Corporate
amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

January 2023 / Issue–136

Contents

Lakshmikumaran & Sridharan attorneys
An ISO 27001:2013 certified law firm

Article

E-waste (Management) Rules, 2022 – An analysis

By **Sudish Sharma and Sonali Srivastava**

The article in this issue of Corporate Amicus analyses the recently introduced E-waste (Management) Rules, 2022. The new Rules will come into force on 1 April 2023 and will introduce recycling targets in the extended producer responsibility ('EPR') plan of the producers of e-waste. The article elaborately discusses major changes and the widened scope as compared to the earlier 2016 Rules. The authors discuss the registration requirements, reduction of compliances on bulk consumers, introduction of recycling certificate, introduction of refurbishing certificate and deferred liability, and incorporation of penal provisions. According to them, expanding the definition of e-waste and electronic equipment, specifying the recycling target with proper implementation mechanism and clearly specifying the penalties for violation of the new Rules will assist in better implementation of the collection, processing and recycling of e-waste

E-waste (Management) Rules, 2022 – An analysis

By Sudish Sharma and Sonali Srivastava

Background and scope:

The growing problem of e-waste required greater emphasis on recycling of the e-waste and better e-waste management. In the light of above, the Ministry of Environment, Forest & Climate Change ('**MOEFCC**') on 2 November 2022, has notified E-waste (Management) Rules, 2022 ('**2022 Rules**') which has replaced the E-waste (Management) Rules, 2016 ('**2016 Rules**').

2022 Rules will come into force on 1 April 2023 and has introduced recycling targets in the extended producer responsibility ('**EPR**') plan of the producers of e-waste.

EPR is a policy-based approach wherein responsibility is casted over the producers of specific category of waste for the treatment and safe disposal of such waste. EPR mechanism under the 2016 Rules focused more on the producer's responsibility to collect back the e-waste introduced in the market and provided collection targets, whereas the EPR regime under 2022 Rules provides an annual e-waste recycling targets to the producers. This will help in proper recycling and safe disposal of e-waste.

Highlights of Rule 2022:

Scope and definitions:

Scope of applicability of 2022 Rules has been restricted to manufacturer, producer, refurbishers, dismantlers and recycler of e-waste ('**MPRDR**'), unlike 2016 Rules wherein dealer, consumer, bulk consumer and collection centres were also covered.

- The definition of term '*e-waste*' has been widened to include solar photo-voltaic modules or panels or cells, which are discarded as waste and the term '*bulk consumer*' has been widened and simplified. Now, any entity which has used at least one thousand units of electrical and electronic equipment listed in Schedule I of 2022 Rule, at any point of time in the particular financial year including the e-retailer, will be considered as bulk consumers of e-waste.
- The term EPR has been redefined to mean responsibility of any producer of electrical or electronic equipment as given in Schedule-I **for meeting recycling targets as per Schedule-III and Schedule-IV, only through registered recyclers of e-waste** to ensure environmentally sound management of such waste. Further, the definition of term 'producer' has also been widened.

Registration requirement:

Unlike 2016 Rules which mandates manufacturer, producer, refurbishers and recycler of e-waste ('**MPRR**') to obtain authorization from concerned State Pollution Control Board, 2022 Rules mandates MPRR of e-waste to obtain registration

on the portal ('**Portal**') to be developed by Central Pollution Control Board ('**CPCB**'). Further, 2022 Rules bars MPRR to operate its business without obtaining aforesaid registration and/or to deal with any unregistered MPRR.

Reducing compliances on 'bulk consumers':

In general parlance, private and public companies and multi-national organizations are considered as 'bulk consumers' for the purpose of 2016 Rules. The requirement of (i) filing annual return and (ii) maintaining record of e-waste generated, by the bulk consumer under 2016 Rules has been done away with under Rule 2022.

Introduction of recycling certificate:

The concept of obtaining EPR recycling certificate has been introduced by 2022 Rules for facilitating the fulfilment of EPR targets. Producers can purchase online EPR recycling certificate from registered recyclers for fulfilling its recycling target under 2022 Rules. However, such recycling certificate issued by CPCB will be valid for two years from the end of the financial year in which the same was generated.

Introduction of refurbishing certificate and deferred liability:

The concept of deferred liability has also been incorporated in 2022 Rules. Now, refurbisher will be issued a refurbishing certificate for a particular quantity of refurbished product whereby the life of such product has been extended. Producers can purchase refurbishing certificate from refurbishers to defer their EPR vis-à-vis corresponding quantity of e-waste in a particular year and same shall be added to the EPR target of the year in which the extended life of the refurbished product is expired.

Incorporation of penal provisions and widened scope:

Unlike 2016 Rules, 2022 Rules expressly introduced provisions related to environment compensation and prosecution under section 15 of the Environment (Protection) Act, 1986 ('**EPA**'). Further, the environment compensation can also be imposed on an entity which aids or abets the violation of 2022 Rules. This widens the scope of imposing environment compensation.

Conclusion:

As per statistics available in public domain, India is the third largest generator of e-waste after China and USA. Expanding the definition of e-waste and electronic equipment, specifying the recycling target with proper implementation mechanism and clearly specifying the penalties for violation of Rule 2022 will assist in better implementation of the collection, processing and recycling of e-waste.

For creating vibrant recycling market, the possibility of regulating the role of e-waste collection centres, producer responsibility organization and dealers under Rule 2022 may also have been explored since they also, play a significant role.

[The authors are Executive Partner and Senior Associate, respectively, in the Corporate and M&A advisory practice at Lakshmikumaran & Sridharan Attorneys, Gurugram]

Notifications & Circulars

- Mode of Settlement on Request for Quote (RFQ) platform notified
- Fee payable for complaints to District Commission, State Commission and National Commission for consumer dispute redressal revised
- Monitoring and periodical reporting of the compliance with the requirements pertaining to 'Security and Covenant Monitoring' system hosted by Depositories
- Future contracts on Corporate Bond Indices allowed
- SEBI (Alternative Investment Funds) (Amendment) Regulations, 2023 notified
- Foreign Investment in India – Rationalisation of reporting in Single Master Form (SMF) on FIRMS Portal notified
- Comprehensive Framework on Offer for Sale (OFS) of Shares through Stock Exchange Mechanism notified
- Food Safety and Standards (Labelling and Display) Amendment Regulations notified
- Relaxation from compliance with certain provisions of the Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015

Mode of Settlement on Request for Quote (RFQ) platform notified

The Securities and Exchange Board of India (SEBI) has, *vide* Circular No. SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2023/9 dated 9 January 2023, has notified the settlement mode/mode of payment for trades done on the Request for Quote (RFQ) platform. The trades that can be executed on the RFQ platform include listed corporate bonds, commercial paper, and securitised debt instruments. The usual mode of settlement employed by the Stock Exchanges is the Real-Time Gross Settlement (RTGS). The SEBI has clarified that in addition to this mode, any other mode of payment used by the banks/payment aggregators may be used to clear trades on the RFQ platform. To this end, arrangements are to be made by the Stock Exchanges/Clearing Houses such as: (i) putting necessary infrastructure in place; (ii) bringing the provisions of this circular to the notice of the Stockbrokers, and also disseminating the same on their websites; and (iii) making necessary amendments to the relevant laws to achieve uniformity, and the same be communicated to SEBI.

Fee payable for complaints to District Commission, State Commission and National Commission for consumer dispute redressal revised

The Ministry of Consumer Affairs, Food and Public Distribution has notified the Consumer Protection (Consumer Disputes Redressal Commissions) Amendment Rules, 2022 dated 20 December 2022 ('**Amendment Rules**'), amending the Consumer Protection (Consumer Disputes Redressal Commissions) Rules, 2020 ('**CDRC Rules**'). The Amendment Rules substitute the 'Table' under Rule 7(2) of the CDRC Rules which states the amount of fees payable for making a complaint. The newly substituted Table is as follows:

Value of goods or services paid as consideration	**Amount of fee payable**
District Commission	
Upto Rupees Five Lakh	Nil
Above Rupees Five Lakh and upto Rupees Ten Lakh	INR 200
Above Rupees Ten Lakh and upto Rupees Twenty Lakh	INR 400
Above Rupees Twenty Lakh and upto Rupees Fifty Lakh	INR 1000
State Commission	
Above Rupees Fifty Lakh and upto Rupees One Crore	INR 2000
Above Rupees One Crore and upto Rupees Two Crore	INR 2500
National Commission	
Above Rupees Two Crore and upto Rupees Four Crore	INR 3000

Above Rupees Four Crore and upto Rupees Six Crore	INR 4000
Above Rupees Six Crore and upto Rupees Eight Crore	INR 5000
Above Rupees Eight Crore and upto Rupees Ten Crore	INR 6000
Above Rupees Ten Crore	INR 7500

Monitoring and periodical reporting of the compliance with the requirements pertaining to 'Security and Covenant Monitoring' system hosted by Depositories

The Securities and Exchange Board of India (SEBI) has, *vide* Circular No. SEBI/HO/DDHS/RACPOD1/CIR/P/2023/0002 dated 5 January 2023, notified that Depositories shall be required to ensure 'Security & Covenant Monitoring System' related compliance issued by SEBI from time to time, including the circulars issued prior to this in the same regard i.e., Circulars dated 13 August 2021 and 29 March 2022 on Distributed Ledger Technology, and other circulars issued on 13 August 2021 pertaining to system driven disclosures. In compliance with the above, the Depositories shall also notify SEBI about instances of non-compliance, on a quarterly basis, not later than one month from the end of the quarter, in the format prescribed in the circular. The effective date from which the circular will be operationalised has been set as on 1 April 2023.

Future contracts on Corporate Bond Indices allowed

The Securities and Exchange Board of India (SEBI) has, *vide* Circular No. SEBI/HO/MRD/MRD-PoD-3/P/CIR/2023/11 dated 10 January 2023, made recommendations on 'Derivatives on Bond Indices', which allows stock markets to bring in derivative contracts on indices of corporate debt securities rated AA+ and above wherein stock exchanges are permitted to launch future contracts on corporate bond indices. This allowance is subject to approval by SEBI, and an elaborate proposal containing all the details about underlying corporate bonds and securities, the index methodology, contract specifications, applicable trading, clearing & settlement mechanism, risk management framework, etc. is required to be submitted. Important details for introduction of such future contracts are covered under Annexure A to the circular, which covers important changes with regard to Cash Settled Corporate Bond Index Futures (CBIF) including:

- Permitted Corporate Bond Index
- The contract value of CBIF should not go below INR 2 lakh at the time at which it is being introduced
- The tenure of the contracts entered into with the stock exchange can go up to a maximum of 3 years and contract cycle i.e., weekly, three serial monthly contracts, one quarterly contract of the cycle March/June/September/December, or one half-yearly contract of the cycle June/December

- The quotation of the prices shall be in Indian currency as well as the settlement of the trades shall be done in Indian currency and settlement day shall be the next working day of the expiry day.
- The expiry or last trading day for the contract shall be the last Thursday of the expiry cycle.
- Position limits for Category I and II Foreign Portfolio Investors (FPIs) shall not exceed 10% of the total open interest or INR 1,200 crore, whichever is higher whereas for Non-institutions in Category II FPIs, the position limit shall be 3% of the total open interest or INR 400 crore whichever is higher. No separate position limit is prescribed at the level of clearing member.
- For every CBIF, stock exchanges shall set an initial price band at 5% of the previous closing price or base price. Whenever a trade in any contract is executed at the highest or lowest price of the band, stock exchanges may expand the price band for that contract by 0.5% in that direction after 30 minutes after taking into account market trend. However, no more than 2 expansions in the price band shall be allowed within a day.
- One of the most important changes is the requirement with regard to having a risk management framework (pre-approved by the SEBI) to ensure that the process is smooth and effective.

To this end, the Stock Exchanges and clearing houses are required to create and implement necessary changes and ensure its effective implementation.

SEBI (Alternative Investment Funds) (Amendment) Regulations, 2023 notified

The Securities and Exchange Board of India (SEBI) has notified the Securities Exchange Board of India (Alternative Investment Funds) (Amendment) Regulations, 2023 dated 9 January 2023, thereby amending the Securities Exchange Board of India (Alternative Investment Funds) Regulations, 2012 ('**2012 Regulations'**). The amendment covers the following:

- The definition of 'Credit Default Swaps' has been inserted into the 2012 Regulations and they have the same meaning as assigned to it in the Master Direction – Reserve Bank of India (Credit Derivatives) Directions, 2022. Under the Master Directions, 'Credit Default Swap (CDS)' means a credit derivative contract in which one counterparty (protection seller) commits to pay to the other counterparty (protection buyer) in the case of a credit event with respect to a reference entity and in return, the protection buyer makes periodic payments (premium) to the protection seller until the maturity of the contract or the credit event, whichever is earlier.
- Alternative Investment Funds (AIF) under Category I are allowed engaging in hedging including CDS, whereas AIFs under Category II and Category III may buy or sell

CDS in compliance with terms and conditions specified by SEBI.

- A custodian registered with SEBI shall be appointed by the sponsor or manager of Category I and Category II AIFs transacting in CDS, and such custodian shall be in compliance with the terms and conditions specified by SEBI.

Foreign Investment in India – Rationalisation of reporting in Single Master Form (SMF) on FIRMS Portal notified

The Reserve Bank of India (RBI), *vide* Notification RBI/2022-23/160 A.P. (DIR Series) Circular No. 22 dated 4 January 2023, has notified the changes that are being introduced with respect to foreign investment reporting in Single Master Form (SMF) on the FIRMS portal run by RBI. Some of the important changes introduced are:

- The submissions will be auto acknowledged and verified within 5 working days of their receipt
- In case the submission is late (upto a delay of 3 years), Late Submission Fee (LSF) will be computed and the required LSF is to be deposited by the applicant
- If the delay in filing is beyond 3 years, the Authorized Dealer (AD) Banks will approve the filing of such forms only after the compounding of the contravention
- Once LSF is realised (if any), the status will be updated on the FIRMS portal
- If the application is rejected by the AD Banks on any other ground, the same shall be informed to the applicant *via* email and also on the FIRMS portal, along with the reason for such rejection

Comprehensive Framework on Offer for Sale (OFS) of Shares through Stock Exchange Mechanism notified

The Securities and Exchange Board of India (SEBI) has, *vide* Circular No. SEBI/HO/MRD/MRD-PoD-3/P/CIR/2023/10 dated 10 January 2023, rescinded the existing provisions of Offer for Sale (OFS) framework through the Stock Exchange Mechanism, which were notified through a number of circulars released by SEBI. Some of the important provisions notified *via* this latest circular are enlisted below:

- The offer size must be a minimum of INR 25 crore except where the offer is by a promoter or a promoter group to achieve the minimum public shareholding
- A minimum of 25% of the shares offered shall be reserved for mutual funds and insurance companies, and a minimum 10% of the offer size shall be reserved for retail investors. No single bidder except for mutual funds and insurance companies can be allocated more than 25% of the entire issue size
- The risk shielding plan includes collection of 100% margin money from non-institutional investor and investors in the retail category

- The settlement process has been made comparatively easier and faster as the trades must be closed on the very next day of trading
- The offer can be withdrawn prior to its proposed opening. The cooling off period in such a case shall be 10 trading days before the offer is made again
- Cancellation of the offer before the bidding period shall not be permitted

Other provisions are related to the Cooling Off Period; Eligibility of Buyers and Sellers; Appointment of Brokers; Announcement or Notice of the OFS of Shares; Floor Price; Order Placement; Settlement and OFS Framework for sale of units of Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs). The stock exchanges, in this regard, are required to make the necessary changes for implementation of this circular.

Food Safety and Standards (Labelling and Display) Amendment Regulations notified

The Food Safety and Standards Authority of India (FSSAI), on 6 January 2023, notified the re-operationalization of Food Safety and Standards (Labelling and Display) Amendment Regulations 2022, which were initially made operational on 17 June 2022. Some of the changes notified *via* the Amendment Regulations are:

- Under Regulation 5(3), per serve percentage (%) contribution to the Recommended Dietary Allowances (RDA) and number of servings per pack may not be given for Infant Nutrition products.
- Under Regulation 8, the logos notified thereunder may not be given where the surface area of the package is not more than 100 square centimeters, but this information should be given on the multi-unit packages.
- Under Regulation 10, every packaged food meant for non-retail sale is to contain a list of mandatory disclosures on the container or the label such as name of the food, FSSAI logo and license number, Lot No./Batch No./Code No., date marking and storage instruction, and the name of the manufacturer or packer.
- Address of the brand owner and the license number of the manufacturer is exempted if the same is provided in the Barcode or Global Trade Identification Number (GTIN).
- The non-retail packages are to bear a clear indication of the same i.e., "NON-RETAIL CONTAINER" or "NON-RETAIL CONTAINER – NOT FOR DIRECT SALE TO CONSUMER".
- The packages that require warning indications (such as pan masala, packages not meant for lactating women, etc.) must bear the warning labels legibly and clearly.

Relaxation from compliance with certain provisions of the Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015

The Securities and Exchange Board of India (SEBI) has, *vide* Circular No. SEBI/HO/CFD/PoD-2/P/CIR/2023/4 dated 5 January 2023, has extended the relaxation provided for the

requirement of sending physical copies of the annual report to shareholders till 30 September 2023.

According to the circular, the listed entities shall ensure to send hard copy of the full annual reports to those shareholders who request for the same. Furthermore, notice of AGM published by advertisement shall disclose the web link to the annual report so as to enable shareholders to have access to the full annual report.

Earlier, SEBI *vide* its circular dated 13 May 2022 had extended the relaxation for sending the hard copy of the Annual Report up to 31 December 2022.

.

Ratio Decidendi

- 'Date of Default' cannot be strictly construed as the date of Non-Performing Assets – NCLAT
- NCLT does not enjoy parallel jurisdiction with SEBI for addressing violations of the regulations framed under the SEBI Act, 1992 – Supreme Court
- Special provisions of MSMED Act do not offend provisions of the Arbitration Act requiring arbitrator to disclose his independence and impartiality – Calcutta High Court

'Date of Default' cannot be strictly construed as the date of Non-Performing Assets

The National Company Law Appellate Tribunal ('**NCLAT**'), in a case where the Adjudicating Authority had dismissed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**') citing a bar on account of the debt being beyond the limitation period, has held that the 'date of default' cannot be strictly construed as the date on which debt is declared Non-Performing Assets ('**NPA**') for the purposes of calculating the limitation period.

Brief facts:

The Corporate Debtor/ Respondent had defaulted on repayment of a loan on 31 March 2009 and, on 30 June 2009 it was declared to be an NPA. The Corporate Debtor had consistently mentioned the debt as being due in its financial documents such as the balance sheets filed till the Financial Year (**FY**) 2018-19. Subsequently, the Appellant filed an application under Section 7 of the IBC on 7 August 2020 for initiation of Corporate Insolvency Resolution Process ('**CIRP**'). However, said application was dismissed by the Adjudicating Authority on 10 August 2021 stating that it was barred by limitation. Aggrieved by the said dismissal, the present appeal has been filed under Section 61 of the IBC.

Submissions by the Appellant:

- It was submitted that the debt due was acknowledged by the Respondent in its balance sheets for Financial Years 2014–15, 2015–16, 2016–17, 2017–18 and 2018–19. Various letters of acknowledgment were given by the Respondent during these years. This constitutes acknowledgement of the debt.
- Further, on 30 June 2017, the Appellant had accepted the request of the Respondent and approved a fresh reconstruction of the debt in place of the reconstruction package that already existed. A recovery certificate was issued by the Debt Recovery Tribunal ('**DRT**'), Pune, on 26 July 2017. However, on 10 October 2017, Consent Terms/ Settlement Agreement were filed before the DRT in light of the reconstruction package. These Consent Terms also constitute acknowledgment of debt, and they were signed by the director of the Respondent.
- This second reconstruction also got cancelled on 1 June 2018 owing to various defaults by the Respondent. Owing to the cancellation of the reconstruction, a sale notice by the Appellant for the mortgaged property was issued on 6 December 2019 and a reply to the same was also filed by the Respondent on 31 January 2020, thereby re-acknowledging the debt.
- Subsequently, the Section 7 Application was filed on 7 August 2020 and, therefore, the application is well within the period of limitation.

Submissions by the Respondent:

- It is submitted by the Respondent that it was declared an NPA way back on 30 June 2009 itself and mere acknowledgement in the balance sheets cannot extend

the limitation period. The 'letter of acknowledgements' sent by the Respondent between 31 March 2010 and 31 March 2012 referred to by the Appellant cannot be relied upon as there is no evidence on record to show that they were signed prior to the expiry of the three years limitation from 2009.

- Further, the revocation of the second restructuring package on 1 June 2018 was objected to by the Respondent, vide letter dated 14 June 2018, stating that it was in compliance with all the terms of the second restructuring package, which was not taken into consideration by the Appellant.
- It is further submitted that, in any case, pursuant to the sale notice issued on 6 December 2019, the date of NPA was declared to be 28 June 2012. Therefore, the Section 7 application is barred by limitation, taking said dates into consideration.

Decision

The NCLAT placed reliance first on *'Laxmi Pat Surana'* v. *'Union Bank of India & Anr.'*, (2021) 8 SCC 481 wherein it was held that the 'date of default' does not mean a strict interpretation that it has to be the 'date of NPA'. In this regard, it was observed that the 'date of default' defined under Section 3(12) of IBC is to mean non-payment of a debt which has become 'due and payable' whether in whole or any part and is not paid by the Corporate Debtor. In the instant case, the material submitted shows that the Respondent/ Corporate Debtor has been consistently acknowledging its 'debt' from 31 March 2010 onwards, by way of letters in restructuring packages, and also by way of communications with the Appellant/Financial Creditor for restructuring, apart from the liability being shown in the balance sheets, and all of this shall constitute acknowledgement of debt. The NCLAT also held that the issue of limitation is to be tested on the touchstone of the ratio of the Hon'ble Apex Court in ***Dena Bank (now Bank of Baroda) v. C. Shivakumar Reddy & Anr.***, **(2021) 10 SCC 330** wherein it was clearly laid down that a judgment/decree for money or a Certificate of Recovery, Arbitral Award etc. in favour of the Financial Creditor constitutes an 'acknowledgement of debt', and gives rise to a fresh cause of action, provided it is within three years of the default. For the aforementioned reasons, the NCLAT held that the Section 7 application in the instant case is not barred by limitation.

[*Edelweiss Asset Reconstruction Company Limited* v. *Perfect Engine Components Pvt. Ltd.* – Judgment dated 22 December 2022 in Company Appeal (AT) (Insolvency) No. 840 of 2021, National Company Law Appellate Tribunal]

NCLT does not enjoy parallel jurisdiction with SEBI for addressing violations of the regulations framed under the SEBI Act, 1992

The Supreme Court of India has recently held that the jurisdiction under Section 59 of the Companies Act, 2013 ('**CA 2013**'), pertaining to rectification of the register of members, is summary in nature and not intended to be exercised where there are contested facts and disputed questions. It has also held that National Company Law Tribunal (**'NCLT'**), under Section 59(4), which deals with transfer of securities in contravention of the Contracts (Regulation) Act, 1956 and the

Securities and Exchange Board of India Act, 1992 ('**SEBI Act, 1992**'), does not exercise a parallel jurisdiction with the Securities and Exchange Board of India ('**SEBI**') for addressing violations of the regulations under the SEBI Act, 1992.

Brief facts:

The overall shareholding of the Respondents, which included Respondent No. 1 Company and its promoters, in the Appellant Company crossed 5% of the total paid-up share capital of the Appellant triggering Regulation 7(1) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 ('**SEBI SAST Regulations**'), which requires disclosures. Soon after that, Respondent No. 1's individual shareholding exceeded 5% of the total paid-up share capital of the Appellant Company, thereby triggering various Regulations of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 ('**SEBI PIT Regulations**'). These guidelines mandated the Respondents to make disclosures in the required format to the Appellant, to which the Respondents did not comply. Therefore, the Appellant moved the NCLT under Section 111A of the Companies Act, 1956 ('**CA 1956**') (Same as Section 59 of CA 2013) praying for rectification of its register by deleting the name of the Respondents as the owner of shares which are over and above the 5% threshold. NCLT found the Respondents liable for the violation of both the Regulations and ordered them to buy back all the shares in excess of 5% of total paid-up share capital of the Appellant company. On appeal by the Respondents, the National Company Law Appellate Tribunal ('**NCLAT**') set aside the order of the NCLT on the ground that the NCLT exceeded its jurisdiction under Section 59 of the CA 2013. The present case is an appeal against the judgment of NCLAT, wherein the Supreme Court has adjudicated upon the following questions: (a) what is the scope and ambit of Section 111A of CA 1956 (Section 59 of CA 2013) to rectify the register of members; and (b) Which is the appropriate forum for adjudication and determination of violations and consequent actions under the SEBI (SAST) Regulations and the SEBI (PIT) Regulations?

Submissions by the Appellant:

- It was submitted that no timely intimation in the prescribed format was given by the Respondents, when Regulation 7(1) of the SEBI (SAST) Regulations got triggered
- Further, Respondent Nos. 1 – 6, as 'connected persons' (as per 2(c) of the SEBI (PIT) Regulations) were 'person acting in concert' (as per 2(e) of the SEBI (SAST) Regulations), thereby violating Regulations 13 and 14 of the SEBI (PIT) Regulations. It was emphasized that the Respondents have also admitted to the non-disclosure.
- It was submitted that, SEBI Act, 1992 must be read in addition to, and not in derogation of the CA 1956.

Submissions by the Respondents:

- It was submitted that filing of a petition under Section 111A of the CA 1956 is an abuse of process of law, and that there is no violation of the SEBI (SAST) Regulations as the Respondents had given a timely intimation in the prescribed format.

- The Section 111A Petition did not allege any violation of the SEBI (SAST) Regulations, and no attempt was made to make any amendment to the same.
- The SEBI (PIT) Regulations are not applicable to Respondent Nos. 2-6 as their individual shareholding never crossed 5%. It was only Respondent No. 1 whose shareholding crossed 5%, which it inadvertently failed to disclose. Further, there is no concept of 'persons acting in concert' under said Regulations, and thus, the Petition in this regard cannot be maintained against Respondent Nos. 2-6.
- Under Section 111A (3) of CA 1956, the Tribunal has no power to annul the transfer or to direct the buy-back of the shares.

Decision:

The Supreme Court, while answering the first question, compared the rectification powers of a Company Law Board ('**CLB**')/ other company courts under the predecessor Acts of CA 2013. It has observed that Section 38 of the Companies Act, 1913, Section 155 of CA 1956, followed Section 111A introduced by the 1996 Amendment to CA 1956, and finally, Section 59 of CA 2013 demonstrate that the essential ingredients of the rectification powers have remained the same: it is a summary power to carry out corrections or rectifications in the register of members. It held that the rectification must relate to and be confined to the facts that are evident and needs no serious enquiry. The Apex Court placed reliance on *Ammonia Supplies Corporation (P) Ltd.* v. *Modern Plastic Containers Pvt. Ltd. & Ors.*, (1998) 7 SCC 105, to hold that the company petition under Section 111A of CA 1956 for a declaration that the acquisition of shares by the Respondents is null and void, is misconceived. It was held that the NCLT should have directed the Appellant to seek such a declaration before the appropriate forum. Hon'ble Supreme Court, while answering the second question, held that both the Regulations whose breach is under question in the present case, contain a comprehensive scheme providing for inquiry, investigation and submission of report by the investigating officer under the respective laws. This ensures that there are sufficient procedural safeguards in favour of the acquirer before a restitution order/direction is passed by the CLB/ other company courts. It was observed that this whole procedure cannot be short-circuited by making an application under Section 111A of CA 1956 on the ground that there exists parallel jurisdiction with the SEBI and CLB/ NCLT in the present case. It was concluded that the transaction complained of must suffer scrutiny by SEBI, and it is only for SEBI to determine the violation of the provisions of the SEBI Act, 1992 and the Regulations made thereunder.

[*IFB Agro Industries Limited* v. *Sicgil India Limited and others* – Judgement dated 4 January 2023 in Civil Appeal No. 2030 of 2019, Supreme Court]

Special provisions of MSMED Act do not offend provisions of the Arbitration Act requiring arbitrator to disclose his independence and impartiality

The Hon'ble High Court of Calcutta has held that the fact that an Arbitrator is appointed under a special statute would not operate as an absolute bar upon an Arbitrator to disclose his

independence and impartiality in accordance with the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'). It was held that an Arbitrator appointed under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 ('**MSMED Act**') has the power to decide all disputes referred to it as if such arbitration was in pursuance of the arbitration agreement defined u/s. 7(1) of the Arbitration Act, and consequently, all the trappings of the Arbitration & Conciliation Act, 1996 would apply to such arbitration proceedings.

Brief facts:

This case arises out of a revision application filed by the Petitioner against an arbitral award passed by the learned arbitrator ('**Arbitrator**'). Disputes arose between the parties as a result of non-payment by the Petitioner against the goods delivered by the Respondent. The Petitioner subsequently challenged the validity of the appointment of the Arbitrator and the credibility of the Arbitrator to fairly arbitrate it during the proceedings. The Petitioner had challenged the jurisdiction of the Delhi Arbitration Centre ('**DAC**') to appoint an arbitrator in the instant matter as the cause of action arose in Kolkata. The Arbitrator, in response, held that Schedules V, VI and VII of the Arbitration Act are inapplicable to the arbitration proceedings initiated under the MSMED Act, thereby dispensing with the need for arbitrator appointed under such proceedings to disclose his independence and impartiality at the beginning of the arbitration process. As a result, the operability of Section 12 (1) and (2) of the Arbitration Act, which requires a declaration with regard to an arbitrator's independence, was impeded. This order was challenged by the Petitioner in the Hon'ble High Court of Calcutta in its revisional jurisdiction under Article 227 of the Constitution of India.

Submissions by the Petitioner:

- It was submitted that the Arbitrator was mandated to make adequate disclosures with regard to his independence and impartiality, as required by the Schedules aforementioned and in accordance with Section 12 of the Arbitration Act. It was submitted that the aforementioned requirement cannot be done away with, for the sole reason that the Arbitrator was appointed under the MSMED Act.
- The Petitioner relied upon the case of *Secur Industries Ltd.* v. *Godrej & Boyce Mfg. Co. Ltd. and Anr.*, (2004) 3 SCC 447 to submit that arbitration proceedings before the Micro and Small Enterprises Facilitation Council (MSEFC) before an arbitrator appointed by the MSEFC under Section 18 of the MSMED Act would be akin to proceedings under the Arbitration Act, pursuant to a deemed agreement between the parties to the dispute.

Submissions by the Respondent:

- It was submitted that the MSMED Act, being a special piece of legislation, must prevail over the applicability of the provisions of the Arbitration Act, thereby giving restricted applicability to the provisions of Section 12 of said Act.
- Further, the challenge cannot be sustained in blatant violation of Section 19 of the MSMED Act, as per which

the Petitioner/ the judgment-debtor is mandated to make a deposit of 75% of the amount claimed by the Respondent, in order to maintain any application for setting aside any decree, award or other order.

- With regard to the issue of jurisdiction, the Respondent placed reliance on Section 18(4) of the MSMED Act which empowers the arbitrator to look into matters if the supplier resides in his jurisdiction, even if the buyer is residing in some other part of India.

Decision:

The Court, as far as the matter of jurisdiction is concerned, did not agree with the contentions of the Petitioner in as much as the appointment of the arbitrator by the DAC was valid in light of Section 18(4) of the MSMED Act. The Court rejected the contentions of the Respondent with regard to the disclosures to be made by the arbitrator, on the grounds that precedence must be given to a special legislation over a general legislation only when there is a conflict between the two, and when one cannot be made applicable without offending the other statute. It was held that the provisions regarding disclosures as envisaged by the Arbitration Act do not offend any of the provisions of the MSMED Act, and it was observed that merely because the appointment was made under the MSMED Act, it does not entirely preclude the applicability of the provisions with regard to disclosures under the Arbitration Act nor does it infringe the objective of the MSMED Act.

[*Security Hitech Graphics Private Limited* v. *LMI India Private Limited* – Judgment dated 20 December 2022 in Civil Order (CO) No. 1931 of 2022, High Court of Calcutta]

News Nuggets

- Recovery proceedings under SARFAESI Act will prevail over those under MSMED Act
- Debt recovery – Amount deposited by auction purchaser is not to be adjusted towards amount of pre-deposit to be deposited by borrower under Section 18 of the SARFAESI Act
- Terminating services of contractual employees for unsatisfactory performance is perverse when done without any notice
- Assignment of debt – Failure of Corporate Debtor to make payment within stipulated time not reverts the debt back to original creditor
- Insolvency – Adjudicating Authority has authority to direct tenant to vacate premises of the Corporate Debtor
- Insolvency – Adjudicating Authority does not possess residual equity-based jurisdiction to direct modifications of claims once the resolution plan is approved by Classes of Creditors
- Arbitration – Clause in tax invoice when deserves to be construed as arbitration clause
- Arbitration proceedings under MSMED Act, 2006 for supplies made prior to registration under the MSMED Act, 2006 is void-ab-initio
- Order passed by an emergency arbitrator in a foreign seated arbitration can be considered while dealing with an application under Section 9

Recovery proceedings under SARFAESI Act will prevail over those under MSMED Act

The Hon'ble Supreme Court of India has allowed an appeal against the decision of the Hon'ble Madhya Pradesh High Court which had held that Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED Act') will prevail over Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'). It held that a 'priority' conferred / provided under Section 26E of the SARFAESI Act would prevail over the recovery mechanism of the MSMED Act. The Apex Court in *Kotak Mahindra Bank Limited* v. *Girnar Corrugators Pvt. Ltd.* [Judgement dated 5 January 2023] in this regard noted that in the entire MSMED Act, there is no specific express provision giving 'priority' for payments under the MSMED Act over the dues of the secured creditors or over any taxes or cesses payable to the Central Government or the State Government or the Local Authority, as the case may be, while Section 26E of the SARFAESI Act, inserted *vide* Amendment in 2016, provides that notwithstanding anything inconsistent therewith contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in 'priority' over all other debts and Government revenues.

It may be noted that the Supreme Court also held that if two enactments have competing non-obstante provision and nothing repugnant, then the non-obstante clause of the subsequent statute would prevail over the earlier enactments. It observed that if the legislature confers the later enactment with a non-obstante clause, it means the legislature wanted the subsequent / later enactment to prevail.

Debt recovery – Amount deposited by auction purchaser is not to be adjusted towards amount of pre-deposit to be deposited by borrower under Section 18 of the SARFAESI Act

The Hon'ble Supreme Court has held that where the borrower challenges the auction sale of the secured properties, it is not open for it to pray to use such sale proceeds to be adjusted/given credit in an application for waiver of pre-deposit in case of filing of appeal before the Debt Recovery Appellate Tribunal (DRAT). As per provisions of Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, ('SARFAESI Act') the borrower is liable to deposit 50% of the amount of debt while filing appeal before the DRAT. The Apex Court in *Sidha Neelkanth Paper Industries Private Limited* v. *Prudent ARC Limited* [5 January 2023] was of the view that the borrower can take the benefit of the amount received by the creditor in an auction sale only if he unequivocally accepts the sale. It held that in case the borrower challenges the auction sale and the steps taken under Section 13(2)/13(4) of the SARFAESI Act with respect to secured assets, he must deposit 50% of the amount claimed by the secured creditor along with interest.

Terminating services of contractual employees for unsatisfactory performance is perverse when done without any notice

The Hon'ble Kerala High Court has held that contractual employees are entitled to be issued a notice with regard to the unsatisfactory nature of their service and their services could be terminated only on a finding being rendered on the same. Setting aside the order terminating services of the petitioner, the Court in *Tintu K* v. *Union of India* [Judgement dated 2 December 2022] observed that even if petitioners were not appointed after the full process of selection was carried out, they have been continuing in service on a contract basis from 2010 and 2016 onwards and the contention that they can be sent out of service on the specific ground of unsatisfactory performance without any notice or finding to that effect is perversive.

Assignment of debt – Failure of Corporate Debtor to make payment within stipulated time not reverts the debt back to original creditor

The NCLT Kochi Bench has held that once the debt of corporate debtor is assigned by the creditor by a written instrument, then the creditor/assignor loses its right over the debt and in case the debtor fails to make payment then the assignee alone can proceed against the debtor. The Adjudicating Authority in *Bangalore Sales Corporation* v. *Sark Spice Products Pvt Ltd.* [Order dated 23 December 2022] noted that in the absence of any written re-assignment the contention of the petitioner-operational creditor that the debt reverted to him when the debtor failed to make payment within three months' time (as stipulated in the assignment agreement) was not sustainable. The Tribunal observed that after deducting the assigned amount, the balance amount payable by the corporate debtor was below the threshold amount fixed under Section 4 of Insolvency and Bankruptcy Code, 2016.

Insolvency – Adjudicating Authority has authority to direct tenant to vacate premises of the Corporate Debtor

While deciding whether the Adjudicating Authority has the authority to direct the tenant to vacate the premises of the Corporate Debtor, the NCLAT, Principal Bench, New Delhi, has observed that the statutory scheme under Section 18 of the Insolvency and Bankruptcy Code, 2016 provides that the Resolution Professional (RP) has the power to take the control of such assets of which Corporate Debtor may or may not be in possession. It was also held that the Adjudicating Authority has been conferred with the jurisdiction to decide all types of claims to property of the Corporate Debtor, and that it has rightly allowed the application filed by the RP directing the Appellant to vacate from the premises. This was upheld to ensure the approved Resolution Plan can be implemented well within its time frame. In the case of *Jhanvi Rajpal Automotive Pvt. Ltd.* v. *R.P. of Rajpal Abhikaran Pvt. Ltd. & Anr.* [Judgment dated 5 January 2023], the Appellant, while challenging the order of the Adjudicating Authority, contended that the proceedings to evict the Appellant must be initiated by the RP under the MP

Accommodation Control Act, 1961. NCLAT, dismissing the Appellant's arguments, held that, '*filing a suit for eviction of the Appellant under MP Accommodation Control Act, 1961 even though lease in favour of the Appellant has expired shall be unduly prolonging the insolvency process which is a time bound process*'. The NCLAT further held that, '*when the Corporate Debtor has the ownership rights over the premises which can be taken in control by Resolution Professional, we are of the view that for eviction of the Appellant especially in event when lease in favour of the Appellant has come to an end, filing a suit is not contemplated in the statutory scheme contained in IBC*.'

Insolvency – Adjudicating Authority does not possess residual equity-based jurisdiction to direct modifications of claims once the resolution plan is approved by Classes of Creditors

While deciding on the issue whether the Adjudicating Authority has equity-based jurisdiction once the Resolution Plan is approved, and whether there was discrimination between the classes of creditors, the NCLAT, New Delhi Bench, has observed that if the provisions and regulations of Insolvency and Bankruptcy Code, 2016 have been met, it is the commercial wisdom of the Committee of Creditors (CoC) to negotiate and accept the Resolution Plan. Dismissing the contentions of the Appellants that the creditors had not received fair and equitable treatment under the Resolution Plan, the NCLAT in the case of *Paramvir Singh Tiwana* v. *Puma Realtors (P) Ltd.* [Judgment dated 22 December 2022], opined that once the Resolution Plan is approved, the Adjudicating Authority has a very limited jurisdiction and cannot interfere in the merits of the 'Business Decision of the CoC.' Finally, upholding the impugned order passed by the Adjudicating Authority, the NCLAT observed that the Resolution Plan was approved by the CoC way back in 2019 and the Adjudicating Authority has approved the Plan after a period of two years and the Plan has already been implemented. It was held that, therefore, the Adjudicating Authority does not have residual equity-based jurisdiction to direct modifications of claims.

Arbitration – Clause in tax invoice when deserves to be construed as arbitration clause

Observing that the parties had acted upon the invoices and there was no denial of the invoices raised, the Hon'ble Bombay High Court has held that the clause contained in the tax invoices which clearly stipulated a reference to arbitration, deserve to be construed as an arbitration clause. The Court in *Bennett Coleman & Co. Ltd.* v. *MAD (India) Pvt. Ltd.* [Judgement dated 22 December 2022] observed that though no particular form is needed to bring into existence an arbitration agreement, it is certain that the words 'must unequivocally' indicate the agreement between the parties to be referred for arbitration. It also noted that the intention of the parties to be referred for arbitration is the most fundamental and this conclusion can be gathered from either one document or several documents in form of correspondence consisting of letters, facts, messages etc.

Arbitration proceedings under MSMED Act, 2006 for supplies made prior to registration under the MSMED Act, 2006 is void-ab-initio

While deciding whether the Arbitral Tribunal has jurisdiction under the Micro, Small, Medium Enterprises Development Act, 2006 ('MSMED Act, 2006') for supplies made prior to the registration under the said Act, the Hon'ble High Court of Gujarat has held that the service provider must be registered under the MSMED Act, 2006 at the time of relevant transaction between the parties, and if arbitration proceedings are held for the services provided *prior* to the registration, then such Arbitration proceedings are *void-ab-initio* viz., void from the beginning. In the case of *Anupam Industries Ltd.* v. *State Level Industry Facilitation Council,* [Judgment dated 16 December 2022], the Hon'ble High Court of Gujarat reiterated that even if a subsequent registration is obtained, it would not act retrospectively, and will be applicable to the transactions executed after the registration only. The High Court also made two other observations, being that (a) even if the other party had knowledge regarding the arbitration proceedings and did not participate in the proceedings, the Facilitation Council is not empowered to exercise its jurisdiction under the MSMED Act, 2006, and (b) if an award is *void ab initio*, the issue of nullity can be raised at any stage of the proceedings.

Order passed by an emergency arbitrator in a foreign seated arbitration can be considered while dealing with an application under Section 9

While dealing with an application filed under Section 9 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') seeking interim measures, as granted by the Emergency Arbitrator under the ICC Arbitration Rules, the Hon'ble High Court of Calcutta has taken into consideration the order of the Emergency Arbitrator from a Foreign Seated Arbitration, despite the fact that the Arbitration Act does not provide for the enforcement of the orders passed by an Emergency Arbitrator in cases of a foreign seated arbitration. The Hon'ble High Court of Calcutta, in the case of *Uphealth Holdings Inc.* v. *Glocal Healthcare Systems Pvt. Ltd. & Ors.,* [Judgment dated 23 December 2022], observed that even though there is no *pari materia* provision under Part II of the Arbitration Act, similar to that of Section 17(2) of the Arbitration Act, the Court felt that such approach to consider the said order was in conformity with the principle of autonomy of parties which is fundamental to the Arbitration Act. While reasoning its decision, the Court went on to state that both the parties had participated in the arbitration proceedings and agreed to be bound by the orders of the Emergency Arbitrator. Furthermore, the orders of the Emergency Arbitrator were elaborate, detailed and reasoned, and was neither interfered with, set aside, illegal, preserve nor in contravention of any law. Accordingly, the same were to be taken into consideration.

NEW DELHI
5 Link Road, Jangpura Extension, Opp. Jangpura Metro Station, New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing, Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street, Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center, Brigade Gateway Campus, 26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800 Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road, Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924 E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII, Nehru Bridge Corner, Ashram Road, Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road, Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building 41, Chowringhee Road, Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59, Sector 26, Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor, Corporate Office Tower, Ambience Island, Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300 Email: lsgurgaon@lakshmisri.com

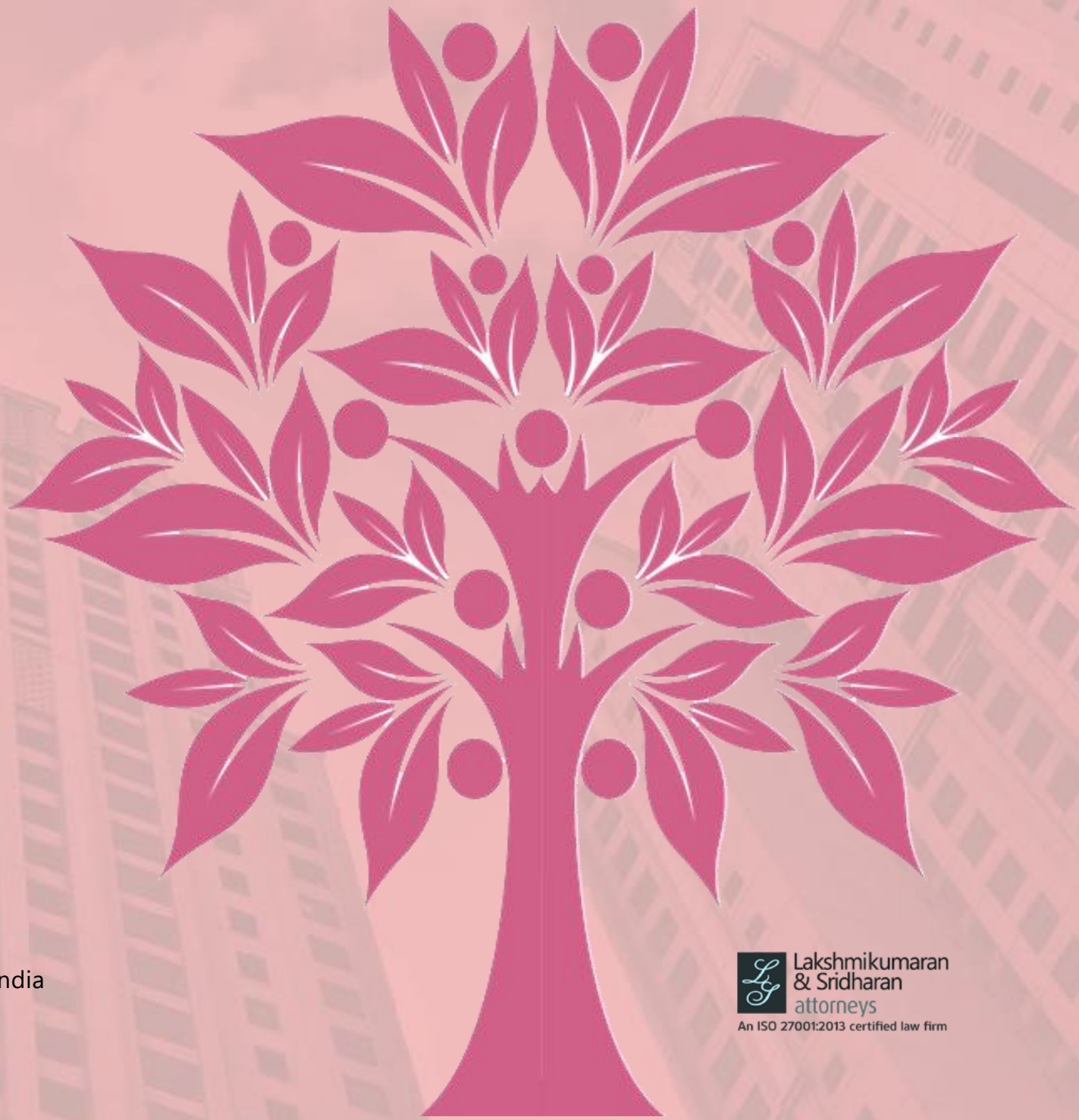
PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales), Colvin Road, (Lohia Marg), Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan, Palliyil Lane, Foreshore Road, Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side), Unique Destination, Tonk Road, Near Laxmi Mandir Cinema
Crossing, Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space, 90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

Lakshmikumaran & Sridharan attorneys



Lakshmikumaran & Sridharan attorneys
An ISO 27001:2013 certified law firm