Lakshmikumaran & Sridharan attorneys

corporate

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

August 2020 / Issue–107

Contents

August
2020

Article

Corporate Social Responsibility and implementation agencies

By **Sudish Sharma and Shikha Thakkar**

India has consistently been a fastest-growing economy in the world. However, for a developing nation, it is important to trickle down this economic growth in an even manner to meet atrocities, *inter alia*, poverty, malnutrition, rural-urban divide and challenges in education and health sector. A series of legislative initiatives have been undertaken against the idea that corporations should act as partners in the social development process of the country by strengthening the social responsibility of companies.

With this objective, Corporate Social Responsibility ("**CSR**") was introduced under the Companies Act, 2013 ("**Act**") to discharge social responsibility through innovative ideas and management skills. What started as a novel philanthropic concept, has emerged as a fundamental corporate governance practice to ensure that the socio-economic development is placed at par with profit maximization objective of the companies.

Over the years, there has been a transition in the concept of CSR from charity to responsibility. In this regard, it is important to note that India became the first country to mandate CSR through statutory provisions i.e. Section 135 of the Act read with the Companies (Corporate Social Responsibility Policy) Rules, 2014 ("**CSR Rules**"). According to the aforesaid provisions, prescribed companies are required to (i) formulate a CSR committee and CSR policy; (ii) earmark 2% of the average net profits during the three immediately preceding financial year for CSR initiative; and (iii) disclose the CSR spending in the board report for the concerned financial year.

At this juncture, it is important to analyze how does a company implement spending of the CSR amount in a particular year.

I. Implementation agency: Position under CSR Rules

- Even after seven years of the Act, CSR eligible companies cite various reasons for not spending their prescribed CSR amount, such as delay in project identification, delay in implementation plans and lack of prior expertise. Therefore, implementation agencies are an effective mode for the execution of CSR projects since they possess presence in the target areas, local connect, knowledge and experience in executing social projects in an effective manner.
- The CSR Rules empower the board of directors to undertake the CSR activities of a company through implementing agencies such as (a) a company established under the Act for charitable purposes; or (b) a registered trust; or (c) a registered society.
- Further, the aforesaid implementing agency shall (a) be established by the

company undertaking CSR activities, either singly or along with any other company; or (b) be established by Central Government or State Government or any entity established under an Act of Parliament or a State legislature; or (c) have an established track record of three years in undertaking similar programs or projects.

II. Recommendations of High-Level Committee ("HLC")

The HLC in its report on CSR has addressed certain issues with respect to implementation agencies which are as follows:

- *Eligibility of international organizations:*

  HLC observed that the international organizations which are currently ineligible to act as an implementation agency unless they are (i) registered under the Act for charitable purposes; or (ii) a registered trust; or (iii) a registered society in India, should be engaged as partners for designing CSR projects, monitoring and evaluation as well as capacity building of CSR-eligible companies and implementing agencies.

- *Registration of implementation agencies:*

  The HLC observed that one of the recurring issues for companies to not undertake CSR activities was lack of identification of suitable implementation agencies. In this regard, the HLC recommended registration of implementation agencies with the Ministry of Corporate Affairs along with a reporting requirement so that there emerges an authentic and reliable list of implementation partners for companies to select from.

III. Implementation agencies: Way forward

The Ministry of Corporate Affairs has released the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 (yet to be notified) ("Draft Rules") proposing amendments to CSR Rules. The summary of amendments proposed by Draft Rules in the CSR Rules with respect to implementation agencies are as under:

- *Wider ambit of implementation agencies:*

  Under the Draft Rules, CSR activities can be undertaken by the company itself or through (a) a company established under the Act for charitable purposes; or (b) any entity established under an act of Parliament or a State legislature.

  As against the CSR Rules where the CSR activities could only be implemented by (a) a company established under the Act for charitable purposes; or (b) a registered trust; or (c) a registered society, the Draft Rules have widened the ambit of implementation agencies by including every entity established under an act of Parliament or a State legislature.

- *Insertion of definition of 'international organization':*

  The term international organization has been introduced in the Draft Rules to mean an organization notified by the Central Government as an international organization under the United Nations (Privileges and Immunities) Act, 1947.

- *Inclusion of international organization:*

  The Draft Rules have introduced the involvement of international organizations with respect to CSR activities for (a) designing, monitoring and evaluation of the CSR projects or programs and capacity building of company's personnel for CSR and for this prior approval of Central Government is not required; and (b) implementation of a CSR project with the prior approval of Central Government.

  Although this is a welcome initiative, however, an additional condition of obtaining prior approval from Central Government is required to be met with for involvement of international organizations that have institutional memory, international foot print, best practices and a proven record of delivery.

- *Registration of implementation agencies:*

  In line with HLC's recommendations, the implementation agencies shall file form CSR-1 with the concerned Registrar of Companies for registration along with prescribed fees. Further, the aforesaid form CSR-1 has also been circulated as part of the Draft Rules.

Conclusion

CSR is about ensuring that the company can grow on a sustainable basis, while ensuring fairness to all stakeholders. In the prevailing situation in India, it is difficult for one single entity to bring about change, as the scale is enormous. In this regard, companies have adequate funds and their successful correlation with implementation agencies that have expertise, strategic thinking and manpower to facilitate extensive social change, is the need of the hour. The Draft Rules are a ray of hope in regulating these implementation agencies and ensuring a greater transparency by formulating the registration process. Further, the inclusion of international organizations is a welcome initiative as these organisations have abundant technical resource and greater experience on international footing. Effective partnerships between companies and implementation agencies is likely to place India's social development trajectory on a faster track.

[The authors are Executive Partner and Associate, respectively, in Corporate Advisory practice of Lakshmikumaran & Sridharan, Gurugram]

Notifications and Circulars

Fair Practices Code for Asset Reconstruction Companies: The Reserve Bank of India ("**RBI**"), *vide* Notification dated 16-07-2020, has advised Asset Reconstruction Companies ("ARCs") registered with it to adopt the Fair Practices Code ("FPC"). The notification lays down the regulatory expectations while adopting FPC, which are as follows:

a) ARCs shall carry out transactions at arm's length basis and follow transparent and non-discriminatory practices in acquisition of assets.

b) For sale of secured assets, invitation for participation in such auctions shall be publicly solicited. Terms of such sales may be decided in consultation with the investors in the security receipts.

c) The spirit of Section 29A of the Insolvency and Bankruptcy Code, 2016 may be followed in dealing with the prospective buyers/purchasers.

d) ARCs shall release all securities on repayment of dues or on realisation of the outstanding amounts, subject to any legitimate right or lien for any other claim they may have against the borrower.

e) ARCs should have a policy approved by its board on the reasonable management fee, expenses and incentives, if any, claimed from trusts under their management.

f) ARCs intending to outsource any of their activity shall put in place a comprehensive outsourcing policy, approved by the board.

g) ARCs shall put in place a Board approved code of conduct for recovery agents.

h) ARCs should constitute a grievance redressal machinery for borrowers. The grievance redressal mechanism shall also extend to issues relating to services provided by any outsourced agency/recovery agent.

i) ARCs shall keep the information, they come to acquire in course of their business, strictly confidential and shall not disclose the same to anyone including other companies in the group except in specified situations.

j) Compliance with FPC shall be subject to periodic review by the board of the ARC.

RBI to administer Foreign Exchange Management (Non-debt Instruments) Rules: Ministry of Finance *vide* Notification dated 27-07-2020 has amended the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("**NDI Rules**"). Pursuant to the amendment, the NDI Rules shall be administered by RBI. RBI may interpret and issue such directions, circulars, instructions, clarifications, as it may deem necessary, for effective implementation of the provisions of the NDI Rules. The provision relating to the RBI's requirement to consult the Central Government has also been deleted. Further, according to the latest amendment, Air Operator Certificate to operate Scheduled Air Transport Services (including Domestic Scheduled Passenger Airline or Regional Air Transport Service) is granted to such company or a body corporate: (a) which is registered and has its principal place of business within India; (b) whose Chairman and at least two-thirds of its Directors are citizens of India; and (c) whose substantial ownership and effective control is vested in Indian nationals.

SEBI – Procedural guidelines to Proxy Advisory Firms: Securities Exchange Board of India **("SEBI**") *vide* Circular dated 03-08-2020 has issued procedural guidelines to be complied with proxy advisors with effect from 01-09-2020. The said procedural guidelines are in addition to Code of Conduct specified under Regulation 24(2) read with Regulation 23(1) of the SEBI (Research Analyst) Regulations, 2014. The key highlights are as follows:

a) Proxy advisors shall formulate the voting recommendation policies and disclose the updated voting recommendation policies to its clients. They should also ensure that the policies are reviewed at least once annually.

b) Proxy advisors shall disclose the methodologies and processes followed in the development of their research and corresponding recommendations to its clients.

c) Proxy advisor shall alert clients, within 24 hours of receipt of information, about any factual errors or material revisions to the report.

d) Proxy advisors shall have a stated process to communicate with its clients and the company.

e) Proxy advisors shall share their report with its clients and the company at the same time. This sharing policy should be disclosed by proxy advisors on their website.

f) Proxy advisors shall clearly disclose in their recommendations the legal requirement *vis-a-vis* higher standards they are suggesting if any, and the rationale behind the recommendation of such higher standards.

g) Proxy advisors shall disclose conflict of interest on every specific document where they are giving their advice.

h) Proxy advisors shall establish clear procedures to disclose, manage and/or mitigate any potential conflicts of interest resulting from other business activities including consulting services, if any, undertaken by them and disclose the same to clients.

SEBI One Time Settlement Scheme, 2020: SEBI, *vide* Public Notice dated 27-07-2020 has introduced the One Time Settlement Scheme ("**Scheme**") in terms of Regulation 26 of SEBI (Settlement Proceedings) Regulations 2018. The Scheme has been introduced for providing a onetime settlement opportunity to the entities that have executed trade reversals in the stock options segment of BSE during the period from 1-4-2014 to 30-9-2015 and against whom any proceedings are pending. The Scheme commenced on 01-08-2020 and will end on 31-10-2020 (both days inclusive). An entity which is interested in availing the Scheme shall along with the settlement application, also submit an application fee of INR 15,000/- in case of individuals and INR 25,000/- in case of body corporates. The entities who do not avail the onetime settlement opportunity within the prescribed period, shall be liable for action as per Section 15-I (*Power to adjudicate*) of the SEBI Act, 1992.

Mechanism for margin obligations to be given by way of pledge / re-pledge in depository system: SEBI, *vide* Circular 25-02-2020 had specified the mechanism with regard to margin obligations to be given by way of Pledge/Re-pledge in the Depository System which were initially to come into effect from 01-06-2020. The implementation date of the circular was extended till 01-08-2020 in view of disruptions on account of COVID-19 pandemic including restrictions in movement of people. SEBI has now *vide* Circular dated 29-07-2020 clarified that the new mechanism is to be implemented from 01-08-

2020, however, the system of parallel acceptance of the client securities by way of title transfer shall be available only up to 31-08-2020 and no further extension shall be granted. The trading and clearing member shall be required to close all existing demat accounts tagged as "Client Margin/Collateral" by 31-08-2020.

Transfer of shares in the insurance companies – IRDAI issues clarification: Insurance Regulatory and Development Authority of India ("**IRDAI**"), *vide* Circular dated 23-07-2020 has clarified on issues relating to transfer of shares of insurance companies by promoters/shareholders. The key highlights of the Circular are as follows:

A) Listed Entities:
   i) For acquisition of more than 1% and up to 5% of the paid-up share capital along with the existing holding – a declaration of fit and proper shall be provided by the acquirer to the insurance company;
   ii) For transfer of more than 1% but less than 5% of the paid-up share capital the transferor shall inform the insurer immediately on execution of the transaction.
   iii) Where the transfer of shares by the transferor, cumulative with his relatives, associate enterprises and persons acting in concert will/is likely to exceed 5% of the paid-up share capital, such transferor shall seek the prior approval of IRDAI. The application for this purpose shall be filed through the concerned insurance company.
   iv) Any proposal for acquisition whereby the transferee's holding is likely to exceed 5% of the paid-up share capital of the insurance company, has to be submitted for prior approval of IRDAI through the concerned insurance company.

B) Determination of extent of transfer – Listed and unlisted insurance companies:
   (i) For the purpose of reckoning the quantum of transfer/acquisition of shares, scenarios where transfer is executed in favour of one or more parties, whether in a single or multiple transaction aggregating to excess of 1% or 5%, the cumulative transfers made during a given financial year shall be considered. Accordingly, whenever the specified limits are likely to exceed in a financial year, the entity shall be under obligation to seek the prior approval of IRDAI.
   (ii) Listed companies: The provisions at (i) above shall be applicable only with respect to the promoters/ promoter group. Further, transfer includes offer for sale as per SEBI (ICDR) Regulations by the existing shareholders, whether such shareholder is part of the promoter/promoter group or not.

C) Suspension of Voting Rights: Where transactions are executed beyond the stipulated threshold limits by the shareholders, without the prior approval of IRDAI, the transferee shall not have any voting rights in any of the meetings of the insurance company; the transferee shall promptly dispose of the excess shares acquired, beyond the specified threshold limits.

Industrial Disputes and Certain Other Laws (Karnataka Amendment) Ordinance, 2020: The Governor of Karnataka, *vide* Notification dated 31-07-2020 has promulgated the Industrial Disputes and Certain Other Laws (Karnataka Amendment) Ordinance, 2020 **("Ordinance")** to amend the Industrial Disputes Act, 1947 ("**IDA**"), the Factories Act, 1948 ("**Factories Act**") and the

Contract Labour (Regulation and Abolition) Act, 1970 ("**CLRA**"). The amendments are as follows:

IDA: The requirement for prior government permission by industries to lay-off and/or retrench their workers or close its operation is revised to three hundred workers from earlier requirement of one hundred workers.

Factories Act: The minimum threshold for constituting a factory is increased from ten workers to twenty workers (with power) and twenty workers to forty workers (without power). The overtime limit for workers has also been increased from seventy-five hours per quarter to one hundred and twenty-five hours per quarter.

CLRA: The applicability of CLRA to establishments is revised to fifty or more workmen from the earlier requirement of twenty or more workmen as contract labour.

Public procurement – Restrictions on bidders from countries which share land border with India: The Central Government, *vide* Office Memorandum dated 23-07-2020, has amended the General Financial Rules, 2017 ("**GFR**") to insert Rule 144(xi) and thereby empower Department of Expenditure, Ministry of Finance (DoE) to impose restrictions, including prior registration or screening on procurement from bidders from a country or countries of grounds of defence and national security of India. Subsequently, Order (Public Procurement No.1) dated 23-07-2020 ("**Order**") was issued by DoE. As per the Order any bidder from such countries sharing a land border with India will be eligible to bid in any procurement whether of goods, services (including consultancy services onand non-consultancy services) or works (including turnkey projects) only if the bidder is registered with the Competent Authority. The Competent Authority for registration will be the Registration Committee constituted by the Department for Promotion of Industry and Internal Trade ("**DPIIT**"). Political and security clearance from the Ministries of External and Home Affairs respectively will be mandatory. The Order is applicable to public sector banks and financial institutions, autonomous bodies, Central Public Sector Enterprises ("**CPSEs**") and Public Private Partnership projects receiving financial support from the Central and State Governments or their undertakings. Although GFR is not applicable to State Governments, the Central Government has invoked the provisions of Article 257 (*Control of the Union over States in certain case*) of the Constitution of India for the implementation of the Order in procurement by State Governments and State Undertakings. For State Government procurement, the Competent Authority will be constituted by the States, but political and security clearance will remain necessary. By a separate order, countries to which Central Government of India extends lines of credit or provides development assistance have been exempted from the requirement of prior registration.

Insolvency – Appointment of liquidator – IBBI (Voluntary Liquidation Process) Regulations, 2017 amended: The Insolvency and Bankruptcy Board of India ("**IBBI**"), *vide* Notification dated 05-08-2020 has amended Regulation 5 of the IBBI (Voluntary Liquidation Process) Regulations, 2017 ("**Regulations**"). Accordingly, a corporate person will appoint an insolvency professional as liquidator, subject to the eligibility criteria specified in Regulation 6 of the Regulations. The corporate person may replace the liquidator, by appointing another insolvency professional as liquidator, after passing necessary resolutions as specified. The resolution for appointment should contain the terms and conditions of appointment of the liquidator, including the remuneration payable to him.

Liquidator fee – IBBI (Liquidation Process) Regulations, 2016 amended: IBBI, *vide* notification dated 05-08-2020 has amended certain provisions of the IBBI (Liquidation Process) Regulations, 2016 ("**Liquidation Regulations**"). In Regulation 4(2)(b) of the Liquidation Regulations, after the table, a clarification has been inserted wherein, if a liquidator realises any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him. The clarification also states that where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him.

Ratio Decidendi

Debenture Trustee can file a petition under Section 7 of IBC on behalf of Financial Creditor-Debenture Holder

The National Company Law Tribunal ("**NCLT**"), Mumbai Bench has upheld and re-iterated the powers of the Debenture Trustee, under a Debenture Trust Deed, to initiate Corporate Insolvency Resolution Process ("**CIRP**") against a Corporate Debtor, under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**").

Brief Facts:

The Petition was filed by the petitioner, acting for and on behalf of the Debenture Holder under Section 7 of Code. The Corporate Debtor had executed an English Mortgage, under a Debenture Trust Deed ("**DTD**") executed in 2016, in favour of the Petitioner, to secure the due repayment of principal amounts of non-convertible debentures ("**NCDs**") of the Corporate Debtor, as subscribed by the said Debenture Holder. At the same time, a Deed of Hypothecation and a Share Pledge Agreement was also executed by the Corporate Debtor, in favour of the Petitioner, a Power of Attorney (POA) was executed by Debenture Holder, in favour of the Petitioner, and personal guarantees were issued on behalf of the said Debtor. The NCDs were partially redeemed. Thereafter, the Corporate Debtor committed a default in payment obligations under the DTD. The dues were subsequently admitted by the Corporate Debtor. Thereafter, the Petitioner filed a Commercial Suit, before the Bombay High Court, seeking to recover the amounts from the Corporate Debtor, and its Guarantors, and further, seeking foreclosure of the mortgaged property/ sale of the hypothecated properties and pledged shares etc. and recovery of the sale proceeds thereof. Simultaneously, basis the POA as well as the DTD, the Petitioner filed the present petition before the NCLT.

Submissions by the Petitioner:

a. Corporate Debtor had not disputed the fact that it had defaulted repayment of financial debt or that financial debt was availed by them and now is due and payable.

b. Petitioner has received written instructions from the Debenture Holder to file the present

Petition. Further, the said provision in the DTD is for the sole benefit of Debenture Holder and not the Corporate Debtor. Therefore, the lack of express instructions to initiate CIRP, if any, by PCHFL has no bearing on the rights and obligations of the Petitioner under the DTD.

c. Filing of the Suit before the Bombay High Court cannot operate as a bar to the present Petition.

d. By a Notification dated 27-02-2019 issued by the Central Government, Debenture Trustees have now been authorized to file application seeking the initiation of CIRP against the Corporate Debtor on behalf of the Debenture Holder-Financial Creditors ("**Notification**").

Submissions by the Corporate Debtor:

a. Petitioner is not the financial creditor and that no monies have been lent or advanced by the Petitioner.

b. Petition is not maintainable since the DTD expressly provides that before initiating any action under the said Deed, the Debenture Trustee (the Petitioner) shall seek prior written instructions from the Debenture Holder (PCHFL). No such written instructions have been produced or filed.

c. Petitioner has also filed Commercial Suit, with an identical issue, before the Bombay High Court.

d. Subsequent to the DTD, the Corporate Debtor had entered into a Loan Agreement-cum-Mortgage deed with PNB Housing Finance Limited ("**PNB**"). As per the same, PNB has agreed to make payments of the earlier existing loans. A *Pari Passu* Agreement was also executed between PNB Housing Finance Limited, Piramal Finance Limited, Piramal Housing Finance Limited, Petitioner and the Corporate Debtor.

e. Petitioner is entitled to the benefit of the Notification dated 27-02-2019. However, the said Notification only permits the Debenture Trustee to file on behalf of the Petitioner. The present application has been filed by the Debenture Trustee, not by itself, but as a purported Power of Attorney Holder.

Decision:

a. The NCLT observed that the DTD executed between the Corporate Debtor and the Petitioner entailed the powers/duties conferred upon the Debenture Trustee to represent the Debenture Holder as a security trustee and represent the Debenture Holder of the events of default due to non-payment of money.

b. The rights of the Petitioner under the DTD cannot be linked to execution of the subsequent *Pari Passu* Agreement abovementioned. As per the Bench, it is evident that this agreement is a mere arrangement to share security on *pari-passu* basis and does not in any way substitute or novate the original loan agreements.

c. Further, as per the Bench, upon conjoint reading of Section 7 of the Code and the abovementioned Notification dated 27-02-2019, the Petitioner, being Debenture Trustee, has sought to file this petition with a POA, to enforce the rights of PCHFL under the DTD. The Debenture Trustee is not a financial creditor. However, it is acting on trust/ as a security Trustee for PCHFL, having requisite authorisation under the DTD and POA as well and the notification dictates a mere procedural formality.

[*IDBI Trusteeship Services Limited* v. *Ornate Spaces Private Limited* – Order dated 29-06-2020 in Company Petition No. 4469/IBC/MB/2019, National Company Law Tribunal, Mumbai Bench]

Timelines under Section 29A of Arbitration and Conciliation Act, 1996 have retrospective effect from 23-10-2015

The Delhi High Court has held that the provisions of Section 29A(1) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), as amended *vide* the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment Act**"), shall be applicable to all pending arbitrations seated in India as on 30-08-2019 and commenced after 23-10-2015.

Brief Facts:

An application dated 31-05-2019 had been filed under Section 29A of the Arbitration Act seeking extension of the time period for the Arbitral Tribunal to complete the proceedings and render the award, before the Delhi High Court, which was duly granted ("**Extension Order**"), effective from 24-06-2019. Thereafter, an issue rose before the Arbitral Tribunal, with regard to addition of a party to the arbitral proceedings. It is relevant to note that addition of the said party would render the nature of the proceedings as an international commercial arbitration. Since the 2019 Amendment Act makes the timelines inapplicable to international commercial arbitration, therefore, pending the adjudication of the issue, the Arbitral Tribunal directed the parties to refer the issue to the relevant Court as to the applicability of the extended time period to the proceedings.

It is relevant to note that conflicting judgments have been passed by co-ordinate benches of the Delhi High Court, in Order dated 23-01-2020 in *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited,* O.M.P.(MISC.) (COMM.) 512/2019 and Order dated 10-02-2020 in *MBL Infrastructures Ltd.* v. *Rites Ltd*., O.M.P.(MISC)(COMM) 56/2020, as per which the effect of amendment to Section 29A under 2019 Amendment Act was held retrospective and prospective, respectively.

Submissions by Petitioner:

a. When the petition for extension was filed under Section 29A of the Arbitration Act, the said section was applicable to all arbitrations seated in India.

b. Section 29A of the Act, as amended *vide* the 2019 Amendment Act, has a retrospective applicability, since the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**"), which introduced Section 29A into the Arbitration Act, has made the said Section applicable to all arbitral proceedings commenced on or after 23-10-2015. There is no provision in the 2019 Amendment Act making the amendment applicable prospectively. This understanding has been upheld in *Shapoorji Pallonji.*

c. Section 29A has been classified as a procedural law and the said Section does not create any vested rights in the parties in the arbitration proceedings/ any new rights/ liabilities, as upheld by the judgment of *BCCI Vs. Kochi Cricket (P) Ltd.*, (2018) 6 SCC 287.

d. When faced with conflicting judgments, the judgment passed earlier in time is to be considered for determination of issue, if the later decision is passed in ignorance of earlier decision is *per incuriam/* in ignorance of law*.* A lower court may also decide the *per incuriam* aspect of a judgment passed by a higher court basis the ignorance of law by the higher court.

Submissions by the Respondent:

- The Co-ordinate Bench of the High Court, in *MBL Infrastructure* has upheld the prospective applicability of the amendment to Section 29A, and the said judgment has come *after* the *Shapoorji Pallonji* case.

Decision:

a. In the latter order, *MBL Infrastructure,* the attention of the Court was not drawn to the earlier order in *Shapoorji Pallonji.* To that extent the order in *MBL Infrastructure* is *per incuriam*.

b. The Apex Court, in *BCCI* had already upheld the prospective application of the 2015 Amendment Act, but there is no such like understanding about the 2019 Amendment Act, either in the said Act itself or through judicial precedents.

c. It is a matter of established law that any change/amendment to the provisions of statute dealing merely with matters of procedure or procedural laws will be retrospective in nature, unless there exist a contrary intention of the legislature.

d. Therefore, the provisions of Section 29A (1) shall be applicable to all pending arbitrations seated in India as on 30-08-2019 and commenced after 23-10-2015. The Petition was disposed off with a direction that the Extension Order shall not be binding on the present arbitral proceedings.

[*ONGC Petro Additions Limited* v. *Ferns Construction Co. Inc.* – Judgment dated 21-07-2020 in Commercial Original Misc. Petition No. 256/2019 and I.A. 4989/2020, Delhi High Court]

Dispute as to title of shares cannot be decided in proceedings under Section 241/242 of Companies Act, 2013

The Supreme Court has observed that when a nominee exists in a case of shares, held by a deceased person who also has legal representatives, the effect of the same is required to be decided by determining the extent of shareholding of the legal representatives, whether any civil suit has been filed for determination of the same and which civil suit filed earlier in point of time is pending consideration, etc. As per the Court, the same cannot be decided in proceedings under Section 241/242 of the Companies Act, 2013 ("**Companies Act**").

Brief Facts:

The Appellant's late husband ("**Deceased**") held shares in one M/s. Oswal Agro Mills Ltd., a listed company ("**OAML**"). Prior to his death the Deceased had filed a nomination under Section 72 of the Companies Act, 2013 ("**Companies Act**") in favour of his wife, the Appellant herein with respect to the said shares. It was explicitly provided in the nomination that '*This nomination shall supersede any prior nomination made by me/us and any testamentary document executed by me/us'.* Accordingly, after his death, the Appellant was registered as the holder of the shares. Respondent No. 1, one of the legal heirs of the Deceased, thereafter, filed a partition suit, claiming entitlement to 1/4th of the estate of the Deceased, including 1/4th of the shares in OAML as well another company viz., M/s. Oswal Greentech Limited ("**OGL**"). A status quo order was passed by the Delhi High Court concerning the said shares as well as all immovable property inherited by the said Respondent. Respondent No. 1, thereafter, filed a Company Petition before the National Company Law Tribunal ("**NCLT**"), alleging oppression and mismanagement in the affairs of OGL, whereunder he claimed maintainability of the said petition on the ground of being a shareholder of OGL, and claiming entitlement and legitimate expectation to shareholding of OAML. In response to the said Company Petition, the Appellant herein had filed an application before the NCLT on grounds of maintainability. The NCLT held Respondent No.1 as legal heir was entitled to share of the property/shares of the Deceased and that the Company Petition is maintainable. Aggrieved thereby, an appeal was filed before National

Company Law Appellate Tribunal ("**NCLAT**"), which was dismissed. Aggrieved thereby, the Appellant filed the present Civil Appeal.

Submissions by Appellant:

a. The claim made by Respondent No. 1 over shareholding held by the Deceased could not be made basis to maintain a petition under Sections 241 and 242 read with Section 244 of the Companies Act. The appropriate remedy is to apply under Section 59 of the said Act.

b. Respondent No.1 did not claim waiver on the rigors of Section 244 of the Companies Act and also did not file an application seeking a waiver under the proviso to said Section.

c. The entire shareholding of deceased stood transmitted in ownership of the Appellant i.e., The Appellant is the absolute owner of shares that rest in her under the provisions contained in Section 72 of the Companies Act and rules framed thereunder.

d. Respondent No.1 indulged in forum shopping, which could not be allowed in view of the availing remedy of filing of the partition suit.

Submissions by Respondents:

a. The nomination was made only to hold the shares for the benefit of legal representatives. It was permissible for a legal representative to maintain the proceedings for oppression and mismanagement in the affairs of the company, though his/her name is not entered as a registered owner of the shares. The judgments in *Vishin N. Khanchandani & Anr. v. Vidya Lachmandas Khanchandani & Anr.*, (2000) 6 SCC 724 and *Ram Chander Talwar & Anr. v. Devender Kumar Talwar & Ors*., (2010) 10 SCC 671 were relied upon.

b. The civil suit's pendency could not have come in the way of maintaining the application concerning oppression and mismanagement, as only civil rights have to be determined in the civil suit. The Company Petition is *prima facie* maintainable because of the verdicts by the NCLT and NCLAT.

Decision:

a. The High Court observed that it is quite apparent from a bare reading of the aforesaid provisions of Section 72(1) of the Companies Act, that every holder of securities has a right to nominate any person to whom his securities shall "vest" in the event of his death. The proviso to the said section contains a non-obstante clause, excluding applicability of all other laws, including testamentary laws. Rule 19(2) of the Companies (Share Capital and Debentures) Rules, 2014 framed under the said Act, also indicates to the same effect.

b. The Apex Court observed that, if there was no case of nomination of shares involved, only then the application can be maintained by the legal representatives of the deceased under Sections 241 and 242 of the Companies Act, by relying on the judgment of *World Wide Agencies Pvt. Ltd. & Anr. v. Margarat T. Desor & Ors.,* (1990) 1 SCC 536 as well as *Sangramsinh P. Gaekwad and Ors. v. Shantadevi P. Gaekwad (Dead) through LRs. And Ors.,* (2005) 11 SCC 314. However, the same principal was not applicable herein.

c. The appeal was allowed and directions were given for dropping of the proceedings under Section 241 and 242 of the Companies Act, with liberty to file fresh proceedings, in case of settlement of disputes with respect to title and satisfaction of threshold for maintaining the petitions.

[*Aruna Oswal* v. *Pankaj Oswal & Ors.* – Judgment dated 06-07-2020 in Civil Appeal No. 9340 of 2019, Supreme Court]

News Nuggets

Execution proceedings – Delhi High Court formulates detailed affidavit of assets and income of judgement-debtor and lays down guidelines for Executing Court

The Delhi High Court has formulated detailed formats of affidavit of assets and income of the judgement-debtor to be filed at the threshold of execution proceedings. The Court in its judgement dated 05-08-2020 observed that this will curb the delay and expedite disposal of execution proceedings. It noted that the execution of decrees/awards deserve special attention considering that inordinate delay in execution proceedings would frustrate the decree-holders from reaping the benefits of the decrees/awards. Modifying its earlier judgement dated 05-12-2019 the Court annexed the modified formats of affidavit of assets and income of the judgment-debtor; affidavit of assets and income of a proprietorship firm/partnership firm/HUF/Company /Trust; and affidavit of expenditure of the judgment-debtor. The High Court examined the formats of the affidavits of assets, income, expenditure and liabilities to be filed by the judgment-debtor in execution cases in United Kingdom, United States of America, Canada, Ireland, Australia, Singapore, New Zealand and South Africa. The judgement in the case *Bhandari Engineers & Builders Pvt. Ltd. v. Maharia Raj Joint Venture & Ors.* also elaborately laid down the procedure to be followed by the Executing Court.

Consumer Protection Act, 2019 comes into force from 20th and 24th July, 2020

Consumer Protection Act, 2019 which received the assent of the President on 09-08-2019 has now come into force from 20-07-2020 and 24-07-2020. It may be noted that while provisions relating to consumer protection councils, consumer disputes redressal forum, mediation, liability of services or products, and penalty for manufacturing, selling, distributing, etc. came into force from 20-07-2020, the provisions relating to e-commerce, direct selling, and establishment of a Central Consumer Protection Authority have come into force from 24-07-2020. The said Act aims to protect interests of the consumers and in this regard aims to establish authorities for timely and effective administration and settlement of consumers' disputes.

One of the important provisions is Chapter VI which deals with product liability. It lists various liabilities of the manufacturer, service provider and even the seller in case a product liability action is brought by a complainant for any harm caused to him on account of a defective product. Interestingly, as per provisions of Section 84 of the Consumer Protection Act, 2019, a product manufacturer shall be liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product. However, the Act also lists certain exceptions to the product liability action.

E-Commerce – Consumer Protection (E-Commerce) Rules, 2020 notified

Within few days of coming into force of major provisions of the Consumer Protection Act, 2019, the Department of Consumer Affairs in the Ministry of Consumer Affairs, Food and Public Distribution has issued Consumer Protection (E-Commerce) Rules, 2020 which have come into force from 23-07-2020. These Rules, in line with the draft National E-Commerce Policy released by the government in early 2019, while elaborating on their scope and applicability, also state the duties and liabilities of the e-commerce entities and even duties of the sellers offering their goods or services through a marketplace e-commerce entity. The new Rules for all models of e-commerce (including market place and inventory models) are applicable in respect of all goods and services bought or sold over digital or electronic network, but exclude activity carried out in a personal capacity which is not part of any professional or commercial activity undertaken on a regular or systematic basis. Interestingly, though these Rules have been made effective from 23-07-2020, the provision relating to e-commerce under the Consumer Protection Act, 2019 are effective only from 24-07-2020 as per Notification S.O. 2421(E), dated 23-07-2020.

RBI Circulars on loan moratorium are not applicable to mutual funds and debentures

In a case where the petitioner had committed default in making payment under Debenture Deed, the Bombay High Court has held that Reserve Bank of India's two circulars dated 27-03-2020 and 23-05-2020 would not apply in case of mutual funds and debentures. Observing that the RBI Circulars only permitted the specified entities to provide moratorium of three months and does not record any directives to grant such moratorium, the High Court also rejected the plea that the concession provided under those two circulars cannot be availed by the petitioner. It also observed that the there was no case for availing the benefit of the circulars as the petitioner had defaulted not only in the lockdown period but before also. The Court in this decision dated 13-07-2020 in *Zee Learn Ltd. v. UTI Asset Management Co. Ltd.* also observed that the respondent had to make payment to 21000 small investors and that the guarantor was a profit-making company and was liable to face consequences of default by the petitioner.

Insolvency – IBC Section 10A applicable even for applications filed before promulgation of Ordinance inserting said section

The Chennai Bench of the National Company Law Tribunal ("**NCLT**") has held that the provisions of the newly inserted Section 10A in the Insolvency and Bankruptcy Code, 2016 by the IBC (Amendment) Ordinance, 2020 as promulgated on 05-06-2020 will be applicable even in respect of the applications which have already been filed and heard well before the promulgation of the Ordinance. The Tribunal was of the view that Section 10A relates back to the date of 25-03-2020 in reckoning the date of default even though the Ordinance got promulgated only on 05-06-2020. It held that in case the "default" had occurred on or after 25-03-2020 then NCLT should desist from entertaining such an application, even though the application is filed between 25-03-2020 and 05-06-2020. The Tribunal in the case *Siemens Gamesa Renewable Power Pvt. Ltd. v. Ramesh Kymal* also observed that the Ordinance was intended to shield and protect the entire body of Corporate Debtors,

irrespective of the reasons attributable to such default arising during the said period commencing from 25-03-2020 in relation to an Operational Debt or Financial Debt whether they were admitted or not by the concerned debtors.

Report by the Committee of experts on Non-Personal Data Governance Framework

The Ministry of Electronics and Information Technology (Meity) constituted Committee of Experts has released its report on non-personal data governance framework dated 12-07-2020 for public consultations till 13-08-2020. The report defines Non-Personal Data (NPD) as the data:

i) that is never related to an identified or identifiable natural person, such as data on weather conditions, data from sensors installed on industrial machines, data from public infrastructures, or

ii) which was initially personal data but was later made anonymous. Data which is aggregated and to which certain data transformation techniques are applied, to the extent that individual specific events are no longer identifiable, can be qualified as anonymous data.

The NPD is further divided into public NPD, community NPD, and private NPD. The report also proposes a separate legislation to govern and regulate NPD and establishment of Non-Personal Data Regulatory Authority (NPDRA).

Lockdown – Supreme Court extends time periods prescribed under Arbitration and Conciliation Act, 1996, Commercial Courts Act, 2015 and for service of notices, summons etc.

The Supreme Court of India, based on various Interlocutory Applications (IAs) filed seeking extension in time for matters where the limitation period was to expire on account of lockdown imposed due to COVID-19, has passed the following directions, *vide* an Order dated 10-07-2020 in a *Suo Motu* Writ Petition:

a. The exemption of the lockdown period from limitation (given *vide* the orders of the Court dated 23-03-2020 and 6-05-2020) shall also apply for extension of time limit for passing arbitral award under Section 29A of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

b. The said exemption shall also apply for extension of the time limit prescribed under Section 23(4) of the said Act, for the completion of the statement of claim and defence.

c. Under Section 12A of the Commercial Courts Act, 2015, time is prescribed for completing the process of compulsory pre-litigation, mediation and settlement. The said time is also extended for the duration of the lockdown plus 45 days after lifting of lockdown.

d. Services of all notices, summons etc. may be effected by e-mail, FAX, commonly used instant messaging services, such as WhatsApp, Telegram, Signal etc. However, if a party intends to effect service by means of said instant messaging services, the party must also effect service of the same document/documents by e-mail, simultaneously on the same date.

e. The period of validity of a cheque cannot be extended, since the same is a period prescribed not under any statute, but by the Reserve Bank of India (RBI) under Section 35-A of the Banking Regulation Act, 1949.

Unpaid instalment of a settlement agreement is not 'Operational Debt'

The National Company Law Tribunal ("**NCLT**"), New Delhi Bench has upheld that failure to pay instalments under or the breach of a settlement agreement cannot be a ground to trigger Corporate Insolvency Resolution Process ("**CIRP**") against a Corporate Debtor. The creditor, in the case of *Brand Realty Services Limited v. Sir John Bakeries India Private Limited*, had entered into an Account Settlement Agreement (ASA) with the debtor, for payment of dues arising from a separate consultancy service agreement executed between the parties. The Corporate Debtor had given Post Dated Cheques for discharging its dues as per the ASA, which were subsequently dishonoured, and thereafter, the Corporate Debtor denied the existence of debt itself due and payable towards the creditor and that there were pre-existing disputes. The NCLT relied on the order passed by the NCLT, Allahabad Bench, in *Delhi Control Devices (P) Limited v. Fedders Electric and Engineering Limited,* CP (IB) No. 343/ALD/2018, and NCLT, New Delhi Bench, in *Trafigura India Private Limited v. TDT Copper Limited,* CP (IB) No. 2817/ND/2019.

Contractual workers also entitled to benefits under the Maternity Benefits Act

The Himachal Pradesh High Court has held that the benefit of maternity leave is available to contractual employees also, with all consequential benefits, including continuity in service. The judgment in *Municipal Corporation of Delhi v. Female Workers & Anr.,* 2000 (3) (SCC) 224, along with various orders of the High Courts, which categorically hold that the entitlement of maternity leave to women employees getting daily wages/ employed on casual basis/ temporary employees is an explicit mandate, were relied upon by the Court, in *Dr. Mandeep Kaur v. Union of India & Ors.* It may be noted that the contract of employment executed with the Petitioner did not contain any clause entitling the Petitioner to maternity leave. However, the Respondent No. 2 clinic had a policy of according maternity leave if any employee had worked for over and above 80 days with the said clinic in the previous 12 months. The High Court observed that, as long as the Maternity Benefits Act, 1961 applies to the shop/ establishment/ factory, in question, the benefit must be accorded to the employees, including contractual employees.

Writ Petition maintainable against private bank for Enforcement of RBI Circular on loan moratorium

The Karnataka High Court has held that, a writ Petition, under Article 226 of the Constitution of India, is maintainable against private banks with respect to implementation of the loan moratorium announced by RBI in the wake of lockdown on 27-03-2020 and extended *vide* Circular dated 23-05-2020. The High Court, in *Velankani Information Systems Limited v. Secretary, Ministry of Home Affairs & Ors.,* was of the view that the said Circulars having been issued "to protect and preserve the economy of the country on account of the COVID-19 pandemic" are "in the public interest, interest of the economy and the country" and would attract the public law element. Therefore, it has been observed that enforcing the obligation amounts to enforcing a public duty, and thus amenable to writ jurisdiction, including in the nature of *mandamus* directing the banks to comply.

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.
Ph: +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

GURUGRAM
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 . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Tel: +91 (0484) 4869018; 4867852
E-mail: lskochi@laskhmisri.com