to the delinquency.

The award of the labour court was set aside by the High Court on the sole ground that non-supply of the inquiry report prior to the show cause notice vitiated the disciplinary proceedings. The High Court, in our opinion, committed an error in its interpretation of the judgment in *Managing Director ECIL Hyderabad & Ors. v. B. Karunakar & Ors.* (supra). It is no doubt true that this Court in the said judgment held that a delinquent employee has a right to receive the report of the inquiry officer before the disciplinary authority takes a decision regarding his guilt or innocence. Denial of a reasonable opportunity to the employee by not furnishing the inquiry report before such decision on the charges was found to be in violation of principles of natural justice. In the instant case, the disciplinary authority communicated the report of the inquiry officer to the Respondent along with the show cause notice. There is no dispute that the Respondent submitted his reply to the show cause notice after receiving the report of the inquiry officer. On considering the explanation submitted by the Respondent, the disciplinary authority passed an order of dismissal. Though, it was necessary for the Appellants to have supplied the report of the inquiry officer before issuance of the show cause notice proposing penalty, we find no reason to hold that the Respondent was prejudiced by supply of the inquiry officer's report along with the show cause notice. This is not a case where the delinquent was handicapped due to the inquiry officer's report not being furnished to him at all.

It is clear from the above that mere non-supply of the inquiry report does not automatically warrant re-instatement of the delinquent employee. It is incumbent upon on the delinquent employee to plead and prove that he suffered a serious prejudice due to the non-supply of the inquiry report. We have examined the writ petition filed by the Respondent and we find no pleading regarding any prejudice caused to the Respondent by the non-supply of the inquiry report prior to the issuance of the show cause notice. The Respondent had ample opportunity to submit his version after perusing the report of the inquiry officer. The Respondent utilised the opportunity of placing his response to the inquiry report before the disciplinary authority. The High Court committed an error in allowing the writ petition filed by the Respondent without examining whether any prejudice was caused to the delinquent employee by the supply of the inquiry officer's report along with the show cause notice. We are satisfied that there was no prejudice caused to the respondent by the supply of the report of the inquiry officer along with the show cause notice. Hence, no useful purpose will be served by a remand to the court below to examine the point of prejudice.

The Respondent contended that the punishment of dismissal is disproportionate to the delinquency. It is submitted that he was working as a driver and the irregularity in issuance of tickets was committed by the conductor. We are in agreement with the findings of the inquiry officer which were accepted by the disciplinary authority and approved by the appellate authority and the labour court that the Respondent had committed the misconduct in collusion with the conductor. It is no more res integra that acts of corruption/misappropriation cannot be condoned, even in cases where the amount involved is meagre. (See - *U.P.SRTC v. Suresh Chand Sharma (2010) 6 SCC 555)*. For the aforementioned reasons, we allow the appeal and set aside the judgment of the High Court. No order as to costs.

P. KARUPPAIAH (D) THROUGH LRS.

v.

GENERAL MANAGER, THIRIUVALLUVAR TRANSPORT CORPORATION [SC]

Civil Appeal No.4160 of 2008

R.K.Agarwl & A M Sapre, JJ. [Decided on 12/10/2017]

Industrial Disputes Act – Dismissal of employee – Reinstatement allowed but back wages was not allowed – Whether entitled for back wages also – Held, No.

Brief facts:

This appeal is filed by the employee against the final judgment and order dated 07.12.2006 passed by the High Court of Judicature at Madras in W.A. No. 1848 of 2000 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and upheld the judgment of 1996 by which the appellant was denied the back wages for the period from 21.07.1994 to 31.08.1999.

The only question involved in the appeal filed by an employee against his employer is whether the appellant is entitled to claim back wages for the period in question, i.e., 21.07.1994 to 31.08.1999?

Decision: Appeal dismissed.

Reason:

Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeal.

The law on the question of award of back wages has taken some shift. It is now ruled in cases that when the dismissal/removal order is set aside/withdrawn by the Courts or otherwise, as the case may be, directing employee's reinstatement in service, the employee does not become entitled to claim back wages as of right unless the order of reinstatement itself in express terms directs payment of back wages and other benefits. (See *M.P. State Electricity Board vs. Jarina Bee, (2003) 6 SCC 141*)

Indeed, the employee in order to claim the relief of back wages along with the relief of reinstatement is required to prove with the aid of evidence that from the date of his dismissal order till the date of his re-joining, he was not gainfully employed anywhere. The employer too has a right to adduce evidence to show otherwise that an employee concerned was gainfully employed during the relevant period and hence not entitled to claim any relief of back wages.

On proving such facts to the satisfaction of the Court, the back wages are accordingly awarded either in full or part or may even be declined as the case may be while passing the order of reinstatement. The Courts have also applied in appropriate cases the principle of "No work-No pay" while declining to award back wages and confining the relief only to the extent of grant of reinstatement along with grant of some consequential reliefs by awarding some benefits notionally, if any, in exercise of discretionary powers depending upon the facts of each case.

Having seen the record of the case, we are satisfied that there was no evidence brought on record by the appellant (employee) in his writ petition to claim the back wages for the period in question either in full or part. Moreover, we find that the issue in question was raised in writ petition and not before the Industrial or Labour Tribunal where parties could adduce evidence on such question.

Be that as it may, the writ Court and the appellate Court yet examined the question in its writ jurisdiction and finding no merit therein declined to award any back wages. This Court does not find any good ground to interfere in the discretion exercised by the two Courts below and accordingly uphold the orders impugned herein calling no interference.

Indeed, the appellant should feel satisfied that he was able to secure reinstatement in service despite his involvement in a murder case. The appellant should be content with what he has got. In view of foregoing discussion, the appeal fails and is accordingly dismissed.

NATIONAL KAMGAR UNION

v.

KRAN RADER PVT LTD & ORS. [SC]

Civil Appeal No.20 of 2018 (Arising out of S.L.P. (C) No.18413 of 2015)

R.K.Agarwal & A M Sapre, JJ. [Decided on 05/01/2018]

Industrial Disputes Act, 1947– Closure of undertaking – Tribunal on the basis of evidence held that there were less than 100 workers – High Court affirmed the said finding – Whether requires any interference – Held, No.

Brief facts:

In 1990, respondent No.1 suffered business loss in running the said manufacturing unit and, therefore, decided to close down the said unit permanently. The appellant-Union, felt aggrieved of the closure notice issued by respondent No.1, filed complaint against respondent No.1 in the Industrial Court at Pune in October 1990 being Complaint (ULP) No.544/1990.

In substance, the grievance of the appellant in their complaint was that since respondent No.1 had employed more than 100 workers on an average per working day for preceding 12 months in their manufacturing unit, the provisions of Chapter VB (Section 25-K) of the ID Act and, in turn, all the relevant provisions contained therein were applicable to respondent No.1. Responded denied this and claimed that it had employed less than 100 workers. Industrial tribunal held that respondent had employed more than 100 workers and on appeal the High court held that the respondent had employed less than 100 workers. Appellant union challenged this before the Supreme Court.

Decision: Appeal disposed of.

Reason:

Having heard the learned counsel for the parties at length and on perusal of the record of the case, we find no good ground to interfere in the impugned judgment of the High Court. In other words, the reasoning assigned by the High Court appears to be just and reasonable calling no interference for the reasons mentioned herein below.

The main question, which arises for consideration in this appeal, is only one, viz., how many workers were working in the Unit of respondent No.1 at all relevant time, whether the strength of the workers was above 100 or below 100. In other words, the question, which arises for consideration, is whether the provisions of Section 25-K of Chapter VB of the ID Act were applicable to respondent No. 1-Unit at the relevant time.

In view of the foregoing discussion, we also hold that respondent No.1 had employed 99 workers in their manufacturing Unit at the time of declaring the closure of the Unit in 1990. Since the strength of workers was below 100, it was not necessary for respondent No.1 to ensure compliance of Chapter VB. In other words, in such circumstances, the provisions of Section 25-K had no application to respondent No.1.

This takes us to examine the next question as to how much compensation and under which heads the workers are entitled to receive from respondent No.1 (Company). It was also stated that now hardly 16 workers or so remain unpaid because they did not accept the compensation when offered to them and preferred to prosecute the present litigation.

Learned counsel for respondent No.1 stated that the total compensation paid to every worker in 1990-1991 varies between Rs.1 lakh to Rs.2 lakhs. Taking into consideration the aforementioned background facts and circumstances of the case, we consider it just and proper to award in lump sum a compensation of Rs.2,50,000/- (Rs. Two Lakhs and Fifty Thousand) to each worker who did not accept the compensation.

Let Rs.2,50,000/- (Rs. Two Lakhs and Fifty Thousand) be paid to each such worker after making proper verification. If any worker is not available for any reason, the amount payable to such worker be paid to his legal representatives or nearest relatives, as the case may be, after making proper verification.

Respondent No.1 will, accordingly, deposit the entire compensation payable to all such workers with details in the Industrial Court, Pune. A notice will then be served to each worker or his legal representatives, as the case may be, by the Industrial Court to enable the workers to withdraw the amount from the Industrial Court.

The amount will be paid to every worker or his nominee as the case may be by the demand draft issued in his/her name or in the name of legal representatives, as the case may be. It will be duly deposited in his/her Bank account to enable him/her to withdraw the same.

The appellant would submit necessary details of each such worker before the Industrial Court. The Industrial Court would ensure compliance of the directions of this Court and complete all formalities within three months from the date of this order. We make it clear that this order is applicable only to those workers who did not accept the compensation from respondent No.1. In other words, those workers who already accepted the compensation will not be entitled to get any benefit of this order.

BATRA HOSPITAL EMPLOYEES UNION

v.

BATRA HOSPITAL & MEDICAL RESEARCH [DEL]

W.P (C) No. 5349/2004

C. Hari Shankar, J. [Decided on 22/01/2018]

Payment of Bonus Act, 1965 – Exemption from coverage – Charitable institution running hospital – Whether entitled for exemption – Held, No.

Brief facts:

The Batra Hospital Employees Union claims, in this petition filed under Articles 226 and 227 of the Constitution of India, to be aggrieved by an award, passed by the Industrial Tribunal-I, Karkardooma (hereinafter referred to "the Tribunal"), which holds that the provisions of the Payment of Bonus Act, 1965 do not apply to the Batra Hospital and Medical Research Centre.

Decision: Petition allowed.

Reason:

Reverting to the determinative tests, to decide whether an establishment is being run "not for the purpose of profit" and is, consequently, entitled to the benefit of Section 32 (V)(c) of the Act, as set out in para 42 supra, if one were to apply the said tests to the respondent-Hospital, it is difficult to accept, at face value, the contention, of the respondent-Hospital, that it could be regarded as established "not for the purpose of profit". It is positively found, by the Tribunal, that profits were, in fact, earned by the respondent- Hospital, but the said aspect has been discounted on the reasoning that the profits were funnelled back into the respondent-Hospital to enhance its services. As a result thereof, the Tribunal holds that the Hospital had expanded, from a small institution in 1986 to a 312-bedded hospital as on the date of the Award. - which, needless to say, would have further expanded, manifold, over the period of nearly a decade and a half during which this litigation has remained pending before this court. The Tribunal has held in favour of the respondent by relying on the "object of the Trust", as set out in its Bye-laws. Even on this aspect, all that is observed, in para 15 of the impugned Award, is that "one of the object of the trust is setting up of hospitals or other medical institutions for administrating medical relief to needy, carrying out medical and clinical research, grant of medical help to poor which clearly goes to show that the objective for which the society is formed and for which the hospital is established is not for earning profits". The finding, in my view is totally presumptuous in nature. The Tribunal does not disclose how, or why, it presumes that a Trust, which sets up hospitals which, inter alia, provide free treatment to needy patients, is not working "for the purpose of profit". It has to be realised, in this context, that expectation of profit, while running an enterprise, is not a sin. Neither is it immoral to run a hospital on commercial lines. However, earning of such profit would necessarily entail the responsibility of sharing some part of such profit with the employees or workmen, whose effort have significantly contributed towards the earning of the profit. That is all that the Act requires, and it would be ex facie unconscionable, for the enterprise, to shirk the said responsibility.

Ex facie, therefore, the respondent-Hospital cannot be regarded as established "not for the purpose of profit", as required by Section 32(v) (c) of the Act. The impugned Award of the Tribunal, which proceeds on assumptions and presumptions, without considering the material evidence on record, in the form of, inter alia, the witnesses" statements, and the contents of the affidavits filed by them, and, instead, applies tests that find no place in the Act, has necessarily to be characterised as perverse, and cannot sustain on facts or in law.

Resultantly, the impugned Award, of the Tribunal, is quashed and set aside. The respondent-Hospital is declared to be covered by the Payment of Bonus Act, 1965, and not entitled to the benefit of Section 32(v) (c) thereof. The reference, made by the Secretary (Labour), Government of National Capital Territory of Delhi, to the Tribunal, vide Notification No F.26 (66)/2002-Lab./2586-90, dated 1st February 2002, is answered in favour of the petitioner and against the respondent-Hospital. Consequential relief, to the workmen of the respondent-Hospital, who had petitioned the Tribunal, as well as to all other workmen of the respondent-Hospital, shall follow. In case of any default, by the respondent-Hospital, in disbursement thereof, in whole or in part, the workmen are at liberty to move the Tribunal by way of appropriate application(s) which, if moved, shall be decided expeditiously by the Tribunal, in view of the fact that, owing to the pendency of this matter before this court, the workmen of the respondent-Hospital have already been denied their legitimate right for nearly a decade and a half.

THAI AIRWAYS INTERNATIONAL LTD

v.

GURVINDER SINGH [DEL]

W.P. (C) 7762 of 2015

Vinod Goel, J. [Decided on 13/02/2018]

Payment of Gratuity Act – Section 7 – Controlling authority directing payment of gratuity – Whether could be challenged under writ jurisdiction – Held, No.

Brief facts:

The respondent preferred a claim application before the Controlling Authority for determination of the amount of gratuity payable to him. After hearing both the parties, the Controlling Authority has passed the order which is impugned in this writ petition.

Decision: Petition dismissed.

Reason:

It is clear from the above said provision that, the petitioner, if aggrieved by an order passed under sub-section (4) of Section 7 could prefer an appeal within 60 days from the date of receipt of the order to the appropriate Government or such other authority as has been specified by the Government.

It is trite that when the petitioner is having an alternative effective statutory remedy of appeal, the writ petition under Article 226/227 of the Constitution of India cannot be allowed to be entertained.

In *Transport & Dock Workers Union vs. Mumbai Port Trust 2011 (2) SCC 575,* the Hon'ble Supreme Court held that:-

"14. In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellants by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits."

In the circumstances when the petitioner is having an alternative effective statutory remedy of appeal available against the impugned order passed by the Controlling Authority under Section 7(4) of the Payment of Gratuity Act, 1972 to prefer an appeal to the appropriate Government or such other authorities as may be specified under sub-section (7) of Section 7, the present writ petition cannot be entertained by this Court under Article 226/227 of the Constitution of India.

PARADEEP PHOSPHATES LIMITED

v.

STATE OF ORISSA & ORS [SC]

Civil Appeal Nos.3997-3998 of 2018 (Arising out of Special Leave Petition (C) Nos.35347-35348 of 2016)

R.K. Agrawal & Abhay Manohar Sapre, JJ. [Decided on 19/04/2018]

Industrial Disputes Act, 1947– Section 9A – Certified standing orders provided retirement age as 58 years – Management enhanced the same to 60 and later reduced to 58 – Whether violates change of working conditions provision – Held, Yes.

Brief facts:

The certified standing orders of the appellant company provided that the retirement age of the workmen would be 58 years of age. In the year 1998, the appellant enhanced the retirement age to 60 years, as a temporary measure, to retain employees and to cut costs. However, in the year 2002 the appellant withdrew the enhancement and restored the retirement age to 58 years.

The trade Union agitated this before the Industrial tribunal contending that the change is in violation of the provisions of section 9A of the Industrial Disputes Act. The Tribunal allowed the claim and on appeal the High court affirmed it. Hence the present appeal before the supreme court by the appellant company.

Decision: Appeal dismissed.

Reason:

We have given our solicitous consideration to the submissions of learned senior counsel for the parties and perused the relevant material placed before us.

The relationship of the employer and employee is of utmost faith and, as a result, it falls under the ambit of fiduciary relationship. In order to regulate such relationship, legislature came up with legislation i.e., the Industrial Disputes Act, 1947. The purpose of the Act is to protect the interest of employees as they are the weaker sections since time immemorial. In order to safeguard the rights of the employees, certain amendments have been made subsequently in the Statute. In 1956, legislature inserted Section 9A of the Act which makes it obligatory on the part of the employer that he is bound to give advance notice to the employee if he intends to change certain things as envisaged under Section 9A of the Act read with Fourth Schedule.

At the first sight of the provision, prima facie, it appears that the employer is bound to give minimum 21 days' notice to the employee if employer intends to change any material terms of service. Section 9A of the Act is a provision in consonance with the Constitutional mandate which assures the protection of principles of natural justice i.e., no one shall be condemned unless heard. For the guidance, legislature prescribed the Fourth Schedule and it is clearly mentioned in Section 9A of the Act that before changing either of the things as envisaged in the Fourth Schedule, prior notice must be given to the employee. In the instant case, the grievance of the Trade Union before the Tribunal was that withdrawal of the age of superannuation i.e., restoration of the age from 60 years to 58 years, amounts to contravention of Clause 8 of the Fourth Schedule, hence, employer was bound to give prior notice which employer cannot escape. Therefore, the action of the employer is bad in law and liable to be set aside which was eventually upheld by the Tribunal and the High Court.

No doubt, the enhancement of the superannuation age was temporary in nature in order to achieve certain objectives and also it is not deniable that yet employees would be governed by the Service Rules and the Certified Standing Orders which were not amended. However, if we allow the plea of the appellant-

Company then it would defeat the object of legislature because legislature could never have intended that employees would be condemned without giving them right of reasonable hearing. Naturally, every employee is under the expectation that before reducing his superannuation age, he would be given a proper chance to be heard. Right to work is a vital right of every employee and in our view, it shall not be taken away without giving reasonable opportunity of being heard otherwise it would be an act of violation of the Constitutional mandate.

Moreover, the contention of the appellant-Company that the object of enhancement of superannuation age was just to save the industries from huge losses, therefore, it does not violate any statutory right of the employees, cannot be sustained in the eyes of law and also it does not give the license to the appellant-Company to act in contravention of law since it is a cannon of law that everyone is expected to act as per the mandate of law.

To sum up, we are of the view that at the very moment when the order of enhancement of superannuation of the employees came into force though temporary in nature, it would amount to privilege to employees since it is a special right granted to them. Hence, any unilateral withdrawal of such privilege amounts to contravention of Section 9A of the Act and such act of the employer is bad in the eyes of law.

DTC SECURITY STAFF UNION (REGD.)

v.

DTC & ANR [SC]

Civil Appeal No.5005 of 2018 (Arising out of SLP(C) No.8039 of 2016)

Ranjan Gogoi, R.Banumathi & Navin Sinha, JJ. [Decided on 11/05/2018]

Industrial Disputes Act, 1947– Public transport corporation – Pay scale of security staff – Should be at par with Delhi police force – Held, No.

Brief facts:

The Appellant sought a Reference on 24.10.1979, under the Industrial Disputes Act, 1947 (hereinafter referred to as ‘the Act’) with regard to revision of pay scale of Security Staff up to the rank of Assistant Security Inspector, in the Delhi Transport Corporation (hereinafter referred to as ‘the Corporation’). The Industrial Tribunal, by Award dated 22.08.1985 held that Assistant Security Officer, Security Havaldar and Security Guard in the services of the Corporation were entitled to the pay scale of Rs.425700/, Rs.260350/ and Rs.225308/- respectively, with effect from 01.10.1979, at par with their counterparts in the Delhi Police Force. The Corporation challenged the Award unsuccessfully before the Single Judge. The Division Bench set aside the Award, and which is presently assailed.

Decision: Appeal dismissed.

Reason:

We have considered the submissions. There is no material to hold that pay scale of Deputy Security Officer and Security Officer in the Corporation was consciously kept at par with that of the Delhi Police keeping in mind aspects with regard to the qualifications, nature of duties etc. Merely because the pay scale may have been and remained the same, it cannot lead to the conclusion of a conscious parity on the principle of equal pay for equal work so as to make it discriminatory and a ground for grant of parity to Assistant Security Officer, Security Havildar and Security Guard also. The Tribunal ought to have refrained from going to the exercise of fixation of pay scales no sooner than that it was brought to its attention that a Commission constituted for the purpose was examining the same. Though the Tribunal examined the pay scales given to similarly situated security personnel in other organisations, and also the next below post principle in the Corporation itself, ignoring the difference in the methods of recruitment and qualifications for appointment in the two organisations, it primarily based its conclusion to grant parity of pay scale to Assistant Security Officer, Security Havaldar and Security Guard merely for the reason that parity of pay scale existed for the posts of Deputy Security Officer and Security Officer with that of the Delhi Police.

It is not in dispute that the pay scale of the employees of the corporation, including the security cadre, have been revised from time to time in accordance with the recommendations of 4th, 5th, 6th Pay Commission and now the 7th Pay Commission. There is no material on record that the appellant at any time filed any objection or raised issues for grant of appropriate pay scale either before the 4th Pay Commission or the successive Commissions. If the award of the Tribunal is to be implemented today, it will create a highly anomalous position in the Corporation, and c=shall lead to serious complications with regard to the issues of pay scale vis-a-vis recommendations of the Pay Commission and would generate further heartburn and related problems vis-à-vis other employees of the Corporation.

The Government of Delhi, which would have had to bear the financial burden, did not concur with the Board of the Corporation to abide by the e by the Award. The vast difference in the nature of general duties performed by personnel of the police force in contradistinction to that of security personnel discharging limited security duties in the confines of the Corporation hardly needs any emphasis. We find no reason to interfere with the order of the Division Bench.

CHENNAI PORT TRUST

v.

The Chennai Port Trust Industrial EMPLOYEES CANTEEN WORKERS WELFARE ASSOCIATION & ORS. [SC]

Civil Appeal No.1381 of 2010

A.M.Sapre & R. K. Agrawal, JJ. [Decided on 27/04/2018]

Industrial Disputes Act, 1947 – Demand for regularisation of canteen employees- whether allowable – Held, Yes.

Brief facts:

The appellant has been in existence for the last many decades and has a large administrative and technical set up to run their multifarious activities on the Port. Large numbers of workers/employees are employed by the Port Trust who work round the clock in shifts to run and maintain the activities of the Port Trust. These Port Trust workers/employees are provided with the facility of canteen. This canteen has employed a large number of employees to run the canteen. The employees working in the canteen have formed an Association known as “Chennai Port Trust Industrial Employees Canteen Workers Welfare Association” (for short called “Association”)-respondent No.1 herein.

The Association-respondent No.1 herein filed a writ petition being W.P. No.6872 of 2001 in the High Court at Madras against the appellant herein (Chennai Port Trust) espousing the cause of their members (employees working in the Canteen) and sought a writ of mandamus against the appellant - Chennai Port Trust (respondent No.3 in the writ petition) directing the appellant to treat the employees working in the Canteen to be the regular employees of the Chennai Port Trust and accordingly pay them all attendant and monetary benefits at par with the regular employees of the Chennai Port Trust.

The Writ Court (Single Judge) allowed the writ petition filed by the Association (respondent No.1 herein) and accordingly issued a writ of mandamus against the appellant (Chennai Port Trust), as prayed by the writ petitioner in their writ petition. In other words, the writ Court granted the reliefs claimed by the writ petitioner in their writ petition [regularisation].

The appellant filed intra court appeal before the Division Bench, which by impugned judgment, dismissed the appeal and upheld the order of the Single Judge, which has given rise to filing of the present appeal.

Decision: Appeal Dismissed.

Reason:

Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeal.

In our considered view, the Writ Court (Single Judge) and the Division Bench were right in their reasoning and the conclusion. The Division Bench, in our opinion, rightly relied upon the decision of this Court in *Indian Petrochemicals Corporation Ltd. & Anr. vs Shramik Sena & Ors (1999) 6 SCC 439* and compared the facts of the above case with that of the case at hand and found great similarities in both for granting relief to the members of the respondent (Association).

The Division Bench in Paras 14 and 15 of the impugned judgment took note of 20 factors of this case, which were found identical to the facts involved in Indian Petrochemical's case (supra) wherein this Court had issued a writ of mandamus against the main employer in relation to such employees working in the canteen run for the benefit of the employer.

We find no fault in the aforementioned findings recorded by the Division Bench as, in our view, these findings were recorded on the basis of undisputed facts and documents on record of the case. That apart, these findings were recorded keeping in view the facts involved and law laid down by this Court in the case of Indian Petrochemicals (supra)

Mere perusal of the decision rendered in the case of Indian Petrochemicals (supra) would go to show that in that case also, somewhat similar question, which is the subject matter of this appeal, had arisen at the instance of the employees working in canteen. This Court (Three Judge Bench) elaborately examined the question and took note of the relevant undisputed facts, which had bearing over the question, granted the reliefs to the employees concerned.

In our considered opinion, the approach and the reasoning of the two Courts below (Writ Court and Division Bench) while deciding the writ petition and the appeal arising out of the writ petition keeping in view the law laid down by this Court in the case of Indian Petrochemicals (supra) is just, proper and legal.

In other words, if on the undisputed facts, this Court has granted benefit to the canteen workers in the case of Indian Petrochemicals (supra) then there is no reason that on the same set of undisputed facts arising in this case, the Court should not grant the benefit to the employees/workers in this case. It is more so when no distinguishable facts are pointed out in this case qua Indian Petrochemical's case (supra).

ANSAL PROPERTIES & INDUSTRIES LTD

v.

NEELAM BHUTANI [DEL]

W.P. (Civil) 4149/2015

Anu Malhotra, J. [Decided on 15/06/2018]

Industrial Disputes Act, 1947 – Section 33(2)-

Brief facts:

The petitioner- has assailed the order of the Labour Court, whereby the petitioner herein was directed to reinstate the work woman back on duty along with full back wages and continuity of services within a period of 30 days from the date of publication of the award failing which it had been directed that the Management would be liable to pay the interest at the rate of 12 per cent per annum till the actual payment - was allowed to the extent that the work woman was held entitled to increment of 10 per cent for every year in her total salary, taking her basic salary to be Rs. 10,850/-; HRA Rs. 2,300/-; conveyance allowance Rs. 1,200/- and medical one month basic salary per annum and LTC to its one month basic salary per annum as part back wages and was further held entitled to interest at the rate of 12 per cent per annum in terms of award from the date 16.06.2010 till the date of actual payment of Rs. 9,73,310/- inasmuch as the management had been directed to comply with the award within a period of 30 days from the publication thereof which had not been so complied with by the Management and apart from the same the Management was also directed to pay a sum of Rs. 20,000/- to the workmen towards the cost of litigation.

Decision: Partly allowed.

Reason:

Thus, reliance placed on behalf of the petitioner/management on the verdict in Municipal Corporation of Delhi v. Ganesh Razak & Anr, (1995) 1 SCC 235 with specific reference to the observations in Para 12 of the said verdict is misplaced in as much as the observations in Para 12 of the said verdict relied upon, whereby appeals therein against the invocation of Section 33C(2) of the Industrial Disputes Act, 1947 have been allowed, it is essential to observe that in that case the claim of the respondents/workmen was to the effect that they were all daily rated/ casual workers and they were seeking wages to be paid to them on the same rate as the regular workers and the said aspect had not earlier been settled by adjudication and recognition by the employer and thus the stage of computation of that benefit could not have been said to have reached and in that particular case, the claim of the workman of equal pay for equal work was disputed and thus without adjudication of the dispute resulting in acceptance of their claim, it was held by the Hon'ble Supreme Court that there could be no occasion for computation of the benefit on that basis to attract Section 33C(2) of the Industrial Disputes Act, 1947.

The verdict of this Court relied upon equally on behalf of the petitioner and on behalf of the respondent in *Piara Lal v. Lt. Governor & Ors, 2001 (1) L.L.N. 235*, makes it apparently clear that the powers under Section 33C(2) of the Industrial Disputes Act, 1947 could have been invoked by the respondent in the facts and circumstances of the instant case to the extent that she claimed increments, DA and revision in pay scales as was granted to other employees from time to time in the category of the respondent and would fall within the ambit of the claims to which the respondent would be entitled to claim having been directed to be reinstated back on duty thus to continue in service along with full back wages vide the award.

Thus, the impugned order, to the extent that it permits the entitlement of full back wages w.e.f. 16.06.2001 onwards, i.e., to the tune of Rs.1,02,713/- and qua increment to the tune of Rs.13,88,711.52/- and the interest at the rate of 12 per cent per annum on the said amount from 16.06.2001 till the date of actual payment of Rs. 1822262.52/- with the cost of litigation to the tune of Rs. 20,000/- to the respondent/ work woman in terms of provisions of Section 11(7) of the Industrial Disputes Act, 1947 is upheld.

However, as regards the claim for LTC for the years 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 qua LTC and Medical reimbursement as granted vide impugned order, without adjudication of the entitlement of the petitioner for reimbursement in relation thereto without it being proved on record as to whether the respondent had undertaken any travel in a particular year for the claim for the LTC and qua the respondent having incurred expenses in availing medical facilities for claiming medical reimbursement, cannot be upheld and is set aside with the matter being remanded to the Labour Commissioner, Delhi to give an opportunity to both the parties to give their calculations in relation to the LTC claims and for medical reimbursements to ascertain as to what is the money due to which the respondent would be entitled to in relation thereto with the request to Labour Commissioner to undertake the necessary exercise within a period of three months from the date of receipt of this order.

M/S. G4S FACILITY SERVICES INDIA PVT LTD

v.

REGIONAL PROVIDENT FUND COMMISSIONER-I [DEL]

LPA 302/2018

S. Ravindra Bhat & A.K. Chawla, JJ. [Decided on 31/05/2018]

Employees Provident Fund and Miscellaneous Provisions Act,1952 – Section 7A & 7O – Determination of contributions – Appeal against – Tribunal directed pre-deposit of 50% of the demand – Whether untenable – Held, No.

Brief facts:

The appellant provides security and other related services, through contracts it enters into with institutions and commercial organizations. The EPFC after affording an opportunity of hearing to the petitioner and affording it hearing, passed the final order under Section 7A directing the appellant to pay about Rs.15.40 crore. An appeal against that decision was preferred to the tribunal along with an application seeking waiver of the deposit of the determined demand. After hearing the parties the Tribunal directed admission of the appeal subject to pre-deposit of 50% of the amount assessed within six weeks. The appellant›s writ petition challenging the above order was dismissed by the Single Judge. Hence the present appeal to the Division Bench.

Decision: Petition dismissed.

Reason:

There is a determination, by the EPFC in the present case, that the appellant used to charge amounts including sums on account of provident fund dues payable, but artificially segregate wage calculations, to exclude portions of the wages paid to its workers. These are findings of fact. The appellant disputes them; it urges that the ceiling of Rs. 6500/- mandated by the EPF scheme was not taken into account; that the EPFC considered materials relating to a period other than the notice period and that "wage" is a restrictive statutory concept, under the EPF Act. Each of these appear to have been urged before the tribunal; they were also urged before the single judge. It is after taking note of this argument, that the tribunal granted limited waiver. What the appellant complains however, is that the relief should have been not confined to 50% waiver, but of the whole amount. Now, while it may be justified in so urging, there ought to be exceptional and compelling reasons for an appellate court (in a third guessing jurisdiction, so to speak) exercising appeal powers over a writ court's order (in respect of an interim order of the tribunal) to hold that such determination is unreasonable. In other words, the threshold of interference in appeals over writ determinations of interim orders is necessarily very high.

Keeping in mind the limitations spelt out above, the court nevertheless scrutinized the order of the EPFC. That official not only considered these specific contentions in the light of the materials, but analyzed them in the light of the amounts charged from the appellant's clients, by it. The EPFC found that separate accounts towards wages, HRA, overtime allowances, etc. were not maintained by the appellant and in fact of the total wage, the segregation made was to the extent that house rent allowance (HRA) amounts were shown to be 25% of the total wage. The finding was that a lump-sum figures, which included provident fund contributions, based on total amounts calculated, were charged and recovered from the appellant's clients by it. Given all these factors, this court is of the opinion that the order of the tribunal cannot be characterized as unreasonable or erroneous to such extent as to be interfered with in judicial review.

MAHENDRA SINGH

v.

DELHI POWER SUPPLY CO. LTD. [DEL]

W.P. (C) 5835/2002

C. Hari Shankar, J. [Decided on 11/06/2018]

Prevention of Corruption Act – Dismissal of employee on the charges of accepting bribe – Whether the punishment of dismissal is proportionate to the offence – Held, Yes.

Brief facts:

The petitioner seeks, by means of this writ petition, quashing of the dismissal order, whereby, consequent on disciplinary proceedings held against him, Delhi Vidyut Board (hereinafter referred to as "DVB") - the predecessor-Corporation to the present respondent - dismissed him from service. The petitioner appealed, on 3rd July, 2002, to the Member (Tech-I) of the DVB, against the impugned punishment order and, having waited, fruitlessly, for some time, for the appeal to be decided, moved this Court by means of the present writ petition.

The charge, against the petitioner, was of having accepted a bribe, of ₹ 10,000/-, from Mr. Sushil Bansal, threatening him, in the alternative, with disconnection of his electricity supply and issuance of inflated bills regarding electricity consumption by him for earlier periods, as the electricity meter installed at Mr. Bansal's premises was defective.

Decision: Petition dismissed.

Reason:

In these circumstances, drawing an analogy from Section 106 of the Indian Evidence Act, 1872, it was for the petitioner, if at all, to explain the circumstances in which he accepted the said money from Sushil Bansal, outside a juice shop, and the circumstances in which ₹ 5000/- was recovered, from him, by the CBI team. No such explanation, worth its name, has been forthcoming, from the petitioner, at any point of time.

In these circumstances, this Court has necessarily to concur with the conclusion of the IO, and the disciplinary authority that the fact of acceptance of bribe, from Sushil Bansal, by the petitioner, stands established and proved beyond reasonable doubt. The discrepancies regarding the nature of the meter installed at Sushil Bansal's premises, as well as the non-reflection of the "untainted" ₹ 5,000/-, also allegedly recovered from the petitioner, in the Recovery Memo, cannot, as has rightly been observed by the IO, detract from the factum of acceptance, by the petitioner, from Sushil Bansal, of bribe of ₹ 5,000/-, and the recovery of the said amount, by the CBI team.

Coming, then, to the last issue, regarding proportionality of the punishment awarded to the petitioner, it is clear that, in the above circumstances, it cannot be said that the punishment awarded to the petitioner was disproportionate to the misconduct committed by him. Judicial authority exists, in abundance, to the effect that corruption in public service can only be rewarded by dismissal therefrom. It is hardly necessary to burden the present judgement by any specific precedential references; so trite, by now, is this proposition.

The petitioner having been proved to have taken, from Sushil Bansal, bribe of at least ₹ 5,000/-, it is not possible to say that, in dismissing him from service, the disciplinary authority was unduly harsh. In view of the above discussion and findings, this Court must necessarily refuse succour, to the petitioner, from the rigour of the impugned order dated 15th June, 2002, dismissing him from the service of the respondent. Consequently, the writ petition is dismissed.

EXECUTIVE ENGINEER, PWD & ORS

v.

COMMISSIONER WORKMEN'S COMPENSATION [J&K]

M.A. No. 187 of 2009

Sanjeev Kumar, J. [Decided on 04/06/2018]

Workmen's Compensation Act, 1923 – Injury to contract labour – Permanent disablement – Whether principal employer is liable to pay compensation – Held, Yes.

Brief facts:

The respondent No. 2, an iron smith by profession, engaged by respondent No. 3 as labour for construction of road for Appellant, while working with respondent No. 3 sustained grievous injuries in an accident. Respondent No. 2 was immediately shifted to District Hospital, Doda, where owing to his injuries, his right forearm below elbow was amputated. As a result of these injuries, respondent No. 2 was rendered permanently disabled. He preferred a claim petition before respondent No. 1, which was allowed.

The appellant appealed to the High Court challenging the award passed by respondent No. 1 on the following grounds:—

(a) That in the absence of the privity of contract between the appellant and respondent No. 2, the liability to pay compensation could not have been fastened on the appellant.

(b) That the accident had not occurred during or in the course of employment and, therefore, the appellant was not liable to pay any compensation.

Decision: Appeal dismissed.

Reason:

Having heard learned counsel for the petitioner, I find no substance in the submissions made on behalf of the appellant. Admittedly, respondent No. 3 was working as a contractor with the appellant and was executing the work allotted to him by none other than the appellant. It is also not in dispute that respondent No. 2 was engaged as labourer by respondent No. 3 for execution of the work of the appellant. From the evidence led by the parties before respondent No. 1, it is further evident that the job of repairing the compressor rod was assigned to respondent No. 2 by the Junior Engineer of the appellant and not by respondent No. 3.

Viewed from any angle, the appellant cannot avoid its liability to compensate the respondent No. 2. The appellant being a principal employer was liable to pay the compensation to the respondent No. 2 on account of permanent disablement suffered by him during and in the course of his employment with the appellant. Even on facts, the job of repairing the compressor rod was entrusted to respondent No. 2 by the appellant.

That being the position, the plea of the appellant that there was no privity of contract between the respondent No. 2 and the appellant is misconceived and is noticed to be rejected only. Both the pleas raised by the appellant to challenge the award, therefore, fail. Accordingly, this appeal is dismissed.

FEDERATION OF OKHLA INDUSTRIAL ASSOCIATION (REGD) & ORS

v.

Lt. GOVERNOR OF DELHI & ANR [DEL]

W.P. (C) No. 8125 of 2016 along with batch of petitions

Gita Mittal & C. Hari Shankar, JJ. [Decided on 04/-8/2018]

Minimum Wages Act, – Section 5 – Power to fix minimum wages – Delhi Government revised minimum wages by notification in 2016 – On appeal revision of minimum wages quashed.

Brief facts:

These petitions challenge the constitutional validity of the Notification bearing no. F.Addl.LC/Lab/MW/2016 dated 3rd of March 2017 published in the Official Gazette on 4th March, 2017, again issued by the respondents, in exercise of power conferred by Section 5(2) of the enactment. By this Notification, minimum rates of wages for all classes of workmen/employees in all scheduled employments stand revised w.e.f. the date of the notification in the official gazette. The challenge rests, inter alia, on the plea of the petitioners that both these notifications are ultra vires the provisions of the enactment itself and that the respondents also violated the principles of natural justice in issuance of the notifications.

Decision: Petitions allowed.

Reason:

After an elaborate analysis of the law and the surrounding circumstances and referring to plethora of case laws, the court, inter-alia, arrived at the following conclusions:

- The purport and object of the Act in fixing the minimum wage rate is clearly to prevent exploitation of labour. The hardship caused to individual employers or their inability to meet the burden of minimum wages or its upward revision, has no relevance.

- The object, intendment and provisions of the Minimum Wages Act, 1948 are clear and unambiguous, and therefore, the applicability of the beneficent rule of interpretation is completely unnecessary.

- Minimum wages have to be more than wages at the subsistence level, have to take into consideration all relevant factors and prescriptions made after due application of mind and must take into consideration the norms and component as approved by the Supreme Court in the Reptakos judgment.

- The appropriate government is required to take into account the report and advice rendered by the Committee/Advisory Board and to apply independent mind and take a balanced decision so far as fixation or revision of minimum wages is concerned. The Government is not bound by the recommendations of the Committee. It is open to the Government to accept (wholly or in part) or to reject the advice of the Board or report of the Committee.

- While there is no absolute prohibition on an employee of the Government being nominated as an independent member of the Committee under Section 5 of the Minimum Wages Act, an objection to such nomination has to be decided on the facts and circumstances of the case. It is only when minimum wages are under consideration for an industry in which the State may be vitally interested as an employer, that it may not be proper to nominate an official to the Committee treating him to be an independent member.

- A defect in composition of the Committee under Section 5 would not per se vitiate either its advice or the decision taken thereon. A defect in the composition of the Committee would vitiate its advice, or the ultimate decision of the Government fixing the minimum wages, only if such illegality or defect has worked to the prejudice to a party, for example where the interest of a particular group of employer or employees has not been represented or has not been taken into consideration.

- The Delhi Metro Rail Corporation is not an employer engaged in scheduled employment in Delhi and it could not have been appointed on the Committee under Section 5 as a representative of the employer.

- Though the eligibility of the officers of the Labour Department or the Director of Economics & Statistics as members of the Committee cannot be faulted, however they failed to conduct themselves dispassionately & did not apply their independent minds. The respondent has appointed the very officials as independent persons on a Committee, which had already taken a view in the matter and made recommendations as members of a Committee in the year 2016, therefore, when appointed for the second time, they were clearly close-minded and proceeded in the matter in a predetermined manner.
- The respondents have denied the statutorily mandated representation to the actual employers in scheduled employments in Delhi which tantamount to non-compliance of Section 9 of the Minimum Wages Act, 1948 and failure on the part of the respondents to constitute a Committee required by law to be constituted.
- It is essential that under Section 5(1) of the MW Act, a Committee “properly constituted” is “genuinely invited” with an open (‘receptive’) mind to tender advice to the appropriate Government.
- It has to be held that employers in the scheduled employments as well as employees with divergent views stand ousted from the consideration and their interests certainly compromised to their prejudice. This prejudice to the employers and employees would constitute a ‘most’ substantial ground (Ref : (2008) 5 SCC 428 (para 14), Manipal Academy of Higher Education vs. Provident Fund Commissioner) justifying interference by this court in exercise of jurisdiction under Article 226.
- Clearly the Government of NCT of Delhi was aware of the requirement of law and consciously failed to comport to the same.
- It is not open to a representative to insist on an oral hearing before the Committee appointed under Section 5 or the Advisory Board under Section 7 of the Minimum Wages Act, 1948.
- The fixation of minimum wages in Delhi cannot be faulted simply because they are higher than the rates of minimum wages fixed in surrounding States and Towns.
- The Committee in making its recommendations as well as the respondents in issuing the singular notification for uniform minimum wages for all scheduled employments have completely ignored vital and critical aspects having material bearing on the issue.
- Any change in the prescribed rates of minimum wages, is bound to impact both the industry and the workmen. The respondents were bound to meaningfully comply with the principles of natural justice especially, the principles of fair play and due process. The representatives of the employers, had a legitimate expectation of being heard as the advice of the Committee was to inevitably affect them, which has been denied to them before the decision to revise minimum wages was finalized.
- The constitution of the Committee was completely flawed and its advice was not based on relevant material and suffers from non-application of mind. The Government decision based on such advice is in violation of express statutory provision , principles of natural justice, denied fair representation to the employers well as the employees in fact without any effort even to gather relevant material and information. The non-application of mind by the committee and the respondents, to the relevant material considerations, offends Article 14 of the Constitution of India.

The Notification bearing no. F-13(16)/MW/1/2008/Lab/ 1859 dated 15th September, 2016 issued by the respondents constituting the Minimum Wages Advisory Committee for all scheduled employments is ultra vires Section 5(1) and Section 9 of the Minimum Wages Act, 1948 and is hereby declared invalid and quashed.

UNION BANK OF INDIA

v.

C.G. AJAY BABU [SC]

Civil Appeal No. 8251 of 2018 (Arising out of SLP (Civil) No. 3852 of 2017]

Kurian Joseph & Sanjay Kishen Kaul, JJ. [Decided on 14/08/2018]

Payment of Gratuity Act, 1972 – Dismissal from services for misconduct – Forfeiture of gratuity– Whether automatic on dismissal – Held, No.

Brief facts:

Whether forfeiture of gratuity, under The Payment of Gratuity Act, 1972 ('the Act'), is automatic on dismissal from service, is the issue for consideration in this case.

The respondent was an employee of the appellant-Bank. While serving as a Branch Manager, disciplinary proceedings were initiated against him and the respondent was dismissed from service. In the meanwhile, the respondent was issued a show-cause notice as to why the gratuity should not be forfeited on account of proved misconduct involving moral turpitude. His explanation was rejected and the gratuity was forfeited.

The dismissal and forfeiture were the subject matters of challenge before the High Court leading to the impugned judgment by which the Court upheld the dismissal and rejected the forfeiture of gratuity. The division bench also confirmed with the Single Judge. Hence, the bank is before the Supreme Court in appeal.

Decision: Appeal dismissed.

Reason:

Though the learned Counsel for the appellant-Bank has contended that the conduct of the respondent-employee, which leads to the framing of charges in the departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court. Apart from the disciplinary proceedings initiated by the appellant- Bank, the Bank has not set the criminal law in motion either by registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude. Under sub-Section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction.

In *Jaswant Singh Gill v. Bharat Coking Coal Limited & Ors (2007) 1 SCC 663*, it has been held by this Court that forfeiture of gratuity either wholly or partially is permissible under sub-Section (6) (b) (ii) only in the event that the termination is on account of riotous or disorderly conduct or any other act of violence or on account of an act constituting an offence involving moral turpitude when he is convicted.

In the present case, there is no conviction of the respondent for the misconduct which according to the Bank is an offence involving moral turpitude. Hence, there is no justification for the forfeiture of gratuity on the ground stated in the order dated 20.04.2004 that the "misconduct proved against you amounts to acts involving moral turpitude". At the risk of redundancy, we may state that the requirement of the statute is not the proof of misconduct of acts involving moral turpitude but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law.

That the Act must prevail over the Rules on Payment of Gratuity framed by the employer is also a settled position as per *Jaswant Singh Gill (supra)*. Therefore, the appellant cannot take recourse to its own Rules, ignoring the Act, for denying gratuity.

To sum-up, forfeiture of gratuity is not automatic on dismissal from service; it is subject to sub-Sections (5) and (6) of Section 4 of the Payment of Gratuity Act, 1972. Thus, though for different reasons as well, we find no merit in the appeal and it is accordingly dismissed. No costs.

COAL INDIA LTD

v.

NAVIN KUMAR SINGH [SC]

Civil Appeal Nos.6491-6492 of 2014

Dipak Misra, A.M. Khanwilkar, & D.Y. Chandrachud, JJ. [Decided on 25/09/2018]

Inter – Company transfer on request – Whether employee loses his service benefit of his transferor company – Held, No.

Brief facts:]

These appeals emanate from the judgment and order passed by the Division Bench of the High Court of Jharkhand whereby the High Court upheld the decision of the Single Judge, with minor modifications and declared that the past service of the respondent in the previous company of the appellant could not be forfeited for all purposes in the event of an inter-company transfer on personal grounds at his request. The employer appellant is in appeal against the order.

Decision: Appeals dismissed.

Reason:

On a fair reading of clause 11 of the policy, there is nothing to indicate that the transferee would lose his past service rendered in the parent company for all purposes. The policy of forfeiture of seniority in the parent company, however, is limited to the executives who seek inter-company transfer on personal grounds. That is to ensure that no prejudice is caused to the executives already working in the transferred company. For that reason, the seniority of the executives seeking inter-company transfer on personal request is fixed as if he had entered the concerned Grade on the date of assumption of charge in the transferred company. It has been made explicitly clear that the executive seeking inter- company transfer on personal grounds will lose his past seniority in the Grade. No more and no less.

In the present case, there is no dispute that the respondent had rendered service in E-2 Grade on regular basis in DCC from where he was transferred to CMPDIL, on personal grounds. The service rendered by him in DCC can be and ought to be taken into account for all other purposes, other than for determination of his seniority in E-2 Grade in the new company i.e. CMPDIL. Indeed, his seniority in CMPDIL in E-2 Grade will have to be reckoned from the date of his assumption of charge on 15th May, 1991, but that can have no bearing while determining his eligibility criterion of length of service in E-2 Grade for promotion to E-3 Grade. For determining the eligibility for promotion to E-3 Grade, the service rendered by him in DCC in E-2 Grade with effect from 4th August, 1990, ought to be reckoned. The view so taken by the High Court commends to us. Hence, no fault can be found with the direction given by the High Court to assign notional date of promotion to the respondent in E-3 Grade with effect from 12th November, 1993.

As regards the Office Memorandum dated 5th June, 1985, the same does not militate against the respondent. It is a different matter that it addresses the difficulty expressed about the denial of opportunity of promotion to the executives who opted for inter-company transfer. On a fair reading of this Office Memorandum, it is discernible that the department has clarified the position that if the concerned executive has already completed service for a specified period including the period of service with the old company, would become entitled to be considered for promotion to the higher Grade. If so, not granting similar advantage to the executive who opted for inter-company transfer on personal request and who incidentally enters at number one position in the seniority in the new company would be anomalous. Concededly, what is affected in terms of the policy for inter-company transfer on personal request, is only the seniority position in the new (transferred) company – which would commence from the date of assuming office thereat. By no stretch of imagination, it can affect the length of service in E-2 Grade in the parent company. The two being distinct factors, neither the policy nor the office memorandum would be any impediment for reckoning the period of service rendered by the respondent from August, 1990 in DCC, albeit a case of inter-company transfer on personal request. As a result, these appeals must fail.

Case 1:

XYZ Bank granted loans of Rs.50 crores to ABC Ltd. The loan remains unpaid after 10 years and is declared a non-performing asset (NPA) in 2019. It is alleged that the Chairman-cum-Managing Director of XYZ bank, Mr. Amit Agarwal had a conflict of interest, as his brother Mr. Sumit Agarwal had business dealings with Chairman of ABC Ltd.

Based on the above case:

a. **Explain conflict of interest.**

b. **Explain who related parties are and what are the duties of directors in relation to related party transactions?**

Suggested solution:

a. Conflict of interest is one of the agency problems which arises because of separation of ownership from management and control. The agency problem arises in a situation where an agent (i.e. a director of a company) does not act in the best interests of a principal (i.e. a shareholder). When a principal chooses to act through others and its interest depends on others, it is subject to an agency problem. Corporate Governance actually concerns these agency problems and the way in which shareholders and other stakeholders can effectively exercise influence and exert control over the actions of company managers. In this environment the board of directors has to play an important role in mitigating the potential conflicts of interest.

   According to section 166 of the Companies Act 2013, a director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company. A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

b. As per section 2(76) of the Companies Act 2013 “related party”, with reference to a company, means –

   (i) a director or his relative;

   (ii) a key managerial personnel or his relative;

   (iii) a firm, in which a director, manager or his relative is a partner;

   (iv) a private company in which a director or manager or his relative is a member or director;

   (v) a public company in which a director or manager is a director and holds along with his relatives, more than two per cent. of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any body corporate which is –

(A) a holding, subsidiary or an associate company of such company;

(B) a subsidiary of a holding company to which it is also a subsidiary; or

(C) an investing company or the venture of the company;

Explanation – For the purpose of this clause, " the investing company or the venture of the company" means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

(ix) such other person as may be prescribed.

The term 'relative' is defined under Section 2(77) of the Companies Act, 2013 and Rule 4 of the Companies (Specification of definitions details) Rules, 2014.

Under the companies act 2013 the concept of related party transaction has been covered under section 188. The provision has following legal requirements:

i. Disclosure by interested directors : Every director of a company who has any direct or indirect interest involved in the contract or arrangement entered into or about to be entered in to must disclose the nature of his concern or interest at the meeting of the board in which such contract or arrangement is discussed.

ii. Board Disclosures: Every related party transaction or a contract or an arrangement shall be disclosed in the board`s report along with the justification for entering into such contract or arrangement.

Thus, in the given case Mr. Sumit Agarwal is the relative of Mr. Amit Agarwal. It was the duty of Mr. Amit Agarwal to make the disclosure of his interest to the Board of directors of the company as per Section 188 of the Companies Act, 2013.

Case 2

Alok Brothers Ltd, a steel manufacturing company, is likely to be seeking a stock exchange listing in a few years' time. In preparation for this, the directors are seeking to understand certain key recommendations of the corporate governance codes, since they realise that they will have to strengthen their corporate governance arrangements. In particular the directors require information about what the governance reports have achieved in:

(i) Defining the role of non-executive directors

(ii) Improving disclosure in financial accounts

(iii) Strengthening the role of the auditor

(iv) Protecting shareholder interests

Previously also, the directors have received the majority of their income from the company in the form of

salary and have decided salary levels amongst themselves. They realise that they will have to establish a remuneration committee but are unsure of its role and what it will need to function effectively. The directors also have worked together well, if informally; there is a lack of formal reporting and control systems both at the board and lower levels of management. There is also currently no internal audit department. The directors are also considering whether it will be worthwhile to employ a consultant to advise on how the company should be controlled, focusing on the controls with which the board will be most valid.

Based on the above case:

(a) Explain the purpose and role of the remuneration committee.

(b) Explain the requirements of Companies Act 2013 in relation to Remuneration Committee.

Suggested solution (a):

According to section 178 of the Companies Act 2013, the Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance.

The Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees.

The Nomination and Remuneration Committee shall, while formulating the above policy ensure that –

(i) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;

(ii) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and

(iii) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

This policy shall also be disclosed in the Board's report of the company.

Suggested solution (b):

According to section 178 of the Companies Act 2013, the Board of Directors of every listed company and such other class or classes of companies, as may be prescribed shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one-half shall be independent directors. Provided, that the chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

The Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance.

Sample Case Studies & Suggested Solutions

Case Study-1

Narmada Limited (The Company) is incorporated as a Private Limited Company under the provision of Companies Act, 1956 with the Registrar of Companies, Gwalior, Madhya Pradesh. The company is having its registered office at Plot No.1, First Floor, West Chamber, Gwalior, Madhya Pradesh. Authorized share capital of the Company is Rs. 5, 00,000/-. The Issued, subscribed and paid up share capital of the Company is Rs. 5,00,000/-. The main objects of the company are construction of building and housing and also educational.

A notice of struck off has been received from Registrar of Companies, Gwalior, Madhya Pradesh by the Narmada Limited. Registrar of Companies, Gwalior, Madhya Pradesh issued a notice on company for non- compliance of provisions of the Companies Act, 2013 in respect of filing of Annual Returns and Financial Statements for years 2014-15 to 2017-18 and subsequently the name of the company was struck off in terms of provision of Section 248(1) of the Companies Act, 2013 read with Rule 7 and Rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. Aggrieved by the order of Registrar of Companies, Gwalior, Madhya Pradesh, Narmada Limited filed an appeal before National Company Law Tribunal (NCLT), Gwalior under Section 252 of the Companies Act, 2013 and submitted that the company was in operation and the business activities were carried out by the company during the period of striking off but the reporting of such activities through Annual Returns and Financial Statement had not been filed with Registrar of Companies due to inadvertence on part of the management.

You are a Practicing Company Secretary and the Company has hired you as a Consultant to advise Narmada Limited on the following, considering the above facts:

(a) What would be the procedure regarding filing of appeal before National Company Law Tribunal (NCLT)?

(b) State the grounds on which Registrar of Companies can remove the name of a company from Register of Companies.

(c) Enumerate the categories of Companies which shall not be removed from the Register of Companies under the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.

Suggested Solution – Case Study-1

(a) *Procedure regarding appeal before National Company Law Tribunal*

- According to Rule 87A of the National Company Law Tribunal Rules, 2016, an appeal under Section 252(1) or an application under Section 252(3) may be filed before the National Company Law Tribunal (NCLT) in Form No. NCLT. 9, with such modifications as may be necessary.
- Following Documents shall be attached with Form No. NCLT.9:
  - Copy of Memorandum and Articles of Association
  - Copy of list of struck off companies issued by ROC
  - Evidence regarding payment of Fee
  - Affidavit Verifying the Petition
  - Memorandum of Appearance
  - Copy of Board Resolution & Vakalatnam
  - Sufficient evidence to prove that it has been in operation during striking off and therefore could not be termed as defunct company

- A copy of the appeal or application, shall be served on the Registrar of Companies and on such other persons as the National Company Law Tribunal may direct, not less than fourteen days before the date fixed for hearing of the appeal or application, as the case may be.
- Upon hearing the appeal or the application or any adjourned hearing thereof, the National Company Law Tribunal may pass appropriate order, as it deems fit.
- Where the National Company Law Tribunal makes an order restoring the name of a company in the register of companies, the order shall direct that-
  - The appellant or applicant shall deliver a certified copy to the Registrar of Companies within thirty days from the date of the order;
  - On such delivery, the Registrar of Companies do, in his official name and seal, publish the order in the Official Gazette;
  - The appellant or applicant do pay to the Registrar of Companies his costs of, and occasioned by, the appeal or application, unless the Tribunal directs otherwise; and
  - The company shall file pending financial statements and annual returns with the Registrar and comply with the requirements of the Companies Act, 2013 and rules made thereunder within such time as may be directed by the Tribunal.

(b) *Grounds on which Registrar of Companies can remove the name of a company from Register of Companies:*

As per Section 248 of the Companies Act, 2013, where the Registrar has reasonable cause to believe that –

- Company has failed to commence its business within one year of its incorporation
- Company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013
- Subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under Section 10A (1) of the Companies Act, 2013
- Company is not carrying on any business or operations, as revealed after the physical verification carried out under Section 12(9) of the Companies Act, 2013.

(c) *Categories of Companies which shall not be removed from the Register of Companies under the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:*

According to Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 the following categories of companies shall not be removed from the register of companies:

(i) Listed companies;

(ii) Companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;

(iii) Vanishing companies;

(iv) Companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up or were completed but prosecutions arising out of such inspection or investigation are pending in the Court;

(v) Companies where notices under section 234 of the Companies Act, 1956 or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;

(vi) Companies against which any prosecution for an offence is pending in any court;

(vii) Companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;

(viii) Companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;

(ix) Companies having charges which are pending for satisfaction; and

(x) Companies registered under section 25 of the Companies Act, 1956 or section 8 of the Companies Act, 2013.

Case Study 2

M/s Jooly Private Limited (Corporate Debtor) is a company incorporated on 01.01.2005 under the provisions of Companies Act, 1956, having its registered office at Mumbai. The Authorised Share Capital of the company is Rs. 100, 00, 00,000/- and Paid up Share Capital of the company is Rs. Rs. 99, 00, 00,000/-.

M/s Jemmy Private Limited(Operational Creditor) is a company incorporated on 01.01.2006 under the provisions of Companies Act, 1956 having its registered office at Kolkata.

M/s Jooly Private Limited approached M/s Jemmy Private Limited for purchase of inputs for his production. It was specifically agreed that upon procuring the inputs by M/s Jooly Private Limited and raising of invoices by M/s Jemmy Private Limited , the entire payment for such invoices shall be made in a timely manner. As per the arrangement, the M/s Jooly Private Limited placed various purchase orders for supply of inputs . M/s Jemmy Private Limited supplied the goods as per the orders placed by M/s Jooly Private Limited and raised invoices against the said supply.

The invoices were duly acknowledged by M/s Jooly Private Limited and an amount as part payments were also made. But thereafter, inspite of various requests made and reminders sent by M/s Jemmy Private Limited, the M/s Jooly Private Limited had neither responded nor repaid the remaining claim.

On failure to pay the outstanding dues by the M/s Jooly Private Limited, the M/s Jemmy Private Limited sent a demand notice dated 01.012019 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the respondent asking them to make the entire outstanding payments of Rs. 10,00,000/- (Rupees Ten Lakhs) inclusive of interest within 15 days from receipt of the notice, failing which the M/s Jemmy Private Limited shall initiate the Corporate Insolvency Resolution process against the M/s Jooly Private Limited.

Despite the demand notice, the M/s Jooly Private Limited did not pay the amount demanded, neither raised any notice of dispute nor replied to the said notice. As a next action M/s Jemmy Private Limited filed an application before National Company Law Tribunal (NCLT), seeking to unfold the process of Corporate Insolvency Resolution Process (CIRP).

Based on the above fact, answer the following:

(a) Who can make application before the Adjudicating Authority on behalf of Operational Creditor and where to file such application to initiate the Corporate Insolvency process in the given case and also state the documents needs to be attached with such application under Insolvency and Bankruptcy Code, 2016.

(b) Who can appoint Interim Resolution Professional in case Resolution Professional is not appointed by the Operational Creditor? State the moratorium as envisaged under the provisions of Section 14(1) to (4) of the Insolvency and Bankruptcy Code, 2016 in relation to the Corporate Debtor.

(c) Enumerate the duties of interim resolution professional during the Corporate Insolvency Resolution Process (CIRP) specified under Section 18 of the Insolvency and Bankruptcy Code, 2016.

Suggested Solution - Case Study-2

(a) As per Section 6 of the Insolvency and Bankruptcy Code, 2016, where any corporate debtor commits a default**,** a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under Chapter II of the Part II of the Insolvency and Bankruptcy Code, 2016. It may be noted that in terms of Section 5(20) of the Insolvency and Bankruptcy Code, 2016 operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Application to initiate the Corporate Insolvency process may be filed before the Adjudicating Authority. In terms of Section 5(1) of the Insolvency and Bankruptcy Code, 2016, Adjudicating Authority means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

According to Section 9 of the Insolvency and Bankruptcy Code, 2016, Application for initiation of corporate insolvency resolution process by operational creditor shall be filed in such form and manner and accompanied with such fee as may be prescribed. The operational creditor shall, along with the application furnish following documents-

- A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;
- A copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
- Any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(b) Adjudicating Authority (National Company Law Tribunal) appoint Interim Resolution Professional in case Resolution Professional is not appointed by the Operational Creditor.

Section 14 of the Insolvency and Bankruptcy Code, 2016 deals with Moratorium.

Section 14(1) provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Section 14(2) states that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

As per Section 14(3) the provisions of sub-section (1) shall not apply to –

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;

(b) a surety in a contract of guarantee to a corporate debtor.

Section 14(4) provides that the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. It may be noted that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

(c) Section 18 of the Insolvency and Bankruptcy Code, 2016 deals with the duties of interim resolution professional.

The interim resolution professional shall perform the following duties, namely: -

(a) Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to -

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) Constitute committee of creditors;

(d) Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) File information collected with the information utility, if necessary; and

(f) Take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including -

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) To perform such other duties as may be specified by the Board.

It may be noted that the term "assets" shall not include the following, namely: -

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Case Study-3

Kanzra Kysco, a company incorporated and listed in South Korea, is *inter-alia* engaged in the business of manufacturing and sale of steel products, automotive parts and fuel cell systems. Kanzra Kysco present in India through its subsidiaries, i.e. Kanzra Kysco India Private Limited. Kanzra Kysco India Private Limited a company incorporated in India, is engaged in the business of supply/distribution of processed steel sheets to automobile original equipment manufacturers (OEMs), or their vendors.

Kanzra Steel, a company incorporated and listed in South Korea, is an integrated iron and steel mining company *inter-alia* engaged in manufacture and sale of various steel products such as steel bars, steel beams, hot and cold rolled steel and plates. Kanzra Steel's presence in India is largely limited to the supply of certain raw materials to Kanzra Kysco India Private Limited.

Kanzra Kysco and Kanzra Steel contemplates a merger. The proposed combination under Section 5 of the Competition Act, 2002 relates to the merger of Kanzra Kysco into Kanzra Steel as a result of which Kanzra Kysco would cease to exist and Kanzra Steel will be the surviving company. Both Kanzra Kysco and Kanzra Steel belong to the Kanzra Automobiles Group of South Korea.

Based on the above fact, answer the following:

(a) As Company Secretary of Kanzra Kysco India Private Limited, advise the Chairman of your Company, who is seeking your advice, regarding threshold of combination as prescribed under Competition Act, 2002.

(b) Merger notice under Section 6(2) of the Competition Act, 2002 has been received by Competition Commission of India. Assuming yourself as the Chairman of Competition Commission of India, state the factors that need to be considered while determining the above combination whether such merger is likely or not likely to have an appreciable adverse effect on competition in India?

Suggested Solution- Case Study-3

(a) The thresholds for the combined assets/turnover of the parties to a combination prescribed under the Competition Act, 2002 are as follows:

At Enterprise level: The value of combined assets of the combining enterprises exceeds INR 2,000 crores or the combined turnover of the combining enterprise exceeds INR 6,000 crores, in India. In case either or both of the combining enterprises have assets / turnover outside India also, then the combined assets of the combining enterprises value exceeds US$ 1000 million, including at least INR 1000 crores in India, or combined turnover exceeds US$ 3000 million, including at least INR 3000 crores in India.

At Group level: The group to which the combining enterprise whose control, shares, assets or voting rights are being acquired, would belong after the acquisition, or the group to which the combining enterprise remaining after the merger or amalgamation, would belong has either assets of value of more than INR 8000 crores in India or turnover more than INR 24000 crores in India. Where the group has presence in India as well as outside India then the group has assets more than US$ 4 billion including at least INR 1000 crores in India or turnover more than US$ 12 billion including at least INR 3000 crores in India.

The term ‘Group’ has been explained in the Act. Two enterprises belong to a “Group” if one is in position to exercise at least 26 per cent voting rights or appoint at least 50 per cent of the directors or controls the management or affairs in the other.

The above thresholds are presented in the form of a table below:

<table>
<tr><th></th><th>APPLICABLE TO</th><th colspan="2">ASSETS</th><th colspan="2">TURNOVER</th></tr>
<tr><td>In India</td><td>Individual Parties</td><td colspan="2">Rs. 2,000 cr.</td><td colspan="2">Rs. 6,000 cr.</td></tr>
<tr><td></td><td>Group</td><td colspan="2">Rs. 8,000 cr.</td><td colspan="2">Rs. 24,000 cr.</td></tr>
<tr><td rowspan="4">In India and outside</td><td rowspan="2"></td><td colspan="2">ASSETS</td><td colspan="2">TURNOVER</td></tr>
<tr><td>Total</td><td>Minimum Indian Component out of Total</td><td>Total</td><td>Minimum Indian Component out of Total</td></tr>
<tr><td>Individual parties</td><td>US$ 1 bn.</td><td>Rs. 1000 cr.</td><td>US$ 3 bn.</td><td>Rs. 3,000 cr</td></tr>
<tr><td>Group</td><td>US$ 4 bn.</td><td>Rs. 1000 cr.</td><td>US$ 12 bn.</td><td>Rs. 3,000 cr.</td></tr>
</table>

(b) The Competition Act, 2002 envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in Section 20(4) of the Competition Act, 2002.

Factors to be considered by the Competition Commission of India while evaluating appreciable adverse effect of Combinations on competition in the relevant market, are as under:

(a) Actual and potential level of competition through imports in the market;

(b) Extent of barriers to entry into the market;

(c) Level of concentration in the market;

(d) Degree of countervailing power in the market;

(e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) Extent of effective competition likely to sustain in a market;

(g) Extent to which substitutes are available or are likely to be available in the market;

(h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) Nature and extent of vertical integration in the market;

(k) Possibility of a failing business;

(l) Nature and extent of innovation;

(m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Case Study-4

Amez Inc. is an E-commerce entity incorporated as an agency in India under Section 2 (v) (iii) of Foreign Exchange Management Act, 1999(FEMA) owned or controlled by a person who is a resident outside India and conducting the e-commerce business in marketplace based model. As a Practicing Company Secretary, Amez Inc. sought your advise on possibility of Foreign **Direct** Investment on e-commerce sector. Prepare a Policy Paper for Foreign Direct Investment on e-commerce sector, in India.

Suggested Solution- Case Study-4

Foreign Direct Investment (FDI) on e-commerce sector

- 100% FDI under automatic route is permitted in marketplace model of e-commerce and FDI is not permitted in inventory based model of e-commerce.

  It may be noted that:

  E-commerce means buying and selling of goods and services including digital products over digital & electronic network.

  Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

  Market place based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

  E-commerce entity means a company incorporated under the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

- Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.

- Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.

- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on Business to Business (B2B) basis.

- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.

- E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.

- An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.
- In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- In marketplace model, any warranty/ guarantee of goods and services sold will be responsibility of the seller.
- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For this purposes provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.
- Guidelines on cash and carry wholesale trading of Consolidated FDI Policy Circular 2017 will apply on B2B e-commerce.
- E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.
- E-commerce marketplace entity will be required to furnish a certificate along with a report of statutory auditor to Reserve Bank of India, confirming compliance of above guidelines, by 30th of September of every year for the preceding financial year.
- Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalities, sale of services through e-commerce will be under automatic route.

Case Study-5

Under the scheme of amalgamation, *M/S Pro-Prof* Limited Liability Partnership (*LLP)* is proposing to amalgamate with *M/S Queens Private Limited.* The scheme of amalgamation filed before the National Company Law Tribunal (NCLT) for approval.

In view of the above fact, answer the following:

(a) Whether a Limited Liability Partnership can be allowed by the NCLT to amalgamate with a Private Limited Company under Scheme of Amalgamation? Justify your answer.

(b) Discuss the powers of NCLT to enforce compromise or arrangement of limited liability partnerships as mentioned under Limited Liability Partnership Act, 2008.

Suggested Solution- Case Study-5

(a) Yes, a Limited Liability Partnership may be allowed by the NCLT to amalgamate with a Private Limited Company under Scheme of Amalgamation.

Chapter XII (Section 60 to 62) of the Limited Liability Partnership Act, 2008 deals with compromise, or arrangement of limited liability partnerships. Further, Section 230 to 234 of the Companies Act, 2013 deals with provisions of compromise, or arrangement of companies.

In the matter of Amalgamation between *M/s Real Image LLP (the transferor LLP) with M/s Qube Cinema Technologies Pvt Ltd. (Transferee Company) and Their Respective Partner Shareholders and Creditors (CP/123/CAA/ 2018/TCA/157/CAA/2017)* the National Company Law Tribunal (Single Bench, Chennai) vide its Order delivered on 11th June, 2018 in Para 15 *inter-alia* observed that:

.... "*the legislative intent behind enacting both the LLP Act, 2008 and the Companies Act, 2013 is to facilitate the ease of doing business and create a desirable business atmosphere for companies and LLPs. For this purpose, both the Acts have provided provisions for merger or amalgamation of two or more LLPs and companies."*........................

.... *"If the intention of Parliament is to permit a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Act prohibits a merger of an Indian LLP with an Indian company. Thus, there does not appear any express legal bar to allow/ sanction merger of an Indian LLP with an Indian company."*...

(b) Section 61 of the Limited Liability Partnership Act, 2008 empowers the National Company Law Tribunal (Tribunal) to enforce compromise or arrangement.

Where the Tribunal makes an order under Section 60 of the Limited Liability Partnership Act, 2008 sanctioning a compromise or an arrangement in respect of a limited liability partnership, it –

(a) shall have power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

If the Tribunal is satisfied that a compromise or an arrangement sanctioned under section 60 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the limited liability partnership, make an order for winding up the limited liability partnership, and such an order shall be deemed to be an order made under section 64 of the Limited Liability Partnership Act, 2008.

Case Study - 6

ABC Limited is a company engaged in the business of cement exports and it is also specialized in the area of Enterprise Resource Planning (ERP) implementation offering their services to domestic and overseas customers.

Enforcement Directorate under Foreign Exchange Management Act (FEMA) carried out the investigation against the ABC Limited. The investigation also centered around the details of the Promoters and their shareholdings; how many subsidiaries companies were formed by the appellants in India and abroad for doing business; details of the share transactions between the promoters of the Company and Non-Resident Indian(NRI) and the details of loans raised by the ABC Limited for their business purpose etc.

The investigation carried out by Enforcement Directorate has clearly made out a case against ABC Limited of violation of Section 8 and Section 42 of Foreign Exchange Management Act as well as Foreign Exchange

Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.

A complaint has been made by the Enforcement Directorate before Special Director. Special Director allowed the complaint and held that ABC Limited has contravened the provisions of FEMA as prayed in the complaint and accordingly imposed a penalty of Rs.5 crores on the Company.

ABC Limited felt aggrieved by the aforementioned order of Special Director and contemplates to file an appeal. As a Company Secretary of ABC Limited advise the company regarding:

(a) Adjudication and Appeal under Foreign Exchange Management Act, 1999.

(b) Duty of persons to realise foreign exchange due and Manner of Repatriation as well as Period for surrender of realised foreign exchange under Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.

(c) Consequence of contravention of provisions of Foreign Exchange Management Act, 1999 and Rules and Regulation made thereunder by a company.

Suggested Solution- Case Study-6

(a) Chapter V (Section 16 to 35) of the Foreign Exchange Management Act, 1999(FEMA) deals with the provisions of Adjudication and Appeal as under:

Adjudicating Authority

For the purpose of adjudication under Section 13 of FEMA (dealing with Penalties), the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under Section 13, against whom a complaint has been made. Adjudicating Authority shall not hold an enquiry except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

Appeal to Special Director (Appeals)

Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities. Every appeal shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by prescribed fee.

Appeal to Appellate Tribunal

Central Government or any person aggrieved by an order made by an Adjudicating Authority, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such prescribed.

Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

(b) *Duty of persons to realise foreign exchange due:*

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Foreign Exchange Management Act, 1999, or the Rules and Regulations made thereunder, or with the general or special permission of the Reserve Bank of India , take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

a. that the receipt by him of the whole or part of that foreign exchange is delayed; or

b. that the foreign exchange ceases in whole or in part to be receivable by him.

Manner of Repatriation:

(1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

   a. sell it to an authorised person in India in exchange for rupees; or

   b. retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or

   c. use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

(2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Period for surrender of realised foreign exchange:

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person, within the period specified below :-

   i. foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;

   ii. in all other cases within a period of ninety days from the date of its receipt.

(c) According to Section 42 of the Foreign Exchange Management Act, 1999, where a person committing a contravention of any of the provisions of the Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

It may be noted that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

Where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

For the purposes of section 42 of the Act, "Company" means anybody corporate and includes a firm or other association of individuals; and "director", in relation to a firm, means a partner in the firm.

Case Study - 7

XYZ Limited is a company engaged in real estate and construction business. In order to build a land bank in various parts of India that were likely to see commercial development and anticipating a future upward trend in land prices in various parts India . XYZ Limited hired the services of Mr. Mahesh to assist in the process of acquisition of lands.

XYZ Limited issued a detailed offer letter to Mr. Mahesh for purchase of around 100 acres of land at the maximum price of Rs. 10,00,000/- per acre in different parts of India within a period not exceeding five years. The said offer was accepted by Mr. Mahesh by a letter of acceptance. Upon exchange of offer and acceptance, a legally binding and valid contract came to be force between XYZ Limited and Mr. Mahesh.

Mr. Mahesh received from XYZ Limited a sum of Rs. 1000 Crore as a loan/advance for the purchase of lands as specified in the contract between the parties. Mr. Mahesh purchased various movable and immovable properties with the funds received from XYZ Limited. Since all the funds could not be directly invested in land as required by the contract, investments were made by Mr. Mahesh by himself or through his company in purchase of immovable property, including land, built-up residential and commercial buildings, etc. and Investment in fixed deposits in name of Mr. Mahesh and PQR Limited(95% shareholding by Mr. Mahesh) also investment in movable property including bank balance and few vehicles.

In the meantime Director of Enforcement initiated *suo moto* proceedings under the Prevention of Money Laundering Act, 2002(PMLA) and registered a complaint under Sections 3 and 4 of the PMLA and attached the property of Mr. Mahesh under the Prevention of Money Laundering Act, 2002.

In view of the above, answer the following question:

(a) Discuss the attachment of property involved in money laundering under PMLA

(b) Explain the extent of punishment prescribed under PMLA.

(c) Discuss Appellate Authority establish under PMLA and what is the time limit to file appeal.

(10 Marks Each)

Suggested Solution- Case Study-7

(a) Section 5 of the Prevention of Money Laundering Act, 2002 (PMLA) deals with the provision of attachment of property involved in money laundering.

As per Section 5(1) of the PMLA, Where the Director or any other officer not below the rank of Deputy Director authorised by the Director, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

It may be noted that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country.

Further, notwithstanding anything contained in above , any property of any person may be attached , if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of Section of the PMLA has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately, the non-attachment of the property is likely to frustrate any proceeding under the Act.

For the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under Section 5 of PMLA is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.;

Section 5(2) states that the Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

Section 5(3) provides that every order of attachment made under sub-section(1) shall cease to have effect after the expiry of the period specified in sub-section(1) or on the date of an order made under sub-section (3) of section 8, whichever is earlier.

As per Section 5(4) of PMLA, nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment. It may be noted that person interested, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Section 5(5) states that the Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

(b) Offence of money-Laundering and Punishment for money-Laundering are specified under Section 3 and 4 of the Prevention of Money Laundering Act, 2002 respectively.

Section 3 of the Prevention of Money Laundering Act, 2002 provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

It may be further noted that proceeds of crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.

According to Section 4 of the Prevention of Money Laundering Act, 2002, whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

It may be noted that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule to the PMLA, shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine.

(c) The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal. Appeal has to be filed within a period of forty-five days from the date of receipt of a copy of the order made by the Adjudicating Authority. Appellate Tribunal may entertain an appeal after the expiry of the period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order. Thus appeal can be filed before High Court on any question of law or fact. High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Case Study-8

A Corporate Debtor defaulted in the payment to the Operational Creditor, Safe Bank, a foreign bank, amounting to INR 1,000 crore. A certificate was also furnished by the Safe Bank with regards to the non-payment of the outstanding amount by the Corporate Debtor and repeated reminders as to the payment of the debt were made, but such communications could not influence the Debtor to make the payment, pursuant to which a Statutory Notice was sent by the Operational Creditor under Section 433 and 434 of the Companies Act, 1956. The reply to such notice denied the existence of any such outstanding debt on the part of the Debtor.

After, the Insolvency and Bankruptcy Code (the Code) was enacted in 2016, the Operational Creditor furnished a Demand Notice through his lawyer to the Corporate Debtor under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Corporate Debtor replied to the notice saying that there existed no outstanding default on its part and simultaneously, also questioned the validity of the Purchase Agreement. The Debtor also challenged the validity of sending the Demand Notice through his lawyer.

Aggrieved by the action of the Corporate Debtor, the Operational Creditor approached the National Company Law Tribunal (NCLT) and applied for the initiation of the Corporate Insolvency Resolution Process. NCLT rejected the application for initiation of Corporate Insolvency Resolution Process. Operational Creditor aggrieved by the decision of NCLT, preferred an appeal to the National Company Law Tribunal (NCLAT), which also upheld the decision of NCLT.

Subsequently, the Operational Creditor approached the Supreme Court for the redressal of its grievance.

In this backdrop, answer the following questions:

(i) Give reasons for the rejection of the application for the initiation of the Corporate Insolvency Resolution Process by NCLT and NCLAT citing relevant provisions of the Code.

(10 marks)

(ii) Discuss whether challenging the validity of the Demand Notice by Corporate Debtor is justified? Discuss with relevant provisions of the Code.

(5 marks)

(iii) The Supreme Court overruled the orders of NCLT and NCLAT and allowed initiation of Corporate Insolvency Resolution Process. Discuss reasons for the same with the help of a decided case law.

(10 marks)

Suggested Solution- Case Study-8

(i) The NCLT rejected the application for initiation of the Corporate Insolvency Resolution Process since it was incomplete as it did not comply with the mandatory requirements of Section 9(3)(c) of the Insolvency and Bankruptcy Code, 2016 which require a certificate from a financial institution with regards to the non-payment of the outstanding amount by the Corporate Debtor. The certificate from the Safe Bank itself was not held to be a certificate from a financial institution as it was a foreign bank which did not fulfill any of the requirements to qualify as a 'financial institution' as per Section 3(14) of the Code. Section 3(14) defines financial institution as under:

"financial institution" means-

(a) a scheduled bank;

(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(c) public financial institution as defined in clause (72) of section 2 of the Companies Act,2013 (18 of 2013); and

(d) such other institution as the Central Government may by notification specify as a financial institution;

NCLAT upheld the NCLT order since the application has to be complete before the initiation of the Corporate Insolvency Resolution Process and that the appellant failed to comply with the mandatory requirement of furnishing a certificate by a financial institution in which the Corporate Debtor has its account with regards that it has failed to pay the outstanding debt. Moreover, it reiterated that the Appellant Bank was not a 'financial institution' as per Section 3(14) of the Code. Also, as it is a mandatory document which acts as an evidence to the existence of default, it has to be necessarily furnished and without it the application is incomplete.

(ii) There was an existence of dispute before the Demand Notice was furnished upon the Corporate Debtor as per Section 8(2)(a) of the Code which was also raised at the time when a reply to the Statutory Notice was furnished under Section 433 and 434 of the Companies Act, 1956 by the Respondent.

Section 8(1) of the Code contains provision relating to Demand Notice, it reads as under:

"An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."

NCLAT noted that "in the present case, as the notice has been given by an advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/ advocate hold any position with or in relation to the appellant company, we hold that the notice issued by the advocate/ lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the Code. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable.

NCLT took cognizance of the Demand Notice which was furnished by the lawyer of the Appellant and noted that such Demand Notice has to be in compliance with Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It was also observed that such Demand Notice was invalid as it has to be furnished as per Form 3 by the Creditor himself or by any authorized person on his behalf and lawyer cannot come under such purview as there was absence of any authority by the Operational Creditor.

(iii) Supreme Court in the matter of *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.* dated December 15, 2017 while deciding upon the aforesaid issues, made the following observations:

(a) *Section 9(3)(c) of the Code is directory and not mandatory in nature*

The Supreme Court observed that a creative interpretation of Section 9(3)(c) is necessary in the present case as the literal interpretation would be unreasonable and would create hardships for Appellants and other foreign banks in the future. Also, the requirement of certificate as a document is not necessary for substantiating the existence of default as it can be proved by other documents as well. Also, in such cases where such certificates are impossible to furnish, serious inconvenience will be caused to the innocent persons like Appellant when such requirements are not even necessary to further the object of the Code.

Section 9(3)(c) has been since amended to read as under,

"a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [1][by the corporate debtor, if available;]"

(b) *A Lawyer can issue a demand notice of an unpaid operational debt on behalf of the operational creditor*

In this context, the Supreme Court observed that Section 8 of the Code speaks of an operational creditor delivering a demand notice and if the legislature had wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been 'issued' and not 'delivered'. Delivery, therefore, would postulate that such notice could be made by an authorized agent.

The expression 'practise' under Section 30 of the Advocates Act, 1961 providing for the 'Right of advocates to practice' is an expression of extremely wide import, and would include all preparatory steps leading to the filing of an application before a Tribunal.

Court also noted that the non-obstante clause contained in Section 238 of the Code (provisions of the Code overriding other laws) will not override the Advocates Act, 1961 as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

SC also considered the judgment in *Byram Pestonji Gariwala v. Union Bank of India, (1992) 1 SCC 31*. In this judgment, what fell for consideration was Order XXIII Rule 3 of the Code of Civil Procedure, 1908 after its amendment in 1976. It was argued in that case that a compromise in a suit had, under Order XXIII Rule 3, to be in writing and "signed by the parties". It was, therefore, argued that a compromise effected by counsel on behalf of his client would not be effective in law, unless the party himself signed the compromise. This was turned down stating that Courts in India have consistently recognized the traditional role of lawyers and the extent and nature of the implied authority to act on behalf of their clients, which included compromising matters on behalf of their clients. The Court held there is no reason to assume that the legislature intended to curtail such implied authority of counsel.

SC also noted that to insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by *vakalatnama*, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

Therefore, a conjoint reading of Section 30 of the Advocates Act, 1961 and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer is in order.

1. Inserted by the Insolvency And Bankruptcy Code (Second Amendment) Act, 2018 dated 17-8-2018

Case Study – 9

'Taste Bud' was a restaurant located at leased premises in New Delhi. It had a great reputation, award-winning chefs and tastefully designed interiors. Much of its business came from executive lunches and dinners. Following the opening of 'Heavens', another excellent restaurant in the nearby vicinity, trading losses were incurred by Taste Bud and eventually the business became insolvent.

Efforts to either have the rent reduced or to sell the business were unsuccessful. Suppliers of food, bevrages and utilities were unpaid for supplies provided in the previous 45- 60 days, amounting to around Rs.90,000. There were rental arrears for one month amounting to Rs.50,000 towards landlord Mr. Deepak (the landlord had received advance rent for three months, lease deed provided for one-month rent as security and one-month rent as advance).

Taste Bud also had a secured creditor, 'Secure Bank'. The bank indicated that it did not wish to appoint a receiver/ file for insolvency as the accounts were regularly maintained. Taste Bud was managed by Mr. Kapil, as a sole proprietor. He employed a staff of 10 people, including a chef, an assistant chef, six waiters and two house-keeping staff. The salaries due to these employees were paid in half since the past three months.

In light of the above, answer the following questions:

(a) Whether Taste Bud can apply for fresh start process? Give answer with citing reasons.

(b) In priority of payment of debts who will be paid before the wages and unpaid dues of employees of the bankrupt? How the priority is decided under the IBC 2016?

(c) Who can initiate an insolvency resolution process in this case? Give reasons.

(d) In the above situation if a bankruptcy order is passed against Taste Bud, who shall prepare the list of creditors? Mention provisions of IBC 2016 in this regard?

(e) Analyse the effect of Bankruptcy Order on secured creditors under the IBC 2016.

(5 marks each)

Suggested Solution- Case Study-9

(a) No, Taste Bud is ineligible for applying for fresh start process.

Reason : Section 80(2)(c) of the Code provides a Fresh Start Process for individuals under which they will be eligible for a debt waiver of up to INR 35,000. The individual will be eligible for the waiver subject to certain limits prescribed under the Code.

Section 80 of the Insolvency and Bankruptcy Code, 2016 provides that a debtor who is unable to pay his debt and fulfils the conditions as mentioned in sub-section (2) of section 80 shall be entitled to make an application to the Debt Recovery Tribunal (DRT) for a fresh start process for discharge of his qualifying debt.

Section 79(19) of the Code defines the meaning of Qualifying Debt. It means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time but does not includes

- an excluded debt;
- a debt to the extent it is secured; and
- any debt which has been incurred three months prior to the date of the application for fresh start process;

(b) The first priority of payment shall be for the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full. The Workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date and the debts owed to the secured creditors comes after second in priority.

Reason: Section 178(1) of the Insolvency and Bankruptcy Code, 2016 prescribes the priority of payments of debts as under:

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or the State Legislature for the time being in force, in the distribution of the final dividend, the following debts shall be paid in priority to all other debts –

(a) firstly, the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full;

(b) secondly, –

 (i) the workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date; and

 (ii) debts owed to secured creditors

(c) thirdly, wages and any unpaid dues owed to employees, other than workmen, of the bankrupt for the period of twelve months preceding the bankruptcy commencement date;

(d) fourthly, any amount due to the Central Government and the State Government including the amount to be received on account of Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the bankruptcy commencement date;

(e) lastly, all other debts and dues owed by the bankrupt including unsecured debts.

(c) No one can initiate an insolvency resolution process.

Reason: Here 'Tast Bud' is the sole proprietorship concern and the proprietor is named as Mr Kapil. As mentioned in sub-question (a) above 'Taste Bud' is enligible to initiate the insolvency.

Section 6 of the Insolvency and Bankruptcy Code, 2016 provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner provided under Chapter II of Part II of the Code. However, it is to be mentioned here that the case referred above relates to Individual and not of the CIRP.

(d) Bankruptcy Trustee shall prepare the list of creditors.

Reason: Section 132 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall within fourteen days from the bankruptcy commencement date prepare a list of creditors of the bankrupt on the basis of,

(i) the information disclosed by the bankrupt in the application for bankruptcy filed by the bankrupt under Section 118 of the Insolvency and Bankruptcy Code, 2016 and the statement of affairs filed under Section 125 of the Insolvency and Bankruptcy Code, 2016; and

(ii) claims received by the bankruptcy trustee under sub-Section (2) of Section 130 of the Insolvency and Bankruptcy Code, 2016.

(e) Section 128 of the Insolvency and Bankruptcy Code, 2016 provides that on passing of the bankruptcy order under Section 126 of the Insolvency and Bankruptcy Code, 2016:

a) the estate of the bankrupt shall vest in the bankruptcy trustee as provided under Section 154 of the Insolvency and Bankruptcy Code, 2016;

b) the estate of the bankrupt shall be divided among his creditors;

c) a creditor of the bankrupt indebted in respect of any debt claimed as a bankruptcy debt shall not:

   (i) initiate any action against the property of the bankrupt in respect of such debt; or

   (ii) commence any suit or other legal proceedings except with the leave of the Adjudicating Authority and on such terms as the Adjudicating Authority may impose.

Subject to the provisions of Section 123 of the Insolvency and Bankruptcy Code, 2016, the bankruptcy order shall not affect the right of any secured creditor to realize or otherwise deal with his security interest in the same manner as he would have been entitled if the bankruptcy order had not been passed: Provided that no secured creditor shall be entitled to any interest in respect of his debt after the bankruptcy commencement date if he does not take any action to realise his security within thirty days from the said date.

Case Study – 10

Disqualification of Director

As on 30th November, 2018, the filing status of the financial statement or annual return of ABC Limited for the last 4 financial year is as under:

Financial Year ended 31st March	Filing of Financial Statement	Filing of Annual Return	Date of AGM
2017-18	Not Submitted	Not submitted	25th September, 2018
2016-17	Not submitted	Submitted	5th June, 2017
2015-16	Submitted	Not submitted	30th May, 2016
2014-15	Submitted	Not submitted	25th May, 2015

On the basis of above please advise:

i. Due date of the filing of the Financial Statement and Annual Return for the FY2015-16.

ii. On the basis of the above filing status, whether the directors of the company are being disqualified or not under section 164(2) of the Companies Act, 2013.

iii. Whether the company has made any non-compliance in calling of the AGM.

iv. Consequence to the company for the Non filing of the Financial Statement.

Suggested Solution- Case Study-10

i. Due date of the filing of the Financial Statement and Annual Return for the FY 2015-16.

As per the Section 137 of the Companies Act, 2013, A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within thirty days of the date of annual general meeting.

In the above case the AGM is held on the 30th May, 2016 accordingly, the financial statement of the company should be filed on or before the 29th June, 2016.

As per section 92 of the companies act, 2013 Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting.

In the above case the AGM is held on the 30th May, 2016 accordingly, the financial statement of the company should be filed on or before the 29th July, 2016.

ii. On the basis of the above filing status, whether the directors of the company are being disqualified or not under section 164(2) of the Companies Act, 2013**.**

As per Section 164 (2) of the Companies Act, 2013, No person who is or has been a director of a company which –

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.]

As per the above filing status, the company has not filed the financial statement for the FY 2016 -17 and 2017-19 and the Annual return for the FY 2014-15 and 2015-16. Hence, all the Director of the company are disqualified. However, in case any director appointed during the FY 2016-17 and 2017-18 will not be disqualified for appointment or reappointment in any company.

iii. Whether the company has made any non-compliance in calling of the AGM.

As per section 96 of the Companies Act, 2013 every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

From the above table it can be seen that the company has call AGM on 05th June, 2017 and the AGM for the FY 17-18 is called on 25th September, 2018, which is called after the gap of fifteen months which was expired on 05th September, 2018. However, if the company has taken the prior approval of the registrar of companies for extension of the date of the Annual general meeting, the company is in compliance with the law.

iv. Consequence to the company for the Non-filing of the Financial Statement.

As per section 137 of the companies Act, 2013 If a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified therein the company shall be liable to a penalty of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, and the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupee.

The company has not filed the financial statement for the year 2016-17 and 2017-18 and company is liable to pay additional fees as per section 403 and the penalty of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees.

Case Study-11

Acceptance of Deposit by Private Company

The Promoter of the ABC Private Limited (a Start-up Registered company) incorporated on 20th June, 2016 is willing to accept deposit from its members. The shareholding of Mr. A and Mr. B and Mr. C as on the 31st March 2017 is as under:

Mr. A Director of the company holding 4000 shares of Rupees 100 per share

Mr. B Friend of Mr. A

Mr. C 3000 Shares of Rupees 100 per share

The Company is not having investment in any Subsidiary Company and Associate Company, the borrowing from the Financial Institutions as on 31st March, 2017 is Rupees 10 Crores.

On the basis of the above information, Please advise on the following:

i. Whether the company can Accept deposit from Mr. A

ii. Whether the company can Accept deposit from Mr. B

iii. Whether the company can Accept deposit from Mr.C?

iv. What will be the maximum limits up to which the deposit can be accepted?

v. Describe the various compliance requirements for the company.

Suggested Solution- Case Study-11

i. Whether the company can Accept deposit from Mr. A

As per the Companies (Acceptance of Deposit) Rules, 2014 any amount received from a person who, at the time of the receipt of the amount, was a director of the company or a relative of the director of the Private Company is exempted under the deposit rules. However in such case the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report.

Hence the company can accept deposit from Mr. A as he is the Director of the company with No limit on the amount of deposit, further he need to give declaration on the same.

ii. Whether the company can accept deposit from Mr. B

No, the Company cannot accept deposit from Mr. B as he is not the director, relative of the directors of the company also he is not the members of the company. The definition of the private company prohibited for any invitation of the public to subscribe for any securities of the company.

iii. Whether the company can accept deposit from Mr. C

Yes, the company can accept deposit from Mr. C as per MCA notification dated 13th June, 2017, the provision the provision of clauses (a) to (e) of sub-section (2) of section 73 shall not apply to following class of private company-

(A) which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account; or

(B) which is a start-up, for five years from the date of its incorporation; or

(C) which fulfils all of the following conditions, namely:-

(a) which is not an associate or a subsidiary company of any other company;

(b) if the borrowings of such a company from banks or financial institutions or anybody corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and

(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

In the above case the company is fits in the various conditions placed in the section for private limited companies for acceptance of deposit. Accordingly, the company can accept deposits from its members up to the one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account.

iv. What will be the maximum limits up to which the deposit can be accepted?

As per rule 3(3) of the Companies (Deposit)Rules, 2014 o No company referred to in sub-section (2) of section 73 shall accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds thirty five per cent of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company.

However maximum limit in respect of deposits to be accepted from members shall not apply to following classes of private companies, namely:-

(i) a private company which is a start-up, for five years from the date of its incorporation;

(ii) a private company which fulfils all of the following conditions, namely:-

(a) which is not an associate or a subsidiary company of any other company;

(b) the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fiffy crore rupees, whichever is less ; and

(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73:

v. Filing requirement:

The companies accepting deposits is required to file the details of monies so accepted to the Registrar in Form DPT-3.

Case Study-12

Notice of Board Meeting

Mr. Sumit, an officer of the Corporate Secretarial Department of the Executive Limited has called the meeting of the members of the board of the director on 25th April, 2019, and served the notice on 17th April, 2019 on email as well as through Registered post, later on Mr. Ashok, one of the directors of the company has challenged the validity of the meeting on the following grounds.

(a) Mr. Sumit was not authorised person to call the meeting.

(b) The Notice was not sent on the letter head of the company.

(c) The Notice is not served as per the statutory requirements.

(d) The notice does not to inform about the facility of the video conferencing being provided by the company.

In this back drop answer the following:

i. Whether Mr. Sumit was authorised person to call the meeting? If so give reasons.

ii. Whether it is mandatory to send Notice of the meeting on the letter head of the company?

iii. What are the statutory requirements for serving of notice of board meeting through emails and registered post?

iv. Whether the facility of the video conferencing is mandatorily required to be provided by the company?

Suggested Solution- Case Study-12

i. Mr. Sumit was authorised person to call the meeting.

As a best practice and a measure of good governance, the Director desirous of summoning a Meeting for any purpose should send his requisition in writing to convene such Meeting, along with the agenda proposed by him for discussion at the Meeting, either to –

- the Chairman or in his absence, to the Managing Director or in his absence, to the Whole-time Director, or
- the Company Secretary or in his absence, to any other person authorised by the Board in this regard.

"any person authorised by the Board", whether an officer of the company or any person other than the officer of the company, should be clearly identifiable.

It is advised to check whether Mr. Sumit fits under the criteria of the any person authorised by the board.

ii. The Notice was not sent on the letter head of the company.

As per the secretarial standard on the meeting of the Board of Director (SS-1) and guidance note issued Theron, The Notice should preferably be sent on the letter-head of the company. Where it is not sent on the letter-head or where it is sent by e-mail or any other electronic means, there should be specified, whether as a header or footer, the name of the company and complete address of its registered office together with all its particulars such as Corporate Identity Number (CIN) as required under Section 12 of the Act, date of Notice, authority and name and designation of the person who is issuing the Notice, and preferably the phone number of the Company Secretary or any other designated officer of the company who could be contacted by the Directors for any clarifications or arrangements.

iii. The Notice is not served as per the statutory requirements.

In case the company sends the Notice by speed post or by registered post, an additional two days shall be added for the service of Notice.

Addition of two days in case the company sends the Notice by speed post or by registered post is in line with Rule 35(6) of the Companies (Incorporation) Rules, 2014 which provides that in case of delivery of Notice of a Meeting by post, the service shall be deemed to have been effected at the expiration of forty eight hours after the letter containing the same is posted.

However, the requirement of adding two days is applicable only if the Notice is sent to any of the Directors solely by speed post or by registered post and not by facsimile or by e-mail or any other electronic means.

In case the Notice is sent by facsimile or by e-mail or by any other electronic means to the Directors, and it is additionally sent by speed post or by registered post to all or any of the Directors, whether pursuant to their request or otherwise, the additional two days need not be added.

iv. The notice does not inform about the facility of video conferencing being provided by the company.

The Director who desires to participate through Electronic Mode may intimate his intention of such participation at the beginning of the Calendar Year and such declaration shall be valid for one Calendar Year [Clause 3(e) read with Clause 3(d) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014]. The Notice shall also contain the contact number or e-mail address (es) of the Chairman or the Company Secretary or any other person authorised by the Board, to whom the Director shall confirm in this regard. In the absence of an advance communication or confirmation from the Director as above, it shall be assumed that he will attend the Meeting physically.

Case Study-13

Financial Analysis (Capital Budgeting Decisions)

For assessing the two proposals, company's CFO Sridhar looked at some popular methods and compared the two projects.

1. **Average Rate of Return (ARR) Method**

Accounting rate of return is also called the simple rate of return and is a metric useful in the quick calculation of a company's profitability. ARR is used mainly as a general comparison between multiple projects as it is a very basic look at how a project is doing.

Project A:

Average EAT = (Total EAT / Time Period) = Rs 408/5 Cr. = Rs 81.6 Cr.

Average Investment = Total Investment / 2 = Rs 390 /2 Cr. = Rs. 195 Cr.

ARR = (Average EAT ÷ Average Investment) *100 % = 81.6 / 195 * 100 **= 41.8%**

Project B:

Average EAT = (Total EAT / Time Period) = Rs. 451.92 / 5 Cr. = Rs 90.38 Cr.

Average Investment = Total Investment / 2 = Rs 390 /2 Cr. = Rs. 195 Cr.

ARR = (Average EAT ÷ Average Investment) *100 % = 90.38 / 195 * 100 = **46.34%**

Mr. Sridhar observed that both of the projects have very good rate of return and project B is performing better ARR than Project A. Major drawback of this technique is that it does not consider the time value of money, which means that returns taken in during later years may be worth less than those taken in present, and does not consider cash flows, which can be an integral part of maintaining a business. Thus, he must not solely depend on ARR as the method for selecting the project.

Finally, accounting rate of return does not consider the increased risk of long-term projects and the increased variability associated with long periods of time.

2. **Pay Back Method**

This method indicates the time period required to recover the initial investment outlays of the capital budgeting proposal. The earlier is the sum received, the better it is as per the payback period.

(in Rs Crores)

Year	**1**	**2**	**3**	**4**	**5**

Annual CFAT	Project A	29.8	53.8	125.8	149.8	173.8
	Project B	37.8	52.92	75.6	122.4	163.2
Cumulative CFAT	Project A	29.8	83.6	209.4	359.2	533
	Project B	37.8	90.72	166.32	288.72	451.92

We need to recover our total Investment of Rs. 390 Cr, thus payback period for each project is

1. **Project A:**

   CFAT at end of year 4 = 359.2, CFAT at end of year 5 = 533

   Therefore, by interpolation, **PB = 4.177 years**

2. **Project B:**

   CFAT at end of year 4 = 288.72, CFAT at end of year 5 = 451.92

   Therefore, by interpolation, **PB = 4.224 years**

On evaluating on the basis of Payback Method he found that Project A is performing better than project B. The payback period does not concern itself with the time value of money. In fact, the time value of money is completely disregarded in the payback method, which is calculated by counting the number of years it takes to recover the cash invested.

So before taking the final decision Mr. Sridhar thought of doing more research and analysis. He remembered about the time value of money concept. He realized that to get the true picture of the projects he needs to discount the cash inflows. He now thought of using the internal rate of return method which is quite popular in the corporate sector to identify the best proposal.

3. **Internal Rate of Return (IRR) Method**

This method indicates the expected rate of return likely to be provided by the capital budgeting proposal. The project is accepted if the cost of capital is less than the IRR and rejected if it is more than IRR. To calculate IRR, we use an approximate method where we first calculate fake payback period to estimate the likely rate of return and then use Annuity table to find the best match.

Project A

Fake Annuity = (Total CFAT) ÷ (Total Time) = 533 / 5 = Rs. 106.6 Cr.

Fake Payback Period= (Total Investment) ÷ (Fake Annuity) = 390/106.6 = **3.658 years**

Now he found the PVIF close to 4.22 years in the table giving present value of an annuity of One Rupee for 5 years to be between 11 and 12% as shown below.

In Rs Crores

Year	CFAT of Project A	PV factor (8%)	PV factor (11%)	PV factor (12)	PV at 8%	PV at 11%	PV at 12%
1	29.8	0.9259	0.9009	0.8929	27.59	26.84	26.61
2	53.8	0.8573	0.8116	0.7972	46.12	43.66	42.89
3	125.8	0.7938	0.7312	0.7118	99.86	91.98	89.54
4	149.8	0.7350	0.6587	0.6355	110.10	98.67	95.19
5	173.8	0.6806	0.5935	0.5674	118.28	103.15	98.61

Total Present Value	401.95	364.30	352.84
Less: Initial Outflow	390.00	390.00	390.00
Net Present Value	11.95	-25.70	-37.16

He observed that the PVIF of 11% and 12% did not give the results, so he tried with 8%.

Now he used interpolation to find the IRR,

IRR = 8 + (402-390) / [11.95-(-25.7)]*3 = 8.95%

Project B

Fake Annuity = (Total CFAT) ÷ (Total Time) = 451.92 / 5 = Rs. 90.38 Cr.

Fake Payback Period= (Total Investment) ÷ (Fake Annuity) = 390/90.38= **4.315 years**

Similarly, he found the PVIF close to 4.315 years in the table giving present value of an annuity of One Rupee for 5 years to be between 4% and 5% as shown below.

in Rs Crores

Year	CFAT of Project B	PV factor (4%)	PV factor (5%)	PV at 4%	PV at 5%
1	37.8	0.9615	0.9524	36.34	36.00
2	52.92	0.9246	0.9070	48.99	48.00
3	75.6	0.8890	0.8638	67.21	65.30
4	122.4	0.8548	0.8227	104.63	100.69
5	163.2	0.8219	0.7835	134.13	127.86
Total Present Value				391.3	377.85
Less: Initial Outflow				390.00	390.00
Net Present Value				1.3	-12.15

Now he used interpolation to find the IRR,

IRR = 4 + (391.3-390)/ [1.3-(-12.15)]*1= 4.096

He observed that project A conclusively outperforms project B in terms of Internal Rate of Return. On having a closer look he found out the reason for project A having higher IRR has to do with higher CFAT on account of full capacity production in the later years. So he was convinced that project A is better and going to convey this to Mr. Khushiram next day, but he thought that the importance of NPV in capital budgeting decisions can't be neglected. Although IRR is an appealing metric to many, it should always be used in conjunction with NPV for a clearer picture of the value represented by a potential project a firm may undertake.

Thus before taking the final call he analyzed the projects using NPV method.

4. Net Present Value (NPV) Method

Determining the value of a project is challenging because there are different ways to measure the value of future cash flows. Because of the time value of money (TVM), money in the present is worth more than the same amount in the future. This is both because of earnings that could potentially be made using the money during the intervening time and because of inflation. In other words, a rupee earned in the future won't be worth as much as one earned in the present.

The discount rate element of the NPV formula is a way to account for this. Companies may often have different ways of identifying the discount rate. He used the discount rate of 10% which was close to the company's expected rate of returns.

Here, **PV = Present Value**

(In Rs. Crore)

Year	CFAT of Project A	CFAT of Project B	PV factor (10%)	PV of CFAT of Project A	PV of CFAT of Project B
1	29.8	37.8	0.91	27.11	34.40
2	53.8	52.92	0.83	44.65	43.92
3	125.8	75.6	0.75	94.35	56.7
4	149.8	122.4	0.68	101.86	83.23
5	173.8	163.2	0.62	107.75	101.18
Total PV of cash inflow				375.72	319.43
Total PV of cash outflow				155.00	3.00
Net PV of Cash Flow				220.72	316.43

Analysis with NPV gave some surprising results, both projects have NPV positive and so both are good projects to invest in. But Project B had significantly higher NPV than Project A, implying that project B is more profitable. But this was completely opposite of what he got from the IRR method where he got two times higher IRR compare to project B.

Faced with completely opposite result from the two methods he was unsure of which project to recommend. So he decided to study the implications of both the methods that would result in greater future value of the company and came to the below conclusion.

Conclusion

NPV and IRR are both used in the evaluation process for capital expenditure. Net present value (NPV) discounts the stream of expected cash flows associated with a proposed project to their current value, which presents a cash surplus or loss for the project. The internal rate of return (IRR) calculates the percentage rate of return at which those same cash flows will result in a net present value of zero. The two capital budgeting methods have the following differences:

1. The NPV method results in a dollar value that a project will produce, while IRR generates the percentage return that the project is expected to create.
2. The NPV method focuses on project surpluses, while IRR is focused on the breakeven cash flow level of a project.
3. The NPV method presents an outcome that forms the foundation for an investment decision, since it presents a dollar return. The IRR method does not help in making this decision, since its percentage return does not tell the investor how much money will be made.
4. The presumed rate of return for the reinvestment of intermediate cash flows is the firm's cost of capital when NPV is used, while it is the internal rate of return under the IRR method.
5. The NPV method requires the use of a discount rate, which can be difficult to derive, since management might want to adjust it based on perceived risk levels. The IRR method does not have this difficulty, since the rate of return is simply derived from the underlying cash flows.

Due to above reasons, NPV is considered to be a better option for evaluation than IRR. Generally, NPV is the more heavily-used method, but some also use simple methods like Pay Back and ARR.

We will suggest Mr. Sridhar to recommend the project with higher NPV i.e. project B of outsourcing the manufacturing to company's CEO Mr. Khushiram.

Case Study-14

MCL is a public limited company, which has its equity shares listed on both BSE Limited and National Stock Exchange of India Limited. **CPPL** is a part of the promoter group of MCL since it is closely held by certain promoters of MCL. However, currently CPPL neither holds any equity shares in MCL nor has any role in the management of MCL. The 'Promoter and Promoter Group' of MCL collectively hold 65.44% of the total paid-up capital of MCL, as on date. Being a public listed company, MCL has issued a 'Code of practice and procedures for fair disclosure of unpublished price sensitive information (**"UPSI"**) and code of conduct to regulate, monitor and report trading by insiders of MCL (**"CoC"**) in accordance with the SEBI (Prohibition of Insider Trading Regulations), 2015 (**"PIT Regulations"**). CPPL now intends to acquire 50,000 equity shares, constituting 0.06% of the paid-up capital of MCL (**"Proposed Acquisition"**), which is beyond the thresholds stipulated by the board of directors of MCL for trading by designated persons. In view of the above facts, answer the following questions:

a. What category of persons are required to obtain a pre-clearance from the compliance officer of a listed entity prior to trading?

b. Will CCPL be required to obtain a pre-clearance from the compliance officer of MCL for the Proposed Acquisition?

c. Does the compliance officer have discretionary powers under the PIT Regulations to reject a pre-clearance request on any reason it deems fit?

d. Is the compliance officer required to consider certain factors while approving or rejecting an application seeking pre-clearance for a proposed transaction?

e. Is there any provision in the PIT Regulations that provides for the examination of acts of a compliance officer?

Suggested Solution- Case Study-14

The following are the findings of the case as given above:

a. Clause 6 of Schedule B of the PIT Regulations states that pre-clearance is required to be obtained only by 'designated persons' (i.e. employees and connected persons designated as such on the basis of their functional role in the organization) if the value of the proposed trades is above such thresholds as stipulated by the board of directors of the listed company.

b. CCPL will be required to obtain a pre-clearance from the compliance officer of MCL for the Proposed Acquisition only if it is designated as a 'designated person' by the board of directors of MCL, in consultation with the compliance officer.

c. The compliance officer, under the provisions of the PIT Regulations, is entrusted with ensuring adherence to the PIT Regulations and in rejecting a pre-clearance request, the compliance officer is required to ensure compliance in letter and spirit to the PIT Regulations i.e. to ensure that no undue advantage accrues to certain categories of investors on account of their access to UPSI and not for any ulterior motive.

d. The compliance officer is required to approve or reject a request for pre-clearance after necessary assessment as per the PIT Regulations and the Code of Conduct of the company. Clause 7 of Schedule

B of the PIT Regulations requires the compliance officer to maintain a list of such securities as a 'restricted list' which is to be used as a basis for approving or rejecting applications for pre-clearance of trades and Clause 8 requires a compliance officer to have regard to whether a declaration (from the applicant seeking pre-clearance to the effect that he is not in possession of UPSI) is reasonably capable of being rendered inaccurate.

e. Regulation 2(1)(c) of the PIT Regulations lays down that the compliance officer acts under the overall supervision of the board of directors of the listed company or the head of the organization (as the case may be). Additionally, Clause 1 of Schedule B of the PIT Regulations requires the compliance officer to report to the board of directors and provide reports to the Chairman of the audit committee/ board of directors. Hence, any act of the compliance officer may be referred to the board of directors and the audit committee for examination with the extant laws and relevant facts of the case.

Case Study-15

Priya Limited (**"Company"**) is an Indian public limited company listed on NSE Limited. The Company was initially promoted by Mr. Suresh, who together with his wife, Mrs. Raina holds 21.15% of the equity share capital of the Company as on date. The total promoter and promoter group holding, as on date, is 64.31% of the shares of the Company. On March 23, 1995, Mr. Suresh entered into a promotional agreement with M/s. Kochi Corporation Limited (**"KCL"**), which provides that both parties shall support each other during the currency of the agreement on all matters coming up before the general meeting of the Company. The shareholding of Mr. Suresh, Mrs. Raina and KCL, as on date, constitutes 29.91% of the equity share capital of the Company. Mr. Suresh and his wife have entered into a shareholders' agreement with M/s. Mumbai Indians under which Mr. Suresh, Mrs. Raina, the Company and M/s. Mumbai Indians undertook to take such actions as may be necessary to give effect to the provisions of, and comply with their obligations under the shareholders' agreement. Further, it was confirmed in the said shareholders' agreement that the director nominated by KCL shall be a promoter director. Another shareholder, Mr. Rohit Sharma, who is also a director in the Company and holds 4.27% of its equity shares intends to enter into a shareholders' voting agreement (**"Agreement"**) with Mr. Suresh under which both Mr. Suresh and Mr. Rohit Sharma intend to support each other on all matters coming up before the board and general meetings of the Company. Mr. Rohit Sharma is not related to the promoter, Mr. Suresh, and was de-classified as a promoter of the Target Company on May 6, 2012. In view of the above facts, answer the following questions:

a. Would Mr. Suresh, Mrs. Raina and KCL be deemed to be persons acting in concert under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**"SAST Regulations"**)?

b. Would the execution of the Agreement attract Regulation 3(1) of the SAST Regulations which will in effect require Mr. Suresh to make a public announcement of an open offer?

c. Would the execution of the Agreement attract any other provision of the SAST Regulations that would require Mr. Suresh to make a public announcement of an open offer?

Suggested Solution- Case Study-15

The following are the findings of the case as given above:

a. Regulation 2(1)(q) of the SAST Regulations include promoters and members of the promoter group under the category of persons deemed to be persons acting in concert. Since Mr. Suresh, Mrs. Raina and KCL are members of the promoter group, they would be deemed to be persons acting in concert in terms of Regulation 2(1)(q) of the SAST Regulations.

b. Since Mr. Rohit Sharma would be voting with the existing promoters on all matters, he would be deemed to be a person acting in concert with the promoter group, and thus he would become a part of the promoter group. Hence, the promoter and promoter group shareholding would increase from 64.31% to

68.58% of the shares of the Target Company, which is well within the limits specified in Regulation 3(1) of the SAST Regulations (i.e. less than 25% of shares of the target company). Hence, the execution of the Agreement would not attract the provisions of Regulation 3(1) of the SAST Regulations.

c. Since, by virtue of the Agreement, Mr. Rohit Sharma would exercise control with Mr. Suresh and other members of the promoter group, such acquisition of control through the proposed Agreement would attract Regulation 4 of the SAST Regulations. In terms of the same, Mr. Rohit Sharma would be required to make a public announcement of an open offer.

Case Study-16

Opex Limited (**"Company"**) is a public company which has its shares listed on BSE Limited and National Stock Exchange of India Limited. The engineering business of the Opex Group is presently held under the Company and Samaira Engineering Limited (**"SEL"**), a subsidiary of the Company. The equity shares of SEL were listed on Ahmedabad Stock Exchange in May, 1965 and were subsequently delisted in June, 2015, in accordance with Chapter III of the SEBI (Delisting of Equity Shares) Regulations, 2009 (**"Delisting Regulations"**). It is proposed to consolidate the engineering business in a single company, for which, the Company will incorporate a wholly owned subsidiary i.e. New Company (**"New Co."**) and will demerge its engineering undertaking into New Co. It is also proposed to simultaneously either merge SEL into the New Co. or demerge the engineering undertaking of SEL into the New Co. As a reason for the aforesaid demerger, New Co. will issue equity shares to the shareholders of the Company and SEL as a consideration for demerger. In order to implement the identified alternative, the Company, SEL and the New Co. would enter into a scheme of arrangement under Sections 230-232 of the Companies Act, 2013. The equity shares of New Co. are proposed to be listed in accordance with the relevant SEBI laws. In view of the above facts, answer the following questions:

a. Is there any restriction on listing of equity shares that have been delisted by voluntary delisting under Chapter III of the Delisting Regulations?

b. Would the listing of equity shares issued by New Co. to the shareholders of the Company and SEL be permissible under the Delisting Regulations?

c. Is there any restriction on listing of equity shares that have been compulsorily delisted under Chapter V of the Delisting Regulations?

Suggested Solution- Case Study-16

The following are the findings of the case as given above:

a. Regulation 30(1)(a) of the Delisting Regulations, 2009 provides that an application for listing equity shares that have been delisted under Chapter III cannot be made until the expiry of a period of 5 years from the delisting.

b. Since the issuance of equity shares by New Co. are distinct from the equity shares of SEL that were delisted from the Ahmedabad Stock Exchange in 2015, they can be issued under the Delisting Regulations.

c. Regulation 30(1)(b) of the Delisting Regulations provides that an application for listing equity shares that have been delisted under Chapter V cannot be made until the expiry of a period of 10 years from the delisting.

Case Study - 17

Bright Mills Company Ltd (the Company) was closed and opened several times for one reason or another and finally was closed in March, 2014. However, the proceedings were pending under the Sick Industrial Companies (Special Provisions) Act, 1985. The Bright Mill Mazdoor Morcha, (the trade union) a registered trade union on 14.03.2017, issued a demand notice on behalf of roughly 3,000 workers under Section 8 of the Code for outstanding dues of workers. The Company replied to it on 31.03.2017.

The National Company Law Tribunal (NCLT), on 28.04.2017, after considering all the antecedent facts including suits that have been filed by respondent and referring to pending writ petitions in the High Court of Delhi, ultimately held that a trade union not being covered as an operational creditor, the petition would have to be dismissed.

By the impugned order dated 12.09.2017, the National Company Law Appellate Tribunal (NCLAT) did likewise and dismissed the appeal filed by the trade union and stating that each worker may file an individual application before the NCLT.

The NCLAT, by the impugned judgment, refused to go into whether the trade union would come within the definition of "person" under Section 3(23) of the Code. The NCLAT held that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor.

Based on the above, answer the following questions:

(a) Who can be termed as 'Operational creditor' and what is meant by 'Operational debt' under the Insolvency and Bankruptcy Code, 2016? Whether Trade Union can be treated as 'person' under the Code?

(b) Whether you endorse the decision awarded by the NCLT and further affirmed by the NCLAT? Give reasons in support of your answer.

(c) If you disagree with the award given by NCLT/NCLAT, what you will suggest to the Trade Union?

Suggested Solution- Case Study- 17

(a) **Operational Creditor:** In terms of section 5(20) of the Code, 'operational creditor' means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Operational Debt: In terms of section 5(21) of the Code, 'operational debt' means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Person: Section 3(23) of the Code provides the inclusive definition of the word 'person', which includes:

(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute, and includes a person resident outside India;

Provisions under the Trade Union Act: Before going to answer, whether Trade Union comes under the term ‘person’ or not, we have to see the definition of the Trade Union as provided in the Trade Union Act, 1926.

Section 2(h) of the Trade Union Act provides that ‘Trade Union’ means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions.

Further the ‘trade dispute’ has been defined in section 2(g) of the Trade Union Act, as any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and “workmen” means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises.

On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, 1926 and would therefore fall within the definition of “person” under Sections 3(23) of the Code.

(b) No, we do not endorse the decision awarded by the NCLT/NCLAT for the following reasons:

(a) After having discussed in the (a) above, it is clear that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, 1926 and would therefore fall within the definition of ‘person’ under Sections 3(23) of the Code.

(b) This being so, it is clear that an ‘operational debt’, meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly.

(c) A registered trade union recognised by Section 8 of the Trade Unions Act, 1926 makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which *inter alia* is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

(d) NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by trade union to corporate debtor. What is clear is that trade union represents its members who are workers, to whom dues may be owed by employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all.

(e) Even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

(c) We are of the opinion based on the above discussions that the Trade Union should make an appeal before the Supreme Court. The above case is based on the recently decided case of the Supreme Court in the matter of *JK Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company Ltd.,* Civil Appeal No. 20978 of 2017, April 30, 2019, which Apex Court held that a registered trade union which is formed for purpose of regulating relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

Senior Advocate appearing on behalf of the appellant took Court through various provisions of the Code and the Trade Unions Act, 1926, and cited a Division Bench judgment of the Bombay High Court in *Sanjay Sadanand Varrier* v. *Power Horse India Pvt. Ltd.*, *[2017] 5 Mah LJ 876* to argue that even literally speaking, the provisions of the Code would lead to the result that a trade union would be an operational creditor within the meaning of the Code. Even otherwise, a purposive interpretation ought to be granted, as has been done in various recent judgments to the provisions of the Code, and that therefore, such an application by a registered trade union filed as an operational creditor would be maintainable.

On the other hand, learned Senior Advocates appearing on behalf of respondent No.1 supported the NCLAT judgment to argue that as no services are rendered by a trade union to the corporate debtor to claim any dues which can be termed as debts, trade unions will not come within the definition of operational creditors. That apart, each claim of each workman is a separate cause of action in law, and therefore, a separate claim for which there are separate dates of default of each debt. This being so, a collective application under the rubric of a registered trade union would not be maintainable.

On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of “person” under Sections 3(23) of the Code. This being so, it is clear that an “operational debt”, meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly. Further, a registered trade union recognised by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which *inter alia* is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

The Bombay High Court in *Sanjay Sadanand Varrier* (*supra*), after setting out various provisions of the Trade Unions Act, including Section 15, has held:

“13. As can be seen from the said section, Registered Trade Unions can prosecute or defend any legal proceeding to which the Trade Union or member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any right of the Trade Union as such, or any rights arising out of the relations of any member with his employer or with a person whom the member employs. In fact, the Trade Union can even spend general funds on the conduct of trade disputes on behalf of the Trade Union or any member thereof.

14. On a conjoint reading of the provisions of the Companies Act, 1956 and more particularly sections 434 and 439 as well as the provisions of the Trade Unions Act, 1926, we are clearly of the view that looking to the mandate of sections 13 and 15 of the Trade Unions Act, 1926, there is no doubt in our

mind that a Petition for winding up would be maintainable at the instance of the Trade Union. This is for the simple reason that section 15(c) and (d) clearly mandates that the prosecution or defence of any proceeding to which the Trade Union or any member thereof is a party as well as the conduct of trade disputes on behalf of the Trade Union or any member thereof can be done by the Trade Union. This would clearly go to show that the Trade Union, for and on behalf of its members can certainly prefer a winding up Petition as contemplated under section 439 of the said Act. This is for the simple reason that if the workmen have not been paid their wages and/or salary by the Company, they would certainly be a creditor or creditors as contemplated under section 439(1)(b) of the Companies Act, 1956. Section 15 clearly mandates that the Trade Union can take up this cause for and on behalf of its members. Hence, after complying with the provisions of section 434 of the Companies Act, 1956 the Trade Union would certainly be competent to present a winding up Petition."

No doubt, this judgment was in the context of a winding-up petition, but the rationale based upon Section 15(c) and (d) equally applies to a petition filed under the Code.

However, learned counsel appearing on behalf of respondent No. 1 have cited the judgment reported as *Commissioner of Income Tax (TDS), Kanpur and Anr. v. Canara Bank,* [2018] 9 SCC 322. This judgment dealt with the expression "established by or under a Central, State or Provincial Act" contained in Section 194-A(3)(iii) of the Income Tax Act, 1961. After exhaustively reviewing the case law on the subject, this Court came to the conclusion that the NOIDA authority was established as an authority under the State Act. While dealing with several judgments of this Court, the Court, in paragraphs 20, 24, and 25, followed judgments stating that a company incorporated and registered under the Companies Act cannot be said to be "established" under the Companies Act. The context of Section 3(23) of the Code shows that this judgment has no application to the definition contained in Section 3(23). Here, a "person" includes a company in clause (c), and would include any other entity established under a statute under clause (g). It is clear that clause (g) has to be read *noscitur a sociis* with the previous clauses of Section 3(23). This being the case, entities such as companies, trusts, partnerships, and limited liability partnerships are all entities governed by the Companies Act, the Indian Trusts Act, and the Partnership Act, which are not "established" under those Acts in the sense understood in *Canara Bank* (*supra*) and the judgments followed by it. The context, therefore, in which the phrase "established under a statute" occurs, makes it clear that a trade union, like a company, trust, partnership, or limited liability partnership, when registered under the Trade Union Act, would be "established" under that Act in the sense of being governed by that Act. For this reason, the judgment in *Canara Bank* (*supra*) would not apply to Section 3(23) of the Code.

SC observed, even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. We must never forget that procedure is the handmaid of justice, and is meant to serve justice. This Court, in *Kailash* v. *Nanhku and Ors.* [2005] 4 SCC 480, put it thus:

"28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in *Sushil Kumar Sen* v. *State of Bihar* [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6)

"The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. … Justice is the goal of jurisprudence — processual, as much as substantive."

29. In *State of Punjab* v. *Shamlal Murari* [(1976) 1 SCC 719 : 1976 SCC (L&S) 118] the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that: (SCC p. 720)

"Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

In *Ghanshyam Dass* v. *Dominion of India* [(1984) 3 SCC 46] the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle."

This judgment was followed by the Constitution Bench decision in *Sarah Mathew* v. *Institute of Cardio Vascular Diseases and Ors.*, [2014] 2 SCC 62 [at paragraph 49].

The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union would come within the definition of 'person' under Section 3(23) of the Code. Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all. For all these reasons, we allow the appeal and set aside the judgment of the NCLAT. The matter is now remanded to the NCLAT who will decide the appeal on merits expeditiously as this matter has been pending for quite some time. The appeal is allowed accordingly.

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NOTES

PROFESSIONAL PROGRAMME

MULTIDISCIPLINARY CASE STUDIES (PAPER 8)

PP-MCS

WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

"27. Suspension and cancellation of examination results or registration.

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as student, or debar him from re-registration as a student, or take such action as may be deemed fit.

PROFESSIONAL PROGRAMME

MULTIDISCIPLINARY CASE STUDIES (PAPER 8) – TEST PAPER

[*This Test Paper is for recapitulate and practice for the students. Students need not to submit responses/ answers to this test paper to the Institute.*]

Time Allowed: 3 Hours *Maximum Marks: 100*

1. The Board of Guava Ltd, a large manufacturing company, decided to set up an internal control and audit functions. The proposal was to appoint an internal auditor at mid-management level and also to establish a board level internal audit committee made up mainly of non-executive directors. The initiative to do so was driven by a recent period of rapid growth of the organisation.

   The Board decided that the increased size and complexity of its operations created the need for greater control over internal activities and that an internal audit function was a good way forward. The need was highlighted by a recent event where internal quality standards were not enforced, resulting in the stoppage of a production line for several hours. The finance director Mr. Kumar said that there were problems with internal control in a number of areas of the company's operations and that there was a great need for internal audit.

   He said that as the head of the company's accounting and finance function, the new internal auditor should report to him. The reasons for this, he said, were because as an accountant, he was already familiar with auditing procedure and the fact that he already had information on budgets and other 'control' information that the internal auditor would need. It was decided that the new internal auditor need to be a person of some experience and with tough personality not to be intimidated nor diverted by other department heads who might find the internal audits an inconvenience.

   One issue the Board had was whether it would be better to recruit to the position from inside or outside the company. Another issue was over the limits of authority that the internal auditor might be given. It was pointed out that while the board considered the role of internal audit to be very important, it didn't want it to interfere with the activities of other departments to the point where their operational effectiveness was reduced.

   Based on the above case answer the following :

   (a) Discuss the factors that are typically considered when deciding to establish internal audit in an organisation.

   (b) Construct the argument in favour of appointing the new internal auditor from outside the company rather than promoting internally.

   (c) Critically evaluate Mr. Kumar's belief that the internal auditor should report to him as finance director.

   (d) Describe characteristics that might demonstrate an internal auditor's professional objectivity.

   (10 marks each)

2. A well-known beverage company Mysty Ltd. owns 22 brands that generate revenues of over $1 billion per annum with the third highest market value in the beverage industry and ranks in the top 100 Forbes list of 'World's biggest public companies'.

   In 2010, the company spent $3.4 billion marketing and advertising its brands. They represent a kind of promise to its customers – a guarantee that the drinks and snacks are safe, and that the taste of them, that irresistible combination of flavors, will be the same every time. But in another sense the brands are abstractions. The taste is the rootstock onto which the Company grafts desires ("aspirations," as they say in the branding business) that have nothing to do with the products themselves. This duality in Company's products – part sensory, part aspirational—extends throughout the company's culture and its mission, as defined by its CEO that it is not enough to make things that taste good but the Mysty must be a good company. It must aspire to higher values than the day-to-day business of making and selling soft drinks and snacks. It may be better described as "performance with purpose."

Mysty Ltd. placed first, second and third globally in the savoury snacks, social beverages and nutrition markets respectively; with Company outperforming the organic growth of 3.5% in 2014 where as its chief competitor Tasty Ltd. growth was only 2% growth over the year. Mysty's market share of non-alcoholic beverages in the US has also increased from 26% in 2006 to 28.7%; as well as, being the leader in savoury snacks in the US with a 36.6% market share. Mysty Ltd. possesses distinctive capabilities that give the company a sustained competitive advantage, due to its long-established and strong brand names, competitive distribution and manufacturing processes and vast financial resources.

Required

1. Identify and describe the five forces f Porter with respect to Mysty Ltd.
2. Explain the strategy Mysty Ltd. should adopt to survive and gain competitive advantage.
3. Identify the resources, capabilities, and distinctive competencies of Company?

(4 marks each)

3. Mr. Rahul, deceitfully personates as an owner of any security or interest in ABC Limited. State the penal consequence applicable to Mr. Rahul under the Companies Act, 2013.

(12 marks)

4. ABC Mazdor Sangh a registered Trade Union registered under the Trade Union Act, 1926 filed a application of Corporate Resolution Insolvency Process (CRIP) of XYZ Limited before the National Company Law Tribunal (NCLT). However, NCLT did not admit the application for CRIP stating that ABC Mazdor Sangh is not an Operational Creditor (OC) under the Insolvency & Bankruptcy Code, 2016. Being aggrieved by the order of NCLT, ABC Mazdor Sangh filed an appeal before the National Company Law Appellate Tribunal (NCLAT). NCLAT dismissed the appeal against the order of NCLT stating that each worker may file individual application before the NCLT. Whether the Trade Union i.e. ABC Mazdor Sangh would come within the definition of "person" under the Insolvency & Bankruptcy Code, 2016 and entitled to file application for CRIP? Give reasons in support of your answer.

(12 marks)

5. ABC Limited is one of the authorised dealer of two wheelers of the XYZ Limited for a period of 15 years. The ABC Limited acquired dealership and service centre of the XYZ Limited through a non-exclusive standard form of agreement between the parties ("Dealership Agreement"). The ABC Limited alleged that the XYZ Limited has imposed the restrictive conditions in the said dealership agreement such as prohibiting from dealing in any manner with any competing product, deliberate deduction from dealer's account to fund advertising expenses, restriction regarding the sale of batteries, exclusive arrangements with financers and re-sale price maintenance etc.

   ABC Limited has, inter-alia, prayed before the Competition Commission of India to initiate an inquiry against the XYZ Limited for contravention of the provisions of Sections 3 and 4 of the Competition Act, 2002 and issue an appropriate direction.

In view of the above, state the factors that are keeping in mind by the Competition Commission of India while determining the abuse dominant position.

(12 marks)

6. The Reserve Bank of India (RBI) is empowered to prohibit, restrict or regulate various types of foreign exchange transactions, including Foreign Direct Investment (FDI), in India by means of necessary Regulations. RBI Regulates foreign investment in India in accordance with Government of India's policy. To promote Foreign Direct Investment (FDI), the Government has put in place an investor-friendly policy, wherein except for a small negative list, most sectors are open for 100% FDI under the Automatic route. Further, the policy on FDI is reviewed on an ongoing basis, to ensure that India remains attractive & investor friendly destination. FDI is prohibited under the Government Route as well as the Automatic Route in the sectors like Atomic Energy, Lottery Business etc.

   Foreign Direct Investment improves forex position of the country, generate employment, increase in production and help in capital formation by bringing fresh capital and also helps in transfer of new technologies, management skills, intellectual property etc. Foreign Investment in various sectors bring international best practices and latest technologies leading to economic growth in the country and providing much needed impetus to manufacturing sector and job creation in India. In line with the policy to provide boost to the manufacturing sector and give impetus to the 'Make in India' initiative, the Government has permitted a manufacturer to sell its product through wholesale and/or retail, including through e-commerce under automatic route.

   With a view to benefit farmers, give impetus to food processing industry and create vast employment opportunities, 100% FDI under Government route for trading, including through e-commerce, has been permitted in respect of food products manufactured and/or produced in India. E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.

   On the basis of the above, answer the following:

   (a) What are the Capital instruments permitted for receiving Foreign Direct Investment (FDI) in an Indian company?

   (b) Discuss the regulatory prescription prescribed under Foreign Direct Investment Policy pertaining to e-Commerce.

(6 marks each)