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PROFESSIONAL PROGRAMME

(New Syllabus)

for

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Multidisciplinary Case Studies

MODULE -3, PAPER-8

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LESSON 1

CORPORATE LAWS INCLUDING COMPANY LAW

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 whether the 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 Sub-section (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. Proposing a 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 Parliament in 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 is no 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 envisaged reduction 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 reduction of 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 the Act, 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 them is 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 Sai Pramella & 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.

19/11/2020	**Kaledonia Jute & Fibres Pvt Ltd (Appellant) Vs. Axis Nirman & Industries & Ors (Respondent)**	**Supreme Court of India Civil Appeal No. 3735 of 2020[@ SLP(C) No.5452 of 2020) S.A.Bobde, A.S. Bopanna & V. Ramasubramanian, JJ.**

Whether any creditor, other than the creditor who filed the winding up petition, can apply?

Brief facts:

On the winding up petition of M/s Girdhar Trading Co., the 2nd respondent herein, the High Court of Allahabad, passed the winding up order against the first respondent and appointed the Official Liquidator. Thereafter, the 1st respondent paid the entire amount due to the petitioning creditor (the second respondent herein) along with costs. However, the Company Court kept the winding up order in abeyance, directing the Official Liquidator to continue to be in custody of the assets of the Company. While things stood thus, the appellant herein, claiming to be a creditor of the first respondent herein, filed an application before the NCLT, and it moved an application before the company court seeking a transfer of the winding up petition to the NCLT, Allahabad. This application was rejected by the Company Court, on the sole ground that the requirement of Rule 24 had already been complied with and that a winding up order had already been passed. It is against this order of the High court, refusing to transfer the winding up proceedings from the Company Court to the NCLT that the financial creditor has come up with this civil appeal.

Issues for Consideration:

The main issues that arise for consideration in this appeal are that

(i) What are the circumstances under which a winding up proceeding pending on the file of a High Court could be transferred to the NCLT; and

(ii) At whose instance, such transfer could be ordered.

Decision:

Thus, the proceedings for winding up of a company are actually proceedings in rem to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors. Therefore, the word "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of section 434 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator. The words "party or parties" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 would take within its fold any creditor of the company in liquidation.

The above conclusion can be reached through another method of deductive logic also. If any creditor is aggrieved by any decision of the official liquidator, he is entitled under the 1956 Act to challenge the same before the Company Court. Once he does that, he becomes a party to the proceeding, even by the plain language of the section. Instead of asking a party to adopt such a circuitous route and then take recourse to the 5th proviso to section 434(1)(c), it would be better to recognise the right of such a party to seek transfer directly.

As observed by this Court in Forech India Limited (supra), the object of IBC will be stultified if parallel proceedings are allowed to go on in different fora. If the Allahabad High Court is allowed to proceed with the winding up and NCLT is allowed to proceed with an enquiry into the application under Section 7 IBC, the entire object of IBC will be thrown to the winds.

Therefore, we are of the considered view that the petitioner herein will come within the definition of the expression "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 of the Companies Act, 2013 and that the petitioner is entitled to seek a transfer of the pending winding up proceedings against the first respondent, to the NCLT.

It is important to note that the restriction under Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016 relating to the stage at which a transfer could be ordered, has no application to the case of a transfer covered by the 5th proviso to clause (c) of subsection (1) of Section 434. Therefore, the impugned order of the High court rejecting the petition for transfer on the basis of Rule 26 of the Companies (Court) Rules, 1959 is flawed.

Therefore, the appeal is allowed, the impugned order is set aside and the proceedings for winding up pending before the Company Court (Allahabad High Court) against the first respondent herein, is ordered to be transferred to the NCLT, to be taken up along with the application of the appellant herein under Section 7 of the IBC. There will be no order as to costs.

For Details: **https://www.advocatekhoj.com/library/judgments/announcement.php?WID=13279**

20.10. 2020	**Ashish O. Lalpuria(Appellant) Vs. Kumaka Industries Ltd & Ors(Respondent)**	**National Company Law Appellate Tribunal New Delhi Company Appeal (AT) No.136 of 2020 (Arising out of judgement and order dated 6th July, 2020 passed in CP(CAA)/190/MB.I/2017 by National Company Law Tribunal, Mumbai Bench)**

Brief facts:

The Respondent Company i.e. Kumaka Industries Limited presented a Scheme of Arrangement Under Section 391-394 of Companies Act, 1956 (Existing Sections 230-232 of Companies Act, 2013) for sanction of the Arrangement embodied in the scheme originally filed before Bombay High Court which by virtue of notification issued by Ministry of Corporate Affairs (MCA) on 7th December, 2016 got transferred to NCLT, Mumbai.

The Appellant is a shareholder of Respondent Company and he pointed out certain irregularities and non-compliances and raised the objections that the Scheme of Arrangements is a mere rectification of action already taken by the Respondent company without obtaining approval of the Tribunal and other Regulatory Authorities as required under the provisions of Companies Act. NCLT, Mumbai passed the order dated 6th July, 2020 stating that the scheme appears to be fair and reasonable and does not violate any provision of law and is not contrary to public policy or public interest. Hence, the Appellant on being aggrieved by the order of NCLT, Mumbai have preferred this appeal under section 421 of Companies Act, 2013.

Decision & Reason:

National Company Law Appellate Tribunal in para 30 & 31 & 32 observed that it is pertinent to note under section 230 (5) provides that a notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectorial regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals. The basic intent behind this provisions of law is that these authorities plays a vital role in the overall legal structure and should work harmoniously with the Tribunal in order to ensure that the proposed scheme is not violative of any provision of law and is also not against the public policy.

NCLT has overruled the objections raised by the Regional Director on the ground that the objections are mere on the procedural aspects and do not raise any illegality in the scheme or that it is against public policy. Even if the objections are procedural but it is the jurisdiction of the Tribunal that such procedural aspects need to be duly complied with before sanctioning of the scheme, as it would lay down a wrong precedent which would allow companies to do

whatever acts without the compliances and confirmation of the Court and other sectoral and regulatory authorities and thereafter get it ratified by the Court under the Umbrella of "scheme". It should havebeen contemplated that compliance of law in itself is a part of public policy. It is the duty of the Tribunal or any court that their Orders should encourage compliances and not defaults.

The Scheme under section 230 of Companies Act, 2013 cannot be used as a method of rectification of the actions already taken. Before the scheme gets approved, the company must be in compliance with all the public authorities and should come out clean. There must be no actions pending against the company by the public authorities before sanctioning of a scheme under section 230 of the Companies Act, 2013.

In light of the above observations the appeal is allowed and National Company Law Appellate Tribunal aside the impugned order dated 6th July, 2020 passed by National Company Law Tribunal, Mumbai.

06/07/2020	ARUNA OSWAL (Appellant) Vs. PANKAJ OSWAL & ORS (Respondent)	Supreme Court of India Civil Appeal No.9340 of 2019 with connected appeals Arun Mishra & S. Abdul Nazeer, JJ.

Companies Act,2013- Sections 72, 241 & 242 – Nomination shares in favour of wife- son disputing the nomination and claiming one-fourth share in the total number of shares in a civil suit- son filed petition before NCLT- NCLT admitted the petition inspite of the civil suit pending- whether admission of the petition is tenable -Held, No.

Brief facts:

The case is the outcome of a family tussle. Appellant is the mother while the respondent No.1 is the son of Late Mr. Abhey Kumar Oswal, who was holding 39.88% shares in Oswal Agro Mills. Ltd. and 11.11% shares in M/s. Oswal Greentech Ltd. He filed a nomination according to section 72 of the Act in favour of the appellant, his wife. The name the appellant, was registered as a holder as against the shares held by her deceased husband. The respondent No.1, filed a partition suit claiming onefourth share in the shareholdings of his father in the above two companies. Further he filed a petition before the NCLT claiming oppression and suppression against his mother and others. The appellant challenged the maintainability of the petition, inter alia, under the ground that the respondent No.1 is not holding the required shares to file such petition. The NCLT dismissed the application challenging the company petition's maintainability. NCLT held respondent No.1 as legal heir was entitled to one-fourth share of the property/shares. Aggrieved thereby, three appeals were filed before NCLAT, which have been dismissed vide the impugned judgment and order. Aggrieved thereby, the appellants are before this Court.

Decision& Reason:

Admittedly, respondent No.1 is not holding the shares to the extent of eligibility threshold of 10% as stipulated under section 244 in order to maintain an application under sections 241 and

242. He has purchased the holding of 0.03% in M/s. Oswal Agro Mills Ltd. in June 2017 after filing civil suit and remaining 9.97% is in dispute, he is claiming on the strength of his being a legal representative. In M/s. Oswal Greentech Ltd., the shareholding of the deceased was 11.11%, out of which onefourth share is claimed by respondent No.1. Admittedly, in a civil suit for partition, he is also claiming a right in the shares held by the deceased to the extent of one-fourth. The question as to the right of respondent no.1 is required to be adjudicated finally in the civil suit, including what is the effect of nomination in favour of his mother Mrs. Aruna Oswal, whether absolute right, title, and interest vested in the nominee or not, is to be finally determined in the said suit. The decision in a civil suit would be binding between the parties on the question of right, title, or interest. It is the domain of a civil court to determine the right, title, and interest in an estate in a suit for partition.

It is admitted by respondent no.1 that he was not involved in day to day affairs of the company and had shifted to Australia to set up his independent business w.e.f. 2001. His grievance is that the family had not recognised him as holder of the onefourth shares. They were registered in the ownership of his mother Mrs. Aruna Oswal; that also he had submitted to be an act of oppression. He acquired 0.03% share capital after filing of the civil suit, otherwise he was not having any shareholding in M/s. Oswal Agro Mills Ltd.

In the instant case, we are satisfied that respondent no.1, as pleaded by him, had nothing to do with the affairs of the company and he is not a registered owner. The rights in estate/ shares, if any, of respondent no.1 are protected in the civil suit. Thus, we are satisfied that respondent no.1 does not represent the body of shareholders holding requisite percentage of shares in the company, necessary in order to maintain such a petition.

It is also not disputed that the High Court in the pending civil suit passed an order maintaining the status quo concerning shareholding and other properties. Because of the status quo order, shares have to be held in the name of Mrs. Aruna Oswal until the suit is finally decided. It would not be appropriate, given the order passed by the civil Court to treat the shareholding in the name of respondent No.1 by NCLT before ownership rights are finally decided in the civil suit, and propriety also demands it. The question of right, title, and interest is essentially adjudication of civil rights between the parties, as to the effect of the nomination decision in a civil suit is going to govern the parties' rights. It would not be appropriate to entertain these parallel proceedings and give waiver as claimed under section 244 before the civil suit's decision. Respondent No.1 had himself chosen to avail the remedy of civil suit, as such filing of an application under sections 241 and 242 after that is nothing but an afterthought.

We refrain to decide the question finally in these proceedings concerning the effect of nomination, as it being a civil dispute, cannot be decided in these proceedings and the decision may jeopardise parties' rights and interest in the civil suit. With regard to the dispute as to right, title, and interest in the securities, the finding of the civil Court is going to be final and conclusive and binding on parties. The decision of such a question has to be eschewed in instant proceedings. It would not be appropriate, in the facts and circumstances of the case, to grant a waiver to the respondent of the requirement under the proviso to section 244 of the Act, as ordered by the NCLAT. It prima facie does not appear to be a case of oppression and mismanagement. Our attention was drawn by the learned senior counsel appearing for respondent No.1 to certain company transactions. From transactions simpliciter, it cannot be inferred that it is a case of oppression and mismanagement. We are of the opinion that the

proceedings before the NCLT filed under sections 241 and 242 of the Act should not be entertained because of the pending civil dispute and considering the minuscule extent of holding of 0.03%, that too, acquired after filing a civil suit in company securities, of respondent no. 1. In the facts and circumstances of the instant case, in order to maintain the proceedings, the respondent should have waited for the decision of the right, title and interest, in the civil suit concerning shares in question. The entitlement of respondent No.1 is under a cloud of pending civil dispute. We deem it appropriate to direct the dropping of the proceedings filed before the NCLT regarding oppression and mismanagement under sections 241 and 242 of the Act with the liberty to file afresh, on all the questions, in case of necessity, if the suit is decreed in favour of respondent No.1 and shareholding of respondent No.1 increases to the extent of 10% required under section 244.

We reiterate that we have left all the questions to be decided in the pending civil suit. Impugned orders passed by the NCLT as well as NCLAT are set aside, and the appeals are allowed to the aforesaid extent. We request that the civil suit be decided as expeditiously as possible, subject to cooperation by respondent No.1. Parties to bear their costs as incurred.

02/09/2020	**Sandeep Agarwal & Anr (Appellant) Vs. Union Of India & Anr (Respondent)**	**High Court of Delhi** **W.P. (C) 5490/2020 & CM APPLs. 19779-80/2020** **Prathiba M. Singh, J.**

Companies Act, 2013- Section 164-disqualification of directors- one of the company failed to file returns while the other companies did file- whether disqualification is correct-Held, No.

Brief facts:

The Petitioners are directors in two companies namely Koksun Papers Pvt Ltd ("Koksun Papers") and KushalPower Projects Pvt Ltd (hereinafter, "Kushal Power"). The name of Kushal Power was struck off from the Register of the Companies on 30th June, 2017, due to non-filing of financial statements and annual returns. The Petitioners, being directors of Kushal Power were also disqualified with effect from 1st November, 2016 for a period of five years till 31st October, 2021 under Section 164(2)(a) of the Companies Act, 2013 (hereinafter, "Act"). Pursuant to their disqualification, their Director Identification Numbers ("DIN") and Digital Signature Certificates ("DSC") have also been cancelled. In view thereof, they are unable to carry on the business and file returns etc. in the active company Koksun Papers. By the present petition, the disqualification is challenged and quashing is sought of the impugned list of disqualified directors.

Decision & Reason:

The Court has heard the ld. counsel for the parties and perused the record. The judgment in *Mukut Pathak & Ors. v. Union of India & Ors., 265 (2019) DLT 506*, insofar as the merits of the case is concerned, is squarely applicable in the present case. The said judgment clearly

holds that the proviso to Section 167(1) (a) of the Act cannot be read to operate retrospectively. It was further held that the said proviso, being a punitive measure with respect to the rights and obligations of directors, cannot be applied retrospectively unless the statutory amendment expressly provides so.

In the present case, the facts and circumstances show that the Companies Fresh Start Scheme (CFSS) is a new scheme, which has been notified on 30th March, 2020. The scheme is obviously launched by the Government in order to give a reprieve to such companies who have defaulted in filing documents and they have been allowed to file their requisite documents and to regularize their operations, so as to not face disqualification. The Scheme also envisages non-imposition of penalty or any other charges for belated filing of the documents. This Scheme provides an opportunity for active companies who may have defaulted in filing of documents, to put their affairs in order. It thus provides Directors of such companies a fresh cause of action to also challenge their disqualification qua the active companies.

In the present case, the Petitioners are Directors of two companies - one whose name has been struck off and one, which is still active. In such a situation, the disqualification and cancellation of DINs would be a severe impediment for them in availing remedies under the Scheme, in respect of the active company. The purpose and intent of the Scheme is to allow a fresh start for companies which have defaulted. In order for the Scheme to be effective, Directors of these companies ought to be given an opportunity to avail of the Scheme. The launch of the Scheme itself constitutes a fresh and a continuing cause of action. Under such circumstances, the question of delay or limitation would not arise.

In view of the fact that in the present case, the Petitioners are directors of an active company Koksun Papers in respect ofwhich certain documents are to be filed and the said company is entitled to avail of the Scheme, the suspension of the DINs would not only affect the Petitioners qua the company, whose name has been struck off, but also qua the company which is active.

Considering the COVID-19 pandemic, the MCA has launched the Fresh Start Scheme-2020, which ought to be given full effect. It is not uncommon to see directors of one company being directors in another company. Under such circumstances, to disqualify directors permanently and not allowing them to avail of their DINs and DSCs could render the Scheme itself nugatory.

In order to enable the Directors of Koksun Papers i.e. the Petitioners herein, to continue the business of the active company Koksun Papers, in the fitness of things and also in view of the judgment in Mukut Pathak (supra), the disqualification of the Petitioners as Directors is set aside. The DINs and DSCs of the Petitioners are directed to be reactivated, within a period of three working days.

20.10. 2020	Ashish O. Lalpuria(Appellant) Vs. Kumaka Industries Ltd & Ors(Respondent)	National Company Law Appellate Tribunal New Delhi Company Appeal (AT) No.136 of 2020 (Arising out of judgement and order dated 6th July, 2020 passed in CP(CAA)/190/MB.I/2017 by National Company Law Tribunal, Mumbai Bench)

Brief facts:

The Respondent Company i.e. Kumaka Industries Limited presented a Scheme of Arrangement Under Section 391-394 of Companies Act, 1956 (Existing Sections 230-232 of Companies Act, 2013) for sanction of the Arrangement embodied in the scheme originally filed before Bombay High Court which by virtue of notification issued by Ministry of Corporate Affairs (MCA) on 7th December, 2016 got transferred to NCLT, Mumbai.

The Appellant is a shareholder of Respondent Company and he pointed out certain irregularities and non-compliances and raised the objections that the Scheme of Arrangements is a mere rectification of action already taken by the Respondent company without obtaining approval of the Tribunal and other Regulatory Authorities as required under the provisions of Companies Act. NCLT, Mumbai passed the order dated 6th July, 2020 stating that the scheme appears to be fair and reasonable and does not violate any provision of law and is not contrary to public policy or public interest. Hence, the Appellant on being aggrieved by the order of NCLT, Mumbai have preferred this appeal under section 421 of Companies Act, 2013.

Decision & Reason:

National Company Law Appellate Tribunal in para 30 & 31 & 32 observed that it is pertinent to note under section 230 (5) provides that a notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectorial regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals. The basic intent behind this provisions of law is that these authorities plays a vital role in the overall legal structure and should work harmoniously with the Tribunal in order to ensure that the proposed scheme is not violative of any provision of law and is also not against the public policy.

NCLT has overruled the objections raised by the Regional Director on the ground that the objections are mere on the procedural aspects and do not raise any illegality in the scheme or that it is against public policy. Even if the objections are procedural but it is the jurisdiction of the Tribunal that such procedural aspects need to be duly complied with before sanctioning of the scheme, as it would lay down a wrong precedent which would allow companies to do

whatever acts without the compliances and confirmation of the Court and other sectoral and regulatory authorities and thereafter get it ratified by the Court under the Umbrella of “scheme”. It should havebeen contemplated that compliance of law in itself is a part of public policy. It is the duty of the Tribunal or any court that their Orders should encourage compliances and not defaults.

The Scheme under section 230 of Companies Act, 2013 cannot be used as a method of rectification of the actions already taken. Before the scheme gets approved, the company must be in compliance with all the public authorities and should come out clean. There must be no actions pending against the company by the public authorities before sanctioning of a scheme under section 230 of the Companies Act, 2013.

In light of the above observations the appeal is allowed and National Company Law Appellate Tribunal aside the impugned order dated 6th July, 2020 passed by National Company Law Tribunal, Mumbai.

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)

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 dated May 29, 2020 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, auditors‟ 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 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 massages 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

15.03.2021	**In the matter of United Textiles Ltd.** **Chhotalal Ramjibhai Bhanderi (Noticee)**	**Adjudication Officer, SEBI**

The disclosure requirements as per laws under reference serve a purpose and are not mere technical obligations. The purpose is to make investors aware of the changes in the substantial shareholding of persons enabling them to take informed investment decisions. Thus, the disclosures requirements prescribed in the provisions in question cannot be termed as non-consequential.

Facts of the case

SEBI conducted examination in the scrip of United Textiles Ltd. ("UTL" or "the Target company, for the period November 2016 – February 2017) (hereinafter referred to as the examination period/EP), a company listed on BSE limited ("BSE"), wherein violations were observed by the entity namely; Mr. Chhotalal Ramjibhai Bhanderi (Noticee) under Regulation 29(1) read with 29(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST Regulations).

During the period of examination, following was noted: -

1. Equity share capital of the Target Company at the quarter ended September 2016 was 30,00,000 out of which the Noticee was holding 1,31,168 (4.37%) shares of the Target Company in public category.
2. On November 28, 2016, Chhotalal Ramjibhai Bhanderi acquired 19,216 shares of Target Company through off market transfer and as a result his shareholding in the Target Company increased to 5.01% from 4.37% (i.e. more than 5 %).
3. Noticee was required to make disclosures, within two days, under provisions of SAST Regulations, to the company & stock exchange, which the Noticee made after a delay of 803 days i.e. after a delay of more than two years.

Thus, Adjudication proceedings under section 15A (b) of the SEBI Act 1992, were initiated against the Noticee for violation of Regulation 29(1) read with Regulation 29(3) of SAST Regulations.

SEBI Order

SEBI imposed a penalty of Rs. 1 lakh on Noticee for not making disclosures as required under regulations 29(1) r/w regulation 29(3) of SEBI (SAST) Regulations, 2011, to the exchange where securities of the Target Company were listed and to the Target Company within 2 working days from the date of change in shareholding.

For details: https://www.sebi.gov.in/enforcement/orders/mar-2021/adjudication-order-in-the-matter-of-united-textiles-ltd-_49507.html

10.02.2021	**In the matter of NSE Co-location-** **1. National Stock Exchange of India Limited ('Noticee No. 1')** **2. Mr. Ravi Narain ('Noticee No. 2')** **3. Ms. Chitra Ramakrishna ('Noticee No. 3')**	**Adjudication Officer, SEBI**

The Principle of 'fair and equitable' should be adhered by the management and adequate steps to be taken to ensure proper systems, checks and balances so as to provide fair and equitable access to all

Facts of the Case

In 2015, SEBI received complaints alleging that a trading member OPG Securities Pvt. Ltd. ("OPG") used National Stock Exchange of India Ltd. ("NSE") system to its advantage by having an arrangement with NSE staff that helped it to connect first. The first one to connect to the lowest load server would get advantage in terms of receiving the data faster than others.

Mr. Ravi Narain served as managing director and chief executive officer of NSE from 2000 to March 2013 and Ms. Chitra Ramakrishna served as MD & CEO of NSE from April 2013 to December 2016.

Further, it was alleged that, during the relevant period of violations of NSE, the Noticee No. 2 and 3, who were in-charge of the affairs of NSE, have failed to take any step to ensure proper systems, checks and balances so as to provide fair and equitable access to all. The adherence to the principle of 'fair and equitable' was left to the technology team without any specific guidance. Thus, the Noticee No. 2 and 3 had failed to perform their role in establishing adequate systems leading to the scenario whereby certain brokers were allowed to breach the norms of fair and equitable access.

SEBI Order

SEBI imposed a penalty of Rs. 1 crore on the NSE for failing to ensure a level-playing field for trading members subscribing to its tick-by-tick (TBT) data feed system.

In addition, the SEBI levied a penalty of Rs 25 lakh each on NSE's former managing directors and chief executive officers Ms. Chitra Ramakrishna and Mr. Ravi Narain.

NSE flouted the principles underlying the conduct of business of a stock exchange, pertaining to fair and equitable access to information.

The NSE had failed to comply with the provisions of Stock Exchange and Clearing Corporation (SECC) Regulations in letter and spirit and Ms. Chitra Ramakrishna and Mr. Ravi Narain are vicariously liable for the acts of omissions/ commissions committed by the exchange during the investigation period.

For details: https://www.sebi.gov.in/enforcement/orders/feb-2021/adjudication-order-in-respect-of-three-entities-in-the-matter-of-nse-co-location_49079.html

LESSON 3

FEMA

05.03.2021	Suborno Bose (Appellant) Vs Enforcement Directorate & Anr. (Respondent)	Supreme court of India, Civil Appeal No. 6267 of 2020

Brief Fact:

A show cause notice dated 19.5.2004 was issued to the appellant, stating that the adjudicating authority under Foreign Exchange Management Act was satisfied that there was a *prima facie* contravention of Section 10(6) of the FEMA Act read with Sections 46 and 47 of the said Act and paragraphs A10 and A11 (Current Account Transaction) of the Foreign Exchange Manual 2003-04 in the complaint filed against the company named M/s. Zoom Enterprises Limited (for short, "the Company") of which, the appellant was the Managing Director.

The appellant filed his reply to the said show cause notice on 10.6.2004, inter alia, contending that the Company had purchased 2 Nos. of Water Cooled Screw Chiller Unit Model and other accessories for a cost of 374000 FRF from Carrier S.A. of France and Air Handling and Fan Coil Unit for US$ 35766 from Carrier Corporation, Syracuse, New York. The import was done under Export Promotion Capital Goods (EPCG) Licence under Open General Licence (OGL). The goods were imported, but kept in warehouse, as the Company, which at the relevant time was under another person and others, failed to take steps to get the goods released. The appellant took over the project only in July, 2002 and afterwards, he spent nearly 5 crores of rupees for the project work. Due to financial constraints, in February, 2003, a request was made to Tourism Finance Corporation of India Limited (TFCI) for sanction of a bank guarantee of Rs.40,00,000/(Rupees forty lakhs only) to get the shipment in question cleared from the Customs Department, but for the reasons beyond the control of the Company and the appellant in particular, the shipment could not be cleared. A request was made to the Customs authority to help the Company to get the goods cleared, in case the clearing agent is unable to take necessary steps on their behalf. In the end, a request was made in the reply to grant more time to get the goods cleared and to submit the Bill of Entry (Exchange Control Copy) with the authorised dealer.

The adjudicating authority concluded that the noticee Company and the appellant had violated the provisions of the FEMA Act. The Company, as well as, the appellant carried the matter in appeal before appellate authority. The appellate authority vide order dated
13.6.2005 dismissed both the appeals and was pleased to uphold the decision of the adjudicating authority.

Being aggrieved, the Company, as well as the appellant carried the matter before the High Court. Both appeals were dismissed by the High Court vide its judgment and observed thus: "After hearing the learned Counsel for the parties and after going through the materials on record placed before us, we are of the opinion that the violation which has been done by the appellant/petitioner, cannot be stated to be a technical violation and it is well settled law that contravention of the said Act or Foreign Exchange Regulation Act, 1973 has created a strict

liability. The violation of these two Acts would come within the meaning of economic offence and cannot be treated as technical offence.
Hence, in our considered opinion, after initial committal and/or contravention of Section 10(6) of the said Act, the violation continues till the time, compliance is made. Therefore, we hold that taking over the charge of the appellate company in the year 2002, cannot absolve the appellant from the liability and, in our considered opinion, the appellant company correctly held as guilty on the face of the continuance of the offence.
Hence, we are of the considered opinion that the Learned Tribunal correctly came to the conclusion and we do not find that there is any reason whatsoever to interfere with the order so passed by the Learned Tribunal. Accordingly, both the appeals are dismissed. For the reasons stated hereinabove, both the appeals are disposed of."

Against the decision of the High Court, the Company, as well as the appellant preferred separate special leave petitions before Supreme Court.

Judgement:

Hon'ble Supreme Court *inter-alia* observed that the High Court has opined that the contravention referred to in Section 10(6) by its very nature is a continuing offence. We agree with that view. It is indisputable that the penalty provided for such contravention is on account of civil obligation under the FEMA Act or the rules or regulations or direction or order made thereunder. If the delinquency is a civil obligation, the defaulter is obligated to make efforts by payment of the penalty imposed for such contravention. So long as the imported goods remained uncleared and obligation provided under the rules and regulations to submit Bill of Entry was not discharged, the contravention would continue to operate until corrective steps were taken by the Company and the persons in charge of the affairs of the Company.

It is not the case of the appellant that he is not an officer or a person in charge of and responsible to the Company for the conduct of the business of the Company, as well as, the Company on or after 22.10.2001. Considering the fact that the appellant admittedly
became aware of the contravention yet failed to take corrective measures until the action to impose penalty for such contravention was initiated, he cannot be permitted to invoke the only defence available in terms of proviso to subsection (1) of Section 42 of the FEMA Act that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. In the reply filed to the showcause notice by the appellant, no such specific plea has been taken.

To sum up, we hold that no error has been committed by the adjudicating authority in finding that the appellant was also liable to be proceeded with for the contravention by the Company of which he became the Managing Director and for penalty therefor as prescribed for the contravention of Section 10(6) read with Sections 46 and 47 of the FEMA Act read with paragraphs A10 and A11 (Current Account Transaction) of the Foreign Exchange Manual 200304. The first appellate authority and the High Court justly affirmed the view so taken by the adjudicating authority.

LESSON 4

INSOLVENCY LAW

26/07/2021	Orator Marketing Pvt. Ltd(Appellant) vs. Samtex Desinz Pvt. 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 thereoflender 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 Jaypee Kensington(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 dissenting financial 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 the appropriate forum and in accordance with law. There will be no order as to costs.

13/01/2021	**Skillstech Services Pvt Ltd(Appellant) vs. Registrar, National Company Law Tribunal & Anr(Respondent)**	**[DEL] W.P.(C) 474/2021 & CM APPL. 1227/2021 Prathiba M. Singh, J.**

Insolvency and Bankruptcy Act,2016- section 9- increase in the threshold limit to file complaint before NCLT- Registrar refusing to list the petition – whether tenable-Held, No.

Brief facts:

The present petition has been filed by the Petitioner seeking listing of its petition, under Section 9 of the Insolvency and Bankruptcy Code, 2016, before the appropriate bench of the National Company Law Tribunal (hereinafter, "NCLT").

The case of the Petitioner was that the Registrar of the NCLT has failed to even list the Petitioner's matter before the appropriate bench of NCLT, on the ground that the threshold of the pecuniary jurisdiction of the NCLT has now been amended by a notification dated 24th November 2020, from Rs.1 lakh, to Rs.1 crore.

Decision: Allowed.

Reason:

Ld. Counsel the Petitioner, submits that the question as to whether the NCLT has the pecuniary jurisdiction or not, cannot be decided by the Registrar of the NCLT, but in fact the same ought to be looked into and determined by an appropriate bench of the NCLT, after appreciating the fact situation involved. Reliance is placed upon the view of the NCLT, Kochi in IA No. 175/KOB/2020 in IBA/34/KOB/2020 titled M/s Tharakan Web Innovations Pvt. Ltd. v. Cyriac Njavally, wherein the Tribunal has held that if disputes had arisen prior to the outbreak of the

pandemic, the said notification may not apply, as the notification cannot be made applicable retrospectively. Ld. Counsel appearing for the Respondent submits that the said judgment of the NCLT, Kochi Bench has been stayed by the Kerala High Court.

This court is of the opinion that the question as to whether the NCLT has jurisdiction to entertain a particular case or not cannot be determined by the Registrar in the administrative capacity. The Registrar would have to place the matter before the appropriate bench of the NCLT, for the said question to be judicially determined. The appropriate bench of the NCLT would have to then, take a considered view as to whether notice is liable to be issued in the matter or not.

The question as to whether the notification dated 24th March 2020 applies to a particular petition that has been filed prior to the said notification or not is also a question to be determined by the Bench of the NCLT and not by the Registrar of the Tribunal.

Accordingly, it is directed that the petition under section 9 of the IBC, moved by the Petitioner before the NCLT, shall be placed by the Registrar, NCLT before an appropriate bench for proceeding further in accordance with law. The listing of the petition is directed to be done within a period of ten days from today. Advance intimation of listing of the said matter shall be given to the Petitioner’s counsel by the Registrar.

14/08/2020	**Babulal Vardharji Gurjar(Appellant) Vs. Veer Gurjar Aluminium Industries Pvt Ltd & Anr(Respondent)**	**Supreme Court of India Civil Appeal No. 6347 of 2019 A.M. Khanwilkar & Dinesh Maheshwari, JJ.**

Insolvency and Bankruptcy Code, 2016- Section 238 A- period of limitation for filing insolvency application whether the period of limitation commences from the date of commencement of the Act, irrespective of the date of default- Held, No.

Brief facts:

This appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 is directed against the judgment and order passed by the National Company Law Appellate Tribunal whereby, the Appellate Tribunal has rejected the contention that the application made by respondent No. 2, seeking initiation of Corporate Insolvency Resolution Process in respect of the debtor company (respondent No. 1 herein), is barred by limitation; and has declined to interfere with the order , passed by the National Company Law Tribunal, for commencement of CIRP as prayed for by the respondent No. 2.

In the impugned order, the Appellate Tribunal has observed that the Code having come into force on 01.12.2016, the application made in the year 2018 is within limitation. The Appellate Tribunal has assigned another reason that mortgage security having been provided by the corporate debtor, the limitation period of twelve years is available for the claim made by the financial creditor as per Article 61 (b) of the Limitation Act, 19638-9 and hence, the application is within limitation.

Decision & Reason:

Having taken note of the rudiments that the Code is a beneficial legislation intended to put the corporate debtor on its feet and it is not a mere money recovery legislation for the creditors; and having also noticed that CIRP is not intended to be adversarial to the corporate debtor but is essentially to protect its interests and that CIRP has its genesis in default on the part of the corporate debtor, we may now examine the operation of law of limitation over the proceedings under the Code.

When Section 238-A of the Code is read with the above-noted consistent decisions of this Court in Innoventive Industries, B.K. Educational Services, Swiss Ribbons, K. Sashidhar, Jignesh Shah, Vashdeo R. Bhojwani, Gaurav Hargovindbhai Dave and Sagar Sharma respectively, the following basics undoubtedly come to the fore:

- that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;
- that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;
- that intention of the Code is not to give a new lease of life to debts which are time-barred;
- that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;
- that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;
- that default referred to in the Code is that of actual nonpayment by the corporate debtor when a debt has become due and payable; and
- that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and
- an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application.

The discussion foregoing leads to the inescapable conclusion that the application made by the respondent No. 2 under Section 7 of the Code in the month of March 2018, seeking initiation of CIRP in respect of the corporate debtor with specific assertion of the date of default as 08.07.2011, is clearly barred by limitation for having been filed much later than the period of three years from the date of default as stated in the application. The NCLT having not examined the question of limitation; the NCLAT having decided the question of limitation on entirely irrelevant considerations; and the attempt on the part of the respondents to save the limitation with reference to the principles of acknowledgment having been found unsustainable, the impugned orders deserve to be set aside and the application filed by the respondent No. 2 deserves to be rejected as being barred by limitation.

18/09/2020	Sagufa Ahmed(Appellant) Vs. Upper Assam Plywood Products Pvt. Ltd(Respondent)	Supreme Court of India Civil Appeal Nos.3007 & 3008 of 2020 A.B.Bobde, A.S. Bopanna & V. Ramasubramanian, JJ.

Insolvency and Bankruptcy Code, 2016- appeal- delay in filing- appeal dismissed- whether correct-Held, Yes.

Brief facts:

Though the appellants admittedly received the certified copy of the order on 19.12.2019, they chose to file the statutory appeal before NCLAT on 20.07.2020. The appeal was filed along with an application for condonation of delay. By an order dated 04.08.2020, the Appellate Tribunal dismissed the application for condonation of delay on the ground that the Tribunal has no power to condone the delay beyond a period of 45 days. Consequently the appeal was also dismissed. It is against the dismissal of both the application for condonation of delay as well as the appeal, which the appellants have come up with the present appeals.

Decision& Reason:

The contentions raised by the learned counsel for the appellants are twofold namely (i) that the Appellate Tribunal erred in computing the period of limitation from the date of the order of the NCLT, contrary to Section 421(3) of the Companies Act, 2013, and (ii) that the Appellate Tribunal failed to take note of the lockdown as well as the order passed by this Court on 23.03.2020 in Suo Motu Writ Petition (Civil) No.3 of 2020, extending the period of limitation for filing any proceeding with effect from 15.03.2020 until further orders.

From 19.12.2019, the date on which the counsel for the appellants received the copy of the order, the appellants had a period of 45 days to file an appeal. This period expired on 02.02.2020. By virtue of the proviso to Section 421(3), the Appellate Tribunal was empowered to condone the delay up to a period of period of 45 days. This period of 45 days started running from 02.02.2020 and it expired even according to the appellants on 18.03.2020. The appellants did not file the appeal on or before 18.03.2020, but filed it on 20.07.2020. It is relevant to note that the lock down was imposed only on 24.03.2020 and there was no impediment for the appellants to file the appeal on or before 18.03.2020. To overcome this difficulty, the appellants rely upon the order of this Court dated 23.03.2020. This takes us to the second contention of the appellants.

To get over their failure to file an appeal on or before 18.03.2020, the appellants rely upon the order of this Court dated 23.03.2020 in Suo Motu Writ Petition (Civil) No.3 of 2020. But we do not think that the appellants can take refuge under the above order. What was extended by the above order of this Court was only "the period of limitation" and not the period up to which delay can be condoned in exercise of discretion conferred by the statute. The above order passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is needless to point out that the law of limitation finds its root in two latin maxims, one of which is *Vigilantibus Non Dormientibus Jura Subveniunt* which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.

Therefore, the appellants cannot claim the benefit of the order passed by this Court on 23.03.2020, for enlarging, even the period up to which delay can be condoned. The second contention is thus untenable. Hence the appeals are liable to be dismissed. Accordingly, they are dismissed.

08/09/2020	**SREI Equipment Finance Limited(Appellant) Vs. Rajeev Anand(Respondent)**	**Supreme Court of India Civil Appeal No. 9425 of 2019 R. F. Nariman, Navin Sinha, & Indira Banerjee, JJ.**

Insolvency and Bankruptcy Code, 2016- section 7- restructuring of old loans by financial creditor- default by corporate debtor- NCLT admitted the petition-NCLAT reversed the order by misreading the documents-whether admission of the petition correct- Held, Yes.

Brief facts:

Appellant-financial creditor had granted two loans to the respondent corporate debtor and later on restructured the loans. As the corporate debtor was in default an application under section 7 of the IBC was filed. NCLT admitted the application but on appeal NCLAT dismissed the application. Against this dismissal the appellant is before the Supreme Court.

Decision & Reason:

A bare reading of the NCLT order shows that it is only after a perusal of the documents, pleadings, and the supplementary affidavit of 03.08.2018, including the counter affidavit in the earlier section 7 application, that the NCLT came to the conclusion that a loan amount remained outstanding. The NCLAT, when it dealt with the NCLT order, wrongly recorded that documents which were already rejected by the adjudicating authority could not have been the basis of the order of admission. The NCLAT also wrongly recorded that there was no further evidence in support of the factthat any amount was outstanding. Further, the NCLAT also held that a ‘document’ filed in the earlier petition that was dismissed as withdrawn could not have been relied upon by the adjudicating authority. The NCLAT is wrong on all these counts. As has been stated earlier, documents evidencing an outstanding loan amount were produced; a supplementary affidavit dated 03.08.2018 was also relied upon; and the admission made in the counter affidavit that was made in the first round of litigation, can by no means be described as a ‘document’ in an earlier petition that could not be relied upon. The ‘document’ was not a pleading by the appellant – it was a counter affidavit by the corporate debtor in which a clear admission of the debt being outstanding was made.

For all these reasons, we set aside the NCLAT order and restore that of the NCLT. The resolution proceedings will continue from the stage at which they were interrupted.

02/11/2020	**Kiran Gupta(Appellant) Vs.**	**Supreme Court of India W.P. (C) 7230/2020 & CM.APPL. 24414/2020(stay)**

	State Bank of India & Anr(Respondent)	Hama Kohl & Subramanian Prasad, JJ.

Section 13 of SARFAESI read with Insolvency and Bankruptcy Code, 2016- CIRP admitted against principal debtor by NCLT- IRP appointed- bank initiated proceedings under the SARFAESI against the guarantor- whether permissible- Held, Yes.

Brief facts: The short question which arises for consideration in this writ petition is as to whether a bank/financial institution can institute or continue with proceedings against a guarantor under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act'), when proceedings under the Insolvency and Bankruptcy Code 2016 (hereinafter referred to "IB Code") have been initiated against the principal borrower and the same are pending adjudication.

Decision & Reason:

The question as to whether the respondent/Bank can proceed against a guarantor even after initiation of proceedings under the IB Code also stands settled. As correctly pointed out, the said issue is squarely covered by the judgment of the Supreme Court in the Supreme Court in State Bank of India v. V.Ramakrishan & Anr, reported as (2018) 17 SCC 394 (supra).

Paras 20 and 25 of the said decision read as under:-

"20. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said section. A plain reading of the said section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.

25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him." (Emphasis added) The view expressed by the Supreme Court amply demonstrates that neither Section 14 nor Section 31 of the IB Code place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues. That being the position, the plea taken by the counsel for the petitioner that all proceedings against the petitioner, who is only a guarantor, ought to be stayed under the SARFESI Act during the continuation of the Insolvency Resolution process

qua the Principal Borrower, is rejected as meritless. The petitioner cannot escape her liability qua the respondent/Bank in such a manner. The liability of the principal borrower and the Guarantor remain co-extensive and the respondent/Bank is well entitled to initiate proceedings against the petitioner under the SARFESI Act during the continuation of the Insolvency Resolution Process against the Principal Borrower. In view of the above discussion, we do not find any merit in the writ petition, which is accordingly dismissed along with the pending application.

19/11/2020	**Kaledonia Jute & Fibres Pvt Ltd(Appellant) vs. Axis Nirman & Industries & Ors(Respondent)**	**Supreme Court of India Civil Appeal No. 3735 of 2020[@ SLP(C) No.5452 of 2020) S.A.Bobde, A.S. Bopanna & V. Ramasubramanian, JJ.**

Insolvency and Bankruptcy Act,2016- Section 7- transfer of winding up petition from High Court to NCLT- Whether any creditor, other than the creditor who filed the winding up petition, can apply-Held, Yes.

Brief facts:

On the winding up petition of M/s Girdhar Trading Co., the 2nd respondent herein, the High Court of Allahabad, passed the winding up order against the first respondent and appointed the Official Liquidator. Thereafter, the 1st respondent paid the entire amount due to the petitioning creditor (the second respondent herein) along with costs. However, the Company Court kept the winding up order in abeyance, directing the Official Liquidator to continue to be in custody of the assets of the Company. While things stood thus, the appellant herein, claiming to be a creditor of the first respondent herein, filed an application before the NCLT, and it moved an application before the company court seeking a transfer of the winding up petition to the NCLT, Allahabad. This application was rejected by the Company Court, on the sole ground that the requirement of Rule 24 had already been complied with and that a windingup order had already been passed. It is against this order of the High court, refusing to transfer the winding up proceedings from the Company Court to the NCLT that the financial creditor has come up with this civil appeal.

Decision & Reason:

The main issues that arise for consideration in this appeal are that (i) what are the circumstances under which a winding up proceeding pending on the file of a High Court could be transferred to the NCLT; and (ii) at whose instance, such transfer could be ordered.

Thus, the proceedings for winding up of a company are actually proceedings in rem to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors. Therefore, the word "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of section 434 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator. The words

"party or parties" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 would take within its fold any creditor of the company in liquidation.

The above conclusion can be reached through another method of deductive logic also. If any creditor is aggrieved by any decision of the official liquidator, he is entitled under the 1956 Act to challenge the same before the Company Court. Once he does that, he becomes a party to the proceeding, even by the plain language of the section. Instead of asking a party to adopt such a circuitous route and then take recourse to the 5 th proviso to section 434(1) (c), it would be better to recognise the right of such a party to seek transfer directly.

As observed by this Court in Forech India Limited (supra), the object of IBC will be stultified if parallel proceedings are allowed to go on in different fora. If the Allahabad High Court is allowed to proceed with the winding up and NCLT is allowed to proceed with an enquiry into the application under Section 7 IBC, the entire object of IBC will be thrown to the winds.

Therefore, we are of the considered view that the petitioner herein will come within the definition of the expression "party" appearing in the 5th proviso to Clause (c) of Subsection (1) of Section 434 of the Companies Act, 2013 and that the petitioner is entitled to seek a transfer of the pending winding up proceedings against the first respondent, to the NCLT. It is important to note that the restriction under Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016 relating to the stage at which a transfer could be ordered, has no application to the case of a transfer covered by the 5 th proviso to clause (c) of subsection (1) of Section 434.

Therefore, the impugned order of the High court rejecting the petition for transfer on the basis of Rule 26 of the Companies (Court) Rules, 1959 is flawed. Therefore, the appeal is allowed, the impugned order is set aside and the proceedings for winding up pending before the Company Court (Allahabad High Court) against the first respondent herein, is ordered to be transferred to the NCLT, to be taken up along with the application of the appellant herein under Section 7 of the IBC. There will be no order as to costs.

LESSON 5

COMPETITION LAW

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 Vyapar Mahasangh 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-sided or 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 longer established 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 pre-installation 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 pre-installation. 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 pre-installation 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.

3/06/2021	**Confederation Of Professional Baseball Softball Clubs (Appellant)** **vs.** **Amateur Baseball Federation Of India (Respondent)**	**Competition Commission of India**

Competition Act,2003- 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 where under 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.

15/12/2020	*Samir Agrawal (Appellant) Vs. Competition Commission of India & Ors (Respondents),*	**Supreme Court of India** *Civil Appeal No. 3100 of 2020*

Supreme Court of India Dismissed the Allegation of Cartelisation and Anti-Competitive Practices by Cab Aggregator Ola & Uber & analysed the provisions of the Competition Act as well as the 2009 Regulations and settled the unsettled: Who can approach the CCI?

Brief Facts

Informant who describes himself as an independent practitioner of the law. The Appellant/Informant, by an Information filed on 13.08.2018 ["the Information"], sought that the Competition Commission of India ["CCI"] initiate an inquiry, under section 26(2) of the Competition Act, 2002 ["the Act"], into the alleged anti-competitive conduct of ANI Technologies Pvt. Ltd. ["Ola"], and Uber India Systems Pvt. Ltd., Uber B.V. and Uber Technologies Inc. [together referred to as "Uber"], alleging that they entered into price-fixing agreements in contravention of section 3(1) read with section 3(3)(a) of the Act, and engaged in resale price maintenance in contravention of section 3(1) read with section 3(4)(e) of the Act. According to the Informant, Uber and Ola provide radio taxi services and essentially operate as platforms through mobile applications ["apps"] which allow riders and drivers, that is, two sides of the platform, to interact. A trip's fare is calculated by an algorithm based on many factors. The apps that are downloaded facilitate payment of the fare by various modes.

The Informant alleged that due to algorithmic pricing, neither are riders able to negotiate fares with individual drivers for rides that are booked through the apps, nor are the drivers able to offer any discounts. Thus, the pricing algorithm takes away the freedom of riders and drivers to choose the best price on the basis of competition, as both have to accept the price set by the pricing algorithm. As per the terms and conditions agreed upon between Ola and Uber with their respective drivers, despite the fact that the drivers are independent entities who are not employees or agents of Ola or Uber, the driver is bound to accept the trip fare reflected in the app at the end of the trip, without having any discretion insofar as the same is concerned. The drivers receive their share of the fare only after the deduction of a commission by Ola and Uber for the services offered to the rider. Therefore, the Informant alleged that the pricing algorithm used by Ola and Uber artificially manipulates supply and demand, guaranteeing higher fares to drivers who would otherwise compete against one and another. Cooperation between drivers, through the Ola and Uber apps, results in concerted action under section 3(3)(a) read with section 3(1) of the Act. Thus, the Informant submitted that the Ola and Uber apps function akin to a trade association, facilitating the operation of a cartel. Further, since Ola and Uber have greater bargaining power than riders in the determination of price, they are able to implement price discrimination, whereby riders are charged on the basis of their willingness to pay and as

a result, artificially inflated fares are paid. Various other averments *qua* resale price maintenance were also made, alleging a contravention of section 3(4)(e) of the Act.

Judgement:

Hon'ble Supreme Court analysed the provisions of the Competition Act as well as the 2009 Regulations and settled the unsettled: Who can approach the CCI? In this case Supreme Court in para 13, 14, 15, 16 and 17 observed that;

"A reading of the provisions of the Act and the 2009 Regulations would show that "any person" may provide information to the CCI, which may then act upon it in accordance with the provisions of the Act. In this regard, the definition of "person" in section 2(l) of the Act, set out hereinabove, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of "consumer" in section 2(f) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.

A look at section 19(1) of the Act would show that the Act originally provided for the "receipt of a complaint" from any person, consumer or their association, or trade association. This expression was then substituted with the expression "receipt of any information in such manner and" by the 2007 Amendment. This substitution is not without significance. Whereas, a *complaint* could be filed only from a person who was aggrieved by a particular action, *information* may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings *in rem* which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion, is also laid down in section 19(1) of the Act. Further, even while exercising *suo motu* powers, the CCI may receive information from any person and not merely from a person who is aggrieved by the conduct that is alleged to have occurred. This also follows from a reading of section 35 of the Act, in which the earlier expression "complainant or defendant" has been substituted by the expression, "person or an enterprise," setting out that the informant may appear either in person, or through one or more agents, before the CCI to present the information that he has gathered.

Section 45 of the Act is a deterrent against persons who provide information to the CCI, *mala fide* or recklessly, inasmuch as false statements and omissions of material facts are punishable with a penalty which may extend to the hefty amount of rupees one crore, with the CCI being empowered to pass other such orders as it deems fit. This, and the judicious use of heavy costs being imposed when the information supplied is either frivolous or *mala fide*, can keep in check what is described as the growing tendency of persons being "set up" by rivals in the trade.

The 2009 Regulations also point in the same direction inasmuch as regulation 10, which has been set out hereinabove, does not require the informant to state how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Also, regulation 25 shows that public interest must be foremost in the consideration of the CCI when an application is made to it in

writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings. What is also extremely important is regulation 35, by which the CCI must maintain confidentiality of the identity of an informant on a request made to it in writing, so that such informant be free from harassment by persons involved in contravening the Act.

This being the case, it is difficult to agree with the impugned judgment of the NCLAT in its narrow construction of section 19 of the Act, which therefore stands set aside."

Further, Hon'ble Supreme Court of India observed in para 22 and 23 that ″obviously, when the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act.

Coming now to the merits, we have already set out the concurrent findings of fact of the CCI and the NCLAT, wherein it has been found that Ola and Uber do not facilitate cartelization or anti-competitive practices between drivers, who are independent individuals, who act independently of each other, so as to attract the application of section 3 of the Act, as has been held by both the CCI and the NCLAT. We, therefore, see no reason to interfere with these findings. Resultantly, the appeal is disposed of in terms of this judgment."

20/01/2021	**Thupili Raveendra Babu** ***(Appellant)*** **vs** **Bar Council Of India & Ors** ***(Respondents)***	**Competition Commission of India[CCI] Case No. 50 of 2020**

Section 4 of the Competition Act, 2002 read with the Advocates Act, 1961- Bar Council of India Rules- legal education-age restriction for pursuing legal education whether BCI is an enterprise-Held, No. Whether the complaint is maintainable-Held, No.

Brief facts:

The instant information was filed by the Informant alleging contravention of provisions of Section 4 of the Act by Bar Council of India and its office bearers, collectively referred to as 'Opposite Parties'. The informant was 52 years old and could not pursue legal education post his retirement. As per the BCI Rules, candidates belonging to General category who have attained the age of more than 30 years, are barred from pursuing legal education. The allegations were based on this age restriction, The BCI has allegedly imposed maximum age restrictions upon the new entrants to enter into the legal education and thus, created indirect barriers to the new entrants in the profession of legal service. The impugned Clause 28 [in he rules] has been incorporated by the BCI in contravention of Section 4 of the Act by 'misusing its dominant position'. By having done so, the BCI has also allegedly indulged in colourable exercise of power. The Informant has further alleged that the members of the BCI, by way of

aforementioned Clause 28, conspired to reduce the competition to its electors and created indirect barriers in the profession of legal service. He has also alleged that the members of the BCI who are managing the affairs of the BCI are misusing the dominant position enjoyed by the BCI in controlling the legal education in India.

Decision: Dismissed.

Reason:

The Commission has carefully perused the information, the documents filed by the Informant and the information available in public domain. The Commission notes that the Informant has alleged contravention of the provisions of Section 4 of the Act, primarily, against the BCI. However, in order to appreciate the facts in the matter, it is imperative to examine the status of the BCI as an enterprise within the contours of the provisions of Section 2(h) of the Act before proceeding further with regard to the allegations raised in the information. Thus, the primary question which falls for consideration is that whether BCI is an 'enterprise' within the meaning of Section 2(h) of the Act. The term 'enterprise' has been defined under Section 2(h) of the Act, inter alia, as a person or a department of the Government, engaged in any activity relating to provision of any kind of services. In the present matter, the Commission notes that the BCI is a statutory body established under Section 4 of the Advocates Act, 1961. Section 7 of the said Act lays down the functions of the BCI which includes promotion of legal education in India and to lay down standards of such education in consultation with the Universities in India and the State Bar councils. Further, Section 49 of the Advocates Act, 1961 empowers the BCI to make rules for discharging its functions under the said Act such as prescribing qualifications and disqualifications for membership of a Bar Council, minimum qualifications required for admission to a course of degree in law in any recognised university, prescribing the standards of legal education for the universities in India, etc. Thus, it is noted that the BCI appears to carry out functions which are regulatory in nature in respect of the legal profession. It is noted that that in Case No. 39 of 2014, In re: Dilip Modwil and Insurance Regulatory and Development Authority (IRDA), decided on 12.09.2014, the Commission had the occasion to examine the status of IRDAI as an 'enterprise' under the Act. The Commission had observed that any entity can qualify within the definition of the term 'enterprise' if it is engaged in any activity which is relatable to the economic and commercial activities specified therein. It was further observed that regulatory functions discharged by a body are not per se amenable to the jurisdiction of the Commission. In the present matter, when the BCI appears to be discharging its regulatory functions, it cannot be said to be an 'enterprise' within the meaning of Section 2(h) of the Act and consequently, the allegations made in relation to discharge of such functions which appears to be non-economic in nature, may not merit an examination within the provisions of Section 4 of the Act. In view of the foregoing, the Commission is of the opinion that there exists no prima facie case under the provisions of Section 4 of the Act and the information filed is directed to be closed forthwith against the Opposite Parties under Section 26(2) of the Act. Consequently, no case for grant for relief(s) as sought under Section 33 of the Act arises and the same is also rejected.

LESSON 7

INTERPRETATION OF LAW

12.02.2021	National Highways Authority of India (Appellant) vs. M/s Progressive Construction Ltd. (Respondent)	The Supreme Court of India

Fresh adjudication may be ordered by the Supreme Court while the Appeals being pending under Section 37 of the Arbitration and Conciliation Act, 1996 before the High Court.

Facts of the case:

This Appeal arose out of the Judgment passed under Section 34 of the Arbitration and Conciliation Act, 1996 wherein the Single Judge has substantially set aside the Award passed by a three-member tribunal. It was observed that the arbitral tribunal has drawn incorrect inferences from the documents on record, and has not considered vital and relevant evidence in reaching its conclusions. Aggrieved by the judgment of the Single Judge, cross appeals were filed by both parties under Section 37 before the Division Bench of High Court. The Division Bench vide the impugned interim Order directed that the Appeals be confined to the findings with respect to claims. The Appellant - NHAI filed the present Appeal to challenge the interim Order of Division Bench.

Decision:

During the pendency of this Appeal, the parties agreed to a fresh adjudication of all the claims and counter claims before a Sole Arbitrator that has been appointed by Supreme Court. In view of the aforesaid directions, the Order passed by the Delhi High Court is set aside. The Appeals filed by both parties under Section 37 of the Arbitration Act being pending before the Delhi High Court have accordingly become infructuous.

For details:
https://main.sci.gov.in/supremecourt/2020/18693/18693_2020_43_25_26142_Judgement_12 - Feb-2021.pdf

LESSON 8

GOVERNANCE ISSUES

I. Governance, Risk Management and Compliance

1. PNB Scam- Case Study

On 14 February 2018, PNB revealed that fraudulent transactions by billionaire jeweler Nirav Modi and related entities amounted to 110 billion rupees (US$1.77 billion). The key accused in the case were jeweler and designer Nirav Modi, his maternal uncle Mehul Choksi, and other relatives and some PNB employees. Nirav Modi and his relatives escaped India in early 2018, days before the news of the scam became public.

Nirav Modi and the companies linked to him colluded with bank officials to get guarantees or letters of undertaking to help fund buyer's credit from other overseas banks. Multiple fake LoUs were opened in favour of branches of Indian banks for import of pearls for a period of one year, for which Reserve Bank of India guidelines lay out a total time period of 90 days from the date of shipment but the guidelines were ignored by overseas branches of Indian banks. They failed to share any document/information with PNB, which were made available to them by the firms at the time of availing credit from them.

The Enforcement Directorate (ED) recovered bank token devices of the foreign dummy companies used by the fugitive diamond trader to transfer the fraudulent funds. The probe agency found that Nehal Modi, brother of Nirav Modi had destroyed the devices and had even secured a server located in the United Arab Emirates (UAE) soon after the scam broke out. These dummy firms had been receiving the fraudulent PNB LoUs and were based out in British Virgin Island and other tax havens.

This case was a result of the mismanagement from the internal regulatory bodies within the PNB itself and also from the side of the Reserve Bank of India (RBI). This is not the only instance in itself where the public sector banks have failed to perform their duties and therefore major changes need to be incorporated into the regulatory mechanisms to prevent such frauds.

In the aftermath of this case, RBI has directed banks to integrate SWIFT and core banking systems. It has also constituted a committee to look into the reasons for high divergence observed in asset classification, various incidents of fraud and necessary interventions (also in terms of information technology) to prevent such frauds. The government passed the Fugitive Economic Offenders Act (2018) which came into force on 21st April 2018. The Act was enacted to prevent economic offenders in the ilk of Nirav Modi from escaping the country.

2. YES Bank Crisis- Case study

YES Bank was once the country's fifth-largest private lender by market capitalization. YES Bank had been founded by Rana Kapoor and Ashok Kapoor in 2004. The bank was ranked

number 1 bank in the Business Today-KPMG Best Banks Annual Survey 2008. YES Bank was the first institution globally to receive funding through IFC's Managed Co-Lending Portfolio Programme and the first Indian bank to raise loan under IFC's A/B loan facility.

What has led to a crisis at YES Bank?

The bank's loan book on March 31, 2014, was Rs 55,633 crore, and its deposits were Rs 74,192 crore. Since then, the loan book has grown to nearly four times as much, at Rs 2.25 trillion as on September 30, 2019. While deposit growth failed to keep pace and increased at less than three times to Rs 2.10 trillion. The bank's asset quality also worsened and it came under regulator RBI's scanner. Yes bank was lending aggressively disregarding the risk limits and also under-reporting the bad loans. They were lending to corporates that were already in very risk businesses and facing some challenges in their business like the Anil Ambani-led Reliance group, DHFL and IL&FS. All this happened in Rana Kapoor's (Founder of Yes Bank) tenure. The exposure of loans to such bad performing companies was huge in Yes Bank's case, and to add up they were hiding the NPAs (Non-performing assets) or misreporting the same. After the above fiasco, Ravneet Gill took charge of Yes Bank but struggled to revive as deposits kept depleting and he wasn't able to raise enough capital given the loss of confidence in the market. The tipping point came when one of the bank's independent directors Uttam Prakash Agarwal, resigned from the board in January 2020 citing governance issues.

Several reasons behind the crisis of YES bank were:

1. **NPAs:** YES Bank ran into trouble following the central bank's asset quality reviews in 2017 and 2018, which led to a sharp increase in its impaired loans ratio and uncovered significant governance lapses that led to a complete change of management. The bank subsequently struggled to address its capitalisation issues. YES Bank suffered a dramatic doubling in its gross NPAs between April and September 2019 to Rs 17,134 crore.
2. **NBFC crisis**: The crisis in India's shadow-banking space started with the unravelling of Infrastructure Leasing & Financial Services (IL&FS) and then extended to Dewan Housing Finance Limited (DHFL). YES Bank's total exposure to IL&FS and DHFL was 11.5 per cent as of September 2019. In April 2019, the bank had classified about Rs 10,000 crore of its exposures, representing 4.1 per cent of its total loans under watch list, as potential non-performing loans over the next 12 months.
3. **Governance issue**: YES Bank faced several governance issues that led to its decline. On January 10, independent director Uttam Prakash Agarwal quit citing deteriorating corporate governance standards and compliance failure at the lender. In 2018-19, the bank under-reported NPAs to the tune of Rs 3,277 crore, prompting RBI to dispatch R Gandhi, one of its former deputy governors, to the board of the bank. Rana Kapoor, who was instrumental in building YES Bank from scratch, was asked to step down as chief executive in January 2019.
4. **Excessive withdrawals:** YES Bank's financial condition dissuaded many depositors from keeping funds in the bank over a longer term. The bank showed a steady withdrawal of deposits, which burdened its balance sheet and added to its woes. The bank had a deposit book of Rs 2.09 trillion at the end of September 2019.

Steps taken by RBI against YES Bank

1. RBI has taken over the YES Bank management
2. The central has imposed a moratorium on the lender

3. RBI announced a draft ‘Scheme of Reconstruction’ that entails SBI investing capital to acquire a 49% stake in the restructured private lender.

How can such conflicts between Management and Board be avoided?
The global best practice recommends that at least three-quarters of board members should be independent, the board should have an independent chairman and not an individual who serve the role of both CEO & Chairman of the board, annual board elections should be conducted as this forces directors to make more careful decisions and be more attentive to shareholders because they can cast the vote to keep or eliminate a director each year. Also, every year board self-assessment practices should be conducted, independent directors should annually/quarterly meet and openly discuss various policies, management, and compensation without concerns about management influence.

II. The Focus on ESG issues- The Global Trend

The COVID-19 pandemic and social justice movements have had far-reaching impacts on business and society around the world. Corporate governance trends vary somewhat across regions, but corporations globally are experiencing a reckoning around their role in society. The expectations of the independent directors who oversee corporations have never been higher.

Following are the Global trends for CG predicted for 2021:

1. Climate Change Risk
2. Diversity, Equity & Inclusion (DE&I)
3. Convergence of Sustainability Reporting Standards
4. Human Capital Management
5. Return of Activism and Increased Capital Markets Activity
6. Virtual Board & Shareholder Meetings: Here to Stay

ESG issues continue to rise up the agenda for corporates, regulators and investors, with the sustained focus on climate change and other environment (E) issues continuing but with an increasing focus on social (S) factors driven in part by the impact of the COVID-19 pandemic.

Most boards are far more focused on their purpose and stakeholders, from delivering great products or services, to wanting to be great places to work, than public perception would believe. For years, business leaders have focused on building long-term success as well as developing skills, strong cultures, being respected in their communities and their environmental impact. While such issues may have historically been viewed as dilutive to financial value, there is a growing acknowledgement that sustainable business practices are not only essential from a risk management perspective, they are also often accretive.

1. Net Carbon-Zero Goal– One step toward Sustainable development

Some of India’s largest firms have announced net-zero goals as companies globally switch to sustainable investments and seek suppliers with similar commitments to curb greenhouse emissions.

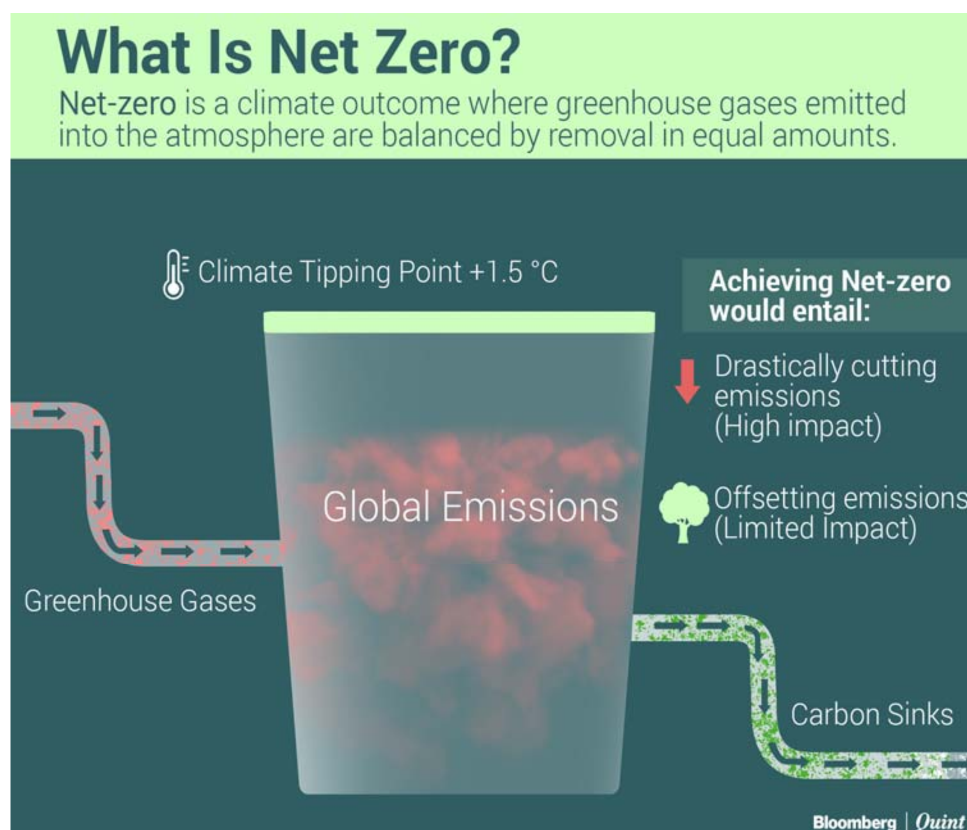
Reliance Industries Ltd. plans to transform each of the units under its refining-to-retail conglomerate to create a sustainable business and chases a net carbon-zero goal by 2035. Private lender HDFC Bank Ltd. has set 2031-32 target for being carbon neutral, while Tata Consultancy Services Ltd. seeks to be there by 2030. Wipro Ltd., Infosys Ltd., Mahindra & Mahindra Ltd., JSW Energy Ltd. and even Indian Railways have also announced similar plans.

What Is Net-Zero?

Net-zero is a climate outcome where any greenhouse emissions through man-made sources are countered by removing such gases in equal amount. The 'net' effect is that the global temperature remains unchanged. There are two ways to achieve this: drastically reduce emissions and simultaneously use methods to neutralise or remove greenhouse gases.

Why's it relevant?

Foremost is to avoid an impending climate catastrophe. Consider carbon budget—the maximum limit of emissions that the Earth can handle before heating up. If we continue to release emissions on a net basis, that budget is breached and temperature continues to rise. For example, a water tank that is filled three-fourths. And a stream is connected to the tank that constantly keeps filling it. The idea of net zero is that we reduce the flow of the stream so that the water doesn't start to overflow.



Source: Bloomberg

Policymakers across the globe have a consensus that setting net-zero goals is a plausible way to contain further damage and, hopefully, reverse some of it. Under the landmark 2016 Paris climate agreement, countries including India agreed to limit global warming to well below 2 degrees Celsius, ideally 1.5 degrees C. A special report by nearly 100 scientists found that to achieve the goal, the world would have to hit net-zero emissions by 2050. That's not likely given the current progress.

Developed nations such as the U.K., France and Denmark, with higher emissions, have already codified in law their commitment to net-zero by 2050, according to the Energy and Climate Intelligence Unit. The European Union, South Korea and Canada have also proposed similar legislation. The U.S., Japan and Germany are considering making it a law.

India, a developing nation with relatively lower per capita emissions, doesn't have a net-zero target. But authorities are said to be considering pledging to net-zero by 2050.

Why Should Companies Care?
Bulk of the emission comes from industries—particularly in the energy, metals and transportation sectors. Any climate action will have to start by reducing or offsetting emissions that come from the industrial and commercial activity.

There is also the need to negate potential business losses. According to the Carbon Disclosure Project, Indian companies stand to collectively lose over Rs 7.14 lakh crore if they do nothing to mitigate climate risks in the next five years. These risks come from physical phenomena like floods, emerging regulations, emission caps, changing customer behaviour and preferences, and even potential legal issues. But if done right, opportunities worth Rs 2.9 lakh crore could emerge.

Indian suppliers of multinational firms also risk losing $274 billion worth of exports every year if they fail to curb carbon emissions, according to Standard Chartered.

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