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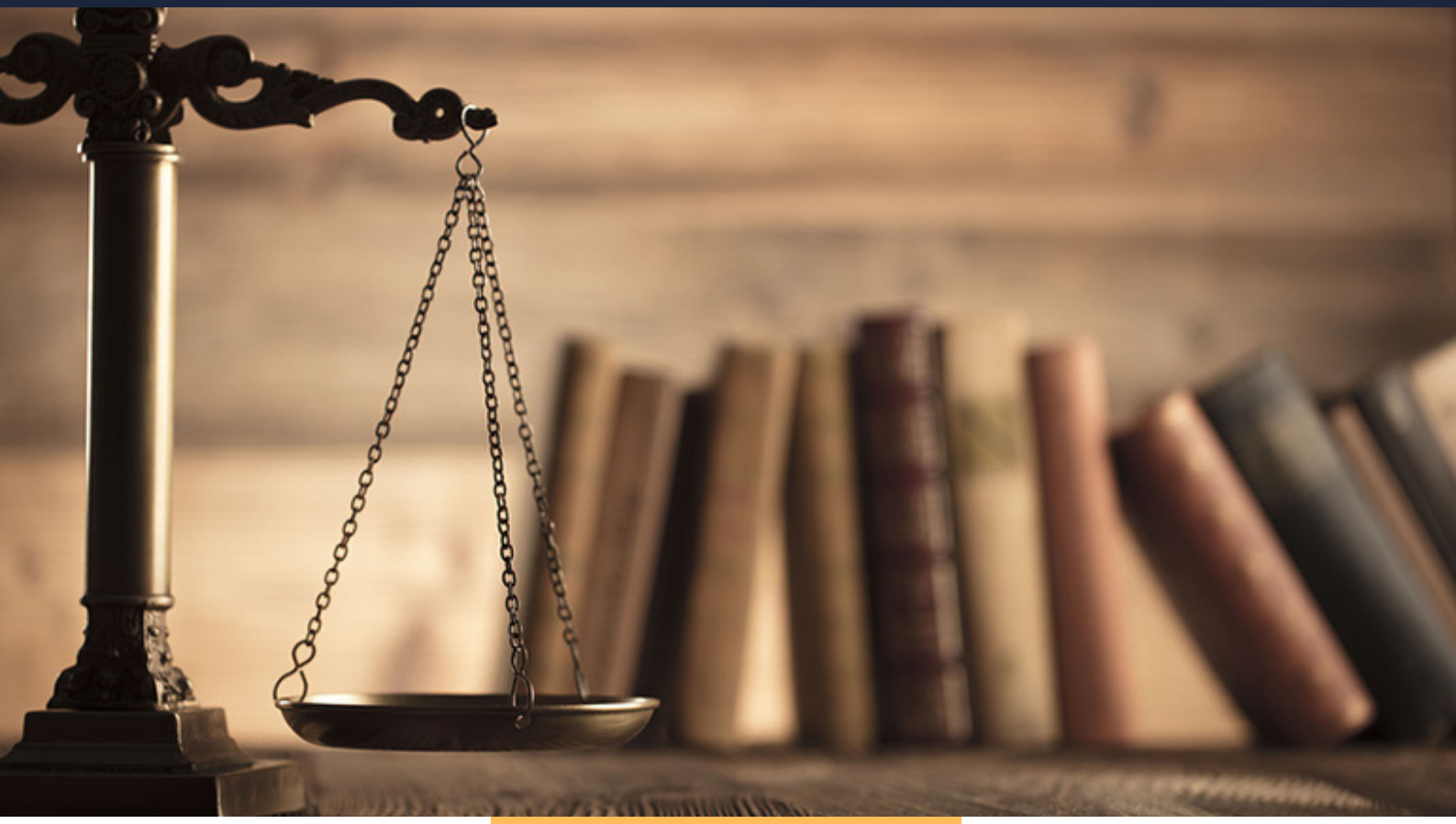

J&M LEGAL
NEWSLETTER

TABLE OF CONTENTS

LEGAL NEWS

Latest Updates

A compendium of the latest changes, modifications, and amendments to Indian Laws

Companies Act, 2013

1.

A Notification dated July 26, 2022, was issued by the Central Board of Direct Taxes, Ministry of Finance on Procedure for PAN application and allotment through Simplified Proforma for incorporating Limited Liability Partnerships (LLPs) electronically. In light of the same, a Common Application Form (CAF) in the form of a Simplified Proforma for Newly appointed LLPs that lays down the classes of persons, forms, format and procedure for PAN has been provided for.

The Notification can be accessed at:
https://www.mca.gov.in/content/mca/global/en/home.html

Insolvency and Bankruptcy Code

1.

The Insolvency and Bankruptcy Board of India has vide its notification dated 1.11.2022 notified the Amendment to the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 which lay down the governance structure and provides for model bye-laws of the Insolvency Professional Agencies (IPA). The Board had issued three circulars, namely, (i) circular No. IP/005/2018 dated January 16, 2018 specifying the format for disclosure of relationship by the insolvency professional (IP) (ii) circular no. IPA/009/2018 dated April 19, 2018 mandating IPAs to submit Annual Compliance Certificate in the format given in the circular and (iii) circular No. IBBI/IPA/43/2021 dated July 28, 2021 specifying the list of contraventions by IP and the amount of penalty to be imposed by IPAs. The Board has notified Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Second Amendment) Regulations, 2022 on November 01, 2022, vide which provisions of aforesaid circulars have been incorporated in the Model Bye Laws Regulations and the said circulars stand rescinded.

The Notification can be accessed at:
https://ibbi.gov.in/uploads/press/2022-11-01-220308-2ip9z-9001ac8ce8835b9ec6adbca4172d3f4a.pdf

2.

The Insolvency and Bankruptcy Board of India has vide its circular dated 12.12.2022, has made available an electronic platform at www.ibbi.gov.in, for reporting the liquidator's decisions which are different from the advice given by the SCC. Sub-regulation (1) of regulation 31A of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides that the liquidator shall constitute an SCC to advise him on matters relating to remuneration of professionals, sale under regulation 32, fees of liquidator, valuation, etc. Sub-regulation (10) of regulation 31A as amended vide notification dated 16.09.2022, provides that the '... advice of the consultation committee shall not be binding on the liquidator'. The proviso to sub-regulation (10) provides that 'where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing and submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report.'

The Circular can be accessed at :
https://ibbi.gov.in//uploads/legalframwork/2d5613091cded4721f7f0297f4416a8e.pdf

Ministry of Corporate Affairs

1.

The Ministry of Corporate Affairs vide Notification dated 15.09.2022 has introduced the Companies (Specification of Definition Details) Amendment Rules, 2022 to amend the Companies (Specification of Definition Details) Rules, 2014, whereby the threshold of 'paid up capital' for small companies have been increased from 2 crores to 4 crores. By way of the amendment, the paid-up capital and turnover of the small company shall not exceed Rupees Four crore and Rupees Forty Crore respectively.

The Notification can be accessed at:
https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MTgwNDY3Mzc5&docCategory=Notifications&type=open

2.

The Ministry of Corporate Affairs vide Notification dated 20.09.2022 has introduced the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022 seeking to amend the Companies (Corporate Social Responsibility Policy) Rules, 2014. The amendment inter alia provides that the cost of social impact assessments, which can be considered as CSR spending, cannot be greater than 2% of all CSR expenditures [Earlier at 5%] for the applicable financial year or Rupees 50 lakh, whichever is higher.

The Notification can be accessed at:
https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MTgwNTU0MTk3&docCategory=Notifications&type=open

Reserve Bank of India

1.

The Reserve Bank of India ('RBI') vide its Notification dated July 28, 2022 notified the Restriction on Storage of Actual Card Data [i.e., Card-on-File(CoF)]. In line with the previous circulars issued in the year 2021 and with effect from October 01, 2022, no entity in the card transaction/payment chain, other than the card issuers and/or card networks, shall store CoF data, and any such data stored previously shall be purged. For ease of transition to an alternate system, as an interim measure, the merchant or its Payment Aggregator involved in the settlement of such transactions can save the CoF data for a maximum period of T+4 days ("T" being the transaction date) or till the settlement date, whichever is earlier. This data shall be used only for the settlement of such transactions and must be purged thereafter. In addition to the same, for the handling of post-transaction activities, the acquiring banks can continue to store CoF data until January 31, 2023. Any non-compliance of this Notification shall attract penal action including imposition of business restrictions.

The Notification can be accessed at:
https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12363&Mode=0

2.

A Notification dated July 04, 2022, was released by RBI by virtue of which the operations of non-bank PSOs (Non-bank Payment System Operators) have been reviewed and hereafter, they shall require prior approval of RBI in the following cases:

a. Takeover / Acquisition of control, which may / may not result in change of management

b. Sale / Transfer of payment activity to an entity not authorised for undertaking similar activity.

Further, the non-bank PSOs shall inform RBI within 15 calendar days in the following cases –

a. Change in management / directors

b. Sale / Transfer of payment activity to an entity authorised for undertaking similar activity

The Notification can be accessed at:
https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12348&Mode=0

3.

The RBI on July 06, 2022 issued a Press Release for Liberalization of Forex Flows in light of global recession and receding market economies. In order to further diversify and expand the sources of forex funding so as to mitigate volatility and dampen global spillovers, the RBI had proposed certain measures to enhance forex inflows while ensuring overall macroeconomic and financial stability.

a. Exemption from Cash Reserve Ratio (CRR) and Statutory Liquidity Ratio (SLR) on Incremental FCNR(B) and NRE Term Deposits

b. FPI Investment in Debt

c. Foreign Currency Lending by Authorised Dealer Category I (AD Cat-I) Banks

d. External Commercial Borrowings (ECBs)

The Press Release can be accessed at:
https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=53979

4.

The RBI vide its notification dated 6.10.2022 has notified the requirement for Appointment of Internal Ombudsman by the Credit Information Companies. All Credit Information Companies holding a Certificate of Registration under sub-section (2) of Section 5 of the Act, to comply with the Reserve Bank of India (Credit Information Companies- Internal Ombudsman) Directions.

The Notification can be accessed at:
https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12395&Mode=0

5.

The RBI vide its notification dated 23.11.2022 has notified that with a view to facilitate cash flow-based lending to MSMEs, it has been decided to include Goods and Services Tax Network (GSTN) as a Financial Information Provider (FIP) under the Account Aggregator (AA) framework. Department of Revenue shall be the regulator of GSTN for this specific purpose and Goods and Services Tax (GST) Returns, viz. Form GSTR-1 and Form GSTR-3B, shall be the Financial Information.

The Notification can be accessed at:
https://rbi.org.in/Scripts/NotificationUser.aspx?Id=12412&Mode=0

SEBI

1.

The SEBI has by a Gazette Notification dated July 15, 2022 expanded the meaning of the term 'securities' under the Securities Contracts (Regulations) Act, 1956 **('SCRA')** whereby 'zero coupon principal instruments' would now fall within the meaning of the term securities under Section 2 of the SCRA. The Explanation provided thereof, defines the meaning of zero coupon zero principal instruments, for the purposes of this notification, as an instrument issued by a Not-for-Profit Organization which shall be registered with Social Stock Exchange segment of a recognized Stock Exchange in accordance with the regulations made by the Securities and Exchange Board of India.

The Notification can be accessed at https://www.sebi.gov.in/legal/gazette-notification/jul-2022/declaration-of-zero-coupon-zero-principal-instruments-as-securities-under-the-securities-contracts-regulation-act-1956_60875.html

2.

SEBI vide the circular dated 04.08.2022 has enhanced the guidelines for debenture trustees and listed issuer companies on security creation and initial due diligence. The gist of the amendment is as follows:

∅ Manner of change in security / creation of additional security / conversion of unsecured to secured in case of already listed non-convertible debt securities;
∅ Encumbrance on securities for issuance of listed debt securities;
∅ Due Diligence Certificate in case of shelf prospectus/memorandum;
∅ Empanelment of External Agencies by Debenture Trustee(s);
∅ Compliance with SEBI Circulars on 'Security & Covenant Monitoring System'

The Circular can be accessed at https://www.sebi.gov.in/legal/circulars/aug-2022/enhanced-guidelines-for-debenture-trustees-and-listed-issuer-companies-on-security-creation-and-initial-due-diligence_61629.html

3.

SEBI vide the circular dated 26.08.2022 has made amendments to the guidelines for the preferential issue and institutional placement of units by a listed REIT.
The gist of the amendment is as follows:
∅ Post allotment, the REIT shall make an application for listing of the units to the stock exchange (s);
∅ Pricing of the frequently traded units has been fixed;
∅ Preferential issue of units shall not be made to any person who has sold or transferred any units of the issuer during the 90 trading days preceding the relevant date.

The Circular can be accessed at
https://www.sebi.gov.in/legal/circulars/aug-2022/amendments-to-guidelines-for-preferential-issue-and-institutional-placement-of-units-by-a-listed-reit_62396.html

4.

SEBI vide the circular dated 26.08.2022 has made amendments to the SEBI (Portfolio Managers) Regulations, 2020 which was notified on August 22, 2022. The amendment to PMS Regulations shall come into force on the thirtieth day from the date of their publication in the Official Gazette.
In terms of the said amendment, the Portfolio Managers shall ensure compliance with the following:
∅ Limits on investment in securities of associates / related parties of Portfolio Managers;
∅ Prior consent of the client regarding investments in the securities of associate / related parties;
∅ Minimum credit rating of securities for investments by Portfolio Managers;
∅ Disclosure of details of investments by Portfolio Managers.

The Circular can be accessed at
https://www.sebi.gov.in/legal/circulars/aug-2022/circular-for-portfolio-managers_62374.html

5.

SEBI vide the circular dated 28.08.2022 has made amendments to the guidelines for the preferential issue and institutional placement of units by a listed InVIT.
The gist of the amendment is as follows:
∅ Post allotment, the InVit shall make an application for listing of the units to the stock exchange (s);
∅ Pricing for the frequently traded units has been fixed;
∅ Preferential issue of units shall not be made to any person who has sold or transferred any units of the issuer during the 90 trading days preceding the relevant date.

The Circular can be accessed at
https://www.sebi.gov.in/legal/circulars/aug-2022/amendments-to-guidelines-for-preferential-issue-and-institutional-placement-of-units-by-a-listed-invit_62399.html

6.

The Securities and Exchange Board of India (SEBI) vide circular number IMD/FPI&C/CIR/P/2019/124 dated November 05, 2019, had issued Operational Guidelines for FPIs, DDPs and EFIs) under the SEBI (Foreign Portfolio Investors), Regulations 2019. Based on requests received from various market participants, vide the present circular dated 26.09.2022, SEBI has sought to make modifications to the Operational Guidelines as follows.
"Where an entity engages multiple investment managers (MIM) for managing its investments, the entity can obtain multiple FPI registrations mentioning name of Investment Manager for each such registration. Such applicants can appoint different DDPs for each such registration. Investments made under such multiple registrations shall be clubbed for the purposes of monitoring of investment limits".

The Notification can be accessed here:
https://www.sebi.gov.in/legal/circulars/sep-2022/modification-in-the-operational-guidelines-for-fpis-ddps-and-efis-pertaining-to-fpis-registered-under-multiple-investment-managers-mim-structure_63378.html

7.

The SEBI has issued a circular dated 28.10.2022 for a Reduction in the denomination for debt securities and non-convertible redeemable preference shares. It mandates that the face value of each debt security or non-convertible redeemable preference share issued on a private placement basis shall be Rs. 10 lakhs and the trading lot shall be equal to the face value. Accordingly, amendments are being made in Chapter V (Denomination of issuance and trading of Non-convertible Securities) of the Operational Circular.

The Notification can be accessed at:
https://www.sebi.gov.in/legal/circulars/oct-2022/reduction-in-denomination-for-debt-securities-and-non-convertible-redeemable-preference-shares_64429.html

8.

The SEBI has issued a circular dated 31.10.2022 for review of the provisions pertaining to specifications related to the International Securities Identification Number (ISIN) for debt securities issued on a private placement basis.

The Notification can be accessed at:
https://www.sebi.gov.in/legal/circulars/oct-2022/review-of-provisions-pertaining-to-specifications-related-to-international-securities-identification-number-isin-for-debt-securities-issued-on-private-placement-basis-modification-to-chapter-viii-_64522.html

1.

The Central Board of Direct Taxes, Ministry of Finance issued a Notification dated July 29, 2022, on the reduction of time limit for verification of Income Tax Return (ITR) from within 120 days to 30 days of transmitting the ITR data electronically. Therefore, with effect from the date of this notification in respect of any electronic transmission of return data on or after the date of this Notification comes into effect, the time limit for e-verification or submission of ITR-Verification shall now be 30 days from the date of transmitting or uploading the data of return income electronically. If the data that is electronically transferred, is e-verified within 30 days of transmission, then the date of transmitting the data electronically shall be considered as the date of furnishing the return of income. If the same is verified post the 30 days, the date of e-verification shall be treated as the date of furnishing the return of income.

The Notification can be accessed at:
https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

2.

The GST Council in its meetings held on June 28 and June 29, 2022 had recommended to withdraw the GST exemptions granted to services by SEBI and the same has been notified vide Notification No.4/2022 dated 13th July, 2022. Accordingly, it is to be noted that all the Market Infrastructure Institutions, Companies who are listed or are intending to list their securities, other intermediaries and persons who are dealing in the securities market, were notified that the fees and other charges payable to SEBI shall be subject to GST at the rate of 18% with effect from July 18, 2022.

The Notification can be accessed at:
https://www.sebi.gov.in/legal/circulars/jul-2022/levy-of-goods-and-services-tax-gst-on-the-fees-payable-to-sebi_60880.html

3.

The Central Government vide Notification No. 69/2022 Customs (N.T.) dated 22.08.2022 has brought changes in the Customs (Compounding of Offenses) Rules, 2005.

The gist of the changes brought in are as follows:

∅ Satisfaction of compounding authority has been limited only to verify and be satisfied that the full and true disclosure of facts has been made by the applicant;

∅ The offense under section 135AA of the Customs Act has also been made compoundable. Further, the competent authority has been mandated to grant immunity when offense is only of this type.

The Notification can be accessed at
https://egazette.nic.in/WriteReadData/2022/238243.pdf

A brief summary of the latest case laws.

CASE LAWS

Latest Updates

Supreme Court

1.

National Highways Authority of India Vs Transstroy (India) Limited (Civil Appeal No. 6732 of 2021) dated 11.07.2022

The issue that arose for consideration before the Hon'ble Supreme Court was whether, the counter claims of a party can be dismissed merely because the claims were not notified before invoking arbitration. The Appellant before the Court moved an application under Section 23 (2A) of the Arbitration and Conciliation Act, to place its counter-claim on record. The Tribunal rejected the counter claim of the Appellant on the ground that in terms of Clause 26 of the agreement that provides for the dispute resolution mechanism, the claims were to be notified and an attempt at an amicable settlement was to be made before the invocation of arbitration.

The Court opined that on a true and fair interpretation of Clause 26 of the agreement before it, every claim that arose out of the termination of the agreement could be referred to arbitration and not just the claims of the respondent and that the Arbitral Tribunal had in rejecting the counter claims sought to be raised, given a very narrow interpretation to the arbitration clause. It further observed that once conciliation failed, the entire gamut of the disputes including counter-claims would form the subject matter of arbitration. Accordingly, the Court set aside the impugned judgement and the award of the Arbitral Tribunal and allowed the appellant to file their counter-claim.

2.

Vidarbha Industries Power Limited vs Axis Bank Limited ((2022) 8 SCC 352) dated 12.07.2022

The Hon'ble Supreme Court in this case was considering whether Section 7(5)(a) of the Insolvency and Bankruptcy Code, 2016 confers a discretionary power on the Hon'ble NCLT, or is mandatory provision that requires the Adjudicating Authority to admit an application of a Financial Creditor under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process.

The Court stated that the existence of debt and default only qualifies a creditor to apply for initiation of CIRP, and further that for admission of such application, the NCLT as the Adjudicating Authority is required to consider the 'expedience' of the application for initiation of CIRP considering inter alia the overall financial health and viability of the Corporate Debtor. The Court remarked that the usage of the word 'may' in Section 7(5) (a) indicates the legislative intent that the Adjudicating Authority need not admit an application by the financial creditor in each and every case. Thus, the Apex court opined that the Adjudicating Authority shall have the discretionary power to admit an application of a financial creditor under Section 7 of IBC for initiation of CIRP.

3.

National Highway Authority of India vs. Sheetal Jaidev Vade (2022 SCC OnLine SC 1070) dated 24.08.2022

In this case, the Bombay High Court, Aurangabad Bench entertained a writ petition for the execution of an arbitral award. A 2 Judge Bench of the Supreme Court disapproved the entertaining of such writ petitions under Article 226 of the Constitution for the execution of an arbitral award. The Court felt that by entertaining the writ petition, the High Court had converted itself into an Executing court. The Court expressed that once the original writ petitioner had an efficacious, alternative remedy to execute the award passed by the learned Arbitral Tribunal/Court, by initiating an appropriate execution proceeding before the competent Executing Court, the High Court ought to have relegated the original writ petitioners to avail the said remedy instead of entertaining the writ petition under Art 226 which was filed to execute the award passed by the Arbitral Tribunal. If the High Court converts itself to an Executing Court and begins to entertain writ petitions under Art 226 to execute the award passed by the Arbitral Tribunal, the High Courts would be flooded with the writ petitions to execute awards passed by an Arbitrator/Arbitral Tribunal.

4.

Katta Sujatha Reddy vs Siddamsetty Infra Projects Pvt. Ltd (2022 SCC OnLine SC 1079) dated 25.08.2022

A 3 Judge bench of the Supreme Court held that the 2018 Amendment Act ("Amendment") to the Specific Relief Act is prospective and cannot apply to those transactions that took place prior to the Amendment coming into force [01.10.2018]. The issue which arose in the present appeal was whether the amended Section 10 of the Specific Relief Act, 1963 which deals with specific performance, is prospective or retrospective in operation. The Court noted that after the Amendment, specific performance which was only a discretionary remedy, is now codified as an enforceable right and is not dependent anymore on equitable principles expounded by the Courts but rather it is founded on satisfaction of the requisite ingredients under the Specific Relief Act, 1963.

The Court further observed that the Amendment was not merely procedural in nature but had substantive principles built into its working. The Court also observed that the Amendment contemplates that the substituted provisions would come into force on such date as the Central Government may appoint by notifying it in the Official Gazette, or different dates may be appointed for different provisions of the Act. In terms of the Amendment Act, 01.10.2018 was the appointed date on which the amended provisions would come into effect. Therefore, the Supreme Court held that the Amendment is prospective in its application, and cannot apply to transactions that took place prior to the amendment coming into force.

5.

Sundaresh Bhatt, Liquidator of ABG Shipyard vs Central Board of Indirect Taxes and Customs (2022 SCC OnLine SC 1101) dated 26.08.2022

A three judge bench of the Hon'ble Supreme Court held that the Insolvency and Bankruptcy Code (IBC) will prevail over the Customs Act and that the customs authority can only determine the quantum of duties and levies but cannot initiate recovery proceedings. While pronouncing the judgement, the Court held that once moratorium under IBC is declared, Customs authorities have only limited jurisdiction to assess the quantum and they cannot take steps to recover the dues. The Court stated that after such assessment, customs authorities had the option to approach the adjudicating authority, claiming the customs dues as operational debt under IBC. IRP can take steps to secure the property. In this case, the Court was considering an appeal against an NCLAT order in which it held that the goods lying in the customs bonded warehouse were not the Corporate Debtor's assets as they were neither claimed by the Corporate Debtor after their import, nor were the bills of entry cleared for some of the said goods.

Allowing the Appeal, the Court observed: "The NCLAT, by deciding the question of passing of title from the Corporate Debtor to the respondent authority, has clearly ignored the mandate of Section 72(2) of the Customs Act relating to sale. This interpretation of the NCLAT clearly ignores the effects of the moratorium under Sections 14 and 33(5) of the IBC. The fact is that the duty demand notice and notice under Section 72(2) of the Customs Act, were issued during the moratorium period, which has been completely ignored by NCLAT and has resulted in rendering the moratorium otiose. The interpretation provided by the NCLAT, regarding the deemed transfer of title of the goods from the assessee to the Customs Authority under Section 72 of the Customs Act, would fly in the face of Section 14 of the IBC, read with Sections 25 and 33(5). Moreover, such deemed transfer cannot be countenanced in law as the same would be in breach of Article 300A of the Constitution, as properties are deemed to be transferred to the Customs Authority without there being adequate hearing or any adjudication of any form. Such an interpretation cannot be accepted by this court."

6.

Morgan Securities and Credits Pvt. Ltd. vs Videocon Industries Ltd (2021 SCC OnLine SC 3362) dated 01.09.2022

In this case, the Arbitrator decreed the claim and awarded an amount of Rs. 5,00,32,656/- along with interest at the rate of
(i) twenty one percent (21%) per annum has been granted from the date of default to the date of the demand notice;
(ii) thirty six percent (36%) per annum with monthly rests from the date of the demand notice to the date of award ("pre-award interest"); and
(iii) eighteen percent (18%) per annum on the principal amount of Rs. 5,00,32,656 from the date of award to the date of payment ("post-award interest").

In rejecting the challenge filed against this decision, the Delhi High Court had noted that the Arbitrator had restricted the post-award interest to the principal amount. Therefore, the issue before the Court was whether the language of Section 31(7)(b) of the Act which uses the expression "unless the award otherwise directs" gives the Arbitrator authority to choose simply the interest rate or to choose both the interest rate and the "amount" it must be paid against. The Court had observed that Section 31(7) gives the Arbitrator a broad discretion over whether to grant pre-award interest and the same is at the discretion of the Arbitrator. However, the Court further held that post-award interest is mandated by the statute where the arbitrator only has the discretion to decide the rate of interest. The Division Bench of the Supreme Court in its Order dated 01.09.2022, held that the Arbitrator has the discretion to determine the rate of reasonable interest, the sum on which the interest is to be paid, that is whether on the whole or any part of the principal amount, and the period for which payment of interest is to be made – whether it should be for the whole or any part of the period between the date on which the cause of action arose and the date of the award. The Hon'ble Court added that the Arbitrator must exercise the discretionary power to grant post award interest reasonably and in good faith, taking into account all relevant circumstances.

7.

State Tax Officer v. Rainbow Papers Ltd (2022 SCC OnLine SC 1162) dated 06.09.2022

In this case, the Adjudicating Authority (NCLT), held that Section 48 of the Gujarat Value Added Tax, 2003 (GVAT) , which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax, interest, penalty, etc. under the said GVAT Act, cannot take precedence over Section 53 of the Insolvency and Bankruptcy Code, 2016 (IBC). Therefore, the Government cannot claim first charge over the property of the Corporate Debtor. This position was upheld by the Appellate Authority. In appeal, the issue raised was whether the provisions of the IBC and, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act.

Referring to the definition of the term "Secured Creditor" as defined under the IBC, the Court observed that it is comprehensive and wide enough to cover all types of security interests. The Court observed:

"If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues."
The Court also disagreed with the NCLAT observation that Section 53 of the IBC overrides Section 48 of the GVAT Act.

"Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority."

8.

K. Paramasivam v. Karur Vysya Bank Ltd (2022 SCC OnLine SC 1163) dated 06.09.2022

A 2-Judge Bench of the Hon'ble Supreme Court has held that Corporate Insolvency Resolution Process (CIRP) can be initiated against the Corporate Guarantor without proceeding against the principal borrower. The Court is of the view that the liability of the guarantor is co-extensive with that of the Principal Borrower. In this case, the issue raised in the appeal was whether CIRP can be initiated against the Corporate Guarantor without proceeding against the principal borrower? According to Section 7 of the Insolvency and Bankruptcy Code, 2016, a corporate entity that has provided a guarantee to secure the debt of a non-corporate entity may be subject to CIRP because, once the borrower defaults, a financial debt accrues to the corporate person in respect of the guarantee provided by it, and the guarantor is then the corporate debtor. While dismissing the appeal, the Court observed:

"...The issues raised in this appeal are settled by this Court in Laxmi Pat Surana (supra). As held by this Court in Laxmi Pat Surana (supra), the liability of the guarantor is co-extensive with that of the Principal Borrower. The judgment in Laxmi Pat Surana (supra), rendered by a three-Judge Bench of this Court is binding on this Bench. It was open to the Financial Creditor to proceed against the guarantor without first suing the Principal Borrower."

9.

Maitreya Doshi vs Anand Rathi Global Finance Ltd (Company Appeal No. 6613 of 2021) dated 22.09.2022

The Supreme Court in this case observed that approval of a resolution plan in respect of one borrower cannot discharge a co-borrower. If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the Corporate Debtors. In this case, Adjudicating Authority (National Company Law Tribunal), NCLT, Mumbai Bench admitted a petition under Section 7 of IBC filed by Anand Rathi Global Finance Limited as Financial Creditor, for initiation of the Corporate Insolvency Resolution Process (CIRP) of M/s Doshi Holdings Pvt. Ltd. The "Financial Creditor" had disbursed a loan to the tune of Rs.6 Crores to M/s Premier Limited, under three separate Loan-cum-Pledge Agreements. Doshi Holdings pledged shares held by it in Premier, in favour of the Financial Creditor, by way of security for the loan. The Appellate authority (NCLAT) dismissed the appeal filed by Doshi Holdings by noting that approval of a resolution plan in relation to a Corporate Debtor does not discharge the guarantor of the Corporate Debtor.

10.

New Noble Educational Society vs Chief Commissioner of Income Tax 1 (Civil Appeal No. 3795 of 2014) dated 19.10.2022

Several Educational Trusts had approached the Apex Court against the judgment of the Andhra Pradesh High Court which held that these trusts which claimed benefit of exemption under Section 10 (23C) of the IT Act were not created 'solely' for the purpose of education and therefore rejected their claim for registration as a fund or trust or institution or any university or other educational institution set up for the charitable purpose of education. Dismissing their appeals, the Hon'ble Supreme Court held that educational trust or societies, which seek exemption under Section 10 (23C) of Income Tax Act, should solely be concerned with education, or education related activities. Where the objective of the institution appears to be profit-oriented, such institutions would not be entitled to approval, the 3 Judge Bench held. The Court also overruled its earlier judgments which interpreted the expression 'solely' in Section 10(23C) as the 'dominant / predominant /primary/ main' object. However, it clarified that the law declared in the present judgment shall operate only prospectively. It is further held that wherever registration of trust or charities is obligatory under state or local laws, the concerned trust, society, other institution etc. seeking approval under Section 10(23C) should also comply with provisions of such state laws as this would enable the Commissioner or concerned authority to ascertain the genuineness of the trust, society etc.

Andhra Pradesh High Court

1.

M/s. Dalapathi Constructions versus the State of Andhra Pradesh & Ors. (W.P.No.4652 of 2022) dated 05.08.2022

A Single Judge of the Andhra Pradesh High Court held that once a Memorandum of Enterprise is registered with the prescribed authority, the said enterprise would be entitled to the benefits of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act"), and it would be entitled to approach the Micro and Small Enterprises Facilitation Council ("MSEFC") under Section 18 of the MSMED Act for recovery of its dues along with interest, under Section 17 of the MSMED Act. The Court added that in case a conciliation initiated under Section 18 is not successful, MSEFC can either take up the dispute for arbitration or refer it to any institution or centre for such arbitration, and the provisions of the Arbitration and Conciliation Act, 1996 ("A&C Act") shall then apply to the dispute as if the arbitration was in pursuance of the arbitration agreement under section 7 of the A &C Act. The Court held that when the provisions of Section 18 of the MSMED Act read with Section 7 of the A&C Act, makes it evident that a reference to the MSEFC under the MSMED Act for conciliation and subsequent arbitration, if required, is not barred on account of the presence of an arbitration agreement between the parties which provides for a different method of constituting an Arbitral Tribunal.

Bombay High Court

1.

Relcon Infroprojects Ltd. & Anr. versus Ridhi Sidhi Sadan, Unit of Shree Ridhi Co.op. Housing Society Ltd. & Ors. (ARBITRATION PETITION (L) NO. 12317 OF 2022) dated 27.08.2022

A Single Judge of the Bombay High Court has ruled that merely because a notice under Section 21 of the A&C Act to refer the disputes to arbitration is issued by a party, the Court is not barred from exercising jurisdiction under Section 9 of the A&C Act to grant interim measures. The Court added that it is not constrained to refer the parties to arbitration and convert the proceedings under Section 9 into an application under Section 17 of the A&C Act, to be adjudicated by the arbitral tribunal.

The Bench observed that the Supreme Court in Arcelor Mittal Nippon Steel India Ltd. v Essar Bulk Terminal Limited (2021) had ruled that if the arbitral tribunal is yet to be constituted, the Court is obliged to exercise power under Section 9 of the A&C Act, and that whether the Court grants interim relief or not is a different issue. Noting that the bar of Section 9(3) operates after an arbitral tribunal is constituted, the Apex Court had held that when an application under Section 9 has already been taken up for consideration and is in the process of consideration or has already been considered, and subsequently an arbitral tribunal is constituted, the question of examining whether the remedy under Section 17 is efficacious or not would not arise.

Calcutta High Court

1.

Yashovardhan Sinha HUF versus Satyatej Vyapaar Pvt. Ltd (2022 SCC OnLine Cal 2386) dated 24.08.2022

A Single Judge of the Calcutta High Court held that the arbitrator was unilaterally appointed by the respondent, therefore, he becomes de jure unable to perform his functions and his mandate stands automatically terminated under Section 14 of the A & C Act.

However, the Court rejected the argument of the petitioner that the entire arbitration agreement becomes illegal or invalid when the procedure of appointment is illegal. The Court held that it has power to severe the illegal portions of the arbitration clause and retain the remaining arbitration clause. It held that the intention of the parties is important and must be given effect and a bare perusal of the arbitration clause makes it evident that the parties had always intended to refer dispute to arbitration, therefore, the arbitration agreement survives the illegal portion.

The Court also held that while exercising powers under Section 14 of the A&C Act for appointing a substitute arbitrator will be guided by the principles of Section 11 of the Act, therefore, the Court may refuse substitution when it finds that the issue itself is not arbitrable or falls under one of the categories wherein the dispute is not required to be sent for arbitration. Accordingly, the Court terminated the mandate of the arbitrator and substituted him with another arbitrator.

Delhi High Court

1.

M/s. SPML Infra Ltd Vs M/s. Trisquare Switch gears Pvt Ltd (FAO(COMM) 81/2022 and CM No. 24865/2022) dated 06.07.2022

A Division Bench of Delhi High Court while considering the issue of the Commercial Court's rejection of an application under Section 8 of Arbitration and Conciliation Act ("A&C Act"), 1996, that was filed after the expiry of the statutory period, observed that Section 8 of the Arbitration and Conciliation Act, does not prescribe any specific time for filing an application under Section 8 and merely states that an application ought to be moved not later than the submission of the first statement on the substance of dispute. A suit for recovery was filed by the Respondent before the Commercial Court but the appellant failed to file the written statement within the statutory period provided and had exhausted the right to file the written statement. Thereafter, the appellant filed an application under Section 8 of Arbitration and Conciliation ("A&C") Act for referring the parties to arbitration. The Court observed that once the proceedings before the court progress beyond the initial stage, it would no longer be permissible for a party to then turn around and seek recourse to arbitration. The Court further remarked that though Section 8 of A&C Act does not specify any time limit, it does clearly imply the stage of proceedings at which a party could apply, that is before filing of the first statement on the substance of the dispute. The Court held that if a party fails to file an application under Section 8(1) of A&C Act for referring the parties to arbitration within the time available for filing the first statement on the substance of the dispute (would include a written statement), the party would forfeit its right to apply under Section 8(1) of the A&C Act.

In light of the aforesaid observations, the Court held that there was no infirmity in the decision of the Commercial Court and accordingly dismissed the appeal. The Court thus upheld the order passed by the Commercial Court that the right of the Appellant to file an application under Section 8(1) stood closed.

2.

Brilltech Engineers Pvt. Ltd. v. Shapoorji Pallonji and Co. Pvt Ltd (Arbitration Petition No. 790/2020) dated 15.12.2022

The High Court of Delhi has held that the dispute would not become non-arbitrable merely because the petitioner, before filing the application for appointment of arbitrator, has filed a corporate insolvency application under Section 9 of the IBC. The Court rejected the argument that since the petitioner has filed insolvency application which can only be filed for admitted debt, there can be no arbitration in respect of an admitted debt. The Bench held that it is settled position of law that jurisdiction of NCLT can be invoked only in respect of determined debts, however, merely because a petition has been filed by the petitioner asserting that a definite amount is payable by the respondent, would not imply that the claimed amount has been admitted. The Court held that when the respondent has consistently denied its liability to pay, the claimed amount would not become an admitted debt and petitioner can invoke arbitration for resolving the dispute. The Court also held that since the scope of inquiry before the NCLT and arbitral tribunal is absolutely distinct, therefore, filing of petition before the two forums cannot be called as forum shopping. It further held that petition under Section 9 of the Act and the willingness of the respondent to resort to arbitration for resolution of disputes therein is sufficient compliance of Section 21 of the Act.

3.

DLF Ltd. v. IL&FS Engineering and Construction Co., (Arbitration Petition No. 1166 of 2021) decided on 21.12.2022

In a case where a petition was filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of a sole arbitrator for the resolution of disputes between the parties, a Single Judge held that the moratorium granted by the NCLAT staying the institution of suits and proceedings after the resolution process was initiated under Sections 241 and 242 of the Companies Act, 2013 was similar to an order of moratorium passed under Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC). The Court opined that the order passed by the NCLAT was akin to an order of moratorium under Section 14 of the IBC. The purpose and rationale behind granting a moratorium was to ensure that the assets of the corporate debtor were protected, with an intention to keep the company a going concern and to use the period to strengthen its financial position. It meant that the intent of the NCLAT was to protect the assets of IL&FS and its group companies to make the resolution process effective/purposeful. Further, the Court held that "the NCLAT not just restrained continuance of suits or proceedings already instituted, but also the filing of fresh suits or proceedings. In other words, the order of stay/moratorium prohibits the initiation of any proceedings, regardless of the period to which the claims in the proceedings pertain". Therefore and on these grounds, the Court dismissed the petition.

4.

M/s. Osho G.S. & Company versus M/s. Wapcos Limited (2022/DHC/005767) dated 22.12.2022

The Delhi High Court has ruled that a unilateral request made by one of the parties for setting the appointment procedure in motion, as provided in the arbitration agreement, would not constitute an agreement falling under the proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996 (A&C Act) to waive the disqualification contemplated under Section 12(5).

The Court held that the arbitration agreement conferred the power to appoint a Sole Arbitrator upon the CMD of the respondent Company, who was de jure disqualified from being appointed as an arbitrator by virtue of Section 12(5) and thus, incapable in law of appointing an arbitrator. The Court held that the arbitration notice issued by the claimant, calling upon the respondent Company to appoint an arbitrator in accordance with the arbitration agreement, cannot be construed as an express agreement between the parties to waive the disqualification contemplated under Section 12(5).

Madras High Court

1.

India Yamaha Motor Private Limited vs. the Assistant Commissioner, GST (WP.No. 19044 of 2019 and WMP.No. 18404 of 2019) dated 29.08.2022

A writ petition was filed by the Petitioner/Assessee under the provisions of the Tamil Nadu Goods and Service Tax Act, 2017 in which they challenged an order dated 10.04.2019 wherein the respondent called upon them to remit interest of a sum of Rs. 5,00,00,000/- for belated remittance of Goods and Service Tax for the period from July, 2017 to October,2017. The Petitioner stated that it had sufficient ITC credit in both the electronic cash ledger (ECR) and the electronic credit register (ECrC) and as a result, there had been no damage done to the revenue, and since interest is exclusively compensatory in nature, there was no rationale for charging it. The department argued that the payment cannot be construed as credit before availment. In this background, a Single Judge of the Madras High Court observed that unless an Assessee actually files a return and debits the respective registers, the authorities cannot be expected to assume that available credits will be set-off against tax liability. The Court also held that GST remittances is levied even if credit in electronic cash or credit ledgers is available.

2.

K. Samad & Anr. vs. Reliance Capital Limited (Arb O.P (Com. Div.) No. 338 of 2022) dated 10.08.2022

A Single Judge of the Madras High Court ruled that a party has no choice of jurisdiction while filing a Section 8 application and that it is a Hobson's choice for it since it is constrained to file an application under Section 8 in the Civil Court where the civil suit has been filed by the opposite party. The Court observed that the in the arbitration agreement, the clause which provided for the exclusive jurisdiction of the Courts of a City was left blank and that the venue of arbitration was specified as Mumbai. The Court relied on the law laid down by the Supreme Court in BGS SGS Soma JV vs. NHPC (2019), "where a place is specified as a "venue" of the arbitral proceedings, in the absence of any other contrary indicator, the said "venue" would also be the juridical "seat" of the arbitration." Therefore the Court noted that the venue of arbitration had been specified as Mumbai, while the seat of arbitration was left blank, the Court ruled that in view of the principle laid down in BGS SGS Soma (2019), the seat and the venue would be the same. The Court reiterated that Section 8 of the Arbitration and Conciliation Act, 1996 is an exception to Section 42 of the A&C Act. The Court added that if Section 8 is also brought within the ambit of Section 42, it would defeat the sublime philosophy underlining arbitration i.e., party autonomy.

National Company Law Appellate Tribunal

1.

Tejas Khandhar vs. Bank of Baroda (CA (AT) No.371 of 2020) dated 12.07.2022

The Hon'ble National Company Law Tribunal, New Delhi while considering the issue of limitation on an application preferred by the Corporate Debtor ruled that One Time Settlement ('OTS') proposal falls within the ambit of the expression 'acknowledgement of debt'. On the facts of the case, the suspended director of the Corporate Debtor preferred an appeal before the Hon'ble NCLAT, contending that the NCLT incorrectly admitted an Application under Section 7 of Insolvency and Bankruptcy Code, 2016, as the same was barred by Limitation, on ground that it had been filed beyond a period of 3 years from the date of default.

In the present case, default occurred in year 2013, an OTS proposal was made in 2016 and revised in 2018, however the application before the NCLT was filed on 11.07.2019. The prime issue for consideration is whether the OTS proposal would fall within the definition of 'acknowledgement of debt' as envisaged under Section 18 of the Limitation Act, 1963.
The Hon'ble NCLAT relying on the judgment of the Hon'ble Supreme Court in the matter of Bank of Baroda Vs. C. Shivkumar Reddy and Anr., observed that the offer of OTS of a live claim, made within the period of limitation should be construed as an acknowledgement to attract Section 18 of the Limitation Act.

The Hon'ble NCLAT further observed that an application under Section 7 of the Code would not be barred by limitation, on the ground that it had been filed beyond a period of 3 years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of 3 years, in which case the period of limitation would get extended by a further period of 3 years. Accordingly, the Hon'ble NCLAT dismissed the appeal.

2.

Ramasubramaniam Liquidator of Padmaadevi Sugars Ltd. vs The Deputy Commissioner of Income Tax (Benami Prohibition) (Company Appeal (AT)(CH)(Ins) No.292/2022) dated 18.08.2022

The main issue in this appeal before the NCLAT, Chennai was whether the immovable property of the Corporate Debtor can be attached by the Respondent i.e. Deputy Commissioner of Income Tax (Benami Prohibition), when 'Moratorium' under the IBC is in force. It was contended by the Appellants that the Insolvency & Bankruptcy Code, 2016, being a special enactment, will override the Benami Transactions (Prohibition) Act, 1988 and therefore no attachment can be made. It was further pleaded that by virtue of Section 238 of the Insolvency & Bankruptcy Code, 2016, the provisions of the Code will supersede over any other law. The Appellant contented that the attached was non-est in the eyes of law. The Respondent relied upon the judgment of Hon'ble Madras High Court in Deputy Director, Office of the Joint Director, Directorate of Enforcement vs. Asset Reconstruction Company India Limited & Ors. (Writ Petition No.29970 of 2019) contented that 'Moratorium' as per Section 14 of the Insolvency & Bankruptcy Code, 2016 does not affect the 'provisional attachment' order passed under Benami Act, as both the 'Laws' on a different field. It was further contended that the Appellant cannot seek for public 'Law' remedy, under the 'The Benami Transactions (Prohibition) Act, 1988', before the NCLAT. After considering the contentions of both the parties, the Hon'ble NCLAT dismissed the appeal and upheld the order of the NCLT. The NCLAT further held that the Resolution Professional of the Corporate Debtor cannot take umbrage under Section 60 (5) of the IBC, 2016 etc., in preferring an Application before the NCLT for the reason that the 'procedural wrangle' is to be adhered to and followed by the 'Aggrieved / affected parties' which cannot be "shackled with'.

3.

Amit Jain v Siemens Financial Services Pvt Ltd (2022 SCC OnLine NCLAT 347) dated 23.08.2022

The issue before the NCLAT, was "whether the benefit of Section 10A can also be claimed by a Personal Guarantor and an application under Section 95 shall be barred for a default which has arisen on or after 25.03.2020 till 24.03.2021?"

The Bench noted that the object of Section 10A is well known and was intended to provide protection to Corporate Debtor from the effects of COVID-19, and it was with this view that Section 10A was inserted in the IBC. It was further observed that when Section 10A was inserted in Chapter II of the IBC, no corresponding amendment was made in Part III of the Code.The NCLAT accordingly held that "Had the legislature intended to prohibit filing of application under Section 95(1) by a creditor against the Personal Guarantor for any default committed on or after 25.03.2020, a provision akin to Section 10A could have very well been inserted in Chapter III Part III of the Code." The NCLAT concluded that the Section 10A is only capable of one interpretation which is the suspension of CIRP only for Corporate Debtor and not for the Personal Guarantor and accordingly, NCLAT dismissed the appeal filed by the Personal Guarantor.

4.

Mrs. Renuka Devi Rangaswamy Vs. M/s Regen Powertech Private limited and Ors (NCLAT – Chennai) (Comp. (AT) (CH) (Ins) No. 357 / 2022) dated 10.10.2022

The present case deals with an appeal filed against the order of the NCLT, wherein the NCLT held that the transfer of assets within the group companies per se would not constitute "Fraudulent Trading" as stipulated under section 66(1) of the Code, 2016. The issue that arose before the NCLAT was whether the transfer of assets within a group of companies would constitute a fraudulent trading as per Section 66 of the Code, 2016

The Hon'ble NCLAT held that it must be borne in mind that whenever a fraud on a Corporate Debtor is committed, in the course of carrying business, it does not necessarily mean that the business is being carried on with an intent to defraud the Creditors. Further a high standard of proof, is required to show that there has been a fraudulent intention. The NCLAT further held that the burden in on the Appellant to show that an individual is carrying on business with the Corporate Debtor with a dishonest intention. The NCLAT going through the impugned order passed by the AA in this case, came to a conclusion that the Transfer of Assets among the Group Companies was ex-facie not a Fraudulent Trading, as per Section 66 (1) of the Code, 2016.

5.

National Agriculture Cooperative Marketing Federation Limited (NAFED) Vs. Synergy Petro Products Private Limited (NCLAT – New Delhi) (Company Appeal (AT) (Insolvency) No. 862 of 2021) dated 11.10.2022

The present appeal has been filed against the order passed by the NCLT, Principal Bench whereby the application filed by the Appellant under Section 7 of the Code for initiating CIRP of the Corporate Debtor/Respondent herein on the ground that Corporate Debtor defaulted in satisfying the Arbitral Award (which arose from a dispute of Leave and Licence Agreement between the parties) and in payment of due license fee. The Section 7 Application was dismissed on the ground that the transaction between the parties does not come under the purview of Financial Debt and the Appellant qualifies to be an Operational Creditor, and not a Financial Creditor.

The Hon'ble NCLAT held that Leave and License Agreement was the core base transaction between the parties on the basis of which Arbitration Award was passed. This Leave and License Agreement, the Tribunal held, does not qualify to be Lease/Financial Lease/capital Lease in view of the terms and restrictions of the Leave and License Agreement. Further the Hon'ble NCLAT relying upon "Sushil Ansal Vs. Ashok Tripathi and Ors.", Company Appeal (AT) (Ins) No. 452 of 2020 in which it was held that Decree Holder, though included in the definition of 'Creditor', does not fall within the definition of 'Financial Creditor' and cannot seek initiation of CIRP as 'Financial Creditor', dismissed the appeal and upheld the order passed by the AA.

6.

CA V. Venkata Sivakumar v IDBI Bank Limited & Ors. (Company Appeal (AT) (CH) (Ins.) No. 269/2022) dated 20.12.2022

The National Company Law Appellate Tribunal ("NCLAT"), has held that the Adjudicating Authority has the power to remove the Liquidator. The Bench held that no Liquidator has any personal rights to continue in Liquidation and the Adjudicating Authority can order for replacement of the Liquidator, recording sufficient reasons as per Law. The NCLAT further held that since the 'Adjudicating Authority', is vested with the power, to `appoint a Liquidator', under Section 33 and 34 of the I & B Code, 2016, by virtue of the provision contained in Section 16 of the General Clauses Act, 1897, it would be the 'Adjudicating Authority', who also, has the power, to remove the `Liquidator'.

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