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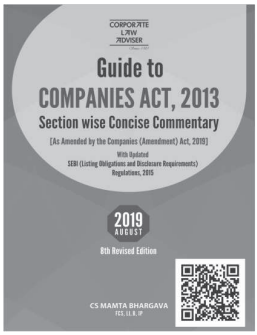

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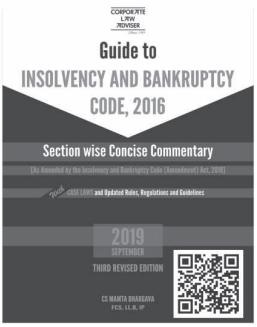

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ANGLE OF PERCEPTION

ARTICLES

Is lockdown also a blessing in disguise ?

Change for betterment is a natural process in human life. Refinement or evolution of human personality if goes on smoothly, or small baby flower blooms into something unique. The change for betterment can take a negative direction. That has always been of utmost concern to educators, psychologists and teachers of mankind. Some present day masters have said that what they could not teach in decades, the deadly pandemic seems to have delivered in its resultant lockdown observed worldwide.

It is common knowledge that good or bad experiences teach every individual in his journey through life. The lessons learnt culminate into his individual philosophy. He adopts some unique way of thinking. As he thinks, so he becomes. Style is the man. So said an early essayist. We are too familiar with the stories of being and becoming, the saint or the sinner out of the same human material. Life itself is the first prerequisite, the greatest lesson worth contemplation, for which the whole mankind got a heaven sent lockdown period.

Lockdown period, as a blessing in disguise, has afforded a boon of spiritual introspection to the busy wordly man, already out of poverty words, with a satisfactory level of economic prosperity (as against the unfortunate migrants). All the same, a great change of attitude in human kind is bound to result by and by. Level of human awareness would uplift many, and a quantum jump would bring a new era of peace, love, harmony, with accentuated vigour and vitality for true human progress all round.

R N SAHAI
A philosopher, thinker and Managing Editor of Corporate Law Adviser

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COMPANY LAW

[2020] 156 CLA (St.) 1

Term of office of Shri Bethala Shantha Vijaya Prakash Kumar, Member (Judicial), as Acting President, NCLT is further extended for a period of three months

SO 1393(E), dated 29th April 2020, issued by MCA

In continuation of this Ministry's notification SO No.72(E) dated 3rd January, 2020, the term of office of Shri Bethala Shantha Vijaya Prakash Kumar, Member (Judicial), as Acting President, NCLT is further extended for a period of three months with effect from 5th April, 2020 or until a regular President is appointed or until further orders, whichever is earliest. ❖❖❖

[2020] 156 CLA (St.) 1

Dispatch of notice under section 62(2) of Companies Act, 2013 by listed companies for rights issue opening upto 31st July, 2020

General Circular No. 21 /2020, dated 11th May 2020, issued by MCA

Several representations have been received in the Ministry for providing clarification on the mode of issue of notice referred to in section 62(1)(*a*)(*i*) of Companies Act (the 'Act') read with section 62(2) of the Act for rights issue by listed companies, in view of the difficulties faced by companies in sending notices through postal or courier services on account of the threat posed by Covid-19. The issues raised in the said representations have been examined. The Circular (Number SEBI/HO/CFD/DIL2/CIR/P/2020/78) issued by SEBI on 6th May, 2020 has also been considered.

2. In view of above and on account of the overall situation, it is hereby clarified that for rights issues opening upto 31st July, 2020, in case of listed companies, which comply with the aforementioned SEBI Circular, dated 6th

May, 2020, inability to dispatch the notice referred in para 1 of this Circular to their shareholders through registered post or speed post or courier would not be viewed as violation of section 62(2) of the Act.

3. This issues with the approval of the competent authority. ❖❖❖

[2020] 156 CLA (St.) 2

Holding of annual general meetings by companies whose financial year has ended on 31st December, 2019

General Circular No. 18/2020, dated 21st April 2020, issued by MCA

Several representations have been received from stakeholders with regard to difficulty in holding annual general meetings ('AGMs') for companies whose financial year ended on 31st December, 2019 due to COVID-19 related social distancing norms and consequential restrictions linked thereto. These representations have been examined and it is noted that the Companies Act. 2013 ('the Act') allows a company to hold its AGM within a period of six months (nine months in case of first AGM) from the closure of the financial year and not later than a period of 15 months from the date of last AGM .

2. On account of the difficulties highlighted above, it is hereby clarified that if the companies whose financial year (other than first financial year) has ended on 31st December, 2019, hold their AGM for such financial year within a period of nine months from the closure of the financial year (*i.e.*, by 30th September, 2020), the same shall not be viewed as a violation. The references to due date of AGM or the date by which the AGM should have been held under the Act or the rules made thereunder shall be construed accordingly.

3. This issues with the approval of the competent authority. ❖❖❖

[2020] 156 CLA (St.) 2

Holding of annual general meeting through video conferencing or other audio visual means

General Circular No. 20/2020, dated 5th May 2020, issued by MCA

Several representations have been received in the Ministry for providing relaxations in the provisions of Companies Act, 2013 ('the Act') or rules made thereunder to allow companies to hold annual general meeting ('AGM') in a manner similar to the one provided in General Circular No. 14/2020, dated

8th April, 2020 ('EGM Circular I') and General Circular No. 17/2020 dated 13th April, 2020 ('EGM Circular II') [2020] 155 CLA 89 (St.), which deal with conduct of extraordinary general meeting ('EGM').

2. In the meanwhile, by virtue of the General Circular No. 18/2020, dated 21st April, 2020, the companies whose financial year ended on 31st December, 2019, have been allowed to hold their AGM by 30th September, 2020.

3. The matter has been further examined and it is stated that in view of the continuing restrictions on the movement of persons at several places in the country, it has been decided that the companies be allowed to conduct their AGM through video conferencing ('VC') or other audio visual means ('OAVM'), during the calendar year 2020, subject to the fulfillment of the following requirements :

(*A*) For companies which are required to provide the facility of e-voting under the Act, or any other company which has opted for such facility

The framework provided in para 3-A of EGM Circular - I and the manner and mode of issuing notices provided in sub-para (i)-A of EGM Circular II shall be applicable *mutatis mutandis* for conducting the AGM.

II. In such meetings, other than ordinary business, only those items of special business, which are considered to be unavoidable by the Board, may be transacted.

III. In view of the prevailing situation, owing to the difficulties involved in dispatching of physical copies of the financial statements (including Board's report, auditor's report or other documents required to be attached therewith), such statements shall be sent only by email to the members, trustees for the debenture-holder of any debentures issued by the company, and to all other persons so entitled.

IV. Before sending the notices and copies of the financial statements, etc., a public notice by way of advertisement be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, preferably both newspapers having electronic editions, and specifying in the advertisement the following information :–

(*a*) statement that the AGM will be convened through VC or OAVM in compliance with applicable provisions of the Act read with this Circular ;

(*b*) the date and time of the AGM through VC or OAVM ;

(*c*) availability of notice of the meeting on the website of the company and the stock exchange, in case of a listed company ;

(*d*) the manner in which the members who are holding shares in physical form or who have not registered their email addresses with the company can cast their vote through remote e-voting or through the e-voting system during the meeting ;

(*e*) the manner in which the persons who have not registered their email addresses with the company can get the same registered with the company ;

(*f*) the manner in which the members can give their mandate for receiving dividends directly in their bank accounts through the Electronic Clearing Service ('ECS') or any other means ;

(*g*) any other detail considered necessary by the company

V. In case, the company is unable to pay the dividend to any shareholder by the electronic mode, due to non-availability of the details of the bank account, the company shall upon normalisation of the postal services, dispatch the dividend warrant/cheque to such shareholder by post.

VI. In case, the company has received the permission from the relevant authorities to conduct its AGM at its registered office, or at any other place as provided under section 96 of the Act, after following any advisories issued from such authorities, the company may in addition to holding such meeting with physical presence of some members, also provide the facility of VC or OAVM, so as to allow other members of the company to participate in such meeting. All members who are physically present in the meeting as well as the members who attend the meeting through the facility of VC or OAVM shall be reckoned for the purpose of quorum under section 103 of the Act. All resolutions shall continue to be passed through the facility of e-voting system.

(*B*) For companies which are not required to provide the facility of e-voting under the Act

AGM may be conducted through the facility of VC or OAVM only by a company which has in its records, the email addresses of at least half of its total number of members, who,

(*a*) in case of a Nidhi, hold shares of more than one thousand rupees in face value or more than one per cent of the total paid-up share capital, whichever is less ;

(*b*) in case of other companies having share capital, who represent not less than seventy-five per cent of such part of the paid-up share capital of the company as gives a right to vote at the meeting ;

(*c*) in case of companies not having share capital, who have the right to

exercise not less than seventy-five per cent of the total voting power exercisable at the meeting.

II. The company shall take all necessary steps to register the email addresses of all persons who have not registered their email addresses with the company.

III. The framework provided in para 3-B of EGM Circular - I and the manner and mode of issuing notices provided in sub-para (*i*)-B of EGM Circular II shall be applicable *mutatis mutandis* for conducting the AGM.

IV. In such meetings, other than ordinary business, only those items of special business, which are considered to be unavoidable by the Board, may be transacted.

V. Owing to the difficulties involved in dispatching of physical copies of the financial statements (including Board's report, Auditor's report or other documents required to be attached therewith), such statements shall be sent only by email to the members, trustees for the debenture-holder of any debentures issued by the company, and to all other persons so entitled.

VI. The companies shall make adequate provisions for allowing the members to give their mandate for receiving dividends directly in their bank accounts through the Electronic Clearing Service ('ECS') or any other means. For shareholders, whose bank accounts are not available, company shall upon normalisation of the postal services, dispatch the dividend warrant/cheque to such shareholder by post.

4. The companies referred to in paragraphs 3(*A*) and (*B*) above, shall ensure that all other compliances associated with the provisions relating to general meetings, *viz*., making of disclosures, inspection of related documents/registers by members, or authorisations for voting by bodies corporate, etc., as provided in the Act and the articles of association of the company are made through electronic mode.

5. The companies which are not covered by the General Circular No. 18/2020, dated 21st April, 2020 and are unable to conduct their AGM in accordance with the framework provided in this Circular are advised to prefer applications for extension of AGM at a suitable point of time before the concerned Registrar of Companies under section 96 of the Act.

6. This issues with the approval of the competent authority. ❖❖❖

[2020] 156 CLA (St.) 5

Extension of the last date of filing of Form NFRA-2

General Circular No. 19 /2020, dated 30th April 2020, issued by MCA

In continuation of the Ministry's General Circular No. 7/2020 dated 5th March,

2020 and after due examination, it has been decided that the time limit for filing of Form NFRA-2 for the reporting period Financial Year 2018-19, will be 210 days from the date of deployment of this form on the website of National Financial Reporting Authority ('NFRA').

2. This issues with the approval of Competent Authority. ❖❖❖

[2020] 156 CLA (St.) 6

Transfer of Shri B S V Prakash Kumar, Member (Judicial) (acting President) from NCLT, Chennai to NCLT, Mumbai

Office Order File No. 10/36/2016-NCLT, dated 12th May 2020, issued by NCLT

The Competent Authority has decided to transfer Shri B S V Prakash Kumar, Member (Judicial) (Acting President) from NCLT, Chennai to NCLT, Mumbai. ❖❖❖

[2020] 156 CLA (St.) 6

Postings/transfers of Members of the National Company Law Tribunal

Office Order File No. 10/36/2016-NCLT, dated 12th May 2020, issued by NCLT

The Competent Authority in exercise of the powers conferred under rule 15 A, sub-rule (4) of NCLT (Salary, Allowances and other Terms and Conditions of Service of President and other Members) Rules, 2015 notified *vide* Notification No. GSR 682(E) dated 23rd September, 2019 by Central Government, Ministry of Corporate Affairs, following postings/transfers of Members of the National Company Law Tribunal are made with immediate effect :–

Sl. No.	*Name of Member*	*Present Posting*	*New Posting*
1.	Shri H P Chaturvedi, Member (Judicial)	NCLT Ahmedabad	NCLT Mumbai
2.	Shri M B Gosavi, Member (Judicial)	NCLT Kolkata	NCLT Ahmedabad
3.	Shri Rajasekhar V K, Member (Judicial)	NCLT Mumbai	NCLT Kolkata

The hon'ble Members shall move to their new stations of posting, after lockdown restrictions on movement are withdrawn by the Central Government and respective State Governments. ❖❖❖

[2020] 156 CLA (St.) 7

Postings/transfers of Members of the National Company Law Tribunal

Office Order File No. 10/36/2016-NCLT, dated 30th April 2020, issued by NCLT

In exercise of the powers conferred under rule 15A, sub-rule (4) of NCLT (Salary, Allowances and other Terms and Conditions of Service of President and other Members) Rules, 2015 notified *vide* Notification No. GSR 682(E) dated 23rd September, 2019 by Central Government, Ministry of Corporate Affairs, following postings/transfers of Members of the National Company Law Tribunal are made with immediate effect :–

Sl. No.	*Name of Member*	*Present Posting*	*New Posting*
1.	Shri B P Mohan, Member (Judicial)	NCLT Mumbai	NCLT Amaravati
2.	Shri. Mohammed Ajmal, Member (Judicial)	NCLT Amaravati	NCLT Mumbai
3.	Ms. Sucharita R, Member (Judicial)	NCLT Cuttack	NCLT Chennai
4.	Shri Narender Kumar Bhola, Member (Technical)	NCLT Hyderabad	NCLT New Delhi
5.	Shri Veera Brahma Rao Arekapudi, Member (Technical)	NCLT Kochi	NCLT Hyderabad
6.	Shri Virendra Kumar Gupta, Member (Technical)	NCLT Kolkata	NCLT Ahmedabad
7.	Shri Prasanta Kumar Mohanty, Member (Technical)	NCLT Ahmedabad	NCLT Guwahati
8.	Shri Venkata Subba Rao Hari, Member (Judicial)	NCLT Guwahati	NCLT Mumbai

The hon'ble Members shall move to their new stations of posting, after lockdown restrictions on movement are withdrawn by the Central Government and respective State Governments.

This issues with the approval of hon'ble President, NCLT. ❖❖❖

[2020] 156 CLA (St.) 7

Reconstitution of NCLT Bench at Guwahati

Order File No. 10/03/2020-NCLT, dated 30th April 2020, issued by NCLT

Consequent to Order No. 10/36/2016, dated 30th April, 2020. The NCLT Guwahati Bench is hereby reconstituted.

In exercise of the powers conferred under section 419 of the Companies Act, 2013, the hon'ble President, NCLT hereby constitutes the following Bench at Guwahati for the purpose of exercising and discharging the Tribunal's powers and functions. The Bench at NCLT Guwahati shall sit for three days (Wednesday. Thursday and Friday) per fortnight at 10:30 AM :

NCLT, Bench at Guwahati

1. Shri Venkata Subba Rao Hari, Member (Judicial)

2. Shri Prasanta Kumar Mohanty, Member (Technical)

This Bench shall sit at NCLT Guwahati on alternate Wednesday. Thursday and Friday, *i.e.*, per fortnight till further orders.

This is in modification of order of even number dated 25th July, 2020.

This shall come into force with effect from 4th May 2020.

During the Lockdown period NCLT Kolkata Bench shall continue to hear urgent matters of NCLT Guwahati through Video Conference.

This issues with the approval of hon'ble President, NCLT. ❖❖❖

[2020] 156 CLA (St.) 8

Reconstitution of NCLT Bench at Cuttack

Order File No. 10/03/2020-NCLT, dated 30th April 2020, issued by NCLT

Consequent to Order No. 10/36/2016, dated 30th April, 2020. The NCLT Cuttack Bench is hereby reconstituted.

In exercise of the powers conferred under section 419 of the Companies Act, 2013, the hon'ble President, NCLT hereby constitutes the following Bench at Cuttack for the purpose of exercising and discharging the Tribunal's powers and functions. The Bench at NCLT Cuttack shall sit for three days (Wednesday, Thursday and Friday) per fortnight at 10:30 AM :

NCLT, Bench at Cuttack

1. Ms. Sucharita R Member (Judicial)

2. Shri Satya Ranjan Prasad, Member (Technical)

This Bench shall sit at NCLT Cuttack on alternate Wednesday, Thursday and Friday, *i.e.*, per fortnight till further orders.

This is in modification of Order of even number dated 25th July, 2020.

This shall come into force with effect form 4th May 2020.

During the Lockdown period NCLT Kolkata Bench shall continue to hear urgent matters of NCLT Cuttack through Video Conference.

This issues with the approval of hon'ble President, NCLT. ❖❖❖

[2020] 156 CLA (St.) 9

Companies (Appointment and Qualification of Directors) (Second Amendment) Rules, 2020

GSR 268 (E), dated 29th April 2020, issued by MCA

In exercise of the powers conferred by section 149 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Appointment and Qualification of Directors) Rules, 2014, namely :–

1. (1) These rules may be called the Companies (Appointment and Qualification of Directors) (Second Amendment) Rules, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Companies (Appointment and Qualification of Directors) Rules, 2014, in rule 6, in sub -rule (1), in clause (*a*), for the words "five months" the words "seven months" shall be substituted. ❖❖❖

[2020] 156 CLA (St.) 9

Draft procedure for submission of audit files to NFRA

Notice No. NF-20011/3/2020, dated 28th April 2020, issued by NFRA

In pursuance of the duties cast upon it under the Companies Act, 2013, and NFRA Rules, 2018, NFRA proposes to prescribe the procedures to be followed by all entities regulated by NFRA for submission of Audit Files to NFRA. NFRA invites comments from regulated entities on the procedure described in this draft document in Annexure A. Your comments should be mailed to *social@nfra.gov.in* before 31st of May, 2020. The email shall contain full contact details of the sender including name, mobile number, professional address and membership number. Comments without these minimum identification requirements will not be considered.

ANNEXURE A

Draft procedure for submission of audit files to NFRA.

These procedures are applicable to all audit firms/chartered accountants (referred to as entities in these procedures) covered under the jurisdiction of the National Financial Reporting Authority ('NFRA') as laid down *vide* section 132 of the Companies Act, 2013, read with NFRA Rules, 2018. These procedures govern the submission of Audit Files to NFRA and are issued under the mandate given to NFRA by the Companies Act, 2013, and to discharge the functional responsibilities defined under NFRA Rules, 2018, particularly under rule 8(1).

2. Audit files are defined by para 6(*b*) of SA 230 Audit Documentation. It may be noted that the SAs are prescribed/deemed to have been prescribed by the Central Government in exercise of its powers under section 143(10) of the Companies Act, 2013. The SAs are, therefore, subordinate legislation. Failure to comply with the SAs will amount to violation of the provisions of law.

3. It may also be noted that one of the purposes of audit documentation is "Enabling the conduct of external inspections in accordance with applicable legal, regulatory or other requirements".

4. The generic procedural requirements described in this document are not a full specification for the Audit Files. They form a baseline which sets out the minimum requirements necessary to be complied with by entities while submitting Audit Files to NFRA for any purposes.

5. As required by law, all entities must establish policies and procedures to ensure that Audit Files are organised, and maintained, in a manner completely consistent with the law, and are retained and accessible as long as prescribed. Similarly, Audit File management requirements should be incorporated into the entity's IT policies, wherever applicable.

6. The Audit File has to be submitted in an electronic format to NFRA. Though entities are free to follow electronic, manual or hybrid methods of maintaining audit files, the final Audit File submitted to NFRA has to be compiled in an electronic format conforming to the minimum requirements mentioned in this document. Care should be taken to maintain the integrity, authenticity, readability and completeness of the records while converting to/preserving in an electronic format. The original formats should not be changed except as provided in this document. Wherever hard copies/physical files/records are maintained ; the entity shall take measures to ensure the integrity of such records. The hard copies shall be serially numbered, dated and signed and sealed, wherever applicable. A log register shall be maintained in such cases and the copies of the log register shall form part of the submission to NFRA.

All such hardcopies or physical files maintained shall be scanned to a PDF format with a scanning density of a minimum of 300 dots per inch (dpi).

7. NFRA will only accept files in the formats of Portable Document Format (PDF), MS Word, MS Excel or MS PowerPoint, or any equivalent file formats, or any combination of the same. Other file formats (*e.g.* : MOV, AVI, MP4, etc.) will be accepted in the original/native format if the conversion of such files into PDF is either not possible or such conversion will compromise the integrity/ authenticity/readability/completeness of such files/information in the files.

8. The Audit File submitted to NFRA in the formats specified in para 7 should contain an Index page in PDF format at the beginning. The index should list out the contents of the Audit File, grouped and sorted in a logical order. The submission must then maintain the referential integrity of all index data in subsequent sections.

9. Many entities use some documents/records management systems, or proprietary IT applications, for creation/collation/ management/ preservation of Audit Files. Such applications must be able to export whole electronic folders of records of an Audit File along with the meta data, into a single PDF file such that the content and appearance of the electronic records are not degraded. All components of an electronic Audit File should be exported as an integral unit ; for example, including emails with associated file attachments. All metadata associated with an electronic record should be linked to the record to which it belongs. Optionally, the metadata and other application related data can be presented in a PDF format with proper reference to the subsequent sections/folders/records that contain other records forming part of the Audit File. All pages of the PDF shall be serially numbered. Care should be taken to ensure that all the data related to the Audit File is exported to the output folders and is transferred to NFRA in its entirety. No additional documents or data will be allowed to be added to the Audit File after it is submitted to NFRA.

10. Such IT applications must have an audit trail (logs) built into the system, which tracks actions taken on electronic records, access, management, archiving, disposal, application related events, coding changes, version changes, etc., to demonstrate authenticity and integrity of the Audit Files throughout the file lifecycle. The exported report as mentioned in para 9 shall contain the log reports of record addition, modification, deletion, archiving, retrieval, re-archiving, user logins, reviews, sign offs, and any modifications to the sign offs at appropriate sections of the output folder, linked to the record to which it belongs. The audit trail shall be unalterable and capable of recording all the actions that are taken upon an electronic

record/IT application/meta-data or software structure. The trail shall contain, inter alia, the details of the user initiating the action, the action taken and the date and time of the event.

11. In case an audit trail/log is not maintained in the existing application used by the entities or there is no log register, the fact shall be mentioned in the submitted Audit File. This will be viewed as an inherent weakness of the quality control policies of the entity.

12. All the records, *i.e.*, the reports/records exported from the IT application, electronic files directly obtained and kept at various electronic/digital storage locations, scanned PDFs of hard copies, copies of the log register, audit trail, etc., shall be arranged in sequential order after the index page referred to in para 8.

13. Once the files are so indexed, sorted and arranged in sequential order, the files shall be placed in a single folder in the same order. The folder shall be compressed to reduce the size using WinZip or WinRAR or similar commonly used applications. When using compression to reduce file size, entities should use lossless compression to maintain the integrity of source data. Lossless compression produces smaller file sizes without removing any information. By use of lossless compression, the file size can be reduced to 85 per cent to 90 per cent of actual file size. The compressed file(s) should be uploaded to the specified File Transfer Protocol ('FTP') location provided by NFRA. The auditor may install any commonly used FTP client for this purpose.

14. The covering letter/email accompanying the Audit File shall include the total number of pages in the attached Audit File, the total number of records/files/folders attached and the total size in MB of the attached audit file. The covering letter shall also contain a brief description about the entity's policies, practices and tools used for maintaining Audit Files.

15. These procedures will be applicable till such time as they are not expressly revoked/amended/modified by NFRA.

16. The above procedures are applicable only with respect to the manner and form in which Audit Files need to be submitted to NFRA. They do not cover anything related to the Integrity of Audit Files, records/document management aspects, and the minimum functional and security requirements of the IT platforms used for Audit Documentation. Separate procedures/guidelines will be issued in this regard. ❖❖❖

INSOLVENCY LAW

[2020] 156 CLA (St.) 13

Filing of default record from information utility along with the new petitions being filed under section 7 of the Insolvency and Bankruptcy Code, 2016

Order File No. 25/02/2020-NCLT, dated 12th May 2020, issued by NCLT

All concerned are directed to file default record from Information Utility along with the new petitions being filed under section 7 of Insolvency and Bankruptcy Code, 2016 positively. No new petition shall be entertained without record of default under section 7 of IBC, 2016.

The authorised representatives/parties in the cases pending for admission under aforesaid section of IBC also directed to file default record from Information Utility before next date of hearing.

This issues with approval of hon'ble Acting. President. ❖❖❖

[2020] 156 CLA (St.) 13

Role of resolution professional/liquidator in respect of avoidance transactions

Facilitation / 001 / 2020, dated 8th May 2020, issued by IBBI

Sections 25 and 37 of the Insolvency and Bankruptcy Code, 2016 ('the Code') enumerate the duties of a resolution professional ('RP') and a liquidator, respectively. These duties include certain actions in respect of avoidance transactions (preferential transactions, undervalued transactions, extortionate transactions, and fraudulent trading). Sections 43, 45, 50 and 66 of the Code mandate the RP and the liquidator to file applications with the Adjudicating Authority ('AA') seeking appropriate reliefs and directions permissible under the Code. Section 47 of the Code, inter alia, provides that the AA shall require the Insolvency and Bankruptcy Board of India ('the Board') to initiate a disciplinary action against the RP or the liquidator, as the case may be, where he has not reported undervalued transactions to the AA.

2. Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 requires the RP to form an opinion whether the corporate debtor ('CD') has been subjected to any avoidance transaction on or before the 75th day of the insolvency

commencement date ('ICD'). Where he is of the opinion that the CD has been subjected to any transactions covered under the aforesaid sections, he shall make a determination, on or before the 115th day of the ICD, under intimation to the Board. Further, he shall apply to the AA for appropriate relief on or before the 135th day of the ICD. These provisions aim to clear back the value lost through avoidance transactions, in sync with objective of maximisation of value of the assets of the CD.

3. The Code, read with Regulations, has demarcated responsibilities of an insolvency professional in corporate insolvency resolution process ('CIRP') and liquidation process. To enable the insolvency professional and the committee of creditors ('CoC') to have a complete and clear understanding of their roles and responsibilities in a CIRP, the Board, on 1st March, 2019, issued an indicative charter of their responsibilities, prepared in consultation with the three Insolvency Professional Agencies. Since the CoC does not exist in the liquidation process, the liquidator has independent and exclusive duties. The emerging jurisprudence is bringing further clarity about their roles in corporate insolvency proceedings.

4. The AA has disposed of a few applications relating avoidance transactions. Some matters have travelled up to the Supreme Court. The observations in the following two matters provide guidance to the insolvency professional and stakeholders as well :

(*i*) *Mr. Ram Ratan Kanoongo* v. *Sunil Kathuria* [MA No.436/2018 in CP No.172/IBC/NCLT/MB/MAH/2017]

Since certain transactions appeared to be fraudulent or preferential in nature during the CIRP of Saana Syntex (P.) Ltd. ('CD'), the RP filed an application under sections 19, 45 and 66 of the Insolvency and Bankruptcy Code, 2016. The CD could not be revived and, therefore, liquidation commenced. The AA observed that if there is a syphoning off funds of the CD, it is important that the same be brought back for the completion of liquidation proceedings. It held :

> 'Sections 43 and 45 start with the phrase "Where the liquidator or the RP....", hence, it can be understood that the avoidance or preferential or undervalued transactions can be handled even at the stage of Liquidation.'.

(*ii*) *Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd.* v. *Axis Bank Ltd., Etc., Etc.* [Civil Appeal Nos. 8512-8527/2019]

In this landmark judgment, the Supreme Court clarified the duties and responsibilities of the RP in respect of avoidance transactions. It held that the RP shall –

(*i*) sift through all transactions relating to the property/interest of the CD backwords from the ICD and up to the preceding two years ;

(*ii*) identify persons involved in the transactions and put them in two categories : (*a*) related party under section 5(*24*), and (*b*) remaining persons ;

(*iii*) identify which of the said transactions of preceding two years, the beneficiary is a related party of the CD and in which the beneficiary is not a related party. The sub-set relating to unrelated parties shall be trimmed to include only the transactions preceding one year from the ICD ;

(*iv*) examine every transaction in each of these sub-sets to find out whether (*a*) the transaction is of transfer of property of the CD or its interest in it ; and (*b*) beneficiary involved in the transaction stands in the capacity of creditor/surety/guarantor ;

(*v*) scrutinise the shortlisted transactions to find, if the transfer is for or on account of antecedent financial debt/operational debt/other liability of the CD ;

(*vi*) examine the scanned and scrutinised transactions to find, if the transfer has the effect of putting such creditor/surety/guarantor in beneficial position, than it would have been in the event of distribution of assets under section 53. If answer is in the affirmative, the transaction shall be deemed to be of preferential, provided it does not fall within the exclusion under section 43(3) ; and then

(*vii*) apply to the AA for necessary orders, after carrying out the aforesaid volumetric and gravimetric analysis of the transactions.

The Supreme Court observed that the parameters and the requisite enquiries as also the consequences in relation to different types of avoidance transactions are different. It clarified that once transactions are held as preferential ; it is not necessary to examine whether these are undervalued and/or fraudulent. In preferential transaction, the question of intent is not involved and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time, while undervalued transaction requires different enquiry under sections 45 and 46 where the AA is required to examine the intent, if such transactions were to defraud the creditors.

5. This communication is issued for the sole purpose of educating the IPs and other stakeholders of corporate insolvency resolution and liquidation processes. A stakeholder must refer to the Code and the Rules/Regulations and relevant case laws or seek professional advice if he intends to take any action or decision in any matter under the Code. ❖❖❖

[2020] 156 CLA (St.) 16

The Insolvency and Bankruptcy Board of India invites comments from the public on the Regulations notified under the Insolvency and Bankruptcy Code, 2016

Press Release No. IBBI/PR/2020/07, dated 4th May 2020, issued by IBBI

The Insolvency and Bankruptcy Code, 2016 ('the Code') is a modern economic legislation. Section 240 of the Code empowers the Insolvency and Bankruptcy Board of India ('IBBI') to make regulations subject to the conditions that the regulations : (*a*) carry out the provisions of the Code, (*b*) are consistent with the Code and the rules made thereunder ; (*c*) are made by a notification published in the Official Gazette ; and (*d*) are laid, as soon as possible, on the floor of each House of the Parliament for 30 days.

1. The IBBI has evolved a transparent and consultative process to make regulations. It has been the endeavour of the IBBI to effectively engage stakeholders in the regulation making process. The process generally starts with a working group making draft regulations. The IBBI puts these draft regulations out in public domain seeking comments thereon. It holds a few round tables to discuss draft regulations with the stakeholders. It takes advice of its Advisory Committees. The process culminates with the Governing Board of the IBBI finalising the regulations and the IBBI notifies them thereafter. This process endeavours to factor in ground realities, secures ownership of regulations and makes regulations robust and precise, relevant to the time and for the purpose.

2. Public consultation enables collective choice and, hence, plays an important role in the evolution of the regulatory framework. The participation of the public, particularly the stakeholders and the regulators, in the regulatory process ensures that the regulations are informed by the legitimate needs of those interested in and affected by regulations.

3. Usually, a regulator prepares draft regulations and presents these to the stakeholders to revalidate its understanding of the issue the said regulations seek to address, and the appropriateness of such regulations to address the issue. Based on the inputs from the stakeholders, the regulator finalises the regulations with modifications, as may be warranted. The IBBI has been essentially following this approach and will continue to do so.

4. Despite the best of efforts and intentions, a regulator may not always have the understanding of the ground realities, as much and as early as the stakeholders and the regulated may have, particularly in a dynamic environment. The stakeholders could, therefore, play a more active role in making regulations.

They may contemplate, at leisure, the important issues in the extant regulatory framework that hinder transactions and offer alternate solutions to address them, in addition to responding urgently to draft regulations proposed by the regulator. This is akin to crowd sourcing of ideas. This would enable every idea to reach the regulator. Consequently, the universe of ideas available with the regulator would be much larger and the possibility of a more conducive regulatory framework much higher.

5. Keeping in view of the above, the IBBI invites comments from the public, including the stakeholders and the regulated, on the regulations already notified under the Code. The comments received between 13th April, 2020 and 31st December, 2020 shall be processed together and following the due process, regulations will be modified to the extent considered necessary. It will be the endeavour of the IBBI to notify modified regulations by 31st March, 2021 and bring them into force on 1st April, 2021.

6. It is clarified that this is in addition to the extant approach of inviting public comments on draft regulations before notifying them.

7. For providing comments, please follow the process as under :

(*i*) Visit IBBI's website, *www.ibbi.gov.in* ;

(*ii*) Select "Public Comments" ;

(*iii*) From the drop-down menu, select "comments on regulations" ;

(*iv*) Provide your Name, and Email ID ;

(*v*) Select the stakeholder category, namely,-

(*a*) Corporate debtor ;

(*b*) Creditor to a corporate debtor ;

(*c*) Insolvency professional ;

(*d*) Insolvency professional agency ;

(*e*) Insolvency professional entity ;

(*f*) Personal guarantor to a corporate debtor ;

(*g*) Proprietorship firms ;

(*h*) Partnership firms ;

(*i*) Academics ;

(*j*) Investors ;

(*k*) Others.

8. Select the regulations, you wish to make a comment upon, from the dropdown menu, as under :

(*a*) IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 ;

(*b*) IBBI (Insolvency Professional Agencies) Regulations, 2016 ;

(*c*) IBBI (Insolvency Professionals) Regulations, 2016 ;

(*d*) IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ;

(*e*) IBBI (Liquidation Process) Regulations, 2016 ;

(*f*) IBBI (Information Utilities) Regulations, 2017 ;

(*g*) IBBI (Fast Track Insolvency Resolution for Corporate Persons) Regulations, 2017 ;

(*h*) IBBI (Inspections and Investigations) Regulations, 2017 ;

(*i*) IBBI (Voluntary Liquidation Process) Regulations, 2017 ;

(*j*) IBBI (Mechanism for Issuing Regulations) Regulations, 2018 ;

(*k*) IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 ;

(*l*) IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019

Kindly note that the selected regulations can be found by clicking the pdf icon right next to the "select regulations" option.

9. Select the kind of comments you wish to make, namely,

(*a*) General Comments ; or

(*b*) Specific Comments.

10. If you have selected "General Comments", please select one of the following options :

(*a*) Inconsistency, if any, between the provisions within any regulations (intra-regulations) ;

(*b*) Inconsistency, if any, between the provisions in different regulations (inter-regulations) ;

(*c*) Inconsistency, if any, between the provisions in any regulations with those in the rules ;

(*c*) Inconsistency, if any, between the provisions in any regulations with those in the Code ;

(*e*) Inconsistency, if any, between the provisions in any regulations with those in any other law ;

(*f*) Any difficulty in implementation of any of the provisions in any regulations ;

(*g*) Any provision that should have been provided in any regulations, but has not been provided ;

(*h*) Any provision that has been provided in any regulations, but should not have been provided.

And then write comments in the "Write Comment" box.

11. If you have selected "Specific Comments", please select regulation number and then sub-regulation number, and write comments in the "Write Comment" box, under the selected regulation/sub-regulation number.

12. You can make comments on more than one regulation, or more than one regulation/sub-regulation number, by clicking on more comments and repeating the process outlined above from point 8 onwards.

13. Click 'Submit', after entering the image text in the box provided on the portal, if you have no more comments to make.

Illustration

14. If you are a creditor to a corporate debtor and wish to make a specific comment on sub-regulation (1) of regulation 6 relating to eligibility for appointment of liquidator as specified in the IBBI (Voluntary Liquidation Process) Regulations, 2017. The steps that you need to follow are :

(*i*) Visit IBBI's website, *www.ibbi.gov.in* ;

(*ii*) Select "Public Comments" ;

(*iii*) From the drop-down menu, select "comments on regulations" ;

(*iv*) Provide your Name and E-mail ID ;

(*v*) Select the stakeholder category, which in this case is "creditor to a corporate debtor" ;

(v*i*) Select the regulations, which in this case is "IBBI (Voluntary Liquidation Process) Regulations, 2017" ;

(*vii*) Select "Specific Comments" ;

(*viii*) Select the regulation/sub-regulation number, which in this case is "regulation 6" and "sub-regulation (1)" ;

(*ix*) Write your comments in the box "Write Comment" ;

(*x*) If you wish to give a comment on another regulations, or another regulation number of the same regulations, repeat the process from '(*vi*)' onwards by clicking the icon "More Comments" ;

(*xi*) Click 'Submit', after entering the image text in the box provided on the portal and after you have given all your comments. ❖❖❖

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[2020] 156 CLA (St.) 20

Relaxation in timelines for compliance with regulatory requirements

SEBI/HO/MIRSD/DOP/CIR/P/2020/82, dated 15th May 2020, issued by SEBI

1. In view of the situation arising due to COVID-19 pandemic, lockdown imposed by the Government and representations received from Stock Exchanges, SEBI had earlier provided relaxations in timelines for compliance with various regulatory requirements by the trading members/clearing members, *vide* Circular Nos. SEBI/HO/MIRSD/DOP/CIR/P/2020/61 dated 16th April, 2020, SEBI/HO/MIRSD/DOP/CIR/P/2020/62 dated 16th April, 2020, and SEBI/HO/MIRSD/DOP/CIR/P/2020/68 dated 21st April, 2020.

2. In view of the prevailing situation and representations received from the stock exchanges, it has been decided to further extend the timelines for compliance with the regulatory requirements, by the trading members/clearing members/depository participants, mentioned in the aforesaid SEBI circulars, as under :

SEBI Circular	*S. Nos. for which timeline is extended*	*Extended timeline / Period of exclusion*
SEBI/HO/MIRSD/DOP/CIR/P/2020/61 dated 16th April, 2020.	I	Till 30th June, 2020 for the month of April 2020.
	II	Till 30th June, 2020 for the quarter ended on 31st March, 2020.
	X and XI	Till 30th June, 2020.
SEBI/HO/MIRSD/DOP/CIR/P/2020/62 dated 16th April, 2020.	III	Period of exclusion shall be from 23rd March, 2020 till 30th June, 2020.
SEBI/HO/MIRSD/DOP/CIR/P/2020/68 dated 21st April, 2020.	I, II and III	Till 30th June, 2020.
	IV and V	Two months from the due date.

3. All other conditions specified in the aforementioned circulars shall continue to remain applicable.

4. Stock exchanges, clearing corporations and depositories are directed to bring the provisions of this circular to the notice of their members/participants and also disseminate the same on their websites.

5. This circular is issued in exercise of powers conferred under section 11(1) of the Securities and Exchange Board of India Act, 1992, and section 19 of the Depositories Act, 1996 to protect the interests of investors in securities and to promote the development of, and to regulate the securities markets. ❖❖❖

[2020] 156 CLA (St.) 21

Relaxations relating to procedural matters – Takeovers and Buy-back

SEBI/CIR/CFD/DCR1/CIR/P/2020/83, dated 14th May 2020, issued by SEBI

1. In view of the impact of the COVID-19 pandemic and the lockdown measures undertaken by Central and State Governments, based on representations, the following one time relaxations are granted from strict enforcement of certain regulations of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Regulations') and SEBI (Buy-back of Securities) Regulations, 2018 ('Buy-back Regulations') pertaining to open offers and buy-back tender offers opening upto 31st July, 2020.

1.1 Service of the letter of offer and/or tender form and other offer related material to shareholders may be undertaken by electronic transmission as already provided under regulation 18(2) of the Takeover Regulations and regulation 9(*ii*) of Buy-back Regulations subject to the following :–

1.1.1 The acquirer/company shall publish the letter of offer and tender form on the websites of the company, registrar, stock exchanges and the manager(s) to offer.

1.1.2 The acquirer/company along with lead manager(s) shall undertake all adequate steps to reach out to the/its shareholders through other means such as ordinary post or SMS or audio-visual advertisement on television or digital advertisement, etc.

1.1.3 Further, the acquirer/company shall make an advertisement containing details regarding the dispatch of the letter of offer electronically and availability of such letter of offer along with the tender form on the website of the company, registrar and manager to the offer in the same newspapers in which (*i*) detailed pubic statement was published as per regulation 14(3) of Takeover Regulations or (*ii*) public announcements was published as per regulation 7(*i*) of Buy-back regulations.

1.1.4 Further, the acquirer/company may have the flexibility to publish the dispatch advertisement in additional newspapers, over and above those required under the respective regulations.

1.1.5 The acquirer/company shall make use of advertisements in television channels, radio, internet, etc., to disseminate information relating to the tendering process. Such advertisements can be in the form of crawlers/ tickers as well.

1.1.6 All the advertisement issued should also be made available on the website of the company, registrar, managers to the offer, and stock exchanges.

2. The acquirer/company and the manager to offer shall provide procedure for inspection of material documents electronically.

3. As far as possible, attempts will be made to adhere to the existing prescribed framework.

4. This circular shall come into force with immediate effect.

5. This circular is issued in exercise of powers conferred by section 11(1) of the Securities and Exchange Board of India Act, 1992. ❖❖❖

[2020] 156 CLA (St.) 22

Relaxation from the applicability of SEBI Circular dated 10th October, 2017 on non-compliance with the minimum public shareholding requirements

SEBI/HO/CFD/CMD1/CIR/P/2020/81, dated 14th May 2020, issued by SEBI

1. SEBI Circular No. CFD/CMD/CIR/P/2017/115, dated 10th October, 2017 lays down the procedure to be followed by the recognised stock exchanges/ depositories with respect to MPS non-compliant listed entities, their promoters and directors, including levy of fines, freeze of promoter holding, etc.

2. After taking into consideration requests received from listed entities and industry bodies as well as considering the prevailing business and market conditions, it has been decided to grant relaxation from the applicability of the 10th October, 2017 circular. Accordingly, the stipulations of the aforesaid 10th October, 2017 SEBI circular are relaxed for listed entities for whom the deadline to comply with MPS requirements falls between the period from 1st March, 2020 to 31st August, 2020. Recognised stock exchanges are advised not to take any penal action as envisaged in the 10th October, 2017 circular against such entities in case of non-compliance during the said period. Penal actions, if any, initiated by stock exchanges from 1st March, 2020 till date for non-

compliance of MPS requirements by such listed entities may be withdrawn.

3. This Circular shall come into force with immediate effect. The stock exchanges are advised to bring the provisions of this circular to the notice of all listed entities that have issued specified securities and also disseminate on their websites.

4. The circular is issued in exercise of the powers conferred under section 11(1) of the Securities and Exchange Board of India Act, 1992 read with regulations 97, 98, 101 and 102 of the LODR Regulations. ❖❖❖

[2020] 156 CLA (St.) 23

Additional relaxation in relation to compliance with certain provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 – COVID-19 pandemic

SEBI/HO/CFD/CMD1/CIR/P/2020/79, dated 12th May 2020, issued by SEBI

1. In view of the COVID-19 pandemic, SEBI had provided relaxations to listed entities, from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('SEBI LODR'/ 'LODR') and circulars issued thereunder *vide* the following circulars :

- No. SEBI/HO/CFD/CMD1/CIR/P/2020/38 dated 19th March, 2020,
- No. SEBI/HO/CFD/CMD1/CIR/P/2020/48 dated 26th March, 2020,
- No. SEBI/HO/CFD/CMD1/CIR/P/2020/63 dated 17th April, 2020 and
- No. SEBI/HO/CFD/CMD1/CIR/P/2020/71 dated 23rd April, 2020.

It has been decided to grant the following further relaxations/issue clarifications regarding provisions of the LODR in the face of challenges faced by listed entities due to the COVID-19 pandemic.

***A.* Relaxations necessitating out of MCA circulars**

2. The Ministry of Corporate Affairs ('MCA'), *vide* Circulars dated 8th April, 2020 and 13th April, 2020 provided certain relaxations for companies, including conducting extraordinary general meeting ('EGM') through Video Conferencing ('VC') or through other audio-visual means ('OAVM') ('electronic mode'). Further, *vide* circular dated 5th May, 2020, MCA also extended these relaxations to AGMs of companies conducted during the calendar year 2020 ; the circular has also dispensed with the printing and despatch of annual reports to shareholders. Accordingly, the following related provisions of the LODR are relaxed :

(*i*) Requirement of sending physical copies of annual report to shareholders

3. Regulation 36(1)(*b*) and (*c*) of the LODR prescribes that a listed entity shall send a hard copy of the statement containing salient features of all the documents, as prescribed in section 136 of the Companies Act, 2013 to the shareholders who have not registered their email addresses and hard copies of full annual reports to those shareholders, who request for the same, respectively. Regulation 58(1)(*b*) and (*c*) of the LODR extend similar requirements to entities which have listed their NCDs and NCRPS'.

4. The requirements of regulation 36(1)(*b*) and (*c*) and regulation 58(1)(*b*) and (*c*) of the LODR are dispensed with for listed entities who conduct their AGMs during the calendar year 2020 (*i.e.*, till 31st December, 2020).

(*ii*) Requirement of proxy for general meetings

5. Regulation 44(4) of the LODR specifies that the listed entity shall send proxy forms to holders of securities in all cases mentioning that a holder may vote either for or against a resolution.

6. The requirement under regulation 44(4) of the LODR is dispensed with temporarily, in case of meetings held through electronic mode only. This relaxation is available for listed entities who conduct their AGMs through electronic mode during the calendar year 2020 (*i.e.*, till 31st December, 2020).

(*iii*) Requirement of dividend warrants/cheques

7. Regulation 12 of the LODR prescribes issuance of 'payable at par' warrants or cheques in case it is not possible to use electronic modes of payment. Further, in case the amount payable as dividend exceeds Rs.1,500, the 'payable-at-par' warrants or cheques shall be sent by speed post. The requirements of this regulation will apply upon normalisation of postal services. However, in cases where email addresses of shareholders are available, listed entities shall endeavour to obtain their bank account details and use the electronic modes of payment specified in Schedule I of the LODR.

***B.* Relaxation from publication of advertisements in the newspapers :**

8. SEBI, *vide* Circular No. SEBI/HO/CFD/CMD1/CIR/P/2020/48 dated 26th March, 2020 had exempted publication of advertisements in newspapers, as required under regulation 47, for all events scheduled till 15th May, 2020, since some newspapers had stopped their print versions due to COVID-19 pandemic. Similarly, *vide* Circular No. SEBI/HO/CFD/CMD1/CIR/P/2020/63 dated 17th April, 2020, a similar requirement that exists in regulation 52(8) of the LODR Regulations and applies to entities which have listed their NCDs and NCRPS' was also exempted till 15th May, 2020.

9. In view of the continuing lockdown and the resultant bottlenecks relating

to print versions of newspapers, the aforesaid exemptions from publication of advertisements in newspapers are extended for all events scheduled till 30th June, 2020.

***C.* Relaxation from publishing quarterly consolidated financial results under regulation 33(3)(*b*) of the LODR for certain categories of listed entities :**

10. As per regulation 33(3)(*b*) of the LODR, in case a listed entity has subsidiaries, the listed entity shall submit quarterly/year-to-date consolidated financial results.

11. The Companies (Indian Accounting Standards (Ind-AS)) Rules, 2015 stipulate the adoption and applicability of Ind-AS in a phased manner beginning from the financial year 2016-17. Currently, Ind-AS is applicable to all listed entities with the exception of those in the banking and insurance sectors. RBI and IRDA have not yet notified the date of implementation of Ind-AS for banks and insurance companies, respectively.

12. SEBI has received representations from listed entities that are banks or insurance companies as well as those that have banks and/or insurance companies as subsidiaries, highlighting the challenges in preparing consolidated financial results under regulation 33(3)(*b*) in view of different accounting standards being followed by companies belonging to same group and the difficulties in restating those financials as per Ind-AS due to the prevailing circumstances in view of COVID-19 pandemic.

13. After considering the representations, the following have been decided :

(*a*) Listed entities which are banking and/or insurance companies or having subsidiaries which are banking and/or insurance companies may submit consolidated financial results under regulation 33(3)(*b*) for the quarter ending 30th June, 2020 on a voluntary basis. However, they shall continue to submit the standalone financial results as required under regulation 33(3)(*a*) of the LODR.

(*b*) If such listed entities choose to publish only standalone financial results and not consolidated financial results, they shall give reasons for the same.

14. This Circular shall come into force with immediate effect. The stock exchanges are advised to bring the provisions of this circular to the notice of all listed entities and also disseminate on their websites.

15. The Circular is issued in exercise of the powers conferred under section 11(1) of the Securities and Exchange Board of India Act, 1992 read with regulation 101 of the LODR. ❖❖❖

[2020] 156 CLA (St.) 26

Relaxations relating to procedural matters – Issues and listing pertaining to rights issue

SEBI/HO/CFD/DIL2/CIR/P/2020/78, dated 6th May 2020, issued by SEBI

1. In view of the impact of the COVID-19 pandemic and the lockdown measures undertaken by Central and State Governments, based on representations, SEBI has decided to grant the following one time relaxations from strict enforcement of certain regulations of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('ICDR Regulations'), pertaining to rights issue opening upto 31st July, 2020 :

(*i*) Service of the abridged letter of offer, application form and other issue material to shareholders may be undertaken by electronic transmission as already provided under regulation 77(2) of the ICDR Regulations. Failure to adhere to modes of dispatch through registered post or speed post or courier services due to prevailing COVID-19 related conditions will not be treated as non-compliance during the said period. However, the issuers shall publish the letter of offer, abridged letter of offer and application forms on the websites of the company, registrar, stock exchanges and the lead manager(s) to the rights issue. Further, the issuer company along with lead manager(s) shall undertake all adequate steps to reach out its shareholders through other means such as ordinary post or SMS or audio-visual advertisement on television or digital advertisement, etc.

(*ii*) The issue related advertisement as mandated by regulation 84(1), shall contain additional details as regards the manner in which the shareholders who have not been served notice electronically may apply. The issuer may have the flexibility to publish the dispatch advertisement in additional newspapers, over and above those required in regulation 84. The advertisement should also be made available on the website of the Issuer, Registrar, lead managers, and stock exchanges. The issuer shall make use of advertisements in television channels, radio, internet, etc., to disseminate information relating to the application process. Such advertisements can be in the form of crawlers/tickers as well.

(*iii*) In terms of SEBI Circular dated 22nd January, 2020, SEBI introduced dematerialised rights entitlements ('REs'). Further, physical shareholders are required to provide their demat account details to Issuer/Registrar to the Issue for credit of REs. In view of COVID-19 pandemic and the lockdown measures undertaken by Central and State

Governments, in case the physical shareholders who have not been able to open a demat account or are unable to communicate their demat details, in terms of clause 1.3.4 of SEBI Circular dated 22nd January, 2020, to the issuer/registrar for credit of REs within specified time, such physical shareholders may be allowed to submit their application subject to following conditions :

(*a*) Issuer along with lead manager(s) and other recognised intermediary shall institute a mechanism to allow physical shareholders to apply in the rights issue. Issuer along with lead manager(s) shall ensure to take adequate steps to communicate such a mechanism to physical shareholders before the opening of the issue.

(*b*) Such shareholder shall not be eligible to renounce their rights entitlements.

(*c*) Such physical shareholders shall receive shares, in respect of their application, only in demat mode. The lead managers may also be guided by para 10 of the Form A Schedule V of the ICDR Regulations.

(*iv*) In terms of regulation 76 of the ICDR Regulations, an application for a rights issue shall be made only through ASBA facility. In view of the difficulties faced due to COVID-19 pandemic and the lockdown measures, and in order to ensure that all eligible shareholders are able to apply to rights issue during such times, the issuer shall along with lead manager(s) to the issue, the registrar, and other recognised intermediaries [as deemed fit by issuer and lead manager(s)] institute an optional mechanism (non-cash mode only) to accept the applications of the shareholders subject to ensuring that no third party payments shall be allowed in respect of any application.

(*v*) In respect of mechanisms at points (*iii*) and (*iv*) above, the issuer along with lead manager(s) shall ensure the following:

(*a*) The mechanism(s) shall only be an additional option and not a replacement of the existing process. As far as possible, attempts will be made to adhere to the existing prescribed framework.

(*b*) The mechanism(s) shall be transparent, robust and have adequate checks and balances. It should aim at facilitating subscription in an efficient manner without imposing any additional costs on investors. The issuer along with lead manager(s), and registrar shall satisfy themselves about the transparency, fairness and integrity of such mechanism.

(*c*) An FAQ, online dedicated investor helpdesk, and helpline shall be created by the issuer company along with lead manager(s) to guide investors in gaining familiarity with the application process and resolve difficulties faced by investors on priority basis.

(*d*) The issuer along with lead manager(s), registrar, and other recognised intermediaries (as incorporated in the mechanism) shall be responsible for all investor complaints.

2. In respect of all offer documents filed until 31st July, 2020, it has been decided to grant the following relaxations :

(*i*) Authentication/certification/undertaking(s) in respect of offer documents, may be done using digital signature certifications.

(*ii*) The issuer along with lead manager(s) shall provide procedure for inspection of material documents electronically.

3. This circular shall come into force with immediate effect.

4. This circular is issued in exercise of powers conferred by section 11(1) of the Securities and Exchange Board of India Act, 1992. ❖❖❖

[2020] 156 CLA (St.) 28

Relaxation in compliance with requirements pertaining to mutual funds

SEBI/HO/IMD/DF3/CIR/P/2020/76, dated 30th April 2020, issued by SEBI

1. SEBI *vide* Circular No. SEBI/HO/IMD/DF3/CIR/P/2020/47, dated 23rd March, 2020 had temporarily relaxed certain compliance requirements and extended the timelines for compliance.

2. Further, based on the representations received from AMFI, it has been decided to grant the following relaxations specified in SEBI (Mutual Funds) Regulations, 1996 and circulars issued thereunder :

(*a*) The effective date of implementation of certain policy initiatives have been extended as under :

Sl. No.	*Circular Name*	*Particulars*	*Extended date*
1	Risk management framework for liquid and overnight funds and norms governing investment in short-term deposits dated 20th September, 2019	Liquid funds shall hold at least 20 per cent of its net assets in liquid assets.	30th June, 2020

2	Review of investment norms for mutual funds for investment in Debt and Money Market Instruments dated 1st October, 2019	Existing open ended mutual fund schemes shall comply with the revised limits for sector exposure.	30th June, 2020
3	Valuation of money market and debt securities dated 24th September, 2019	Amortization based valuation shall be dispensed with and irrespective of residual maturity, all money market and debt securities shall be valued in terms of paragraph 1.1.2.2 of the Circular	30th June, 2020

(*b*) The timelines for submission of cyber security audit reports as mandated in SEBI circular dated 10th January, 2019 is extended by two months, *i.e.*, till 31st August, 2020.

(*c*) The timelines for filing scheme annual reports for the year 2019-20 is extended by one month, *i.e.*, till 31st August, 2020.

3. This circular is issued in exercise of the powers conferred under section 11(1) of the Securities and Exchange Board of India Act, 1992, read with regulation 77 of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. ❖❖❖

[2020] 156 CLA (St.) 29

Existing grandfathered unlisted NCDs

SEBI/HO/IMD/DF2/CIR/P/2020/75, dated 28th April 2020, issued by SEBI

1. SEBI *vide* Circular SEBI/HO/IMD/DF2/CIR/P/2019/104, dated 1st October, 2019 has allowed the existing unlisted NCDs to be grandfathered till maturity, such NCDS are herein referred to as "identified NCDs".

2. It is hereby clarified that the grandfathering of the identified NCDs is applicable across the mutual fund industry. Accordingly, mutual funds can transact in such identified NCDs and the criteria as specified in para B(1) of SEBI Circular dated 1st October, 2019 is not applicable.

3. However, investments in such identified NCDs shall continue to be subject to compliance with investment due diligence and all other applicable investment restrictions.

4. Based on the request received, the timeline for compliance with the maximum limits for investment in unlisted NCDs (as issued *vide* SEBI Circulars dated 1st October, 2019 and 23rd March, 2020) as 15 per cent and 10 per cent of the debt portfolio of the scheme is extended to 30th September, 2020 and 31st December, 2020, respectively.

5. This circular is issued in exercise of powers conferred under section 11 (1) of the Securities and Exchange Board of India Act, 1992, read with the provisions of regulations 77 of SEBI (Mutual Funds) Regulations, 1996, to protect the interest of investors in securities and to promote the development of, and to regulate the securities market. ❖❖❖

[2020] 156 CLA (St.) 30

Securities and Exchange Board of India (Payment of Fees) (Amendment) Regulations, 2020

SEBI/LAD-NRO/GN/2020/011, dated 8th May 2020, issued by SEBI

In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following regulations to further amend the Securities and Exchange Board of India (Stock Brokers) Regulations, 1992, Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 and Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018, namely: -

1. These regulations may be called the Securities and Exchange Board of India (Payment of Fees) (Amendment) Regulations, 2020.

2. They shall come into force on 1st June, 2020.

Amendments to Securities and Exchange Board of India (Stock Brokers) Regulations, 1992.

3. In the Securities and Exchange Board of India (Stock Brokers) Regulations, 1992, —

I. In Schedule V, in Part B, in clause 3, after sub-clause (1), the following shall be inserted, namely, –

"(1A) Every stock broker in cash segment, equity derivatives segment, currency derivatives segment, interest rate derivatives segment and commodity derivatives segment (other than agri commodity derivative) liable to pay fees as a percentage of their turnover as specified at sub-clause (1) shall, for the period 1st June, 2020 to 31st March, 2021, pay only 50 per cent of fees as calculated therein, including for off-market transactions undertaken by them.".

Amendments to Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

4. In the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, -

I. In Schedule *III*, after the existing table in clause 2(*a*), the following table shall be inserted for the period from 1st June, 2020 to 31st December, 2020, namely, –

"Size of the issue, including intended retention of oversubscription	*Amount /Rate of fees*	*Amount/Rate of fees for filing within one year after expiry of SEBI observation letter*
Less than or equal to ten crore rupees.	A flat charge of fifty thousand rupees (50,000).	A flat charge of twenty five thousand rupees (25,000).
More than ten crore rupees, but less than or equal to five thousand crore rupees.	0.05 per cent of the issue size.	0.025 per cent of the issue size.
More than five thousand crore rupees.	Two crore fifty lakh rupees (2,50,00,000) *plus* 0.0125 per cent of the portion of the issue size in excess of five thousand crore rupees (5000,00,00,000).	One crore twenty five lakh rupees (1,25,,00,000) *plus* 0.00625 per cent of the portion of the issue size in excess of five thousand crore rupees (5000,00,00,000)".

II. In schedule III, after the existing table in clause 2(b), the following table shall be inserted for the period from 1st June, 2020 to 31st December, 2020, namely, –

Size of the issue, including intended retention of oversubscription	*Amount /Rate of fees*	*Amount / Rate of fees for filing within one year after expiry of SEBI Observation letter*
Less than or equal to ten crore rupees	A flat charge of twenty five thousand rupees (25,000).	A flat charge of twelve thousand five hundred rupees (12,500).
More than ten crore rupees#	0.025 per cent of the issue size.	0.0125 per cent of the issue size.
# to be read as twenty-five crore with effect from 21st April, 2020		

Amendments to Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018

5. In the Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018 -

I. In schedule V, after the existing table, the following table shall be inserted for the period from 1st June, 2020 to 31st December, 2020, namely, –

Offer Size	*Fee (Rupees)*
Less than or equal to rupees ten crore	2,50,000

More than rupees ten crore but less than or equal to rupees one thousand crore	0.25 per cent of the offer size
More than rupees one thousand crore	2,50,00,000/-plus 0.0625per cent of the portion of offer size in excess of rupees one thousand crore.".

❖❖❖

FEMA

[2020] 156 CLA (St.) 32

Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2020

SO 1374(E), dated 27th April 2020, issued by Ministry of Finance

In exercise of the powers conferred by clauses (*aa*) and (*ab*) of sub-section (2) of section 46 of the Foreign Exchange Management Act, 1999 (42 of 1999), the Central Government hereby makes the following rules further to amend the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, namely :–

Short title and commencement.

1. (1) These rules may be called the Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ('the principal rules'), in rule 7, the *Explanation* shall be omitted.

3. In the principal rules, after rule 7, the following rule shall be inserted, namely :

"7A. *Acquisition after renunciation of rights*. – A person resident outside India who has acquired a right from a person resident in India who has renounced it may acquire equity instruments (other than share warrants) against the said rights as per pricing guidelines specified under rule 21 of these rules.".

4. In the principal rules, in Schedule 1, in the Table, –

(*i*) against serial number 15.3.1, in the entries under column (2), under sub-heading "Note", in serial number (3), after the words "first store", the words "or start of online retail, whichever is earlier" shall be inserted ;

(*ii*) serial number F.8.1, for the entries in column (2), under the heading

"Sector/Activity", the following entry shall be substituted, namely :–

"Insurance Company"

(*iii*) for serial number F. 8.2 and the entries relating thereto, the following serial number and entries shall be substituted, namely :–

(1)	(2)	(3)	(4)
"F.8.2	Intermediaries or Insurance Intermediaries including insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time-to-time.	100%	Automatic" ;

(*iv*) after serial number F.8.2 as so substituted, the following serial number and entries shall be inserted, namely :–

(1)	(2)
"F.8.3	Other Conditions
	(*a*) No Indian Insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed forty-nine percent of the paid up equity capital of such Indian Insurance Company. (*b*) The foreign investment up to forty-nine percent of the total paid-up equity of the Indian Insurance Company shall be allowed on the automatic route subject to approval or verification by the Insurance Regulatory and Development Authority of India. (*c*) Foreign investment in this sector shall be subject to compliance with the provisions of the Insurance Act, 1938 and the condition that companies receiving FDI shall obtain necessary license or approval from the Insurance Regulatory and Development Authority of India for undertaking insurance and related activities. (*d*) An Indian Insurance company shall ensure that its ownership and control remains at all times in the hands of resident Indian entities as determined by Department of Financial Services or Insurance Regulatory and Development Authority of India as per the rules or regulation issued by them from time-to-time. (*e*) Foreign portfolio investment in an Indian Insurance company shall be governed by the provisions contained in Chapter-IV, rule 10 and rule 11 read with Schedule-II of these rules and provisions of the Securities and

	Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014. (*f*) Any increase in foreign investment in an Indian Insurance company shall be in accordance with the pricing guidelines specified in these rules. (*g*) The foreign equity investment cap of 100 per cent shall apply on the same terms as above to insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time-to-time. However, the condition of Indian owned and controlled, as specified in clause (d) above, shall not be applicable to Intermediaries and Insurance Intermediaries and composition of the Board of Directors and key management persons shall be as specified by the concerned regulators from time-to-time. (*h*) The foreign direct investment proposals shall be allowed under the automatic route subject to verification by the Authority and the foreign investment in intermediaries or insurance intermediaries shall be governed by the same terms as provided under rules 7 and 8 of the Indian Insurance Companies (Foreign Investment) Rules, 2015, as amended from time-to-time : Provided that where an entity like a Bank, whose primary business is outside the insurance area, is allowed by the Authority to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from the primary (non-insurance related) business must remain above 50 per cent of their total revenues in any financial year. (*i*) The insurance intermediary that has majority shareholding of foreign investors shall undertake the following : (*i*) be incorporated as a limited company under the provisions of the Companies Act, 2013 ; (*ii*) at least one from among the chairman of the Board of directors or the chief executive officer or principal officer or managing director of the insurance intermediary shall be a resident Indian citizen ;

	(*iii*) shall take prior permission of the Authority for repatriating dividend ; (*iv*) shall bring in the latest technological, managerial and other skills ; (*v*) shall not make payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond what is necessary or permitted by the Authority; (*vi*) shall make disclosures in the formats to be specified by the Authority of all payments made to its group or promoter or subsidiary or interconnected or associate entities ; (*vii*) composition of the Board of directors and key management persons shall be as specified by the concerned regulators. (*j*) The other condition under the heading 'Banking-Private Sector' specified against serial number F.2.1 shall be applicable in respect of bank promoted insurance companies. (*k*) Terms 'Control', 'Equity Share Capital', 'Foreign Direct Investment' (FDI), 'Foreign Investors', 'Foreign Portfolio Investment', 'Indian Insurance Company', 'Indian Company', 'Indian Control of an Indian Insurance Company', 'Indian Ownership', 'Non-resident Entity', 'Public Financial Institution', 'Resident Indian Citizen', 'Total Foreign Investment' will have the same meaning as provided in Notification No. GSR 115(E), dated the 19th February, 2015 issued by Department of Financial Services and regulations issued by Insurance Regulatory and Development Authority of India from time-to-time.".

(*v*) in the principal rules, in Schedule II, for the entries in clause (*iii*) of sub-paragraph (*a*) of paragraph 1, the following entries shall be substituted, namely :–

"The FPIs investing in breach of the prescribed limit shall have the option of divesting their holdings within five trading days from the date of settlement of the trades causing the breach. In case the FPI chooses not to divest, then the entire investment in the company by such FPI and its investor group shall be considered as investment under Foreign Direct Investment (FDI) and the FPI and its investor group shall not make further portfolio investment in the company concerned. The FPI, through its designated custodian, shall bring

the same to the notice of the depositories as well as the concerned company for effecting necessary changes in their records, within -seven trading days from the date of settlement of the trades causing the breach. The divestment of holdings by the FPI and the reclassification of FPI investment as FDI shall be subject to further conditions, if any, specified by Securities and Exchange Board of India and the Reserve Bank in this regard. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale or conversion to FDI within the prescribed time, shall not be reckoned as a contravention under these rules.". ❖❖❖

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ARBITRATION AND CONCILIATION ACT

[2020] 156 CLA 1 (SC)

SUPREME COURT OF INDIA

Dyna Technologies (P.) Ltd.

v.

Crompton Greaves Ltd.

Civil Appeal No. 2153 of 2010

N V Ramana, Mohan M Shantanagoudar & Ajay Rastogi, JJ

18th December 2019

The High Court ought to have considered remanding the matter to the Tribunal in the usual course where it had concluded that the award ceased to exist

Where the High Court concluded that there was no reasoned award, then the award ceased to exist and the court was functus officio under section 34 for hearing the challenge to the award under the provisions of that section and to come to a conclusion that the arbitration award was not in the terms of the agreement.

Arbitration and Conciliation Act, 1996 – Section 34 – Arbitral award – Setting aside – Application for – High Court concluding that there was no reasoned award – Does award cease to exist making court functions officio – Whether when the Court has concluded that the arbitral award was not in terms of the agreement, the court cannot hear the challenge to the award in terms of the agreement – Held, yes [Paras 37 to 39].

SYNOPSIS

Setting aside the Madras High Court judgment in *Crompton Greaves Ltd*. v. *Dyna* [CMP No. 11892 of 2001, dated 27th April, 2007], the Supreme Court

has held the award unintelligible and cannot be sustained. Considering that the matter has been protracted for 25 years, it considered appropriate to direct the respondents to pay a sum of Rs. 30,00,000 to the appellant in full and final settlement.

Cases referred to : *K N Sathyapalan* v. *State of Kerala* [2007] 13 SCC 43 ; *Raipur Development Authority* v. *Chokhamal Contractors* [1990] 4 CLA 106 (SC) ; *S Harcharan Singh* v. *Union of India* [1990] 4 CLA 205 (SC) and *Som Datt Builders Ltd.* v. *State of Kerala* [2009] 4 ARB LR 13 (SC).

Appearances : Ms. Diksha Rai & Ms. Renu Gupta for the Appellant. Ashok Kumar Jain, Pankaj Jain, Amit Kasera, & Bijoy Kumar Jain for the Respondent.

JUDGMENT

RAMANA, J

1. The question involved herein revolves around the requirement of reasoned award and the cautionary tale for the parties and arbitrators to have a clear award, rather than to have an award which is muddled in form and implied in its content, which inevitably leads to wastage of time and resources of the parties to get clarity, and in some cases, frustrate the very reason for going for an arbitration.

2. This appeal is filed against the final order and judgment dated 27th April, 2007, passed by the High Court of Judicature at Madras whereby the High Court partly allowed the appeal filed by the respondent and set aside the award of Arbitral Tribunal relating to claim No. 2 for payment of compensation for the losses suffered due to unproductive use of machineries.

3. Brief facts of the case are that a contract was entered into between DCM Shriram Aqua Foods Ltd. ('DCM') and Crompton Greaves Ltd. ('CGL') for an aquaculture unit to be set up by such Principal, namely, DCM. CGL invited tenders for carrying out certain works for construction of ponds, channels, drains and associated works. The appellant-Dyna Technologies (P.) Ltd. gave its proposal, estimate and quotation for carrying out the work. Thereafter, the respondent CGL placed a letter of intent dated 25th July, 1994, relevant portions of which are as under :

> "10. In the event that you are forced to keep your equipment and manpower idle due to non-availability of work fronts due to reasons attributable to DCM or due to legal disturbances not connected with you, you shall be compensated as follows :
>
> (*i*) Maximum seven days of stoppage of work without any compensation.
>
> (*ii*) CGL reserves the right to advice you to demobilise partially or fully *in lieu* of paying compensation for such delays. Under such circumstances, you shall be paid such compensation towards transportation of equipment to site at mutually agreed rates.

(*iii*) Suitable time extension shall be given to complete the work to compensate the delay caused due to the stoppage of work.

11. Storage and Security: you will be responsible to provide necessary stores, office and labour camps for your staff at site. Only open area for construction of above will be given to you. Electricity will be provided at one point on chargeable basis at actuals. You will be responsible to tap the same to your required place.

A format work order will be charged subsequently which will cover other General Terms and Conditions. Labour rules, Workmen Compensation, etc., which may not be covered by this LOI and the same shall also be part of this LOI."

4. The appellant made certain queries and clarifications, and by letter dated 10th October, 1994, CGL amended the contract as suggested by the appellant-company. Thereafter, CGL issued work order on 15th November, 1994 setting out the terms and conditions of the work, material portions of which are stated as under :

"2. *Termination of contract* :

The company reserves the right to terminate this work at any stage without payment of compensation due to any of the following reasons :

(*a*) If the original contract between the client and the company is terminated/ suspended.

(*b*) The company is unable to proceed with the work due to reasons like non-availability of work fronts, delay in availability of materials or delay in receipt of payments from clients, etc.

(*c*) If the contractor is not able to carry out work to the satisfaction of the company's clients representatives.

(*d*) If the contractor is unable to ensure adequate progress as required by the company and their purchaser.

(*e*) Upon termination of this contract/work order, all rights and obligation of the parties, shall cease provided that the termination shall not relieve the contractor of any of his obligations which may have accrued upto the date of termination.

Upon termination of this contract/work order due to default on the part of the contractor, he/it shall indemnify the company against all losses incurred by the company as a result of such termination."

5. After commencement of the work, the respondent CGL on 5th January, 1995 instructed the employees of the appellant-company to stop the work.

6. The appellant-company claimed compensation for such premature termination of the contract and ultimately the dispute was referred to arbitral tribunal consisting of three arbitrators.

7. The appellant-claimant made the following claims :–

(*1*) Losses due to idle charges ;

(2) Losses due to unproductivity of the men and machineries which could not work due to hindrances ;

(3) Loss of profit as the contract got dissolved ;

(4) Interest on the above claims ; and

(5) Costs.

8. The aforementioned claims are listed in the statement of claims totalling to Rs. 54,21,170.45 initially on 21st June, 1997 and revised to Rs. 53,83,980.45 on 5th July, 1997.

9. The following is a summary of the final claims:—

(1) Idle Charges for machineries and demobilisation as approved by respondent	...Rs. 4,18,551.50
(2) Losses due to unproductive use of machineries	...Rs. 45,85,286.00
(3) Loss of profit	...Rs. 20,89,925.00
(4) And (5) Interest and Costs	... to be assessed
	Rs. 70,93,763.33
Deduct Payment already received	Rs. 17,09,782.88
Balance due	Rs. 53,83,980.45 + Interest and costs

10. It may be relevant to note at this stage that so far as claim No. 1 in reference to the losses due to idle charges is concerned, it was finally settled amicably by the parties and the balance towards the interest component also stands paid.

11. So far as claim No. 3 in reference to loss of profit is concerned, the same was disallowed by the Arbitral Tribunal and it was later not questioned by the appellant-claimant and that attained finality.

12. The only objection is in reference to claim No. 2, *i.e.*, losses due to unproductive use of machineries which was accepted by the Arbitral Tribunal for a sum of Rs. 27,78,125 with interest at 18 per cent per annum *vide* its award dated 30th April, 1998 and correction to award dated 5th May, 1998.

13. Aggrieved by the award passed by the Tribunal, an original petition was filed before the learned Single Judge of the High Court of Judicature at Madras, questioning the award under section 34 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act'), by the respondent. The learned Single Judge, while upholding the award of the Tribunal, observed as under :

"7. Thus the arbitrators have given a specific finding that the amount paid as compensation is actually the amount expended by the fourth respondent and, therefore, the petitioner is liable to reimburse the loss sustained by the fourth respondent. Therefore, this contention is also not acceptable.

9. Further, the learned counsel for the petitioner took this court to various portions of the award and tried to convince this court that the arbitrators have not decided the issue fully appreciating the evidence on record. In the judgment of the Supreme Court reported in *Sundarsan Trading Co.* v. *Government of Kerala* AIR 1989 SC 890 it has been clearly held that the power of the arbitrator in respect of the interpretation of the contract in a matter for arbitration, the arbitrator can pass the award by taking a particular view of the contract and, hence, the court cannot substitute its own decision. Therefore, this court cannot reappraise the evidence and substitutes its views and set aside the award. Also in the case of *Tamil Nadu Civil Supplies Corporation Ltd.* v. *Albert & Co.* [2000] III CTC 83, this court has held that as per section 34 of the Act, the award of the arbitrator can be set aside only on the limited grounds and the award cannot be interfered with simply because another view is possible on the available materials. The arbitrator is a Judge of choice of parties and this court cannot set aside unless it suffers from error apparent on the face of the record. It cannot be set aside even if the court can come to different conclusion on the same facts. The learned counsel for the petitioner has not pointed out any such ground. It cannot also be said that the award is perverse or has error apparent on the face of the record. Therefore, the award passed by the arbitrator is not illegal or invalid and cannot be set aside. Therefore, the petition is dismissed." [emphasis supplied]

14. Aggrieved by the aforesaid decision of the learned Single Judge, the respondent appealed before the Division Bench in OSA No. 234 of 2001. As aforementioned, the High Court *vide* impugned order partly allowed the appeal and set aside the award of the Tribunal relating to claim No. 2. The High Court was of the opinion that the award does not contain sufficient reasons and the statements contained in paragraph 3.1(*a*) to 3.1(*g*) of the award does not provide any reasons, discussions or conclusion. The High Court has observed in the following manner :

"18. It is of course true that an arbitrator cannot be expected to write a detailed judgment as in a law court. However, the present Act contemplates that the award of the arbitrator should be supported by reason. The decision relied upon by the counsel for the respondent, rendered on the basis of the Arbitration Act, 1940, cannot be pressed into service keeping in view the specific provision contained in the Act. Moreover, even assuming that the ratio of the said decision is applicable, we cannot cull out any underlying reason in the award for directing payment of compensation. The basis for the right of the claimant and the basis of the liability of the present appellant have not been indicated anywhere within four corners of the award and in spite of the best efforts it is not possible to discover even any latent reason in the award.

19. It was also contended that the discussion in para 3.1(*g*) of the award contains the basis and reason given by the Tribunal.

We have carefully gone through such paragraph as well as the preceding and subsequent paragraphs. In our considered opinion, the statements recited in para 3.1 including para 3.1(*g*) are only substance of the submissions/claim made by the

claimant and para 3.1(*g*) cannot be construed as a conclusion or even the reasoning given by the Tribunal."

15. Having come to a conclusion that the arbitral award was deficient due to the lack of reasoning, the High Court proceeded further to note that the option of section 34(4) of the Arbitration Act was not necessary as the compensation could not have been claimed considering the fact that the work order has provision barring claim No. 2, in the following manner :

"20. Learned counsel for the respondent has relied upon section 34(4) of the Arbitration Act and has submitted that in case if this court finds that the Arbitral Tribunal has not given reason, even though it is so required under section 31(3) by invoking jurisdiction under section 31(4), this court can give opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to take action as in the opinion of the Arbitral Tribunal would eliminate the grounds for setting aside the arbitral award.

21. We do not think that the present case is a fit case where the Arbitral Tribunal can be called upon to give reasons in support of its conclusion. This is because, in our considered opinion, the terms of the contract clearly exclude the possibility of payment of any compensation on account of premature termination of the contract as envisaged in para C.2(*a*)."

16. Thereafter, the High Court proceeded further to note that the arbitral proceeding was beyond the competence of the Tribunal by considering the conditions under the work order.

17. Learned counsel for the appellant submits that the Arbitral Tribunal comprising of three arbitrators has looked into the entire material available on record and recorded a finding in reference to claim No. 2 (losses suffered due to unproductive use of machineries) based on the case set up by the parties taking note of section 73 of the Indian Contract Act, 1872 ('Contract Act') and relying on the evidence including appraisal of the log books approved by the respondent and held that actual losses/expenses were incurred by the appellant. In the given circumstances it was not open for the High Court in appeal to reappraise and substitute its own view in contravention of the clause of the agreement pursuant to which the arbitral dispute was raised and a finding came to be recorded in acceptance of the claim with regard to the losses suffered by the appellant due to unproductive use of machineries and the interference made by the High Court is beyond the scope of section 37 of the Arbitration Act.

18. Learned counsel further submits that the Division Bench of the High Court did not hold that the evidence relied upon by the Arbitral Tribunal, *i.e.*, the log books were not proper or were lacking quality. As a matter of fact, there was no challenge to the same in the appeal filed by the respondent under section 37 of the Arbitration Act and only the liability was questioned. The learned

counsel further submitted that the only submission of the learned counsel for the respondent before the Arbitral Tribunal and also before the learned Single Judge of the High Court was that there was no provision under the contract granting compensation for loss incurred for unproductive use of machinery and that the Arbitral Tribunal has exceeded its jurisdiction. This issue was examined by the Tribunal and confirmed by the Single Judge of the High Court, after examining the objections raised by the respondent under section 34 of the Arbitration Act. The learned counsel for the appellant contented that interference at the appellate stage is beyond the scope of section 37 of the Arbitration Act and in the given circumstances, claim No. 2 which has been set aside by the Division Bench of the High Court under the impugned judgment deserves to be interfered by this court.

19. Learned counsel also submits that section 73 of the Contract Act confers a right which is for public interest/benefit and contractual clause, if any, which takes away such a right unilaterally of a party is violative of section 23 of the Contract Act. The law which is made for an individual's benefit can be waived by only by such individual, however, where law is for public interest or has policy element, then such rights cannot be waived by an individual person inasmuch as such rights are a matter of public policy/public interest.

20. Learned counsel further submits that a contractual provision which is in contravention of a specific statutory provision, if allowed to be implemented, the same will result in frustration of a right conferred by law or if the contractual clause is immoral or opposed to public policy, in such cases the contractual clause is invalid and void *ab initio* and cannot be enforced to disentitle appellant in claiming the actual loss which has been suffered by it and established before the Arbitral Tribunal and which the respondent is under an obligation to reimburse. In the given circumstances, claim No. 2 which has been set aside by the High Court needs interference by this court. The learned counsel in support has placed reliance on the judgment of this court in *K N Sathyapalan* v. *State of Kerala* [2007] 13 SCC 43.

21. *Per contra,* learned counsel for the respondent, while supporting the findings recorded by the High Court in the impugned judgment, submits that the claim which has been disallowed by the High Court in the impugned judgment is basically a claim for payment of compensation or damages on account of premature termination of contract and neither the Arbitral Tribunal nor the learned Single Judge of the High Court has considered/examined the terms of the contract in appreciating the right of the claimant to claim compensation of damages and the corresponding liability of the respondent to pay/settle the claim. According to him, as per the terms of contract, no such compensation was payable.

22. Learned counsel further submits that it is well settled that the Arbitral

Tribunal cannot travel beyond the terms of contract to award compensation. As a matter of fact, in the present case, the terms of contract expressly prohibit that no compensation is payable if the contract is terminated on account of termination of the project. In the face of such express prohibition, the Arbitral Tribunal has exceeded its jurisdiction and committed a manifest error in directing the payment of compensation even without disclosing the basis of arriving at such a conclusion.

23. Learned counsel for the respondent submits that section 34(2)(*a*)(*iv*) of the Arbitration Act clearly envisages that such an award can be set aside if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration. When there is a specific exclusion/ prohibition in the contract, it was not open for the Tribunal to travel beyond the terms of contract in passing an award which has been taken note of by the Division Bench of the High Court in the impugned judgment and has been rightly set aside, supported by cogent reasons. The learned counsel further submitted that what has been observed by the Division Bench of the High Court in the impugned judgment is based on settled principles of law and needs no interference.

24. We have heard learned counsel for the parties and with their assistance perused the material available on record.

25. Before we devolve into the contractual issues, we need to observe certain pointers on the jurisdiction of the court under section 34 of the Arbitration Act. Section 34 as it stood before the Amendment Act of 2015, was as follows —

> "34 *Application for setting aside arbitral award*. – (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the court only if –
>
> (*a*) the party making the application furnishes proof that –
>
> (*i*) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force ; or
>
> (*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or
>
> (*iv*) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration :
>
> Provided that, if the decisions on matters submitted to arbitration can

be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside ; or

(*v*) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part ; or

(*b*) the court finds that—

(*i*) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(*ii*) the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (*ii*) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the Arbitral Tribunal :

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

26. There is no dispute that section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognisant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

27. Moreover, umpteen number of judgments of this court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under section 34 of the Arbitration Act.

28. Having established the basic jurisprudence behind section 34 of the Arbitration Act, we must focus on the analysis of the case. The primary contention of the learned counsel appearing on behalf of the appellant is that the award by the learned Tribunal was perverse for want of reasons. The necessity of providing reasons has been provided under section 31 of the Arbitration Act, which reads as under :

> "31. *Form and contents of arbitral award. – ....* (3) *The arbitral award shall state the reasons upon which it is based*, unless—
>
> (*a*) the parties have agreed that no reasons are to be given, or
>
> (*b*) the award is an arbitral award on agreed terms under section 30." [emphasis supplied]

Under the UNCITRAL Model Law the aforesaid provision is provided as under :

> "(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30."

29. Similar to the position under the Model Law, India also adopts a default rule to provide for reasons unless the parties agree otherwise. As with most countries like England, America and Model Law, Indian law recognises enforcement of the reasonless award if it has been so agreed between the parties.

30. There is no gainsaying that arbitration proceedings are not *per se* comparable to judicial proceedings before the court. A party under Indian Arbitration Law can opt for an arbitration before any person, even those who do not have prior legal experience as well. In this regard, we need to understand that the intention of the Legislature to provide for a default rule, should be given rational meaning in light of commercial wisdom inherent in the choice of arbitration.

31. A five-Judge Constitution Bench of this court in the case of *Raipur Development Authority* v. *Chokhamal Contractors* AIR 1990 SC 1426, considered the scope of section 30 of the Arbitration Act, 1940 and held as under :

> "It is now well settled that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions

reached in it except where the arbitration agreement or the deed of submission requires him to give reasons. The arbitrator or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons. The arbitrator or umpire shall have to give reasons also where the court has directed in any order such as the one made under section 20 or section 21 or section 34 of the Act that reasons should be given or where the statute which governs an arbitration requires him to do so."

32. A three-Judge Bench of this court in another case of *S Harcharan Singh* v. *Union of India* [1990] 4 SCC 647, reiterated its earlier view that the arbitrator's adjudication is generally considered binding between the parties for he is a Tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in section 30 of the Arbitration Act, 1940.

33. However, the ratio of *Chokhamal*case (*supra)* has not found favour of the Legislature, and accordingly Section 31(3) has been enacted in the Arbitration Act. This court in *Som Datt Builders Ltd.* v. *State of Kerala* [2009] 4 ARB LR 13 SC, a Division Bench of this court has indicated that passing of a reasoned award is not an empty formulation under the Arbitration Act.

34. It may be relevant to note *Russell on Arbitration* 23rd edn. (2007), wherein he notes that:

"If the court can deduce from the award and the materials before it, which may include extracts from evidence and the transcript of hearing, the thrust of the tribunal's reasoning then no irregularity will be found .... *Equally, the court should bear in mind that when considering awards produced by non-lawyer arbitrators, the court should look at the substance of such findings, rather than their form, and that one should approach a reading of the award in a fair, and not in an unduly literal way*." [emphasis supplied]

35. The mandate under section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regards to the speedy resolution of dispute.

36. When we consider the requirement of a reasoned order three characteristics of a reasoned order can be fathomed. They are : proper, intelligible and adequate. If the reasoning in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be

equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the court while exercising jurisdiction under section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.

37. At this juncture it must be noted that the legislative intention of providing section 34(4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. This provision cannot be brushed aside and the High Court could not have proceeded further to determine the issue on merits.

38. In case of absence of reasoning the utility has been provided under section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of section 34 of the Arbitration Act. The power vested under section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced.

39. It may be noted that when the High Court concluded that there was no reasoned award, then the award ceased to exist and the court was *functus officio* under section 34 of the Arbitration Act for hearing the challenge to the award under the provisions of section 34 and come to a conclusion that the arbitration award was not in terms of the agreement. In such case, the High Court ought to have considered remanding the matter to the Tribunal in the usual course. However, the High Court analysed the case on merits, but, for different reasons and we need not go into the validity of High Court's interference.

40. Coming back to the award, we need to see whether the award of the

Arbitral Tribunal can be sustained in the instant case. Although the Arbitral Tribunal has dealt with the claims separately under different sub-headings, the award is confusing and has jumbled the contentions, facts and reasoning, without appropriate distinction. The Tribunal rendered the award with narration of facts with references to the annexures wherever it relied upon by it. The Tribunal abruptly concluded at the end of the factual narration, without providing any reasons, in the following manner :

> "(3) Claim for unproductive usage of machineries ....
>
> (*g*) *All the above facts clearly establish that the machineries deployed by the claimant had to do unproductive work by shifting from one place to another to suit the availability of work. The contract contemplates only payment for actual turnover of earthwork and for this they had received amount totaling to Rs. 17,09,782.88.* The claimant claims that the hire charges paid to the machineries, men and engineers should be reimbursed to him. He has given the actual expenses in his claim statement." [emphasis supplied]

41. Interestingly, the factual narration is coupled with the claimant's argument, which is bundled together. A close reading of the same is required to separate the same wherein the Arbitral Tribunal has mixed the arguments with the premise it intended to rely upon for the claimant's claim. Further, it has reduced the reasons for respondent's defence. In spite of our independent application of mind based on the documents relied upon, but cannot sustain the award in its existing form as there is a requirement of legal reasoning to supplement such conclusion. In this context, the complexity of the subject-matter stops us from supplementing such legal reasoning and we cannot sustain the aforesaid award as being reasoned.

42. It may be beneficial to reduce the concluding paragraph of the award, which reads as under :

> "3.4. The above arguments and various authorities quoted by them have been studied by the Tribunal and we are convinced that the compensation is payable on the hire charges and expenses incurred by the claimant based on the claims made by him in June, 1995 and now submitted by the claimant in his revised claim petition on 5th July, 1997. *We are convinced that the machineries have been actually mobilised from the letter R-3. R-8 and R-10 issued by DCM reporting on the number of machineries deployed by claimant.* The claimants have produced the log books and bills for the various machineries and modified their claims. *The tribunal had perused the log books and idle wages approved in C-7 by respondent and the claims made in R-17.*" [emphasis supplied]

43. From the facts, we can only state that from a perusal of the award, in the facts and circumstances of the case, it has been rendered without reasons. However, the muddled and confused form of the award has invited the High Court to state that the arbitrator has merely restated the contentions of both parties. From a perusal of the award, the inadequate reasoning and basing

the award on the approval of the respondent herein cannot be stated to be appropriate considering the complexity of the issue involved herein, and accordingly the award is unintelligible and cannot be sustained.

44. In any case, the litigation has been protracted for more than 25 years, without any end for the parties. In totality of the matter, we consider it appropriate to direct the respondents to pay a sum of Rs. 30,00,000 to the appellant in full and final settlement against claim No. 2 within a period of 8 weeks, failing which the appellant will be entitled to interest at 12 per cent per annum until payment, for providing quietus to the litigation.

45. In view of the conclusions reached, the appeal is disposed of to the extent indicated herein. There shall be no orders as to the costs.

INSOLVENCY AND BANKRUPTCY CODE

[2020] 156 CLA 14 (NCLAT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Ruchita Modi

v.

Kanchan Ostwal and Another

Company Appeal (AT) (Ins) No.1000 of 2019

JUSTICE A I S CHEEMA, VENUGOPAL M & JARAT KUMAR JAIN, MEMBERS (JUDICIAL)

4th November 2019

Where before constitution of committee of creditors the disputes between the operational creditor and the corporate debtor stand settled by making payments, the order of corporate insolvency resolution is to be withdrawn

Where the committee of creditors has not yet been constituted, but the operational creditor and the corporate debtor have settled their disputes, and signed the settlement deed, handing over draft and post-dated cheques to operational creditor on behalf of corporate debtor, the order of corporate insolvency resolution process is to be withdrawn.

Insolvency and Bankruptcy Code, 2016 – Section 12A read with section 9 – Insolvency resolution process – Withdrawal of application – Settlement reached between operational creditor and corporate debtor before constitution of committee of creditors signing settlement deed and handing over draft and post-dated cheques

– Was order of corporate insolvency resolution process to be withdrawn – Whether where the committee of creditors has not yet been constituted and the settlement has taken place between operational creditor and corporate debtor, the order of corporate insolvency resolution process is to be withdrawn – Held, yes [Paras 5, 6 & 8].

SYNOPSIS

The Appellate Tribunal has disposed of appeal directing closure of the case by Adjudicating Authority.

Appearances : Ms. Ani Singh Jhala for the Appellant. Praveen Kumar Sharma for the Respondents.

ORDER

1. Company secretary Ani Singh Jhala appears on behalf of the appellant-shareholder of MEC Shot Blasting Equipment (P.) Ltd.-corporate debtor. She states that she has directions from the appellant who is present as also from advocate-Shri Susshil Daga who could not appear today, to request recording of settlement deed between the operational creditor and the corporate debtor which is executed on 2nd November, 2019. She tenders the deed of settlement.

2. Company secretary-Shri Praveen Kumar Sharma appears on behalf of the operational creditor-Mrs. Kanchan Ostwal. None present for IRP in spite of service of Notice.

3. Both the company secretaries state that there is settlement as per the deed of settlement which has been tendered at Bar.

4. This matter had earlier come up before this Tribunal on 26th September, 2019 when while issuing Notice, direction was given not to constitute committee of creditors if not yet constituted. Both the company secretaries make statement that committee of creditors has till now not been constituted.

5. As the committee of creditors has not been constituted and the operational creditor and the corporate debtor have settled their disputes, we take the deed of settlement on record. The deed of settlement tendered is taken on record and marked 'X' for identification. It reads as under :–

"*Deed of settlement*

This deed of settlement is executed on this 2nd day of November, 2019 at Jodhpur

BY AND BETWEEN

1. Ms. Ruchita Modi, Mr. Anand Kishore Modi and Mr. Vaibhav Modi, erstwhile promoters/directors and shareholders of Mec Shot Blasting Equipments (P.) Ltd. ('Mec Shot') [having majority control in the management of Mec Shot Blasting Equipments (P.) Ltd.], having their office at E-279, Marudhar Industrial Area, Phase II, Basni, Jodhpur-342005 hereinafter referred to as "Mec Shot

Promoters", which expression shall unless repugnant to the context or meaning thereof be deemed to include their heirs, executors, administrators and assigns.

AND

2. Mrs. Kanchan Ostwal, Sole proprietor of J.K. Electricals, having office at 32, Baktawarmal ji ka Bagh, Chopasani Road, Jodhpur-342003 ('operational the creditor') operational creditor and Mec Shot promoters are hereinafter collectively referred to as "the parties".

WHEREAS

A. The operational creditor has supplied goods from time-to-time to Mec Shot. Upon the contractual date of payment Mec Shot failed to make payment of the operational debt to operational creditor against such supplies.

B. After several reminders and rounds of negotiations relating to repayment of the due operational debt, Mec Shot acknowledged the debt on 30th January, 2016 and issued 97 cheques against the total dues of operational creditor out of which some were honoured and some were dishonoured,.

C. The operational creditor again approached Mec Shot for payment but didn't get any proper response in the matter. Facing this the operational creditor was constrained to file an insolvency application before the National Company Law Tribunal, Jaipur Bench under section 9 of Insolvency and Bankruptcy Code, 2016 ('IBC') *vide* company petition No. (IB)/ 93/ 9/JPR/2018.

D. The insolvency application was finally disposed *vide* order dated 18th September, 2019 wherein hon'ble NCLT, Jaipur Bench ordered initiation of corporate insolvency resolution process against Mec Shot. In accordance with IBC, Mr. Anoop Kumar Goyal, interim resolution professional ('IRP') has taken charge over the control and management of Mec Shot.

E. Being aggrieved, Ms. Ruchita Modi (in her capacity as shareholder and aggrieved party) filed an appeal before National Company Law Appellate Tribunal, New Delhi *vide* Company Appeal (AT) Insolvency No. 1000 of 2019 ('Appeal') and submitted that she is ready to settle the claim amicably if operational creditor approaches her for the same. Hon'ble NCLAT ordered interim resolution professional not to constitute committee of creditors, if not already constituted,, till 4th November, 2019, *i.e.*, the next date of hearing in the matter and issued necessary instructions in the matter.

F. The operational creditor in pursuance of the order of hon'ble NCLAT approached the Mec Shot Promoters for settlement and Mec Shot Promoters offered to pay a sum of Rs. 60,65,668 ("Settlement amount") in full and final settlement of the dues and liabilities of operational creditor and operational creditor agreed to accept the settlement amount on the terms and conditions described in this deed of settlement.

G. For the above mentioned purpose, the parties are desirous of recording the terms and conditions of their settlement in writing to regulate their right and obligation in accordance with the terms and conditions mutually agreed to as follows:

NOW THIS DEED OF SETTLEMENT WITNESSTH AS UNDER :

1. The above preamble shall be considered as an integral part of the present Deed of Settlement.
2. The shareholding pattern of Mec Shot as on the date of execution of these presents is attached as Annexure-1 hereto.
3. The Mec Shot Promoters acknowledge that there is a debt due and payable to the operational creditor by the corporate debtor and such debt amounts to Rs. 1,33,55,795.40 ("the claim") which includes principal amount, interest and legal expenses. Parties further agree that there is no dispute pending in respect of such claim and such amount is validly payable by the corporate debtor.
4. The parties sat across the table and agreed to settle the claim by making payment of following amounts :

Sl. No.	*Particulars*	*Amount (Rs.)*
1	Amount due and payable against supply of goods by the operational creditor	53,65,668
2	Amount towards legal expenses	5,00,000
3	Amount paid to interim resolution professional as per NCLT order dated 18th September, 2019	2,00,000
	Total	**60,65,668**

5. Mec Shot promoters agrees to pay the settlement amount of Rs. 60,55,668 to settle the claim of operational creditor which operational creditor accepted.
6. It was decided by the parties that the Mec Shot Promoters will ma.ke payment of Rs. 15,00,000 by way of demand draft payable to operational creditor and the balance amount will be paid in eight monthly installments for which post-dated cheques are being issued. The details of demand draft and the post-dated cheques are provided in the table given hereunder :

Sl. No.	*Date*	*Particulars*	*Amount (Rs.)*
1	4th November, 2019	Initial payment by way of demand draft No. 208958	15,00,000
2	30th December, 2019	Cheque No. 157780 issued by Mr. Anand Kishore Modi	5,70,000
3	30th January, 2020	Cheque No. 157781 issued by Mr. Anand Kishore Modi	5,70,000
4	29th February, 2020	Cheque No. 157782 issued by Mr. Anand Kishore Modi	5,70,000

5	30th March, 2020	Cheque No. 157783 issued by Mr. Anand Kishore Modi	5,70,000
6	30th April, 2020	Cheque No. 157784 issued by Mr. Anand Kishore Modi	5,70,000
7	30th May, 2020	Cheque No. 157785 issued by Mr. Anand Kishore Modi	5,70,000
8	30th June, 2020	Cheque No. 157786 issued by Mr. Anand Kishore Modi	5,70,000
9	30th July, 2020	Cheque No. 157787 issued by Mr. Anand Kishore Modi	5,75,668
		Total	**60,65,668**

The above table is hereinafter referred to as "the repayment schedule".

7. The operational creditor agrees to settle the claim subject to clearing of all post-dated cheques and receipt of settlement amount as per the repayment schedule. Operational creditor confirms that there shall be no dues from the corporate debtor against the claim after receipt of the settlement amount as per the repayment schedule.

8. The parties hereby undertake to present a copy of this deed of settlement to hon'ble National Company Law Appellate Tribunal, New Delhi on 4th November, 2019 with a request to stop the corporate insolvency resolution process ("CIRP") against Mec Shot but the operational creditor reserves the right to reinitiate CIRP if Mec Shot Promoters defaults in making payment as per repayment schedule. Parties further undertake to cooperate for taking necessary steps in this respect before the Adjudicating Authority.

9. It is hereby agreed by the parties that the fees payable to interim resolution professional, all other expenses relating to corporate insolvency resolution process, cost imposed by NCLT/NCLAT, if any, and all other expenses/costs of whatsoever nature, shall be borne by the Mec Shot Promoters and Mec Shot Promoters shall keep the operational creditor indemnified in respect of any such cost/liability occurring out of withdrawal of the application under IBC and any other proceeding in the matter.

10. Notwithstanding anything contained in any other provision of this agreement, the operational creditor shall not be liable for any indirect, incidental or consequential loss or damage (including lost profit or loss of business) suffered or incurred by the other party in connection with the present agreement.

11. It is hereby clarified that the operational creditor will withdraw the application under IBC only. All other legal proceedings initiated by the operational creditor against Mec Shot and/or Mec Shot promoters shall be withdrawn by the operational creditor only after receipt of settlement amount as per the repayment schedule.

12. If Mec Shot Promoters fails to comply the terms of this deed and defaults in

making payment as per the repayment schedule, this deed of settlement shall stand null and void and the claim of operational creditor amounting to Rs. 1,33,55,795.40 shall become payable by Mec Shot and Mec Shot Promoters without considering anything contained in this deed of settlement.

13. In case of default in making payment of the settlement amount as per the repayment schedule, the operational creditor will be open to move to Adjudicating Authority for revival of corporate insolvency resolution process against Mec Shot by setting aside any order passed by hon'ble NCLAT. Operational creditor may also file an application for initiation of contempt proceedings against Mec Shot and Mec Shot Promoters in such case.

14. That the parties to this deed of settlement have well understood and agreed to the above terms and conditions on their own with free will and without any coercion, pressure or undue influence.

15. This deed of settlement is executed in two counterparts, each of which, when executed and delivered, shall be an original, but all counterparts shall together constitute one and the same instrument. One original will be kept by Mec Shot promoters and one original will be kept by operational creditor.

In Witness whereof the parties hereto have hereunto set and subscribed their respective hands the day and year first hereinabove mentioned.

SIGNED AND DELIVERED BY

The within named Mec Shot

Promoters

1. Ruchita Modi
2. Anand Kishore Modi
3. Vaibhav Modi

The within named operational creditor

Mrs. Kanchan Ostwal

Sole Proprietor of J K Electricals

In presence of Witnesses :

	Witness 1	*Witness 2*
Signature		
Name	*Hari Prasad Karwa*	*Naveen Ostwal*
Father's Name		*Manendra Kumar Ostwal*

Address 83, Keshav Nagar, H-28-A, Bakhtawarmal ji Jodhpur ka Bagh, Chopasani Road, Jodhpur

Annexure 1 to the Deed of Settlement

List of Shareholders of Mec Shot Blasting Equipments (P.) Ltd. as on 2nd November, 2019

Sl. No.	*Name of shareholder*	*Address*	*No. of Shares held*	*% of holding*
1	Anand Kishore Modi	47-B-5, PWD Colony, Jodhpur	19,11,560	48.83%
2	Vaibhav Modi	47-B-5, PWD Colony, Jodhpur	18,30,010	46.74%
3	Pushpa Modi	47-B-5, PWD Colony, Jodhpur	1,73,230	4.42%
3	Ruchita Modi	47-B-5, PWD Colony, Jodhpur	100	0.01%
4	Hari Prasad Karwa	83, Keshav Nagar, Jodhpur	100	0.01%
		Total	**39,15,000**	

6. The appellant hands over draft of Rs.15 lakh on behalf of corporate debtor-Mec Shot Blasting Equipment (P.) Ltd. to company secretary representing Mrs. Kanchan Ostwal-operational creditor along with postdated cheques as mentioned in the deed of settlement.

7. Both parties state that they will be bound by this settlement. In exercise of inherent powers under rule 11 of the NCLAT Rules, 2016, we allow the settlement and set aside the impugned order dated 18th September, 2019 passed by Adjudicating Authority (NCLT) Jaipur (Court No.1). Company Petition No.(IB)-93/9/JPR/2018 filed by Mrs. Kanchan Ostwal against MEC Shot Blasting Equipment (P.) Ltd. is disposed of as withdrawn. The appellant as well as shareholders, directors of the corporate debtor will be bound by the terms of settlement. in case there is default in the payment in terms of the settlement, it will be open for the operational creditor to move this Appellate Tribunal for recall of this order and to revive the CIRP process against the corporate debtor. The operational creditor may also file Application for initiation of the contempt proceedings against the defaulting appellant, directors/director and shareholders.

As the IRP is functioning since 18th September, 2019 on admission of section 9-Application, we compute the fees of IRP at Rs.1,50,000. The IRP would be entitled to also recover CIRP costs as may have been incurred. The appellant - for corporate debtor undertakes to contact IRP and pay fees as above and CIRP costs as may have been incurred by the IRP in 3 weeks, after deducting amount already received by IRP under the impugned order. In case IRP has any difficulty regarding CIRP costs, he would be entitled to move the Adjudicating Authority and the appellant will be bound to pay the CIRP costs concerned, as may be directed by Adjudicating Authority.

8. The impugned order admitting section 9-Application and order(s) passed by learned Adjudicating Authority appointing 'interim resolution professional', declaring moratorium and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'resolution professional' are set aside. The application preferred by the respondent under section 9 of the I&B Code is disposed of as withdrawn. The Adjudicating Authority will now close the proceeding. The respondent-company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

The company appeal stands disposed of.

[2020] 156 CLA 21 (NCLAT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Edelweiss Asset Reconstruction Company Ltd.

v.

Sai Regency Power Corporation (P.) Ltd. and Anr.

Company Appeal (AT) (Ins) No.887 of 2019

Justice A I S Cheema, Member (Judicial), Kanthi Narahari & V P Singh, Members (Technical)

20th December 2019

All financial creditors have to contribute towards interim finance to keep the company going by interim resolution professional as per decision of the committee of creditors since that decision is binding on all including a dissenting creditor

Where the committee of creditors by requisite majority put execution responsibility on interim resolution professional to incur costs to keep the company a going concern, that could not be treated as forcing the appellant to part with property or forcing to incur liability, in case the appellant had itself sought to be part of the committee of creditors. The decision of the majority would be binding on all including the dissenting financial creditor and the same was not to be interfered with. The contention that only secured financial creditors have to contribute towards interim finance was not acceptable.

Insolvency and Bankruptcy Code, 2016 – Section 20(2)(c) read with section 28 – Management of operation of corporate debtor as going concern – Authority of interim resolution professional ('IRP') to raise interim finance – Committee of creditors by majority putting execution responsibility on IRP to incur cost to keep company a going concern – Would decision of majority be binding on all –

Whether where the committee of creditors by requisite majority approve incurring interim costs to keep the company a going concern, such decision of the committee could not be treated as forcing the dissenting appellant to part with property of the company, etc. – Held, yes, the decision of the majority binds all financial creditors and it cannot be interfered with [Paras 7 & 10].

SYNOPSIS

Finding no substance in the appeal, the Appellate Tribunal has dismissed the same affirming the order of the Tribunal.

Cases referred to : *ICICI Bank Ltd*. v. *Sidco Leathers Ltd.* [2006] 72 CLA 291 (SC) and *K Sashidhar* v. *Indian Overseas Bank* [2019] 148 CLA 497 (SC)

Appearances : Sanjeev Sen, senior advocate (Arjun Krishnan, Sumit Srivastava, Ms. Khushboo Mittal, Shri Soumo Palit & Shri Sayan Ray with him) for the Appearing Parties.

JUDGMENT

JUSTICE CHEEMA, MEMBER (JUDICIAL)

1. The insolvency resolution process has been filed against Sai Regency Power Corporation (P.) Ltd. ('corporate debtor') which is pending. In the CIRP process, committee of creditors ('CoC') has been constituted in which the appellant-Edelweiss Asset Reconstruction C. Ltd. ('EARC') is having 25 per cent voting share. In the 6th meeting of CoC dated 2nd August, 2019 (Annexure A-3), the appellant-EARC participated in the meeting. CoC took decision regarding interim finance with regard to :–

"*Agenda B2 - To approve interim finance*

In furtherance to the discussion in Agenda A6, the RP requested the members of the CoC to vote on the following resolution through e-voting facility as per the instructions provided

E-Voting Agenda - B2	*To approve interim finance*
RESOLVED THAT pursuant to the provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations made thereunder, the members of the CoC hereby approve interim finance as defined under section 5(*15*) of the Insolvency and Bankruptcy Code, 2016, amounting to INR 35,25,80,379 for the non-fund based requirement towards GAIL and ONGC. FURTHER RESOLVED that Mr. G Ramachandran, RP, be and is hereby authorised to do all such acts and deeds as maybe required for giving effect to the above said resolution.	

The appellant-EARC objected to the resolution but it is stated that the resolution was passed by CoC with 75 per cent voting.

2. The resolution professional filed MA/872/2019 (Annexure A-10) in the

Insolvency Proceedings IBA/92/2019 before the Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) under section 60(5)(*c*) read with section 25(1), 25(2)(*c*) and 28(1)(a) of the Insolvency and Bankruptcy Code, 2016 ('the IBC'). It was mentioned that the CIRP process has been initiated *vide* order dated 27th March, 2019 on the basis of application under section 10 of IBC. The RP mentioned that the corporate debtor is engaged in the business of generation and sale of electricity from its Gas based Combined Cycle Power Plant. In order to generate electricity from the project, corporate debtor requires approximately 2,74,000 SCMD gas per day and, inter alia, was procuring its major requirement of gas from Oil and Natural Gas Corporation ('ONGC') in terms of Gas Supply Agreement dated 19th April, 2017 and balance quantity of gas was being procured from GAIL India Ltd. in terms of Gas Supply Agreement dated 24th December, 2015. On 30th April, 2019, the Agreement between corporate debtor and ONGC completed its term. On mutual understanding, ONGC continued to supply gas to the corporate debtor till 10th May, 2019 but now had stopped supply of gas under the erstwhile agreement. The RP entered into fresh negotiations with ONGC but it was informed that RP would have to participate in fresh tender/bid for gas supply. Inter alia, it was mentioned in the application to the Adjudicating Authority that the Agreement with GAIL was due to expire on 6th August, 2019 and GAIL had asked the corporate debtor to open/renew and submit Standby Irrevocable Resolving Letter of Credit with Face Value as mentioned. That, GAIL further clarified that aggregate liability of issuing bank under the letter of credit should also be for the amount as mentioned. The RP then referred to the 6th meeting of CoC and the decision taken. RP stated that in spite of decision of CoC, financial creditor-Edelweiss Asset Reconstruction Co. Ltd. ('the appellant') and Axis Bank were reluctant to release letter of comfort to the lead bank-Punjab National Bank which was willing to disburse interim finance since the resolution has been passed with the approval of 75 per cent voting share of CoC.

It is now stated at the time of appeal that Axis Bank has also issued Letter of Comfort and only the appellant has not done so. In the MA filed before the Adjudicating Authority, the relief sought was :

> "Issue a certification that approved Interim Finance and any costs related to Interim Finance, since it forms part of the insolvency resolution process cost, has to be shared between all the members of the committee of creditors, in the proportion of their voting rights."

The Adjudicating Authority passed the following Order for reasons recorded and allowed the application, which reads as under :–

> "4. It is obvious that all the members of the CoC are bound by the resolution approved by the CoC with requisite majority as mentioned under the Code. That

being so, all the members of the CoC including Edelweiss Asset Reconstruction Co. Ltd. and Axis Bank shall release the Letter of Comfort in favour of the lead bank Punjab National Bank within 24 hours from thereof or on or before by 5.00 PM on 22nd August, 2019. The reason for passing this order even without waiting for the appearance of the financial creditors, who are not inclined to release the Letter of Comfort is in the event if this interim finance is not released, the corporate debtor will not be in a position to participate in the Tender for fuel for the Power Plant for which the last date is 23rd August, 2019.

5. The resolution professional having further stated that, to participate in the Tender, the corporate debtor is required to pay security deposit of Rs.16,61,77,689 to ONGC through the bank guarantee, we are constrained to pass this order on the mentioning made by the resolution professional. Another reason for passing this order on mentioning is, since the CoC has decided and approved the same for approving interim finance on proportionate basis, it has to be presumed that all the CoC members are aware of the resolution passed by the CoC on 2nd August, 2019 for granting interim finance of Rs.35,25,80,329.

6. In view of the same, this application is hereby allowed with a direction to the CoC members including Edelweiss Asset Reconstruction Co. Ltd. and Axis Bank to release the Letter of Comfort within 24 hours from hereof or else by 5.00 p.m. on or before 22nd August, 2019.

7. It is a going concern running with 100 employees, in case this interim finance has not been released, the corporate debtor will come to a grinding halt, therefore, this application is fit for the relief sought, therefore, we held that this application is fit for granting the reliefs as sought by the resolution professional."

3. Against developments as above, the appellant-EARC has filed this Appeal and it is claimed that in view of amendment to section 30(4) of IBC read with section 52(8) of IBC, insolvency resolution process costs which includes interim finance can only be recovered from secured creditors and not from unsecured creditors like appellant. It is also claimed that the appellant is unsecured creditor and commercially it is injudicious in precarious condition for the appellant to incur additional liabilities in the form of interim finance/ letter of comfort and the appellant cannot be compelled to do so. According to the appellant, the CoC is free to raise CIRP cost/interim finance from external sources or willing financial creditors which may be repaid in priority as per section 53 of IBC. The other ground raised is that the RP moved the Adjudicating Authority just two days before the last date of the gas supply tender and the impugned order was passed without giving opportunity of being heard to the appellant and thereby principles of natural justice were violated. The RP in the CoC meeting wanted that each of the CoC member should provide letter of comfort to provide guarantee in proportion to their voting share in the event of invocation of the letter of comfort to be furnished by Punjab National Bank. According to the appellant, it declined to provide the letter of comfort because the corporate debtor was highly leveraged and

there was no point in providing additional interim finance to the corporate debtor for procuring gas and overhauling. The appellant claims that there would be little or no value maximisation even if the interim finance could be provided. The appellant claims that in view of the amendment in IBC, it is for the secured creditors who ought to contribute, if at all, for the provision of interim finance and there was little hope of realisation for the appellant (unsecured creditor) through CIRP. According to the appellant, only the consenting members of the CoC ought to be directed to provide letters of comfort to raise interim finance.

4. The learned senior counsel for the appellant has argued the appeal referring to averments made in appeal. According to him, the appellant cannot be forced or compelled to pay. He referred to the various provisions under the IBC relating to raising of interim finance and with regard to keeping the company as a going concern to submit that there was nothing on the basis of which dissenting unsecured financial creditor could be compelled to pay or part with money. At the time of hearing, we had made a query to the learned senior counsel as to what happens if all the financial creditors or majority of them were to say that they will not contribute towards CIRP costs and to keep the company a going concern to maximise value. The learned senior counsel stated that the company would go in liquidation but, however, added that the appellant being unsecured financial creditor could not be forced to infuse further capital. The learned counsel referred to the CoC Resolution and the objection which had been raised by the appellant in the CoC meeting. It is argued that section 14(2) while dealing with moratorium, provides that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interpreted during Moratorium. The learned counsel then referred to regulation 32 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('Regulations') to submit that essential supplies mean – (*1*) electricity, (*2*) water, (*3*) telecommunication services, and (*4*) information technology services, to the extent they are not direct input to the output produced or supplied by the corporate debtor. According to the counsel, the decision taken by the CoC for entering into further arrangement with ONGC/GAIL for supply of gas was not essential service and the appellant could not be forced to make provisions so that company remains functional. Except for essential services, it is claimed that appellant could not be compelled.

5. Against this, the learned counsel for resolution professional referred to the resolution itself. It is stated that it was "non-fund based requirement towards GAIL and ONGC". According to him, there is nothing that the appellant was being made to pay but only letter of comfort was to be executed. The learned counsel referred to various provisions of the IBC to submit that it is

the responsibility of the IRP/RP to keep the corporate debtor a going concern. When the RP has taken a decision that interim finance needs to be raised so as to ensure that the corporate debtor remains a going concern so as to maximise the value of the corporate debtor, the appellant should not have objected and cannot resist liability when it is part of the CoC. The CoC decision taken with requisite voting majority is binding on everybody including the appellant. The counsel referred to various provisions of IBC which permit raising of interim finance to keep the corporate debtor a going concern till resolution becomes possible. The primary object of IBC is to make efforts for resolution and not liquidation.

6. The learned counsel for the respondent further submitted that there was urgency for seeking orders of the Adjudicating Authority due to the approach of the appellant which was not ready to release the letter of comfort as the default would have led to render the corporate debtor ineligible to participate in tender for power supply for which the last date was 23rd August, 2019. In any case, (it is argued by the counsel for respondent that) the appellant has now been heard and according to the counsel, even now no good reasons are shown as to how and why the appellant would not be liable to abide by the CoC decision.

7. We have heard counsel for both sides. Under section 5(*13*) of IBC "Insolvency Resolution Process Costs", inter alia, includes the amount of any interim finance and costs incurred in raising such finance. Section 5(*15*) says that "Interim Finance" means any financial debt raised by the resolution professional during the insolvency resolution process period.

Section 20 of IBC relates to "Management of operations of corporate debtor as going concern" and it is responsibility of the interim resolution professional (and later the resolution professional) to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. The sub-section (2) of section 20 gives authority to the IRP under clause (*c*) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without prior consent of the creditors whose debt is secured over such encumbered property. Clause (*e*) of sub-section (2) of section 20 states that the IRP has the authority "to take all such actions as are necessary to keep the corporate debtor as a going concern". Section 25 of IBC which deals with "duties of resolution professional" in sub-section (2) (*c*) provides that the resolution professional shall undertake to "raise interim finances subject to approval of the committee of creditors under section 28." (Section 28(3) requires approval of vote of 66 per cent of the voting shares.) Relevant part of section 28(1) reads as follows :

"28. (1) Notwithstanding anything contained in any other law for the time being

in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely :–

(*a*) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting ;"

Thus, IRP/RP and CoC have responsibilities with regard to interim finance.

8. If a resolution plan comes to be considered and approved, section 30(2)(a) shows that such plan would require providing for the payment of the insolvency resolution process costs in a manner specified by the Board "in priority" to the payment of other debts of the corporate debtor. Even if no resolution plan comes around to get approved and contingencies as provided in section 33(1) arise and order of liquidation is to be passed, even then section 53(1) makes it clear that in the waterfall mechanism, the first in order of priority is "the insolvency resolution process costs" and the liquidation costs paid in full.

9. Keeping in view all these provisions, it is surprising that the appellant should be apprehensive regarding letter of comfort sought for by the committee of creditors.

10. The learned counsel for the appellant relied on the judgment in the matter of *ICICI Bank Ltd*. v. *Sidco Leathers Ltd.* [2006] 72 CLA 291 (SC)/[2006] 10 SCC 452 and referred to para 41 of that judgment to submit that while enacting a statute, Parliament cannot be presumed to have taken away a right in property, and that right to property is a constitutional right. The counsel then relied on para 43 of the judgment which reads as follows :

"43. If Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge-holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statute. It is in fact the other way round and, thus, a contrary presumption shall have to be raised."

If that judgment in the matter of *ICICI* is perused, it appears to be in the context of winding up proceedings under the old Companies Act, 1956 and in the context of section 529A which dealt with overriding preferential payment in the winding up of a Company to workmen's dues and debts due to the secured creditors to the extent such debts ranked under section 529(1)(*c*) *pari passu* with such dues. Hon'ble Supreme Court noted (in para 38) that section 529A did not ex facie contain a position (on the aspect of priority) amongst the secured creditors. Provisions of Transfer of Property Act and terms of contract were considered and the observations as above were made. Relying on the above judgment of the hon'ble Supreme Court, the learned counsel for the appellant is submitting that the appellant cannot be forced to

contribute or incur further liability under CIRP as it would amount to forcing the appellant to contribute. We are not convinced that the judgment helps the appellant in the facts and law applicable in present matter. When CoC in a meeting of the financial creditors by requisite majority takes a decision with regard to CIRP costs which includes execution of responsibility put by law on the IRP/RP to keep the company a going concern, the same cannot be treated as forcing the appellant to part with property or forcing to incur liability. Appellant has itself sought to be part of CoC and joined it. Nobody is forcing appellant to file claim and/or to be part of CoC. If the appellant is part of CoC and wants to remain part of CoC, the appellant cannot expect to only claim benefits from the process and claim that it would not take any of the liabilities and responsibilities which in the present matter, are apparently based on legal provisions for the duties to be performed by IRP/RP/CoC. In CoC meeting the appellant has right of dissent but if decision is still taken by majority provided under the statute, all of CoC members are duty bound to abide by the decision.

11. The argument of the RP shows that the corporate debtor is engaged in the business of generation and sale of electricity from its 58MW Gas based Combined Cycle Power Plant situated in Tamil Nadu. The corporate debtor had a turnover of Rs.200 crore approximately in Financial Year 2018-19 and was generating cash surplus of Rs.5 crore every month. RP has argued that the corporate debtor was regularly paying the salaries and meeting other expenses from the revenue generated. The RP referred to the Power Purchase Agreement with consumers pursuant to which corporate debtor had been supplying electricity to the consumers and that to generate electricity, the corporate debtor requires gas. According to the RP, this was being procured mainly from ONGC and balance quantity was being procured from GAIL (India) Ltd. in terms of respective Gas Supply Agreements. On 30th April, 2019, the Gas Supply Agreement executed between corporate debtor and ONGC completed its entire term but on mutual understanding, ONGC continued to supply gas to the corporate debtor until 10th May, 2019. However, due to ongoing disputes between corporate debtor and ONGC with respect to applicability of GDU charges, ONGC stopped supply of gas on 10th May, 2019.

This, inter alia, explains as to why the RP moved the CoC for necessary support to keep the company a going concern. If the corporate debtor has been a going concern generating cash surplus of Rs.5 crore every month, it would be unwise to let it come to a grinding halt and to render it no more a going concern, which would be harmful to the object of maximisation of value. Value of a going concern is much more than a non-functional plant or concern. The adamant stand of the appellant in the facts of the matter and keeping in view legal provisions, cannot be appreciated.

12. The learned counsel for the appellant has argued that the appellant has 25 per cent voting share in the CoC and it is unsecured financial creditor. It is stated that the appellant dissented in the meeting and it is commercial wisdom of the appellant that corporate debtor being highly leveraged, it would provide negligible value maximisation and loading of any additional debt on the corporate debtor could be detrimental to the value of its assets. The learned senior counsel referred to para 39 of the judgment in the matter of *K Sashidhar* v. *Indian Overseas Bank* [2019] 148 CLA 497 (SC)/2019 SCC OnLine SC 257 to state that the commercial wisdom of the individual financial creditor is non-justiciable. It would be appropriate to reproduce the portion from judgment of the hon'ble Supreme Court from para 39 which reads as under :

> 'There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The Legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the Adjudicating Authority. That is made non-justiciable.'

Going through the observations of the hon'ble Supreme Court and considering present facts what appears to us is that in the meeting of CoC, the appellant may have taken a decision to dissent and that dissent even if treated as a commercial wisdom of the dissenting financial creditor, cannot be questioned before Adjudicating Authority so as to see whether or not the same was justified. Commercial wisdom of individual financial creditor may not be justiciable. Same is the case with collective decision. However, under the law, if individual creditor's decision has not been accepted by CoC in its collective decision, what is enforceable is only the collective decision. When the law provides that a decision taken by majority would be binding, the dissenting financial creditor, even with the dissent, would remain bound by the majority decision taken as per the requisite voting share.

The impugned order shows the reasons why without waiting for appellant the order was required to be passed. It was in interest of resolution of corporate debtor. Even now, appellant has not made out good case that if it was heard, impugned order could have been different. We find principles of natural justice are satisfied. We are not convinced with the argument that amended sub-section (4) of section 30 requires only secured financial creditors to contribute towards interim finance and not the unsecured financial creditors. No such interpretation can be drawn. We will not interfere in the collective decision of CoC in this regard.

13. The dissenting financial creditor in CoC cannot be allowed to scuttle CIRP

process otherwise the provision permitting CoC to take decisions with regard to subjects stated in section 28(1) by given majority of 66 per cent under section 28(3) would be rendered nugatory.

14. For reasons mentioned above, we do not find any substance in this appeal. The appeal is dismissed. No orders as to costs.

[2020] 156 CLA 30 (NCLT)

NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH

Bhavi Shreyansh Shah

v.

Canara Bank and Others

IA No. 664 of 2019 in CP(IB) No. 299 of 2018

MS. MANORAMA KUMARI, MEMBER (JUDICIAL) & CHOCKALINGAM THIRUNAVUKKARASU, MEMBER (TECHNICAL)

1st January 2020

The plan approved by the committee of creditors has got to be approved by the Adjudicating Authority who has no jurisdiction to interfere with the commercial wisdom of the committee. Where clause pertaining to automatic waiver is not proved, the resolution applicant will be at liberty to approach competent authority

Where the insolvency resolution plan as approved by the committee of creditors is in conformity with the statutory provisions under sub-section (2) of section 30, the Adjudicating Authority has no jurisdiction to interfere with the commercial wisdom of the committee of creditors, and the plan has to be approved. Non-approval of clause pertaining to automatic waiver/abatement of legal proceedings will not hinder implementation of the plan, and the resolution applicant will be at liberty to approach competent authorities/ courts/legal forums/offices for appropriate relief.

Insolvency and Bankruptcy Code, 2016 – Sections 30 and 31 – Insolvency resolution – Resolution plan in conformity with statutory provisions – Jurisdiction of Adjudicating Authority – Has Adjudicating Authority no jurisdiction to interfere with the plan approved by the committee of creditors – Whether where the insolvency resolution plan as approved by the committee of creditors is in conformity with the statutory provisions under sub-section (2) of section 30, the Adjudicating Authority has no jurisdiction to interfere with the commercial wisdom of the committee of creditors, and the plan has to be approved – Held, yes – Whether non-approval of clause pertaining to automatic waiver/abatement of legal proceedings will not

hinder implementation of the plan, and the resolution applicant will be at liberty to approach competent authorities/courts/legal forums/offices for appropriate relief – Held, yes [Paras 16 & 19].

SYNOPSIS

While approving the resolution plan as approved by the committee of creditors, the National Company Law Tribunal gave appropriate directions, and clarified that its approval does not mean automatic waiver or abatement of legal proceedings.

Appearance : Aman Shankar & Atul Sharma for the Applicant. Urvesh K Gor for the Respondents.

ORDER

KUMARI, MEMBER (JUDICIAL)

1. The instant application (IA) No. 664 of 2019 in CP(IB) No. 299/2018, is filed by the applicant, the resolution professional of V S Texmills (P.) Ltd. ('corporate debtor') under section 30(6) read with 31 of the Insolvency and Bankruptcy Code, 2016 ('IB Code') for seeking approval of resolution plan dated 20th June, 2019 along with its final addendum dated 11th September, 2019 submitted by Chamaria Fashions (P.) Ltd. for insolvency resolution of the corporate debtor as a going concern.

1.1 The applicant has also submitted affidavits dated 12th December, 2019 and affidavit dated 31st December, 2019 and rectified the clerical mistakes made in their petition and the submission of the resolution plan.

2. For the sake of convenience, it is mentioned herein that :

2.1 CP(IB)No. 299/2018 was filed by financial creditor, *viz.*, Reliance Commercial Finance Ltd., the respondent No. 2 under section 7 of the IB Code seeking initiation of corporate insolvency resolution process against V S Texmills (P.) Ltd., the corporate debtor, having registered office at 342, Govindpura Nadiad Mehmdabad Road, Vill. Kamla, Taluka Nadian, Dist. Kheda, Gujarat-387320.

2.2 The said CP(IB) No. 299/2018 was admitted on 9th January, 2019 by this Adjudicating Authority and appointed Smt. Bhavi Shreyans Shah, as an interim resolution professional ('IRP').

2.3 The IRP, so appointed, made public announcement on 12th January, 2019 as per the provisions of section 15 of the Code calling upon the claims from the creditors in view of the order dated 9th January, 2019 of this Adjudicating Authority. Consequent upon public announcement, IRP received claims from different creditors till 23rd January, 2019 and constituted the committee of creditors ('CoC') on 31st January, 2019.

3. It is stated that IRP called the first meeting of CoC on 6th February, 2019

and in the aforesaid meeting of CoC, the resolution was passed to appoint the IRP as resolution professional ('RP').

4. It is stated that third meeting of CoC was convened on 14th March, 2019 to initiate the expression of interest ('EoI') process and accordingly, the applicant made the public announcement in newspapers inviting EoI in Form G on 29th March, 2019.

5. It is stated that in pursuant to the invitation inviting EoI, the applicant received two EoIs one from Chamaria Fashions (P.) Ltd. and the other from Vikash Enterprises. Thereafter, Vikash Enterprises withdrew their resolution plan and, thus, Chamaria Fashions (P.) Ltd. was the only resolution applicant. The resolution plan dated 23rd May, 2019 submitted by Chamaria Fashions (P.) Ltd. ('RA') was discussed in the 4th meeting of CoC on 17th June, 2019.

5.1 It is stated that the said resolution plan was revised and the RA submitted the revised resolution plan dated 20th June, 2019 and the said revised resolution plan dated 20th June, 2019 was discussed by the CoC in its 5th meeting held on 6th July, 2019, wherein the CoC was of the opinion regarding improvement of resolution plan and accordingly RA was given a chance to rectify the resolution plan.

5.2 It is further stated by the RP that in the 5th meeting of CoC, it was resolved by the CoC to extend the CIRP and accordingly, an interlocutory application was preferred by the applicant and this Adjudicating Authority *vide* its order dated 12th July, 2019 in IA No.403 of 2019 in CP(IB) No.299 of 2018 extended the CIRP for further 90 days beyond 180 days.

5.3 The 6th meeting of CoC was convened on 10th July, 2019, wherein, CoC granted further time to RA to submit a revised resolution plan. Further, in the 7th meeting of CoC held on 19th July, 2019, interest to submit resolution plan shown by the director of the suspended management of the corporate debtor was rejected by the CoC and the RA was given a chance to submit resolution plan by 25th July, 2019 with certain changes.

5.4 The applicant *vide* his affidavit dated 12th December, 2019 submits that RA, in all, submitted four Addendums dated 25th July, 2019, 25th July, 2019, 5th September, 2019 and 11th September, 2019 and the members of CoC voted and approved the resolution plan dated 20th June, 2019 along with the final addendum dated 11th September, 2019. The said resolution plan dated 20th June, 2019 and the Addendum dated 11th September, 2019 was placed before the CoC for e-voting in the ninth meeting of CoC which was convened on 3rd October, 2019 and thereafter e-voting was conducted from 4th October, 2019 to 5th October, 2019. The CoC approved the said Resolution Plan dated 20th June, 2019 with Addendum dated 11th September, 2019 with majority voting share of 92.44 per cent.

6. The RP *vide* compliance certificate in the form of Form H has submitted liquidation value of the corporate debtor as Rs. 4,63,89,800.

7. Pursuant to the approval of the resolution plan by the CoC under section 30(4) of the Code (as amended on 6th June, 2018) as the successful resolution plan, the resolution professional filed the instant application being IA No. 664 of 2019 under section 30(6) of the Code seeking its approval for the same in terms of section 31(1) of the Code and regulation 39(4) of the CIR Regulations.

8. The resolution professional submitted a detailed Table showing the compliances of the resolution plan with the mandatory requirements under the Code and CIR Regulations to support his contention, which said plan has also been approved by the CoC having 92.44 per cent of voting in favour of the resolution plan. The Table showing the compliances is given hereunder :

Sl. No.	*Section/ Regulation*	*Requirement of the Code and CIR Regulations*	*Clause of the resolution plan*	
1	Section 25(2)(*h*)	Whether the resolution applicant meets the criteria approved by the CoC having regard to the complexity and scale of operations of business if the CD?	Demonstrated along with EoI submitted	Yes
2	Section 29A	Whether the resolution applicant is eligible to submit resolution plan as per final list of resolution professional or order, if any of the Adjudicating Authority?	The resolution professional has received affidavit for stating and affirming that RA is eligible to submit the resolution plan under section 29A of the IBC, 2016	Yes
3.	Section 30(1)	Whether the resolution applicant has submitted an affidavit stating that it is eligible	-do-	Yes
4.	Section 30(2)	Whether the resolution plan : (*a*) provides for the payment of insolvency resolution process costs? (*b*) provides for the payment of the debts of operational creditors? (*c*) provides for the management of the affairs of the corporate debtor? (*d*) the implementation and supervision of the resolution plan ? (*e*) contravenes any of the provisions of the law for the time being in force ;	(*a*) Part B (*b*) Part D (*c*) Part M (*e*) Part N (*e*) NA	(*a*) Yes (*b*) Yes (*c*) Yes (*d*) Yes (*e*) No

5.	Section 30(4)	Whether the resolution plan : (*a*) is feasible and viable, according to the CoC? (*b*) has been approved by the CoC with 66 per cent voting share?		(*a*) Yes (*b*) Yes
6.	Section 31(1)	Whether the resolution plan provisions for its effective implementation plan, according to the CoC?		Yes
7.	Regulation 35A	Where a resolution professional made a determination if the corporate debtor has been subjected to any transaction of the nature covered under sections 43, 45, 50 or 66 before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board?	No transaction falling within times specified under section 43,45,50 or 66	Yes
8.	Regulation 38(1)	Whether a resolution plan identifies specific source of funds that will be used to pay the – (*a*) insolvency resolution process costs? (b) liquidation value due to operational creditors? (*c*) liquidation value due to dissenting financial creditors?	Part L	 Yes Yes Yes
9.	Regulation 38(1A)	Whether the resolution plan includes a statement as to how it has dealt with the interests of all stakeholders?	Minutes of 9th meeting of the CoC and Part L	Yes
10.	Regulation 38(2)	Whether the resolution plan shall provide : (*a*) the term of the plan and its implementation schedule ; (*b*) for the management and control of the business of the corporate debtor during its term ; and (*c*) adequate means for supervising its implementation?	(*a*) Part L (*b*) Part M (*c*) Part N	Yes Yes Yes

11.	Regulation 38(3)	Whether the resolution plan demonstrates that : (*a*) it addresses the cause of default? (*b*) it is feasible and viable? (*c*) it has provisions for its effective implementation? (*d*) it has provisions for approvals required and the timeline for the same? (*e*) the resolution applicant has the capability to implement the resolution plan?	(*a*) (*b*) (*c*) Part L (*d*) (*e*)	(*a*) Yes (*b*) Yes (*c*) Yes (*d*) Yes (*e*) Yes
12.	Regulation 39(2)	Whether the RP has filed applications in respect of transactions observed, found or determined by him?	No transaction falling within times specified under section 43, 45, 50 or 66	No
13.	Regulation 39(4)	Provide details of performance security received as referred to in sub-regulation (4A) of regulation 36B.	Yet to receive	

9. The present application has been filed for approval of the resolution plan under section 30(6) read with section 31(1) of the Code (as amended) submitted by Chamaria Fashions (P.) Ltd., in respect of the corporate debtor.

9.1 The applicant/the resolution professional, deliberating the sequence of events right from calling EoI up to approval of the resolution plan by the CoC in its 9th meeting held on 3rd October, 2019 submitted the resolution plan duly approved by the CoC and affirming that he has verified the contents of the resolution plan and confirmed that it complies with the requirements envisaged under regulation 38 of the CIR Regulations as well as section 30 of the Code, and sought for approval of the resolution plan by this Adjudicating Authority.

9.2 The resolution applicant in pursuance to the Public Notice dated 29th March, 2019 submitted the plan relating to the insolvency resolution process of V S Texmills (P.) Ltd. ('company')/corporate debtor under the provisions of Insolvency and Bankruptcy Code, 2016 and the rules and regulations issued thereunder.

On perusal of the records it is found :

- that total outstanding financial debt of the company/corporate debtor admitted by the resolution professional towards its financial creditors, both secured as well as unsecured, is Rs. 16,31,41,624 as set out in Part C of the resolution plan. The amount of Rs. 16,31,41,624 includes interest amounting to Rs. 4,54,57,711.
- that, the total outstanding operational debt of the company provisionally admitted by the resolution professional towards its operational creditors is Rs.

1,37,73,192 as set out in Part of the resolution plan, based on the information memorandum.

- That, as per the information memorandum provided by the resolution professional, there is no amount outstanding due to worker or employee of the corporate debtor.

A statement showing the amount of claim and amount proposed to be paid is given below :

Name of claim	*Amount of claim admitted by IRP/RP*	*Amount proposed by RA*
IRP Cost	25,00,000	25,00,000
Financial creditors	16,31,41,624	4,44,00,000
Workers	NIL	NIL
Employees	NIL	NIL
Operational creditors	1,37,73,192	6,00,000
Statutory dues	NIL	NIL
Shareholders	NA	NIL
Total:	17,94,14,816	4,75,00,000

A statement showing sources of funds and applicability of the funds is mentioned hereunder :

Application of funds	*Rs. in lakhs*	*Sources of Funds*	*Rs. in lakhs*
Liabilities to be resolved/settled		Internal Sources/ Retained earnings of resolution applicant and out of revenue generation from the corporate debtor	575.00
(*a*) Insolvency resolution process cost	25.00		
(*b*) Financial creditors (secured and unsecured)	444.00		
(*c*) Workmen/employees			
Total :			
(*d*) Liquidation value due to operational creditors	NIL		
(*e*) Statutory dues	NIL		
(*f*) Operational creditors	6.00		575.00
(*g*) Equity share capital	NIL		
Total value of resolution plan	475.00		
Fresh fund based working capital	100.00		
Total :	**575.00**	**Total :**	**575.00**

Payment Schedule – Financial creditors from the date of approval of the resolution plan by the Adjudicating Authority :

Particulars	*Principal*	*Interest*	*Total*	*Balance*
				444,00,000
EMD with EoI	15,00,000		15,00,000	4,29,00,000
EMD with Plan	30,71,000		30,71,000	3,98,29,000
Q-l	49,78,625	_	49,78,625	3,48,50,375
Q-2	49,78,625	-	49,78,625	2,98,71,750
Q-3	49,78,625	7,46,794	57,25,419	2,48,93,125
Q-4	49,78,625	6,22,328	56,00,953	1,99,14,500
Q-5	49,78,625	4,97,863	54,76,488	1,49,35,875
Q-6	49,78,625	3,73,397	53,52,022	99,57,250
Q-7	49,78,625	2,48,931	52,27,556	49,78,625
Q-8	49,78,625	1,24,466	51,03,091	-
Total	4,44,00,000	26,13,779	4,70,13,779	

10. Funds infused by the resolution applicant shall be distributed as per section 53(1) which speaks as follows :

Section 53(1). Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :–

(*i*) The insolvency resolution process costs and the liquidation costs paid in full ;

(*ii*) The following debts which shall rank equally between and among the following :–

(*i*) Workmen's dues for the period of twenty-four months preceding the liquidation commencement date ; and

(*ii*) Debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52 ;

(*iii*) Wages and any unpaid dues owned to employees other than workmen for the period of twelve months preceding the liquidation commencement date ;

(*iv*) Financial debts owed to unsecured creditors ;

(*v*) The following dues shall rank equally between and among the following: -

(*i*) Any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the

whole or any part of the period of two years preceding the liquidation commencement date ;

(*ii*) Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest ;

(*vi*) Any remaining debts and dues ;

(*vii*) Preference shareholders, if any ; and

(*viii*) Equity shareholders or partners, as the case may be.

(2) Any contractual arrangement between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that subsection shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipients shall be distributed after such deduction.

Explanation : For the purpose of this section –

(*a*) It is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full ; and

(*b*) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

11. Thus, section 53 of the Code lists the priorities to be given to the beneficiaries, of liquidation value of the assets of the corporate debtor. The provisions of section 53 make it amply clear that operational creditors are at the end of the list of beneficiaries as the secured financial creditors have edge over the others.

12. It would also be pertinent to mention here that operational creditors have no *locus standi* as far as approval of the resolution plan by the CoC is concerned. As per section 24(3)(*C*), they are not eligible to attend and vote at the meetings of CoC, if, they are holding less than 10 per cent of the total debt.

Section 24(3) of the Code reads as under :

Section 24 :...

(3) The resolution professional shall give notice of each meeting of the committee of creditors to –

(*a*) member of [committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)] ;

(*b*) members of the suspended Board of directors or the partners of the corporate persons, as the case may be ;

(*c*) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

13. To decide the issue, it will be pertinent to notice the very object of the IB Code, resolution and role of CoC.

The objective of the I&B Code

'The objective of the Insolvency and Bankruptcy Code, 2016 is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in time bound manner for maximisation of the value of assets of such persons, to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders including alteration in the priority of the payments of the government dues, to establish an Insolvency and Bankruptcy Fund and matters connected therewith or incidental thereto.

Thus, the preamble of the I&B Code aims to promote resolution over liquidation. The purpose of resolution is for maximisation of value of assets of the corporate debtor and thereby for all creditors. It is not maximisation of value for a "stakeholder" or "assets of a stakeholder" such as creditors and to promote entrepreneurship, availability of credit and balance the interests. The first objective is "resolution". The second objective is "maximisation of the value of assets of the corporate debtor" and third objective is "promoting entrepreneurship, availability of credit and balancing the interests". This objective of the I&B Code is sacrosanct.

The said objective of the I&B Code is also affirmed by hon'ble Supreme Court in *Arcelor Mittal India (P.) Ltd*. v. *Satish Kumar Gupta* wherein the hon'ble Supreme Court observed that "the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.

Resolution plan

The I&B Code defines resolution plan as a plan for insolvency resolution of the corporate debtor as a going concern. It does not spell out the shape, colour and texture of resolution plan, which is left to imagination of stakeholders. Read with long title of the I&B Code, functionally, the resolution plan must resolve insolvency (rescue a failing, but viable business) ; should maximise the value of assets of the corporate debtor, and should promote entrepreneurship availability of credit and balance the interests of all the stakeholders.

In the backdrop of the object of the IBC, it is amply clear that the "resolution is rule and the liquidation is an exception".

Liquidation brings the life of a corporate to an end. It destroys organisational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. The IB Code, therefore, does not allow "liquidation of a corporate debtor" directly. It allows "liquidation only on failure of corporate insolvency resolution process". It rather facilitates and encourages resolution in several ways.

The said objective of the resolution plan is affirmed in the decision in the matter of

K Sashidhar v. *Indian Overseas Bank.* The Supreme Court has observed that National Company Law Tribunal has no jurisdiction and authority to analyse or evaluate the commercial decision of the committee of creditors (CoC) to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

Keeping in view such object behind the enactment of the Code, intention of the Legislature is, that the priority is to be given to the resolution than liquidation in the larger interests of the public, workmen, stakeholders and the other employees of the corporate debtors in the interest of justice and in order to achieve the object of the Code and liquidation of a company can be only as a last resort, wherein, all efforts for brining resolution plan were failed or it cannot be found workable in the larger public interest. Hence, now the approval of resolution plan by this Adjudicating Authority is rule as per the Apex Court's decision in the matter of *K Sashidhar* v. *Indian Overseas Bank* as discussed above.

The hon'ble Supreme Court in its recent judgment in Civil Appeal No. 10673 of 2018 in *K Sashidhar* v. *Indian Overseas Bank* .

Comprising of hon'ble Justice A M Khanwilkar and hon'ble Justice Ajay Rastogi observed that Adjudicating Authority has no jurisdiction to interfere with the commercial wisdom of the CoC.'

14. On perusal of the records, it is found that the resolution plan confirms to the criteria as provided under clauses (*a*) to (*f*) in section 30(2) of the Code and the CoC approved the resolution plan by 92.44 per cent majority of voting share. The resolution plan also confirms to such other requirements as may be specified by the Board.

On perusal of the resolution plan, it is found that it meets the requirement of section 31 read with section 30(2) of the Code. Therefore, the present application IA No.664 of 2019 is allowed subject to certain observations.

To make the provisions clearer, section 30 of the IBC is reproduced hereunder :

"30. *Submission of resolution plan.* – (1) A resolution applicant may submit a resolution plan 1 along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(*a*) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor ;

(*b*) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53 ;

(*c*) provides for the management of the affairs of the corporate debtor after approval of the resolution plan ;

(*d*) the implementation and supervision of the resolution plan ;

(*e*) does not contravene any of the provisions of the law for the time being in force ;

(*f*) conforms to such other requirements as may be specified by the Board.

Explanation : For the purposes of clause (*e*), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent, of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board :

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it :

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (*c*) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (*c*) of section 29A :

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section :

Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered :

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority."

15. However, clause No. (*e*) of Chapter IV : Assumptions and Limitations of resolution plan, cannot be allowed as these are the subject-matter of the various Competent Authorities having their own jurisdiction. The said clause No. (*e*) is reproduced hereunder :

> "...All business permits required by the corporate debtor to conduct its business and which have not been granted, cancelled, terminated, revoked, suspended or not renewed ; having been granted or reinstated, as the case maybe, at no additional cost to the resolution applicant or corporate debtor..."

16. In this regard, we are of the view that approval of the resolution plan does not mean automatic waiver or abetment of legal proceedings, if any, which are pending by or against the company/ corporate debtor as those are the subject-matter of the concerned competent authorities having their proper/own jurisdiction to pass any appropriate order as the case may be. The resolution applicant(s) on approval of the Plan may approach those competent authorities/courts/legal forums/offices - Govt., or Semi Govt./State or Central Govt., for appropriate relief(s) sought for in clause No. (*e*) of Chapter IV of the resolution plan.

17. Thus, not allowing the above said clause No. (*e*) of Chapter IV of the resolution plan, is not going to make any hindrance for proper implementation of the resolution plan as those are the subject-matter of the concerned/ appropriate competent authorities. The resolution applicant(s) has/have liberty to approach competent authorities for any concession, relief or dispensation as the case may be.

18. It is further directed that :

(*i*) The approved resolution plan shall come into force with immediate effect.

(*ii*) The resolution plan shall be subject to the various existing laws in force and shall also confirm to such other requirements specified by the Board and other statutory/competent authorities as the case may be.

(*iii*) The resolution applicant(s) shall pursuant to the resolution plan approved under section 31(1) of the Code, obtain the necessary approvals required under any laws for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under section 31(1) or within such period as provided for in such law, whichever is later or as the case may be.

(*iv*) The resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and resolution plan to the Insolvency and Bankruptcy Board of India to be recorded on its database.

19. We, the Adjudicating Authority, are of the considered opinion and also being satisfied that the resolution plan along with final Addendum, dated 11th

September, 2019 as approved by the committee of creditors (CoC) meets the requirements as referred to under section 30(2) of the Code, accordingly IA No.664 of 2019 is allowed with the above said observations and directions.

Any other IA(s), if pending, also stand(s) infructuous and disposed of in view of the above order.

COMPANIES ACT

[2020] 156 CLA 43 (DEL.)

HIGH COURT OF DELHI

Mukut Pathak

v.

Union of India

WP(C) 9088/2018 &CM Appln. No.35006/2018

Yogesh Khantwal

v.

Union of India and Anr.

WP(C) 4353/2018 & CM Appln. No.16864/2018

Aarti Khantwal

v.

Union of India and Anr.

WP(C) 4352/2018

Vineet Wadhwa

v.

Union of India and Anr.

WP(C) 3658/2019& CM Appln. No.23830/2019

Vibhu Bakhru, J

4th November 2019

The directors are not liable to demit their office on account of disqualifications incurred prior to statutory amendments introduced on 7th May, 2018. For disqualifications incurred after 7th May, 2018, they

would demit their office in all companies other than the defaulting company

The directors are not liable to demit their office on account of disqualifications incurred under sub-section (2) of section 164 by virtue of clause *(a)* of sub-section (1) of section 167 prior to the statutory amendments introduced with effect from 7th May, 2018. However, if they suffer any of the disqualifications under sub-section (2) of section 164 on or after 7th May, 2018, the clear implication of the proviso of aforesaid sections is that they would demit their office in all companies other than the defaulting company.

Companies Act, 2013 – Sections 164(2) and 167(1)(a) – Directors – Disqualification for appointment/reappointment – Vacation of office – Would petitioners demit their office of director on account of disqualifications incurred under sub-section (2) of section 164 by virtue of clause (a) of sub-section (1) of section 167 prior to statutory amendments introduced with effect from 7th May, 2018 – Would they demit office in all companies other than the defaulting company for disqualifications incurred on or after 7th May, 2018 in view of said sections – Whether the Parliament in its wisdom has enacted clause (a) of sub-section (1) of section 167 to provide for directors incurring disqualification to immediately vacate their office as director under sub-section (2) of section 164 on incurring the disqualification – Held, yes [Para 96] – Whether any challenge to the constitutional vires to the provisions of the aforesaid sections has not been raised in any of the present petitions – Held, yes [Para 97] – Whether the petitioners would not demit their office on account of disqualifications incurred under sub-section (2) of section 164 by virtue of clause (a) of sub-section (1) of section 167 prior to the statutory amendments introduced with effect from 7th May, 2018 – Held, yes – Whether, however, if they suffer any of the disqualifications under sub-section (2) section 164 on or after 7th May, 2018, the clear implication of the proviso to aforesaid sections is that they would demit their office in all the companies other than the defaulting company – Held, yes [Para 98].

SYNOPSIS

The petitioners have filed the present petitions, inter alia, impugning the list of directors stated to have incurred the disqualification under clause *(a)* of sub-section (2) of section 164 for default on the part of the companies in filing the annual returns and financial statements for the financial years 2014-16. The petitioners also challenge the list of disqualified directors published subsequently for defaults pertaining to the financial years 2012-2014 and 2013-2015. They impugn the same to the extent that it includes their names. They further pray that the respondents be directed to allow the petitioners to use their digital signature certificates ('DSC') and director identification number ('DIN'). The case required examination of the provisions containing scheme of relevant sections. While explaining the said scheme fully, the High Court

of Delhi has held that the petitioners would not, however, demit their office on account of disqualifications incurred under sub-section (2) of section 164 by virtue of clause *(a)* of sub-section (1) of section 167 prior to the statutory amendments introduced with effect from 7th May, 2018. Where they suffer any of the disqualifications on or after 7th May, 2018, the clear implications of the aforesaid sections are that they would demit their office in all companies other than the defaulting company. Important points made by the High Court are briefly as follows :

• The penal consequences of not filing returns for three consecutive financial years would be attracted under section 164 on its coming into force. Section 164 of the Act came into force on 1st April, 2014 and, thus, the failure of a company/its directors to file annual returns for three financial years thereafter would result in the directors incurring the disqualification as specified under sub-section (2) of section 164 [Para 46].

• Merely because an enactment draws on events that are antecedent to its coming in force does not render the said enactment retrospective [Para 47].

• Sub-section (2) of section 164 operates prospectively [Para 52].

• The principles of natural justice have been accepted as a part of procedural law, where it is necessary to supplement it. The question whether such principles are required to be read into any law must be considered in the context of the basic scheme of the statutory provisions [Para 60].

• The principles of natural justice are not inflexible. When it comes to applicability of the principles of natural justice, it is not apposite to follow a dogmatic approach. The rules can be suitably modified where it is expedient to do so [Para 64].

• Section 164(2) merely sets out the conditions, which if not complied with would disqualify and individual person from being reappointed or appointed as a director. The said section set out a qualifying criteria for the directors to be appointed or reappointed, in negative terms. This provision does not entail any decision-making process on the part of the authorities administering the Act [Para 65].

• The rationale for enacting sections 164 and 167 was to meet the malady of a large number of inoperative and shell companies [Para 66].

• The expression "other company" in sub-section (2) of section 164 is used to refer to all companies other than the company which has committed the defaults as specified in clauses *(a)* and *(b)* of sub-section (2) of section 164. [Para 75].

• A plain reading of clause *(a)* of sub-section (1) of section 167 indicates that a director would demit office if he incurs the disqualification under section

164. The proviso to clause *(a)* of sub-section (1) of section 167 of the Act was introduced with effect from 7th May, 2018, by virtue of the Companies (Amendment) Act, 2018 [Para 77].

Cases referred to : *Bhagavan Das Dhananjaya Das* v. *Union of India* [2018] 146 CLA 168 (Mad.) ; *Dharampal Satyapal Ltd.* v. *Deputy Commissioner of Central Excise, Gauhati* [2015] 8 SCC 519 ; *Gaurang Balvantlal Shah* v. *Union of India* [2019] 149 CLA 286 (Guj.) ; *Kaynet Finance Ltd.* v. *Verona Capital Ltd.* Appeal Lodging No. 318 of 2019 ; *Maneka Gandhi* v. *Union of India* [1978] 1 SCC 248 ; *Queen* v. *The Inhabitants of St. Mary, Whitechapel* [1848] 12 QB 120 ; *Sajjan Singh* v. *The State of Punjab* [1964] 4 SCR 630 ; *State of Orissa* v. *Dr. Bina Pani Dei* AIR 1967 SC 1269 ; *Swadeshi Cotton Mills* v. *Union of India* [1981] 1 SCC 664 ; *Union of India* v. *J N Sinha* [1970] 2 SCC 458 and and *Yashodhara Shroff* v. *Union of India* [2019] 152 CLA 393 (Kar.).

Appearamces : Vaibhav Dang, Assem Malhotra, Indraneel Ghosh, Ms. Vinita Sahitya, Kaushik Mandal, Ms. Shiva Lakshmi, Vikram Jetley, Bharathi Raju, Siddharth Singh, Sriram Krishna and Ms. Maya Narula for the Appearing Parties.

JUDGMENT

1. The petitioners have filed the present petitions, inter alia, impugning the list of directors stated to have incurred the disqualification under clause *(a)* of section 164(2) of the Companies Act, 2013 ('the Act') for default on the part of concerned companies in filing the annual returns and financial statements for the financial years 2014-16. The said list was published on 15th September, 2017 and is hereafter referred to as the "impugned list". The petitioners also challenge the list of disqualified directors published subsequently for defaults pertaining to the financial years 2012-14 and 2013-15. The petitioners impugn the same to the extent that it includes their name. The petitioners further pray that the respondents be directed to allow the petitioners to use their Digital Signature Certificates ('DSC') and Director Identification Number ('DIN').

2. The petitioners in the present batch of petitions were directors in various companies. By way of the impugned list, the petitioners have been disqualified from being appointed/reappointed as directors for a period of five years under section 164(2)*(a)* of the Act. Further, the names of some of the companies, in which the petitioners were holding the office of directors, have been struck off from the register of companies. In WP(C) No.3658 of 2019, the petitioners have been disqualified as directors on account of failure on the part of a company (Logic Eastern India Private Limited) to file its annual returns. It is stated that corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 has been initiated in relation to said company.

3. The impugned action was taken against the petitioners on account of default on the part of the companies in not filing the annual returns for the preceding financial years.

4. The petitioners have challenged the impugned list, essentially, on four grounds. First, that the action of the respondents in disqualifying the petitioners is arbitrary inasmuch as the petitioners were not afforded an opportunity to be heard. The petitioners contend that the said action is in violation of principles of natural justice. Second, that section 164 of the Act, which mandates the disqualification of directors, being penal in nature, could not be applied retrospectively. Third, that on the plain interpretation of section 164(2)*(a)* of the Act, the petitioners cannot be disqualified to act as directors of the companies, which have not defaulted in filing their annual returns and financial statements for a period of three consecutive years. And fourth, that the defaults under section 164(2) of the Act result in the directors being disqualified from being appointed/re-appointed as directors but does not result in them demitting office as directors.

5. The respondents dispute the aforesaid contentions and contend that sufficient opportunity had been provided to the petitioners to correct the default of not filing the statutory documents.

6. These petitions were heard together, as the controversy involved in the present petitions is common.

7. In view of the above, this court will refer to only to the facts of WP(C) No.9088/2018 for addressing the controversy raised in these petitions.

8. The petitioners in WP(C) No. 9088/2018 were appointed as directors in various companies in the period of 2005-10.

(*i*) Petitioner Nos.1 and 2 were appointed as directors in the company Aryan Cargo Express (P.) Ltd., registered under the Companies Act, 1956 : petitioner No.1 was appointed as a director in the said company on 23rd December, 2005 ; and petitioner No.2 was appointed as director in the said company on 19th April, 2007. The said appointments were made after obtaining the required security clearance by the Ministry of Home Affairs, through Ministry of Civil Aviation as per Civil Aviation Requirements (CAR).

(*ii*) Thereafter, on 15th May, 2008, petitioner Nos.1 and 2 were appointed as directors in the company Aryan Express Holding (P.) Ltd.

(*iii*) On 1st September, 2009, the petitioners were named as directors in the company Aryan Cargo & Express Logistics (P.) Ltd.

(*iv*) On 19th March, 2010, the petitioners were also appointed as directors in the company Cargo Logistics (P.) Ltd.

9. It is stated that the company, Aryan Cargo Express (P.) Ltd. commenced its business in March, 2010. It is further stated that financial statements and annual returns of the aforesaid company were completed and uploaded on the website of Registrar of Companies ('RoC') upto the financial year 2012-13, but the petitioners failed to submit the aforesaid statements for the subsequent years.

10. In the year 2014, respondent No.1 issued a circular (General Circular No. 34/2014), whereby it floated a scheme called Company Law Settlement Scheme, 2014. The said Scheme was floated to provide an opportunity to the defaulting companies to file their (belated) financial statements and annual returns for the consecutive period of three financial years. The said Scheme also offered an opportunity to the inactive companies *"to get their companies declared as "dormant company" under section 455 of the Act by filing a simple application at reduced fees"*.

11. Thereafter, in the year 2015, the petitioners applied for the voluntary closure of companies, namely Aryan Express Holding (P.) Ltd. and Aryan Cargo Logistics (P.) Ltd., on account of failure to commence the business. It is stated that the said applications were rejected by the RoC.

12. On 12th April, 2017, a notice dated 19th March, 2017 under section 248 of the Act was sent to petitioner Nos.1 and 2, inter alia, stating that the company Aryan Cargo Express (P.) Ltd. had been non-operational for two preceding financial years and, therefore, the RoC intended to remove the name of company from the register of companies. The relevant extract of the said notice is set out below :

> "(1) Pursuant to sub-sections (1) and (2) of section 248 of the Companies Act, 2013, notice is hereby given that as per available record :
>
> The company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455.
>
> (2) Therefore, on the basis of aforesaid ground, I intend to remove the name of company from the register of companies and request you to send your representation along with copies of the relevant documents, if any, within thirty days from the date of receipt of this notice.
>
> (3) Unless a cause to the contrary is shown within the time period above mentioned, the name of the above mentioned company shall be liable to be removed from the register of companies. However, the directors of the company shall be liable for appropriate action under the Act.
>
> This notice is also treated as having been served on the directors of the company in terms of the provisions of section 20 of the Companies Act, 2013."

13. In the meanwhile, respondent No.1 introduced another scheme known as "Condonation of Delay Scheme - 2018".

14. Petitioner No.1 replied to the aforesaid notice stating that the operations of the said company were stopped due to financial difficulties and further requested the RoC to allow the petitioner a chance to re-start operations within the then current financial year.

15. Thereafter, RoC issued another notice dated 15th May, 2018 to petitioner

No.1 reiterating its intention to remove the name of the aforesaid company from the register of companies. On 18th June, 2018, petitioner No.1 sent a reply to the aforesaid notice stating that efforts had been made to re-launch the operations of the said company.

16. On 15th September, 2017, respondent No.1 published the impugned list of disqualified directors, disqualifying 74,920 directors under section 164 read with section 167 of the Companies Act, 2013 on account of non-filing of Annual Returns for block of three consecutive years 2014-16, comprising of financial years 2013-14, 2014-15 and 2015-16. Consequently, the DINs of the aforesaid disqualified directors were blocked and details of these directors regarding their disqualification for the period from 1st November, 2016 to 31st October, 2021, were updated.

17. It is submitted by the respondents that the aforesaid list published on 15th September, 2017 did not take into account the defaults committed in filing the annual returns for the preceding block of three financial years – financial years 2011-12, 2012-13 and 2013-14 (FYs 2012-14) and financial years 2012-13, 2013-14 and 2014-15 (FYs 2013-15), respectively.

18. It is further submitted that the said defaulting directors were also disqualified because part of the defaults was post-1st April, 2014. For the block of financial years 2012-14 and financial years 2013-15, two separate lists of disqualified directors, both dated 3rd October, 2017, were published by respondent No.2 under which 37,237 directors were identified as disqualified for the block years 2012-14, for the period 1st November, 2014 to 31st October, 2019 and 1st November, 2015 to 31st October, 2020, respectively.

19. A tabular statement of the list of disqualified directors for the aforesaid block years, that is 2012-14, 2013-15 and 2014-16 is set out below:

List	*Block years*	*Date of publication of list of disqualified directors*	*No. of directors disqualified*	*No. of common directors with 2014-16 list*	*No. of directors exclusive in the lists dated 3rd October, 2017*	*Period of disqualification*
First	2014-16	15th September, 2017	74920	N.A.	N.A.	1st November, 2016 to 31st October, 2021
Second	2013-15	3rd October, 2017	34047	33790	257	1st November, 2015 to 31-10.2020
Third	2012-14	3rd October, 2017	37237	36451	786	1st November, 2014 to 31-10-2019
				Total	1043	

20. It is stated that thereafter, on 14th August, 2018, the petitioners became

aware that their DSCs had been blocked and they had been disqualified as directors for a period of five years. The name of Aryan Cargo & Express Logistics (P.) Ltd. was also struck off from the register of companies. The petitioners also came to know about the three separate lists published by respondent No.1 (including the impugned list for the financial years 2012-14, 2013-15 and 2014-16), setting out the names of the directors disqualified on account of violation of section 164(2)*(a)* of the Act. The names of petitioners also featured on these lists and, thus, they were also disqualified for a span of five years, that is, from 1st November, 2014 to 31st October, 2019, from 1st November, 2015 to 31st October, 2020 and from 1st November, 2016 to 31st October, 2021, respectively. The DSCs of the petitioners were also blocked pursuant to the impugned lists.

21. The learned counsel appearing for the petitioners have assailed the impugned list, essentially, on four grounds. First, it is contended that the petitioners were not provided an opportunity to be heard inasmuch as no show cause notice was issued to the petitioners intimating them about their disqualification as directors and such omission is in violation of principles of natural justice. It is submitted on behalf of the petitioners that the notice issued to the petitioners under section 248(1) of the Act cannot be construed as a show cause notice, as a company's name is open to be struck off for failure to carry on business for a period of two financial years, but for incurring a disqualification under section 164(2) of the Act, the company must default for a minimum period of three financial years.

22. Second, it is contended that the provisions of section 164 of the Act, being penal in nature, could not be applied retrospectively. It is submitted that the Companies Act, 2013 ('the Act') came into force on 1st April, 2014 but the petitioners were disqualified as directors for committing defaults for the financial years preceding the first financial year commencing on 1st April, 2014. It is further submitted that in terms of the General Circular No. 8/2014 dated 4th April, 2014, the provisions of the Companies Act, 1956 would govern the financial years preceding 1st April, 2014.

23. Third, that on a plain interpretation of section 164(2)*(a)* of the Act, the petitioners cannot be disqualified to act as directors of the companies, which had not defaulted in filing their annual returns and financial statements for a period of three consecutive years.

24. Fourth, that the defaults under section 164(2) of the Act result in the directors being disqualified from being appointed/re-appointed as directors but does not result in them demitting office as a director.

25. In addition, the petitioners also impugn the action of the respondents in deactivating their DINs and DSCs.

Reasons and conclusions

26. At the outset, it is relevant to note that the controversy involved in the present petition is limited to interpreting the provisions of section 164(2) and section 167(1)*(a)* of the Act. The petitioners have not challenged the constitutional vires of the aforesaid sections in these petitions.

27. By virtue of notification dated 26th March, 2014, the provisions of sections 164 and 167 of the Act came into effect from 1st April, 2014. The principal questions to be addressed are :

(*i*) whether the directors of defaulting companies would be disqualified under the provisions of section 164(2)*(a)* of the Act on account of defaults committed by the said companies in respect of financial years ending 31st March, 2014 and the preceding financial years ?

(*ii*) Whether the impugned action of the respondents in including the name of the petitioners in the list of disqualified directors without issuing any prior notice or affording the petitioners an opportunity to be heard, is void as being violative of principles of natural justice ?

(*iii*) Whether the directors of a company, which in default of clauses *(a)* and *(b)* of section 164(2) of the Act, are disqualified from being re-appointed as directors in other non-defaulting companies in which they were directors at the time of incurring the disqualification under section 164(2) of the Act ?

(*iv*) Whether the provisions of section 167(1)*(a)* of the Act are applicable in respect to offices of directors, who have incurred the disqualification under section 164(2) of the Act ?

(*v*) Whether, the Director Identification Number (DIN) and Digital Signature Certificate (DSC) of directors that have incurred the disqualification under section 164(2) of the Act, can be cancelled on account of them incurring such disqualification?

Whether the provisions of section 164(2)(*a*) are retrospective ?

28. The first and foremost question to be addressed is whether the provisions of section 164(2) of the Act operate retrospectively. This controversy arises in the context of the submissions advanced on behalf of the petitioners that considering the defaults in filing financial statements and annual returns for the financial year ending 31st March, 2014 (FY 2013-14) and prior years for the purposes of imposing the disqualification under section 164(2) of the Act, tantamount to applying the said provisions retrospectively. This, according to the petitioners, is impermissible.

29. Section 164(2) of the Act disqualifies a director from being re-appointed in a company for a period of five years, if the company has *(a)* not filed financial statements or annual returns for any continuous period of three financial years ; or *(b)* failed to repay the deposits accepted by it or pay

interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more. In addition, a director of such a company is also disqualified from being appointed in any other company for a period of five years.

30. Clause *(g)* of section 274(1) of the Companies Act, 1956, which was in force prior to 1st April, 2014, also contained similar provisions for disqualifying a director of a company that had failed to file the requisite returns for a consecutive period of three years. However, the said provision applied only to public companies and was wholly inapplicable to private companies. The sweep of section 164(2) of the Act is wider ; it not only includes public companies but private companies as well.

31. It is important to note that none of the learned counsel appearing for the respondents, canvassed the proposition that the provisions of section 164(2) of the Act would relate back to a period prior to its enactment. Thus, concededly, the said section is applicable prospectively.

32. Whilst, there is no dispute that the provisions of section 164(2) of the Act must be applied prospectively ; there is much controversy whether the defaults in relation to the financial year ending 31st March, 2014 can be taken into account while considering defaults in filing financial statements or annual returns, for the continuous period of three financial years. Thus, the controversy, essentially, relates to whether the default as contemplated in clause *(a)* of section 164(2) of the Act, in respect of a financial year prior to the said provision coming into force, could be considered for the purposes of the said section.

33. The impugned list was published on 15th September, 2017 and includes the names of directors of companies that had defaulted in filing annual returns for the financial years 2013-14, 2014-15, 2015-16. Such directors had been disqualified for the five-year period commencing from 1st November, 2016 to 31st October, 2021. The petitioners contend that the default for the financial year ending 31st March, 2014 cannot be considered since the same was prior to section 164 of the Act coming into force.

34. The Karnataka High Court, Gujarat High Court and Madras High Court have also considered a similar challenge – see *Yashodhara Shroff* v. *Union of India* WP No. 52911/2017 and connected matters, decided on 12th June 2019 [2019] 152 CLA 393 (Kar.) ; *Bhagavan Das Dhananjaya Das* v. *Union of India* WP Nos. 25455/2018 and other connected matters, decided on 3rd August, 2018 [2018] 146 CLA 168 (Mad.) and *Gaurang Balvantlal Shah* v. *Union of India* [2019] 149 CLA 286 (Guj.)/Manu/GJ/1278/2018. All of the aforesaid courts are unanimous in their opinion that the provisions of section 164 apply prospectively. In *Yashodhara Shroff* (*supra*), the Karnataka High Court had observed as under :–

"When for the first time under the 2013 Act the disqualification of a director of a private company is stipulated under the Act in the form of section 164(2), the said provision must be given only a prospective operation."

35. In *Gaurang Balvantlal Shah* (*supra*), the Gujarat High Court had observed as under :–

"Such provision of disqualification for the director of a company – public or private company, has been incorporated for the first time in section 164(2) of the Act of 2013. Such being the case, the said provision has to be construed as having prospective effect. If retrospective effect is given to it, that would destroy, alter and affect the right of the directors of private company existing under the Act of 1956."

36. The essential question to be addressed is whether the consideration of the default committed in filing financial statements and annual returns for the financial year 2013-14 would amount to applying the provisions of section 164(2) of the Act retrospectively. It is well settled that no statute shall be construed to apply retrospectively, unless such a construction appears clear from the language of the enactment or otherwise necessary by implication. It is also equally trite that a statute is not retrospective merely because it affects existing rights or because a part of the requisites for its action is drawn from a time antecedent to its passing.

37. In *Queen* v. *The Inhabitants of St. Mary, Whitechapel* [1848] 12 QB 120, the Court had observed "*the statute which is in direct operation prospective cannot be properly called a retrospective statute because a part of the requisites for that action is drawn from the time antecedents to its passing*."

38. The aforesaid proposition is also stated in *Halsbury's Laws of England*, 4th Edn., vol. 44, paragraph 921 in the following words :

'"Retrospective" is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regards as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects even if for the future only the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not retrospective merely because it affects existing rights ; nor is it retrospective merely because a part of the requisite for its action is drawn from a time and antecedents to its passing.'

39. It is also relevant to refer to the definition of the word 'retrospective'. The same is defined in *Judicial Dictionary* by K J Aiyar, Butterworth as under :–

'"Retrospective" when used with reference to an enactment may mean *(i)* affecting an existing contract ; or *(ii)* reopening up of past, closed and completed transaction ; or *(iii)* affecting accrued rights and remedies ; or *(iv)* affecting procedure. *Words and Phrases*, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "retrospective or retroactive law" as one which takes away or impairs vested or accrued rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under

existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transaction or considerations already past.'

40. Indisputably, the Parliament exercises the sovereign power to legislate in respect of the matters other than those specified in List II of the Seventh Schedule to the Constitution of India. In those matters, the State Legislatures exercise the legislative powers. Subject to the rigors of article 20(1) of the Constitution of India, there is no restriction on the Parliament or any State Legislature to enact any law with retrospective effect. However, it is also settled that no law shall be read as applicable retrospectively unless it is expressly enacted or necessarily implied. A retroactive law impairs vested rights acquired under the existing laws. It seeks to reopens past transactions and affects accrued rights. It is for this reason that retrospective application of a law is not readily inferred.

41. The question whether a law is retrospective has to be viewed in the context whether it divests a person of accrued rights, or creates new obligations, or attaches a disability in respect of transactions or actions done in the past.

42. It is apposite to bear the aforesaid in mind while examining the issue whether consideration of the defaults in filing financial statements and returns pertaining to financial year 2013-14, for the purposes of section 164(2) of the Act, amounts to retrospective application of section 164(2) of the Act.

43. It is necessary to bear in mind that there is no dispute that the Companies Act, 1956, as well as the Act (Companies Act, 2013) expressly oblige a company to file its financial statements and its annual returns within the stipulated period. In terms of proviso to section 96(1) of the Act, a company is required to hold an annual general body meeting within a period of six months from the end of the financial year. Thus, the company is obliged to hold its annual general meeting before 30th September of the next financial year following the close of the financial year. In terms of section 92(4) of the Act, the annual return for a financial year is to be filed within a period of sixty days from the annual general meeting ('AGM') or the last date on which the AGM of a company ought to have been held. The final accounts of the company are required to be filed within a period of thirty days from the holding of the AGM. In cases where such meeting has not been held, the financial statements have to be filed within a period of thirty days from the last date of holding of such AGM – see *sub-sections (1) and (2) of section 137 of the Act*.

44. Thus, even though the financial year ending 31st March, 2014 had ended prior to section 164 of the Act coming into force, the AGM in respect of that financial year was required to be held by 20th September, 2014, that is, after the section 164 of the Act had come into force. Any default in holding this meeting would invite the consequences under the Act. In terms of section 137(1) of the Act, the financial statements for the financial year ending 31st March, 2014

were required to be filed within thirty days of holding of the AGM or of the last date for holding such AGM. The annual returns for the financial year ending 31st March, 2014 is required to be filed within a period of sixty days of holding of the AGM or on the last date on which such meeting ought to have been held. Similar obligations also existed under the Companies Act, 1956.

45. In view of the above, if a company had failed to file its annual returns within a period of thirty days from the holding of the AGM or from the last date for holding such meeting for the financial year 2013-14, it would be in default under the provisions of the Act. There is no reason for excluding such default for the purposes of considering defaults in respect of three financial years as contemplated under section 164(2) of the Act. Plainly, a director cannot be heard to contend that he had acquired a vested right not to be penalised for this default since it pertains to filing returns for a financial year that had closed prior to section 164 of the Act coming into force. The date on which such default occurred is after the date on which section 164 of the Act had become effective. This court finds it difficult to understand as to which right of the petitioners has been impaired by considering such default for the purposes of section 164 of the Act.

46. The penal consequences of not filing returns for three consecutive financial years would be attracted on section 164 of the Act coming into force. Section 164 of the Act came into force on 1st April, 2014 and, thus, the failure of a company/its directors to file annual returns (for three financial years) thereafter would result in the directors incurring the disqualification as specified under section 164(2) of the Act. It is of little consequence that such defaults relate to filing annual returns that pertain to a period prior to 1st April, 2014. Undisputedly, the concerned companies (and vicariously the petitioners) were obliged to file the financial statements for the financial year 2013-14 after 1st April, 2014. As noticed above, the failure to do so would be in violation of section 137(2) of the Act and this court finds no reason why such defaults should not be considered for the purposes of section 164 of the Act. Merely, because the returns to be filed pertain to a period prior to 1st April, 2014, is of no relevance considering that the default in doing so has occurred after the provisions of section 164 of the Act had become applicable.

47. Merely because an enactment draws on events that are antecedent to its coming in force does not render the said enactment retrospective. We may consider an illustration where an Act provides for a higher punishment for a second offence. Thus, a person committing an offence for the second time after such enactment has come into force would suffer enhanced punition even though the first offence was committed prior to such enactment coming in force. This is so because the punishment is for the second offence and merely because it also takes into account an event that had occurred prior to the Act coming in force, the same would not render the said enactment as

retrospective. Such a law would not suffer from the vice of being *ex post facto*. This is so because it neither impairs any vested or accrued right nor imposes any new disabilities in respect of events that had occurred earlier.

48. It is relevant to refer to the decision of the Supreme Court in *Sajjan Singh* v. *The State of Punjab* [1964] 4 SCR 630. In that case, the Supreme Court had considered the case of the appellant who was convicted and sentenced under section 5(2) of the Prevention of Corruption Act, 1947. The appellant was found to be in possession of assets disproportionate to his legitimate source of income. It was contended on his behalf that the pecuniary resources and properties acquired before 11th March, 1947, that is, prior to the Prevention of Corruption Act. 1947 coming into force, could not be taken into consideration for the purposes of section 5(3) of the said statute since the same would amount to enforcing it with retrospective effect.

49. The Supreme Court rejected the aforesaid contention. The court referred to *Maxwell on Interpretation of Statute*, 11th edn. and observed that a statute cannot be stated to be retrospective "*because a part of the requisites for its action is drawn for a time antecedent of its passing*".

50. *A fortiori*, in this case the respondents are not seeking to draw on any default or event, which had occurred or an action which was required to be taken, prior to section 164 of the Act coming into force.

51. In view of the above, this court is in respectful disagreement with the view of the Karnataka High Court, Madras High Court and Gujarat High Court in *Yashodhara Shroff* (*supra*) ; *Bhagavan Das Dhananjaya Das* (*supra*) and *Gaurang Balvantlal Shah* (*supra*) inasmuch as the said Courts have held that the defaults for the financial year ending 31st March, 2014 cannot be considered for determining whether a director had incurred the disqualification under section 164(2) of the Act.

52. Concededly, section 164(2) of the Act operates prospectively. However, such prospective operation would entail taking into account failure to file the financial statements pertaining to the financial year ending 31st March, 2014 on or before 30th October, 2014. This court is of the view that the taking into account such default does not amount to a retrospective application of section 164 of the Act and the contentions advanced by the petitioners in this regard, are unmerited.

53. The impugned list of disqualified directors published on 15th September, 2017 contained names of 74,920 individuals who had been disqualified to act as a director on account of failure of the concerned companies to file their annual returns for the financial years ending 31st March, 2014, 31st March, 2015 and 31st March, 2016 (FY 2013-4, FY 14-15 and FY 15-16) . These directors were disqualified to act as such with effect from 1st November, 2016 to 31st

October, 2021. Apart from this list, the respondents had also published two other lists. These lists were published on 3rd October, 2017 (hereafter referred to as the "the second list" and "the third list"). The second list contained names of 34,047 persons who were disqualified to act as directors for the defaults committed by the concerned companies in respect of financial years ending on 31st March, 2013, 31st March, 2014 and 31st March, 2015 (FY 2012-13, FY 13-14 and FY 14-15). Such persons were disqualified to act as a directors with effect from 1st November, 2015 to 31st October, 2020. The third list contained the names of 37,237 directors who were disqualified for defaults pertaining to the financial years ending 31st March, 2012, 31st March, 2013 and 31st March, 2014 (FY 2011-12, 2012-13 and FY 2013-14).

54. The second and the third lists cannot be sustained. This is, principally, for two reasons. First of all, the disqualification of directors under the said lists is premised on the defaults committed prior to section 164 of the Act coming into force. The default in filing the financial statements/annual returns for the financial year ending 31st March, 2013 had occurred on the failure of the concerned companies to file the same by 31st October, 2013. This was prior to the section 164(2) of the Act coming into force. Similarly, the third list is also premised on the failure to file financial statements/annual returns pertaining to FY 2011-12 and FY 2012-13. These were to be filed latest by 31st October, 2012 and 31st October, 2013. It is relevant to note that it is not the contention of the respondents that defaults prior to 1st April, 2014 could be taken into account for the purposes of section 164 of the Act. It is not their contention that the default committed by not filing the returns for the financial year ending 31st March, 2014 by 31st October, 2014 (which would be a default after section 164 of the Act had come into force) would trigger the consequences of section 164(2) of the Act since the said default was committed after the section 164 of the Act had come into force. No such contention was advanced, perhaps, because it would be inconsistent with respect to the period for which disqualification is stated to have been incurred. Clearly the respondents cannot contend that a director who has been disqualified to act as such on account of defaults committed for the financial years ending 31st March, 2012, 31st March, 2013 and 31st March, 2014 can be held to be responsible for any defaults for a period of five years thereafter since, according to them, he would have been disqualified to act as a director after incurring the disqualification under section 164(2) of the Act. As mentioned in the third list, such persons would suffer the disqualification for the period 1st November, 2014 to 31st October, 2019. All the names included in the third list, except names of 786 persons, are common with the names in the first list.

55. In the aforesaid context, Ms. Shiva Laxmi, learned counsel appearing for the respondents, after seeking instructions, conceded that the second and third lists were inconsistent in respect of disqualification period as specified

in the impugned list. Since neither the petitioners nor the respondents have argued that the defaults committed prior to 1st April, 2014 can be considered for imposing the disqualification under section 164 of the Act ; the second and the third list, published on 3rd October, 2017, cannot be sustained. The same are, accordingly, set aside.

Whether a prior notice and an opportunity of being heard was required to be afforded to the petitioners before including their names in the impugned list and whether the impugned list is void as being violative of principles of natural justice?

56. It is contended on behalf of the petitioners that the respondents have violated the principles of natural justice by including their names in the impugned list of disqualified directors and, therefore, the same is liable to be set aside. It is earnestly contended that since disqualification of a director has serious adverse consequences, it is necessary for the respondents to afford an opportunity of hearing before any such action is taken. It is contended that failure to do so has rendered the impugned list of disqualified directors void.

57. The question whether principles of natural justice are applicable is required to be considered in the context of the statutory provisions. In *Union of India* v. *J N Sinha* [1970] 2 SCC 458 the Supreme Court had observed that the rules of natural justice do not supplant the law but supplement it. It is trite law that a party whose rights and interests are likely to be affected adversely, must be provided an opportunity of representing his case. Such a requirement is now accepted as an intrinsic part of fair procedure. However, since the principles of natural justice are only meant to supplement the law, they are read as a part of the decision making process only in cases where such principles are not excluded expressly or by necessary implication.

58. In *Dharampal Satyapal Ltd.* v. *Deputy Commissioner of Central Excise, Gauhati* [2015] 8 SCC 519, the Supreme Court had briefly traced the genesis of the principles of natural justice and had observed as under :

> "The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong."

59. The Supreme Court further referred to the views of Professor D J Gallian and had observed as under :–

> "It, thus, cannot be denied that principles of natural justice are grounded in

procedural fairness which ensures taking of correct decision and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms."

60. It is clear from the above that the principles of natural justice have been accepted as a part of procedural law, where it is necessary to supplement it. The question whether such principles are required to be read into any law must be considered in the context of the basic scheme of the statutory provisions.

61. In *Maneka Gandhi* v. *Union of India* [1978] 1 SCC 248, the Supreme Court had explained that the exceptions to the rule of *audi alteram partem* are really not exceptions to procedural fairness in the true sense but in the context of certain laws are not considered applicable, as nothing unfair can be inferred by excluding such procedure. The relevant extract of the said decision is set out below :–

'.... There are certain well recognised exceptions to the *audi alteram partem* rule established by judicial decisions and they are summarised by S A de Smith in *Judicial Review of Administrative Action*, 2nd edn., at pages 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair play in administrative action. The word "exception" is really a misnomer because in these exclusionary cases, the *audi alteram partem* rule is held inapplicable not by way of an exception to "fair play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The *audi alteram partem* rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands.'

62. In *J N Sinha (supra),* the Supreme Court had observed as under :–

'"Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental Rights. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice, the courts should do so. But if a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice then the court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice." So also the right to be heard cannot be presumed when in the circumstances of the case, there is paramount need for secrecy or when a decision will have to be taken in emergency or when promptness of action is called for where delay would defeat the very purpose or

where it is expected that the person affected would take an obstructive attitude. To a limited extent it may be necessary to revoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the passport authority or the Government to revoke or impound the passport. But that by itself would not justify denial of an opportunity to the holder of the passport to state his case before a final order is passed. It cannot be disputed that the Legislature has not by express provision excluded the right to be heard….'

63. In *Swadeshi Cotton Mills* v. *Union of India* [1981] 1 SCC 664, the Supreme Court of India referred to the earlier decisions in *Maneka Gandhi* (*supra*), *State of Orissa* v. *Dr. Bina Pani Dei* AIR 1967 SC 1269 and *A K Kraipak* (*supra*) and held as under :–

"31. The rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant it (Per Hegde, J in *A K Kraipak* [1969] 2 SCC 262. If a statutory provision either specifically or by inevitable implication excludes the application of the rules of natural justice, then the court cannot ignore the mandate of the Legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of the exercise of that power – See *Union of India* v. *Col. J N Sinha*, [1970] 2 SCC 458....

33. The next general aspect to be considered is : Are there any exceptions to the application of the principles of natural justice, particularly the *audi alteram partem* rule ? We have already noticed that the statute conferring the power, can by express language exclude its application. Such cases do not present any difficulty. However, difficulties arise when the statute conferring the power does not expressly exclude this rule but its exclusion is sought by implication due to the presence of certain factors : such as, urgency, where the obligation to give notice and opportunity to be heard would obstruct the taking of prompt action of a preventive or remedial nature……"

64. It is also important to note that the principles of natural justice are not inflexible. As noticed above, the object of including principles of natural justice where the statutory provisions are silent in that regard, is to ensure procedural fairness. When it comes to applicability of the principles of natural justice, it is not apposite to follow a dogmatic approach ; principles of natural justice admit a considerable degree of flexibility and said rules can be suitably modified where it is expedient to do so.

65. Bearing the aforesaid in mind, this court may now proceed to examine the statutory provisions and the applicability of the *audi alteram partem* rule. section 164 (2) of the Act merely sets out the conditions, which if not complied with would disqualify an individual a person from being reappointed or

appointed as a director. To put it in a converse manner, the said sections sets out a qualifying criterion for directors to be appointed or re-appointed, in negative terms. This provision does not entail any decision-making process on the part of the Authorities administering the Act. No Authority is required to exercise any discretion or take any judicial or quasi-judicial decision regarding disqualification of a director. The Authority is also not required to pass any order disqualifying an individual. Clearly, in these circumstances, the rule of *audi alteram partem* would be inapplicable. As noticed above, such rules are meant to supplement the law to ensure procedural fairness. Such principles are also to be followed while taking administrative decisions to ensure fairness in action. In *Dharampal Satyapal Ltd.* (*supra*), Dr. A K Sikri, J, had observed that such principles "*are a kind of code of fair administrative procedure in the decision making process*". It is difficult to understand as to how such principles would assist in the administrative procedure where an authority is not required to take any qualitative decision. The question whether a person fulfils the stipulated qualifications leaves little room for debate. As observed above, the administrative authorities are not required to take any qualitative decision in this regard. In the aforesaid view, this court is unable to accept that exclusion of the *audi alteram partem* rule results in any procedural unfairness.

66. It is also important to note that the rationale for enacting section 164(2) and section 167(1)*(a)* of Act was to meet the malady of a large number of inoperative and shell companies. Current information of such companies is available with the Registrar of Companies as the persons in control of such entities had consistently failed and neglected to file the requisite returns. Undisputedly, in a large number of cases, withholding of information was willful as the information pertained to shell companies, which were incorporated to serve a limited purpose. The purpose of debarring such directors from participating in any corporate entity as a direction is to ensure that persons who take up the mantle of becoming directors of companies are conscious of their responsibility of ensuring that the companies comply with the statutory requirement.

67. There is also a paradigm shift in administering the Act from a predominantly manual driven mode to an electronic one. One of the principal function performed by the Registrar of Companies, is to maintain records which was being done manually. The current policy is to now maintain such records digitally and with the limited manual intervention. A part of the routine functions, which do not require any application of mind, are now driven by appropriate computer software programs.

68. The Rules framed under the Act, thus, provide for electronic filing of records and an electronic tracking of the defaults on the part of the companies and their directors. The impugned list of directors is also a result of such an

exercise carried out by the respondents. Importing the rule of prior hearing would clearly stultify and obstruct the said process.

69. As noticed above, this court is of the view that the principles of audi alteram partem are not applicable given the nature of the provisions of section 164(2) of the Act. However, even if it is assumed that disqualifying a director entails an administrative decision, there is a qualitative decision required to be taken by the authorities, the rule of affording a prior hearing cannot be readily inferred as a part of section 164(2) of the Act. This is so because the same would have the effect of obstructing and rendering the provision inefficient.

70. In *Yashodhara Shroff* (*supra*), the Karnataka High Court rejected the contention that the rule of *audi alteram partem* is applicable in the context of section 164(2) of the Act. The court had observed as under :–

> "127. Thus, when the ineligibility for being appointed as a director of the defaulting company or in all the companies is for a period of five years from the date of the default is by operation of law, there is no necessity to give a prior hearing or comply with the provisions of *audi alteram partem* before such consequences visit a director of such a company. The ineligibility is in the nature of suspension of a director for a period of five years. Therefore, in my view, the need to hear the director of a company before the ineligibility to be reappointed as a director of a company in default or to be appointed in any other company on account of default of a company in which he is a director, for a period of five years from the date of default of the company is rightly not envisaged under section 164(2) of the Act. Even in the absence of a prior hearing the section is valid and not in violation of article 14 of the Constitution."

71. A similar view was expressed by the Gujarat High Court in *Gaurang Balvantlal Shah* (*supra*), in the following words :–

> "....As such, there is no procedure required to be followed by the respondent-authorities for declaring any person or director ineligible or disqualified under the said provision. A person would be ineligible to be appointed as director, if he falls in any of the clauses mentioned in sub-section (1) and the person is or has been a director in a company, and the company makes defaults as contemplated in clause *(a)* or *(b)* of sub-section (2) thereof, he would be ineligible to be reappointed in the said defaulting company and appointed in any other company. The ineligibility is incurred by the person/director by operation of law and not by any order passed by the respondent-authorities, and, therefore, adherence of principles of natural justice by the respondents is not warranted in the said provision, as sought to be submitted by learned advocates for the petitioners."

72. In *Bhagavan Das Dhananjaya Das* (*supra*), the Madras High Court has taken a contrary view. This Court is in respectful disagreement with the aforesaid view and concurs with the view of the Gujarat High Court in *Gaurang Balvantlal Shah* (*supra*).

73. In view of the above, the contention that the impugned list is void as having been published without following the principles of natural justice, is rejected.

Re : Interpretation of provisions of section 164(2) of the Act.

74. It was earnestly contended on behalf of the petitioners that the petitioners may be disqualified to act as directors of the concerned companies that had committed defaults as contemplated under section 164(2)*(a)* of the Act – that is, had failed to file financial statements or annual returns for a continuous period of three financial years – but they are not disqualified to act as directors of companies that are not in default. It was contended by Ms. Sahaitya that in terms of section 164(2) of the Act, a director of a defaulting company would not be eligible for being reappointed in that company or being appointed in any other company for a period of five years. She submitted that the word 'appointed' and "re-appointed" cannot be read as synonyms. She stated that since two separate expressions – 'appointed' and 'reappointed' – have been used by the Legislature in the same statutory provision, the same must be given different meanings. On the strength of the aforesaid principle, she contended that a person who has incurred the disqualification under section 164(2) of the Act, cannot be appointed in any other company but can be re-appointed. She contended that in this view, there was no impediment for a director to be re-appointed in a company that had not committed any default as specified in clauses *(a)* and *(b)* of section 164(2) of the Act. She contended that a director of a defaulting company is disqualified from being appointed in any company in which he was not serving as a director at the material time. In other words, if a person was a director of a defaulting company but was also a director of other companies that were not in default, he would be disqualified from being re-appointed in defaulting company or for being appointed in any company other than the non-defaulting companies in which he was already a director. But he could be re-appointed in those non-defaulting companies where he had been appointed as a director prior to incurring the disqualification under section 164(2) of the Act. According to her, the expression "other companies" ought to be read as non-defaulting companies in which the director was not holding the office of a director at the material time.

75. The above contention is unsubstantial. A plain reading of section 164(2) does not indicate this legislative intent. It provides that no person who is or has been a director of company shall be eligible to be re-appointed as a director of "that company" or appointed in any "other company". The expression "other company" is used to refer to all companies other than the company which has committed the defaults as specified in clauses *(a)* and *(b)* of section 164(2) of the Act. It is also relevant to note that the term appointment would include any 'reappointment' as well.

Whether the directors incurring a disqualification under section 164(2) of the Act, would demit their office as a director in all companies in terms of section 167(1)(a) of the Act.

76. Section 167 of the Act reads as under :

167. *Vacation of office of director*.— (1) The office of a director shall become vacant in case—

(*a*) he incurs any of the disqualifications specified in section 164 ;

(*b*) he absents himself from all the meetings of the Board of directors held during a period of twelve months with or without seeking leave of absence of the Board ;

(*c*) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested ;

(*d*) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184 ;

(*e*) he becomes disqualified by an order of a court or the Tribunal ;

(*f*) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months :

Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court ;

(*g*) he is removed in pursuance of the provisions of this Act ;

(*h*) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

(2) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in sub-section (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

(3) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

(4) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1).

77. A plain reading of clause *(a)* of section 167(1) of the Act indicates that a director would demit office if he incurs the disqualification under section 164

of the Act. The proviso to clause *(a)* of section 167(1) of the Act was introduced with effect from 7th May, 2018, by virtue of the Companies (Amendment) Act, 2018.

78. It was contended by the petitioners that clause *(a)* of section 167(1) as it stood prior to introduction of the proviso could apply only individuals who incurred the disqualification as specified in section 164(1) of the Act not to those who incurred the disqualification under section 164(2) of the Act. It was contended that introduction of the proviso brought about a material change in the import of clause *(a)* of section 167(1) of the Act and, therefore, the same would be applicable only prospectively. The learned counsel appearing for the petitioners relied upon the decision of the Bombay High Court in *Kaynet Finance Ltd.* v. *Verona Capital Ltd.* Appeal Lodging No. 318 of 2019 in Arbitration Petition No. 716 of 2019 and Notice of Motion Lodging No. 662 of 2019, decided on 9th July, 2019 in support of their contention. In that case, the Division Bench of the Bombay High Court had read down the provisions of section 167)(1)*(a)* of the Act to be applicable only in cases where a director had incurred disqualification under section 164(1) of the Act. The said clause was held wholly inapplicable in cases where a director had incurred disqualification under section 164(2) of the Act. The court had reasoned that directors of company that had defaulted in filing returns and financial statements for a period of three consecutive years would be disqualified from being appointed in that company by virtue of clause *(a)* of section 164(2) of the Act. If section 167(1)*(a)* was read to apply to such directors, it would lead to an absurd situation where no person could possibly act as a director of a defaulting company. This would be so because a director would demit his office as soon as he was appointed. The court observed that "it could not have been the intention of law to create an absurdity."

79. At this stage, it would be necessary to refer to the provisions of section 164 of the Act, which sets out circumstances in which a person is disqualified for being appointed as a director. The said section reads as under :–

> 164. *Disqualifications for appointment of director*.— (1) A person shall not be eligible for appointment as a director of a company, if —
>
> (*a*) he is of unsound mind and stands so declared by a competent court ;
>
> (*b*) he is an undischarged insolvent ;
>
> (*c*) he has applied to be adjudicated as an insolvent and his application is pending ;
>
> (*d*) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence :
>
> Provided that if a person has been convicted of any offence and sentenced in

respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company ;

(*e*) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force ;

(*f*) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call ;

(*g*) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years ; or

(*h*) he has not complied with sub-section (3) of section 152.

(2) No person who is or has been a director of a company which—

(*a*) has not filed financial statements or annual returns for any continuous period of three financial years ; or

(*b*) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

(3) A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) :

Provided that the disqualifications referred to in clauses *(d)*, *(e)* and *(g)* of sub-section (1) shall not take effect—

(i) for thirty days from the date of conviction or order of disqualification ;

(ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of ; or

(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of."

80. It is seen from the above that a person is disqualified from being appointed as a director if *(a)* he is of an unsound mind ; *(b)* he is an undischarged insolvent ; *(c)* he has applied for being adjudicated as an insolvent and his application is pending ; *(d)* he is convicted of an offence involving moral turpitude and sentenced to imprisonment for a period of not less than six months ; *(e)* an order disqualifying him from being appointed as a director has been passed by any court ; (*f*) he has not paid any calls in respect of any shares of any company held by him ; *(g)* he has been convicted of an offence with related party transactions under section 188 of the Act ; or *(h)* he has not

complied with the provisions of sub-section (3) or he has not secured a Director Identification Number (DIN) as required in terms of section 152(3) of the Act.

81. As is apparent from the above, the conditions as set out in sub-section (1) of section 164, which disqualify a person from being appointed as a director are directly attributable to him/her. In contrast to the above, the provisions of sub-section (2) of section 164 of the Act stipulates the defaults committed by a defaulting company, which results in the directors of that company incurring the disqualification being vicariously responsible for such defaults. It is possible that a particular director may not be, in fact, directly responsible for such defaults ; nonetheless, he is disqualified to act as a director on account of being responsible for the affairs of the defaulting company by virtue of his holding the office of a director.

82. A person who has incurred the disqualification under section 164(1) of the Act is not eligible for being appointed as a director of any company. Any person who has incurred the disqualification under sub-section (2) of section 164 of the Act is not eligible for being re-appointed as a director of the company that has defaulted in terms of clauses *(a)* and *(b)* of sub-section (2) of section 164 of the Act. He is also disqualified for being appointed to any other company for a period of five years. In terms of section 164, a person who has incurred the disqualification is not eligible for appointment as a director. The disqualification under sub-section (2) of section 164 is applicable only to a person who is or was a director. Such disqualification, thus, operates on his reappointment in the defaulting company or for an appointment in any other company. A plain reading of sub-section (2) of section 164 indicates that his functioning as a director in companies, in which he holds such office at the time of incurring the disqualification, is not affected. Such disqualification triggers in respect of appointment in the future after he has incurred the disqualification.

83. Section 164 of the Act has replaced the provisions of section 274(1) of the Companies Act, 1956. Section 274(1)(*g*) was inserted in the Companies Act, 1956 with effect from 13th December, 2000. The said provision was only applicable to directors of a public company, which had defaulted in filing its annual accounts and annual returns for a period of three financial years or had failed to meet its specified payment obligations.

84. There is no difficulty in the operation of section 164 of the Act on a standalone basis. The controversy, essentially, arises in the context of clause *(a)* of section 167(1) of the Act. In terms of clause *(a)* of section 167(1) of the Act, the office of a director becomes vacant in case he incurs any disqualification as specified under section 164 of the Act. Thus, whereas section 164 disqualifies a person from being appointed/reappointed as a director, the import of section 167(1)*(a)* is that such a director demits his office immediately on incurring such disqualification.

85. Insofar as the conditions that disqualify a person disqualified from acting as a director under section 164(1) are concerned, there is no difficulty in reading such conditions to also result in the particular director demitting office in terms of section 167(1)*(a)* of the Act. This is so because the conditions as stipulated in section 164(1) of the Act are attributable to the individual and not to all directors of a company. In other words, a person who was disqualified from being appointed as a director on account of being *(a)* of an unsound mind ; *(b)* an undischarged insolvent ; *(c)* an applicant for being adjudicated as an insolvent ; *(d)* convicted of an offence involving moral turpitude and sentenced for imprisonment for not less than six months ; *(e)* disqualifying for being appointed as a director by an order passed by any court ; (*f*) a defaulter on account of not paying calls in respect of any shares of any company held by him ; *(g)* convicted of an offence with respect to related party transactions under section 188 of the Act ; or *(h)* not compliant with the provisions of section 152(3) of the Act.

86. The problem, essentially, arises in implementing the provisions of section 167(1)*(a)* in respect of directors who have incurred disqualification under section 164(2) of the Act. This is so because the disqualification incurred in sub-section (2) are not directly on account of reasons attributable to an individual director but on account of defaults committed by a company. Any person who *is* or *has been* a director of a company, which commits the defaults as set out in clauses *(a)* and *(b)* of sub-section (2) of section 164 of the Act, incurs the disqualification for being appointed/reappointed as a director. If the provisions of section 167(1)*(a)* of the Act are applied in such a case, all directors of such a defaulting company would demit their office as directors immediately on incurring the disqualification under section 164(2) of the Act. In addition, such directors would also cease to be directors of any other company in which they are directors. This results in an absurd situation where a defaulting company can never appoint a director. This is so because as soon as the person – who is otherwise eligible for being appointed as a director and has not incurred any disqualification either under sub-section (1) or (2) of section 164 of the Act – is appointed as a director of a company that has committed the defaults as stipulated in clause *(a)* or *(b)* of section 164(2) of the Act ; he would immediately incur the said disqualification and consequently demit office of not only that company but any other company in which he is a director.

87. Concededly, this is not the legislative intent of including section 167 in the Act. Ms. Shiva Lakshmi, learned counsel appearing for respondent had contended that section 167 should be read along with the proviso to section 167(1)*(a)* which was introduced with effect from 7th May, 2018. She stated that the proviso is clarificatory and, therefore, is applicable retrospectively. In terms of the proviso to clause *(a)* of section 167(1), the office of a director

of defaulting company would not fall vacant on the directors incurring the disqualification under section 164(2) of the Act. She further submitted that any person appointed as a director of a company that had already committed defaults as stipulated in clauses *(a)* and *(b)* of section 164(1) of the Act would not demit office by virtue of proviso to section 167(1)*(a)* of the Act.

88. The question whether the proviso to section 167(1)*(a)* is clarificatory, and should be read as implicit in section 167(1)*(a)* even prior to its enactment, cannot be examined by reading the proviso in isolation. Sections 164(2) and 167(1)*(a)* of the Act as in force prior to 7th May, 2018 are required to be interpreted on the basis of their plain language as existing prior to 7th May, 2018. It is important to examine the interplay of these sections in order to understand the statutory scheme. The proviso to section 167(1)*(a)* as introduced by the Companies (Amendment) Act, 2018 with effect from 7th May, 2018, also cannot be read in isolation and without reference to the proviso to section 164(2), which was introduced by the same amending enactment.

89. The proviso to section 164(2) provides that any person who has been appointed as a director of a company which is in default of clauses *(a)* or *(b)* of sub-section (2) of section 164 of the Act would not incur the disqualification for a period of six months. Clearly, this proviso is not clarificatory. It is a substantive provision to enable a company to appoint directors (other than those who had incurred any disqualification) to enable them to cure the defaults. The Legislature has provided a window of six months for curing the defaults and to enable the incoming directors appointed on the Board of the defaulting companies to avoid disqualification under section 164(2) of the Act. There is no possibility to read such a window of six months in section 164(2) of the Act prior to 7th May, 2018 ; that is, prior to enactment of the proviso to section 164(2) of the Act.

90. This also leads to the question as to why it was necessary to introduce the proviso to section 164 (2) of the Act. It is obvious that such a proviso was also necessary if the provisions of section 167(1)*(a)* were to be extended to result in vacation of office occupied by persons who had incurred the disqualification under section 164(2) of the Act. In absence of such a provision, the incoming directors – who are otherwise eligible for being appointed as a directors and had not incurred any disqualification either under sub-section (1) or under sub-section (2) of section 164 of the Act – would demit office in all other non-defaulting companies on being appointed on the Board of a company that had already committed defaults under clauses *(a)* and *(b)* of section 164(2) of the Act. With the inclusion of the aforesaid proviso, a person appointed as a director of a defaulting company would not incur such disqualification for a period of six months. Consequently, he would also not cease to be a director of any company by application of section 167(1)*(a)* of the Act. Extending the

punitive measure under section 167(1)*(a)* to such directors, would expose the said section to a challenge on the ground of being manifestly unreasonable and arbitrary.

91. This scheme was reinforced by introduction of the proviso to section 167 (1)*(a)* of the Act. In addition, the proviso to section 167(1)*(a)* of the Act also cleared the path for implementing section 167(1)*(a)* in respect of offices held by directors of a defaulting company who had incurred the disqualification under section 164(2) of the Act.

92. It is clear from the import of the two provisions as introduced by the Companies (Amendment) Act, 2018 with effect from 7th May, 2018 that the same cannot be read as clarificatory. This is so because the plain language of sections 164 and 167 of the Act did not any such statutory scheme. More importantly, this is not the only interpretation that would resolve the absurdity presented by the plain language of the said sections. Thus, such a scheme – as introduced by enactment of the two provisions – could not be read as a part of sections 164 and 167(1) of the Act.

93. It is also relevant to mention that section 167(1) of the Act provides for a punitive measure against directors of a defaulting company. Plainly, such provisions cannot be readily inferred to apply retrospectively.

94. In view of the above, the scheme of section 164 of the Act read with section 167(1)*(a)* of the Act, for the period prior to 7th May, 2018, must be determined on the basis of the plain language of the said provisions as in force prior to 7th May, 2018. The legislative scheme of those provisions stand materially amended by introduction of the provisions with effect from 7th May, 2018.

95. Indisputably, the plain language of section 164(2) read with section 167(1) *(a)* of the Act leads to an absurd situation as discussed earlier. In this view, the rule of literal interpretation cannot be applied for interpreting the provisions of section 167(1)*(a)* of the Act. In *Kaynet Finance Ltd. (supra),* the Bombay High Court had resolved this issue by reading down the provisions of section 167(1) *(a)* to apply to cases of disqualification falling under section 164(1) of the Act and not section 164(2) of the Act. In other words, clause *(a)* of section 167 (1) has been read as, *"he incurs any of the disqualification specified in section 164 (1)"* instead of *"he incurs any of the disqualification specified in section 164"*. This court respectfully concurs with this view.

96. There is compelling reason for limiting the scope of section 167(1)*(a)* for the disqualification incurred under section 164(1) of the Act. As noticed above, the disqualifications under section 164(1) of the Act are directly attributable to the individuals incurring such disqualifications. These include an individual being declared insolvent, of being unsound mind, and being convicted of an offence involving moral turpitude. Clearly, such persons cannot continue to

hold the office of a director on incurring such disqualifications. It would be irrational to await for the reappointment of a director for section 164 to trigger in respect of companies in which such individuals stand appointed as directors. Thus, the Parliament in its wisdom has enacted clause *(a)* of section 167(1) of the Act to provide for such directors to immediately vacate their office as a director, on incurring the disqualifications under section 164(1) of the Act.

97. Although, the challenge to the constitutional vires to the provisions of sections 164(2) and 167(1) of the Act have not been raised in any of these petitions, however, it is apposite to observe that reading down the provisions of section 167(1)*(a)*, as has been done by the Bombay High Court in *Kaynet Finance Ltd.* (*supra*), would also obviate the challenge to the provisions of section 167(1)*(a)* of the Act as being arbitrary and unreasonable.

98. In view of the above, the petitioners would not demit their office on account of disqualifications incurred under section 164(2) of the Act by virtue of section 167(1)*(a)* of the Act prior to the statutory amendments introduced with effect from 7th May, 2018. However, if they suffer any of the disqualifications under section 164(2) on or after 7th May, 2018, the clear implication of the provisos to sections 164(2) and 167(1)*(a)* of the Act are that they would demit their office in all companies other than the defaulting company.

Whether the act of the respondents in deactivating the DIN of the directors is sustainable?

99. Sub-section (3) of section 152 of the Act proscribes any person from being appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under section 154 of the Act. Section 153 of the Act contains provisions regarding the application for allotment of a DIN. The said section is set out below :–

> "153. *Application for allotment of Director Identification Number.* – Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form and manner and along with such fees as may be prescribed."

100. It is apparent from the above that the application for a DIN is required to be made by any person who intends to be appointed as a director. There is no impediment for a person who has been temporarily disqualified from acting as a director, to apply for a DIN.

101. In terms of section 154 of the Act, the Central Government is required to allot a DIN to any applicant within a period of one month from receipt of the application under section 153 of the Act. Section 155 expressly proscribes an individual from having more than one DIN. No individual who has been allotted a DIN can apply for or possess any other DIN. Section 156 of the Act requires a director to inform his DIN to the company(ies) in which he

is a director. Section 157 of the Act obliges a company to inform the DIN of its directors to the Registrar of Companies. Section 158 of the Act makes it obligatory for a director to indicate his DIN while furnishing any return or information or particulars as required under the Act.

102. It is at once clear that the provisions pertaining to DIN are only to ensure that any person acting as a director has a unique identity to identify him. Plainly, this is for purposes of administering the Act in an efficient manner. He is not required to give up this identification number only because he is temporarily disqualified for being appointed as a director.

103. The Central Government had notified the Companies (Directors Identification Numbers) Rules 2006. The said Rules came into force on 1st November, 2006. It is relevant to note that the said Rules did not provide for deactivation of DIN of any individual irrespective of whether he was a director or not. On 15th March, 2013 the Central Government notified the Companies (Directors Identification Number) (Amendment) Rules 2013, whereby the Companies (Directors Identification Number) Rules, 2006 were amended. The amendments, inter alia, introduced rule 8 in the said Rules relating to cancellation or de-activation of DIN. Rule 8 of the said Rules as introduced with effect from 15th March, 2013, reads as under :–

> "8. *Cancellation or deactivation of DIN*. – The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director, upon being satisfied on verification of particulars of proof attached with the application received from any person seeking cancellation or deactivation of DIN, in case –
>
> (*a*) the DIN is found to be duplicate ;
>
> (*b*) the DIN was obtained by wrongful manner or fraudulent means ;
>
> (*c*) of the death of the concerned individual ;
>
> (*d*) the concerned individual has been declared as lunatic by the competent court ;
>
> (*e*) if the concerned individual has been adjudicated an insolvent,
>
> then the allotted DIN shall be cancelled or deactivated by the Central Government or Regional Director (NR), Noida or any other officer authorised by the Regional Director (NR) :
>
> Provided that before cancellation or deactivation of DIN under clause *(b)*, an opportunity of being heard shall be given to the concerned individual."

104. Several provisions including section 164 of the Companies Act, 2013 were notified and came into force with effect from 1st April, 2014.

105. The Central Government also notified the Companies (Appointment and Qualification of Directors) Rules, 2014 which superseded the earlier Rules framed under the Companies Act, 1956. These Rules also included certain rules pertaining to the Directors Identification Number and included

certain provisions similar to those provided in Companies (Directors Identification Number) Rules, 2006. Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014 is relevant and is set out below :–

'11. *Cancellation or surrender or deactivation of DIN*.- The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with fee as specified in Companies (Registration Offices and Fees) Rules, 2014 from any person, cancel or deactivate the DIN in case –

(*a*) the DIN is found to be duplicated in respect of the same person provided the data related to both the DIN shall be merged with the validly retained number ;

(*b*) the DIN was obtained in a wrongful manner or by fraudulent means ;

(*c*) of the death of the concerned individual ;

(*d*) the concerned individual has been declared as a person of unsound mind by a competent court ;

(*e*) if the concerned individual has been adjudicated an insolvent :

Provided that before cancellation or deactivation of DIN pursuant to clause (*b*), an opportunity of being heard shall be given to the concerned individual ;

(*f*) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN :

Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.

Explanation : For the purposes of clause *(b)* –

(*i*) the term "wrongful manner" means if the DIN is obtained on the strength of documents which are not legally valid or incomplete documents are furnished or on suppression of material information or on the basis of wrong certification or by making misleading or false information or by misrepresentation ;

(*ii*) the term "fraudulent means" means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government.'

106. Neither any of the provisions of the Companies Act nor the rules framed thereunder stipulate cancellation or deactivation of DIN on account of a director suffering a disqualification under section 164(2) of the Act. It is relevant to note that rule 11 of the Company (Appointment and Qualification of Directors) Rules, 2014 was amended with effect from 5th July, 2018 to provide for deactivation of DIN in the event of failure to file Form DIR-3-E-KYC within the period as stipulated under rule 12A of the said Rules. The amendment so introduced also does not empower the Central Government to cancel or deactivate the DIN of disqualified directors.

107. It is also material to refer to rule 14 of the said Rules. In terms of Rule 14(1) of the said Rules, every director is obliged to inform the company concerned, about his disqualification under sub-section (2) of section 164 of the Act in Form DIR-8. In terms of sub-rule (2) of rule 14 of the said Rules, a company, which has committed the defaults as stated in clauses *(a)* or *(b)* of section 164(2) of the Act, is required to file Form DIR-9 furnishing the names and addresses of all its directors, with the Registrar of Companies. Sub-rule (5) also contemplates filing of an application for removal of the disqualification of directors. None of the provisions of rule 14 of the said Rules indicates that the DIN of directors incurring the disqualification under section 164(2) of the Act, is required to be deactivated.

108. It is important to note that whereas a DIN is necessary for a person to act as a director ; it is not necessary that a person who has a DIN be appointed as a director. Section 164(2) only provides for temporary disqualification for a period of five years for a person to be appointed/re-appointed as a director. Thus, it is not necessary that the DIN of such person to be deactivated.

109. It is also material to note that sub-section (2) of section 167 of the Act provides for a punishment for any person who functions as a director knowing that his office has become vacant on account of his disqualification as specified in section 167(1) of the Act. Thus, section 167 includes a mechanism for enforcing the rigours of section 167(1) of the Act. In the present case, the respondents have sought to cancel/deactivate the DIN of directors disqualified under section 164(2) of the Act. This has been done to enforce the provisions of section 167(1) of the Act. Clearly, this is not supported by any statutory provision. This court is of the view that the Central Government having framed the rules specifying the conditions in which a DIN may be cancelled, cannot cancel the same on any other ground and without reference to such rules.

110. Similarly, there is also no provision supporting the respondents' action of cancelling the DSC of various directors. The said action is, therefore, unsustainable.

111. In view of the above, this court finds no infirmity with the impugned list to the extent it includes the names of the petitioners as directors disqualified under section 164(2) of the Act. This court also rejects the contention that the impugned list is void as having been drawn up in violation of the principles of natural justice.

112. However, the court finds merit in the contention that the petitioners cannot be stated to have demitted their office as directors by virtue of section 167(1) of the Act. As held above, the provisions of section 167(1) of the Act are wholly inapplicable to directors who had incurred disqualification under section 164(2) of the Act. As noticed above, the defaulting companies in

which the petitioners were directors have been struck off from the register of companies [except in WP(C) 3658/2019 where the proceedings have been initiated under the Insolvency and Bankruptcy Code, 2016]. Plainly, the petitioners cannot hold office in those companies that have been struck off from the register of companies. However, as it is held that section 167(1) was inapplicable in respect of disqualifications that were incurred under section 164(2) of the Act, the petitioners continue to be directors of other companies which had not committed any defaults in terms of clauses *(a)* and *(b)* of section 164(2) of the Act.

113. As discussed above, the Scheme of section 164(2) and section 167(1)*(a)* of the Act was materially amended by the Companies (Amendment) Act, 2018 by introduction of the provisos to section 164(2) and section 167(1)*(a)* of the Act with effect from 7th May, 2018. All directors who incur disqualification under section 164(2) of the Act after the said date, would also cease to be directors in other companies (other than the defaulting company) on incurring such disqualification. However, the operation of the provisos to section 164(2) and section 167(1)*(a)* of the Act cannot be read to operate retrospectively. The proviso to section 167(1) of the Act imposes a punitive measure on directors of defaulting companies. Such being the nature of the amendment, the same cannot be applied retrospectively. It is well settled that the statute that impairs an existing right, creates new disabilities or obligations – otherwise than in regard to matters of procedure – cannot be applied retrospectively unless the construction of the statute expressly so provides or is required to be so construed by necessary implication. Therefore, the office of a director shall become vacant by virtue of section 167(1)*(a)* of the Act on such director incurring the disqualifications specified under section 164(1) of the Act. It shall also become vacant on the directors incurring the disqualification under section 164(2) of the Act after 7th May, 2018. However, the office of the director shall not become vacant in the company which is in default under sub-section 164(2) of the Act.

114. As discussed above, there is also much merit in the contention that the DIN and DSC of the petitioner could not be deactivated. Accordingly, the respondents are directed to reactivate the DIN and DSC of the petitioners.

115. It is clarified that the petitioners would continue to be liable to pay penalties as prescribed under the Act.

116. The petitions are disposed of in the aforesaid terms. All pending applications are also disposed of.

117. The parties are left to bear their own costs.

[2020] 156 CLA 76 (NCLAT)
NATIONAL COMPANY LAW APPELLATE TRIBUNAL

MAIF Investment India (P.) Ltd.

v.

Ind-Barath Power Infra Ltd. and Others

Company Appeal (AT) No. 334 of 2018

JUSTICE A I S CHEEMA, MEMBER (JUDICIAL) &
BALVINDER SINGH, MEMBER (TECHNICAL)
28th May 2019

National Company Law Tribunal is competent to deal with incidental and peripheral questions, and, therefore, it can give directions to cancel name of debenture holder entered as member in register of members

National Company Law Tribunal is competent to deal with all incidental and peripheral questions relating to conversion of compulsorily convertible debentures into equity shares. Where an investor initially seeking conversion later on revokes such consent, and conversion is in violation of articles of association, the Tribunal is empowered to decide validity of such conversion, and issue appropriate directions in fact and circumstances of the case.

Companies Act, 2013 – Section 59 – Register of members – Jurisdiction of National Company Law Tribunal to deal with incidental and peripheral questions – Conversion of compulsorily convertible debentures into equity shares – Investor initially seeking conversion but later on revoking consent – Conversion in violation of articles – Is Tribunal empowered to decide validity of conversion – Can Tribunal direct to cancel name of debenture holder entered as member in the register of members – Whether with the change of law and in terms of section 59 the Tribunal is competent to deal with rectification and all questions including incidental and peripheral questions with regard to rectification for the purpose of deciding the legality of the rectification – Held, yes – Whether it can direct to cancel name of debenture holder entered in register of members – Held, yes – Whether the Tribunal has jurisdiction to decide any complex questions and the Appellate Tribunal in appeal is bound to consider whether or not entry made in the register of members could be upheld - Held, yes [Para 32].

SYNOPSIS

Setting aside the order of the Tribunal in *MAIF Investments India (P.) Ltd.* v. *Ind Barat Power* [CP No. 248/59/HDB/2018], the Appellate Tribunal has directed cancellation of name of debenture holder entered in the register of members in the facts of the case.

Cases referred to : *Ammonia Supplies Corpn. (P.) Ltd.* v. *Modern Plastic Containers (P.) Ltd.* [1998] 90 CLA 355 (SC) ; *MAIF Investment India Pte. Ltd.* v. *Ind. Barath Energy (Utlcal) Ltd.* Company Appeal (AT) (Insolvency) No.597 of 2018 *vide* judgment dated 23rd April, 2019 ; *Shashi Prakash Khemka* v. *NEPC Micon* [2019] 149 CLA 6 (SC) and *Smiti Golyan* v. *Nulon India Ltd.* MANU/NL/0118/2019.

Appearances : Arun Kathpalia, senior advocate (Krishnendu Datta, Lzafeer Ahmad, Ms. Parinaz Vakil & Ms. Bani Brar with him) for the Appellant. Yogesh Kumar Jagia, Ms. Tanya Negi, Siddharth Mehta, Abhay Pratap Singh, Anshuman Mozumdar, Sujoy Chatterjee & Satendra K Rai for the respondent.

JUDGMENT

JUSTICE CHEEMA, MEMBER (JUDICIAL)

1. This appeal arises out of Impugned Order dated 29th August, 2018 passed by the National Company Law Tribunal, Hyderabad Bench ('NCLT') in CP No.248/59/HDB/2018 whereby the NCLT dismissed the company petition filed by the appellant-MAIF Investments India PTE Ltd. under section 59 of the Companies Act, 2013 ('the Act').

2. The appellant - original petitioner filed the company petition claiming rectification in the register of members of respondent No.2 - "Ind-Barath Thermotek (P.) Ltd." ('IBTPL') ('the company').

Parties inter se

Respondent No.1-IND-Barath Power Infra Ltd. ('IBPIL') is shareholder of respondent No.2-company holding 99.99 per cent shares of respondent No.2. Respondent No.2 – the company we are concerned with, is subsidiary of respondent No.1. Respondent No.3-Vistra ITCL (India) Ltd. (earlier IL&FS Trust Co. Ltd.) ('Vistra') is debenture trustee in respect of non-convertible debenture holder in respondent No.2, *i.e.*, respondent No. 13. Respondent No.4-IND-Barath Energy (Utkal) Ltd. ('IBEUL') is subsidiary of respondent No.2. Respondent No.5-Karvy Computershare Ltd. is registrar and transfer agent of respondent No.2 and respondent No.6-National Securities Depository Ltd. is depository of securities of respondent No.2. Respondent No.7 is managing director of respondent No.2 while respondent No.8 and 9 are independent directors of respondent No.2 and respondent No. 10 is director of respondent No.2. Respondent No. 11 is stated to be erstwhile director at the time concerned of 26th March, 2018. Respondent No. 12 is also a director. Respondent No. 13 is company incorporated in Singapore registered as Foreign Portfolio Investor under SEBI.

3. It appears that respondent No.4 had entered into Common Rupee Term Loan Agreement with 14 banks for part-financing cost of 700W Coal Fired Thermal Power Plant at Orissa ('the Project'). The said Agreement was entered into in March, 2010 and it came to be modified in March, 2017 between respondent

No.4 and the lenders. Respondent No.2 Company came to be incorporated in December, 2014.

Investment Agreement dated 25th June, 2015 entered

As per record, appellant and respondent No.13 ('The Investors' - Investor 2 and Investor 1, respectively) entered into Investment Agreement (Appeal p.130) on 25th June, 2015 with the Promoter Group consisting of respondent No.7, Shri K Raghu Rama Krishna Raju and Sriba Seabase (P.) Ltd. (the promoters) and respondents 1, 2 and 4. In terms of the said investment agreement, the appellant and respondent No.13 lent a sum of Rs. 780 crore. The appellant had agreed to subscribe to 9,06,599 compulsory convertible debentures (CCD) and had also taken one equity share for aggregate consideration of Rs. 99,99,990 while respondent No.13 subscribed to 6,990 non-convertible debentures ('NCD') for an aggregate consideration of Rs. 699 crore.

Company Petition No.248/59/HDB/2018 filed

The Company Petition (p. 88) came to be filed on 24th April, 2018 only relating to the wrongful conversion of the CCDs of the appellant, and consequent shares entered in register of members in the company without sufficient cause.

Articles of association amended ; other documents executed

4. As per record, in pursuance to the investment agreement, articles of association of respondent No.2 also came to be amended so as to incorporate the terms of the investment agreement in the articles of association (p.594). It appears that respondent No.4 issued a letter with regard to modification in equity structure of respondent No.4 on account of execution of investment agreement and debenture trust deed was also executed between respondents 2 and 3 in 2015. The obligations under the investment agreement are stated to have been secured by pledge of shares under share pledge agreement executed between respondents 1, 2 and 4 and respondent No.3. It is stated that the appellant and respondent No.13 lent Rs. 780 crore to respondent No.2 by way of subscription of debentures and acquired one equity share each in the respondent Nos.2 and 4 in view of the investment agreement and this happened in July of 2015. Appellant provided a bridge loan for a sum of Rs. 102 crore by subscribing to 10,200,000 optionally convertible debentures ('OCDs') of respondent No.4 at Rs. 100 per OCD (in February, 2017) for Rs. 102 crore.

Conversion sought by appellant – Letter dated 29th August, 2017

The appellant claimed that no interest payments were made by respondent No.2 within 12 months of the completion date under the Investment Agreement and record shows that the appellant and respondent No.13 in view of default sought to exercise their rights under the investment agreement together with share pledge agreement and had sent a letter to the promoters, respondents

1, 2, 4 and Arkay Energy Rameswaram Ltd. ('Arkay') on 29th August, 2017 (p.258) claiming, inter alia, penal interest and called upon the promoters and respondents 1, 2 and 4 to pay penal interest on the subscription amount ; jointly and/or severally to redeem the NCDs held by respondent No.13 and to convert CCDs held by Appellant in the company into 9,06,599 equity shares of respondent No.2-the company.

Conversion sought again – Notice dated 5th September, 2017 ; respondent No.3 sought calling of EGM

5. When there was non-compliance, record shows that the appellant and respondent No.13 issued letters/notices dated 5th September, 2017 (pp.265 and 267, respectively) to the promoters and respondents 1, 2 and 4 (contesting respondents) and Arkay Energy Rameswaram Ltd., inter alia, appellant calling upon them to convert CCDs into equity shares and claimed that in terms of the investment agreement, they were required to complete the process of conversion within a period of 5 days from the issuance of Notice. Respondent No.3-Vistra sent Notice under section 100(2) of the Act to respondent No.2 on 12th September, 2017 (p.270) exercising right under debenture trust deed, the share pledge agreement and the power of attorney it had, calling upon respondent No.2 to convene EGM within 21 days to convert CCDs and remove the directors/additional directors. It is stated that the Joint Lender Forum of respondent No.4 had also convened meeting of lenders of respondent No.4 on 26th September, 2017 in which respondents 1 and 2 failed to attend the same in spite of Notice.

Respondent No.1 rushed into litigation

On the same date of 26th September, 2017, however, respondent No.1 and the promoters filed petition under section 9 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act') seeking stay to the convening of EGM. It was Commercial Arbitration Petition (L) 423/2017 which sought to restrain the appellant from converting 9,06,599 CCDs into equity shares. It is stated, they failed to get interim relief from High Court of Bombay.

6. It is stated, on 6th October, 2017, the appellant and respondent No.13 sent letter/Notice addressed to the respondent No.3 so as to call EOGM of shareholders of respondent No.2. Document (at p.292) shows respondent No.3 - Vistra issued Special Notice on 6th October, 2017 to respondent No.2, its members and directors, under section 115 read with section 169 of the Act for removing respondent Nos.7 to 10 as directors of the company in the EGM.

7. It is stated that the petition under section 9 of the Arbitration Act came to be withdrawn on 13th October, 2017. It is stated that respondent No.1 then on 17th October, 2017 filed 2 petitions before NCLT —

(*a*) Company Petition 235/2017 under sections 110, 115 and 169 of the Act, and

(*b*) Company Petition 243/2017 under section 59 of the Act.

Record shows, NCLT, Hyderabad on 27th October, 2017 stayed (p.310 at 334) the EGM which was scheduled on 1st November, 2017 as had been called by respondent No.3-Vistra. The stay came to be extended on 17th November, 2017 till 12th December, 2017 (p.335) (whereafter it does not appear to have been continued).

8. According to the appellant, respondents 1 and 2 protracted matter in the garb of settlement discussions. As per appellants, in January 2018, they had invited the lenders to the site and on 6th February, 2018, they had sent e-mail to Power Finance Corporation Ltd. informing that the site visit had revealed grave situation and it was very difficult to take over the project without revised debt package.

Respondent No.1 – withdrew its Company Petitions – Order dated 6th March, 2018

9. According to appellant, the respondent No.1 initially protracted the petitions it had filed and later withdrew the petitions filed before NCLT, Hyderabad, which happened on 6th March, 2018 (pp. 396 and 409) in CP No.235/2017 filed by respondent No.1, respondent No.2 (in which it held 99.99 per cent shares) was arrayed as respondent No.1. Other present companies were also parties. The order of withdrawal in para 5 read as under :

> "5. In view of the above facts and circumstances of the case the present Company petition bearing CP No.235 100 115 and 169 HDB-2017 is disposed of as withdrawn, by granting liberty to the petitioner to file a fresh company petition, if the petitioner is aggrieved by the action of the respondent. Since the restraint order passed by the Tribunal stands vacated by virtue of disposal of the present company petition the *respondent -1 may conduct the EGM* in accordance with law and also follow principles of natural justice. Accordingly CA Nos.178 and 177 of 2017 also stands disposed of." [emphasis supplied]

Notice issued for Board meeting on 26th March, 2018

10. As per record, after such withdrawal of the company petitions, respondent No.2 issued Notice on 17th March, 2018 (p.400) to convene meeting of Board of directors on 26th March, 2018 for conversion of CCDs into equity shares.

Appellant and respondent No.13 now opposed the unilateral conversion sought

11. The appellant and respondent No.13 responded to such Notice dated 17th March, 2018, on 20th March, 2018 (pp. 414, 416) and informed the promoter group and respondents 1, 2 and 4 as well as Arkay Energy Rameswaram Ltd. that any unilateral conversion of CCDs as was proposed in the Agenda

would be contrary to the articles of association and the terms of CCDs and the investment agreement. The appellant clearly informed them that, it had *vide* letter dated 5th September, 2018 (read - 2017) called upon them to convert the CCDs into equity shares. That, however, IBTPL declined to do so for a very long time and the Notice period for conversion has expired now. It is stated that the Board of directors of respondent No.2 on 26th March, 2018, however, moved so as to hold the meeting to convert the CCDs. Appellant claims that the Board of directors were purporting to act under the orders of NCLT although the order was only of withdrawal and no mention to hold meeting of Board of directors was there. The appellant and respondent No.13 reiterated the contents of letter dated 20th March, 2018 in their letter dated 26th March, 2018 (p. 416) and informed :–

> "31. Any change to the share capital of IBTPL requires our consent under the terms of the Investment Agreement dated 25th June, 2015 in relation to IBTPL (the Investment Agreement) and the articles of association of IBTPL. Accordingly, any purported conversion of the CCDs and issuance of equity shares of IBTPL without our consent is ultra vires IBTPL and the corporate authority of the Board of directors of IBTPL....
>
> 34. Since IBTPL has, due to the actions of its promoters, breached the terms of the agreements with us, we are withdrawing our nominee directors on the Board. Please note we reserve all our rights under the IA and applicable law and will nominate an observer to the Board of directors of IBTPL in accordance with the Investment Agreement."

Company investor directors resigned : No quorum

The nominee directors of the appellant and respondent No.13 resigned from the Board of respondent No.2 (pp. 418 and 419). Appellant and respondent No.13 addressed yet another letter (p. 420) on 28th March, 2018 to the respondents 1, 2 and 4, the promoters and Arkay Energy Rameswaram Ltd. highlighting that any resolution, decision or action of the Board of respondent No.2 to convert the CCD into equity shares would be ultra vires, void and invalid. It was informed :–

> 3. As we had stated in the said letters, any purported conversion of the compulsory convertible debentures ('CCDs') held by us in IBTPL into equity shares is contrary to the terms of the said debentures and the articles of association on the company.
>
> 4. Despite our letters as aforesaid, and despite our nomine directors pointing out the above in the said meeting, you purported to proceed with the meeting to discuss the agenda in relation to the conversion of CCDs which was not only ultra vires the articles of association but also based on deliberate misinterpretation of the Order dated 6th March, 2018 passed by the hon'ble National Company Law Tribunal, Hyderabad ("said Order"). Our nominee directors thereupon resigned from the Board.

5. We call upon you to ensure that the CCDs are not converted into equity shares without our prior written consent for the reasons mentioned in our said letters.

6. Please note that any resolution or decision or action of the board of the company or the company to convert the CCDs into equity shares ultra vires, void and invalid and would amount to contempt of the said Order besides being in direct breach of the articles of association of the company as also the Investment Agreement dated 25th June, 2015, in which case we will proceed under legal advice.

7. We would like to remand the directors of IBTPL of their fiduciary duties which they owe to IBTPL and its shareholders. Acting contrary to the terms of the articles of association of IBTPL and contrary to the agreement entered into by IBTPL will render them personally liable for the breach of their fiduciary duties."

12. According to the appellant, with the resignation of nominee directors of appellant and respondent No.13, *i.e.*, the company investor directors, the quorum required for the Board meeting on 26th March, 2018 as per article 60.2 of the articles of association was no longer available and as per the articles of association, the meeting could not have been continued or any business transacted as claimed by contesting respondents.

Prayers of appellant in its company petitions

13. It is stated that the appellant later came to know on 6th April, 2018 when SBI-SG Global Securities intimated that the CCDs had been converted. As per appellant, in spite of the above action on the part of the appellant and respondent No.13, the Board of directors went ahead to convert the CCDs of the appellant into equity shares. Because of this, the company petition came to be filed with the following prayers :–

"8. *Relief sought*

In view of the facts and circumstances mentioned above, the petitioner prays for the following reliefs in the interest of justice, *viz.*, that this learned Tribunal be pleased to :

(a) declare that the Board resolution dated 26th March, 2018 passed by the erstwhile Board of directors authorising the conversion of the compulsory convertible debentures into equity shares of respondent No.2 is ultra vires the articles of association. Respondent No.2 (as also the terms of the CCDs as set out in Schedule 9, Part B of the Investment Agreement), illegal and *void ab initio* and set aside the same ;

(b) declare that the conversion of the compulsory convertible debentures is ultra vires and contrary to the articles of association of respondent No.2 (as also the terms of the CCDs as set out in Schedule 9, Part B of the Investment Agreement), illegal and *void ab initio* ;

(c) direct respondent Nos.5 and 6 to cancel the 9,06,599 equity shares of respondent No.2 credited to the account of the petitioner pursuant to the illegal instruction/

corporate action on the basis of the resolution passed by the erstwhile Board of directors (respondent Nos. 7 to 12) in contravention of the articles of association of respondent No.2 ;

(d) pass such orders as it deems necessary for the rectification of the register of members of respondent No.2 ; and

(e) pass such further or other orders as this learned Tribunal may deem fit and proper in the facts and circumstances to meet the ends of justice and equity."

The defence

14. Respondents 1 and 2 filed their replies in NCLT. In the replies in substance, these respondents appear to have claimed that the relief claimed in the petition was beyond the scope of section 59 of the Act and that issues raised required detailed trial and interpretation of agreements which had been executed between the parties. They referred to the statement in the company petition where petitioner had stated that the Act of respondent No.2 converting the CCDs was act of oppression and mismanagement for which the petitioner was reserving right to file necessary proceedings, if and when advised. These respondents appear to have claimed that the petition was for collateral purpose as the petitioner (appellant) filed multiple petitions out of which, one was under section 7 of the Insolvency and Bankruptcy Code, 2016 which had been filed against respondent No.4-IBEUL and another application under section 425 of the Act for contempt, had also been filed. These respondents also claimed that the company petition was barred under section 8 of the Arbitration and Conciliation Act. The respondents claimed that the grievance of original petitioner (appellant) was that the act of respondent No.2 converting 9,06,599 CCDs into equity shares, did not constitute "sufficient cause" stipulated under section 59 of the Act. These respondents claimed that the respondent No.2 could not convert the CCDs earlier due to operation of the Stay Order passed by NCLT on 27th October, 2017 and continuation of pending litigation, and that since the pending petitions were disposed of by Order of NCLT on 6th March, 2018, respondent No.2 took action to comply with Notices issued by the original petitioner on 29th August, 2017 read with Notice dated 5th September, 2017. These respondents claimed that the CCDs were converted in accordance with the investment agreement read with Subscription Agreement on election of the petitioner (appellant). The stand of these respondents is that the original petitioner had not taken steps to stop recalling/invocation which had already been done and when original petitioner had invoked the pledge, it had become major shareholder of respondent No.2 and even when meeting of Board of directors of respondent No.2 was convened on 26th March, 2018 to give effect to the conversion of CCDs, the original petitioner did not take steps to withdraw/recall the pledge which was already invoked by them.

NCLT - dismissed the petition

15. It appears that the learned NCLT heard the parties and was of the view that the issues raised were contentious issues which also required looking into section 29A of the Insolvency and Bankruptcy Code, 2016 ; the question of dealing with section 8 of Arbitration Act was also involved and it was contentious issue ; that the Act of original petitioner retracting the election it had made for conversion of CCDs was also contentious matter ; the CCDs had been converted as per request of the original petitioner ; that whether after the passage of 5 days of the receipt of Notice, conversion of CCDs could have been done or not was question of law. For such and other reasons, as recorded in the impugned order, the NCLT went on to dismiss the company petition.

The arguments in short

16. We have already referred to the case put up by appellant, using the words "it is stated" but for contents of the documents, we have looked into the documents. At the time of hearing before us, the learned counsel for the appellant has then taken us through the contents of the Investment Agreement dated 25th June, 2015 and the articles of association in which the clauses of the Agreement were got incorporated and made part of the articles of association. The counsel pointed out that the articles of association referred to the appellant and respondent No.13 as the "investors" and the articles provided that the Board of directors shall at all times comprise maximum of 5 directors of which NCD holder has the right to appoint and maintain 2 directors. It is argued that there is provision even regarding quorum of meeting in which also at least one of the company investor director has to be present throughout the meeting. The articles of association provide that in reserve matters, decision cannot be taken unless consent is obtained of the Investors. The articles also provide that the CCD was convertible into equity shares at the election of the holder of CCD and when Notice in this regard is given, the company and its promoters were liable to convert the same within 5 days. According to the learned counsel in this regard, the appellant first gave Notice on 29th August, 2017 and when within 5 days the action was not taken, yet another Notice was issued on 5th September, 2017 and when the respondent No.2 and the promoter directors did not comply, respondent No.3 was moved so as to call EGM. At such time, according to the counsel, and as record shows, respondent No.1 first moved the hon'ble High Court under Arbitration Act and then withdrew the motion under section 9 of the Arbitration Act and filed two company petitions on 17th October, 2017 and obtained a stay to the EGM, which was to be held. It is argued that after having obtained the stay, the respondents 1 and 2 and promoter directors went on prolonging the litigation and in the meanwhile, the appellant found that the project concerned was in grave situation due to the acts of respondents 1 and 2 and the promoters. It

is argued for the appellant that the stay continued till 12th December, 2017 but the petitions remained pending and the respondent No.1 withdrew the company petitions only on 6th March, 2018. The learned counsel stated that if the articles of association are kept in view, the respondents were required to convert the CCDs within 5 days of the notice and when this had not been done, without exercise of fresh option from the side of the appellant, the respondents could not have, after prolonging the matter in litigation on their own, proceeded to convert the CCDs. The argument is that having the option of 5 days in the articles of association was with a purpose and the purpose was that when the appellant exercises the option, it is aware with regard to the situation and standing of respondent No.2. However, as respondent No.1, which is the holding company of respondent No.2, indulged in litigation, the appellant was later in no position to assess as to the actions these respondents and promoters of respondent No.2 had indulged into and, thus, when after withdrawing the company petitions, respondents called for meeting to convert the CCDs, the appellant had in writing informed that now the CCDs cannot be converted and the nominee directors of the investors also protested in the meeting and even resigned and the Board was left without quorum and, thus, could not have proceeded further if the articles of association are considered. It is argued that although the appellant had sought conversion of the CCDs into equity shares, the respondent No.2 had not taken action and when subsequently, respondent No.2 wanted to take action, the appellant had by then withdrawn its consent to convert and when this is so, the post-conversion on the part of the respondent No.2 was illegal and there is no substance in the stand taken by respondents that the appellant had become the majority shareholder. According to the counsel, the respondents 1 and 2 along with the promoters continued to control respondent No.2. Only because appellant sought conversion of CCDs, when contesting respondents declined and resorting to litigation, the conversion had not taken place. It is argued that on the basis of pleas raised by the respondents, the NCLT erred in observing that there were contentious issues. It is argued that after coming into force of the Companies Act, 2013 and provision like section 430 of the Act coming into existence, the old law with regard to rectification of register of the company that contentious issues could not be examined, is no more good law. The counsel submitted that earlier provisions of the Companies Act barring jurisdiction of civil court had not been enforced. Now, however, section 430 bars jurisdiction of civil court and, thus, even if there are contentious issues relating to Company matters even under section 59 or under any other section of the Act, the same can be and have to be decided by the NCLT. The learned counsel placed reliance on the judgment in the matter of *Shashi Prakash Khemka* v. *NEPC Micon* [2019] 149 CLA 6 (SC)/[2019] 152 SCL 482. Referring to this judgment of hon'ble Supreme Court, the submission is that the old law as

appearing in the matter of *Ammonia Supplies Corpn. (P.) Ltd.* v. *Modern Plastic Containers (P.) Ltd.* [1998] 90 CLA 355 (SC)/[1998] 17 SCL 463 (SC) relied on by the NCLT in the impugned order, was no more good law.

17. According to the counsel, the CCDs were converted contrary to the articles of association and there was no affirmative consent of the appellant for conversion of the CCDs, at the time of Board meeting, and that the Board meeting held was without proper quorum and, thus, there was no sufficient cause for the respondent No.2-company to reflect in the register of members that securities had been issued in favour of the appellant against the conversion of CCDs.

18. Against this, the learned counsel for respondents 1, 2, 7 and 8 (Contenting respondents) supported the impugned order. According to the counsel, the remedy with regard to CCDs for the appellant was to resort to arbitration. As the appellant had invoked the pledge, it had become 51 per cent shareholder. The documents referred to and relied on by the appellant, have been referred by the learned counsel for respondents also and it is stated that in view of the appellant and respondent No.13 exercising their rights *vide* communication dated 29th August, 2017 (p.258) and letters dated 5th September, 2017 (pp.265 - 267), the respondent No.2 proceeded to call for meeting on 26th March, 2018, once the company petition filed by respondent No.1 had been withdrawn and the actions taken were in compliance with the orders passed by NCLT at the time of withdrawal and, thus, respondent No.2 could not be faulted with and there was sufficient cause for the respondent No.2 to concert the CCDs into shares in favour of the appellant.

19. It appears, and the learned counsel for the respondents accepted that copy of the Board resolution dated 26th March, 2018 has not been put on record. The learned counsel referred to the memorandum of association to say that the Arbitration Act is applicable. The learned counsel submitted that the appeal deserved to be dismissed. According to the learned counsel, the issues raised could not be dealt with and decided under section 59 and section 430 of the Act will not be helpful, for, according to the counsel, section 430 applies when the Tribunal is empowered to determine a factor. Under section 59 of the Act, NCLT was empowered to consider registration and transfer or refusal to transfer of existing shares without sufficient cause but it could not consider, if the same was contrary to the articles of association or Investment Agreement which has arbitration clause.

Certain aspects hardly or not in dispute

20. In this matter, there does not appear to be dispute with regard to the execution of agreements between the parties and the correspondence referred to by the appellant. Legal proceedings which took place when the appellant

and respondent No.13 sent communication dated 29th August, 2017 seeking to redeem NCDs and convert CCDs is also not in dispute. There does not appear to be dispute that respondent No.1 (which as per the company petition holds 99.99 per cent shares in respondent No.2) resorted to litigation by first moving under the Arbitration and Conciliation Act and then filing company petitions ; taking stay ; and subsequently withdrawing the petitions. In the arguments on the part of contesting respondents, there is no resistance to the submissions of appellant regarding facts that after withdrawal of the company petitions by respondent No.1, the respondent No.2 proposed to convert the CCDs, which was opposed by the appellant and respondent No.13 with even investor directors opposing and at the penultimate stage resigning from the Board, but that contesting respondents still went ahead to convert the CCDs.

21. The main thrust of the arguments of contesting respondents is that the petition being under section 59 of the Act, the NCLT could not go into issues relating to arbitration ; the effect of appellant invoking Insolvency and Bankruptcy proceedings against respondent No.4 ; the interpretation of the investment agreement and the articles of association, which it is argued NCLT found to be contentious issues which the NCLT could not go in, in petition under section 59 of the Act.

22. Sub-section (1) of section 59 of the Act which section deals with rectification of register of members reads as under :–

> "(*1*) If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, without sufficient cause, omitted therefrom, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register."

Apparently, a petitioner will have to prima facie show whether or not the act or omission is without sufficient cause, but the company, which is in control of the register of members, will have larger burden and must put on record all evidence to justify the act or omission to show that the act or omission is not without sufficient cause.

23. Undisputedly, the appellant has had held one share in the company. Its grievance is regarding making entry in the register of members showing another 9,06,599 equity shares treating the same as having been converted from CCDs. As per section 59, the only question relevant is whether the name of appellant has been entered regarding shares said to have been issued against CCDs to be "without sufficient cause". In this matter although

there is Investment Agreement, we will not dwell much on the agreement as admittedly, the protection sought by the appellant and respondent No.13 while entering into the investment agreement was translated into amendment of the articles of association which clearly has a higher binding nature and protection as the company as well as all the shareholders including directors become bound by the same.

Relevant articles of association

24. If the articles of association (p. 594) are seen, the following aspects and relevant articles require to be noted:—

(*a*) Article 53 gives overriding effect to articles 53 to 84 of the "amending articles" over the earlier articles 1 to 52. Article 53.4 deals with definitions which includes "CCD holder" to be the appellant ; "company investor directors" have been defined as in article 59.1 and "investment agreement" is stated to be the agreement dated 25th June, 2015. "Investor CCDs" have been defined as 9,06,599 CCDs. "Investor's consent" is stated to mean the prior written consent of the investors. Article 54.1 (p.615) deals with "fundamental terms" which reads as under :

"54.1 It is fundamental term of these articles that the investors shall be entitled to realise their investment in the company in accordance with the terms of these articles and in particular:

(*a*) NCD holder shall be entitled to exercise its rights in respect of the exit options (and such other rights under these articles and under applicable Law) ;

(*b*) the promoters, the company and IBEUL shall comply with their obligations under these articles and applicable law, including in respect of the exit options, the accrued return, the coupon payment, and the conversion of the CCDs ; and

(*c*) the promoters, the company and IBEUL shall waive any rights, remedies or claims which they may have in respect of the legal enforceability of the exit options or any rights of the investors hereunder."

(*b*) Article 59.1 (p.621) under article 59 – "investor director" is as under :–

"59.1 The Board shall at all times comprise a maximum of 5 directors, of whom NCD holder shall have the right to appoint and maintain in office 2 (two) directors (and to remove from office any director(s) so appointed and to appoint another in the place of the director(s) so removed) (such directors are referred to as the "Company Investor Directors" or "Investor Directors")."

NCD holder is the respondent No.13

(*c*) Article 60.2 and article 60.4 read as follows :–

"60.2 The quorum for a meeting of the Board (or committee of the Board) shall be one-third of its total strength (any fraction contained in that one-third

being rounded up to one) or two directors (whichever is higher), and shall specifically include at least one of the company investor directors, present throughout the meeting, unless otherwise agreed with the investors' consent."

"60.4 The quorum for a meeting of the shareholders of the company shall include representatives of the investors, present throughout the meeting, unless otherwise agreed with the investors' consent. Without prejudice to article 0 (Reference: 60.2), no reserved matter will be discussed or approved without the presence of a company investor director ; unless the investors' consent in respect of such reserved matter has been received prior to the commencement of such meeting."

"Reserved matters" are in article 62 and relevant portions of 62.1 and 62.2 read as —

"62.1 Post completion, no action or decision (including any steps being commenced or taken for any action or decision) relating to any of the reserved matters as set out in article 62.2 below with respect to the company and/or IBEUL shall be proposed, taken or given effect to (whether by the Board, any director, any committee, the senior management or the shareholders of IBPIL, or the company, or IBEUL ; or any of the employees, officers, managers of IBPIL, company or IBEUL) unless the investors' consent is first obtained."

"62.2 The following matters with respect of the company, the subsidiary and all subsidiaries investee companies of the company/IBEUL/resulting company shall require investors' consent : ……

(*d*) Any change in the authorised, issued, subscribed or paid-up equity or preference share capital of the company and/or IBEUL, or re-organisation of the share capital of the company and/or IBEUL, including any Transfer of any equity securities, issuance of new shares or other securities of the company and/or IBEUL, the issuance of convertible preference shares of debentures or warrants, or grant of any options over its shares by the company and/or IBEUL or the redemption, retirement or repurchase of any shares or other securities ;"

(*d*) Article 76.5 relates to redemption procedure.

(*e*) Article 77.2 relating to 'Term' is as under :–

"77.2 *Term*

(*a*) The term of the CCDs shall be 120 months from the completion date, or such extended term as may be determined by the Board with the prior written consent of the CCD holders ("Conversion Due Date").

(*b*) The holder of the CCDs shall have the option to convert the CCDs, in whole or in part, before the conversion due date in accordance with article 0 below."

The relevant portion of Conversion Procedure is at article 77.4(*d*) which is as under :–

"(*d*) *Conversion Procedure*

The CCDs shall be converted, when pursuant to article 0(*a*), in the following manner :

(*i*) The company shall convert the CCDs upon recipe of a written notice (the "Conversion Notice") by the CCD holders. The conversion of the CCDs shall be completed within a period of 5 days from the date of receipt of the Conversion Notice.

(*ii*) Within a period of 5 days from the date of receipt of the conversion notice :

(*A*) The company shall issue and allot to the CCD holders one equity share for each CCD converted by them, and shall deliver duly stamped share certificates in respect thereof.

(*B*) The company shall update its registers of debenture holders and members to record the conversion of the CCDs.

(*iii*) The company and the promoters shall do all such acts and deeds to give effect to the provisions of this article 0(*d*), including without limitation, causing any director nominated by the promoters to exercise their voting rights in a meeting of the Board to approve the conversion of the CCDs."

Analysis

25. It is apparent from the above articles that the appellant and respondent No.13 had taken sufficient precautions while investing money in the company, to safeguard their interests. When the appellant and respondent No.13 claimed that there was default, and wanted to invoke their rights on 29th August, 2017 and sent the letter (p.258), the contesting respondents did not act as per the articles of association referred above. The appellant and respondent No.13 again sent two letters/notices dated 5th September, 2017 (as can be seen at pp.265 and 267) clearly calling upon the contesting respondents to do the needful conversion within a period of 5 days of the issuance of the Notice. They referred to the investment agreement in this context (which is part of articles of association also). When in spite of the articles of association providing right regarding conversion, the contesting respondents did not act in 5 days as per articles of association, the respondent No.3 issued requisition Notice dated 12th September, 2017 (p.270). The contesting respondents at such stage resorted to litigation by first rushing to the High Court professing to invoke section 9 of the Arbitration Act and later on, withdrew the same and filed two company petitions and took stay to the EGM and then after keeping the matter pending, withdrew the company petitions also, on 6th March, 2018. Apparently, the contesting respondents, if they had a grievance that 'default' as contemplated under the Agreement and articles of association had not taken place, did not take the litigations to any logical ends. They can hardly say that they had good case not to act in the prescribed 5 days. They by conduct, declined to

accept liability in response to correspondence dated 29th August, 2017 and 5th September, 2017 as was sent by the appellant and respondent No.13. We find substance in the argument of the learned counsel for the appellant that when after the appellant had exercised option to seek conversion on 5th September, 2017, the contesting respondents had not done the needful act within 5 days and the contesting respondents could not subsequently, purport to act under such exercise of option of the appellant. There is substance in the argument of the learned counsel that when there is specific provision made in the investment agreement and incorporated in articles of association, the period of 5 days had its own value. The learned counsel rightly submits that the Investor may be in a position to know the financial and other standing of the company on the particular date when he wants to exercise option but if respondents by their conduct declined and went into litigation, the investor later, may not be in a position to judge the financial standing and viability of the company and the company cannot subsequently turn around and force the conversion on the Investor, claiming that you asked for it. If the articles of association prescribe or act to be done in a particular manner, the company, directors, shareholders are all bound to do the act in the particular manner prescribed, as articles of association is heart and soul of the company, we find.

26. We also find substance in the submissions of the learned counsel for the appellant who pointed out article 59.1 which makes it mandatory that the Board shall at all times comprise a maximum of 5 directors of which 2 have to be of the NCD holders and the record shows that when, after withdrawing the company petitions by the respondent No.1, respondent No.2 proposed to hold Board meeting for converting the CCDs, the appellant had opposed and claimed that such meeting could not be held and the CCDs could not be converted. The learned counsel for the appellant submitted that in response to the agenda (p. 400) circulated by the respondent No.2 so as to hold Board meeting on 26th March, 2018, the appellant and respondent No.13 had both opposed and sent letter (p.414) with regard to the Notice dated 17th March, 2018 *(sic. 2017)*. It is rightly argued by the learned counsel for the appellant that by this communication, the appellant clearly conveyed to the contesting respondents that it had withdrawn its option to convert CCDs sent on 5th September, 2017.

27. It is apparent on record that when contesting respondents still wanted to go ahead, the appellant and respondent No.13 sent yet another communication dated 26th March, 2018 wherein, inter alia, it was mentioned :–

> "3.1 Any change to the share capital of IBTPL requires our consent under the terms of the investment agreement dated 25th June, 2015 in relation to IBTPL (the *Investment Agreement)* and the articles of association of IBTPL. Accordingly, any purported conversion of the CCDs and issuance of equity shares of IBTPL without our consent is ultra vires IBTPL and the corporate authority of the Board of directors of IBTPL."

"3.4 Since IBTPL has, due to the actions of its promoters, breached the terms of the agreements with us, we are withdrawing our nominee directors on the Board. Please note we reserve all our rights under the IA and applicable law and will nominate an observer to the Board of directors of IBTPL in accordance with the investment agreement."

Not only this, on 26th March, 2018, the investor directors did resign from the Board and the appellant and respondent No.13 informed the contesting respondents on 28th March, 2018 (p.420), inter alia, as follows :–

'3. As we had stated in the said letters, any purported conversion of the compulsory convertible debentures (CCDs) held by us in IBTPL into equity shares is contrary to the terms of the said debentures and the articles of association of the company.

4. Despite our letters as aforesaid, and despite our nominee directors pointing out the above in the said meeting, you purported to proceed with the meeting to discuss the agenda in relation to the conversion of CCDs which was not only ultra vires the articles of association but also based on deliberate misinterpretation of the order dated 6th March, 2018 passed by the hon'ble National Company Law Tribunal, Hyderabad ("said order"). Our nominee directors thereupon resigned from the Board.

5. We call upon you to ensure that the CCDs are not converted into equity shares without our prior written consent for the reasons mentioned in our said letters.

6. Please note that any resolution or decision or action of the Board of the company or the company to convert the CCDs into equity shares is ultra vires, void and invalid and would amount to contempt of the said Order besides being in direct breach of the articles of association of the company as also the investment agreement dated 25th June, 2015, in which case we will proceed under legal advice.

7. We would like to remind the directors of IBTPL of other fiduciary duties which they owe to IBTPL and its shareholders. Acting contrary to the terms of the articles of association of IBTPL and contrary to the agreements entered into by IBTPL will render them personally liable for the breach of their fiduciary duties.'

28. The record speaks for itself. As on the part of contesting respondents, they have not even put on record copy of the Board resolution dated 26th March, 2018 to let the Tribunal know as to how and on what basis they proceeded. The company cannot hold back material documents and expect the Tribunal to find that the company had sufficient cause for inserting the concerned shares against the name of the appellant. The appellant has sufficiently put on record the evidence to show that the contesting respondents and, especially, respondent No.2-company did not have sufficient cause to enter shares against the name of the appellant purporting to have been converted from CCDs. We do not find that there are any contentious issues involved as being tried to be projected by the respondents. Only because the appellant took separate action against respondent No.4 under Insolvency and Bankruptcy Code, 2016 with regard to bridge loan relating to OCDs, which related to a bridge loan,

there did not arise any contentious issue for decision in this matter which was clearly different. This has been held even by this Tribunal (by another hon'ble Bench) *MAIF Investment India Pte. Ltd.* v. *Ind. Barath Energy (Utlcal) Ltd.* in [Company Appeal (AT) (Insolvency) No.597 of 2018 *vide* judgment dated 23rd April, 2019], passed recently.

29. Even regarding arbitration, when we asked the learned counsel for the contesting respondents, he did not show any articles of association relating to the arbitration. He referred to clause 29.1 of the investment agreement (p. 130 at 186) which reads as under :–

> "29.1 Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Mumbai in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") in force at the date of applying for arbitration, which rules are deemed to be incorporated by reference in this agreement."

30. In the articles of association, this does not appear to have reflected. The learned counsel for the contesting respondents referred to memorandum of association (p.500) in which, clause 40 is as under :–

> "40. To refer all questions, disputes or differences arising between the company and any other person whosoever (other than a director of the company) in connections with or in respect of any matter relating to the business or affairs of the company to arbitration in such manner and upon such terms as the company and such other person may mutually agree upon in each case, and such reference to arbitration may be in accordance with the provisions of the Indian Arbitration Act or the Rules of the International Chamber of Commerce relating to arbitration or otherwise."

Clause 40 as mentioned above, is not part of articles of association but is part of the memorandum of association which is dated 4th December, 2014 (which is before the investment agreement dated 25th June, 2015). The clause apparently shows that matters relating to business or affairs of the company can go to arbitration "in such manner and upon such terms as the company and such other person may mutually agree". Thus, it is only an enabling clause which would be subject to the Agreement to be entered into with such other person. If we come back to clause 29(1) of the investment agreement as referred above, in this matter, we are not dealing with the questions whether the appellant rightly invoked the Agreement or not. We are concerned with the question of entry made in Register of Members. Whether there was sufficient cause or not to enter name is matter which only NCLT can decide under section 59 of the Act.

Change of law under Companies Act, 2013

31. The contesting respondents have relied on judgment in the matter of *Ammonia Supplies Corporation (P.) Ltd.* (*supra*) and the learned NCLT has also

referred to this judgment of the hon'ble Supreme Court so as to state that there are contentious issues and they cannot be looked into under section 59 Petition of the Act. This Tribunal had the occasion of considering section 59 in the changed context of the Companies Act, 2013 coming into force in the matter of *Smiti Golyan* v. *Nulon India Ltd.* MANU/NL/0118/2019. We had observed in that judgment as under :–

'21. In para - 31 of the judgment in the matter of "*Ammonia Supplies*" portions of which we have reproduced above, the hon'ble Supreme Court had observed that there was nothing under the Companies Act expressly barring the jurisdiction of the civil court and, thus, mandated that the "court" should examine whether prima facie what is said is a complicated question or not. The earlier section 10GB of the Companies Act, 1956 relating to civil court not to have jurisdiction, does not appear to have been enforced but the position has now changed with coming into force of Companies Act, 2013 and section 430 of the Act providing that civil court would not have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act. Under the new Companies Act – Section 59, it is for the NCLT to consider if the name of any person is "without sufficient cause" entered or omitted from the register of members of a company. Recently in the matter of *"Shashi Prakash Khemka (Dead) through LRs.* v. *NEPC Micon (Now called NEPC India Ltd.)*" Civil Appeal Nos.1965 - 1966 of 2014 decided on 8th January, 2019 – 2019 SCC OnLine 223, the hon'ble Supreme Court of India dealt with disputes which were before the hon'ble Supreme Court relating to exercise of power under section 111A of the Companies Act, 1956 (relating to rectification of register on transfer) and noticed above judgment in the matter of "*Ammonia Supplies*". It was observed :

"Learned counsel for the appellants has drawn our attention to the view expressed in *Ammonia Supplies Corporation (P.) Ltd.* v. *Modern Plastic Containers (P.) Ltd.* [1998] 7 SCC 105, to canvass the proposition that while examining the scope of section 155 (the predecessor to section 111), a view was taken that the power was fairly wide, but in case of a serious dispute as to title, the matter could be relegated to a civil suit. The submission of the learned counsel is that the subsequent legal developments to the impugned order have a direct effect on the present case as the Companies Act, 2013 has been amended which provides for the power of rectification of the register under section 59 of the said Act. Learned counsel has also drawn our attention to section 430 of the Act, which reads as under :

"430. *Civil court not to have jurisdiction.* – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate."

The effect of the aforesaid provision is that in matters in respect of which power has been conferred on the NCLT, the jurisdiction of the civil court is completely barred.

It is not in dispute that were a dispute to arise today, the civil suit remedy would be completely barred and the power would be vested with the National Company Law Tribunal (NCLT) under section 59 of the said Act. We are conscious of the fact that in the present case, the cause of action has arisen at a stage prior to this enactment. However, we are of the view that relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which section 430 of the Act is widely worded.

We are, thus, of the opinion that in view of the subsequent developments, the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act, 2013." [emphasis supplied]

It is apparent that now even otherwise, exclusive jurisdiction with regard to section 59 is of the NCLT. NCLT would now clearly have jurisdiction to deal with rectification and all questions including incidental and peripheral questions raised with regard to rectification for the purpose of deciding legality of the rectification. What could earlier be looked into to see if prima facie made out can now be considered if proved to justify rectification even if it was to be said to be complicated question.'

32. We have already mentioned that the learned counsel for the appellant has relied on the above judgment of hon'ble Supreme Court in the matter of *Shashi Prakash Khemka* (*supra*). For above reasons, we are of the view that with change of law now under section 59 of the Act, NCLT can deal with rectification and all questions including incidental and peripheral questions raised with regard to rectification for the purpose of deciding legality of the rectification. NCLT which exercises widest possible powers in a matter under sections 241, 242 of the Act ; which even otherwise is expected to always keep interest of the company in forefront, cannot be treated as unequipped only because the petition is under section 59 of the Act. In the present matter, firstly, we are of the view that there were really no complex questions involved and even if it was to be said that there were any complex questions, the same had to be decided by the NCLT and in appeal, this Tribunal is bound to consider whether or not entry made in the register of members could be upheld.

33. When we look at the facts of the present matter and the concerned documents and developments, it is apparent that for the Board of directors to take a decision, articles 59.1 and 60.2 required presence of the company investor directors and there could not be quorum unless one of the two company investor directors remains present throughout the meeting. It is clear that Board of directors could not on their own have taken any decision with regard to the conversion. In the context of article 62.1 read with section 62.2, conversion of CCDs was "reserved matter" which also required change in the subscribed or paid-up equity and this could not be done without Investor's consent, which as per article 59.1 meant "prior written consent". In fact, in present matter, leave apart consent, there was recorded opposition. We reject

the argument made in appeal by the counsel for contesting respondents that conversion was only a ministerial act. Had it been so, these respondents would not have called the Board meeting with agenda in the first place. There is no substance in the arguments of the contesting respondents that section 59 could not be resorted to if the effect would be reduction in capital under section 66 of the Act. Contesting respondents who have held back the copy of resolution of the Board of directors dated 26th March, 2018, cannot be heard on this count without they first showing justification as to how they entered disputed shares against the name of appellant in the register of members. Again, even if a resolution was taken by promoter directors on their own, in the face of facts of the matter and articles of association, the same would be and has to be termed as illegal.

34. For such reasons, we are unable to maintain the impugned judgment and we set aside the same. We direct cancellation of entry of the name of appellant in the register of members of respondent No.2 showing 9,06,599 equity shares purported to have been credited on the basis of conversion of 9,06,599 CCDs standing in the name of the appellant. Appeal is allowed accordingly.

No orders as to costs.

[2020] 156 CLA 96 (NCLAT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Akal Spring Ltd. and Others

v.

Amrex Marketing (P.) Ltd.

Company Appeal (AT) No. 326 of 2019

JUSTICE, S J MUKHOPADHAYA, CHAIRPERSON &
VENUGOPAL M, MEMBER (JUDICIAL)

25th November 2019

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

Where the Tribunal had allowed the condonation of delay application in company appeal by passing the impugned order by exercising its discretionary power based on the facts and circumstances of the case, the same requires no interference, as the impugned order suffers from no material irregularity or patent illegality in the eye of law.

Companies Act, 2013 – Section 58 – Transfer of shares – 'Refusal to register – Appeal against refusal – Limitation – Application for condonation of delay allowed by Tribunal finding sufficient cause to condone delay in its discretionary power in the facts and circumstances of the case – Whether the impugned order suffers from no illegality to justify interference by the Appellate Tribunal – Held, yes [Para 37].

SYNOPSIS

While dismissing the appeal affirming order of the Tribunal in *Amrex Marketing (P.) Ltd*. v. *Akal Spring Ltd*. [CA No. 67 of 2017 dated 17th March, 2017], the National Company Law Appellate Tribunal made it clear that the dismissal will not preclude the respective parties to raise factual and legal pleas before the Tribunal at the time of hearing of the company petition.

Cases referred to : *Amrex Marketing (P.) Ltd.* v. *Akal Spring Ltd.* CA No. 67 of 2017 in Diary No. 1991, dated 17th March, 2017 ; *Kamlesh Kalidas Shah* v. *State Bank of India Ltd.* [2018] 144 CLA 59 (NCLT) ; *Mackintosh Burn Ltd.* v. *Sarkar & Chowdhury Enterprises (P.) Ltd.* 2015 SCC online Cal. 10466 and *Property Co. Ltd.* v. *Rohinten Daddy Mazda* [2017] 136 CLA 219 (Cal.).

Appearances : Gaurav Varma, Surekh K. Baxy and Shantanu Singh for the Appellants. Ms. Niharika Ahluwalia, Kiran and Ms. Chetan for the respondent.

JUDGMENT

VENUGOPAL M, MEMBER (JUDICIAL)

1. Heard the learned counsel for the appellant.

It is the averment of the appellants in IA No. 3632 of 2019, that the certified copy of the impugned order, dated 23rd September, 2019 passed by the Tribunal ('National Company Law Tribunal'), Chandigarh Bench, Chandigarh in *Amrex Marketing (P.) Ltd.* v. *Akal Spring Ltd.* [CA No. 67 of 2017 in Diary No. 1991, dated 17th March, 2017], was applied for by them and in view of the fact that the limitation period in preferring the appeal expires on 7th November, 2019, an exemption maybe given to the appellants from filing the certified copy of the impugned order.

2. Taking into consideration of the aforesaid request made on the side of the appellants this Tribunal permits the appellants to prefer the present appeal without the production of certified copy of the impugned order. However, this Tribunal directs the appellants to furnish the certified copy of the impugned order, dated 23rd September, 2019, in CA No. 67 of 2017, in Diary No. 1991, dated 17th March, 2017, within a week from today. Accordingly, IA No. 3632 of 2019, stands disposed of.

3. The appellants/respondents have preferred the instant Company Appeal (AT) No. 326 of 2019, as 'aggrieved persons' in respect of impugned order, dated 23rd September, 2019, passed by the Adjudicating Authority ('National

Company Law Tribunal') Chandigarh Bench, Chandigarh in condoning the delay of 186 days, in CA No. 67/2017, in Diary No. 1991, dated 17th March, 2017, in filing the appeal.

4. Earlier, the Adjudicating Authority while passing the impugned order dated 23rd September, 2019, in CA No. 67/2017, in Diary No. 1991, in condoning the delay and allowed the application filed by the respondent-applicant whereby a direction was issued to the respondent-applicant to deposit the cost of Rs. 25,000 in the "Prime Minister's National Relief Fund" within two weeks from the date of passing of the impugned order, etc.

5. The learned counsel for the appellants urges that the Adjudicating Authority had failed to appreciate that the statutory prescribed time period to supply for "transfer of shares" and "rectification of register" is 60 days from the date of receipt of refusal or in case no notice of refusal was transmitted by the company, within a period of 90 days from the date of which the instrument was transferred was delivered to the company.

6. In this connection, the learned counsel for the appellants takes a stand that while assuming jurisdiction, the learned Adjudicating Authority does not possess the power to condone the delay of 186 days, although, admittedly the delay was more than 1700 days.

7. The learned counsel for the appellants points out that the actual delay was '1795' days as the request for registration of "transfer of shares" was for the first time made on 29th November, 2011 and the same was refused. In fact, the cause of action for filing of the appeal before the Tribunal had lapsed on 28th March, 2012 and that the respondent-applicant had not ascribed any sufficient reason to explain the delay.

8. The learned counsel for the appellants point out that on 29th November, 2011, the respondent-applicant through its director had applied for registration of 1,00,000 shares of the first appellant in its name and that the respondent-applicant applied to the 1st appellant for "transfer of shares" of the 1st appellant-company in its favour. Further, the shares applied for 'transfer' by the respondent-applicant are the same held by "Unit Trust of India" (A/C Vecaus-I) was of the 'Subscription Agreement' and the request was accompanied with the "Original Share Certificates", "Original Transfer Deed", "memorandum and articles of association" of the appellant-company and the documents were addressed to the Registered Office of the 1st appellant-company.

9. Added further, the learned counsel for the appellants brings it to the notice of this Appellate Tribunal that the 1st appellant-company had not registered the "Transfer of Shares" in favour of the respondent-applicant and neither issued any notice of refusal and, therefore, as per the provisions of section 111A of

the Companies Act, 1956, an appeal before the hon'ble Tribunal ought to have been made within four months from the date of delivery of the "instrument of transfer", *i.e.*, on or before 28th March, 2012.

10. The learned counsel for the appellant(s) contends that the 1st appellant is a public limited company providing for free transferability of shares and it has in good faith on 22nd December, 2014, through its director had responded to the letter by informing the respondent-applicant for "transfer of shares", the latter is to comply with the statutory process and provide all mandatory requirements such as "original share certificates", "transfer deed", etc.

11. Yet another submission of learned counsel for the appellants is that the 1st appellant-public company had onwards responded to the request of the respondent and allowed it the respondent to issue a "transfer instrument" as per Companies Act, 2013.

12. Expatiating his contention, the learned counsel for the appellants puts forth a plea that "refusal of registration of transfer of shares" is effectively the "refusal of shares" and not the 'instrument'. That apart, the respondent in the year 2011 had sought for the registration of "transfer of shares" which was deemed to be refused, as no acceptance of refusal was issued by the appellants. Subsequently, the respondent-applicant instead of preferring the 'appeal' before the Tribunal against the said refusal relodges a fresh instrument for transfer of the same shares, with an intention to revive a time barred action.

13. The learned counsel for the appellants submits that the Tribunal had committed an error in applying its mind in respect of issue of limitation by blindly reported the decision of hon'ble High Court of Calcutta reported in *Mackintosh Burn Ltd.* v. *Sarkar & Chowdhury Enterprises (P.) Ltd.* 2015 SCC online Cal. 10466, in allowing the application.

14. The learned counsel for the appellants points out that the Tribunal ('National Company Law Tribunal') Chandigarh Branch had failed to consider the decision of hon'ble Supreme Court in *Mackintosh Burn Ltd.* v. *Sarkar & Chowdhury Enterprises (P.) Ltd.* [2018] 5 SCC 575 wherein it was observed that the High Court on erroneous appreciation of facts recorded that there were no other grounds except ground of limitation taken by the public company. Also, the hon'ble High Court at page 583 at para 19, inter alia, observed :

> ".... The order, dated 16th September, 2015, passed by the Company Law Board, Kolkata Bench, Kolkata, the order, dated 15th October, 2015, in *Mackintosh Burn Ltd.* v. *Sarkar & Chowdhury Enterprises (P.) Ltd.* 2015 SCC Online Cal 10466 and the order, dated 15th September, 2017 in *Mackintosh Burn Ltd.* v. *Sarkar & Chowdhury Enterprises (P.) Ltd.* 2017 SCC Online Cal 20415 are set aside. The matter is remitted to the Company Law Board, now the National Company Law Tribunal for consideration afresh of the appeal filed under section 58 of the Companies Act, 1956."

15. It is the contention of the learned counsel for the appellants that the period of 'limitation' will commence from the date of first refusal to register the "transfer instrument" in the year 2011 and that the ingredients of section 111 of the Companies Act, 1956, clearly provided that an 'appeal' shall be made within 4 months from the date on which the "instrument of transfer" was delivered and, therefore, the time period for filing of the 'appeal' expired on 28th March, 2012. That Apart, the appellants take a stand that the respondent-applicant had not exercised its available remedies within the 'parameters' of law and continued to insist upon the 1st appellant to register the "transfer instrument", dated 29th November, 2011 till 2015.

16. The learned counsel for the appellants contends that in any event, the respondent-applicant had not offered "satisfactory reasons" to explain the delay and has adopted a casual and laconic approach in its 'application' for condonation of delay.

17. Per contra, it is the contention of the learned counsel for the respondent that by means of impugned order, dated 23rd September, 2019, passed by the National Company Law Tribunal, Chandigarh Bench, Chandigarh that delay of 186 days in preferring the application was condoned subject to certain direction being issued thereto.

18. The learned counsel for the respondent contends that the dispute between the parties revolves around the "acquisition of 1,00,000 shares" of the appellant-public limited company, by the respondent-applicant and shockingly the appellant-company had refused to register the "transfer of shares" on 19th August, 2016, on the pretext that the "articles of association" of the public limited company contains a "first right of refusal by other members".

19. The learned counsel for respondent urges before this court that the request for "transfer of shares" made by the respondent-applicant through letter, dated 29th November, 2011, was never delivered to the appellant and that the 1st appellant had categorically admitted that the respondent's request through letter dated 29th November, 2011 was 'undelivered' and never received by it. Furthermore, the 1st appellant-public limited company in the letter, dated 11th January, 2016 had, requested for the "correct share transfer form" so that they could register the 'transfer' in the name of the respondent-company and, hence, the appellants are estopped from taking a different plea.

20. It is the submission of the learned counsel for the respondent that the mala fide act of refusal by the appellant(s) to registering the "transfer of shares" is apparent from the fact that the 1st appellant-company through its letter, dated 25th July, 2015, had offered to buy-back the 1,00,000 shares from the respondent and when this was refused on 19th August, 2016, for the first time the appellant had raised the issue on registration of "transfer of shares" in the articles of association.

21. The learned counsel for the respondent comes out with an argument that the issue of limitation is not to be pressed into service, to defeat the substantive right of 'transferee' which accrues to it by means of an "operation of law".

22. The learned counsel for the respondent relies on the decision *(Property Co. Ltd.* v. *Rohinten Daddy Mazda* [2017] 136 CLA 219 (Cal.)/[2017] 200 Comp Cas 87 (Cal.) wherein the order of Company Law Board in condoning the delay was not interfered with.

23. The learned counsel for respondent places reliance refers to the decision of *Golden Vyapar (P.) Ltd.* v. *Shefali Papers Ltd.*, wherein a delay of approximately eight years was condoned.

24. The learned counsel for respondent refers to the order, dated 4th November, 2017, of National Company Law Tribunal, Mumbai Bench between *Kamlesh Kalidas Shah* v. *State Bank of India Ltd.* in Company Application No. 13/58(4) & 59/CLB/MB/MAH/2015/[2018] 144 CLA 59 (NCLT) under section 58(4) and 59 of Companies Act, 1956 wherein at para 7, inter alia, observed as follows :

> .... relief - "As a consequence, we are of the considered view that on this technical ground, specially when the matter related to the period when the provisions of Companies Act, 2013, were not applicable, it is unfair, unlawful and unjustifiable to throw this vigilant petitioner out of the litigation at the very threshold without granting him an opportunity of hearing which otherwise is his one of the judicial rights."

25. While winding up, it is the contention of the learned counsel for respondent that the delay in filing the application before the Tribunal was passed on the reason that the respondent-applicant of his registered office in Kolkata and that the appellant's office place his office in Ludhiana and further that the respondent had to collect the documents from the year 2011, etc., and that the hon'ble Tribunal was specified as to the instance of "sufficient cause" to condone the delay. Moreover, it is the case of the respondent that no prejudice would be caused to the appellants, if the main matter was heard on merits.

26. This court has heard the learned counsel for the respective parties and noticed their contentions.

27. At the outset, this Tribunal pertinently points out that the impugned order, dated 23rd September, 2019, in CA No. 67/2017, in Diary No. 1991, dated 17th March, 2017, passed by the National Company Law Tribunal, Chandigarh Branch pertains to "condonation of delay application" and, therefore, this Tribunal is not traversing upon the merits of the controversies between the parties in main dispute and also not delving deep into the same.

28. While dealing with an "application for condonation of delay", the concerned Tribunal/Appropriate Authority is only required to consider whether the "plea of sufficiency of cause" is a reasonable one or otherwise,

of course after taking into consideration of the facts and circumstances of a given case. Undoubtedly, consideration of an existence of a "sufficient cause" is within the ambit of the concerned Authority, which has to be exercised based on sound judicial principles.

29. It cannot be gains aid that "right to refuse" registration of transfer of shares, "sufficient cause" is question of law and the cause shown for refusal is sufficient or otherwise in a given case, can also be a "mixed question of law" and fact. Besides this, a refusal maybe on the basis of "Breach of Law" or any other "sufficient cause".

30. It is to be remembered under the Companies Act, 1956, in case of refusal to transfer the shares by a public company, no time limit was specified in filing an appeal against 'refusal' and whereas under the Companies Act, 2013, it is mentioned that in case, the 'transferee' receives an intimation of refusal, an appeal has to be filed within 60 days of such refusal and in case any intimation was received by a person, then, within 90 days of lodgement of the instrument of transfer with the company.

31. As regards the "condonation of delay" matter, the length and breadth of the delay is an irrelevant one. On the other hand, the acceptance of explanation offered by a litigant/party is a material factor. If a party/litigant exhibits a "sufficient cause" for the delay in question, then an Appropriate Authority may condone the delay and admit the main matter for 'hearing' on merits.

32. One cannot brush aside a vital fact that in Law, a Lis' is to be decided on merits and no party should be non-suited harping on technicalities and also by adopting a pedantic approach.

33. There is no two opinion of the fact that although 'day-to-day' explanation for "condonation of delay" is not necessary, but "sufficiency of reason" must exist. As a matter of fact, the term "sufficient cause" is not defined in the Limitation Act, 1963, but the establishment of "sufficient cause" is a condition precedent for exercising the discretion by the "Competent Authority".

34. At this juncture, a mere running of the letter, dated 11th January, 2016, of the 1st appellant-1st respondent addressed to the respondent-appellant latently and patently indicates that the request of the respondent, dated 29th November, 2011 was 'undelivered' and also it was mentioned that the letter, dated 11th October, 2014, was never received by it, etc.

35. In the present case, the respondent-company, is registered in West Bengal has a registered office at Kolkata and that the 1st respondent-appellant's company registered office is situated at Ludhiana. Furthermore, the respondent-applicant before the Tribunal had averred in the application that 1st appellant-company had refused to register the 'Transfer of shares' on 20th

September, 2016 and that the respondent-applicant had to collect documents pertaining to year 2011, which were to be annexed along with the Application, being necessary documents for arriving at a decision of the case.

36. Apart from that, the respondent's stand is that documents were also to be sent to Chandigarh, together with original of all the documents, as enunciated by NCLT Rules, 2016. In this background, according to the respondent-applicant, the "delay of 186 days" had occurred before the Application was first filed in March 2017. Also that the Tribunal had exercised its discretion by allowing the CA No. 67/2017, subject to the deposit of Rs. 25,000, etc., and the same may not be interfered by this Tribunal, at this stage in the interest of justice.

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

38. In view of the upshot, the Company Appeal (AT) No. 326 of 2019, fails and the same is dismissed without costs. It is made quite clear that the dismissal of present appeal will not preclude the respective parties to raise factual and legal pleas before the Tribunal at the time of hearing of company petition. Connected Interlocutory Application No. 3631/2019 stands closed.

[2020] 156 CLA 103 (NCLAT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Regional Director, Southern Region, MCA and Anr.

v.

Real Image LLP and Anr.

Company Appeal (AT) No.352 of 2018

Justice, Jarat Kumar Jain, Member (Judicial), Balvinder Singh & Dr. Ashok Kumar Mishra, Members (Technical)

4th December 2019

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

Reading provisions of the Companies Act as a whole in reference to conversion of Indian company, there is no ambiguity or absurdity or anomalous results which could not have been intended by the Legislature. Hence, the principle of casus omissus cannot be supplied by the court when there is no such occasion to apply this principle.

Companies Act, 2013 – Sections 232 and 366 read with sections 55 to 57 of Limited Liability Partnership Act, 2008 ('LLP Act') – Amalgamation of companies – Amalgamation of LLP into private limited company – Application of Companies Act and LLP Act and principle of casus omissus – Whether when reasons for conversion of Indian limited liability partnership into Indian company are found in the four corners of the statute itself, that is the Companies Act the principle of casus omissus cannot be applied by the court – Held, yes [Para 17].

SYNOPSIS

The National Company Law Appellate Tribunal has set aside the impugned order finding it not sustainable in law.

Case referred to : *Union of India* v. *Rajiv Kumar* [2003] 6 SCC 516.

Appearances : Ripu Daman Bhardwaj and T P Singh for the Appellant. Goutham Shivshankar for the Respondent.

JUDGMENT

JUSTICE JAIN, MEMBER (JUDICIAL)

1. National Company Law Tribunal, Chennai *vide* impugned order dated 11th June, 2018 allowed the company petition filed by respondents and permitted amalgamation of the limited liability partnership firm into private limited company. Hence, the appellant Regional Director Southern Region and Registrar of Companies have preferred this appeal under section 421 of the Companies Act, 2013.

2. Real Image LLP ('transferor-LLP') with Qube Cinema Technologies (P.) Ltd. ('transferee-company') and their respective partners, shareholders and creditors moved joint company petition CP No.123/CAA/2018 under sections 230 to 232 of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 and National Company Law Tribunal Rules, 2016 before NCLT, Chennai. Transferor-LLP is proposed to be amalgamated and vested with transferee-company. Transferor-LLP is incorporated on 4th January, 2016 under the provisions of Limited Liability

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COMPANY LAW

[2020] 156 CLA (Mag.) 1

Interim dividend through circular resolution – Is it good governance ?

Dr. S Chandrasekran*

There is a practice being followed by some listed companies to approve the interim dividend through circular resolutions of the Board of directors without placing for considering at the audit committee and Board meetings. In this article, the author makes an attempt to examine whether approval of interim dividend through circular resolution is a good governance ? ❖❖EFW❖❖

Introduction

1. The definition 'dividend' has been inserted by the Companies (Amendment) Act, 2000 to provide that dividend includes 'interim dividend'. Further, the Companies (Amendment) Act, 2017 also substituted sub-section (3) of section 123 of the Companies Act, 2013 ('the Act'), thereby interim dividend, inter alia, may be declared during any financial year or at any time the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account. Normally, dividend is recommended by the Board of directors on consideration of annual accounts and the shareholders approve such recommended dividend at their annual general meetings. Profit earning listed companies do consider and distribute a portion of profits to the shareholders at the time of considering and approving quarterly results as a reward on capital and retain the remaining portion of profits. But, there is a practice being followed by some listed companies to approve the interim dividend through circular resolutions of the Board without placing for consideration at the audit committee and Board meetings.

* Senior Partner, Chandrasekaran Associates Company Secretaries.

Powers to declare interim dividend

2. The Board of directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend. There is no need for shareholders to approve the interim dividend. The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('the LODR Regulations') mandated certain compliances by a listed company for declaration and payment of dividend. All such requirements such as (*a*) prior intimation to stock exchanges about Board meeting ; (*b*) disclosure of outcome of Board meeting ; and (*c*) record date ; recognise the concept of Board meeting.

Whether interim dividend can be declared by circular resolution ?

3. The Act recognises the concept of circular resolution by the Board of directors ('Board'). However, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board. Further, the Board of a company shall exercise certain powers on behalf of the company by means of resolutions passed at meetings of the Board the dividend is not one among such powers to be exercised only at the Board meetings. Secretarial Standards-I (SS-1), which is mandatory for compliance by listed companies, also place certain resolutions to be passed only at a Board meeting and again dividend is not one among such resolutions to be passed at Board meetings. At the same time, SS-1 confirms that resolutions passed by circulation are deemed to be passed at a duly convened meeting of the Board and have equal authority. SS-3 on dividend issued by the Institute of Company Secretaries of India ('ICSI') requires that approval of dividend has to be in a duly convened Board meeting but the said SS-3 is not mandatory and only recommendatory. Therefore, circular resolution passed by a company for declaration of dividend is not barred but wonders whether declaration of dividend by circular resolution is a good corporate governance?

Role of audit committee

4. Audit committee shall have minimum three directors as members and all members shall be financially literate and at least one member shall have accounting or related financial management expertise. "Financially literate" has been explained in the LODR Regulations which means the ability to read and understand basic financial statements, *i.e*., balance sheet, profit and loss account and statement of cash flows. The role of audit committee includes

(*a*) approval of payment to statutory auditors for any other services rendered by the statutory auditors; and (*b*) the appointment, removal and terms of remuneration of the chief internal auditor shall be subject to review by the audit committee. While the payment of remuneration to both internal and statutory auditors have been included for the approval of audit committee, but, unfortunately no express provision has been included for declaration and payment of interim dividend. There are chances that in a listed company, the remaining directors in the Board other than the audit committee members may exceed the number of audit committee members. If that is so, all other directors other than the audit committee members can pass a circular resolution for payment of interim dividend and the role of audit committee may be infructuous.

Will it fall under the unpublished price sensitive information ?

5. Listed company has to give prior intimation to the stock exchange about the Board meeting in which the declaration of interim dividend is to be considered, at least 2 working days in advance, excluding the date of intimation and date of the meeting. Normally, listed companies inform the date of such Board meeting and only on consideration and declared at the Board meeting the rate and amount of dividend, are again informed to the stock exchanges the outcome of Board meeting within 30 minutes of the closure of Board meeting. Whereas, for passing a circular resolution for consideration and approval of interim dividend, it is very much necessary to inform the directors about the rate and amount of interim dividend to be declared and one wonders whether this would fall under the unpublished price sensitive information?

Suggestions

6. The Act requires certain business to be approved only at meetings of the Board. However, other business that requires urgent decisions can be approved by means of resolutions passed by circulation. No doubt, passing of circular resolutions are deemed to be passed at Board meeting. The Act, SS-1 and LODR Regulations do not mandate that interim dividend is to be declared at a duly convened Board meeting. Board may also validly pass a circular resolution without any audit committee member's participation. But will such circular resolution for declaration of interim dividend test the principles of good governance? I leave this question among professionals for further discussion and analysis.

COMPANY LAW

[2020] 155 CLA (Mag.) 4

Companies (Amendment) Bill, 2020 – A lead from criminality to civil wrongs

Namo Narain Agarwal*

The Companies (Amendment) Bill, 2020, introduced in Lok Sabha on 17th March, 2020, has proposed 72 amendments in the Companies Act, 2013. It is note worthy that 40 of the 62 clauses of the Bill decriminalise the minor procedure lapse details from fine or imprisonment or both into the civil wrongs. This article intended to provide summary of amendments in tabular format. ❖❖EFW❖❖

Introduction

1. Companies (Amendment) Bill, 2020 ('the Bill') was introduced in Lok Sabha on 17th March, 2020 proposing 72 amendments in various provisions of the Companies Act, 2013 ('the Act') on the basis of 56 out of 62 recommendations of the Company Law Committee (2019) and 16 on the basis of internal review of the Government. Before the proposed amendments through this Bill, the Act has already been amended an innumerable number of times through Removal of Difficulties Orders, (Electoral Bond) Scheme, Government Notifications, Companies Rules, Companies Orders, General Circulars, Presidential Ordinances and, especially, through the following year-wise enactments :

- Companies (Amendment) Act, 2015
- Insolvency and Bankruptcy Code, 2016
- Companies (Amendment) Act, 2017
- Finance Act, 2017
- Companies (Amendment) Act, 2019
- Companies (Amendment) Bill, 2020 (in the process of being enacted)

1.1 Thanks to the Ministry of Corporate Affairs to appreciate the irony of India Inc. and its concerned law abiding officers and professionals in

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keeping track of and complying with so fast changing one of the most important corporate laws, along with different dates for different provisions coming into force. Thanks are also due to the Ministry to propose, in the impugned Bill, decriminalisation of several minor procedural or technical lapses into civil wrongs and providing a greater ease of living to the corporates. India Inc. feels a sigh of great relief for saving, to a great extent, its officials and associates from undergoing the rigours of Criminal Procedure Code and appearing before the criminal courts for bail/acquittal or conviction as criminals.

1.2 The Bill states, inter alia, the following as its Statement of Objects and Reasons :

- To decriminalise certain offences under the Act in case of defaults which can be determined objectively and which otherwise lack any element of fraud or do not involve larger public interest.
- To empower the Central Government to exclude, in consultation with the Securities and Exchange Board, certain class of companies from the definition of "listed company", mainly for listing of debt securities.
- To clarify the jurisdiction of trial court on the basis of place of commission of offence under section 452 for wrongful withholding of property of a company by its officers or employees, as the case may be.
- To incorporate a new Chapter XXIA in the Act relating to producer companies, which was earlier part of the Companies Act, 1956.
- To set up Benches of the National Company Law Appellate Tribunal.
- To make provisions for allowing payment of adequate remuneration to non-executive directors in case of inadequacy of profits, by aligning the same with the provisions for remuneration to executive directors in such cases.
- To relax provisions relating to charging of higher additional fees for default on two or more occasions in submitting, filing, registering or recording any document, fact or information as provided in section 403.
- To extend applicability of section 446B, relating to lesser penalties for small companies and one person companies, to all provisions of the Act which attract monetary penalties and also extend the same benefit to producer companies and start-ups.
- To exempt any class of persons from complying with the requirements of section 89 relating to declaration of beneficial interest in shares and

exempt any class of foreign companies or companies incorporated outside India from the provisions of Chapter XXII relating to companies incorporated outside India.

- To reduce timelines for applying for rights issues so as to speed up such issues under section 62.
- To extend exemptions to certain classes of non-banking financial companies and housing finance companies from filing certain resolutions under section 117.
- To provide that the companies which have corporate social responsibility spending obligation up to fifty lakh rupees shall not be required to constitute the corporate social responsibility committee and to allow eligible companies under section 135 to set off any amount spent in excess of their corporate social responsibility spending obligation in a particular financial year towards such obligation in subsequent financial years.
- To provide for a window within which penalties shall not be levied for delay in filing annual returns and financial statements in certain cases.
- To provide for specified classes of unlisted companies to prepare and file their periodical financial results;
- To allow direct listing of securities by Indian companies in permissible foreign jurisdictions as per rules to be prescribed.

Proposed amendments – A study

2. It is heartening that 40 of the 62 clauses of the Bill relate to decriminalisation of the minor and procedural lapses and defaults under the Act from fine or imprisonment or both. There are eleven clauses in the Bill, in respect of which Rules will have to be made under the proposed legislation for matters of procedural or administrative details. Their enforceability will depend upon the speed with which these Rules are made. Herein below is summary of the amendments as proposed in the Bill :

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
1.	*Section 1 – Enforcement*	Different dates may be appointed for different provisions of the Bill for coming into force.	There should be an endeavour to reduce number of "different dates" to avoid uncertainty, follow up, wait, ambiguity.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
2.	*Section 2(52) proviso – New Listed company defined*	Inserted to enable the Central Government to exclude companies, based on listing of some specific non-convertible securities on stock exchanges, as may be provided by rules, in consultation with SEBI.	CLC report – Chapter 2, para 2 Listed company will be on the basis of equity shares/ convertible securities. Welcome as logical.
3.	*Section 8(11) – Punishment with fine and imprisonment for defaults in companies with charitable objects*	Omit the punishment of imprisonment in relation to the defaulting officer under section 8. No change in fine.	CLC report – Chapter 1, table 4, point 4. Decriminalisation welcome.
4. (i)	*Section 16(1)(a)(b) – Timeline for rectification of name of a company*	Reduce the time limit of compliance from six months to three months.	CLC report – Nil Welcome
(ii)	*Sub-section (3) provides for punishment with fine and imprisonment in case of default in changing the name by the defaulting company*	Substitute to provide for allotment of a new name to the company by the Central Government (Regional Director), in case of default in complying with the direction under sub-section (1).	CLC report – Chapter 1, table 3, point 1 Defaulting company will have to use the (auto generated) new name allotted by RD. Decriminalisation welcome.
5.	*Section 23(3) & (4) – New public offer and private placement of shares*	Insert for certain public companies to : (*i*) issue a class of securities on foreign stock exchanges and (*ii*) also exempt them from any provision of Chapter III (prospectus), Chapter IV (share capital), sections 89 (BO), 90 (SBO) or 127 (dividend), as per Rules.	CLC report – Nil Welcome, long awaited.
6.	*Section 26(9) – Punishment with fine and imprisonment with respect to issue of prospectus by a company*	Omit the punishment of imprisonment in relation to a person, who is in default for any provision under section 26. Fine amounts remain the same.	CLC report – Chapter 1, table 4, point 5. Decriminalisation welcome

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
7.	*Section 40(5) – Punishment with fine and imprisonment with respect to default in making application for listing of proposed issue of securities*	Omit the punishment of imprisonment in relation to the defaulting officer. Fine amounts remain the same.	CLC report – Chapter 1, table 4, point 6. Decriminalisation welcome.
8.	*Section 48(5) – Punishment with fine and imprisonment for non-compliance of NCLT order relating to variation of shareholders rights*	Omit the sub-section to remove penal provisions. Default shall be taken care of through contempt powers of NCLT.	CLC report – Chapter 1, table 1, point 1. Decriminalisation welcome.
9.	*Section 56(6) – Punishment with fine for default in transfer/ transmission of shares*	Substitute for monetary penalty.	CLC report – Chapter 1, para 2.6, 2.7. Decriminalisation welcome.
10.	*Section 59(5) – Punishment with fine and imprisonment for non-compliance of NCLT order for rectification of register of members*	Omit the sub-section to remove penal provisions. Default shall be taken care of through contempt powers of NCLT.	CLC report – Chapter 1, table 1,Point 2. Decriminalisation welcome.
11.	*Section 62(1)(a)(i) – Timeline of rights issue of shares*	To make rules for lesser number of days (than present 15 days) for deeming/ declining offer of shares.	CLC report – Chapter 2, para 10. Postal ballot process also needs such reduction of timeline.
12.	*Section 64(2) – Penalty for non-compliance for notice to RoC for alteration of share capital*	Modify/reduce the monetary penalty on the company and, especially, its defaulting officers.	CLC report – Nil Welcome.
13.	*Section 66(11) – Punishment with fine for non-compliance of NCLT order for reduction of share capital*	Omit the sub-section to remove penal provisions. Default shall be taken care of through contempt powers of NCLT.	CLC report – Chapter 1, table 1,Point 3. Decriminalisation welcome.
14.	*Section 68(11) – Punishment with fine and imprisonment for default in complying with requirements for buy back of shares by a company*	Omit the punishment of imprisonment in relation to the defaulting officer. Fine amounts remain the same.	CLC report – Chapter 1, table 4, point 7. Decriminalisation welcome.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
15.	*Section 71(11) – Punishment with fine and imprisonment for non-compliance of NCLT order regarding redemption of debentures or interest payment*	Omit the sub-section to remove penal provisions. Default shall be taken care of through contempt powers of NCLT.	CLC report – Chapter 1, table 1, point 4. Decriminalisation welcome
16.	*Section 86(1) – Punishment with fine and imprisonment for contravention of any provision relating to creation/modification/ satisfaction of charges*	Substitute to provide for monetary penalty in case of non-compliance of any provision of Chapter VI relating to Charges.	CLC report – Chapter 1, para 2.14, 2.15. Decriminalisation welcome.
17.	*Section 88(5) – Punishment with fine for failure to maintain registers of members/ security holders as stipulated u/s 88 and Rules thereunder.*	Substitute to provide for monetary penalty in case of non-compliance of relevant provisions.	CLC report – Chapter 1, para 2.7. Decriminalisation.
18.	*Section 89(5) and (7) – Punishment with fine and imprisonment for contravention of provisions relating to declaration for Beneficial interest in shares*	Substitute to provide for monetary penalty in case of non-compliance of relevant provisions. Cap of penalty also fixed in both sub-sections.	CLC report – Chapter 1, para 2.11, 2.16. Decriminalisation welcome.
	Section 89(11) – New	Insert for Central Government to grant exemption to certain persons, in public interest, from complying with certain provisions of section 89.	CLC report – Chapter 2, para 9. Quite different from CLC recommendation and too discretionary.
19.	*Section 90(10) and (11) – Punishment with fine and imprisonment for failure to make a declaration by an SBO*	Substitute to provide for monetary penalty in case of non-compliance of relevant provisions. Cap of penalty also fixed in both sub-sections.	CLC report – Chapter 1, para 2.10, 2.11. Decriminalisation welcome.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
20.	*Section 92(5) – Penalty for failure to file the annual return* *Section 92(6) – Punishment with fine for wrong certification*	Modify to reduce the monetary penalty amount. Modify for monetary penalty and its rationalisation	CLC report - Nil Welcome being rational and logical. CLC report - Chapter 1, paras 2.18, 2.19. Decriminalisation welcome.
21.	*Section 105(5) -Punishment with fine for invitation for proxy*	Modify for levy of monetary penalty of fixed amount.	CLC report – Chapter 1, para 2.20. Decriminalisation welcome.
22.	*Section 117(2) – Penalty for default in filing certain resolutions with RoC* *Section 117(3)(g) – second proviso – New*	Modify to reduce the monetary penalty amount. Insert second proviso for Government to exempt NBFCs, etc., from filing resolutions relating to resolutions for grant of loans etc.	CLC report – Nil. Welcome. CLC report – Chapter 2, para 11. Welcome in view of nature of their business.
23.	*Section 124(7) – Punishment with fine for non-compliance in respect of unpaid dividend etc.*	Substitute for levy of monetary penalty, amount remaining the same.	CLC report – Chapter 1, para 2.20. Decriminalisation welcome.
24.	*Section 128(6) – Punishment with fine and imprisonment for default in maintenance of books of account*	Omit the punishment of imprisonment.	CLC report – Chapter 1, table 4, Point 3. Part Decriminalisation welcome.
25.	*Section 129A – New periodical financial results, etc., by unlisted companies*	Insert for specified unlisted companies to file periodical financial results, etc., with RoC within 30 days as per Rules	CLC report – Nil Good, but should apply to big companies with Public shareholders, Banks/FIs Loans, FDs
26.	*Section 134(8) – Punishment with imprisonment/fine in respect of financial statements, board report*	Substitute for monetary penalty, amount also reduced with cap.	CLC report – Chapter 1, para 2.18, 2.19. Decriminalisation and reduction in penalty amount welcome.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
27. *(a)*	*Section 135 – Corporate Social Responsibility* *Sub-section (5) second proviso – New*	Insert to allow companies to set off excess CSR expenditure in one year in succeeding financial years as per Rules.	CLC report – Nil Good for promotion of generous CSR spend as excess allowed to be set off in future.
(b)	*Sub-section (7) – Punishment with fine/ imprisonment for default in CSR spend/transfer to Unspent CSR account for expenditure in three years*	Substitute for fixed amount of monetary penalty on the company and its defaulting officers.	CLC report – Chapter 1, para 2.20. Decriminalisation welcome, companies burdened with higher penalty.
(c)	*Sub-section (9) – New*	Insert for exemption from CSR Committee involvement if mandatory CSR spend is less than Rs. 50 lakhs in a year. Ideally, why should there continue/be constituted CSR Committee?	CLC report – Nil Good for simplicity and avoiding duplicity, but uncertainty in marginal cases as exact CSR amount is ascertained at year end.
28.	*Section 137(3) – Penalty for failure to file annual financial statements with RoC*	Modify to reduce the amount of penalty.	CLC report – Nil Good move being rational for procedural default.
29.	*Section 140(3) – Penalty on auditor for not filing his resignation with RoC/CAG within 30 days*	Modify to reduce the amount of penalty.	CLC report – Nil Good move being rational for a procedural default.
30.	*Section 143(15) – Punishment with fine on Financial/Secretarial/ Cost Auditor for non-reporting of fraud to Central Govt.*	Modify for fixed amount of different monetary penalty in case of listed/unlisted companies. For listed company, minimum penalty increased.	CLC report – Chapter 1, para 2.18, 2.19. Decriminalisation welcome.
31.	*Section 147(1) – Punishment with fine and imprisonment for default in compliance with provisions relating to Audit and Auditors* *Section 147(2) – Punishment for certain contraventions*	Modify to omit imprisonment on defaulting officers, fine remaining the same on company and officers. Contravention under section 143 excluded from punishment under this section.	CLC report – Chapter 1, table 4, Point 8. Part Decriminalisation welcome. CLC report – Chapter 1, para 2.19 Drafting/overlapping change.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
32.	*Section 149(9) proviso – New*	Insert for payment of remuneration to independent director even in case of loss.	CLC report – Nil This will allure ID to become more non-independent, strange provision?
33.	*Section 165(6) – Penalty for excess directorships than permitted under sub-section (1).*	Substitute to reduce the penalty amount with a cap, but widens the scope of contravention to the entire section.	CLC report – Nil Welcome to penalty reduction, other amendment is a drafting correction.
34.	*Section 167(2) – Punishment with fine and imprisonment of a director continuing after automatic vacation*	Omit the punishment of imprisonment, fine amount remaining the same.	CLC report – Chapter 1, table 4, Point 9. Part Decriminalisation welcome.
35.	*Section 172 – Punishment with fine for contravention of provisions relating to appointment/ qualification of directors in Chapter XI*	Substitute for monetary penalty with lower amounts	CLC report – Chapter 1, para 2.23. Decriminalisation welcome.
36.	*Section 178(8) – Punishment with fine and imprisonment for contravention in Audit, Nomination/ Remuneration and Stakeholder Relationship Committees*	Modify for monetary penalty, penalty on company fixed at maximum amount of Rs. 5 lakh.	CLC report – Chapter 1, para 2.20. Decriminalisation welcome.
37.	*Section 184(4) – Punishment with fine and imprisonment for default in disclosure of director's interest*	Modify for monetary penalty.	CLC report – Chapter 1, para 2.12. Decriminalisation welcome.
38.	*Section 187(4) – Punishment with fine and imprisonment for default in investments in company's name*	Modify for monetary penalty with lower and fixed amounts.	CLC report – Chapter 1, para 2.20. Decriminalisation welcome.
39.	*Section 188(5)(i) and (ii) – Punishment with fine and imprisonment for contravention relating to Related Party Transactions*	Modify for monetary penalty, amounts fixed but substantially increased.	CLC report – Chapter 1, para 2.20. Decriminalisation welcome.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
40.	*Section 197(3) – Remuneration to NE directors in case of loss or inadequacy of profits*	Amend for remuneration to non-executive director, independent director even in case of loss in accordance with Schedule V.	CLC report – Nil Welcome for ease of doing business, but not for IDs
41.	*Section 204(4) – Punishment with fine for default in respect of Secretarial Audit of listed/bigger companies*	Modify for monetary penalty with fixed amount.	CLC report – Chapter 1, para 2.19. Decriminalisation welcome.
42.	*Section 232(8) – Punishment with fine and imprisonment for non-compliance of obligations in relation to merger and amalgamation under section 232*	Substitute for monetary penalty restricting to non-filing NCLT order with RoC under sub-section (5), No specific remedy provided for non-filing of statement with RoC under sub-section (7).	CLC report – Chapter 1, para 2.3. Decriminalisation welcome. This will be taken care of section 450.
43.	*Section 242(8) – Punishment with fine and imprisonment for any alteration in MoA/ AoA, inconsistent with the NCLT order*	Modify for monetary penalty with no change in amount.	CLC report – Chapter 1, table 4, point 1. Decriminalisation welcome.
44.	*Section 243(2) – Punishment with fine and imprisonment to MD, manager, director acting as such for 5 years after termination/ set aside by NCLT*	Modify for monetary penalty with no change in amount.	CLC report – Chapter 1, table 4, point 2. Decriminalisation welcome.
45.	*Section 247(3) – Punishment with fine and imprisonment of a Valuer for contravention of his obligations*	Modify for monetary penalty with fixed amount.	CLC report – Chapter 1, para 2.21. Decriminalisation welcome.
46.	*Section 284(2) – Punishment with fine and imprisonment of promoters, directors, employees, associates for non-cooperation with company liquidator*	Substitute to provide that liquidator to apply to NCLT for necessary directions when a person does not assist him and NCLT may issue directions to such person for compliance.	CLC report – Chapter 1, table 3, Point 3 Non compliance will attract NCLT contempt jurisdiction.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
47.	*Section 302(3) and (4) – Punishment with fine and imprisonment of company liquidator for not filing NCLT order for dissolution of a company with RoC*	Substitute to provide that NCLT will itself forward copy of its order to RoC. Hence, no criminal proceedings required and sub-section (4) omitted.	CLC report – Chapter 1, table 3, point 4. Decriminalisation welcome.
48.	*Section 342(6) – Punishment with fine of delinquent officers and members of the company in liquidation*	Omit the sub-section. Prosecuting court may use its powers to mandate their cooperation.	CLC report – Chapter 1, table 2, Point 1. Decriminalisation welcome.
49.	*Section 347(4) – Punishment with fine and imprisonment for default in disposal of wound up company's books, etc.*	Modify to omit imprisonment.	CLC report – Chapter 1, table 4, Point11 Part Decriminalisation welcome.
50.	*Section 348(6) – Punishment with fine on Liquidator for non-furnishing information related to pending liquidations*	Substitute to provide that the defaulting liquidator will be liable for action under Insolvency and Bankruptcy Code.	CLC report – Chapter 1, para 3.3. Decriminalisation welcome.
51.	*Section 356(2) – Punishment with fine on liquidator or other person for not filing NCLT order with RoC for declaring any company dissolution as void*	Substitute to provide that NCLT will itself forward copy of its order to RoC. NCLT shall also direct liquidator to file a copy of the order within 30 days.	CLC report – Chapter 1, table 3, Point 5. Decriminalisation welcome.
52.	*Sections 378A – 378ZU (Chapter XXIA) New Producer Companies*	Insert a new Chapter on similar lines as provided in Companies Act, 1956 to, inter alia, avoid reference of the old Act.	CLC report– Chapter 2, para 4 Welcome, shall ease administrative and professional work.
53.	*Section 379(1) proviso – Applicability of certain sections to foreign companies with a proviso for exemption*	Omit the proviso	CLC report – Nil Kindly see clause 55 herein below.

Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
54.	*Section 392 – Punishment with fine and imprisonment for defaults by foreign companies*	Modify by omitting the punishment for imprisonment.	CLC report-Chapter 1, table 4, point 10 Part Decriminalisation welcome.
55.	*Section 393A – New Exemption to foreign companies from certain provisions of the Act*	Insert to empower Central Government to exempt any class of foreign companies from provisions of the entire Chapter XXII (sections 379-393).	CLC report – Chapter 2, para 9. Exemption widened as compared to present proviso to section 379(1). See clause 53 herein above.
56.	*Section 403(1) third proviso* *Payment of additional fee for default in filing documents with RoC*	Substitute to provide to make rules for payment of higher additional fee. Present fee was very high and irrational.	CLC report – Chapter 2, para 7. Hope, new Rules will be logical, rational and commensurate default.
57.	*Section 405(4) – Punishment with fine and imprison for non-compliance with Govt. order to companies for furnishing correct/ complete information*	Substitute for levy of monetary penalty with some modification in amounts.	CLC report – Chapter 1, para 2.4, 2.5 Decriminalisation welcome.
58.	*Section 410 – Constitution of NCLAT*	Amend by removing restriction on number of NCLT members that Government may appoint.	CLC report – Nil Administrative matter.
59.	*Section 418A – New* *Constitution of Benches of NCLAT*	Insert to provide for constitution of NCLAT and related provisions.	CLC report – Chapter 2, para 5 Administrative matter.
60.	*Section 435(1) – Jurisdiction of Special Courts*	Amend to exclude offence relating to wrongful withholding of property u/s 452(1) from their jurisdiction.	CLC report – Chapter 2, para 3 Administrative matter, section 452 also amended correspondingly.
61.	*Section 441(5) – Compounding Punishment with fine and imprisonment for non-compliance with NCLT/RD order*	Substitute by omitting imprisonment, also some changes in fine amount	CLC report – Chapter 1, table 3, Point 2 Part Decriminalisation welcome.

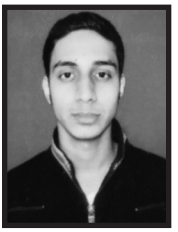
Bill clause	*Corresponding section and provision of the act*	*Amendment as proposed in the Bill*	*Remarks*
62.	*Section 446B – Lesser penalty on OPC/Small company*	Substitute to extend lesser penalty to start-up company, producer company	CLC report – Chapter 2, para 8 Welcome – Need of the hour.
63.	*Section 450 – Punishment with fine for offences where no specific penalty or punishment provided*	Substitute for levy of monetary penalty fixing a cap for continuing defaults.	CLC report – Chapter 1, para 2.23 Decriminalisation welcome.
64.	*Section 452(2) proviso – New* *Wrongful withholding of company property*	Insert to avoid punishment in respect of a dwelling unit pending payment of certain dues/compensation.	CLC report – Nil Welcome for employees benefit.
65.	*Section 454(3) proviso – New* *Adjudication of penalties*	Insert for monetary penalty on rectification of certain defaults in annual return/ financial statements	CLC report – Chapter 2, para 16 Welcome for relief.
66.	*Section 465(1) – Repeal of certain enactments and savings*	First proviso omitted relating to Producer companies,	CLC report – Chapter 2, para 4

In the end, it is hoped that the proposals will become a reality and the Bill find place on the statute book along with delegated legislation to come into force sooner than later.

COMPETITION LAW

[2020] 156 CLA (Mag.) 17

An antithetical approach towards jurisdictional duplicity vis-a-vis Competition Commission or the sectoral regulators



Anish Gupta* • Yash Raj*

The competition law in India has always been put at the back foot even when there arises an issue of jurisdictional duplicity. This article focuses on the jurisdictional duplicity issue with regard to sector specific regulator as discussed in the Competition Commission of India *v.* Bharti Airtel Ltd. *[2019) 2 SCC 521 and demands for an exclusive competency for competition enforcement with sectoral competition regulation.* ❖❖EFW❖❖

Background

1. In end 2016, Reliance Jio Infocomm Ltd. ('RJIL') filed a suit, along with Competition Commission of India ('CCI'), under sub-section (1) of section 19 of the Competition Act, 2002 ('the Act') against few major cellular network operators, Idea Cellular, Bharti Airtel, Vodafone Telenor (India) Communications and Videocon Telecommunications ['incumbent dominant operators' or ('IDO')] for cartelisation. It also stated that the Cellular Operators Association of India ('COAI') – an industry association of mobile telecom operators, was aiding the IDO's in formation of the alleged cartel. RJIL alleged that the IDO's were consciously denying the new entrant by –

(*a*) point of inter-connections (POI's a physical interface between two networks, which is a mandatory requirement for telecommunication services. Moreover, it also alleged that the IDOs were providing only one way POIs and preventing RJIL subscribers from making calls across different service providers hence, downgrading their service, and

(*b*) denying the request for mobile number portability (MNP).

RJIL contended that these conduct of the IDO's violated telecom norms and was anti-competitive in nature, which amounts to cartelisation.

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1.1 Prior to filing the above suit with the CCI, RJIL also approached the Telecom Regulatory Authority of India ('TRAI') with the same grievances abovementioned. TRAI through its investigation found IDOs guilty of violation of licence agreements and the standards of quality of service ['QoS'] of basic telephone service [wireline] and Cellular Mobile Telephone Service Regulations, 2009. It, then, immediately held the IDOs accountable by making a recommendation to the DoT (Department of Telecommunications) for imposing a penalty of Rs.50 crore per licence service area. Ultimately, the said members approached the Delhi High Court separately to challenge the said order of the TRAI.

1.2 In the meanwhile, the CCI directed a probe into the cartelisation charge alleged against the IDO's by RJIL under sub-section (1) of section 26 of the Act. The CCI held that the grievances of RJIL were genuine and that the conduct of the IDOs amounted to cartelisation which violated section 3 of the Act and, hence, pushing itself into anti-competitive effect on the market.

1.3 The order the CCI was then challenged by the IDOs and the COAI in the Bombay High Court. The High Court's decision was not protective of the powers prescribed under the provisions of the Act and merely held that CCI was incapable in dealing and deciding the issues which arose out of the TRAI Act, thereby setting aside the order passed by the CCI. The Court held that the issues related to contract agreements, terms and clauses were to be settled by TRAI, in the first instance and unless these issues were decided, no proceedings could be initiated by or before CCI. The High Court noted that the Telecommunications sector/industry/market is governed, regulated, controlled and developed by authorities under the Telegraph Act, the TRAI Act and related regulations, rules, circulars, including all government policies. Thus, all issues pertaining to development of telecommunications market, such as interpretation or clarification of contract clauses, inter-connection agreements, and quality of service regulations are to be settled by the telecom authorities/ Telecom Disputes Settlement and Appellate Tribunal ('TDSAT') and not by any authority under the Act.

1.4 To settle the dispute of jurisdiction, the CCI filed a SLP seeking adjudication of the matter before the Supreme Court of India. The court observed that the obligation on the IDOs to provide inter-connectivity flowed from the unified licence and the inter-connection agreements entered into by the telecom operators as per the Telecommunication Inter-connection (Reference Interconnect Offer) Regulations, 2002, which fell with the specialised domain of TRAI.

1.5 TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. The Supreme

Court stated that the functions of TRAI and CCI are distinct in its own manner, further elaborating that the CCI has duties, powers and functions to deal with anti-competitive practices, to protect the interest of the consumers and ensure freedom of trade. Whereas, on the other hand, TRAI is empowered to regulate telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. The Court took a protective approach towards the CCI's powers, as being distinct and specific and tried maintaining a balance in the jurisdiction of power between TRAI and CCI. The court made the investigation of the CCI subject to the findings of TRAI. The Court held as follows :

> "Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion."

Analysis

2. The Competition Law should be evolved to include an effective conflict resolution mechanism for jurisdiction conflicts between sector specific regulators and competition authorities. The Supreme Court, however, has laid down a rather frowned upon mechanism of keeping the sector specific regulators at the helm in such anti-competitive matters. The Supreme Court followed the existing jurisprudence of the US Supreme Court as laid down in *Credit Suisse*[1] case and the *Verizon Communications*[2] case.

2.1 In the Anti-trust regime of the United Kingdom, there exists a concurrency model for resolving such disputes where both the authorities enjoy competency and reach a decision on the exercise of the same through a consultative process.[3] However, this model may not be suitable for a country like India which is still developing and where a hierarchical institutional culture and power battles prevent governmental bodies from meaningfully cooperating with each other.

2.2 The current mechanism as propounded by the Supreme Court faces some major practical challenges. Presently, the laws do not provide for a clear functional distinction between sector specific regulators and competition authorities in such cases. A clear legislative language providing for guidelines and parameters for effective competition related interventions by the sector specific regulators. Further, the present mechanism of giving the sector specific regulators an upper hand in such matters may result in unnecessary

1. *Credit Suisse Securities (USA) LLC* v. *Glen Billing*, 551 US 264.

2. *Verizon Communications Inc*. v. *Law Offices of Curtis V. Trinko, LLP*, 540 US 398.

3. Competition Act 1998; Competition Act 1998 (Concurrency) Regulations 2014, SI 2014/536.

interventions by them. Regulators, due to their bias towards regulation, may take the latitude of imposing burdensome, intrusive obligations, instead of allowing the competitive trends in the market to flourish organically. Such unwarranted regulatory interference can result in misallocation of resources, market distortions, and economic inefficiencies. Furthermore, despite the emergence of sustainable competition, regulators may often be reluctant to lift regulatory obligations to serve their own vested interests. Without the necessary legislative amendments, the current laws are not adequate to deal with such conflicts.

Conclusion

3. The resolution of such conflicts in India requires an exclusivity model to be implemented where a single body is granted exclusive competency to deal with such issues. The CCI should be the exclusive body for enforcement of competition law as the sector specific regulators face many limitations. Competition authorities take an economy-wide perspective, possess the necessary expertise to evaluate anti-competitive conduct, ensure consistency in the application of rules across sectors, and reduce the risk of regulatory capture and lobbying to which industry regulators are susceptible, besides minimising the market distortions that can arise from direct regulatory interference. A clear legislative mandate should be brought so that CCI could exercise an exclusive jurisdiction in matters of competition law enforcement and sector specific regulators only have a role of devising technical and economic guidelines and accessing regulations. The sector specific regulators should also have an advisory role in such matters. The expertise and specialised knowledge of these regulators should be utilized by the CCI as the regulators will provide sector specific information and advice. Legislative amendments should be brought to assign this advisory role to the sector specific regulators.

SEBI LAW

[2020] 156 CLA (Mag.) 21

Angle of Perception

Disgorgement order passed under the SEBI Act against several persons jointly / severally

T V Narayanaswamy

Interesting legal issues often crop up on which there can be more than one view. It may be useful for any one faced with such issues to have them examined from as many angles as possible to enable him to decide how best he can deal with them, but always bearing in mind that an opinion is not an advice. Shri T V Narayanaswamy has graciously offered himself for providing an insight to the problems that baffle readers. Readers are invited to send their queries directly to Shri Narayanaswamy at his e-mail Id : tvns32@gmail.com

Disgorgement order – Whether it can be passed against several persons jointly/severally in respect of securities of a listed companies – The question of issuing a disgorgement order 'jointly and severally' against persons who have benefitted out of transactions in the stock exchange of securities of a listed company in their individual capacity would not arise.

Query

Whether a disgorgement order under the Securities and Exchange Board of India Act, 1992 can be passed against several persons jointly and severally in respect of transactions of securities of a listed company ?

Reply

Under the Securities and Exchange Board of India Act, 1992 ('the Act'), the SEBI is empowered to issue orders on persons who have enriched themselves by their dealings in the stock exchange in contravention of the provisions of the Act and the Regulations made thereunder. Such an order includes an order to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention. In this connection a question would arise as to whether several persons who have benefitted out of their transactions in securities of a listed company, a disgorgement order could be passed jointly

and severally against all of them ? A person is answerable to his actions. If any of the action by him is in contravention of the provisions of any law or rules and regulations made thereunder, he alone is responsible and answerable for his action in contravention of law. No other individual could be penalised of such a contravention. Only the person benefitted has to disgorge the benefit. This is the intent of the Act in providing by way of *Explanation* to clause (*iii*) of sub-section (1) of section 11B of the Act which reads as under:

> "*Explanation*. – For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct *any person*, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention."(emphasis supplied)

Therefore, the question of issuing a disgorgement order "jointly and severally" against persons who have benefitted out of transactions in the stock exchange of securities of a listed company in their individual capacity would not and should not arise.

In this regard, please also see the order of the Securities Appellate Tribunal, Bombay dated 18th October, 2019 handed in Appeal No.393 of 2018 between *Mahavirsingh N Chauhan* v. *SEBI*.

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