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SUPPLEMENT
PROFESSIONAL PROGRAMME

(This supplement covers Amendments/ Developments from August, 2021 to May, 2023)

MULTIDISCIPLINARY CASE STUDIES

MODULE 2

PAPER 8

Instructions to Students

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

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Lesson 1 - Corporate Law Including Companies Law

27/09/ 2021	**Ravindranath Bajpe(Appellant) –vs- Mangalore Special Economic Zone Limited & Others(Respondent)**	**Supreme Court of India**

Can a Company Director be Held to be Vicariously Liable for Offence Committed by the Company?

Brief Facts:

The original complainant Mr. R.Bajpe filed a private complaint against 13 accused in the Court of the learned Judicial Magistrate, First Class, Mangalore for offences punishable under sections 406, 418, 420, 427, 447, 506 and 120B read with section 34 of the IPC stating that he is the absolute owner and in possession and enjoyment of the immovable property described in the schedule attached to the private complaint and the said scheduled properties were surrounded by a stone wall as boundary and that there were valuable trees on the schedule properties. He alleged that accused No.1 was a company incorporated under the Companies Act and accused No.2 being its Chairman and accused No.3 being its Managing Director and accused No.4 was its Deputy General Manager (Civil &Env.) of accused No.1 company and accused No.5 was the planner and executor of the project work of accused No.1. Further, accused No.6 was also a company, wherein accused No.7 was its Chairman, accused No.8 was its Executive Director. Accused No.9 was the Site Supervisor of accused No.6, accused No.10 was the sub-contractor of accused No.6 and accused Nos.11 to 13 were the employees of accused No.10.

The complainant alleged that accused No.1 intended to lay a water pipeline by the side of Mangalore-Bajpe Old Airport road abutting the scheduled properties of the complainant. On behalf of accused No.1, accused No.2 appointed accused No.6 as a contractor for execution of the said project of laying the water pipe-line. Accused No.6, in turn authorised Accused Nos.7 and 8 to execute and oversee the said work. They in turn appointed accused No.9 as the Site Supervisor and accused No.10, being the sub-contractor, engaged accused Nos.11 to 13 as labourers. Accused Nos. 4 and 5 were entrusted the work of supervision and overseeing the pipeline works carried out by accused Nos. 6,7 and 8 through accused Nos.9 and 10 to 13. Accused Nos.6 to 8 had put into service heavy machineries and excavators and their vehicles for carrying out the work. The complainant contended that accused Nos.2 to 5 and 7 to 13 had conspired with common intention to lay the pipeline beneath the scheduled properties belonging to the complainant, without any lawful authority and right whatsoever. In furtherance thereof, they had trespassed over the scheduled properties of the complainant and demolished the compound wall which was having height of 7 feet and foundation of 2 feet to a distance of 500 meters. The accused had cut and destroyed 100 valuable trees and laid pipeline beneath the scheduled properties in a high-handed manner. The complainant stated that when this unauthorised illegal acts were being committed, the accused was out of station and when he came back on 21.4.2012, he noticed these destructive activities. The accused had committed the act of mischief and waste and caused pecuniary loss of more than Rs.27 lakhs to the complainant. He said that all the accused are jointly and severally liable to make good the loss to the complainant.

It was further contended that the Complainant had questioned the accused about their high-handed acts, but they indulged in criminal intimidation by threatening to taking the Complainant's life if he insisted on making good the loss. Thereafter, the Complainant filed a complaint to the concerned Police Station, but no proper enquiry was held by the police, only accused No.5 gave a statement admitting the guilt and also undertaking to pay adequate compensation to the complainant towards the damages caused to the complainant's property. It was contended that the said undertaking given by accused No.5 is binding on all the other accused. However, the accused did not come forward to make good the loss and thereby they had committed an act of criminal breach of trust and cheating. It was also contended that the accused were having no right whatsoever to commit trespass over the scheduled properties and to cause damage and that each one of the accused persons had common intention to lay the pipeline by damaging the property of the complainant and with that intention they had committed criminal trespass and caused damages. Therefore, the complainant prayed the learned Trial Court to take cognizance of the matter and to issue process against the accused. The Complainant was examined on oath before the Trial Court and documents submitted in support were examined. Thereafter, the learned Trial Magistrate directed registration of the case and issued summons against all the accused u/s 427, 447, 506 and 120B read with Section 34 of the IPC. Feeling aggrieved by the summoning order issued by the learned Trial Magistrate, accused Nos.1 to 5 and 6 to 9 preferred Criminal Revision Petitions before the learned Sessions Court. By its order dated 7.4.2014, the Sessions Court allowed criminal revision petitions and set aside the orders issued by the adjudicating Magistrate against accused Nos.1 to 8. In so far as accused No.9 is concerned, order issued against the said accused was confirmed.

Feeling aggrieved and dissatisfied with the common judgement and order passed by the Sessions Court, the complainant preferred revision applications before the Karnataka High Court. By judgement dated 28.9.2015, the High Court dismissed the revision applications filed by the Complainant. Hence, feeling aggrieved, he preferred appeals before the Hon'ble Supreme Court of India

Decision:

Hon'ble Supreme Court of India (SC) in the case of declared that unless and until the specific statute makes the company directors vicariously liable and unless there are specific allegations and averments against them with respect to their individual role, merely because the complainant thinks so, the Company Directors cannot be vicariously held liable. This is a significant judgement on the liability of company directors and hence, being discussed in this article in the context of the role and responsibilities of company directors under the Companies Act, 2013 and some of the court judgements in regard thereto.

Section 2(34) of the Companies Ac, 2013 (the Act) stipulates that "director" means "a director appointed to the Board of a company" and section 2(59) stipulates that "officer" "includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act." With regard to "duties of directors", the Act provides that subject to the provisions of the Act, a director of a company shall act in accordance with the Articles of Association of the Company. The Act further stipulates that a "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 and shareholders, the community and for the protection of environment." It further stipulates that a director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgement.

The SC also referred to its earlier judgement in Pepsi Foods Limited –vs- Special Judicial Magistrate (1998-5-SCC749) which held that "summoning of an accused in a criminal case is a matter of serious matter and that the Criminal Law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to findout the truthfulness of the allegations or otherwise and then examine if any offence is prima-facie committed by all or any of the accused."
The Supreme Court, therefore, in this judgement concluded that merely because respondent accused nos.2 to 5 and 7 & 8 are the Chairman/Managing Director/Executive

Director/Dy. G.M/ Planner, they cannot automatically be held vicariously liable, unless, there are specific allegations and averments against them with respect to their role.

In the light of the above, the Supreme Court dismissed the appeals filed by the Complainant/Appellant and allowed the learned Magistrate to proceed with the complaint against accused Nos.9 to 13 on its own merits, in accordance with law.

21/05/ 2021	**Vijaya Sai Poultries Pvt. Ltd(Appellant) –vs- Vemulapalli Sai Pramella& Others(Respondent)**	**National Company LawAppellate Tribunal Company Appeal (AT) No. 296 of 2019**

Companies Act, 2013- Oppression and Financial Mismanagement- Forensic Audit of the Accounts ordered by NCLT- Whether Tenable- Held, No

Brief Facts:

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

Decision:

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

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

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

There is nothing in the order to justify the directions for conducting forensic audit of accounts of the Company that too for more than 15 years. The Adjudicating Authority must record reasons in support of conclusions. However, in the impugned order no reasons are mentioned for the said directions. The order is cryptic and non-speaking; therefore, it cannot be sustained. With the aforesaid discussions, we have no option but to set aside the Impugned Order.

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

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

Brief facts:

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

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

Reason:

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

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

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

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

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

In other words, the purpose of an order both under the English Law and under the Indian Law, irrespective of whether the regime is one of "oppressive conduct" or "unfairly prejudicial conduct" or a mere "prejudicial conduct", is to bring to an end the matters complained of by providing a solution. The object cannot be to provide a remedy worse than the disease. The object should be to put an end to the matters complained of and not to put an end to the company itself, forsaking the interests of other stakeholders. It is relevant to point out that once upon a time, the provisions for relief against oppression and mismanagement were construed as weapons in the armoury of the shareholders, which when brandished in terrorem, were more potent than when actually used to strike with. While such a position is certainly not desirable, they cannot today be taken to the other extreme where the tail can wag the dog.

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

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

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

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

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

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

Under Section 10(1) of the Companies Act, 2013, the Articles of Association bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member. However, this is subject to the provisions of the Act. Article 94 of the Articles of Association of Tata Sons is in tune with Section 47(1)(b), as it says that upon a poll, the voting rights of every member, whether present in person or by proxy shall be in proportion to his share of the paid-up capital of the company. Therefore, a shareholder or a group of shareholders who constitute majority, can always seek to be in the driving seat by reserving affirmative voting rights. So long as these special rights are incorporated in the Articles of Association and so long as they are not in contravention of any of the provisions of the Act, the same cannot be attacked on these grounds.

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

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

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

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

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

But what NCLAT failed to see was that Tata sons did not become a public company by choice but became one by operation of law. Therefore, we do not know how such a company should also be asked to follow the rigors of Section 14(1)(b) of the 2013 Act. As a matter of fact, Section 14(1) does not ipso facto deal with the issue of conversion of private company into a public company or vice versa. Primarily, Section 14(1) deals with the issue of alteration of Articles of Association of the company. Incidentally, Section 14(1) also deals with the alteration of Articles "having the effect of such conversion".

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

The only provision that survived after 13.12.2000 was Subsection (2A) of Section 43A. It survived till 30012019 until the whole of the 1956 Act was repealed. There are two aspects to Sub section (2A). The first is that the very concept of "deemed to be public company" was washed out under Act 53 of 2000. The second aspect is the prescription of certain formalities to remove the remnants of the past. What was omitted to be done by Tata

Sons from 2000 to 2013 was only the second aspect of Subsection (2A), for which Section 465 of the 2013 Act did not stand as an impediment. Section 43A(2A) continued to be in force till 3001 2019 and hence the procedure adopted by Tata Sons and the RoC in July/August 2018 when section 43A(2A) was still available, was perfectly in order.

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

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

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

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

Brief facts:

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

Decision: Appeal dismissed.

Reason:

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

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

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

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

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

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

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

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

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

Based on the above analysis, we find that the prohibition placed by the Parliamentin Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC. As such, Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B(1), is also constitutionally valid. For the above reasons, we have come to the conclusion that there isno merit in the appeals and the writ petition. The civil appeals and writ petition are accordingly dismissed.

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

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

Brief facts:

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

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

230-232 of the Act. Wherein compromise or arrangement between the Company and its creditors or any class of them or between a Company and its members or any class of themis permissible. Therefore, the Company failed to make out any case under Section 66 of the Act and thus, the petition is dismissed with the liberty to file appropriate application as per extant provisions of the Act.

Decision: Appeal allowed.

Reason:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Decision: Appeal allowed.

Reason:

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

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

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

There is nothing in the order to justify the directions for conducting forensic audit of accounts of the Company that too for more than 15 years. The Adjudicating Authority must record reasons in support of conclusions. However, in the impugned order no reasons are mentioned for the said directions. The order is cryptic and non-speaking; therefore, it cannot be sustained. With the aforesaid discussions, we have no option but to set aside the Impugned Order.

17/01/2022	**Devas Multimedia Pvt Ltd (Appellant)** **vs.** **Antrix Corporation Ltd** **(Respondent)**	**Supreme Court of India Civil Appeal No.5766 of 2021 & Civil Appeal No.5906 of 2021**

Brief facts:

Challenging an order of winding up passed by the National Company Law Tribunal under Section 271(c) of the Companies Act, 2013, which was confirmed by the National Company Law Appellate Tribunal on appeals, the company in liquidation, namely, Devas Multimedia Private Limited, through its ex-Director has come up with an appeal in Civil Appeal No.5766 of 2021 and one of the shareholders of the company in liquidation, namely, Devas Employees Mauritius Private Limited (hereinafter referred to as DEMPL) has come up with another appeal in CA No.5906 of 2021.

Decision: *Appeals dismissed.*

Reason:

Apart from the above main grounds of attack, which we have dealt in extenso, the learned senior counsel for the appellants also made a few supplementary submissions. One of them was that a lis between two private parties cannot become the subject matter of a petition under Section 271(c). But this argument is to be rejected outright, in view of the fact that the claims of Devas and its shareholders are also on the property of the Government of India. The space segment in the satellite proposed to be launched by the Government of India, is the property of the Government of India. In fact, the shareholders have secured two awards against the Republic of India under BIT. Therefore, it is neither a lis between two private parties nor a private lis between a private party and a public authority. It is a case of fraud of a huge magnitude which cannot be brushed under the carpet, as a private lis.

Another contention raised on behalf of the appellants is that the petition under Section 271(c) should have been preceded, at least by a report from the Serious Fraud Investigation Office, which has now gained statutory status under Section 211 of the Companies Act, 2013. But this contention is unacceptable, in view of the fact that under the 2013 Act there are two different routes for winding up of a company on allegations of fraud. One is under Section 271(c) and the other is under the just and equitable clause in Section 271(e), read with Section 224(2) and Section 213(b). What was Section 439(1)(f) read with Section 243 and Section 237(b) of the 1956 Act, have now taken a new avatar under Section 224(2) read with Section 213(b). It is only in the second category of cases that the report of the investigation should precede a petition for winding up.

Yet another contention raised on behalf of the appellants is that the criminal complaint filed for the offences punishable under Section 420 read with Section 120B IPC, has not yet been taken toits logical end. Therefore, it is contended that in case the officials of Antrix and shareholders of Devas are acquitted after trial, the clock cannot be put back, if the company is now wound up. Attractive as it may seem at first blush, this contention cannot hold water, if scrutinised a little deeper. The standard of proof required in a criminal case is different from the standard of proof required in the proceedings before NCLT. The outcome of one need not depend upon the outcomeof the other, as the consequences are civil under the Companies Act, 2013 and penal in the criminalproceedings. Moreover, this argument can be reversed like the handle of a dagger. What if the company is allowed to continue to exist and also enforce the arbitration awards for amounts totalling to tens of thousands of crores of Indian Rupees (The ICC award is stated to be for INR 10,000 crores and the 2 BIT awards are stated to be for INR 5,000 crores) and eventually the Criminal Court finds all shareholders guilty of fraud? The answer to this question would be abhorring.

Lastly, it was contended that the actual motive behind Antrix seeking the winding up of Devas, isto deprive Devas, of the benefits of an unanimous award passed by the ICC Arbitral tribunal presided over by a former Chief Justice of India and the two BIT awards and that such attempts onthe part of a corporate entity wholly owned by the Government of India would send a wrong message to international investors.

We do not find any merit in the above submission. If as a matter of fact, fraud as projected by Antrix, stands established, the motive behind the victim of fraud, coming up with a petition for winding up, is of no relevance. If the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of thoseseeds, such as the Agreement, the disputes, arbitral awards etc., are all infected with the poison offraud. A product of fraud is in conflict with the public policy of any country including India. Thebasic notions of morality and justice are always in conflict with fraud and hence the motive behindthe action brought by the victim of fraud can never stand as an impediment.

We do not know if the action of Antrix in seeking the winding up of Devas may send a wrong message, to the community of investors. But allowing Devas and its shareholders to reap the benefits of their fraudulent action, may nevertheless send another wrong message namely that byadopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores. Conclusion Therefore, in fine, we find all the grounds of attack to the concurrent orders of the NCLT and NCLAT to be unsustainable. Therefore, the appeals are dismissed. However, without any order as to costs.

07/09/ 2022	Hamlin Trust & Ors(Appellant)v. Rose investments S.Ã R.L. & Ors(Respondents)	National Company Law Appellate Tribunal (NCLAT) , Company Appeal (AT) No.77 of 2022

Sections 184,189 and 203 of the Companies Act,2013 - Key Managerial Persons- appointment of CFO by a private company- whether private company is covered by these sections -Held, yes.

Brief facts

This appeal was preferred against the order passed by the NCLT Delhi Bench, whereby the prayer relating to the appointment of Chief Financial Officer (in short 'CFO') has been allowed along with certain directions. The main company petition is presently pending adjudication and this appeal is limited to assailing the order, and inter alia, the directions contained in the Impugned Order relating to appointment of CFO in R-2 Company. This judgment shall, therefore, limited tothe said Impugned Order.

Judgement

A reading of the section on KMP in the AoA, under which Article 140 is included, indicates that the CFO is considered a KMP, and Rose Investments (R-1) has the right to nominate a person for the position of CFO, and in the event the JV Partners/Appellants reject the appointment of such nominee to the position of CFO, Rose Investments shall have the right to nominate another person,and if nomination of the second person is also rejected or at least 45 days has lapsed since the position of CFO is vacant (whichever is earlier), Rose Investments shall have the right to nominateany person and the JV Partners shall support the appointment of such person as CFO.

Thus, the position of CFO is included as a KMP in subsection 51 of section 2 of the Act. Section 6 of the Companies Act provides that the provisions of this Act shall override anything to the contrary contained in the memorandum or articles of association of the company. We also note that the Impugned Order accepts the applicability of sections 184, 189 and 203 of the CompaniesAct, 2013 in that it directs Mr. Bipin Kabra to file an affidavit undertaking to abide by the requirements of these provisions. These provisions of the Act provide rational and reasonable norms and standards regarding eligibility of a KMP (CFO in the present case) and which are quite relevant and useful in conducting the affairs of the company in a transparent, independent and unbiased manner keeping the interest of the company foremost.

Section 203 of the Act lays down that the CFO is a whole-time KMP and is prohibited from holdingoffice in more than one company except in its subsidiary company at the same time. There are other elements of conduct that are provided in the Act as being relevant to the functioning of a KMP. A perusal of Article 140 of AoA makes it clear that in case JV Partners/ appellants reject appointment of two suggested candidates, it has to accept the nomination of the third candidate.

While the right of Rose Investments has been made primary the text of this article does not implythat any person, even if ineligible by the normal standard of eligibility given in section 203 of theCompanies Act and the requirement of the CFO to be a whole- time KMP, can be considered a valid candidate for the position of CFO.

In the absence of any specific mention regarding eligibility and the method of selection of the CFOin the AoA, it would be logical to take recourse to section 203 of the Companies Act, 2013 in theselection and appointment of CFO, and also keep in view sections 184 and 189 in adjudging the eligibility of the KMP. We also note that the Appellants have, as Respondents before the NCLT in IA 19/2022, argued through their Written Submissions dated 16.3.2022 that even though the R-2 Company is a private limited company, and the provisions of the Companies Act, 2013 do not apply thereto, the principles governing the appointment and qualification of the KMP under section203 can be taken for guidance de hors Article 140 of the AoA of R-2 company.

Thus, we are of the view that the Appellants are not precluded from arguing the applicability of section 203 at the stage of appeal. Thus, we find that proposals for deployment of Mr. Devendra Mehta and Mr. Venkataraman Subramanian in R-2 Company are in the nature of 'secondment'. We thus find that the first two suggested names, viz. Mr. Devendra Mehta and Mr. Venkataraman Subramanian, are clearly ineligible for appointment as CFO as they contravene sub-section (3) ofsection 203 of the Companies Act.

The import of article 140 of the AoA is certainly not that the first two suggestions could be of ineligible candidates so that the Appellants have to then accept the name of the third candidate as Hobson's choice. Thus, the effect of first two suggestions being of ineligible candidates could also mean that the Appellants would be forced to accept the name of the third candidate who may be, for some reason, not acceptable to them.

We are, therefore, of the view that all the suggested candidates should satisfy the basic conditionsof eligibility as required under section 203 of the Companies Act, 2013 sothat the Appellants canexercise their right of selecting the most appropriate and suitable candidate in the true letter and spirit of the article 140 of the AoA. We, therefore, conclude that the NCLT has committed error in inferring that provision in article 140 of the AoA 'does not contemplate that a person's nomination can be considered to be valid or invalid for any particular reason'. On this basis the NCLT has held that in case the Appellants did not accept the first two nominations, they will haveto accept the third nomination of Mr. Bipin Kabra for appointment as CFO.

If we take the view that only article 140 of the AoA were to be relevant and applicable in the appointment of CFO, and there is no need to look at the ineligibility of the suggested names, we could have a situation where all the three suggested names are ineligible, or at least unsuitable, and not fit to carry out the duties of CFO properly and professionally, and the

Appellant would bebound to accept the third nomination even though he may also be unfit or unsuitable to hold officeas CFO of the Company. Such a situation could only exacerbate the situation of mismanagement in the company that is already beset with issues of mismanagement of its operations. Such a situation could prove to be detrimental for the company's management and should not be allowedto happen.

Thus the Impugned Order fails to interpret the import of Article 140 of the AoA in its true letter and spirit and takes the first two suggested names as being valid nominations which were rejected by the Appellants, and in the result directs that the third suggested candidate namely Mr. Bipin Kabra should be appointed as CFO of R-2 Company.

We hold the view that the suggested candidates should be eligible as per the provision of section 203 of the Companies Act, while applying article 140 of the AoA. The Impugned Order is, therefore, set aside and the parties are directed to take necessary action for appointment of CFO of the R-2 company as per article 140 of the AoA, after making valid nominations keeping in view section 203 of the Companies Act, 2013 and completing the appointment of CFO within a periodof sixty days from the date of this order.

13/10/2022	**SEBI(Appellant) v. NSE Members Association& Ors(Respondents)**	**Supreme Court of India Civil Appeal No(s). 435 of2007 with connected appeals**

Section 12 of SEBI Act, 1992- Multiple registration as stockbroker in different stock exchanges-Whether single registration and payment of single registration fee permissible-Held, No.

Brief facts

The instant appeal was directed against the judgment and order passed by the Division Bench of the High Court of Delhi, setting aside the finding returned by the learned Single Judge of the HighCourt. The Division Bench has arrived at a conclusion that in terms of Section 12(1) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "the Act 1992"), a single registration with Securities and Exchange Board of India (hereinafter referred to as "SEBI") is sufficient even if the stock broker has various memberships and functions from several stock exchanges and, therefore, will have to pay the fee for the initial registration with SEBI and, accordingly, set aside paragraph (vi) of Part A of the Circular dated 28th March, 2002 issued by SEBI.

Judgement

The grievance of the respondents was in reference to paragraph (vi) of Part A to the Circular dated28th March, 2002 which prescribed the fees payable by composite corporate members. It only clarifies that every stockbroker who wants to obtain certificate of registration from

SEBI irrespective of the number of registration cards which are held by the stockbroker under stock exchange or stock exchanges, will be required to pay the fees, for each and every certificate of registration which he holds. That appears to be the primary cause of grievance which was assailed by the respondents through the association by filing of a writ petition before the High Court of Delhi and after examining the scheme of regulations and the circular of which reference has been made dated 28th March, 2002, and taking note of the judgment of this Court, while repelling the contentions advanced by the respondents, the learned Single Judge of the High Court upheld the Circular dated 28th March, 2002.

The Division Bench of the High Court was primarily persuaded with the expression 'a certificate' as referred to under Section 12(1) of the Act, 1992 and arrived at a conclusion that the expression 'a certificate' signifies a single certificate of registration irrespective of the fact that a stock broker is a member of various stock exchanges and the rules/regulations which are being framed either by the Central Government or the Board in exercise of power under Sections 29 and 30 of the Act, 1992 have to be in conformity with the mandate of the Act, 1992 and that will prevail over the subordinate legislation. Proceeding on the said premise, the Division Bench of the High Court arrived at the conclusion that only initial registration with SEBI is required for a stockbroker even if he is a member of multiple stock exchanges and accordingly directed the appellant to refund the fee which had been deposited by each of the stockbroker for multiple registrations.

The High Court, in our view, appears to be influenced by the expression 'a certificate of registration' referred to under Section 12(1) of the Act, 1992 but has failed to notice that the expression 'a certificate' is not in reference to any number and it can be considered that the words in the singular shall include plural as well, and has failed to notice that certificate of registration has to be obtained from the Board in accordance with the regulations framed in exercise of power under Section 30 of the Act 1992. In this context, the very scheme of rules framed by the Central Government in exercise of power under Section 29 and regulations framed by the Board under Section 30 of the Act, 1992 has been completely misplaced which indeed has a statutory force. Although the scheme may be in the nature of subordinate legislation, the same has superior force and supplements a mechanism/ procedure according to which the member (stock broker) of the stock exchange has to obtain certificate of registration from the Board and issuance of certificate of registration from SEBI remain co-terminus with the stock exchange to which the stock broker is a member and that being the reason, Reg. 10 read with Schedule III lays down the procedure according to which the fees has to be paid/ deposited by the stock broker in obtaining certificate of registration from SEBI in reference to the stock exchange and for its renewal at a later stage for keeping its registration in force.

When the law has to be applied in a given case, it is for the Court to ascertain the facts and then interpret the law to apply on such facts. Interpretation, indeed, cannot be in a vacuum or in relation to hypothetical facts. It is always the function of the legislature to say what shall be the law and it is only the Court to say what the law is and this Court applied the principle of purposive construction while interpreting the law to apply to such facts. A statute has to be construed according to the intent that makes it and it is always the duty of the Court to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation, it is always desirable of the Court to choose the interpretation which represents the true intention of the legislature. It is also well- settled that to arrive at the intention of the legislation, it is always depending on the objects for which the enactment is made, the Court can resort to historical, contextual and purposive interpretation leaving textual interpretation aside.

Thus, while interpreting the statutory provisions, the Court is always supposed to keep in mind the object or purpose for which the statute has been enacted. Thus, in our considered view, the conjointreading of the expression “a certificate” as referred to in Section 12(1) of the Act read with the scheme of Rules, 1992 and Regulations 1992, leads to an inevitable conclusion that the stock broker not only has to obtain a certificate of registration from SEBI for each of the stock exchangewhere he operates, at the same time, has to pay ad valorem fee prescribed in terms of Part III annexed to Regulation 10 of the Regulations, 1992 in reference to each certificate of registration from SEBI in terms of the computation prescribed under Circular dated 28th March, 2002 and fee is to be paid as a guiding principle by the stock broker which is in conformity with the scheme.

15/12/2022	Durga Builders Pvt Ltd vs. Registrar of Companies & Anr	NCLAT Company Appeal (AT) No. 154 of 2021

Companies Act,2013- section 252- restoration of the name of the company- company was in litigation- not able to file financial statements -name struck off from the register without hearing the company – name restoration application was also rejected- whether correct-Held, No.

Brief facts:

The present Appeal was filed by the Appellant being aggrieved and dissatisfied by the order passed by the National Company Law Tribunal whereby Appeal filed by Directors of the Company named Durga Builders Pvt Ltd (“the Company” for short) invoking the provisions of Section 252 of the Companies Act, 2013 (the Act) for restoration of the name of the Company in the Register maintained by the Registrar of Companies (the RoC) has been rejected.

Decision: Allowed

Reason:

After hearing the parties and going through the pleadings made on behalf of the parties, we observe that the Appellant Company is in litigation therefore, the Company has not filed the financial statements and also without giving opportunity of hearing, the Respondent No. 1/Registrar of Companies struck off the name of the Appellant Company’s from the Register maintained by him, but in view of the fact and also the Bank Statements of the Appellant Company from 2015 -2018 shows that the Appellant Company is having substantial movable as well as immovable assets. Therefore, it cannot be said that the Appellant Company is not carrying on any business or operations. Hence, we are of the view that the order passed by the National Company Law Tribunal (Court-V, New Delhi) as well as Registrar of

Companies, NCT Delhi & Haryana is not sustainable in law.

In view of the aforenoted, we set aside the impugned order passed by the National Company Law Tribunal. The name of the Appellant Company be restored to the Register of Companies subject to the following compliances.

(i) Appellant shall pay costs of Rs. 50,000/- (Rupees Fifty Thousand) to the Registrar of Companies, NCT Delhi & Haryana within 08 (Eight) weeks from passing of this Judgment.

(ii) After restoration of the Company's name in the Register maintained by the RoC, the Company shall file all their Annual Returns and Balances Sheets. The Company shall also pay requisite charges/fee as well as late fee/charges as applicable within 08 (Eight) weeks thereafter.

(iii) Inspite of present orders, RoC will be free to take any other steps punitive or otherwise under the Companies Act, 2013 for non- filing/late filing of statutory returns/ documents against the Company and Directors. The instant Appeal is allowed to the above extent.

04/01/2023	**IFB Agro Industries Ltd vs. Sicgil India Ltd**	**Supreme Court of India Civil Appeal No. 2030 of 2019**

Companies Act,2013- section 59 (S.111A of 1956 Act)-rectification of members register-application filed for rectification of register raised violations of SEBI (PIT) regulations as well-NCLAT allowed the same- whether proper-Held, No.

Brief facts:

The short question for our consideration in this appeal relates to the scope of the rectificatory jurisdiction of the National Company Law Tribunal under Section 59 of the Companies Act, 2013. In this context, we are called upon to determine the appropriate forum for adjudication and determination of violations of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 19972, and Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992, framed under the Securities and Exchange Board of India Act, 1992.

This was an appeal against the judgment of the National Company Law Appellate Tribunal (hereinafter referred to as 'Appellate Tribunal') whereby the Appellate Tribunal set aside the judgment of the National Company Law Tribunal (hereinafter referred to as the 'Tribunal'), allowing the company petition filed by the Appellant under Section 111A of the Companies Act, 1956, (which is Section 59 of the 2013 Act), for rectification of Members Register. The Tribunal while allowing the petition, directed the Appellant to buy-back its shares which were held by the Respondents. In appeal, the Appellate Tribunal set aside this direction on the ground that the Tribunal exceeded its jurisdiction. It is this order of the Appellate Tribunal which was challenged before the Supreme Court.

Decision: Dismissed.

Reason:
Having heard both sides, we formulate the following questions for our consideration.

What is the scope and ambit of Section 111A of the 1956 Act, as amended by Section 59 of the 2013 Act, to rectify the register of members?

Which is the appropriate forum for adjudication and determination of violations and consequent actions under the SEBI (SAST) Regulations 1997 and the SEBI (PIT) Regulations 1992?

Re: Interpretation and scope of Section 111A of the 1956 Act as replaced by Section 59 of the 2013 Act:

The declaration to hold the acquisition of shares by the Respondents as null and void in a petition under Section 111A has to be examined in the context of the scope and ambit of the rectificatory jurisdiction of the Tribunal and, in particular, the specific wordings of the said provision.

The rectificatory powers of a Board/Company Court under Section 38 of the Companies Act, 1913, then under Section 155 of the 1956 Act, followed by Section 111A introduced by the 1996 Amendment to the 1956 Act, and finally, Section 59 of the 2013 Act, demonstrate that its essential ingredients have remained the same. It is a summary power to carry out corrections or rectifications in the register of members. The rectification must relate to and be confined to the facts that are evident and need no serious enquiry.

While interpreting Section 155, this Court has held that the power of CLB is narrow and can only consider questions of rectification. If a petition seeks an adjudication under the garb of rectification, then the CLB would not have jurisdiction, and it would be duty-bound to re-direct the parties to approach the relevant forum. The Court also held that the words 'sufficient cause' cannot be interpreted in a manner which would enlarge the scope of the provision.

The decision in Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. & Ors was followed by this Court even after the deletion of Section 155 and insertion of Section 111A. This Court, in Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors, and Jai Mahal Hotels (P) Ltd. v. Devraj Singh & Ors held that even though Section 111(7) of the 1956 Act seemingly enlarges the power of the CLB, the power of rectification continues to remain summary in nature and if any seriously disputed questions arise, the Company Court should relegate parties to a forum which is more appropriate for investigation and adjudication of such disputed questions.

The principle enunciated in Ammonia's case relating to the jurisdiction of a Tribunal with respect to the rectification of the register is well-recognized and consistently followed. Sub-section (3) of Section 59 recognizes the overarching right to hold and transfer securities with the concomitant entitlement of voting. This is a precious right, and that is the reason why the Parliament found it necessary to caution that the provision of this Section shall not restrict the right of a holder of securities, to transfer such securities. This is another feature which is indicative of the limited scope and extent of the power of rectification of the register.

For the reason stated above, we are of the opinion that the company petition under Section 111A of the 1956 Act for a declaration that the acquisition of shares by the Respondents as null and void is misconceived. The Tribunal should have directed the Appellant to seek such a declaration before the appropriate forum. The Appellate Tribunal is, therefore, justified in allowing the appeal and setting aside the order of the Tribunal.

Re: appropriate forum for enquiry and adjudication of violations of the SEBI Regulations:
There is another perspective in which the legality and propriety of the company petition under Section 111A for declaring the acquisition of shares as null and void for violation of SEBI Regulations could be judged - Which is the appropriate forum for adjudication and determination of violations and consequent actions under the SEBI (SAST) Regulations and the SEBI (PIT) Regulations?

Having considered the comprehensive role of the SEBI in regulating the securities market with respect to insider trading, we are of the opinion that the important role of the Regulator cannot be circumvented by simply asking for rectification under Section 111A of the 1956 Act. Such an approach is impermissible. The scrutiny and examination of a transaction allegedly in violation of the SEBI (PIT) Regulations will have to be processed through the regulations and remedies provided therein.

Having considered the matter from a different perspective, we are of the opinion that the Appellant is not justified in invoking the jurisdiction of the CLB under Section 111A of the Act for violation of SEBI regulations. We are also of the opinion that the Tribunal committed an error in entertaining and allowing the company petition filed under Section 111A of the 1956 Act. Though we are not in agreement with the reasoning adopted by the Appellate Tribunal in the impugned order, we are in agreement with its conclusion that the Tribunal exceeded its jurisdiction and therefore, the Appellate Tribunal was correct in setting aside the judgment dated 05.07.2017.

21/02/2023	Garish Oberoi & Ors vs. Hotel and Restaurant Association of Western India & Anr	NCLAT Company Appeal (AT) No. 162 of 2022 with connected appeals

Companies Act, 2013- oppression and mismanagement- sections 241-242- whether the petition is maintainable-Held, Yes.

Brief facts:

The two appeals have been filed under section 421 of the Companies Act, 2013 (in short «Companies Act”) by the respective Appellants assailing the order dated 30.8.2022 (hereinafter called “Impugned Order”) passed by the National Company Law Tribunal, New Delhi (in short “NCLT”).Both the above- mentioned appeals are being disposed of through this judgment. The appellants are the sitting managerial persons.

Decision: Dismissed.

Reason:

(i) The three issues that arise for consideration in the instant appeals are as follows:-

(i) Whether petitioners in the original CP No. 473/241- 242/2018 were entitled to maintain the said Company Petition under sections 241-242 of the Companies Act and whether the waiver granted to them under section 244 to prefer such a petition is correct;

(ii) Whether the alleged acts of oppression and mismanagement as claimed by the petitioners in original CP No. 473/241-242/2018 actually amount to oppression and mismanagement as claimed by the petitioners in original company petition and as are required for a section 241-242 petition; and

(iii) Whether the AoA regarding election of President of FHRAI have been followed properly in letter and spirit in the election of President of FHRAI for the year 2018-19, as was required by law?

On the first issue: A perusal of the Impugned Order, wherein the issue of grant of waiver has been dealt by the NCLT shows that the NCLT has considered the matter of Casino Hotels, where the proposed action of the Executive Committee to amend clauses IV(1)(a) and (b) of Appendix-A of the AoA of FHRAI was under challenge, and in which the Eastern Region members had opposed the stand of Northern and Western Regions members. The NCLT has found that the issue which was raised in the Casino Hotels case has found reflection in the process of election of President of FHRAI for the year 2018-19. Looking to the facts and circumstances pleaded by the Respondent HRAEI, we are of the view that the acts of oppression and mis- management have continued in one form or the other right from the filing of the Casino Hotels petition, and therefore, in the interest of corporate democracy and to ensure proper functioning of FHRAI in accordance with the AoA and to examine the alleged ats of oppression and mismanagement, we are of the view that it is a case whether exceptional circumstances demand grant of waiver under section 244 of the Companies Act to enable the petitioners of CP 473/241- 242/2018 to raise their grievances which could then be adjudicated upon. We thus hold that the Impugned Order is correct on this account.

On the second issue: The issue in the company petition in the Casino Hotels case regarding proposed amendment to the AoA was being opposed by members of Eastern Region against the proposal of the members of Northern and Western Regions. Thus while, overtly, there may not appear to be any direct relation between the matter in consideration in the Casino Hotels case and the issue in instant petition CP No. 473/341-242/2018, it is clear that there is certainly an under-current of feeling against the Eastern Region members, and Mr. Sudesh Kumar Poddar among the Western and Northern Regions members which arose from the time of the Casino Hotels case. We are inclined to think so because while Mr. Sudesh Kumar Poddar is fully qualified to contest for the post of President, FHRAI, and that the Eastern Region Executive Committee members have decided to put forward his name as the sole candidate for the post of President of FHRAI, the members of Executive Committee from Northern and Western Regions are insistent on accepting any other member as President except Mr. Sudesh Kumar Poddar, which is a stand that does not have any legal or rational basis.

Thus, this act of the Western and Northern Region members in EC is definitely an act of oppression and mis- management and when seen in conjunction with the earlier incident where members of Western and Northern Region were bent upon amending the AoA to increase the number of terms of membership in the Executive committee, it is clear that those members, who either stood to benefit from such an amendment or who were supporting it would be peeved or unhappy with the stand taken by Mr. Sudesh Kumar Poddar. We, therefore, are of the view that the procedure being adopted in the election of the President of FHRAI for the year 2018-19 as interpreted by the siting President Mr. Garish Oberoi is clearly an act of oppression and mismanagement, which if not checked at nascent stage right in the beginning, can result in further oppression of FHRAI's members and mismanagement of the affairs of the company to the detriment of the functioning of the company FHRAI and against the legitimate interests of its members. The intent of sections 241-242 is to protect the company›s members from acts of oppression and mis- management and to also protect and preserve the interest of the company, and in that light we are of the clear view that in the present case, the acts as stated in CP 473/241-242/PB/218, clearly constitute acts of 'oppression and mismanagement'.

On the third issue: We note that the members of the Executive Committee are elected at every Annual General Meeting as provided in Appendix 'A' of AoA and the incoming Executive Committee is deemed to have taken office from the date its office bearers are elected. Further, the previous Executive Committee as well retiring office bearers continue to hold office until the new office bearers are elected by the incoming Executive Committee. Therefore, it is clear that once the new Executive Committee members were elected in the Annual General Meeting held on 30.10.2018, they were to have taken office. Also, the other office bearers which would certainly include the President also continued to hold office until the new office bearers are elected by the incoming Executive Committee. By not completing the process of election of President for the year 2018-19, and presiding over the Executive Committee as sitting President and also electing the office bearers including the .Vice Presidents and others, Mr. Garish Oberoi not only exhibited a blatant and high-handed oppressive behaviour nefariously assisted by some other members who were acting like a 'clique', he also disregarded provisions of the AoA and acted in an oppressive manner.
Thus, a detailed perusal of the minutes of the Executive Committee meeting dated 30.10.2018, particularly in item No. 5 and Item No. 7 make it abundantly clear that the members of the Western and Northern regions in the Executive Committee had formed a clique and were relentlessly pursuing their iniquitous, perverse and flagrant design to block the appointment of Sudesh Kumar Poddar as President of FHRAI as preferred candidate of the Eastern Region. Such acts of Executive Committee members, mainly by the above stated members of the Northern and Western regions, are clearly acts of oppression of members of the Eastern region and that the outgoing President Mr. Garish Oberoi was clearly an active party in perpetuating such illegal acts. Moreover, the FHRAI which was not being allowed to elect a President for the term 2018-19 and would affect the smooth management of FHRAI's affairs. Thus, these acts would also constitute acts leading to mismanagement of the affairs of the company, which would be covered under sections 241-242 and which are not merely directorial complaints.

20/02/2023	**Mukesh Kumar Gupta vs. Registrar of Companies**	**NCLAT Company Appeal (AT) No. 164 of 2021**

Companies Act, 2013- section 248- removal of name from the register-whether correct- Held, No.

Brief facts:

The present Appeal under Section 421 of the Companies Act, 2013, has been filed by the Appellant being aggrieved and dissatisfied by the order passed by the National Company Law Tribunal (New Delhi Bench, Court-II) whereby and whereunder appeal filed by the Appellant Company for restoration of the name of the Company in the Register maintained by the Registrar of Companies (RoC), NCT of Delhi and Haryana was dismissed by the Tribunal.

Decision: Allowed.

Reason:

After hearing the parties and going through the pleadings made on behalf of the parties, we observed that the Audited Financial Statements for the Financial Years from 2014-15 to 2015-16 shows that the Appellant Company is having substantial movable as well as immovable assets and the Company was/is in operation when the name was struck off. Therefore, it cannot be said that the Appellant Company is not carrying on any business or operations. Hence, we are of the view that the order passed by the National Company Law Tribunal (New Delhi Bench, Court-II) as well as Registrar of Companies, NCT of Delhi & Haryana is not sustainable in law.

In view of the aforenoted, we set aside the impugned order passed by the National Company Law Tribunal (New Delhi Bench, Court-II). The name of the Appellant Company be restored to the Register of Companies subject to the following compliances.

i) Appellant Company shall pay costs of Rs. 2,00,000/- (Rupees Two Lakhs) to the Registrar of Companies, NCT of Delhi & Haryana within eight (8) weeks from the passing of this Judgment.

ii) After restoration of the Company’s name in the Register maintained by the Registrar of Companies, the Company shall file all their Annual Returns and Balances Sheets. The Company shall also pay requisite charges/fee as well as late fee/charges as applicable.

iii) Inspite of present orders, Registrar of Companies will be free to take any other steps punitive or otherwise under the Companies Act, 2013 for non-filing/late filing of statutory returns/documents against the Company and Directors. The instant Appeal is allowed to the above extent.

16/02/2023	Thyagaraja vs. The Church of South India Trust& Ors	NCLAT TA No.15/2021 (Company Appeal (AT) No.235 of 2020/TR)

Companies Act,2013- section 241-242 – oppression and mismanagement- company petition dismissed by NCLT- whether correct- Held, Yes.

Brief facts:

Aggrieved by impugned order passed by the National Company Law Tribunal in CA171/2019 in C.P.02/2016, the Appellant preferred this TA No. 15/2021 (Comp. App. (AT) No. 235/2020/TR) Appeal, challenging the dismissal of the Company Petition by the NCLT.

Decision: Dismissed.

Reason:

In the instant case, apart from not being a party to the main Petition, the Appellant herein is, admittedly, only a Member of the Church and he has not filed any documentary evidence to substantiate that any of the requirements under Section 2(55) of the Companies Act, 2013, is met. Admittedly, there is a four layered Election Process to become a Member of the Company. The persons acting as Member of CSITA are in fact first elected by various Parishes falling under more than 20 Dioceses and these Parishes Member elect people to the Diocesan Council and also to the Synod Council who in turn elect the process of the Company. In this four layered process, it is not in dispute that the Appellant herein has not passed through the layers to become the Member. This Tribunal is of the earnest view that merely because a person is a Member of Church, he does not have the locus standi to file a Petition under Sections 241 & 242 of the Companies Act, 2013, against a Section 8 Company of which, he is admittedly, not a 'Member'.

At the cost of repetition, as the Petitioner in CA/171/2019 and in CP/02/2016, does not satisfy any of the requirements stipulated under Section 2(55) of the Companies Act, 2013, he cannot seek any exemption under Section 244 of the Companies Act, 2013. This Tribunal does not find any illegality, in the Order of NCLT, in holding that the Company Petition is not maintainable, which even otherwise was preferred by one John S Dorai.

To reiterate, the Appellant before us is not even a party to the main Company Petition, and is seeking expunge of some observations made by the NCLT. A brief perusal of the paragraphs in the Impugned Order, shows that the said paragraphs are by and large the submissions of the parties and there were no strictures or conclusion, arrived at by the Tribunal (NCLT), which require expunging. For all the aforenoted reasons, this Tribunal, does not find any illegality or infirmity, in the well-considered and reasoned order of the Tribunal (NCLT).

03/05/2023	**Union Of India vs. Deloitte Haskins And Sells LLP**	**Supreme Court of India Criminal Appeal Nos.2305-2307 of 2022 with connected appeals**

Companies Act, 2013- section 140(5)- removal of auditor by Tribunal- auditors accused of fraud resigned before investigation-whether they are liable to be removed-Held, Yes.

Brief facts:

This batch of Criminal Appeals/Civil Appeals raise common question(s) of law pertaining to the interpretation of Section 140(5) of the Companies Act, 2013 and the Investigation Report dated 28.05.2019 (hereinafter referred to as the 'IFIN SFIO Report') in respect of IL&FS Financial Services Limited.

By the impugned judgment and order, though the High Court has upheld the validity of Section 140(5) of the Act, 2013, the High Court has interpreted section 140(5) of the Act, 2013 and has set aside the order passed by the NCLT upholding the maintainability of Section 140(5) petition and has quashed Section 140(5) petition and has set aside/quashed the directions issued by the Ministry of Corporate Affairs and the SFIO and also has quashed/ set aside criminal proceedings instituted by the SFIO. Hence, the present appeals.

Decision: Appeal of UOI allowed & appeals of the auditors dismissed.

Reason:

By the impugned judgment and order, though the High Court has upheld the vires of Section 140(5) of the Act, 2013, however, the High Court has held that once the auditor resigns as an auditor or is no more an auditor on his resignation, thereafter Section 140(5) proceedings are no longer maintainable as the petition filed by the Union of India under section 140(5) has been satisfied by the subsequent resignation of the auditor. The view taken by the High Court is absolutely erroneous and is unsustainable. Subsequent resignation of an auditor after the application is filed under section 140(5) by itself shall not terminate the proceedings under section 140(5). Resignation and/or removal of an auditor cannot be said to be an end of the proceedings under section 140(5). There are further consequences also on culmination of the enquiry under section 140(5) proceedings and passing a final order by the Tribunal on the conduct of an auditor, whether such an auditor has, directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, as provided under the second proviso to section 140(5) of the Act, 2013.

Therefore, the enquiry/proceedings initiated under the first part of section 140(5) has to go to its logical end and subsequent resignation and/or discontinuance of an auditor shall not terminate the enquiry/proceedings under section 140(5). If the interpretation given by the High Court that once an auditor resigns, the proceedings under section 140(5) stand terminated and are no longer further required to be proceeded, in that case, an auditor to avoid the final order and the consequence of final order as provided under the second proviso to section 140(5) may resign and avoid any final order by the Tribunal. That cannot be the intention of the legislature.

As observed hereinabove, the second proviso to section 140(5) of the Act, 2013 is a substantive provision, though it is by way of a proviso, and the same shall operate and/or depend upon the final order to be passed by the Tribunal in the first part of section 140(5). If the interpretation given by the High Court that on subsequent resignation and/or discontinuance of an auditor, proceedings under section 140(5) stand terminated and/or the petition under section 140(5) by the Central Government is no longer maintainable is accepted, in that case, second proviso to section 140(5) would become nugatory and in no case there shall be any action under the second proviso to section 140(5). If such an interpretation, as interpreted by the High Court, is accepted, in that case, the object and purpose of incorporation of second proviso to section 140(5) shall be frustrated. The object and purpose of second proviso to section 140(5), as observed hereinabove, is to make the provision more stringent and to provide for consequences for an auditor when such an auditor is found to have been perpetrating a fraud and is removed by the NCLT for such fraud. At this stage, it is required to be noted that under the second proviso to section 140(5) on the final order being passed by the Tribunal that the auditor/firm has, directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, he/it shall not be eligible to be appointed as an auditor of any company for a period of five years. The word "any" used in the second proviso to section 140(5) is significant. On the final order being passed by the Tribunal, such an auditor not only shall be removed or changed as an auditor of a company, but such an auditor/firm shall also be ineligible to be appointed as an auditor of any other company for a period of five years.

In view of the above and for the reasons stated above, challenge to the constitutional validity of section 140(5) of the Companies Act, 2013 fails and it is observed and held that section 140(5) is neither discriminatory, arbitrary and/or violative of Articles 14, 19(1)(g) of the Constitution of India, as alleged. The impugned judgment and order passed by the High Court quashing and setting aside the application/proceedings under section 140(5) on the ground that as the auditors have resigned and therefore thereafter the same is not maintainable is hereby quashed and set aside. Consequently, the impugned judgment and order passed by the High Court quashing and setting aside the NCLT order holding that even after the resignation of the auditors, the proceedings under section 140(5) shall be maintainable is hereby quashed and set aside. The application/proceedings under section 140(5) of the Act, 2013 is held to be maintainable even after the resignation of the concerned auditors and now the NCLT therefore to pass a final order on such application after holding enquiry in accordance with law and thereafter on the basis of such final order, further consequences as provided under the second proviso to section 140(5) shall follow. However, it is made clear that we have not expressed anything on merits on the allegations against the concerned auditors and it is ultimately for the NCLT/Tribunal to pass a final order on the application filed by the Central Government under section 140(5) of the Act, 2013.

03/05/2023	Official Liquidator, Calcutta vs. Ujjain Nagar Palika Nigam & Ors	Supreme Court of India Civil Appeal No. 8015 of 2010 with connected appeal

Liquidation of company- sale of property by OL in public auction on "as is where is" basis- charges and encumbrances were not disclosed- Nigam claimed its property tax dues for pre and post liquidation period- OL allowed only for the preliquidation period and rejected the claim for post liquidation period- whether correct-Held, No.

Brief facts:

For what has been noticed hereinabove, the dispute between appellant OL and respondent No. 1 Nigam, put in a nutshell, is with regard to the rates and taxes for the period between 10.07.1997 (being the date on which the company was ordered to be wound up) and 04.07.2003 (being the date on which the sale in favour of the purchaser was confirmed). As noticed, part rejection of the claim of respondent No. 1 Nigam by the appellant OL, in relation to the period aforesaid between 10.07.1997 to 04.07.2003 was not approved by the Company Court while observing that post-liquidation liabilities were to be treated as part of the costs of winding up of the company in liquidation and such liability would get priority over all other liabilities of the company. The Company Court observed and reiterated that the principle of priority of certain creditors would be applicable to the liability of the company at the time of passing of the order of winding up but, costs and expenses incurred on behalf of the company in winding up were to be paid in full; and the liability of the company to pay rates and taxes would not automatically come to an end with the order of winding up. The Company Court yet left it open for the appellant OL to file an appeal under the provisions of the M.P. Act of 1956 while observing that unless such appeal was filed and demand was reduced, the appellant OL was bound to discharge the tax liability as per the claim of the Nigam even for the post-liquidation period. The contention of appellant before the Division Bench in challenge to the order so passed by the Company Court had essentially been with reference to the terms and conditions of sale and reliance upon the decision in United Bank of India (supra). The Division Bench compared the terms and conditions of sale in the cited decision and the terms and conditions of sale in the present case and observed that the sale notice in the present case was not couched in similar and comprehensive language so as to oblige the respondent No. 3 to make himself aware about encumbrances, if any, in respect of the assets of the company in liquidation. The Division Bench further observed that Section 530 of the Companies Act had no application in relation to the taxes which might have mounted between the date of the order of winding up and the date of sale of assets. Similarly, the Division Bench indicated inapplicability of Rule 154 of the Rules of 1959, providing for the manner of estimation of claims on the date of the order of winding up. The Division Bench summarised its conclusion that the claim in question was that of a post- liquidation liability which the OL was obliged to discharge in absence of a clear provision in the sale notice obliging the intended purchaser to satisfy himself as regards the assets of the company in liquidation in all respects, including encumbrances. More or less the same submissions have been made by the respective parties in this appeal but, with a little elaboration on their respective stands. While leaving the irrelevant aspects aside, the neat question is as to whether the claims so made by the respondent No. 1 Nigam towards property tax and water tax pertaining to the post- liquidation period, from the date of order of winding up and until the date of confirmation of sale of assets to the auction purchaser, are admissible against the appellant OL.

Decision: Appeal dismissed.

Reason:

One of the principal points arising for determination in this matter is the impact and effect of sale of assets of the company in liquidation to the respondent No. 3, particularly when the property was sold on "as is where is whatever there is" basis. Learned counsel for the appellant has referred to and relied upon a few decisions of this Court in support of his contention that looking to the terms and conditions of sale, the purchaser would be deemed to have full knowledge of defects, encumbrances and statutory dues and would remain liable towards such dues, particularly when the sale in the present case had been by the appellant OL under the orders of the Court. Per contra, learned counsel for the contesting respondents have referred to a couple of decisions to assert that no charge would be enforceable against the property at the hands of transferee for consideration without notice of charges and, for the municipal taxes not creating an encumbrance or charge as such on the property in question. We may closely examine the cited decisions to take note of the ratio decidendi and principles available therein.

The sheet anchor of the submissions on behalf of the appellant OL is the decision of this Court in the case of United Bank of India (supra) that has been cited for the proposition that in the sale of property and assets of company in liquidation, the Official Liquidator does not hold any guarantee or warranty in respect thereof; and the intending purchaser has to satisfy himself in all respects, particularly as regards encumbrances.

At the first blush, the said decision might appear to be standing somewhere near to the facts of the present case, for that had also been a case of sale of the assets by an OL with a somewhat similar stipulation that the sale was on "as is where is" basis. However, as rightly pointed out by the Division Bench of the High Court, there had been a marked difference in the terms and conditions of sale in the case of United Bank of India (supra) and those of the present case.

As noticed and extracted in the impugned judgment of the Division Bench of the High Court, in the case of United Bank of India (supra), the sale notice, inter alia, carried a significant stipulation whereby the purchaser was put to notice to satisfy himself "in all respects as regards movable and immovable assets as to their title, encumbrances, area, boundary, description, quality, quantity, and volume etc." Therein, it was also stated that "the purchaser shall not be entitled to any compensation or deduction in price on any account whatsoever and shall be deemed to have purchased property subject to all encumbrances, liens and claims including those under the existing legislation affecting labour, staff etc." Such stipulations left nothing to chance and nothing of any ambiguity where the purchaser was required to satisfy himself not only about the physical attributes of the assets but also about all encumbrances, liens and claims. Unfortunately, the terms and conditions of the sale in the present case fell too short of such material stipulations.

The Division Bench of the High Court has rightly said that if the intending purchaser was required to satisfy himself in all respects including encumbrances, he might not be heard in any objection about want of knowledge of encumbrances but, if he was not so warned, such an obligation on him to make himself aware about encumbrances cannot be foisted by any deeming fiction.

The submissions made on behalf of the appellant about the likely prejudice to the other pre-liquidation creditors if such post-liquidation liabilities are given preference over other liabilities; and reference to Section 529A and 530 of the Companies Act do not carry any relevance and do not make out any case for interference. The provisions contained in Sections 529A and 530 essentially relate to overriding preferential payments as also preferential payments in relation to the classes of dues/debts specified therein. However, the question of payment of the same would arise after payment of costs and expenses of winding up that are properly incurred by the appellant OL and are to be paid in priority. As aforesaid, the taxes payable to the respondent No. 1 Nigam during the period in question would directly amount to the costs and expenses of liquidation.

This being the position, in our view, the Company Court and then the Division Bench of the High Court have rightly underscored the faults on the part of the appellant OL and have rightly held that the liability on account of the property tax and water tax claimed by the respondent No. 1 to the extent rejected by the appellant OL has been a post liquidation liability, which the OL was obliged to discharge, in view of omission in the sale notice and then, in view of the operation of Rule 338 of the Rules of 1959.

For what has been discussed hereinabove, we do not find it necessary to dilate upon the other decisions cited by learned counsel for the parties. As aforesaid, the ambiguity as also omissions in the terms and conditions of the sale notice in the present case obviously lead to the position that the view taken by the High Court calls for no interference.

Lesson 2 – Securities Laws

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

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

Facts of the case :

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

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

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

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

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

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

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

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

SAT Order :

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

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

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

  Appellant Shruti Vora in the case of Wipro has specifically pointed out that along with the said message, a similar message regarding Axis Bank had also reached her which she had also forwarded. The published results, in that case, however, were widely different. The AO did not give any weightage to the same, SAT said.
- to prove any preponderance of probabilities that the impugned messages were unpublished price sensitive information, that the appellants knew that it was unpublished price sensitive information and with the said knowledge they or any of them had passed the said information to other parties.

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

Lesson 3: FEMA and other Economic and Business Legislations

May 30, 2023	Union of India through Deputy Legal Adviser, Directorate of Enforcement (Appellant) vs. Kamal Chand (Respondent)	Appellate Tribunal Under SAFEMA at New Delhi FPA-FE-28/CHN/2020

Facts of the case:

The present appeal is for enhancement of penalty of Rs. 16,00,00,000/- (Rupees Sixteen Crore only) imposed by the Adjudicating Authority on the respondent Shri Kamal Chand Proprietor of M/s. Anjaneya Enterprises for contravention of provisions of FEMA 1999 and Regulation thereunder involving amount of Rs. 15,21,95,977/- (Rupees Fifteen Crore Twenty One Lakh Ninety FiveThousand Nine Hundred and Seventy Seven only). Penalty of Rs. 16,00,00,000/- comprises of Rs. 8,00,00,000 (Rupees Eight Crore only) for the contravention of the provisions of Section 10(6) of FEMA, 1999 r/w Regulation 6(1) of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 and Rs. 8,00,00,000 (Rupees Eight Crore only) for the contravention of the provisions of Section 3(b) of FEMA, 1999. It has been pleaded in the Appeal that the quantum of penalty imposed is highly unreasonable and ridiculously low despite the charges against the respondent having been upheld on merit by the Adjudicating Authority.

The respondent has not appeared for the hearings scheduled on 31.01.2023, 02.03.2023, 10.05.2023 & 24.05.2023 even though Registry sent a notice to Shri Kamal Chand, the Respondent. During the hearing on 24.05.2023 the learned counsel for the appellant pleaded for allowing the appeal on the grounds that the two contraventions are separate and hence the penalty imposed for each of the contravention should have been higher. He pleaded that the penalty should be enhanced.

The Adjudicating Authority made a finding that the said outward remittances were in contravention of the provisions of Section 10(6) of FEMA, 1999 r/w Regulation 6(1) of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 as the respondent had acquired the Foreign Exchange and remitted abroad for the purpose of imports which did not happen.

The grounds taken in the appeal for enhancement of penalty is to state that the penalty imposed by the Adjudicating Authority is highly unreasonable and ridiculously low. The appellant has stated that the Adjudicating Authority has ignored the provisions of Section 13 (1) of FEMA which provides for imposition of penalty up to thrice the sum involved in the contraventions.

Order:

Hon’ble Appellate Tribunal in this case referred to the Hon’ble Supreme Court in State of MP and Ors. Vs. Bharat Heavy Electricals [(1997) 7 Supreme Court Cases 1] in its order dated 14.08.1997 held that in a statute prescribing the provision for penalty equal to ten times the amount of entry tax, the statute prescribed only a maximum limit and did not prescribe an irreducible amount depriving the assessing authority of any discretion in this regard. The stand of the State in the case supra conceded that the assessing authorities are not bound to levy fixed penalty equal to ten times the amount of entry tax. In fact, in the present case the statute (FEMA) itself provides for a penalty up to thrice the sum involved in such contravention and thereby gives explicit scope to the Adjudicating Authority to exercise his discretion, albeit judiciously, for imposition of penalty.

In view of the appeal having failed to bring out the reasons that why the penalty imposed is low and as to how the Adjudicating Authority has not exercised his discretion judiciously, It was observed that the order of the Adjudicating Authority cannot be interfered with. In view of the aforementioned discussions and observations, the appeal fails and is dismissed.

Lesson 4 - Insolvency Law

23/11/2021	TATA Consultancy ServicesLtd(Appellant) vs. Vishal Ghisulal Jain (RP)(Respondent)	Supreme Court of India

Insolvency and Bankruptcy Code, 2016- CIRP- termination of agreement due to deficiency of corporate debtor rendering services- termination arose out of the contract – application of RP- NCLT rejected the termination and NCLAT also confirmed- whether correct-Held, No.

Brief facts:

The appellant and SK Wheels Private Limited [“the Corporate Debtor”] entered into a Build Phase Agreement and Facilities Agreement. The Facilities Agreement obligated the Corporate Debtor to provide premises with certain specifications and facilities to the appellant for conducting examinations for educational institutions. It contained termination for material breach clause and arbitration clause for resolving the disputes.

As the corporate debtor provided insufficient services, the appellant, after warning the CD through various e-mails, terminated the Facilities Agreement after issuing a termination notice on 10 June 2019 which came into effect immediately.

The Corporate Insolvency Resolution Process was initiated against the Corporate Debtor on 29 March 2019. The Corporate Debtor instituted a miscellaneous application before the NCLT under Section 60(5)(c) of the IBC for quashing of the termination notice. The NCLT passed an order granting an ad-interim stay on the termination notice issued by the appellant and directed the appellant to comply with the terms of the Facilities Agreement. NCLAT also upheld the judgement of the NCLT. The judgment of the NCLAT has given rise to the present appeal.

Decision:

Based on the appeal, two issues have arisen for consideration before this Court:

(i) Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties; and

(ii) Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Facilities Agreement.

It is evident that the appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10 June 2019 were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT.

While in the present case, the second issue formulated by this Court has no bearing, we would like to issue a note of caution to the NCLT and NCLAT regarding interference with a party's contractual right to terminate a contract. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor. In Gujarat Urja (supra), this Court held thus:

"176. Given that the terms used in Section 60(5)(c) are of wide import, as recognised in a consistent line of authority, we hold that NCLT was empowered to restrain the appellant from terminating PPA. However, our decision is premised upon a recognition of the centrality of PPA in the present case to the success of CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the corporate debtor. In doing so, we reiterate that NCLT would have been empowered to set aside the termination of PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of NCLT under Section 60(5)(c) of IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix).

177. The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of the regime under Section 22 of SICA

which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of PPA which is the sole contract of the corporate debtor, governing the supply of electricity which it generates, it will pull the rug out from under CIRP, making the corporate death of the corporate debtor a foregone conclusion." (emphasis supplied).

The narrow exception crafted by this Court in Gujarat Urja (supra) must be borne in mind by the NCLT and NCLAT even while examining prayers for interim relief. The order of the NCLT dated 18 December 2019 does not indicate that the NCLT has applied its mind to the centrality of the Facilities Agreement to the success of the CIRP and Corporate Debtor's survival as a going concern. The NCLT has merely relied upon the procedural infirmity on part of the appellant in the issuance of the termination notice, i.e., it did not give thirty days' notice period to the Corporate Debtor to cure the deficiency in service. The NCLAT, in its impugned judgment, has averred that the decision of the NCLT preserves the 'going concern' status of the Corporate Debtor but there is no factual analysis on how the termination of the Facilities Agreement would put the survival of the Corporate Debtor in jeopardy.

Admittedly, this Court has clarified the law on the present subject matter in Gujarat Urja (supra) after the pronouncements of the NCLT and NCLAT. Going forward, the exercise ofthe NCLT's residuary powers should be governed by the above decision.

We accordingly set aside the judgment of the NCLAT dated 24 June 2020. The proceedings initiated against the appellant shall stand dismissed for absence of jurisdiction. The appealis disposed of in the above terms with no order as to costs.

14/09/2021	**National Spot Exchange Limited (Appellant) vs. Anil Kohli- RP for Dunar Foods Ltd (Respondent)**	**Supreme Court of India Civil Appeal No. 6187 of 2019**

Insolvency and Bankruptcy Code, 2016- Section 61- Appeals- limitation period – Power of NCLAT to condone delay- delay of 44 days in filing appeal- NCLAT refused to condone the delay- whether correct- Held, Yes.

Brief facts:

Feeling aggrieved and dissatisfied with the impugned order dated 05.07.2019 passed by the National Company Law Appellate Tribunal [NCLAT] where under the NCLAT has refused to condone the delay of 44 days in preferring the appeal against the order passedby the National Company Law Tribunal (hereinafter referred to as the ’NCLT’), rejecting the claim of the appellant herein, the appellant National Spot Exchange Limited has preferred the present appeal.

Decision:

At the outset, it is required to be noted that the appellant herein has challenged the order passed by the adjudicating authority dated 6.3.2019 affirming the decision of the resolution professional of rejection of the claim of the appellant before the NCLAT. The appeal preferred before the NCLAT was under Section 61(2) of the IB Code. As per Section 61(2) of the IB Code, the appeal was required to be preferred within a period of thirty days. Therefore, the limitation period prescribed to prefer an appeal was 30 days. However, as per the proviso to Section 61(2) of the Code, the Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for not filing the appeal, but such period shall not exceed 15 days. Therefore, the Appellate Tribunal has no jurisdiction at all to condone the delay exceeding15 days from the period of 30 days, as contemplated under Section 61(2) of the IB Code.

In the present case, even the appellant applied for the certified copy of the order passed by the adjudicating authority on 8.4.2019, i.e., after a delay of 34 days. Therefore, even the certified copy of the order passed by the adjudicating authority was applied beyond the prescribed period of limitation, i.e., beyond 30 days. The certified copy of the order was received by the appellant on 11.04.2019 and the appeal before the NCLAT was preferred on 24.06.2019, i.e., after a delay of 44 days. As the Appellate Tribunal can condone the delayup to a period of 15 days only, the Appellate Tribunal refused to condone the delay which was beyond 15 days from completion of 30 days, i.e., in the present case delay of 44 days and consequently dismissed the appeal. Therefore, as such, it cannot be said that the learned Appellate Tribunal committed any error in not condoning the delay of 44 days, which was beyond the delay of 15 days which cannot be condoned as per Section 61(2) of the IB Code.

It is true that in a given case there may arise a situation where the applicant/appellant may not be in a position to file the appeal even within a statutory period of limitation prescribed under the Act and even within the extended maximum period of appeal which could be condoned owing to genuineness, viz., illness, accident etc. However, under the statute, the Parliament has not carved out any exception of such a situation. Therefore, in a given case, it may cause hardship, however, unless the Parliament has carved out any exception by a provision of law, the period of limitation has to be given effect to. Such powers are only with the Parliament and the legislature. The courts have no jurisdiction and/or authority to carve out any exception. If the courts carve out an exception, it would amount to legislate which would in turn might be inserting the provision to the statute, which is not permissible.

It is also required to be noted that even the learned senior counsel appearing on behalf of the appellant has, as such, fairly conceded that considering Section 61(2) of the IB Code, the Appellate Tribunal has jurisdiction or power to condone the delay not exceeding 15 days from the completion of 30 days, the statutory period of limitation. However, has requested and prayed to condone the delay in exercise of powers under Article 142 of the Constitution of India, in the facts and circumstances of the case and submitted that the amount involved is a very huge amount and that the appellant is a public body. We are afraid what cannot be done directly considering the statutory provisions cannot be permitted to be done indirectly, while exercising the powers under Article 142 of the Constitution of India.

In view of the afore-stated settled proposition of law and even considering the fact that even the certified copy of the order passed by the adjudicating authority was applied beyond the period of 30 days and as observed hereinabove there was a delay of 44 days in preferring the appeal which was beyond the period of 15 days which maximum could have been condoned and in view of specific statutory provision contained in Section 61(2) of the IB Code, it cannot be said that the NCLAT has committed any error in dismissing the appeal on the ground of limitation by observing that it has no jurisdiction and/or power to condone the delay exceeding 15 days.

26/07/2021	**Orator Marketing Pvt. Ltd (Appellant)vs. SamtexDesinzPvt. Ltd (Respondent)**	**Supreme Court of India Civil Appeal No. 2231 of 2021**

Insolvency and Bankruptcy Code,2016- Section 7- interest free loan given to corporate debtor- non-payment thereof lender filing CIRP application- NCLT & NCLAT dismisses the application on the ground that it is an interest free loan, and the applicant is not a financial creditor- whether correct-Held, No

Brief facts:

The Original Lender, advanced a term loan of Rs.1.60 crores to the Corporate Debtor for a period of two years, to enable the Corporate Debtor to meet its working capital requirement.

The Original Lender has assigned the outstanding loan to the Appellant. According to the Appellant the loan was due to be repaid by the Corporate Debtor in full within 01.02.2020. The Appellant claims that the Corporate Debtor made some payments, but Rs.1.56 crores still remain outstanding. The Appellant filed a Petition under Section 7 of the IBC in the NCLT for initiation of the Corporate Resolution Process. NCLT dismissed the petition with the finding that the Appellant is not a financial creditor of the Respondent. On appeal, NCLAT also concurred with the judgement of the NCLT. Hence the present appeal before the Supreme Court.

The short question involved in this Appeal is, whether a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is not a Financial Creditor, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the IBC.

Decision:

The judgment and order of the NCLAT, affirming the judgment and order of the Adjudicating Authority (NCLT) and dismissing the appeal is patently flawed. Both the NCLAT and NCLT have misconstrued the definition of 'financial debt' in Section 5(8) of the IBC, by reading the same in isolation and out of context.

When a question arises as to the meaning of a certain provision in a statute, the provision has to be read in its context. The statute has to be read as a whole. The previous state of the law, the general scope and ambit of the statute and the mischief that it was intended to remedy are relevant factors.

The definition of 'financial debt' in Section 5(8) of the IBC has been quoted above. Section 5(8) defines 'financial debt' to mean "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing.

Furthermore, sub-clauses (a) to (i) of Sub-section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive.

At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor.

'Default' means non-payment of debt in whole or part when the debt has become due and payable, and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

The appeal is, therefore, allowed. The judgment and order impugned is, accordingly, set aside. The order of the Adjudicating Authority, dismissing the petition of the Appellant under Section 7 of the IBC is also set aside. The petition under Section 7 stands revived and may be decided afresh, in accordance with law and in the light of the findings above.

26/07/2021	**Orator Marketing Pvt. Ltd(Appellant) vs. SamtexDesinzPvt. Ltd(Respondent)**	**Supreme Court of India, Civil Appeal No. 2231 of 2021**

Insolvency and Bankruptcy Code, 2016- Section 7- interest free loan given to corporate debtor- non-payment thereof lender filing CIRP application- NCLT & NCLAT dismisses the application on the ground that it is an interest free loan, and the applicant is not a financial creditor- whether correct-Held, No

Brief facts: The Original Lender, advanced a term loan of Rs.1.60 crores to the Corporate Debtor for a period of two years, to enable the Corporate Debtor to meet its working capital requirement. The Original Lender has assigned the outstanding loan to the Appellant. According to the Appellant the loan was due to be repaid by the Corporate Debtor in full within 01.02.2020. The Appellant claims that the Corporate Debtor made some payments, but Rs.1.56 crores still remain outstanding. The Appellant filed a Petition under Section 7 of the IBC in the NCLT for initiation of the Corporate Resolution Process. NCLT dismissed the petition with the finding that the Appellant is not a financial creditor of the Respondent. On appeal, NCLAT also concurred with the judgement of the NCLT. Hence the present appeal before the Supreme Court. The short question involved in this Appeal is, whether a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is not a Financial Creditor, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the IBC.

Decision & Reason:

Appeal allowed. The judgment and order of the NCLAT, affirming the judgment and order of the Adjudicating Authority (NCLT) and dismissing the appeal is patently flawed. Both the NCLAT and NCLT have misconstrued the definition of ‘financial debt’ in Section 5(8) of the IBC, by reading the same in isolation and out of context.

When a question arises as to the meaning of a certain provision in a statute, the provision has to be read in its context. The statute has to be read as a whole. The previous state of the law, the general scope and ambit of the statute and the mischief that it was intended to remedy are relevant factors.

The definition of ‘financial debt’ in Section 5(8) of the IBC has been quoted above. Section 5(8) defines ‘financial debt’ to mean “a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of ‘financial debt’ in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

The NCLT and NCLAT have overlooked the words “if any” which could not have been intended to be otiose. ‘Financial debt’ means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause (f) of Section 5(8), in terms whereof ‘financial debt’ includes any amount raised under any other transaction, having the commercial effect of borrowing.

Furthermore, sub-clauses (a) to (i) of Sub-section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive.

At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor.

‘Default’ means non-payment of debt in whole or part when the debt has become due and payable, and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of ‘debt’ is also expansive and the same includes inter alia financial debt. The definition of ‘Financial Debt’ in Section 5(8) of IBC does not expressly exclude an interest free loan. ‘Financial Debt’ would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

The appeal is, therefore, allowed. The judgment and order impugned is, accordingly, set aside. The order of the Adjudicating Authority, dismissing the petition of the Appellant under Section 7 of the IBC is also set aside. The petition under Section 7 stands revived and may be decided afresh, in accordance with law and in the light of the findings above.

13/05/2021	**India Resurgence Arc Pvt Ltd v. (Appellant) vs. Amit Metaliks Ltd &Anr (Respondent)**	**Supreme Court of India, Civil Appeal No. 1700 of 2021**

Insolvency and Bankruptcy Act,2016- approval of resolution plan by CoC – exercise of commercial wisdom by CoC- discretion of adjudicating authority- whether correct- Held, Yes.

Brief Facts:

The appellant challenged the resolution plan in the corporate insolvency resolution process concerning the corporate debtor VSP Udyog Private Limited (respondent No. 2 herein), as submitted by the resolution applicant Amit Metaliks Limited (respondent No. 1 herein). NCLT approved the resolution plan and the NCLAT confirmed it. Hence, the appellant seeks to question the order passed by the National Company Law Appellate Tribunal by way of this appeal.

Decision: Dismissed.

Reason:

Having heard the learned counsel and having perused the material placed on record, we are clearly of the view that this appeal remains totally bereft of substance and does not merit admission.

The requirements of law, particularly in regard to the contentions sought to be urged on behalf of the appellant, are referable to the provisions contained in Section 30 of the Code dealing with the processes relating to submission of a resolution plan, its mandatory contents, its consideration and approval by the Committee of Creditors, and its submission to the Adjudicating Authority for approval.

As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority.

It needs hardly any elaboration that financial proposal in the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.

The NCLAT was, therefore, right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

In regard to the question of fair and equitable treatment, though the Adjudicating Authority as also the Appellate Authority have returned concurrent findings in favour of the resolution plan yet, to satisfy ourselves, we have gone through the financial proposal in the resolution plan. What we find is that the proposal for payment to all the secured financial creditors (all of them ought to be carrying security interest with them) is equitable and the proposal for payment to the appellant is at par with the percentage of payment proposed for other secured financial creditors. No case of denial of fair and equitable treatment or disregard of priority is made out.

The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance. Thus, what amount is to be paid to different classes or sub- classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

In JaypeeKensington(supra), this Court repeatedly made it clear that a dissenting financial creditor would be receiving the payment of the amount as per his entitlement; and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It has never been laid down that if a dissentingfinancial creditor is having a security available with him, he would be entitled to enforce the entire of security interest or to receive the entire value of the security available with him. It is but obvious that his dealing with the security interest, if occasion so arise, would be conditioned by the extent of value receivable by him.

The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived.

The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further exposited in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.

It needs hardly any emphasis that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximisation of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced. For what has been discussed hereinabove, this appeal fails and stands dismissed.

22/04/2021	**Sandeep Khaitan (Appellant) vs. JSVM Plywood Industries Ltd (Respondent)**	**Supreme Court of India, Criminal Appeal No.447 OF 2021**

Section 14 of the Insolvency and Bankruptcy Code,2016 read with section 482 of the CrPC-CIRP- operation of frozen bank account was allowed to be operated- whether correct-Held, No.

Brief facts:

The appeal is directed against order dated 04.02.2021 passed by the Hon'ble High Court of Guwahati. In the impugned order, the High Court has allowed an interlocutory application filed by the Respondent No. 1 to allow it to operate its bank account maintained with the ICICI Bank Bhubaneswar and to unfreeze the bank account of its creditors over which the lien has been created and the accounts frozen pursuant to the lodging of an FIR by the appellant before us. It was made subject to conditions.

Decision: Appeal allowed.

Reason:

The provisions of the IBC contemplate resolution of the insolvency if possible, in the first instance and should it not be possible, the winding up of the Corporate Debtor. The role of the insolvency professional is neatly carved out. From the date of admission of application and the appointment of Interim Resolution Professional, the management of the affairs of the Corporate Debtor is to vest in the Interim Resolution Professional. With such appointment, the powers of the Board of Directors or the partners of the Corporate Debtor as the case may be to stand suspended. Section 17 further declares that the powers of the Board of Directors or partners are to be exercised by the Interim Resolution Professional. The financial institutions are to act on the instructions of the Interim Resolution Professional. Section 14 is emphatic, subject to the provisions of sub section (2) and (3). The impact of the moratorium includes prohibition of transferring, encumbering, alienating or disposing of by the Corporate Debtor of any of its assets.

We have to also in this context bear in mind that the High Court appears to have, in passing the impugned order, which is an interim order for that matter, overlooked the salutary limits on its power under Section 482. The power under Section 482 may not be available to the Court to countenance the breach of a statuary provision. The words 'to secure the ends of justice' in Section 482 cannot mean to overlook the undermining of a statutory dictate, which in this case is the provisions of Section 14, and Section 17 of the IBC.

It would appear to us that having regard to the orders passed by the NCLT admitting the application, under Section 7, and also the ordering of moratorium under Section 14 of the IBC and the orders which have been passed by the tribunal otherwise, the impugned order of the High Court resulting in the Respondent No. 1 being allowed to operate the account without making good the amount of Rs 32.50 lakhs to be placed in the account of the Corporate Debtor cannot be sustained. The Learned Counsel for the Appellant has also no objection in the Respondent No. 1 being allowed to operate its account subject to it remitting an amount of Rs. 32.50 lakhs into the account of the Corporate Debtor. In such circumstances, Appeal is allowed.

The Impugned order is modified as follows: i. The Respondent No.1 is allowed to operate its account subject to it to first remitting into the account of the Corporate Debtor, the amount of Rs 32.50 lakhs which stood paid to it by the management of the Corporate Debtor. The assets of the Corporate Debtor shall be managed strictly in terms of the provisions of the IBC. The Appellant as RP will bear in mind the provision of Section 14 (2A) and the object of IBC. We however make it clear that our order shall not be taken as our pronouncement on the issues arising from the FIR including the petition pending under Section 482 of the Cr.P.C. ii. We also make it clear that the judgment will not stand in the way of the Respondent No.1 pursuing its claim with regard to its entitlement to a sum of

Rs.32.50 lakhs and any other sum from the Corporate Debtor or any other person in theappropriate forum and in accordance with law. There will be no order as to costs.

17/05/2022	NOIDA (Appellant) vs. Anand Sonbhadra (Respondent)	Supreme Court of India Civil Appeal No. 2222, 2367-2369 of 2021

Facts

The appellant is the lessor described as the Authority under Section 3 of the Uttar Pradesh Industrial Area Development Act, 1976 (hereinafter referred to as the 'UPIAD Act'). NOIDA **("Appellant")** had granted a lease of plot in favour of the Corporate Debtor on 30.07.2010 for a period of 90 years. Thereafter, Corporate Insolvency Resolution Process **("CIR Process")** of the Corporate Debtor was initiated wherein NOIDA initially filed its claim in Form- B as an Operational Creditor **("OC")** and also attended meetings of the Committee of Creditors **("CoC")** as an OC.

Subsequently, NOIDA filed another claim in Form-C claiming to be a Financial Creditor **("FC")** and sought voting share in the CoC on the basis of the Lease Deed entered into between NOIDA and the CD while contending that the same is a Financial Lease. The Hon'ble Adjudicating Authority being the Hon'ble National Company Law Tribunal, New Delhi Bench **("AA")** held that the lease deed in question was not a financial lease according to the IndianAccounting Standards **("IndAS")** and thus, the Appellant cannot be said to be a FC. The said Order of the AA challenged by way of the said Appeal before the NCLAT.

The Hon'ble National Company Law Appellate Tribunal **("NCLAT")** vide its Judgment dated 16.04.2021 rejected the contentions of New Okhla Industrial Development Authority ("NOIDA")claiming to be Financial Creditor **("FC")** basis the lease deed entered into with the Developer Company namely Shubhkamna Buildtech Private Limited **("Corporate Debtor/ CD")**.

NOIDA had filed appeal before Supreme Court against the order of the **"NCLAT".**

Centre of the Controversy

The apex court while delivered its verdict on appeals filed by NOIDA noted that Section 5(8), which is at the centre of the controversy, Thereafter, Hon'ble Court examined the definitions such as: ‘Financial Debt’, Financial Creditor, Operational Creditors, Operational Debt, Debt, Claim & Transaction etc.

According to Section “5(8) of IBC, “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes– (a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis; (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation. -For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing;and (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation andDevelopment) Act, 2016]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only themarket value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the itemsreferred to in sub-clause (a) to (h) of this clause;”

Section 3(11) defines the word *‘debt’*. It reads as: -"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

Section 3(6) defines the word ‘claim’. It reads as: - *"claim"* means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured,unmatured, disputed, undisputed, secured or unsecured;”

Section 5(21) defines the word *'operational debt'*. It reads as: - "operational debt" means a claimin respect of the provision of goods or services including employment or a debt in respect of the repayment 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;"
Section 5(20) defines the word '*operational creditor'*. It reads as: -"operational creditor" means aperson to whom an operational debt is owed and includes any person to whom such debt has beenlegally assigned or transferred;"
Section 3(33) defines the word *'transaction'*. It reads as: - "transaction" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;"

Analysis

Supreme Court observed that a debt is a liability or an obligation in respect of a right to payment. Irrespective of whether there is adjudication of the breach, if there is a breach of contract, it may give rise to a debt. In the context of section 5(8), disbursement has been understood as money, which has been paid. In the context of the transaction involved in such real estate projects, the homebuyers advance sums to the builder, who would then utilise the amount towards theconstruction in the real estate project.

What is relevant is to attract section 5(8), on its plain terms, is disbursement. While, it may be truethat the word 'transaction' includes transfer of assets, funds or goods and services from or to the corporate debtor, in the context of the principal provisions of section 5(8) of the Code, to import the definition of 'transaction' in section 2(33), involving the need to expand the word 'disbursement', to include a promise to pay money by a debtor to the creditor, will be uncalled forstraining of the provisions.

'Debt' means a liability or obligation, which relates to a claim. The claim or right to payment or remedy for breach of contract occasioning a right to payment must be due from any person.

In the lease in question, there has been no disbursement of any debt (loan) or any sums by the NOIDA to the lessee.

The subject matter of section 5(8)(d) is a lease or a hire-purchase contract. It is not any lease or a hire purchase contract, which would entitle the lessor to be treated as the financial creditor. Theremust be a lease or hire-purchase contract, which is deemed as a finance or capital lease. The law giver has not left the courts free to place, its interpretation on the words 'finance or capital lease'.The legislature has contemplated the finance or a capital lease, which is deemed as such a lease under the Indian Accounting Standards.

The Appellant is not the financial lessor under section 5(8)(d) of the Code. Needless to say, there is always power to amend the provisions which essentially consist of the Indian Accounting Standards in the absence of any rules prescribed under section 5(8)(d) of the Code by the CentralGovernment.

Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under section 5(8)(d), may create a financial debt within the meaning of section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, havingthe commercial effect of the borrowing.

Finding

The lease in question does not fall within the ambit of section 5(8)(f). This is for the reason that the lessee has not raised any amount from the Appellant under the lease, which is a transaction. The raising of the amount, which, according to the Appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the Appellant/Lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead to the conclusion that any amount has been raised, under the lease, from the Appellant, which is the most important consideration.

The appeal failed, Supreme Court held that the Appellant is not a Financial Creditor.

26/08/2022	***Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs***	***Supreme Court of India Civil Appeal No. 7667 of2021***

Issues

1. Stages of Corporate Insolvency Resolution Process
2. Interplay between IBC and the Customs Act, 1962

On the first issue, Hon'ble Supreme Court of India inter-alia observed various stages involved in the corporate insolvency process in India wherein Hon'ble Apex Court held that when a financial default occurs, either the borrower (Corporate Debtor under Section 10 read with Section 11 of the IBC) or the lender (creditors – financial creditor under Section 7 or operational creditor under Section 9 of the IBC) can approach the NCLT for initiating the resolution process. Operational creditors need to give a notice of 10 days to the Corporate Debtor before approaching the NCLT. If the Corporate Debtor fails to repay dues to the operational creditor, or fails to show any existing dispute or arbitration, then the operational creditor can approach the NCLT. Upon admission of an application by the NCLT, the claims of the creditor will be frozen for 180 days, during which time, the NCLT will hear proposals for revival of the Corporate Debtor and decide on future course of action. During this period, a moratorium is imposed to ensure no coercive proceedings are launched or continued against the Corporate Debtor in any other forum or under any other law, until approval of the resolution plan or initiation of the liquidation process.

The NCLT first appoints an interim insolvency professional. The interim insolvency professional is to hold office until a resolution professional is appointed. He further takes control of the Corporate Debtor's operations and collects its financial information from information utilities. The NCLT must also ensure public announcement of the initiation of corporate insolvency process and call for submission of claims. The Corporate insolvency process must normally be completed within 180 days of admission of the application by the NCLT. The Committee of Creditors has tothen take decisions regarding insolvency resolution as provided by law.

On the second issue, Hon'ble Supreme Court of India inter-alia observed that the Customs Act andthe IBC act in their own spheres. In case of any conflict, the IBC overrides the Customs Act. In present context, this Court has to ascertain as to whether there is a conflict in the operation of twodifferent statutes in the given circumstances. As the first effort, this Court is mandated toharmoniously read the two legislations, unless this Court finds a clear conflict in its operation.

As laid down earlier, the Customs Act and IBC can be read in a harmonious manner wherein authorities under the Customs Act have a limited jurisdiction to determine the quantum of operational debt – in this case, the customs duty – in order to stake claim in terms of Section 53 ofthe IBC before the liquidator. However, the respondent does not have the power to execute its claim beyond the ambit of Section 53 of the IBC. Such harmonious construction would be in linewith the ruling in ***Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta***, (2021) 7 SCC 209, wherein a balance was struck by this Court between the jurisdiction of the NCLT under the IBC and the potential encroachment on the legitimate jurisdiction of other authorities.

The IBC would prevail over The Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. Therespondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

02/09/2022	**Sumat Kumar Gupta Insolvency Professional, Formerly Resolution Professional M/S Vallabh Textiles Company Ltd (Appellant)** **Vs.** **Committee of Creditors of M/S Vallabh Textiles Company Ltd. Through Punjab National Bank (Respondent)**	**National Company Law Appellate Tribunal Principal Bench, New Delhi Company Appeal (AT) (Insolvency) No. 1037 of 2022**

Section 27 of the Insolvency & Bankruptcy Code does not contemplate any opportunity of hearing to the Resolution Professionals be given by the Adjudicating Authority before approvingthe proposal of new Resolution Professional.

Brief Facts:

This Appeal has been filed before the National Company Law Appellate Tribunal against the order dated 11.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench in *I.A. No. 682 of 2022 in CP(IB) No. 391/Chd/Pb/2018* by which order the application filed by the Punjab National Bank – the Financial Creditor for replacement of the Resolution Professional has been allowed and in place of the Appellant another person has been appointed as Resolution Professional. Aggrieved by the impugned order, the Appellant has come up in this Appeal.

Learned counsel for the Resolution Professional submitted before National Company Law Appellate Tribunal that the Adjudicating Authority passed the impugned order without giving any opportunity of hearing and within issuing any notice to the Appellant.

Order

Appeal is dismissed by the Hon'ble National Company Law Appellate Tribunal and *inter-alia* observed that when we look into the scheme of Section 27 as delineated by the statute, it does not contemplate any opportunity of hearing to the Resolution Professionals be given by the Adjudicating Authority before approving the proposal of new Resolution Professional. Section 27 requires the CoC to forward the name of proposed Resolution Professional to the Adjudicating Authority and the Adjudicating Authority is required to forward the name of the proposed Resolution Professional to the Board for its confirmation. The scheme of Section 27 does not indicate that Resolution Profession is to be made party and is to be issued notice before taking decision to appoint another Resolution Professional. Looking to the purpose and object of the I&BCode, where timeline is the essential factor to be taken into consideration at all stages, there is no warrant to permit a *Lis* to be raised by the Resolution Professional challenging his replacement bythe CoC. The decision taken by the CoC is a decision by vote of 66% and when the decision is by votes of a collective body, the decision is not easily assailable and replacement is complete as per Scheme of Section 27 when the resolution is passed with requisite 66% voting share.

13/12/2022	**Andhra Pradesh State Financial Corporation vs. Kalptaru Steel Rolling Mills Ltd & Ors**	**NCLAT Company Appeals (AT) (Insolvency) No. 584 of 2020 & 68 9f 2021**

Insolvency and Bankruptcy Act,2016 read with State Financial Corporations Act, 1959 - corporate debtor had mortgaged the property and handed over the title deeds to the appellant- approval of resolution plan by NCLT and direction to the appellant to release the titled deeds of the property- whether NCLT was correct- Held, Yes.

Brief facts:

These two Appeals have been filed by the same Appellant challenging order passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi approving the Resolution Plan of the Corporate Debtor - Kalptaru Steel Rolling Mills Ltd. and another order allowing the application filed by the Resolution Professionals seeking direction to the Appellant for releasing original title deeds of the property mortgaged with the Appellant by the Corporate Debtor.

Decision: Dismissed

Reason:

Now coming to the submission of learned counsel for the Appellant that objections raised by the Appellant have not been adequately considered by the Adjudicating Authority, suffice it to say that the objection was filed by the Appellant raising ground that Resolution Plan is not in accordance with the Code which objection has been rejected on 31.01.2020 by the Adjudicating Authority, which order has never been challenged. The Adjudicating Authority in the impugned order has also noticed certain objection raised by the Appellant Financial Creditor and the Adjudicating Authority has returned a finding that there has been equitable treatment between both the similarly situated secured creditors, CoC had approved the Resolution Plan by the requisite majority. The submission of the Appellant that Corporate Debtor was not a going concern, hence, there was no question of approving the Resolution Plan, also need to be rejected. In Para 52 of the impugned order the Adjudicating Authority has referred to the reply submitted by the Resolution Professional where it was mentioned that the Resolution Plan contains the provision for takeover of the Corporate Debtor as going concern and amalgamation of the Corporate Debtor with the Resolution Applicant. The Resolution Plan also contains provision for implementation of the plan through a monitoring committee. The Adjudicating Authority rightly observed that resolution is the rule and the object of the Code is to promote resolution. The Adjudicating Authority in detail considered the various parts of the plan which has been held to be compliant to the Section 30 of the Code.

The submission of the Appellant that the order passed by the Adjudicating Authority is nullity since it is passed on an application which is barred by time, need no acceptance for the reasons as we have indicated above. The challenge to the order initiating CIRP on Section 7 application has been rejected by the Hon’ble Supreme Court in the Special Leave Petition filed by the Appellant, hence, it is no more open for the Appellant to contend that the order passed by the Adjudicating Authority was without jurisdiction. Learned counsel for the Resolution Professional has rightly placed reliance on the judgment of Hon’ble Supreme Court in India Resurgence ARC Pvt. Ltd. vs. Amit Metaliks Ltd. & Anr (Civil Appeal No. 1700 of 2021), where the Hon’ble Supreme Court has held that distribution of the amount to the Financial Creditors as per the decision of the CoC cannot be permitted to be challenged.

We, thus, are satisfied that there are no grounds made out to interfere with the order approving the Resolution Plan. Now, coming to the order dated 19.11.2020 passed by the Adjudicating Authority allowing I.A. No.2123 (PB)/2019, suffice it to say that the order dated 19.11.2020 is a consequential order to the approval of the plan dated 14.02.2020 which needs no interference by this Appellate Tribunal. In result, both the Appeals are dismissed.

25/01/2023	**Shahi Md Karim vs. Kabamy India LLP & Anr**	**NCLAT** **Company Appeal (AT) (CH) (Ins.) No. 16 of 2023**

Insolvency and Bankruptcy Code,2016- Section 9- CIRP petition- admitted by NCLT- whether correct-Held, Yes

Brief facts:
Aggrieved by the 'Order' dated 05.01.2023 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench - I), whereby the Adjudicating Authority has admitted the application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code'), the Suspended Director of the 'Corporate Debtor' preferred this Appeal.

Decision: Dismissed.

Reason:

From the aforenoted Orders, it is clear that the Corporate Debtor had appeared on both the dates and that the copy of the Petition and the supporting documents were served on them on 02.11.2022, hence the Adjudicating Authority had closed the opportunity to file the Counter vide Order dated 21.11.2022; the matter was posted for hearing' on 05.12.2022 and thereafter on 05.01.2023, the CIRP was initiated. When the matter came up for hearing on 05.12.2022, the Corporate Debtor could have been present and submitted his arguments. Though, his right to file the counter was closed, he was not set 'Ex Parte' as on the date 21.11.2022 and therefore he could have appeared on 05.12.2022 when the matter was posted for final hearing and having been present as on 11.12.2022, the Counsel was very much aware that the matter was posted for hearing' on 05.12.2022. Though, the Adjudicating Authority does not have the 'Power of Review' it can, based on the facts and circumstances of the case, recall the order. In the instant case, this Tribunal, sitting in appeal, does not find any tangible / substantial grounds to interfere with the impugned order.

Further, the Appellant, has challenged the admission order on merits, on the ground that there was an arbitration clause', in the C & F Agreement, and that the Respondent, ought to have invoked this Clause. There is no embargo on the Operational Creditor, to file a Section 9 Petition, under I & B Code, 2016, even if there is an arbitration clause, in the Agreement. The scope and objective of the Code is 'Resolution', and not a 'Recovery Mode / Forum'.

In the instant case, the Adjudicating Authority, based on the material on record, had arrived at a conclusion that there were recurring defaults on behalf of the Corporate Debtor and that the Operational Creditor, has requested for full and final payment of the outstanding dues. The Corporate Debtor vide reply dated 01.02.2022, requested for dispatch of the inventory stocked in the warehouse in Mumbai. The Operational Creditor in reply to the email, sent an email dated 02.02.2022, highlighting the outstanding dues, along with the ledger attached. But there was no response and the Operational Creditor sent one more email dated 29.03.2022, demanding the outstanding total dues of Rs.3,12,81,028/- and therefore issued a legal notice dated 28.06.2022, for which, the Corporate Debtor sent a reply dated 12.07.2022, but the amounts were not paid.

For all the aforenoted reasons and discussions, this Tribunal, does not find any illegality or infirmity, in the passed by the Adjudicating Authority and this Appeal is dismissed accordingly.

23/01/2023	**Supriyo Kumar Chaudhuri & Anr vs. Jhunjhunwala Oil Mills Ltd & Anr**	**NCLAT Company Appeal (AT) (Ins) No. 794 of 2021 with Company Appeal (AT) (Ins) No. 04 of 2022**

Insolvency and Bankruptcy Code, 2016 - moratorium period- rent demanded from corporate debtor whether tenable- Held, No.

Brief facts:

These appeals have been filed by the Appellants, who are aggrieved by the order dated 6.8.2021 (hereinafter called 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Allahabad Bench) in the three interlocutory applications.

Two IAs were filed by Jhunjhunwala Oil Mills Limited (in short 'JOML') praying for direction to the Resolution Professional (in short 'RP') of the corporate debtor JVL Agro Industries Pvt. Ltd. (in short 'JVL Agro') to pay the rent along with interest of the premises owned by JOML which was used by JVL Agro and also to vacate the premises of JOML. One IA was filed by the liquidator of JVL Agro with prayer for direction to Respondents No. 1 to 5 to open the padlocks inserted at the entry gate of the office premises of the corporate debtor situated at Village Tilmapur, Gazipur Road, Ashapur, Varanasi and further to restore the physical possession of the said office to the liquidator.

The Appellant/JOML was aggrieved by the part of the order whereby vacant possession of the said premises has not been directed to be handed over to JOML and further the rent directed to be paid is as per the assessment done by the District Magistrate and not the amount of Rs. six lakhs plus GST per month, which was agreed to between the two parties.

Decision: Allowed.

Reason:

The issues that arise for consideration in the present appeal are two-fold:-

(i) Whether the 'said premises' of JOML being used as Registered Office of the corporate debtor JVL Agro could be recovered by the landlord JOML during the subsistence of moratorium after the initiation of CIRP, and

(ii) Whether any monthly rent was agreed upon and is payable to the landlord JOML by the corporate debtor JVL Agro whether before the imposition of moratorium or during the moratorium period?

We first look at the issue whether 'said premises' owned by JOML, situated at Village Tilmapur, Gazipur Road, Ashapur, Varanasi were being used by the corporate debtor prior to the initiation of CIRP of JVL Agro. We note that JVL Agro started using the 'said premises' belonging to JOML since 14th February, 2018. Therefore, on the basis of above stated letters (after referring to various communications), we are of the clear view that the 'said premises' were definitely in possession of JVL Agro from 14.2.2018, if not earlier, and was definitely in the possession of the corporate debtor on 25.7.2018 when the CIRP of the corporate debtor was initiated.

We now consider the issue whether the insertion of padlocks on the gates of the 'said premises' was permitted in view of moratorium which was in force.

18. Section 14(1)(d) of the IBC stipulates that during the period of moratorium, recovery of any property by an owner or lessor, where such property occupied by or in the possession of the corporate debtor is prohibited. We also note that the provision in section 14(2-A)which stipulates that where the Interim Resolution Professional considers the supply of goods and services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except when the corporate debtor has not paid dues arising from such supply of services during the moratorium period.

In the instant case, we have already noted that the 'said premises' owned by JOML were in possession of the corporate debtor JVL Agro at least from 14.2.2018 which is about five months prior to the date of initiation of CIRP of the corporate debtor. Therefore, the recovery of any property by the owner was expressly prohibited under section 14(1)(d) of the IBC during the period when moratorium was in force. The insertion of padlocks by JOML at the 'said premises' happened on 28.7.2020, which is as is stated in the complaint made by the RP to the Officer In- charge, Sarnath Thana, Varanasi and later to SSP, Varanasi and hence complaints are not disputed by JOML. Thus, this recovery which was done by the owner JOML of the 'said premises' on 28.7.2018, is clearly after the initiation of CIRP on 25.7.2018 and therefore, during the period of enforcement of moratorium and thus, such a recovery is a clear infringement of section 14(1)(d) of the IBC.

We do not think that section 14(2-A) is attracted in the present case as the RP had not considered the renting of the 'said premises'' critical to protect and preserve the value of the corporate debtor nor had made any request to JOML to continue renting of the 'said premises' to the corporate debtor. The 'said premises', therefore, should have lawfully been with the RP/ corporate debtor and continue in its lawful possession during the continuation of the CIRP of the corporate debtor.

The second issue to be considered is whether any rent was payable to the owner of the 'said premises' JOML by the corporate debtor during the period of subsistence of moratorium.
In this connection, we note the no objection certificate given by JOML regarding the use of this premises to the corporate debtor, JVL Agro does not mention payment of any monthly rent to the owner of the premises.

We further peruse the NOC which is claimed to be issued by JVL Agro addressed to JOML (attached at pg. 246 of appeal paperbook Vol.II). Evidently, this NOC is undated and the letterhead is also different from the letterhead used by JVL Agro, which is attached at pg. 48 of the appeal paperbook, Vol.I). Further, the letter does not disclose the name/identity of the director, who has signed this NOC. In the face of such uncertainties, this NOC appears to be of doubtful origin and does not inspire confidence to place reliance upon it. Further e-mail dated 28.8.2018 and reminder e-mails dated 31.8.2018 and 24.9.2018 sent by the JOML to RP do not indicate if any rent was being paid prior to date of sending of these e-mails. Therefore, on the basis of documents submitted both the parties, we are of the view that no rent was agreed upon to be paid by the corporate debtor to JOML nor any such payment was made for any period starting from 14.2.2018. It is clear that the issue of payment of rent was created by JOML only after the corporate debtor went into CIRP.

Thus, we are convinced by the arguments of the corporate debtor JVL Agro/RP that no rent was agreed upon to be paid for use of 'said premises' when the 'said premises' were offered to be used as registered office of the corporate debtor nor any rent was paid prior to the initiation of the CIRP of the corporate debtor. We also take note of section 14(2-A) of the IBC, which the landlord JOML has placed reliance upon regarding payment of rent during the moratorium period. A plain reading of this provision makes it clear that supply of certain goods and services has to be considered critical by IRP/IP to protect and preserve the value of the corporate debtor. Quite clearly in this case, the IRP/RP has neither recorded such a need nor requested the landlord JOML for continuing the supply of rental services to the corporate debtor. Therefore, we are of the view that section 14(2-A) is not attracted in the present case. Moreover, we have already seen how the present case is covered under section 14(1)(d) of the IBC, whereby the recovery of the 'said premises' in the possession of the corporate debtor, though owned by JOML, is expressly prohibited during the moratorium period.

In view of the detailed discussion on the issues framed by us, we hold the clear view that the Adjudicating Authority has gone beyond its jurisdiction in ordering payment of rent by the corporate debtor during the period of moratorium. We also find that the Adjudicating Authority did not adjudicate on the prayer made by the RP in IA No. 199/2020 for restoration of the possession of the 'said premises', which it should have done to settle the dispute early. In view of the fact that liquidation order with respect to the corporate debtor has already been passed by the Adjudicating Authority, no orders are now necessary in connection with IA 199/2020 in the present appeals.

We thus hold that the Impugned Order is erroneous, and therefore, liable to be set aside. We set aside the Impugned Order. The appeal is disposed of accordingly.

02/05/2023	**Moser Baer Karamchari Union vs. Union of India & Ors**	**Supreme Court of India Writ Petition (C) No. 421 of 2019 with connected cases**

Liquidation of insolvent company- Section 327 (7) of the Companies Act, 2013 read with section 53 of the Insolvency and bankruptcy Act,2016- workmen's dues- removing it from the IBC- whether tenable-Held, No.

Brief facts:

By way of this writ petition under Article 32 of the Constitution of India, filed by the writ petitioner had prayed for an appropriate writ, direction or order striking down Section 327(7) of the Companies Act, 2013 (hereinafter referred to as "Act, 2013") as arbitrary and violative of Article 21 of the Constitution of India. It is also prayed to issue an appropriate writ, direction or order in the nature of Mandamus so as to leave the statutory claims of the "workmen's dues" out of the purview of waterfall mechanism under Section 53 of the Insolvency and Bankruptcy Code, 2i016 (hereinafter referred to either as "IBC" or "Code").

By way of this writ petition under Article 32 of the Constitution of India, the petitioner - union has sought for an appropriate writ, direction or order striking down Section 327(7) of the Companies Act, 2013 as arbitrary and violative of Article 21 of the Constitution of India. The petitioner has also sought for an appropriate direction so as to leave the statutory claims of the "workmen's dues" out of the purview of waterfall mechanism under Section 53 of the Insolvency and Bankruptcy Code, 2016. As per Section 327(7), Sections 326 and 327 of the Act, 2013 shall not be applicable in the event of liquidation under the IBC. Sections 326 and 327 of the Act, 2013 provide for preferential payments in a winding up under the provisions of the Act, 2013. However, in view of the introduction of new regime under the IBC, in case of liquidation under IBC, distribution is to be made as per Section 53 of IBC. At this stage, it is required to be noted that IBC has been enacted w.e.f. 28.05.2016 and as per Section 53 of the IBC, the distribution of assets in case of liquidation under the IBC is required to be made.

Decision: Dismissed.

Reason:

We now turn our attention to Section 53 of the Code which begins with a non-obstante clause and states that notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of liquidation assets shall be distributed in the order of priority, which is stipulated, and within such period and such manner as may be specified. The consequence of sub-section (1) to Section 53 of the Code is that it will override the rights of parties, including the secured creditor, when the said provision applies. Section 53 of the Code is the complete and comprehensive code which ensures collection of assets and then provides the manner in which the creditors are to be paid. Even the rights of the secured creditor falling under Section 53 of the Code to enforce, realise, settle, compromise or deal with the secured assets as applicable to the security interest are diluted and compromised.

The waterfall mechanism is based on a structured mathematical formula, and the hierarchy is created in terms of payment of debts in order of priority with several qualifications, striking down any one of the provisions or rearranging the hierarchy in the waterfall mechanism may lead to several trips and disrupt the working of the equilibrium as a whole and stasis, resulting in instability. Every change in the waterfall mechanism is bound to lead to cascading effects on the balance of rights and interests of the secured creditors, operational creditors and even the Central and State Governments. Depending upon the facts, in some cases, the waterfall mechanism in the Code may be more beneficial than the hierarchy provided under Section 326 of the Companies Act, 2013 and vice-versa. Therefore, we hesitate and do not accept the arguments of the petitioners.

The Code is based on the organic evolution of law and is a product of an extensive consultative process to meet the requirements of the Code governing liquidation. It introduced a comprehensive and time-bound framework to maximise the value of assets of all persons and balance the interest of the stakeholders. The guiding principle for the Code in setting the priority of payments in liquidation was to bring the practices in India in line with global practices. In the waterfall mechanism, after the costs of the insolvency resolution process and liquidation, secured creditors share the highest priority along with a defined period of dues of the workmen. The unpaid dues of the workmen are adequately and significantly protected in line with the objectives sought to be achieved by the Code and in terms of the waterfall mechanism prescribed by Section 53 of the Code. In either case of relinquishment or non-relinquishment of the security by the secured creditor, the interests of workmen are protected under the Code. In fact, the secured creditors are taking significant haircut and workmen are being compensated on an equitable basis in a just and proper manner as per Section 53 of the Code. The Code balances the rights of the secured creditors, who are financial institutions in which the general public has invested money, and also ensures that the economic activity and revival of a viable company is not hindered because it has suffered or fallen into a financial crisis. The Code focuses on bringing additional gains to both the economy and the exchequer through efficiency enhancement and consequent greater value capture. In economic matters, a wider latitude is given to the law- maker and the Court allows for experimentation in such legislations based on practical experiences and other problems seen by the lawmakers. In a challenge to such legislation, the Court does not adopt a doctrinaire approach. Some sacrifices have to be always made for the greater good, and unless such sacrifices are prima facie apparent and ex facie harsh and unequitable as to classify as manifestly arbitrary, these would be interfered with by the court.

In view of the above and for the reasons stated above and as sub-section (7) of Section 327 of the Act, 2013 provides that Sections 326 and 327 of the Act, 2013 shall not be applicable in the event of liquidation under the IBC, which has been necessitated in view of the enactment of IBC and it applies with respect to the liquidation of a company under the IBC, Section 327(7) of the Act, 2013 cannot be said to be arbitrary and/or violative of Article 21 of the Constitution of India. In case of the liquidation of a company under the IBC, the distribution of the assets shall have to be made as per Section 53 of the IBC subject to Section 36(4) of the IBC, in case of liquidation of company under IBC.

In view of the above and for the reasons stated above, the writ petition(s) lack merits and the same deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

04/05/2023	**VISTRA ITCL (INDIA) Ltd vs. Dinkar Venkatasubramanian**	**Supreme Court of India Civil Appeal No.3606 of 2020**

Insolvency and Bankruptcy Code, 2016- financial creditor- claim rejected- whether correct-Held, No.

Brief facts:

The Resolution Professional (respondent herein) of the corporate debtor Amtek Auto Ltd filed I.A. No.225 of 2020 before the Adjudicating Authority seeking approval of the resolution plan. The Adjudicating Authority dismissed the application filed by the appellants being I.A. No.62 of 2020 seeking to include its claim in the resolution plan. The NCLAT by the impugned judgment and order the NCLAT has dismissed the appeal filed by the appellant observing that the appellant no.1's claim in purported capacity of 'Secured Financial Creditor' has been rejected way back in the year 2017 and the decision in this regard has not been called in question and therefore it is not open for the appellants to raise the same issue in 2020 by filing I.A. No.62 of 2020. The NCLAT has also observed that the appellants have not lent any money to the Corporate Debtor and the Corporate Debtor did not owe any financial debt to the appellants except the pledge of shares was to be executed. Therefore, the NCLT observed that the appellants not having advanced any money to the Corporate Debtor as a financial debt would not be coming within the purview of financial creditor of the Corporate Debtor. Making above observations, the NCLAT has dismissed the appeal. Hence the present appeal before the Supreme Court.

Decision: Partially allowed with modification

Reason:

Thus, we are presented with a difficult situation, wherein, Appellant No.1 – Vistra, a secured creditor, is being denied the rights under Section 52 as well as Section 53 of the Code in respect of the pledged shares, whereas the intent of the amended Section 30(2) read with Section 31 of the Code is too contrary, as it recognises and protects the interests of other creditors who are outside the purview of the CoC. To our mind, the answer to this tricky problem is twofold. First is to treat the secured creditor as a financial creditor of the Corporate Debtor to the extent of the estimated value of the pledged share on the date of commencement of the CIRP. This would make it a member of the CoC and give it voting rights, equivalent to the estimated value of the pledged shares. However, this may require reconsideration of the dictum and ratio of Anuj Jain (supra) and Phoenix ARC (supra), which would entail reference to a larger bench. In the context of the present case, the said solution may not be viable as the resolution plan has already been approved by the CoC without Appellant No. 1 Vistra being a member of the CoC. Therefore, we would opt for the second option. The second option is to treat the Appellant No. 1 – Vistra as a secured creditor in terms of Section 52 read with Section 53 of the Code. In other words, we give the option to the successful resolution applicant – DVI (Deccan Value Investors) to treat the Appellant No.1 – Vistra as a secured creditor, who will be entitled to retain the security interest in the pledged shares, and in terms thereof, would be entitled to retain the security proceeds on the sale of the said pledged shares under Section 52 of the Code read with Rule 21A of the Liquidation Process Regulations. The second recourse available, would be almost equivalent in monetary terms for the Appellant No. 1 Vistra, who is treated it as a secured creditor and is held entitled to all rights and obligations as applicable to a secured creditor under Section 52 and 53 of the Code. This to our mind would be a fair and just solution to the legal conundrum and issue highlighted before us.

We wish to clarify that the directions given by us would not be a ground for the successful resolution applicant – DVI to withdraw the resolution plan which has already been approved by the NCLAT and by us. The reason is simple. Any resolution plan must meet with the requirements/provisions of the Code and any provisions of law for the time being in force. What we have directed and the option given by us ensures that the resolution plan meets the mandate of the Code and does not violate the rights given to the secured creditor, who cannot be treated as worse off/inferior in its claim and rights, viz, an operational creditor or a dissenting financial creditor.

In the end, we must meet the argument raised by the Respondent No. 1 – Dinkar Venkatasubramanian, resolution professional for the Corporate Debtor – Amtek and the Respondent No. 2 – the CoC of the Corporate Debtor – Amtek, that the present plea of the Appellant No.1 – Vistra to be treated as a financial creditor of the Corporate Debtor Amtek should be dismissed on the grounds of delay, laches and acquiescence. The submission is that the Appellant No. 1 Vistra had not objected to the resolution plan submitted by the erstwhile resolution applicant LHG and, as a sequitur, its non-classification as a financial creditor in the CoC of the Corporate Debtor Amtek. Though this argument had appealed and had weighed with the NCLAT, in our opinion is untenable since the resolution plan submitted by erstwhile resolution applicant LHG did not in any way affect the rights or interests of the Appellant No. 1 – Vistra as a secured creditor in respect of the pledged shares. Appellant No. 1 – Vistra has elaborately explained that LHG etc. were in negotiations with them so as to redeem the pledge and acquire the shares.

In view of our aforesaid findings, the impugned judgment of the NCLAT affirming the view taken by the NCLT is partly modified in terms of our directions holding that appellant no.1 – M/s. Vistra ITCL (India) Limited would be treated as a secured creditor, who would be entitled to all rights and obligations as applicable to a secured creditor in terms of Sections 52 and 53 of the Code, and in accordance with the pledge agreement dated 05.07.2016.

Lesson 5 - Competition Law

12/10/2021	**Eastern Railway, Kolkata(Informant) vs. M/S Chandra Brothers &Ors(Opposite Parties)**	**Competition Commission of India**

Collusive bidding & cartel under Section 3 of Competition Act, 2002- identical price quoted by Opposite Parties (Ops) for the product Axle Bearings- was there any cartel- Held, Yes. Should OPs penalised-Held, No

Brief facts:
In the present matter, the informant Eastern Railway alleged contravention of the provisions of Section 3 by the 8 OPs as they have formed a cartel among themselves nd bid for the supply of Axle Bearings. The Axle Bearings supplied by the OPs are used in EMU/DMU motor coaches to assist in the rotations of axle motors. It is an alloy comprising high-leaded bronze, steel, copper, nickel, etc., as its main constituents. The product was standardised as per RDSO specifications, which undergo minor changes at times to customise the product as per the requirements of Zonal Railways. The bearing is also known as “High Lead Bearing”. The OPs are MSMEs.

Decision:

In view of the above, the Commission holds that OP-1 to OP-8 have contravened the provisions of Section 3(1) of the Act read with Section 3(3) thereof, as detailed in this order.

Further, the Commission, in terms of Section 27 (a) of the Act, directs OP-1 to OP-8 and their respective officials who have been held liable in terms of the provisions of Section 48 of the Act to cease and desist in the future from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act, as detailed in the earlier part of the present order.

The Commission contemplated at length the issue of imposition of penalty upon the OPs and respective officials keeping in view factors specific to this case, such as market structure, role of Indian Railways as a monopsony buyer, nature of the firms, the staff employed by them and the quantum of their annual and relevant turnover, and considered the same in light of the overall the objective of the Act to prevent practices from having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. It was observed that, with the purpose to give effect to the objective of the Act, the statute confers upon the Commission the power to impose penalty upon such market participants who act in contravention of the provisions of the Act. Such power under the statute is not rigid. It allows flexibility to take such measures that may be appropriate in a given market situation to address market distortions which may, inter alia, arise from the behaviour of the market participants.

So far as the instant case is concerned, the Commission notes that all the OPs in this case are MSMEs having limited staff and small turnover. Clearly, they have contravened the provisions of the Act, as brought out in the order above, and indulged in anticompetitive conduct, for which corrective measures need to be taken against them. In fact, the Commission notes abject lack of awareness of the provisions of law on the part of the OPs, which is reflected from the explicit communications and arrangements. Further, the Commission also appreciates the cooperative and non-adversarial approach adopted by OPs in admitting their involvement and coming forward to seek leniency. In this backdrop, the question which is looming large before the Commission is as to whether imposition of penalty would be the appropriate measure and course in the given market situation? As highlighted in the Composite Brake Blocks case (supra), the Commission is conscious of the fact that the MSME sector in India is already under stress and bearing the impact of the economic situation arising from the outbreak of the pandemic (COVID-19). The Government of India has undertaken various measures to support the liquidity and credit needs of viable MSMEs to help them withstand the impact of economic shock. In such a situation, if any penalty were to be imposed on these firms, it may render these firms economically unviable; some firms may even exit the market, which would further reduce competition in a market already characterised by the presence of few players due to the policy of the Indian Railways to procure items from RDSO-approved vendors.

Thus, considering the matter holistically, the Commission decides not to impose any monetary penalty on the OPs and their respective officials in the peculiar circumstances of this case, as noted above. Further, the Commission is of the considered opinion that the objectives of the Act would be met if the parties in the present matter cease such cartel behaviour and desist from indulging in similar behaviour in the future, as directed earlier. The parties are, however, cautioned to ensure that their future conduct is strictly in accord with the provisions of the Act, failing which, any such future behaviour would be viewed seriously as constituting recidivism, with attendant consequences.

23/08/2021	**In Re: Alleged Anti-Competitive Conduct By Maruti Suzuki India Limited In Implementing Discount Control Policy Vis-À-Vis Dealers**	**Competition Commission of India Suo Motu Case No. 01 of 2019**

Competition Act, 2002- Section 3- restrictive clauses in dealership agreements- differential discounts controlled- whether restrictive to the detriment of competition– Held, yes.

Brief Facts:

The present matter was taken up suomotu by the Commission based on an anonymous e- mail dated 17.11.2017 received from a purported Maruti Suzuki India Limited ('MSIL') dealer, wherein it was, inter alia, alleged that MSIL's sales policy is against the interest of customers as well as the provisions of the Competition Act, 2002 (the 'Act'). It was alleged that the dealers of MSIL in the West-2 Region (Maharashtra State other than Mumbai & Goa) are not permitted to give discounts to their customers beyond that prescribed by MSIL in the announced 'consumer offer'. If a dealer is found giving extra discounts, a penalty is levied upon the dealer by MSIL. This is called the 'Discount Control Policy' ofMSIL. It was averred that, as such, a cartel is formed by MSIL within the dealerships, which is a policy of MSIL.

Decision:

In the instant case, the RPM enforced upon the dealers by MSIL has led to denial of benefits to the consumers in terms of competitive prices being offered by MSIL dealers. When all the dealers are controlled by a Discount Control Policy, they are forced to sell the same product at the same price which, to a large extent, eliminates price competition amongst them. As such, due to almost nil intra-brand competition amongst MSIL dealers, the consumers would have had to purchase MSIL vehicles at fixed prices without flexible discounts being offered to them by MSIL dealers, thereby leading to charging of higher prices/ denial of discounts in kind, to them. Such arrangements perpetuated by MSIL restricted intra-brand competition amongst MSIL dealers, as it impaired their ability to compete with respect to prices in the sale and distribution of MSIL brand cars. There are numerous instances noted above whereby dealers have offered additional discounts to the MSAs assuming them to be genuine consumers and have been levied financial penalties for their such conduct by MSIL. As such, it is evident that had there been no Discount Control Policy enforced by MSIL, customers of MSIL would have been able to buy MSIL vehicles at lower prices. This has resulted in the denial of benefits to consumers, which would have otherwise been accrued to them in a healthy competitive environment between dealers. The anti-competitive impact of such a practice of MSIL is reinforced by the fact that MSIL has more than 50% market share in the passenger vehicles segment, as observed by the DG.

The Commission, however, is of the view that, imposition and enforcement of RPM by a player like MSIL, having a significant market share, not only thwarts intra-brand competition but also leads to the lowering of inter-brand competition in the passenger vehicles market. When a significant player such as MSIL imposes minimum selling price restrictions in the form of maximum discount that can be offered by the dealers, RPM can decrease the pricing pressure on competing manufacturers. This is more so in case of dealers who may be in an interlocking relationship with multiple manufacturers. When all dealers of MSIL are selling vehicles at similar prices, the prices of MSIL vehicle models can be easily comprehended by other players in the market. Being aware of the similar prices of MSIL's dealers due to prevalence of RPM in the passenger vehicle segment, the other OEMs can easily monitor MSIL's prices and also factor it in their pricing strategy, thereby softening competition. As such, it relaxes competitive pressure upon them and they can price their competing models accordingly, which due to the prevalence of RPM, may be priced higher than a competitively determined price. This phenomenon creates an obstruction for consumers to avail the benefit of competition in pricing across different brands as well.

It is known that RPM as a practice by multiple manufacturers is conducive for monitoring of tacit collusion among such manufacturers. Higher prices under RPM can exist, even when a single manufacturer imposes minimum RPM. This is more likely in the case of multi-brand dealers who have significant bargaining power because of their ability to substitute one brand with another. Further, this leads to another likely anticompetitive effect of higher prices across all brands even if there is no upstream or downstream conspiracy, because preventing price competition on a popular brand would result in higher prices of competing brands as well, including those that have not adopted RPM. Thus, minimum retail price RPM has the effect of reducing inter-brand price competition in addition to reducing intra-brand competition. Further, in terms of the factors stated under Section 19(3) of the Act, the impugned agreement/arrangement did not result in accrual of any consumer benefits; rather, the same resulted in denial of benefits to consumers as they were made to pay high prices.

Further, the said arrangement/agreement is not resulting in any improvements in production or distribution of goods or provision of services. The arrangement/agreement perpetuated by MSIL also hindered in the distribution of goods and the provision of services in relation to new cars. The arrangement/agreement put in place by MSIL also resulted in creation of barriers to new entrants/dealers in the market as the new dealers would take into consideration restrictions on their ability to compete with respect to prices in the intra-brand competition of MSIL brand of cars. Hence, the arrangement perpetuated by MSIL in fixing the resale price of MSIL brand of cars in the manner, as discussed above, foreclosed intra-brand price competition for its dealers as well as stifled inter-brand competition.

The Commission is, however, of the view that by controlling the dealers' margin, inter brand competition softens due to ease of monitoring of retail prices by the competitors. This provides the manufacturer more liberty to regulate its own margin freely. Thus, RPM lowers the pressure on the margin of the manufacturer. As such, MSIL may have a motive to indulge in RPM through the Discount Control Policy. Anyhow, motive or *mens rea* of the alleged violator of Competition Law is of no value or significance.

However, the Commission is of the view that the SOP and SPG put in place by MSIL provide a very clear and detailed description for working of MSIL dealers in terms of services to be rendered to the customers and other pre-sales services. Further, admittedly, these services are also monitored by MSIL through MSAs and the imposition of penalties. As such, considering such detailed guidelines for dealers backed by sanctions, there is very little scope for issues like free riding. All dealers of MSIL are subjected to the SOP/SPG and noncompliance with the same also results in the imposition of penalties. As such, the justification put forth by MSIL that RPM is required to eliminate the problem of free riding, is not tenable.

Though MSIL has argued that SOP/SPG may not be sufficient to solve the free-riding problem, and neither can they be fully monitored, the Commission observes that even a vertical restraint like RPM may not be the solution to such a problem. Eliminating price competition between dealers may not necessarily incentivise them to pass on the benefit of extra margins to consumers by way of providing better complementary services and it may not necessarily add extra value to complementary services. Nonetheless, in any circumstances, even if a benefit in the form of improved complementary services may be resulting from RPM, the same does not outweigh the harm caused to the market due to significant reduction in intra-brand competition and softening of inter-brand competition, leading to higher prices for the consumers.

On the basis of the above analysis, the Commission concludes that MSIL not only entered into an agreement with its dealers across India for the imposition of Discount Control Policy amounting to RPM, but also monitored the same by appointing MSAs and enforced the same through the imposition of penalties, which resulted in AAEC within India, thereby committing contravention of the provisions of Section 3(4)(e) read with Section 3(1) of the Act.

Having considered the nature of the infringing conduct and the post-pandemic phase of recovery of automobile sector, the Commission takes a considerate view and deems it appropriate to impose a penalty of ₹200 crores (Rupees Two Hundred Crores) only upon MSIL, as against a maximum penalty permissible under the provisions of the Act, which may extend up to ten percent of the average of the turnover of the entity for the last three preceding financial years.

06/08/2021	**Informant (Confidential) vs. Grasim Industries Limited [Opposite Parties(OP]**	**Competition Commission of India(CCI) Case No. 51 of 2017 with connected cases**

Competition Act, 2002- Section 4- abuse of dominance-Viscose Staple Fibre (VSF)- CCI passes cease and desist order.

Brief facts:

All three complaints in the instant matters were filed, by the informants, under Section 19(1)(a) of the Competition Act, 2002 against Grasim Industries Limited (the 'OP') alleging, inter alia, contravention of the provisions of Sections 3(4) and 4 of the Act with respect to Viscose Staple Fibre (VSF).

Decision:

Having considered the issue and contention of OP thereon, it is noted from the above table, that the quantum of VSF imports into India were 43,000 MT, 44,000 MT and 41,000 MT during the period of 2015-16, 2016-17 and 2017- 18 respectively. It is observed that the quantum of VSF imports has been very small as a percentage of domestic consumption of VSF for each year considered ranging between 14% to 16% and the market share of OP has been ranging between 84% to 86% in the relevant market during the period of investigation. The consistent market share of OP during the period of investigation indicate that imports do not act as a significant, economically viable alternative source of VSF supply for the spinners, much less acting as any countervailing force. Furthermore, it is noted that VSF manufacturing is capital intensive and involves complex technology, and subject to strict environmental restrictions. OP is having an excess production capacity of around 25%, thus, it is difficult for a new entrant to offer any sort of price competition to

OP in the relevant market. Taking into account the aforesaid discussion, it is clear that OP enjoys a position of dominance in the relevant market of supply of VSF to spinners in India.

Undertakings in competitive markets are generally entitled to determine whom to deal or supply and decide independently not to deal or supply to certain companies in the said market. Whereas, in case of dominant entity the situation is different as it is entrusted with a special responsibility with respect to the supply in the market. The case at hand however, points to a situation in which a dominant entity by offering VSF at prices that are not economically viable for the buyer/spinner to continue with its activity of spinning VSF yarn has denied a buyer/spinner access to an indispensable input in order to exclude that buyer/spinner from participating in VSF spinning thereby amounting to a refusal to supply. A refusal to supply may be classified as an exclusionary abuse. By way of its conduct the dominant entity prevents the requesting or terminated party from gaining access to an input. As a result, this undertaking/spinner is either driven out of the market, marginalized, denied access to market or prevented from entering the market.

VSF manufactured by OP is an indispensable input for producing both 100% VSF yarn or blended yarn. Without this input spinners cannot manufacture VSF yarn. The Commission has already shown that VSF imports are not an economically viable alternative for domestic spinners. Furthermore, the Commission in earlier cases has demonstrated that the OP has been discriminating against domestic category spinners by way of discounts resulting in a distortion of competition in the downstream market for 100% VSF yarn and blended yarn. In the instant matter, OP withdrew all discounts/credit notes to Informant No. 2, making the supply of VSF costly to Informant No. 2 and resulting in the VSF yarn manufactured by it to become uncompetitive. The difference between the present matter and earlier ones is that in the earlier matter, the issue was discrimination between domestic spinners regarding discounts offered by OP, whereas this is another case of discrimination but in a different form, i.e., withdrawing/ providing no discounts/credit notes to a VSF spinner and at the same time selling VSF at discounted prices/adjusting through credit notes to other domestic spinners who are all competitors in the downstream domestic VSF yarn market. Owing to the said conduct, Informant No. 2 had to cease production of VSF yarn/blended VSF yarn. OP, being a dominant entity, manufacturing and supplying an indispensable input/raw material to downstream domestic spinners, is entrusted with a special responsibility not to discriminate amongst its buyers. Taking into account the aforesaid analysis, the Commission is of the view that the argument of OP, that refusal to supply VSF to Informant No. 2 is owing to a commercial dispute and the same is not a competition law matter, is devoid of merit and is misconceived. The Commission considers such conduct unfair and discriminatory in violation of Section 4(2) (a)(ii) read with Section 4(1) of the Act. The said conduct is also in violation of Section 4(2)(c) read with Section 4(1) of the Act.

In view of the above, the Commission is of the opinion that the OP has abused its dominant position in the relevant market of 'the market for supply of VSF to spinners in India' by charging discriminatory prices to its customers, denying market access and imposing supplementary obligations upon its customers in violation of the provisions of Sections 4(2)(a)(ii), 4(2)(c) and 4(2)(d) read with 4(1) of the Act, as detailed in this order. The Commission directs the OP to cease and desist from indulging in such practices, which have been found to be in contravention of the provisions of the Act.

14/07/2021	**Meru Travel Solutions Pvt. Ltd(Appellant)** **vs.** **Uber India Systems Pvt. Ltd. &Ors(Respondent)**	**Competition Commission of India**

Competition Axt,2002- section 4- radio taxi services- below cost pricing by Uber- whether abuse of dominance-Held, No.

Brief facts:

Meru, the Informant, is engaged in the radio taxi service business in India to provide radio taxi services under the brand names 'Meru', 'Meru Genie' and 'Meru Flexi' in 21 major cities across India including Delhi NCR. It started operations in India in the year 2007, with self-owned cars but since 2012, it has started offering its services through aggregation model as well. OPs Uber Group entered the Indian radio taxi services market in 2013 and started its operations in Delhi-NCR in December 2013, wherein it offered services under three different brands namely 'Uber Black', 'Uber X' and 'UberGo'. The main grievance of the Informant is with regard to the alleged below cost pricing adopted by Uber. The Informant has alleged that the said allegation can be looked into both under Section 3(4) as well as Section 4 of the Act. Reliance has been placed on the prima facie order passed in Delhi VyaparMahasangh case as well as interim order passed in the MMT case.

Decision & Reason:

Based on the foregoing discussion, the Commission finds the relevant market in the present case to be 'market for radio taxi services in Delhi- NCR'.

In digital economy markets, network effects play a pivotal role. Network effects depend heavily on number of players/ participants joining the network on each side of two-sidedor multi-sided markets e.g. in case of radio taxi/cab aggregators, the network effects depend upon the drivers and riders joining the network. More riders mean more demand scattered across a geographic region owing to higher density of riders, leading to more ride requests on a particular platform as compared to its competitor, which in turn lead to the requirement of more drivers to serve such riders. More drivers improve the service (in terms of pickup time and geographical coverage) for riders, thus attracting more riders which in turn attracts more drivers. Such increased number of rides through limited platforms also generate efficiencies through higher utilization rate and lesser idle time for cabs/taxies.

It has been the constant endeavour of the Commission to promote competition in the market and to ensure efficient competitive markets. Such endeavour shall not be perceived to ensure a particular number of competitors. What is of significance is the strength of competitive constraints faced by players in a relevant market. To quote from an earlier decision 'as long as there is competition in and for the market satisfying these outcomes, regulatory intervention is not warranted to either protect the existing players or to increase the number of players in the market. Towards that end, Competition and competition law is not about counting the number of firms in a particular relevant market to determine whether or not that market is competitive.' Further, 'every market is unique with a unique number of players that are determined organically by competitive forces. There can be no sacrosanct number of firms that ensures the presence or absence of competition. There can be markets which may not be competitive even with large number of players and equally possibly there can be markets which can work perfectly well with fewer players, constraining the conduct of each other. What is significant is that the existing firms are effective enough to constrain the behaviour of one another so as to dissuade independent abusive conduct by any of them.'

In view of the foregoing, Uber is not found to be dominant in the relevant market. In the absence of dominance of Uber, examination of abuse or any analysis of pricing strategy by Uber is not warranted under the provisions of the Act.

This platform-based model, though distinct, competes with the asset-owned model where cabs are owned by the radio taxi operators. While the radio taxi companies operating under the asset-owned model own the taxis attached to them, the cab aggregators like Uber and Ola heavily rely on their network of driver partners with their own cars to provide ride services to the consumers/riders.

The digital market economy players rely on the strength of the network effects to generate efficiencies. Network effects in cab aggregators market depends upon the number of drivers and riders joining the network. As highlighted earlier, more riders mean more demand, leading to more ride requests on a particular platform as compared to its competitor, requiring more drivers to serve such riders. More drivers improve the geographical coverage and reduces the waiting time/ pickup time for riders, thus attracting more riders which in turn would attract/require more drivers. Thus, ceteris paribus, a cab- aggregator platform having a larger network will be able to allocate more ride requests to the drivers and offer more efficient rides to the riders/consumers in terms of lesser waiting time and lower prices. It has been submitted by Uber that its incentives were aimed at building a strong network and achieving a minimum viable scale to generate efficiencies.

During the initial stages, the focus of all platform operators, including the cab aggregators, is on developing and growing the network size. Depending upon the network externalities offered by each side, platforms design the pricing structure so as to make 'joining' the network and 'staying committed' to it, attractive to both sides. In cab aggregators' market, this was exhibited by discounts and incentives offered to riders and drivers, respectively. However, as the network grows and reaches a critical mass providing immense cross-side network benefits to the platform participants, the need to offer discounts/ incentives gets obviated. The data collected by the DG during investigation also depicts that the average margin per trip, which is essentially based on the gross billed amount collected from the customers (riders) less the amount spent by Uber on discounts and incentives, had become positive from October-2017 onwards (except in May, 2018). Thus, Uber has been earning positive margin per trip in Delhi NCR market since October 2017, which kept on increasing and went up to a range of Rs.0-50 per trip in March, 2019.

Meru has alleged that these discounts and incentives are funded by deep pockets and are not a result of efficiency. However, the present example of cab aggregators market is more of a case of penetrative pricing strategies for creation of a network. Given that Uber operates in a competitive market, having competitive constraints from an equally strong player i.e. Ola who has also been allegedly deploying similar pricing strategies, it seems to be a compelling business strategy to induce loyalty by offering incentives to drivers. This in itself becomes a competitive strategy in the early stages of network creation. Unlike players operating under the asset-owned model like Meru, the pure cab aggregators do not have fixed fleet of cabs or drivers working for them. In order to create a fleet of cabs that attach themselves on the platform simulating a fleet model, these incentives in the early stages are essential to attract cab-owning drivers.

In view of the foregoing discussion and on a collective assessment of various facts and evidence, the Commission thus, does not find merit in the argument of Meru that the incentives and rating mechanism adopted by Uber for its driver partners has led to any AAEC in the market.

22/06/2021	Kshitiz Arya &Anr (Appellant) vs. Google Llc & Ors (Respondent)	Competition Commission of India

Competition Act, 2002- section 3 & 4- android based smart phones and television devices- pre-installation of google app play store – restrictions on OEMs not to manufacture other forked android devices- whether abuse of dominance: Held, yes.

Brief Facts:

The Informants, stated to be consumers of the android based smart-phones and smart television devices. The Informant has alleged that Google has imposed several restrictions, as summarized below:

- Bundling its two different products, i.e. its app store (Play Store) to the operating system developed by it for television devices, i.e. Android TV. All Android TV based smart TV devices are alleged to come pre-installed with Google's app store, i.e. Play Store for smart TVs.
- Android Compatibility Commitments (ACC) formerly referred to as the Anti-fragmentation Agreements (AFA) stipulate and prevent OEMs from manufacturing/ distributing/ selling any other smart television or mobile devices which operate on a competing forked Android operating system. Thus, the developers of such forked Android operating system are denied market access resulting in violation of Section 4(2)(c) of the Act.
- Google's Play Store is not available on other licensable operating system as Google does not make available its app store to any TV operating on a forked Android operating system to prevent competition in these distinct relevant markets. This in turn also results in denial of market access which is alleged to be another violation of Section 4(2)(c) of the Act.
- OEMs which have entered into the ACC/AFAs with Google, are restrained from developing their own operating system based on 'forked android' for televisions. This has been stated to have not only created a barrier to entry into the market but actively resulted in limiting further research and scientific/ technical development of forked Android based Operating Systems. Further, as per the Informants, such restriction on the OEMs tantamount to imposition of supplementary obligations and have no connection or nexus with the licensing of OS or Google Mobile Services (GMS) for smart device.
- The obligations, by virtue of the ACC/ AFA, restrict freedom of action of OEMs with regard to the whole of their device portfolio (smart mobile devices, televisions, etc.),

and not just the devices on which the Play Store or Android TV OS is pre-installed. Thus, the Informants have alleged that these obligations can in no manner be conceived as connected to agreement for licensing of Android OS or app store for TV.

In addition to allegations under Section 4 of the Act, the Informants have averred that the agreements entered into by the OPs are in the nature of agreements as contemplated by Section 3(4) of the Act. These agreements are causing/ have caused an appreciable adverse effect on competition and therefore, are in contravention of Section 3(1) of the Act.

Decision: Investigation by DG ordered.

Reason:

However, as already noted, prima facie app stores in smart TV ecosystems are an important consideration for both OEMs as well as users and therefore, they appear to be a must have app. Further, it appears that all the Android TV based smart TVs come with pre- installed Play Store for Android TV. As already stated, Google occupies most significant position in the relevant market for licensable smart TV OS. Therefore, based on the aforesaid observations, prima facie it appears that Google has a dominant position in the relevant market for licensable smart TV device operating systems in India and the market for app store for Android smart TV operating systems in India.

Based on the information submitted by Google, it is noted that Google enters into two agreements with Android TV licensees i.e. Television App Distribution Agreement (TADA) and Android Compatibility Commitment (ACC), which, in conjunction essentially entail the following restrictions (a) In order to be able to preinstall Google's proprietary apps, device manufacturers have to commit to comply with the ACC for all devices based on Android manufactured/distributed/sold by them; and b) In order to be able to preinstall any proprietary app of Google, e.g. Play Store, device manufacturers will have to preinstall the entire suite of Google apps.

It appears that the obligations imposed by ACC restricts OEMs from dealing in Android Forks as OEMs commit that (i) All devices based on Android that Company manufactures, distributes, or markets will be Android Compatible Devices; (ii).All Androidbased software that Company develops, distributes, or markets will be designed to run on Android Compatible Devices, and (iii). Company may not distribute or market an SDK based on Android to third parties or participate in the development of such as SDK. Company remains free to develop an SDK based on Android for its own internal use.

Google, in its submissions, has asserted that licensing of Android operating system is not conditional upon signing of either of the two agreements i.e. TADA and ACC as both are optional. In this regard, the Commission is of the prima facie opinion that Google's app store, i.e. Play Store is prima facie noted as a 'must have' app, in the absence of which the marketability of Android devices may get restricted. Since, the license to pre-install Play Store is dependent on execution of TADA and ACC between Google and OEMs, therefore, these agreements become de facto compulsory.

In this backdrop, the Commission is of the prima facie opinion that by making pre- installation of Google's proprietary apps (particularly Play Store) conditional upon signing of ACC for all android devices manufactured/distributed/marketed by device manufacturers, Google has reduced the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of Android i.e. Android forks, and thereby limited technical or scientific development relating to goods or services to the prejudice of consumers in contravention of Section 4(2)(b) of the Act. Further, ACC prevents OEMs from manufacturing/ distributing/ selling any other device which operate on a competing forked Android operating system. Therefore, given the dominance of Google in the relevant markets and pronounced network effects, by virtue of this restriction, developers of such forked Android operating system are denied market access resulting in violation of Section 4(2)(c) of the Act.

In relation to ACC, Google has inter alia contended that by requiring a minimum level of baseline compatibility, the ACC facilitates competition between Android TV and longerestablished players in the connected TV sector to the benefit of Indian consumers. Further, ACC's compatibility requirement makes content providers more willing to certify their content for use on Android TV since they can be assured that their content will work as intended across all certified Android TV devices. The Commission is of the view that such pleas of Google can be appropriately examined during the investigative stage based on examination of device manufacturers and application developers.

In relation to the mandatory preinstallation of the all the Google Applications under TADA, it is observed that the device manufacturers who sign this agreement cannot pick and choose from amongst the Google Applications for preinstallation. In essence, this entails compulsory tying of 'must have' Google apps (such as Play Store), which the device manufacturers would like to have on their devices, with other apps where other credible alternatives may be available. The Commission is of the prima facie opinion that mandatory preinstallation of all the Google Applications under TADA amounts to imposition of unfair condition on the smart TV device manufacturers and thereby in contravention of Section 4(2)(a)(i) of the Act. It also amounts to prima facie leveraging of Google's dominance in Play Store to protect the relevant markets such as online video hosting services offered by YouTube, etc. in contravention of Section 4(2) (e) of the Act. All these aspects warrant a detailed investigation.

In view of the foregoing, the Commission directs the Director General ('DG') to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the date of receipt of this order.

20/05/2021	**CP Cell, Directorate General Ordnance Service (Appellant)** **vs.** **Sankeshwar Synthetics Pvt. Ltd (Respondent)**	**Competition Commission of India**

Competition Act, 2002- section 3- bid rigging- two bids of identical value- whether cartelisation established-Held, No.

Brief Facts:

The Informant in the present case had issued RFP for procurement of under pant Woollen for 9, 95,073 pairs. The Informant has stated that out of 12 firms which participated, only 7 firms could qualify for opening of commercial bids. The Informant submits that post- opening of commercial bids, it was observed that the rate quoted by two firms may have been quoted after collusion. The Informant has stated that it is opined that firms have colluded and quoted same rate, it gives an impression that the rates offered are through cartelisation.

Decision: Dismissed.

Reason:

The Commission notes that the bid rigging is defined in explanation under Section 3(3)(d) of the Act as, any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. The Commission observes that bid rigging or collusive bidding in a tender can be done by unscrupulous bidders in myriad ways, including clandestine arrangements to submit identical bid or deciding inter se as to who shall submit lowest bid amongst them or who shall refrain from submitting a bid and even includes designation of bid winners in advance on rotational basis/ geographical basis or on customer allocation basis. Any such agreement is clearly in contravention of Section 3(3)(d) read with Section 3(1) of the Act.

The Commission notes that in the additional information it came to light that the case was retendered by Informant based on its assessment that two L-1 firms quoted identical rates which was deemed as cartelisation. As per the additional information, the tender was retracted on 16.09.2020 and retendered on 12.11.2020. The Commission observes upon consideration of the minutes of the meeting of Technical Evaluation Committee that the procurer has raised this suspicion of bid-rigging only based on identical rates. Further, such bid has been negotiated with other firms and the procurer has found 5 firms willing to supply the order at the reduced rate of Rs. 127.90/-.

Additionally, it is seen that only two tenders were floated in last 5 years for procurement of woollen underpants. The earlier tender was floated on 02.07.2017 for procurement of 16,54,618 pairs of underpants woollen wherein 23 firms had participated. From list of 23 firms participated in earlier tender, the Commission notes that OPs in the present case had also participated in that tender. The OP-2 in the present matter, had in the previous tender submitted a bid of Rs. 142.40 and was the L4 bidder, and OP-1 had also participated, but did not attain any ranking. However, in the present tender both these firms have submitted the bid price of Rs. 127.90 which is much lower than the rate at which the previous tender was awarded. Further, 5 other firms were found willing to supply the order at reduced rate of Rs. 127.90/-. However, the tender was cancelled, and the procurer retendered for the supply of the item.

Based on information available at the disposal, the Commission notes that other than mere existence of an identical L-1 rate there is no other evidence to buttress the allegations of collusion or suggest any inter se relationship between the Opposite Parties. The Commission observes that the mere existence of price parallelism or identical prices is not per se sufficient to hold the parties liable for act of manipulation of bids/ bid rigging. The Commission holds that price parallelism has to be accompanied by some plus factor in order to substantiate the presence of ‘collusion’/ or ‘any agreement’ on part of the bidders which still stands unsubstantiated even after seeking additional information. Thus, the Commission observes that the information available at present is insufficient to proceed forward with this matter.

03/06/2021	**Confederation Of Professional Baseball Softball Clubs (Appellant)** **vs.** **Amateur Baseball Federation OfIndia(Respondent)**	**Competition Commission of India**

Competition Act, 2002 - section 4- abuse of dominance -tournaments conducted by unrecognised bodies- OP restriction players from participating in the tournaments organised- whether abuse of dominance- Held, Yes.

Brief facts:

The Informant was primarily aggrieved of the communications sent by ABFI to its affiliated State Baseball Associations whereby and whereunder they have been requested not to entertain unrecognized bodies and not to allow State level players to participate in any of the tournaments organized by them. The communication also threatens that strict action will be taken against the players who participate in such tournaments. This is alleged to be an abusive conduct by ABFI in contravention of the provisions of Section 4 of the Act.

Decision: Investigation ordered.

Reason:

On the issue of dominance of OP in the afore-delineated relevant market, the Commission notes from the submissions of OP itself that it is recognised as a National Sports Federation by the Ministry of Youth Affairs and Sports, Government of India and is primarily working for the general promotion of baseball and the players. It is also stated by OP in its reply that ABFI is affiliated to Baseball Federation of Asia, which is a continental level body and also to World Baseball and Softball Confederation, which is an International organization. ABFI is stated to have 26 affiliated State Associations across the country in 6 different zones. is an apex body in the country for promotion and development of baseball game recognized by Ministry of Youth Affairs & Sports, Government of India and Indian Olympic Association. Apart from conducting zonal, national and international baseball tournaments in India, ABFI is admittedly entrusted with the task of selecting Indian Baseball Team to participate in the international events.

In view of such admitted apex position of ABFI in the baseball ecosystem coupled with linkages/ affiliations with continental and international organizations, it is axiomatic that ABFI plays a decisive role in the governance of this sport discipline in the country. Accordingly, the Commission is of prima facie opinion that ABFI is in a dominant position in the ‘market for organization of baseball leagues/events/ tournaments in India’.

As regards the alleged abusive conduct, the Commission notes that ABFI by issuing communication dated 07.01.2021 to its affiliated State Baseball Associations requesting them not to entertain the unrecognised bodies and further by requesting them not to allow their respective State players to participate in any of the tournaments organised by such unrecognised bodies, has violated the provisions of Section 4(2)(c) of the Act as it results in denial of market access to other federations. Also, such conduct results in limiting and restricting the provision of services and market therefor, in contravention of the provisions of Section 4(2)(b)(i) of the Act. It is pertinent to mention that ABFI has acknowledged in its response that it has sent the communication dated 07.02.2021 to its affiliated State Associations.

The Commission also notes that the communication dated 07.02.2021 has further warned of strict action against the players who participate in the tournaments organised by bodies which are not 'recognised' by ABFI. Such conduct imposes an unfair condition upon the players and thereby falls foul of the provisions of Section 4(2)(a)(i) of the Act besides stultifying the very objective of promoting the cause of baseball in India, which a National Sports Federation is obligated to discharge.

In view of the foregoing, the Commission is of the prima facie opinion that ABFI has violated the provisions of Section 4 of the Act through its impugned conduct and the matter warrants investigation. Further, though the Informant has alleged contravention of the provisions of Section 4 of the Act only, yet looking at the decisions taken and communicated by ABFI, the Commission is of the opinion that the impugned conduct may also be examined by the DG within the framework of Section 3 of the Act, as highlighted previously in this order, as the impugned acts of ABFI in communicating its decision vide letter dated 07.01.2021 prima facie seem to limit or control provision of services, and thereby stand captured within the framework of Section 3(1) read with Section 3(3) of the Act. Resultantly, the Commission directs the DG to cause an investigation to be made into the matter.

19/01/2022	**Competition Commission of India v. State of Mizoram & Ors**	**Supreme Court of India Civil Appeal No. 10820-10822 of 2014**

Brief facts:

One of the bidders, who participated in the tender processing conducted by the State of Mizoram, for the appointment of selling agents for State lottery run by the State, made a complaint to the Competition Commission of India (CCI) alleging bid rigging in the tender process. The CCI directed investigation into the matter and the State of Mizoram approached the High Court challenging the jurisdiction of the CCI. High Court allowed the petition and held CCI has no jurisdiction to investigate in the matter. Aggrieved, CCI was before the

Supreme Court. The core issue was whether CCI had jurisdiction to investigate the allegation of bid rigging and cartelisation in the tender process conducted by the State of Mizoram.

Decision:
Appeal allowed.

Reason:

We are in agreement with the line of arguments that the concern of the CCI was not at all with the carrying out, regulation or prohibition of the lottery business as was governed by the Regulation Act. Rather, the concern was limited to the role assigned to the CCI under the Competition Act, and in the context of the EoI was limited to examining any perceived bid rigging in the tendering process for appointment of selling agents and distributors for the lottery business. There was no conflict in the interplay of the two Acts that even needed reconciliation or prohibition against either one, as the limited scrutiny was to examine the mandate of Section 3(1) read with Section 3(3) of the Competition Act.

Lotteries may be a regulated commodity and may even be res extra commercium. That would not take away the aspect of something which is anti-competition in the context of the business related to lotteries. We must take note of the expansive definition of ‘Service’ under Section 2(u) of the Competition Act. It means “service of any description”, which is to be made available to potential users. The purchaser of a lottery ticket is a potential user, and a service is being made available by the selling agents in the context of the Competition Act. Suffice for us to say the inclusive mentioning does not inhibit the larger expansive definition. The lottery business can continue to be regulated by the Regulation Act.

However, if in the tendering process there is an element of anti-competition which would require investigation by the CCI, that cannot be prevented under the pretext of the lottery business being res extra commercium, more so when the State Government decides to deal in lotteries. We would like to say that the intervention by the High Court was extremely premature. It ought to have waited for the CCI to come to a conclusion but on the other hand what has happened is that the CCI proceedings have been brought to a standstill while the High Court opined on the basis of some aspects which may or may not arise. The complaint having been made by respondent No.4 under Section 19 of the Competition Act, which provides that the Commission “may” inquire into certain agreements and dominant position of enterprise as envisaged under sub-section (1) of Section 3 and sub- section (1) of Section 4 of the Competition Act. The CCI found out a prima facie case for investigation by the DG under Section 3(1) of the Competition Act, the DG opined adversely, and the CCI issued notice giving an opportunity to the affected parties to place their stand before it. This process ought to have been permitted to conclude with the right available to the affected parties to avail of the appellate remedy under Section 53B of the Competition Act.

13/09/2022	**Consumer Unity & Trust Society(Informant) Vs. PVR Limited (Opposite Party No. 1) & INOX Leisure Limited(Opposite Party No. 2)**	**Competition Commission of India Case No. 29 of 2022**

Facts

The present information is filed by Informant under Section 19(1) (a) of the Competition Act, 2002(Act) against Opposite Parties (Ops) alleging contravention of the provisions of Section 3(1) of the Act.

Informant is stated to be a global, independent, non-profit, public policy research, advocacy and capacity building organisation. In pursuit of its vision of consumer sovereignty, it promotes optimal regulation, rule-based trade and good governance across sectors by bridging the gap between policymakers and grassroots through evidence-based interventions.

OP-1 (PVR) is stated to be a public listed company incorporated under the provisions of the Companies Act, 1956, which is engaged in the business of exhibition, distribution and productionof movies, and also earns revenue from in-house advertisement, sale of food and beverages. OP- 2 (INOX) is stated to be a public listed company incorporated under the provisions of the Companies Act, 1956, which is engaged in the business of operating and managing multiplexes and cinema theatres in India.

As per the Informant, the Opposite Parties (Ops) have entered into anti-competitive agreements which are likely to cause an appreciable adverse effect on competition (**AAEC**) in the relevant market for the *'exhibition of films in multiplex theatres and high-end single screen theatres in different cities in India'*. Further, the Information, the OPs, on 27.03.2022, announced a transaction(Proposed Transaction) whereby OP-2 will merge with OP-1, and the combined entity will be called 'PVR INOX Limited' (Combined Entity/PVR INOX Ltd.). The Informant has averred thatthe Proposed Transaction is likely to cause an AAEC in India.

The Informant has prayed to initiate an investigation against the OPs on the aforesaid allegations and, accordingly, impose penalty on them for entering into the Proposed Transaction. It is also prayed that the OPs be directed to suitably amend the Proposed Agreement so as not to cause an AAEC in India and ensure that the Combined Entity does not abuse its dominant position.

Order

The Competition Commission of India in its Order *inter alia* observed that the present case filed by the Informant is based on an apprehension that the PVR and INOX merger will result in the new entity being the largest player in Film Exhibition Industry. This entity, as per the Informant, will be dominant in terms of Section 4 of the Act by virtue of owning 1646 multiplex screens outof 3200 multiplex screens (approx.) in India. It is the contention of the Informant that the ProposedTransaction is likely to cause AAEC in the relevant market and create barriers for entry given the limited availability of space at key locations for opening multiplexes by new players, the high capital expenditure required to outfit an operating space, the onerous regulations and the long drawn process of getting approvals as well as economies of scale.

Further, Competition Commission of India is of the view that apprehension of likelihood of AAEC by an entity which is yet to take form cannot be a subject matter of inquiry/investigation under Section 3 or 4 of the Act. Section 3 of the Act provides for examination of likelihood of AAEC arising of conduct in terms of an agreement, not a likelihood of conduct itself. This kind of an assessment is *ex-ante*, which can be undertaken by the Commission in appropriate cases, when legal requirements for such examination are attracted in the first place. Therefore, the Commissionis of the view that conduct, much less of an anti-competitive nature, is found to be missing in the present case for an analysis from the standpoint of provisions of Section 3 or 4 of the Act. *Post- facto,* if any matter of abusive conduct under the provisions of the Act is brought, or comes, to the notice of the Commission, the same may be examined at that stage in terms of the provisions of the Act.

In view of the foregoing, the Competition Commission of India is of the opinion that there exists no *prima facie* case under the provisions of Sections 3 and 4 of the Act, and the Information filedis directed to be closed forthwith against the Opposite Parties under Section 26(2) of the Act.

02 /05/2022	**Swastik Road Carrier v. Central Railside Warehouse Co Ltd**	**Competition Commission of India Case No. 04 of 2022**

Section 3 & 4 of the Competition Act, 2002- Bid process informant's bid rejected on the ground of conflict of interest- whether tenable- Held, Yes.

Brief facts

The Informant is primarily aggrieved by the conduct of OP in disqualifying and rejecting its bid in the first tender on the ground of "conflict of interest" and thereafter again providing for disqualification of bidders on 'Conflict of Interest' basis and further providing for disqualification/blacklisting for next three years in case of breach of such condition.

Order

The Commission has perused the conditions provided in the NIT dated 05.08.2021 and is of the opinion that term enabling the OP to disqualify bidders due to "conflict of interest", does not appear to be unfair or anti-competitive in any manner. The Informant itself has enclosed a copy of the letter dated 01.10.2021 written by CMD of OP wherein the rationale for such term has been clearly spelt out. The letter clearly states that "...there were various instances wherein warehouses had diverted the customers of CRWC for their own benefit, thereby causing business loss to CRWC and Railways as well". In fact, a cursory search of information available in public domainreveals that such/similar clauses/conditions are found in the tenders floated by other procurers of services as well.

Even otherwise, from the reply of OP, it appears that there are several players who are operating in business similar to that of OP and the bidders who participate in the tenders for providing handling services hail from local as well as from far-off places in the state/ All India level. Accordingly, from the reply, there appears to be many such players who procure similar services and there also seems to be a number of players bidding for providing such services on Pan India as well as regional basis. In this market construct, OP does not appear to command any market power and as such the issue of abuse of dominance does not arise.

The Commission also deems it appropriate to reiterate that a procurer, as a consumer, can stipulatecertain technical specifications/ conditions/ clauses in the tender document as per its requirementswhich by themselves cannot be deemed anti- competitive if the same appear to be commercially justifiable. It is, however, made clear that if any stipulation made by dominant procurer is found to be unfair or anti- competitive in any manner, appropriate action against such procurer can be initiated as per the scheme of the Act.

Further, as brought out supra, in the instant matter, the impugned clause of the NIT does not appear to contravene the provisions of the Act. In light of the above, the Commission finds that no case is made out against the OP in the instant matter.

23/12/2022	**United Breweries Ltd. (Appellant) vs. CCI & Ors(Respondents)**	**National Company Law Appellate Tribunal, Principal Bench, New Delhi, Competition Appeal (AT) No. 23 of 2021**

It is settled that if a statute speaks to do it in a particular manner that has to be done in the same manner not in other way.

Brief Facts:

The short fact of the case is that on the basis of an application dated 26.07.2017 filed under Section 46 of the Act read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter referred to as 'LPR') by Crown Beers India Ltd, Respondent No.2 herein, and SABMiller India Pvt Ltd, Respondent No.3, against all the Respondents alleging cartelisation in relation to the production, marketing, distribution and sale of Beer in India, suo moto proceeding was initiated which was numbered as Suo Moto Case No.6/2017.

The Competition Commission of India (CCI) on the basis of materials available on record by its order dated 31.10.2017 formed an opinion that prima facie the conduct of appellants and private respondents in contravention of provisions of Section 3(1) read with Section 3(3)(a) of the Act and by its order dated 31.10.2017 under Section 26(1) of the Act directed the Director General (hereinafter referred to as 'DG') to conduct investigation and submit report. The Commission, in terms of Section 27(a) of the Act, directs the parties to cease and desist in future from indulging in any practice/conduct/activity, which has been found in the present order to be in contravention of the provisions of Section 3 of the Act.

Aggrieved by the Order of CCI Appeal before the National Company Law Appellate Tribunal. During the hearing the Appellants inter alia have raised the contention that there was no 'judicial member' in the CCI and hence the entire proceedings are void. The CCI inter alia submitted that the absence of judicial member does not render the Impugned Order void.

Judgement

Hon’ble National Company Law Appellate Tribunal in its judgement inter alia observed that on perusal of provisions it is evident that nowhere it has been indicated that CCI must consist a Judicial Member. The Act does not reflect to add a Judicial Member for deciding the proceeding. Section 8 is very much reflected on the issue. Even Section 9 does not indicate that Chairperson or Members of the Commission must be a Judicial Member rather there is no indication in the aforesaid provision for selecting Chairperson and Members of the Commission. There is a selection committee presided over by Hon'ble the CJI or his nominee besides other three Members. It is settled that if a statute speaks to do it in a particular manner that has to be done in the same manner not in other way. Since the statute does not speak about inclusion of Judicial Member the objection raised by learned counsel for appellant that in absence of Judicial Member order impugned is illegal has got no substance.

Lesson 7 – Interpretation of Law

06/08/2021	**Bhupesh Rathod (Appellant) vs. Dayashankar Prasad Chaurasia & Anr. (Respondents)**	**Supreme Court of India**

If a complaint was made in the name of the Company, it is necessary that a natural person represents such juristic person in the court and the court looks upon the natural person for all practical purposes. It is in this context that observations were made that the body corporate is a *de jure* complainant while the human being is a *de facto* complainant to represent the former in the court proceedings.

Brief Facts

Dayashankar Chaurasia, the respondent issued eight (8) cheques of totalling to Rs.1,60,000/- in favour of M/s. Bell Marshall Telesystems Limited ('the Company'). These cheques were drawn on different dates but were presented together for payment on 10.05.2006. All the cheques got dishonoured on account of "funds insufficient". On the cheques being dishonoured, legal notices were issued by the beneficiary under Section 138(b) of the Negotiable Instruments Act, 1881 ('NI Act') on 26.05.2006. The demand was, however not met within fifteen (15) days of the receipt of the notice nor was any reply sent which resulted in the complaint before the Special Metropolitan Magistrate, Mumbai.

The case made out that a sum of Rs.1,60,000/-was advanced to the respondent by the Company and the cheques were issued to repay the loan. The respondent took an objection that the complaint was filed in the personal capacity of Managing Director and not on behalf of the Company. While on the other hand it was contended by the appellant that the complaint was in the name of the Company and in the cause title of the complaint he had described himself as the Managing Director. The registration certificate, however, was not placed on record. On this aspect, it was the further submission of the respondent that it is only in the aforesaid title description that the complainant is described as the Managing Director of the Company but in the body of the complaint it is not so mentioned.

The trial court acquitted the respondent on 12.03.2009 based on a dual reasoning –

(a) there was no document except the promissory note signed by the respondent to show that the loan was being granted; and

(b) the Board Resolution itself was not signed by the Board of Directors (it may be stated that this was really a true copy of the Board Resolution).

The appellant preferred an appeal before the High Court but it was dismissed. The reasoning of high court was as under:

(a) it could not be said that the complaint had been filed by a payee or holder in due course as mandated under Section 142(a) of the NI Act.

(b) the payee was the Company and a perusal of the complaint did not show that the complaint was filed by the Company. It had been filed by the appellant who had described himself as the Managing Director of the Company only in the cause title of the complaint;

(c) probably a conscious choice was made to not file the complaint in the name of the Company as it was unclear whether the Company was authorised to advance loans.

Decision

The Supreme Court observed that the respondent not having disputed his signatures on the cheques, it was for the respondent to show in what circumstances the cheques had been issued, i.e., why was it not a cheque issued in due course. The words of Section 139 of the NI Act are quite clear that unless the contrary is proved, it shall be presumed that the holder of the 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. The respondent has not set up a case that the nature of transaction was of the nature which fell beyond the scope of Section 138.Other than taking a technical objection, really nothing has been said on the substantive aspect. The only eligibility criteria prescribed under Section 142(1)(a) is that the complaint must be by the payee or the holder in due course.

As to what would be the governing principles in respect of a corporate entity which seeks to file the complaint, an elucidation can befound in the judgment of the Supreme Court in ***Associated Cement Co. Ltd. v. Keshavanand***. If a complaint was made in the name of the Company, it is necessary that a natural person represents such juristic person in the court and the court looks upon the natural person for all practical purposes. It is in this context that observations were made that the body corporate is a *de jure* complainant while the human being is a *de facto* complainant to represent the former in the court proceedings. Thus, no Magistrate could insist that the particular person whose statement was taken on oath alone can continue to represent the Company till the end of the proceedings. Not only that, even if there was initially no authority the Company can at any stage rectify that defect by sending a competent person. The aforesaid judgment was also taken note of in a subsequent judgment of this Court in ***M.M.TC Ltd. &Anr. v. Medchl Chemicalsand Pharma (P) Ltd. &Anr.***

Supreme Court was, thus, of the view that both the impugned orders of the trial court and the High Court cannot be sustained and are required to be set aside. The finding is, thus, reached that the complaint was properly instituted and the respondent failed to disclose why he did not meet the financial liability arising to a payee, who is a holder of a cheque in due course.

We now turn to what would be the result of the aforesaid finding. The complaint was instituted in July, 2006. Fifteen (15) years have elapsed since then. The punishment prescribed for such an offence under Section 138 of the NI Act is imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both. We are of the view that in the given scenario the respondent should be sentenced with imprisonment for a term of one year and with fine twice the amount of the cheque, i.e., Rs.3,20,000/-. However, in view of passage of time, we provide that if the respondent pays a further sum of Rs.1,60,000/- to the appellant, then the sentence would stand suspended.

08/09/2021	**Mayan (Appellant) vs. Mustafa and Anr.(Respondents)**	**Supreme Court of India**

High Court should not interfere with the award on the ground of territorial jurisdiction on the make-belief stand that the injured has not pleaded in his claim petition that he was residing within the jurisdiction of the Compensation Commissioner, Trichirapalli.

The challenge in the present appeal was to an order passed by the learned Single Judgeof the High Court of Judicature at Madras on 25.04.2013, whereby an appeal filed by the first respondent was accepted on the ground that the Compensation Commissioner at Trichirapalli has no jurisdiction to entertain the complaint as it is the Compensation Commissioner at Cuddalore, who has the jurisdiction to entertain the complaint.

In an accident, which occurred during the course of employment on 05.03.2001, the appellant lost his right leg which got stuck in a Harvesting Machine. The appellant was working as a worker in the agricultural farm of the respondent since 1997. Signature Not Verified The learned Compensation Commissioner awarded a Digitally signed by Jayant Kumar Arora Date: 2021.11.09 16:55:32 IST Reason: sum of Rs. 1,21,997/- with 12% interest. An appeal against the said award was maintainable only on substantial question of law in terms of Section 30 of the Employees Compensation Act, 1923. But unfortunately, the High Court interfered with the award on the ground of territorial jurisdiction on the make-belief stand that the injured has not pleaded in his claim petition that he was residing within the jurisdiction of the Compensation Commissioner, Trichirapalli.

We find that the High Court should not have in-terfered in an appeal filed against the award of the Compensation Commissioner dealing with the injury of amputation of leg suffered by the appellant during the course of employment. The High Court should have heart to alleviate the loss suffered by the appellant but the order passed by the High Court shows total non-application of mind without any compassion to set aside an award of grant of compensation on account of loss of a limb on wholly untenable ground of lack of territorial jurisdiction. The appellant was a resi- dent of Sriram Nagar, Thiruvaiyaru Town and Thanjavour District, falling within the jurisdiction of Trichirapalli, thus even legally the jurisdiction was that of Compensation Commissioner under Section 21(1)(b) of the Employees Compensation Act, 1923.

In view thereof, the Supreme Court allowed the present appeal and set aside the order passed by the High Court and restore the order of the Compensation Commissioner. In addition to the amount already awarded by the Compensation Commissioner, the first respondent shall pay an amount of Rs.1,00,000/- (Rupees One Lakh) to the appellant as Costs, for depriving him the compensation for the last more than 20 years. The due amount shall be paid within a period of two months from today.

06/09/2021	**M/s Indsil Hydro Power and Manganese Limited (Appellant) vs. State of Kerala & Others (Respondents)**	**Supreme Court of India**

'Royalty' has consistently been construed to be compensation paid for rights and privileges enjoyed by the grantee. As against tax which is imposed under a statutory power without reference to any special benefit to be conferred on the payer of the tax. Where the Agreements were entered into after long deliberations and had the advantage of legal counsel, it cannot be said that parties were in a position with lesser bargaining power or were so vulnerable that by force of circumstances they were forced to accept such term.

Brief Facts

Civil Appeal preferred by M/s Indsil Hydro Power and Manganese Limited ("INDSIL") and Carborundum Universal Limited ("CUMI") were directed against the common judgement and order dated 03.04.2014 passed by the Division Bench of the High Court allowing Writ Appeal Nos.1345 and 1355 of 2013 preferred by State of Kerala against INDSIL and CUMI respectively. On 07.12.1990, the Government framed a policy allowing private agencies and public undertakings to set up hydel schemes for generation of electricity at their own cost. As per the Policy, the matters concerning the construction, operation and maintenance of the hydel scheme were to be managed as per the stipulations made by the Government/Board.

INDSIL having expressed interest in setting up a small hydel scheme, due negotiations and meetings were held. In a meeting held with the Board on 08.04.1994, one of the decisions was:

> “i) Royalty to be charged on water – It was decided that Irrigation Dept. will be requested not to charge the cess or royalty especially where water is being retained in the same basin and there is no consumptive use.”

On 11.10.2002, Guidelines were issued by the Government after noting the Policy and the recommendations of the Empowered Committee. These Guidelines dealt with transmission and distribution losses in wheeling the energy to CPPs but did not deal with royalty for the use of water. The Guidelines were revised vide G.O. dated 16.1.2003 which dealt with CPPs and IPPs. Nothing was specified with regard to the royalty for the use of water by CPPs but while dealing with IPPs, it was stipulated.

Both CUMI and INDSIL have been paying wheeling charges for consumption of electricity. Right from 1994 till April 2003, CUMI had also paid charges for the use of controlled supply of water at the rate specified in Clause 14 of the CUMI Agreement. In May 2003, CUMI however made a representation that it be exempted, like other projects from payment of such charges. Attempts on part of the Board to charge royalty/cost component for controlled release of water from CUMI and INDSIL in terms of clause 14 of the Policy has led to the disputes in the instant matters which are subject matter of these appeals. On 03.07.2004 an order was issued by the Government that in terms of Clause 19 of INDSIL Agreement, INDSIL would be liable to pay royalty and cost of controlled release of water. INDSIL challenged the order dated 03.07.2004 by filing Writ Petition (C) No.22187 of 2004 in the High Court. The Writ Petition was however withdrawn with liberty to make an appropriate representation to the Government. This led to some correspondence and representations from INDSIL. The Government, however, refused to recall its decision to recover royalty and cost of controlled release of water, which was communicated vide order dated 23.01.2008. The action on part of the Government was challenged by INDSIL by filing Writ Petition (C) No.4596 of 2008 in the High Court. Writ Petition (C) No. 4596 of 2008 preferred by INDSIL was allowed by the Single Judge of the High Court by his judgment and order dated 15.02.2013. It was observed that the action on the part of the Government was discriminatory, as all CPPs with the exception of CUMI were not subjected to such royalty. The explanation offered that CPPs and IPPs stood on different footings was not accepted. It was concluded that there was no jurisdiction to recover any royalty or cess and accordingly the order dated 03.07.2004 was quashed.

O.P. No.6880 of 2003 preferred by CUMI was allowed by the Single Judge of the High Court by his judgment and order dated 03.04.2013 with following observations:

“Even though in W.P.(C) No.4596/2008, I have given some findings against the petitioner, in view of my findings in Paragraphs 36 to 41 and 51 to 53 of the said judgment, I allow this writ petition and set aside the impugned order, Annexure P-3 holding that the Government is devoid of jurisdiction to realize any amount from the petitioner by way of Royalty or other charges on the water used for the Maniyar Hydel Project. In the circumstances, there will be no order as to costs.”

The decisions of the Single Judge in the matters of INDSIL and CUMI were called in question by the Board by filing Writ Appeal Nos.1345 of 2013 and 1355 of 2013 respectively before the Division Bench.

The Division Bench found that the Single Judge of the High Court had erred in allowing the Writ Petition preferred by INDSIL. It, however, concluded that the demand raised by the Government vide order dated 03.07.2004 was on the quantum of energy generated rather than being linked to the quantity of water used or the utilization of controlled release of water. It, therefore, directed the Government to pass fresh orders after due notice to the appellant. The Writ Appeal preferred against CUMI was thus allowed and the decision of the Single Judge was set aside. INDSIL being aggrieved, filed Civil Appeals Nos.9845-9846 of 2016 reiterating its submissions advanced in the High Court. In Civil Appeal Nos. 9847- 9850 of 2016, the grounds of appeal raised by CUMI have reiterated its submissions before the High Court.

Decision

The facts on record thus showed that both the projects have certainly derived advantage of controlled supply of water as contemplated in Clause 14 of the Policy. How much benefit of controlled supply of water each of the projects has received or will receive in future would be a matter of computation and calculations.

Learned Senior Advocate for INDSIL *inter alia* submitted Imposition of royalty in terms of Clause 19 of INDSIL Agreement would partake the nature and character of a "Tax". Assuming that the royalty imposed on INDSIL had genesis in a contract, no decision was taken by the Government as contemplated under said Clause 19.

Appearing for CUMI, learned Senior Advocate *inter alia* submitted there could be no distinction between CPPs and IPPs. Guidelines of 2002 as revised did not make any such distinction. The basis for levy was the advantage gained from controlled release of water. Therefore, the differentia could be between those having the benefit of controlled release of water on one hand and those not having such advantage on the other. Any other distinction such as CPPs as against IPPs would be unnatural and irrational.

The Agreements entered into by CUMI and INDSIL show that the terms and conditions of the Policy including Clause 14 thereof were consciously incorporated in the Agreements. Both CUMI and INDSIL were alive to the fact that because of peculiar location, their units would certainly have the advantage of controlled supply of water. Thus, the absence of a specific clause, akin to Clause 14 of CUMI Agreement, in INDSIL Agreement, would be of no consequence. The relationship between the parties would be governed by Clause 14 of the Policy, as incorporated in the respective Agreements.

The next questions to be considered are whether Clause 14 of CUMI Agreement and

Clause 14 of the Policy which stood incorporated into the respective Agreements could be termed to be unconscionable and/or manifestly arbitrary. The law is thus clear that in cases where a term of contract or agreement entered into between the parties is completely one sided, unfair and unreasonable, where the other party having less bargaining power had to accept such term by force of circumstances, the relief in terms of the decision of this Court in Central Inland Water Transport Corporation can be extended. It may be stated that the Agreements were entered into after long deliberations where both CUMI and INDSIL had the advantage of legal counsel.It cannot be said that CUMI and INDSIL were in a position with lesser bargaining power or were so vulnerable that by force of circumstances they were forced to accept such term. Therefore, the concerned Clause in CUMI Agreement as well as the terms of the Policy that stood incorporated in the respective Agreements, cannot be termed unconscionable.

Though we have considered the submissions that Clause 14 of the Policy would be unconscionable or arbitrary on merits, reference may also be made to the following statement of law culled out in Rajasthan State Industrial Development and Investment Corporation and Another vs. Diamond and Gem Development Corporation Limited and Another.

"15. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, ororder upon himself……"

Moving further, even if the relevant term in the Policy is not found to be unconscionable or arbitrary and is found to be perfectly justified, the question still remains whether in the application of said term to CPPs alone and not to IPPs, was any discriminatory treatment meted out to CPPs.

Qualitatively, the CPPs and IPPs have a basic distinction. CPPs produce electricity for self consumption. In the present case both CUMI and INDSIL generate electricity to be consumed in their factories or industrial units. Under the terms of their Agreements, if anything is produced in excess of their requirements, the surplus or excess electricity would be accepted by the Board. However, the principal purpose and end use would be self consumption. As against that, IPPs produce electricity not for self consumption but for the use of the Board. The electricity generated by IPPs becomes part of the grid of the Board to be supplied by the Board to its consumers like electricity produced by the generating units or power houses of the Board. If the charges towards controlled supply of water were to be imposed uniformly for CPPs and IPPs, the effect would be that the electricity supplied through IPPs to common consumers and general public would necessarily have an additional burden or load towards proportionate element of water charges. In these circumstances, if the Board decided not to apply Clause 14 of the Policy in case of all IPPs, such decision would not be termed as discriminatory.

The last set of submissions challenging the imposition of royalty or charges on controlled supply of water on the ground of absence or lack of jurisdiction and some ancilliary issues.

The expression ‘Royalty’ has consistently been construed to be compensation paid for rights and privileges enjoyed by the grantee and normally has its genesis in the agreement entered into between the grantor and the grantee. As against tax which is imposed under a statutory power without reference to any special benefit to be conferred on the payer of the tax, the royalty would be in terms of the agreement between the parties and normally has direct relationship with the benefit or privilege conferred upon the grantee.

Whatever be the nomenclature, the charges for use of controlled release of water in the present cases were for the privilege enjoyed by INDSIL and CUMI. Like the case in Motion Picture Association, the basis for such charges was directly in terms of, and under the arrangement entered into between the parties, though, not referable to any statutory instrument. The controlled release of water made available to INDSIL and CUMI, has always gone a long way in helping them in generation of electricity. For such benefit or privilege conferred upon them, the Agreements arrived at between the parties contemplated payment of charges for such conferral of advantage. Such charges, in our view, were perfectly justified. The submission that it was compulsory exaction and thus assumed the characteristics of a tax was completely incorrect and untenable. It was a pure and simple contractual relationship between the parties and the Division Bench was right in rejecting the submissions advanced by CUMI and INDSIL.

23/07/2021	**Prakash Gupta (Appellant) vs. SEBI (Respondent)**	**Supreme Court of India Criminal Appeal No 569 of 2021 [@ SLP (Crl) No. 4728 of 2019]**

Consent of SEBI is not required for compounding of offences under SEBI Act. However, views of SEBI should be considered. Supreme Court issues guidelines for compounding.

Brief facts:

The appellant is being prosecuted for an offence under Section 24(1) of the Securities and Exchange Board of India Act, 1992 (“SEBI Act”). The appellant sought the compounding of the offence under Section 24A. The Trial Court rejected the application, upholding the objection of the SEBI that the offence could not be compounded without its consent. Single Judge of the High Court of Delhi upheld the order of the Trial Judge in revision. The High Court has held that the trial has reached the stage of final arguments and the application for compounding cannot be allowed without SEBI’s consent. The reasons of the High Court are extracted below:

“6. Compounding at the initial stage has to be encouraged, but not at the final stage. The object of the SEBI Act has to be kept in mind. A stable and orderly functioning of the securities market has to be ensured. It will not be in the interest of justice to discharge the accused at the final stage of the proceedings by allowing the application for compounding without the consent of SEBI Act as it will defeat the objective of the SEBI Act. Though the Adjudicating Officer has found that the alleged violation committed by petitioner has not resulted in any loss to the investors, but this by itself would not justify discharge of accused at the fag end of trial. After considering the Supreme Court’s decision in Meters and Instruments Private. Limited (Supra), and the view expressed by High Court of Bombay in N.H. Securities Ltd. (Supra) as well as the facts and circumstances of this case, I find no justification to allow petitioner's application under Section 24A of the SEBI Act, 1992.”

This view of the High Court has been called into question in these

proceedings. **Decision:** Impleadment and interventions allowed.

Reason:

Hon’ble Supreme Court observed that legislative sanction for compounding of offences is based upon two contrasting principles:

First , that private parties should be allowed to settle a dispute between them at any stage (with or without the permission of the Court , depending on the offence), even of a criminal nature, if proper restitution has been made to the aggrieved party; and second, that, however, this should not extend to situations where the offence committed is of a public nature, even when it may have directly affected the aggrieved party. The first of these principles is crucial so as to allow for amicable resolution of disputes between parties without the adversarial role of Courts, and also to ease the burden of cases coming before the Courts. However, the second principle is equally Important because even an offence committed against a private party may affect the fabric of society at large.

Non-prosecution of such an offence may affect the limits of conduct which is acceptable in the society. The Courts play an important role in setting these limits through their adjudication and by prescribing punishment in proportion to how far away from these limits was the offence which was committed. As such, in deciding on whether to compound an offence, a Court does not just have to understand its effect on the parties before it but also consider the effect it will have on the public. Hence, societal interest in the prosecution of crime which has a wider social dimension must be borne in mind.

In the present case, it is evident that Section 24A does not stipulate that the consent of SEBI is necessary for the SAT or the Court before which such proceedings are pending to compound an offence. Where Parliament intended that a recommendation by SEBI is necessary, it has made specific provisions in that regard in the same statute. Section 24B provides a useful contrast. Section 24B(1) empowers the Union Government on the recommendation of SEBI, if it is satisfied a person who has violated the Act or the Rules or Regulations has made a full and true disclosure in respect of the alleged violation , to grant an immunity from prosecution for an offence subject to such conditions as it may impose. The second proviso clarifies that the recommendation of SEBI would not be binding upon the Union Government. In other words, Section 24B has provided for the exercise of powers by the Central Government to grant immunity from prosecution on the recommendation of SEBI. In contrast, Section 24A is conspicuously silent in regard to the consent of SEBI before the SAT or, as the case may be, the Court before which the proceeding is pending can exercise the power. Hence, it is clear that SEBI's consent cannot be mandatory before SAT or the Court before which the proceeding is pending, for exercising the power of compounding under Section 24A.

Guidelines for Compounding under Section 24A

Section 24A only provides the SAT or the Court before which proceedings are pending with the power to compound the offences, without providing any guideline as to when should this take place. Hence, we deem it necessary to elucidate upon some guidelines which SAT or such Courts must take into account while adjudicating an application under Section 24A:

(i) They should consider the factors enumerated in SEBI's circular dated 20 April 2007 and the accompanying FAQs, while deciding whether to allow an application for a consent order or an application for compounding. These factors, which are non-exhaustive, are:

"Following factors, which are only indicative, may be taken into consideration for the purpose of passing Consent Orders and also in the context of compounding of offences under the respective statute:

1. Whether violation is intentional.
2. Party's conduct in the investigation and disclosure of full facts
3. Gravity of charge i.e. charge like fraud, market manipulation or insider trading.
4. History of non-compliance. Good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past.
5. Whether there were circumstances beyond the control of the party.
6. Violation is technical and/or minor in nature and whether violation warrants penalty
7. Consideration of the amount of investors' harm or party's gain.

8. Processes which have been introduced since the violation to minimize future violations/lapses.
9. Compliance schedule proposed by the party.
10. Economic benefits accruing to a party from delayed or avoided compliance.
11. Conditions where necessary to deter future noncompliance by the same or another party
12. Satisfaction of claim of investors regarding payment of money due to them or delivery of securities to them
13. Compliance of the civil enforcement action by the accused.
14. Party has undergone any other regulatory enforcement action for the same violation.
15. Any other factors necessary in the facts and circumstances of the case."

(ii) According to the circular dated 20 April 2007 and the accompanying FAQs, an accused while filing their application for compounding has to also submit a copy to SEBI, so it can be placed before the HPAC. The recommendation of the HPAC is then filed before the SAT or the Court, as the case may be. As such, the SAT or the Court must give due deference to such opinion. As mentioned above, the opinion of HPAC and SEBI indicates their position on the effect of non-prosecution on maintainability of market structures. Hence, the SAT or the Court must have cogent reasons to differ from the opinion provided and should only do so when it believes the reasons provided by SEBI/HPAC are mala fide or manifestly arbitrary;

(iii) The SAT or Court should ensure that the proceedings under Section 24A do not mirror a proceeding for quashing the criminal complaint under Section 482 of the CrPC, thereby providing the accused a second bite at the cherry. The principle behind compounding, as noted before in this judgment, is that the aggrieved party has been restituted by the accused and it consents to end the dispute. Since the aggrieved party is not present before the SAT or the Court and most of the offences are of a public character, it should be circumspect in its role. In the generality of instances, it should rely on the SEBI's opinion as to whether such restitution has taken place; and

(iv) Finally, the SAT or the Court should consider whether the offence committed by the party submitting the application under Section 24A is private in nature, or it is of a public character, the non-prosecution of which will affect others at large. As such, the latter should not be compounded, even if restitution has taken place.

12/01/2022	The Authority for Clarification and Advance Ruling & Anr. (Petitioners) v. M/S. Aakavi Spinning Mills (P) Ltd. (Respondents)	Special Leave to Appeal (C)No. 306/2022 Supreme Court of India

No external aid for interpretation can be employed when the exemption Entry being clear and unambiguous

Facts

The petitioners seek special leave to appeal against the judgment and order dated 05.02.2020, as passed by a Division Bench of the High Court of Judicature at Madras in Writ Appeal No. 947 of 2018 whereby, the Division Bench has reversed the common order dated 13.12.2017 as passed by the learned Single Judge in a batch of petitions led by Writ Petition No. 17722 of 2017; and has disapproved the impugned clarification orders dated 14.02.2013 and 29.06.2017.

By the said clarification orders, the petitioner No. 1, the Authority for Clarification and Advance Ruling, had held that the commodity "Hank Yarn", as stipulated in Entry 44 of Part B of the Fourth Schedule to the Tamil Nadu Value Added Tax Act, 2006 ('the Act'), meant only "Cotton Hank Yarn" and not "Viscose Staple Fiber ('VSF') Hank Yarn".

The learned Single Judge agreed with the interpretation put by the petitioner No. 1, essentially looking at the purpose for which the Entry in question was inserted into the Fourth Schedule to the Act, with reference to the Budget speech delivered by the Hon'ble Minister of Finance, Government of Tamil Nadu. The learned Single Judge also referred to the reasons assigned by the petitioner No. 1 based on the contents of a Notification dated 17.04.2003 issued by the Ministry of Textiles, Government of India in exercise of powers conferred under the Textiles (Development and Regulations) Order, 2001 and Section 3 of the Essential Commodities Act, 1955.

Per contra, the Division Bench was of the view that no external aid for interpretation was called for when the language of the Entry in question was clear in itself.

Decision

When the Entry in question specifically provides for exemption to the goods described as "Hank Yarn" without any ambiguity or qualification, its import cannot be restricted by describing it as being available only for the hank form of one raw material like cotton nor could it be restricted with reference to its user industry. That being the position, reference to the decision in *K.P. Varghese (supra)* remains entirely inapposite to the facts of the present case. Therein, this Court was dealing with the interpretation of the language of sub-section (2) of Section 52 of the Income Tax Act, 1961 and it was found that a literal interpretation might not cover several eventualities concerning the value of consideration declared by the assessee in respect of the transfer of a capital asset vis-a-vis its fair market value as on the date of its transfer. Thus, the Supreme Court found, with reference to the intent and purpose, that the said provision could only be invoked when the consideration for transfer had not been correctly declared by the assessee, with burden of proving such understatement or concealment being on the Revenue. The observations in the said decision, based on the rules of interpretation to cull out meaning of a sentence, do not apply to the question at hand because the Entry in question is clear, direct and unambiguous; and simply reads: "Hank Yarn".

Thus, the view as taken by the High Court commends to us and we find no question of law worth consideration so as to entertain this petition. Therefore, the special leave petition stands dismissed.

For details: https://main.sci.gov.in/supremecourt/2021/23618/23618_2021_44_1_32516_Order_12-Jan- 2022.pdf

30/09/2022	***Gandhar Oil Refinery (India) Ltd (Appellant) vs. CityOil Pvt. Ltd (Respondent)***	**National CompanyLaw Appellate Tribunal Principal Bench, New Delhi** **Company Appeal (AT) (Ins.) No. 915 of2022**

A decision without reasons is like grass without root, the requirement to record reasons is one of the principles of natural justice

The Hon'ble NCLAT while setting aside the Order passed by the Adjudicating Authority in its order *inter-alia* observed that when judgment is pronounced without reasoning, it is not a judgment in the eye of law for the reason that the requirement of reasoning either by Original Court or Appellate Authority is to convey the mind of the judge while deciding such an issue before the Tribunal. The object of the Rule in making it incumbent upon the Tribunals to record reasons is only to afford an opportunity in understanding the ground upon which the decision is founded witha view to enabling them to know the basis of the judgment or order and if so considered appropriate and so advised, to avail the remedy of appeal.

Further, the Appellate Tribunal observed that ……. "the requirement of recording of reasons is only to show that the Court has focused concentration on rival contentions and to provide litigant parties an opportunity of understanding the ground upon which the decision is founded. Even if itis an order under the provisions of the Act, still these basic requirements cannot be ignored by Courts and Tribunals. In such case, a judge is required to apply his mind and give focused consideration to rival contentions raised by both parties. Courts/Tribunals ought to be cautious and only on being satisfied that there is no fact which needs to be proved despite being in admission, should proceed to pass judgments *vide Balraj Taneja and another vs. Sunil Madan and another (AIR 1999 SC 3381).* The need for recording of reasons is greater in a case where the orderis passed at the original stage, a decision without reasons is like grass without root, the requirementto record reasons is one of the principles of natural justice as well and where a statute required recording of reasons in support of the order, it must be done by the authorities concerned as held by the Apex Court in *S.M. Mukerji Vs. Union of India(1990 Crl.L.J.2148)."*

Justice M.M. Corbett, Former Chief Justice of the Supreme Court of South Africa, recommendeda basic structural form for judgment or order writing, which is as follows: *"(i) Introduction section; (ii) Setting out of the facts; (iii) The law and the issues; (iv) Applying the law to the facts; (v)*

Determining the relief; including costs; and (vi) Finally, the order of the Court.”

The decision also stated in para 18 that Keeping in view various principles and observations, the ‘Apex Court’ laid down certain guidelines for writing judgments and orders in ‘Joint Commissioner of Income Tax, Surat, Vs. Saheli Leasing and Industries Limited’ (Civil Appeal No. 4278 of 2010) in para No. 7 of the judgment and they are extracted hereunder: *"7. These guidelines are only illustrative in nature, not exhaustive and can further be elaborated looking to the need and requirement of a given case:-*

a) It should always be kept in mind that nothing should be written in the judgment/order, which may not be germane to the facts of the case; It should have a co-relation with the applicable law and facts. The ratio decidendi should be clearly spelt out from the judgment/order.

b) After preparing the draft, it is necessary to go through the same to find out, if anything, essentialto be mentioned, has escaped discussion."

c) The ultimate finished judgment/order should have sustained chronology, regard being had to the concept that it has readable, continued interest and one does not feel like parting or leaving itin the midway. To elaborate, it should have flow and perfect sequence of events, which would continue to generate interest in the reader.

d) Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgments creates more confusion rather than clarity. The foremost requirement is that leading judgments should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgment, in which all previous judgments have been considered, should be mentioned. While writing judgment, psychology of the reader has also to be borne in mind, for the perception on that score is imperative.

e) Language should not be rhetoric and should not reflect a contrived effort on the part of the author.

f) After arguments are concluded, an endeavour should be made to pronounce the judgment at the earliest and in any case not beyond a period of three months. Keeping it pending for long time, sends a wrong signal to the litigants and the society.

It should be avoided to give instances, which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society."

14/03/2023	Cholamandalam Investment and Finance Company Ltd. vs. Amrapali Enterprises and Ors.	High Court of Calcutta

Compliance with Section 12(5) read with Schedule VII of Arbitration and Conciliation Act, 1996 is a sine qua non for validity of arbitral reference

Facts

This application was filed under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') by Cholamandalam Investment and Finance Company Ltd. (hereinafter referred to as the 'award holder') seeking execution of an arbitral award passed by Sole Arbitrator. The award debtors herein are Amrapali Enterprises (hereinafter referred to as the 'borrower') and the guarantor.

It was submitted that the impugned award has been challenged under Section 34 of the Act before the City Civil Court. However, the High Court understand that the same may be time barred.

From the submissions made by the parties and perusal of the arbitral award, it is apparent that Sole Arbitrator was unilaterally appointed by the award holder. Further, the arbitral proceedings were conducted without participation of the award debtors and consequently, the arbitral award was passed ex-parte.

Decision

The position of law on unilateral appointment of an arbitrator is no more res integra and has been settled by the Supreme Court through various judicial pronouncements.

The proscription under Section 12(5) read with Schedule VII of the Act was extended to persons unilaterally appointed to act as an arbitrator. Such persons who are unilaterally appointed lack inherent jurisdiction unless an express written approval is given by the parties subsequent to disputes having arisen.

The Court said that I find myself in complete concurrence with the aforesaid judgments, and in my view, the impugned award is unsustainable and non-est in the eyes of law. It is a settled principle of law that compliance with Section 12(5) read with Schedule VII is sine qua non for any arbitral reference to gain recognition and validity before the Courts. In the present facts in hand, an arbitral reference which itself began with an illegal act has vitiated the entire arbitral proceedings from its inception and the same cannot be validated at any later stage. Thus, it would be a logical inference to consider the aforesaid arbitral proceedings as *void ab initio.*

The High Court said that in my view, the impugned award, which was passed by a dejure ineligible arbitrator, suffers from a permanent and indelible mark of bias and prejudice which cannot be washed away at any stage including the execution proceedings. Infact, as the arbitrator was dejure ineligible to perform his functions and therefore lacked inherent jurisdiction or competence to adjudicate the disputes in hand, the impugned award cannot be accorded the privileged status of an award.

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Note: Students appearing in December, 2023 Examination should also update themselves on all the relevant Notifications, Circulars, Clarifications, Orders etc. issued by MCA, SEBI, RBI & Central Government upto 31st May, 2023.