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Dear Reader

It gives me great pleasure to address you through this **100th issue of Corporate Amicus**. I have always believed that the wealth of knowledge should be shared. We began this journey in August 2011 recalling the Sanskrit verse that the unique wealth of knowledge increases with spending or expending. I hope over these years we have been able to give business critical inputs and academic inputs in a timely manner. These days information is available practically everywhere but value addition results when relevant information is properly digested and communicated in a systematic manner. We intend to continue this endeavour. Your feedback to improve the newsletter is welcome.

Thank you.

Warm regards

V. Lakshmikumaran

Contents

Article
Independent Directors and mandate of online proficiency test: Approbation or mere disdain? 2

Notifications and Circulars 5

Ratio Decidendi 9

News Nuggets 12

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Article

Independent Directors and mandate of online proficiency test: Approbation or mere disdain?

By **Sudish Sharma and Vidhi Madan**

Introduction

With the objective of thriving good corporate governance, Ministry of Corporate Affairs ("MCA") on October 22, 2019 notified the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019 ("Databank Rules") in exercise of the powers conferred upon it by Sections 150 and 469 of the Companies Act, 2013 ("CA 2013"). The Databank Rules endeavor to create and maintain an online databank of persons willing and eligible to be appointed as independent directors ("IDs") which shall be placed on the website of the Indian Institute of Corporate Affairs ("IICA"). The provisions other than Rule 2 (dealing with definitions under the Databank Rules) and Rule 5 (dealing with panel of members of Indian Institute of Corporate Affairs) of the Databank Rules are effective from December 01, 2019.

Additionally, MCA amended Rule 8 of the Companies (Accounts) Rules, 2014 ("Accounts Rules") and Rule 6 of Companies (Appointment and Qualifications of Directors) Rules, 2014 ("Appointment and Qualification Rules"). The aforesaid amendments to Accounts Rules and Appointment and Qualification Rules are effective from December 01, 2019.

Therefore, an attempt has been made to simplify the harmonious interpretation of the aforesaid notifications which thereby affects the process of appointments of IDs on the Board of Indian Companies and the process and requirements of the new database and test rules.

Analysing the aforesaid notifications and effect of creating an online databank

IDs are the most credible source on the board of the Company as they are expected to be under no influence from both inside and outside forces. However, considering the plethora of corporate scams coming to light, it became evident for MCA to improve the corporate governance regime by exercising conscious effort in making IDs aware of their independent practice on the board and to advance the corporate literacy by conducting online proficiency test within a period of one year from the date of inclusion of name in the databank.

As per Section 149(4) of CA 2013, every listed Company is under a mandate to appoint IDs on its board. The role of IDs broadly includes improving corporate credibility and governance standards, functioning as a watchdog, and playing a vital role in risk management of the Company. It be noted that when the CA, 2013 was notified, Section 150 of CA 2013 (which deals with the manner of selection of IDs) was kept inactive and reason for the same was the absence of a body or institution or association who can create and maintain the databank of IDs. However, this hurdle has now been removed as the authority and responsibility has been assigned to IICA. While the Central Government is in process of creating the database of IDs, any appointment or re-appointment made by the Companies is not affected by Section 150 of CA 2013 provided such appointments and re-

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appointments of IDs are made in terms of Section 149(6) of CA 2013 and provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations").

However, the interpretation of the expression '*an independent director may be selected from a databank*' stands changed now. The word '*may*' was not interpreted in its literal meaning and therefore, the interpretation has now been affected by the amended Rule 6(1) of Appointment and Qualification Rules and Rule 3 and Rule 4 of Databank Rules. The effect of the creation of the databank can be understood on two broad classifications, i.e. effect on already appointed IDs and secondly on proposed appointments of IDs.

(a) Effect on already appointed IDs

Rule 6(1)(a) of Appointment and Qualifications Rules read with Rule 4 of Databank Rules clarifies the effect on already appointed IDs. Rule 6(1)(a) of Appointment and Qualifications Rules, states that every individual who has been appointed as an ID in a company as on December 01, 2019 shall within a period of three months from December 01, 2019 (i.e. within March 01, 2020) apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time and the effective date of applying online is from December 01, 2019. On the other hand, Rule 4 of Databank Rules states that the institute shall conduct an online proficiency self-assessment test covering companies law, securities law, basic accountancy, and such other areas relevant to the functioning of an individual acting as an ID as well as prepare a basic study material, online lessons, including audio-visuals for easy reference of individuals taking the online proficiency self-assessment test. Therefore, it can be said that any individual falling under Rule 6(1) of Appointment and Qualification Rules shall apply for inclusion of his name after passing an online proficiency test to be conducted by IICA and only on passing of such test his name shall be included in the database. The time limit for applying for inclusion of names shall be March 01, 2020.

(b) Effect on proposed assignments

Rule 6(1) (b) of Appointment and Qualification Rules states that anyone who intends to get appointed as an ID in a Company, shall before such appointment apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time, till he continues to hold the office of an independent director in any company. Rule 6(1)(b) of Appointment and Qualification Rules obligates the individual who is proposed to be appointed as an ID to qualify the online proficiency test to be conducted by IICA with effect from December 01, 2019.

Therefore, the interpretation of the word '*may*' in Section 150(1) of CA 2013 has now been broadly interpreted to state that any ID whether already appointed or is proposed to be appointed has to undergo the process of passing online proficiency test for inclusion of his or her name into database of IDs. Further, IICA has also been empowered to reject the applications received for inclusion of names in the database or remove any name already included on case to case basis.

Positive and negative aspects of conducting online proficiency test

Rule 6 of Appointment and Qualification Rules requires IDs to qualify the online proficiency test with atleast 60% marks. This is a novel step by the MCA and is in line with the amended CA 2013. This will remove years of slack and frequent allegations of corruption, nepotism and directors who act like mute spectators in corporate boardrooms. It is not just domain knowledge that will be put to test, but

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also various aspects of Companies' law, Securities law, basic accountancy and such other areas relevant to the functioning of an individual acting as ID. The rules made are stringent as it was noticed that in many cases political appointees with standard financial background were also getting rehabilitated in several Companies as IDs. This method may help in bringing professionalism, alertness and more accountability leaving aside a usual passive role. Furthermore, the entire process is done in a financially efficient way that will make the crème de la crème of the industry available to various companies and business organizations.

However, there lies some ambiguity and visible gaps in the process of conducting this entire mechanism of online proficiency test.

Firstly, it is not clear whether the existing IDs will have to vacate their office if they do not qualify online proficiency test or if they do not get themselves enrolled in the databank.

Secondly, the enrolment can be for one year, five years or for lifetime. However, the qualification requirement of passing the online proficiency test is only once in a lifetime. It is therefore, presumed that prospective IDs will update their knowledge of rapidly changing laws on their own and only under the apprehension of qualifying the online proficiency test.

Thirdly, a uniform test may not achieve its intended purpose and could shrink the pool. A board needs multiple skills depending on the business they are in and the requirements vary from business to business. Having a standardized test would only take away from the pool of available IDs and limiting the options available to a business organization.

Lastly, there is a procedural and administrative impediment concerning the fast track implementation of the aforesaid notifications. At present, neither the Institute, databank, educational material nor test system seem to be fully ready for the new requirement of ticking the box for qualifying the online proficiency test for IDs.

Conclusion

The initiative of MCA in bringing this requirement of online proficiency test for IDs can be praised as a step in the right direction. It has been observed that the number of IDs required in the industry is ever increasing. Their obligations and potential liabilities are also enormous and continue to increase. A singular database would make it easier for corporates to compare and select the right individual as per their requirements as it would give them atleast an objective scale in the form of the standardized test to compare them. This initiative of MCA is not expected to be costly and the fees payable to the Institute for the enrolment is also reasonable. Therefore, it can be said that the effort and costs would pay off in terms of knowledge possessed by the IDs along with the increased opportunities for the individuals.

However, there are some ambiguities that need to be clarified. Even though enough time has been given for the transition, this would still make it difficult for many prospective IDs to comply with the requirement. If the rules are taken literally and narrowly, it is possible that many IDs would become disqualified and some may vacate their office. Clearly, some clarification and relaxation both in terms of time and requirement of enrolment is needed. The office of IDs also needs a holistic relook so that the cream of the IDs does not quietly leave the scene being underpaid, underpowered, under-respected and over-obligated.

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Notifications and Circulars

SARFAESI – Amendments by Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 effective from 4-1-2020: The Ministry of Finance (Department of Financial Services), has vide Notification dated December 26, 2019 appointed January 04, 2019 as the date of enforcement of Sections 17 to 19 of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016. Pursuant to Section 17 of the Amendment Act, the timeline of 30 (thirty) days for filing transactions of securitisation, reconstruction and creation of security interest with the Central Registry of Securitisation Asset Reconstruction and Security Interest ("CERSAI") has been omitted. Section 18 of the Amendment Act introduces Chapter IVA in the SARFAESI Act, which deals with the registration of the particulars of transactions of creation, modification or satisfaction of any security interest by secured creditors and other creditors with CERSAI. Section 26E of the aforesaid Chapter IVA states that, upon registration of a security interest with CERSAI, the debts due to any secured creditor shall be paid in priority to all other debts, all revenues, taxes, cesses and other rates payable to the Central Government/ State Government/ local authority. However, in cases where IBC proceedings are pending in respect of secured assets of the concerned borrower, priority to secured creditors in payment of debt shall be subject to the provisions of the Insolvency and Bankruptcy Code, 2016. Section 19 of the Amendment Act amends Section 27 of the SARFAESI Act, which deals with penalties for default in filing of transactions of securitisation, reconstruction and creation/ modification/ satisfaction of security interest. Pursuant to the Amendment Act, Section 27 of the SARFAESI Act shall be deemed to have been omitted.

Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2019: The Reserve Bank of India has amended the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015. Sub regulation (ea) has been inserted in Regulation 4, as follows:

"(ea) re-export of leased aircraft/ helicopter and/or engines/auxiliary power units (APUs) re-possessed by overseas lessor and duly de-registered by the Directorate General of Civil Aviation (DGCA) on the request of Irrevocable Deregistration and Export Request Authorisation (IDERA) holder under 'Cape Town Convention' subject to permission by DGCA/Ministry of Civil Aviation for such export/s."

Regulation 4 provides exemption from filing declaration of exports under Regulation 3 for exports taking place through customs manual ports to any place outside India, other than Nepal and Bhutan. Henceforth, by inserting sub regulation (ea) in Regulation 4, such declaration of exports is not required to be filed for above mentioned case.

SEBI (Issue of Capital and Disclosure Requirements) (Fifth Amendment) Regulations, 2019: SEBI has *vide* Notification No. SEBI/LAD-NRO/GN/2019/42, dated: 06-12-2019 substituted Schedule IV of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018. As per the new schedule, Draft offer documents/ letters of offer/ offer documents shall be filed by the lead manager(s) with the relevant office of the SEBI under the jurisdiction of which the registered office of the

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issuer company is located, based on the estimated issue size as may be specified by SEBI from time to time. Additionally, a Circular No. CFD/DIL1/CIR/P/2019/0000000154, dated: 11-12-2019 has been issued clarifying that the draft offer documents in respect of issues of size up to Rs. 750 crores shall be filed with the concerned regional office of SEBI under the jurisdiction of which the registered office of the issuer company falls. Further, in respect of issues of size greater than Rs. 750 crores the draft offer documents shall be filed with SEBI head office in Mumbai.

Acquisition of financial assets by Asset Reconstruction Companies from sponsors and lenders – Restrictions: The Reserve Bank of India through Circular No. DOR.NBFC(ARC) CC. No. 8/26.03.001/2019-20, dated 06-12-2019 has reviewed its earlier Circular No. DNBS (PD) CC.No.37/SCRC/26.03.001/2013-2014, dated March 19, 2014 wherein Asset Reconstruction Companies ("ARCs") was not permitted to acquire any non-performing financial asset from their sponsor banks on a bilateral basis. As per the latest Circular, ARCs shall not acquire financial assets from the following on a bilateral basis, whatever may be the consideration:

- A bank/ financial institution which is the sponsor of the ARC;
- A bank/ financial institution which is either a lender to the ARC or a subscriber to the fund, if any, raised by the ARC for its operations;
- An entity in the group to which the ARC belongs.

However, the ARCs may participate in auctions of the financial assets, provided such auctions are conducted in a transparent manner, on arm's length basis and the prices are determined by market forces.

Through this Circular, RBI has tightened the norms for ARCs, restricting them from buying financial assets from the above-mentioned entities on a bilateral basis. However, the ARCs may continue to participate in the auctions of the financial assets.

Investment norms for mutual funds for investment in debt and money market Instruments: The Securities and Exchange Board of India had issued a Circular No. SEBI/HO/IMD/DF2/CIR/P/2019/104 dated October 1, 2019 wherein paragraph E prescribed limits on investments by debt mutual fund schemes in debt and money market instruments of group companies of both the sponsor and the asset management company ("AMCs"). The Circular No. SEBI/HO/IMD/DF2/CIR/P/2019/152 dated 10-12-2019 has been issued for partial modification of said paragraph E. As per the latest Circular, the investments of mutual fund schemes in debt and money market instruments of group companies of both the sponsor and the AMCs of the mutual fund in excess of the limits specified therein, made on or before October 1, 2019 may be grandfathered till maturity date of such instruments. The maturity date of such instruments shall be as applicable on October 1, 2019. The Circular mandates AMCs to publish on their respective website a list of their group companies and those of their sponsor(s) along with names and identifier of the respective group that are considered for calculation of group exposure by mutual fund schemes and the sector to which each company belongs. The additional disclosures required to be made under this Circular by the AMC is a step forward to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

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NBFC Peer to Peer Lending Platform (Reserve Bank) Directions, 2017, updated: On August 04, 2017, the Reserve Bank of India issued Master Directions- Non-Banking Financial Company- Peer to Peer Lending Platform (Reserve Bank) Directions, 2017. A Peer to Peer Lending Platform ("P2P") is defined under the Master Direction as '*an intermediary providing the services of loan facilitation via online medium or otherwise, to the participants*'. Further, Non-banking financial company ("NBFC") P2P means '*a non-banking institution which carries on the business of a P2P*'. This Master Direction has now been updated by the RBI by way of Circular No. DOR.NBFC(PD) CC.No.106/03.10.124/2019-20, dated 23-12-2019. The contents of this Circular are as follows:

- ***Cap on aggregate lender exposure-*** Across all P2P platforms, the RBI has placed a cap of Rs.50,00,000 on the aggregate exposure of a lender to all borrowers at any point of time, provided such P2P platform lender investments are consistent with their net-worth.
- ***Net-Worth certificate-*** The lender investing more than Rs.10,00,000 across P2P platforms shall produce a certificate to P2P platform from a practicing-chartered accountant certifying minimum net-worth of Rs. 50,00,000.
- ***Declaration by lenders-*** All the lenders shall submit declaration to P2P platforms that they have understood all the risks associated with lending transactions including the P2P platform does not assure return of principal/payment of interest.
- ***Escrow accounts-*** Escrow accounts operated by bank promoted trustee for transfer of funds need not be mandatorily maintained with the bank that has promoted the trustee.

Implications of the Circular- The recent update makes an addition in the prudential norms which are to be complied by NBFC P2P such as maintaining a leverage ratio not exceeding 2, maturity of loans not to exceed 36 months etc. for a better lending ecosystem.

Format on statement of deviation or variation for proceeds of public issue, rights issue, preferential issue, qualified institutions placement, etc.: SEBI has issued Circular No. CIR/CFD/CMD1/162/ 2019, dated 24-12-2019 to prescribe a common format for compliance with Regulation 32(1), 32(2) and 32(3) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 with respect to statements of deviation in the use of proceeds of public issue, rights issue, preferential issue etc., or variation between projected utilization of funds and the actual utilization of funds. The salient features of the prescribed format are as under:

- ***Applicability-*** The format shall be applicable for funds raised by listed entities through public issue, rights issue, preferential issue, qualified institutional placements etc.
- ***Frequency of disclosure-*** The disclosure to the stock exchange(s) shall be made by listed entities on quarterly basis along with the declaration of financial results until such funds are fully utilized or the purpose for which these proceeds were raised has been achieved.
- ***Role of the audit committee-*** The statement of deviation report shall be placed before audit committee of the listed entity for review on quarterly basis and after such review, the comments of audit committee along with the report shall be disclosed/submitted to the stock exchange, as part of the format. In cases where the listed entity is not required to have an audit committee the statement of deviation report shall be placed before board of directors of the listed entity.

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Implications of the Circular: The common format for deviation in the use of proceeds of public issue, rights issue, preferential issue or variation between projected utilization of funds and the actual utilization of funds creates more consistency and transparency in LODR Regulations.

Framework for listing of Commercial Paper - Amendments: SEBI has *vide* Circular No. SEBI/HO/DDHS/ CIRP/P/2019/167, dated 24-12-2019 modified its earlier Circular No. SEBI/HO/DHS/DDHS/CIR/P/2019/115, dated October 22, 2019 prescribing a framework for listing of Commercial Paper. The brief contents of the Circular are,

- ***Relaxation to file unaudited financials with limited review by issuers who have outstanding listing requirements -*** The proviso to paragraph 5.2 of annexure I of earlier circular which provides for *'Disclosures to be provided along with the application for listing'* shall be read as under:

✓ Provided that listed issuers (who have already listed their specified securities and/or 'Non-convertible Debt Securities' and/or 'Non-Convertible Redeemable Preference Shares') and are in compliance with SEBI (Listing obligations and disclosure requirements) Regulations, 2015, *and/or issuers (who have outstanding listed Commercial Paper (CP)) who are in compliance with Annexure II of CP Circular* may file unaudited financials with limited review for the stub period in the current financial year, subject to making necessary disclosures in this regard including risk factors.

- ***Relaxation to submit quarterly financial results-*** Second para of para 1.2 of Annexure II of earlier Circular which provides for *'Continuous obligations and disclosure requirements for listed CP'* shall be read as under:

✓ However, if an issuer is required to prepare financial results for the purpose of consolidated financial results of its parent company in terms of Regulation 33 of SEBI LODR Regulations, such issuers shall submit financial results *or shall submit quarterly financial results that have been prepared for the purpose of consolidation of their parent company.*

Implications of the Circular: The Circular provide relaxation in terms of disclosure requirements for commercial papers by permitting the submission of quarterly financial results along with (i) application for listing; and (ii) continuous disclosures for listed CP.

Stewardship Code for mutual funds and all categories of alternative investment funds: Upon SEBI, IRDA and PFDRA's examination of the proposal for introducing stewardship principles in India, the sub-committee of the Financial Stability and Development Council has approved the Stewardship Code that is meant to come into effect from April 01, 2020 and shall be applicable on all mutual funds and all categories of alternate investment funds in relation to their investment in listed equities. The Circular No. CIR/CFD/CMD1/168/2019, dated 24-12-2019 in this regard states,

- ***Principle 1: Formulate stewardship code-*** In order to monitor and actively engage with investee companies on various matters including performance, strategy, corporate governance, i*nstitutional investors are required to formulate a comprehensive policy on the discharge of their stewardship responsibilities, publicly disclose, review and update it periodically.*

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- ***Principle 2: Policy for managing conflicts of interest-*** *Institutional investors should publicly disclose a clear policy on how they manage conflicts of interest.* The conflict of interest policy formulated shall address aspects including (i) identifying possible situations where conflict of *interest* may arise; and (ii) procedures put in place by the entity in case such conflict of interest situations arises.
- ***Principle 3: Monitoring investee company-*** *Institutional investors should monitor their investee companies in respect of all aspects they consider important which shall include performance of the companies, corporate governance, strategy, risks etc.*
- ***Principle 4: Policy on intervention-*** *Institutional investors should develop and disclose a clear policy on intervention in their investee companies. A clear policy for collaboration with other institutional investors to preserve the interests of the ultimate investors should also be created.*
- ***Principle 5: Voting policy-*** *Institutional investors should have a clear policy on voting and disclosure of voting activity.* It is critical that institutional investors take their own voting decisions in the investee company after in-depth analysis.
- ***Principle 6: Periodic report-*** The periodic report must be made by institutional investors on fulfillment of their stewardship responsibilities under this Circular. The periodic report may also be sent as a part of annual intimation to its clients/ beneficiaries.

Implications of the Circular- The stewardship code sets out an exhaustive list of requirements to impose a sense of responsibility upon institutional investors and consequently protect investee companies' interest. This framework seeks to bring India at par with the global investment regulatory regime.

Ratio Decidendi

Conversion of public company into private company – Section 14 required to be followed - Endless saga of the Cyrus Mistry Feud

Key Points:

A public company converting into private company requires to follow Section 14 of the Companies Act, 2013. National Company Law Appellate Tribunal ("NCLAT") held that the General Circular No. 15/2013 cannot override the substantive provisions of Section 14 of Companies Act, 2013 which is mandatory for the conversion of a 'public company' into a 'private company'.

Facts:

Tata Sons Limited ("Respondent") is a group company comprising of 'Tata Trust', 'Tata Family', 'Tata Group Companies' ("Tata Entities") and 'Shapoorji Pallonji Group' ("SP Group"). With the equity share capital distributed of 81% is collectively held by Tata Entities and 18% equity share capital is held by SP Group.

In 2012, Mr. Cyrus Pallonji Mistry was selected as 'Executive Chairman' of the Respondents on merits after subjecting him to a professional selection process. Thereafter, the Respondents

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vide board meeting of October 24, 2016, brought a motion and passed a resolution for the replacement of Mr. Cyrus Pallonji Mistry.

On December 20, 2016, an application alleging oppression and mismanagement on part of the management of the Respondent was filed in National Company Law Tribunal, Mumbai by Cyrus Investments Pvt. Ltd. and Sterling Investments Corporation Pvt. Ltd. (collectively, "Firms"). The applicants also sought waiver from the non- fulfilment of the threshold requirement of 10% ownership in the company for the filing of a case of oppression and mismanagement by the Respondent under Section 244(2) of the Companies Act ("Threshold"). However, the same was set aside by NCLT citing the non-fulfillment of threshold requirement by the Company.

The Firms moved the NCLAT, challenging NCLT order which rejected their petitions over maintainability and also challenged rejection of their waiver plea.

On September 21, 2017, the NCLAT accepted the application of the Firms seeking filing of waiver in filing case of oppression and mismanagement against the Respondents. However, NCLAT dismissed the maintainability on the ground that the Firms did not have more than 10 % (ten percent) ownership in Respondent.

On July 09, 2018, NCLT also dismissed plea of Mr. Cyrus Pallonji Mistry challenging his removal as the chairman of the Respondent.

Subsequently, on August 29, 2018 NCLAT accepted the application filed by Mr. Cyrus Pallonji Mistry in his personal capacity and decided to hear the application along with the main petitions filed by the Firms. Hence, the present matter was heard by NCLAT.

Observations of Appellate Tribunal:

1. The NCLAT vide its Order:
   a) Restored the position of Mr. Cyrus Pallonji Mistry and held that the board meeting of the Respondent held on October 24, 2016 so far as it relates to the removal and other actions against Mr. Cyrus Pallonji Mistry was illegal.
   b) held that Mr. Ratan Tata and the nominee of 'Tata Trust' shall desist from interfering with any decision of the Respondent in advance which require majority decision of the board of directors in the Annual General Meeting.
   c) held that the Article 75 of the Article of Association of the Respondent which was 'prejudicial' and 'oppressive' against the Appellants will not be exercised by the board of directors of the Respondent and its shareholders. It also held that the Respondent may use the aforesaid article sparingly but before exercising such power, reasons should be recorded in writing and intimated to the concerned shareholders whose right will be affected.
   d) held that the decision of the Registrar of Companies changing the Respondent from 'public' company to 'private company as illegal and set aside the decision.
2. Whether the removal and other actions taken against Mr. Cyrus Pallonji Mistry were illegal?
   Held: Yes, the removal and other actions taken against Mr. Cyrus Mistry were not legal since, the compliance requirement to be followed under the Companies Act, 2013 were not adhered to and consequently, the decision of the board of directors of the Respondent vide the board resolution of October 26, 2016 was set aside.

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As a result, Mr. Cyrus Pallonji Mistry was reinstated as the 'Executive Chairman' of the Respondent, however, the NCLAT agreed to suspend the aforesaid reinstatement for a period of 4 (four) week.

3. Whether the conversion of the Respondent from a public to private company was legal?
 Held: NCLAT held that the conversion of the Respondent from public to a private company had to be in compliance with Section 14 of the Companies Act, 2013 and also held that the conversion of the Respondent was not as per the provisions of Companies Act, 2013. Thus, holding the conversion of the Respondent from public company into private company illegal and it was set aside by the NCLAT.

4. Whether there was a prejudicial or oppressive treatment against the minority shareholders?
 Held: Yes. The Respondent, its board of directors and shareholders, did not exercise their duties in a fair manner. Mr. Cyrus Pallonji Mistry had sought the board of directors to take fair governance decision on numerous occasions however, the board of directors did not conduct themselves fairly.

Order:

The impugned judgement dated July 09, 2018 passed by NCLT Mumbai was set aside. Both the appeals were allowed with no costs. After the Judgment, due to the prayer by the Respondent, the NCLAT agreed to suspend the aforesaid reinstatement for a period of 4 (four) week. [*Cyrus Investments Pvt. Ltd.* v. *Tata Sons Ltd. & Ors.* - Company Appeal (AT) Nos. 254 and 268 of 2018, Order dated December 18, 2019, National Company Law Appellate Tribunal]

Time consumed in SARFAESI proceedings to be excluded for calculating limitation under IBC

Key Points:

The time period consumed in enforcing security interest under Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI") against a corporate debtor may be excluded when computing limitation period under the Insolvency and Bankruptcy Code, 2016 ("IBC") if the financial creditor is found to be vigilant and bona fide in carrying out the SARFAESI proceedings.

Facts:

Prior to the application filed under Section 7 of the IBC, the Respondent sanctioned a cash credit facility in the favour of the Appellant on February 12, 2012. Subsequently, the Appellant committed default on repayment of debt and the its account was declared as Non-Performing Assets on March 31, 2013. Pursuant to aforesaid default, a demand notice dated January 18, 2014, under Section 13(2) of the SARFAESI and a possession notice dated December 24, 2014, under Section 13(4) of the SARFAESI was issued against the Appellant by the Respondents. Upon continuous default on the part of the Appellant, the possession order dated May 11, 2017 was passed by the District Magistrate, Hooghly.

Concurrently, the Appellant filed a writ petition on December 19, 2014 before Kolkata High Court against the Respondent challenging the demand notice dated January 18, 2014 under Section 13(2) of the SARFAESI. In this regard, Kolkata High Court restrained the Respondent from taking any further steps under SARFAESI via an order dated July 24, 2017.

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Whereas, the account of the Appellant was declared as NPA on March 31, 2013, the application under Section 7 of the IBC was filed at NCLT on August 27, 2018 i.e. after almost 5 years and 5 months from date of cause of action by the Respondents. As held by the Supreme Court in previous cases, Article 137 of the Limitation Act, 1963 requires an application under Section 7 of the IBC to be made within three years from date of cause of action i.e. till March 30, 2016.

Accordingly, the Appellant requested to set aside and stay the NCLT, order dated April 25, 2019 initiating CIRP against the Appellant. Whereas, the Respondent requested an exclusion of time period consumed in SARFAESI proceedings (3 years and 6 months) from the day the account was termed NPA under Section 14(2) of the Limitation Act.

Observations by the Appellate Tribunal:

Whether the Respondent was entitled to exclusion of time consumed in SARFAESI proceedings under Section 14(2) of the Limitation Act for computing the period of limitation for application filed under Section 7 of the IBC?

Held: Yes, the Respondent was entitled to an exclusion of 3 years and 6 months starting from the issue date of demand notice i.e. January 18, 2014 under Section 13(2) of SARFAESI. The exemption was granted as the Appellate Tribunal found that the Respondent had been vigilant about his rights, bona fide and duly diligent in proceeding against the Appellant under SARFAESI at that time.

Order:

The application filed by the Respondents under Section 7 of the IBC was held well within the limitation period of 3 years under Article 137 of the Limitation Act. The appeal was dismissed without any order to costs. [*Sesh Nath Singh and Anr.* v. *Baidyabati Sheoraphuli Cooperative Bank Ltd.* - Company Appeal (AT) (Insolvency) No. 672 of 2019, Order dated 22-11-2019, National Company Law Appellate Tribunal]

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News Nuggets

Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 promulgated

The Central Government has on 28-12-2019 promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019. As per the Ordinance, the insolvency proceedings against a real estate company can only be initiated by a minimum of 100 flat allottees or 10 per cent of total number of allottees (as financial creditors), whichever is lower. The ordinance states that any existing license, permit, registration, quota, concession, or clearance, given by the government or local authority, will not be suspended or terminated on the grounds of insolvency. However, there should be no default in payment of current dues for the use or continuation of such grants. The resolution plan may result in change in management of the corporate debtor and the liability for offences committed prior to institution of CIRP will cease (subject to conditions) from the date the plan is approved by the NCLT.

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Chit Funds (Amendment) Act, 2019 effective from 1st of January, 2020

The Central Government has *vide* notification dated December 26, 2019 appointed the January 01st, 2020 as the date of enforcement of Chit Funds (Amendment) Act, 2019. The amendment *inter alia* substitutes the words chit amount, dividend and prize amount with gross chit amount, share of discount and net chit amount, respectively. The amendment states that at least two subscribers must be present, either physically or via video-conferencing, when a chit is drawn. The maximum commission of a foreman is now revised from 5% of the chit amount to 7%.

Section 142(2) of Negotiable Instruments Act, 1881 is constitutionally valid

Division Bench of the Madras High Court *vide* judgement dated December 18, 2019 has upheld the constitutional validity of Section 142(2) inserted vide Negotiable Instruments (Amendment) Act, 2015. The petitioners challenged the amendment primarily claiming that the amendment goes completely contrary to the judgment of the Supreme Court in *Dashrath Rupsingh Rathod v. State of Maharastra* [AIR 2014 SC 3519]. In the said case, the Apex Court had held that in cases of dishonor of cheques, only those courts within whose territorial limits the drawee bank is located would have jurisdiction to entertain the case. However, by the amendment in question, the entire basis of the judgment of *Dashrath Rupsingh Rathod* has been removed. The High Court however held that the power of the legislature to take away the basis of a judgment by making amendments is well settled and the Parliament is competently empowered to amend Negotiable Instruments Act, 1881.

Place of arbitration is juridical seat of arbitration unless there is an indication to contrary

The Supreme Court *vide* its judgment dated December 10, 2019 has held that where no seat has been specifically designated in an arbitration agreement, the venue is the seat of the arbitration. Relying on the principle laid down in *Roger Shashoua & Ors. v. Mukesh Sharma,* [2009] EWHC 957 (Comm)., by a English Court, the Supreme Court held that when there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.

Jammu & Kashmir – Special Court for speedy trail of offences under Companies Act, 2013

In exercise of the powers conferred by sub-section (1) of Section 435 of the Companies Act, 2013, the Central Government, with the concurrence of the Chief Justice of the High Court of Jammu and Kashmir, has *vide* Notification dated December 19, 2019 designated Courts of Additional Sessions Judges, Anti-corruption, Jammu and Srinagar as Special Courts for the purposes of trial of offences punishable under the Companies Act, 2013 with imprisonment of two years or more in terms of Section 435 of the Companies Act, 2013.

Form BEN-2 and Form BEN-1 - Relaxation of additional fee and extension of last date

The Ministry of Corporate Affairs has *vide* Circular dated January 01, 2020 and in continuation of General Circular No. 10/2019

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extended the last date for filing Form BEN-2 to March 31, 2020 without payment of additional fee. Subsequently, the last date for filing of Form BEN-1 is to be construed accordingly.

CRX-4 for FY 2018-19 - Relaxation of additional fee and extension of last date

In continuation to MCA General Circular No. 12/2019 dated October 24, 2019 and in view of several representations received from various stakeholders for extension of last date, MCA *vide* Notification dated December 30, 2019 has extended the last date of filing of CRA-4 (cost audit report) for all eligible companies for the FY 2018-19, without payment of additional fee to September 29, 2020.

LLP must register as Company under Companies Act, 2013 prior to its merger with another Company

NCLAT, *vide* judgement dated December 04, 2019 has ruled that a limited liability partnership (LLP) may only be merged with an Indian company by first registering the LLP as a company. Aggrieved by the Order of NCLT approving the merger of LLP and Company, the RD and ROC had preferred the appeal before NCLAT. The respondents herein argued that the amalgamation scheme for LLPs and Companies must be sanctioned by the same authority i.e. NCLT. Hence there is no utility that LLP first convert into company then apply for merger. Upholding the appeal, NCLAT held that there is no question of infringement of any constitutional rights of the respondents.

NCLT Order not as per Rule 151 of NCLT Rules - Bombay High Court quashes IBC admission order

The Bombay High Court *vide* Order dated November 29, 2019 has quashed the IBC admission order of NCLT on the ground that the corporate debtor was unaware of the pronouncement and there is no record to prove that the order was pronounced as per Rule 151 of NCLT Rules, 2016. Rule 151 deals with pronouncement of order by any one member of the Bench and *inter alia* states that when an order is pronounced under this rule, the Court Master shall make a note in the order sheet, that the order of the bench consisting of president and members was pronounced in open court on behalf of the Bench.

High Court when has jurisdiction over NCLT

Observing that the NCLT was *coram non-judice*, the Larger Bench of Supreme Court has held that High Court of Karnataka was justified in entertaining the writ petition, against the NCLT order. It held that NCLT did not had jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. The Court in *Embassy Property Developments Pvt. Ltd. v. State of Karnataka* was of the view that NCLT/NCLAT would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. It was however held that NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, and hence fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.

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Arbitration - Challenge on inadequacy of reasons of arbitration award, must be adjudicated based on degree of particularity of reasoning required

The Supreme Court *vide* judgement dated December 18, 2019 has held that unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards. The Court further held that the mandate under Section 31(3) of the Arbitration Act, 1996 is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the Courts from a fair reading of the award and documents referred to thereunder, if the need be and the said aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regards to the speedy resolution of dispute.

TRAI issues pre-consultation paper on 'Enabling unbundling of different layers through differential licensing'

A pre-consultation paper has been issued pursuant to a reference received from the Department of Telecommunications (DoT) under which the DoT has sought recommendations on enabling unbundling of different layers through differential licensing. The telecom network mainly comprises of three layers: i) infrastructure, network, services and applications layer. Currently, the unified licenses issued to telecom operators are not segregated. The pre-consultation paper proposes to enable a parallel regime where the license itself can be granted for establishing a network, maintaining it and provide it on wholesale basis to the service delivery operators for retailing purpose. In the background, TRAI has sought views from stakeholders by January 27, 2020.

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