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EDITORS DESK ...



Dear Readers,

I am pleased to share the 2nd issue of SNG Newsletter dated September, 2022. I am also glad to take this opportunity and wish you on behalf of everyone at SNG a very happy and joyous Diwali.

This issue of the newsletter contains important developments in the areas of ESG, FEMA, IBC, PMLA, RERA as well as recent regulations and circulars issued by RBI, SEBI and MCA.

I am sure you will find this information useful.

Best wishes,

Rajesh Narain Gupta

Managing Partner,

SNG & Partners

A. BANKING AND FINANCE

1. Madras HC expounds: Only Fraud and Irretrievable Injury are grounds for interfering with the Bank Guarantee¹

A two-judge bench of the Madras High Court comprising of Justice M. Duraiswamy and Justice Sunder Mohan reiterated that the invocation of bank guarantee cannot be ordinarily interfered with unless the two grounds namely (i) fraud and, (ii) irretrievable injury are shown, which is independent of the breach or otherwise of the primary contract. Further, in order to establish irretrievable injury, on account of invocation of bank guarantee, the irretrievable injury must be such that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

2. Original Title Documents of Property of Customer lost by Bank: NCDRC says compensate²

The NCDRC has set aside State Commission's order denying compensation to the customer whose bank lost the original title documents of his property.

It allowed the appeal under Section 19 of the Consumer Protection Act, 1986 while opining that there are makings of post-haste adjudication and pre-judging of the case on the part of the State Commission which critique the amount of Rs. 95 lakh that has been claimed and has termed it to be 'very high'.

Commission stated that, "Non-availability of its original title documents unarguably puts a property under suspicion in the eyes of the general public or prospective buyers and decisively impacts its value detrimentally. The consequences continue in perpetuity, they continue even after the property has devolved to the heirs i.e. the value-extenuating consequences sustain indefinitely. The adverse consequences of non-availability of the original title documents do not appear to have been realistically appreciated in the right pragmatic perspective by the State Commission."

3. SC dismisses Appeal: Appellant has no locus standi as he is neither a Company nor a member nor creditor of the Company struck off from RoC³

The division judge bench of Justice Ajay Rastogi and Justice B.V. Nagrathana of the apex court in the case of Nirendra Nath Kar v. Gopal Navin Bhai Dave & Ors didn't interfere with the decision of the high court in which it was held that the appellant has no locus standi as he is neither a Company nor a member nor creditor hence he cannot be said to be a person aggrieved to question the order of the Registrar in striking off the name of the Company from the register of RoC as referred to under Section 560(5) of the Act 1956.

¹<https://latestlaws.com/case-analysis/hc-expounds-only-fraud-and-irretrievable-injury-are-grounds-for-interfering-with-the-bank-guarantee-read-judgment-189436/>

²<https://latestlaws.com/case-analysis/original-title-documents-of-property-of-customer-lost-by-bank-ncdrc-says-compensate-read-order-189123/>

³<https://latestlaws.com/case-analysis/sc-dismissed-an-appeal-for-the-restoration-of-the-company-s-name-because-it-cannot-be-determined-by-someone-whose-status-as-a-director-is-in-dispute-read-judgment-190210/>



4. Notification by the Ministry of Electronics and Information Technology amends the IT Act, 2000 schedule to include Demand Promissory Note and Power of Attorney in favor of entities regulated by the RBI, SEBI, NHB, IRDA and PFRDA

“With regard to the Notification by the Ministry of Electronics and Information Technology dated 26th September, 2022, in exercise of the powers conferred by the proviso to sub-section (4) of Section 1 of the Information Technology Act, 2000, the Central Government has made Amendments to the First Schedule of the Act.

The Act’s Schedule amended would include Demand Promissory Note and Power of Attorney in favor of entities regulated by the Reserve Bank of India, Securities and Exchange Board of India, National Housing Bank, Insurance Regulatory and Development Authority, and Pension Fund Regulatory and Development Authority.

Any contract for the sale or conveyance of immovable property or any interest in such property has been omitted. Hence, a contract of sale, conveyance, and mortgage can now be done electronically in terms of the Amendment, but these have a physical registration requirement.”

B. ESG IN SINGAPORE

1. Disclosure and Reporting Guidelines for Retail ESG Funds.

The ESG Circular will apply to

1. holders of a capital markets services licence in respect of fund management, and
2. trustees approved under section 289 of the Securities and Futures Act 2001 (to act as approved trustees in relation to certain collective investment schemes).

The Circular will take effect on 1 January 2023. Regulations would apply to retail ESG funds, and the applicable disclosure and reporting guidelines.⁴

C. FEMA

1. Evasion of tax robs the nation of critical resources and could be used in ways which could threaten National security

The Jammu and Kashmir and Ladakh High Court observed that money stashed abroad by evading tax could be used in ways which could threaten National security. It further observed that Stashing away of black money abroad by some people with the intent to evade taxes has been a matter of deep concern to the nation. The bench further stated that evasion of tax robs the nation of critical resources necessary to undertake programs for social inclusion and economic development. It also puts a disproportionate

⁴Monetary authority of Singapore (CFC 02/2022 Dated July 28, 2022.)



burden on the honest taxpayers as they have to bear the brunt of higher taxes to make up for the revenue leakage caused by evasion.

The Court dismissed a batch of petitions challenging orders and notices passed by the authorities under Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act (the Act of 2015).

The bench also stated that the Act of 2015 provides complete machinery for the person aggrieved of any action taken by the Assessing Officer and the said person could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had the adequate remedy open to him by way of an appeal to the Commissioner of Appeals.⁵

D. INSOLVENCY AND BANKRUPTCY CODE

1. NCLAT: Margin money can in no manner be said to be a ‘Security Interest’ as defined under Section 3(31) of the IBC

Issue: Whether margin money deposited by way of an FDR against a Letter of Credit construes, a ‘Security’ as provided for under the Code and Whether this margin money can be appropriated by the Bank during the period of Moratorium on the ground that it does not form a part of the asset of the Corporate Debtor?

Decision: It held that margin money can in no manner be said to be a ‘Security Interest’ as defined under Section 3(31) of the IBC. Section 14(1)(c) prohibits any action to foreclose, recover or ensure any ‘Security Interest’ created by the Corporate Debtor in respect of its property. As held that no ‘Security Interest’ was created by the Corporate Debtor with respect to the margin money that was deposited by the Corporate Debtor Company towards the opening of the Letter of Credit in the Appellant Bank, NCLAT is of the view that the Banks having appropriated this money during the period of Moratorium is justified, the amount is not an asset of the Corporate Debtor. Therefore, a conjoint reading of Section 3(31) and Section 14 of the Code makes it abundantly clear that margin money is not included as a ‘Security’ and is not an asset of the Corporate Debtor.⁶

2. SC: There is no bar to withdrawal of an admitted CIRP application before constitution of Committee of Creditors.

The Supreme Court (“Court”) observed that there is no bar to withdrawal of an admitted CIRP application before constitution of Committee of Creditors.

The Court further noted that Rule 11 of the NCLT Rules enable NCLT to pass orders for the ends of justice including orders permitting an applicant for CIRP to withdraw its application and to enable a corporate body to carry on business with ease, free of any impediment.⁷

⁵<https://www.latestlaws.com/case-analysis/hc-evasion-of-tax-robs-the-nation-of-critical-resources-and-could-be-used-in-ways-which-could-threaten-national-security-read-judgement-190252/>

⁶<https://www.latestlaws.com/latest-news/nclat-margin-money-can-in-no-manner-be-said-to-be-a-security-interest-as-defined-under-section-3-31-of-the-ibc-190291/>

⁷<https://www.latestlaws.com/latest-news/sc-there-is-no-bar-on-withdrawal-of-an-admitted-cirp-application-before-constitution-of-committee-of-creditors-read-judgement-190287/>

Further, the withdrawal of an application for CIRP by the applicant would not prevent any other financial creditor from taking recourse to a proceeding under IBC. The urgency to abide by the timelines for completion of the resolution process is not a reason to stifle the settlement.

3. SC: The approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower.

The Supreme Court (“Court”) observed that approval of a resolution in respect of one borrower cannot discharge a co-borrower.

On a parity of reasoning given in matter of Lalit Kumar Jain v/s Union of India the Court held that, the approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower.

If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the Corporate Debtors.

Needless to mention, the same amount cannot be realised from both the Corporate Debtors. If the dues are realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over.⁸

4. NCLAT applied the Doctrine of Prospective Overruling: When status of a debtor attains finality, the same cannot be altered on the basis of a subsequent judgement in different proceedings

The NCLAT applied the Doctrine of Prospective Overruling while observing that when status of a debtor attains finality, the same cannot be altered on the basis of a subsequent judgement in different proceedings.

NCLT had admitted the Corporate Debtor into insolvency under Section 7 for defaulting in payments in respect of supply of materials.

Subsequently, the Supreme Court in Anuj Jain v/s Axis Bank Limited had held that debt arising out of supply of materials in operational debt and not financial.

The NCLAT bench declined to intervene in NCLT’ order by applying the Doctrine of Prospective Overruling.

Further it was held that NCLT is exclusively invested with inherent jurisdiction to decide the petition filed under Section 7, 9 or any of the provisions of IBC.⁹

⁸<https://www.latestlaws.com/case-analysis/sc-the-approval-of-a-resolution-in-respect-of-one-borrower-cannot-certainly-discharge-a-co-borrower-read-judgement-190289/>

⁹<https://www.latestlaws.com/case-analysis/nclat-applied-the-doctrine-of-prospective-overruling-when-status-of-a-debtor-attains-finality-the-same-cannot-be-altered-on-the-basis-of-a-subsequent-judgement-in-different-proceedings-read-judgement-190243/>

5. SC expounds: Sec- 48 of Gujrat Value Added Tax Act not contrary to or inconsistent with Sec- 53 or any other provisions of IBC

The Supreme Court held that a Resolution Plan which ignores the statutory demands payable to any State Government or a legal authority, altogether, is liable to be rejected.

The Supreme Court also held that the Section 48 of the Gujrat Value Added Tax Act (“GVAT”) is not contrary to or inconsistent with Section 53 or any other provisions of the Insolvency and Bankruptcy Code.

Under Section 53(1)(b)(ii), the debts owed to a secured creditor, would include the State under the GVAT Act.¹⁰

6. NCLAT: Remanding a resolution plan back to Committee of Creditors (“CoC”) on the grounds of the procedural deviations would render the Corporate Insolvency Resolution Process (CIRP) a never-ending process.

The NCLAT held that remanding a resolution plan back to Committee of Creditors (“CoC”) on the grounds of the procedural deviations rose by a dissenting minority in class of creditors, would render the Corporate Insolvency Resolution Process (CIRP) a never-ending process and is against the time bound objective of the Insolvency and Bankruptcy Code.

The NCLAT declined to remand back the revise Resolution Plan to CoC over hyper-technical grounds raised by minority dissenting creditors.¹¹

7. Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Second Amendment)

In first Schedule, after clause 26, the following clause has been inserted:

“26A. An insolvency professional shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes.”¹²

8. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2022 No. IBBI/2022-23/GN/REG091. With effect from September 13, 2022.

Schedule-II and Regulation 34B has been inserted in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

This Regulation is based on:

- i. Per month minimum fee.
- ii. Performance-linked incentive fee for timely resolution.

¹⁰<https://www.latestlaws.com/case-analysis/sc-sec-48-of-gujrat-value-added-tax-act-not-contrary-to-or-inconsistent-with-sec-53-or-any-other-provisions-of-ibc-read-judgement-190244/>

¹¹<https://www.latestlaws.com/case-analysis/nclat-remanding-a-resolution-plan-back-to-committee-of-creditors-on-grounds-of-procedural-deviations-would-render-cirp-a-never-ending-process-read-judgement-190294/>

¹²<https://ibbi.gov.in/uploads/legalframework/b6c7706eeb134271106c3c0cb56a1e27.pdf>

Performance-linked incentive fee for value maximisation i.e., fix percent of realisable value over liquidation value.¹³

9. NCLAT: If Resolution Plan could not be approved after expiry of Statutory Period, proceedings to be initiated under Sec- 33(2) IBC

NCLAT held that once Resolution Professional (“RP”) in compliance with the conditions mentioned in Section 33(2) with a prayer to liquidate Corporate Debtor, the Adjudicating Authority (“AA”) has no option but to pass an order for liquidation.

The word “shall” in Section 33(2) has been inserted and as such on being intimated by the RP, in the present case, the Committee of Creditors has resolved for liquidation in terms of Section 33(2) and as such the AA was having no option but to pass order for initiation of the liquidation proceeding.

After initiation of liquidation proceeding under Section 33(2) of IBC the status of appellant may not be maintained as suspended directors.

The suspension of director of a Corporate Debtor comes to an end after conclusion of proceeding initiated either under Section 7 and Section 9 of IBC.

Once liquidation proceeding is initiated under Section 33(2) of IBC, officers/employees and workmen of the Corporate Debtor shall be deemed to be under discharge notice.¹⁴

10. SC: Liability of a Guarantor is co-extensive with the Borrower

The Supreme Court (“SC”) held that Corporate Insolvency Resolution Process (“CIRP”) under applicable provisions of Insolvency and Bankruptcy Code, 2016 (“IBC”) can be initiated against the corporate guarantor without proceeding against the borrower of the defaulted loan (“Principal Borrower”).

The liability of the corporate guarantor is co-extensive with that of the Principal Borrower.

The SC noted that, under Section 7 of IBC, CIRP can be initiated against a corporate entity who has given a corporate guarantee to secure the dues of a non-corporate entity as a financial debt accrues to the Principal Borrower, being entity, in respect of the guarantee given by such corporate guarantor, once the Principal Borrower commits default.¹⁵

11. NCLAT: It is the duty of the Resolution Professional (“RP”) to exercise necessary care and diligence in verifying the claims and scrutinise the documents for genuineness and authenticity.

It was held by the NCLAT that since the voting share in the Committee of Creditors is extremely relevant and important element in the CIRP insofar as the insolvency resolution of the Corporate Debtor is concerned. It was the duty of the Resolution Professional (“RP”) to exercise necessary care and

¹³<https://ibbi.gov.in/uploads/legalframework/7c96f51884d5ad840f4a7af0d6bba604.pdf>

¹⁴<https://www.latestlaws.com/case-analysis/nclat-if-resolution-plan-could-not-be-approved-after-expiry-of-statutory-period-proceedings-to-be-initiated-under-sec-33-2-ibc-read-judgement-190248/>

¹⁵<https://www.latestlaws.com/case-analysis/sc-liability-of-a-guarantor-is-co-extensive-with-the-borrower-read-judgement-190247/>

diligence in verifying the claims and scrutinise the documents submitted with Form C for genuineness and authenticity.

It also noted that such exercise does not appear to have been done by the RP in the present case.

NCLAT also urged the Insolvency and Bankruptcy Board of India to investigate this matter further regarding the conduct of RP and take necessary action under the regulation.¹⁶

12. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022

By this amendment the following regulations are inserted and/or substituted, namely:

1. Insertion of Regulation 4C: Process e-mail;
2. Insertion of Regulation 6A: Communication to creditors;
3. Insertion of Explanation in Regulation 18(1);
4. Substitution in of Regulation of 35 A (3);
5. Insertion of Regulation 35A(3A);
6. Substitution in Regulation 36(1) and 36(2);
7. Insertion of Regulation 36B(6A);
8. Insertion of Regulation 36C: Strategy for marketing of assets of the corporate debtor;
9. Insertion of Regulation 37(1)(m);
10. Insertion of Regulation 39BA: Assessment of Compromise or Arrangement;
11. Substitution for the Table in Regulation 40A;
12. Insertion of Regulation 40 D: Decision for liquidation; and
13. Substitution of Form G in the Schedule.

Press release dated September 17, 2022 is attached for better understanding.¹⁷

13. Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Second Amendment) Regulations, 2022

By this amendment the following regulations are inserted and/or substituted, namely:

1. Insertion of Regulation 3(5); and

Substitution of Regulation 41: Preservation of records.¹⁸

¹⁶<https://www.latestlaws.com/case-analysis/nclat-it-is-the-duty-of-the-resolution-professional-to-exercise-necessary-care-and-diligence-in-verifying-the-claims-and-scrutinise-the-documents-for-genuineness-and-authenticity-read-judgement-190285/>

¹⁷<https://ibclaw.in/ibbi-insolvency-resolution-process-for-corporate-persons-fourth-amendment-regulations-2022-ibbi-notification-no-ib-bi-2022-23-gn-reg093-dated-16-09-2022/>

¹⁸<https://ibbi.gov.in/uploads/legalframework/812b4ba287f5ee0bc9d43bbf5bbe87fb.pdf>



14. Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022

By this amendment the following regulations are inserted and/or substituted, namely:

1. Insertion of proviso in Regulation 2B;
2. Insertion of regulation 4(1A);
3. Insertion of Regulation 12(2)(c);
4. Insertion of Regulation 12A: Process email ID;
5. Substitution in Regulation 15(1);
6. Omission of Proviso of Regulation 15(4);
7. Insertion of Proviso in Regulation 30;
8. Substitution in Regulation 31A (1);
9. Insertion of Regulation 31A(1A);
10. Substitution in Regulation 31A (2);
11. Substitution in Regulation 31A (3);
12. Insertion of Regulation 31A (4A);
13. Substitution in Regulation 31A (6);
14. Substitution of words “Voting” in Regulation 31A (9);
15. Substitution in proviso of Regulation 31A (10);
16. Insertion of Regulation 31A (11);
17. Substitution in Regulation 32A (4);
18. Insertion of Regulation 32B: Conduct of meetings of the constitution committee;
19. Substitution in Regulation 34 (1) and 34(5);
20. Insertion of Regulation 34(1A);
21. Omission of proviso of Regulation 44(1);
22. Insertion of Regulation 44A;
23. Insertion of Regulation 45A: Preservation of Records;
24. Insertions in the Table in Regulation 47;
25. Insertion of pf clause 1A, 1B, 1C, 1D, 1E, and 1F in Para 1 of Schedule I;
26. Substitution of clause 7 in Schedule I; and Insertion of Form AA in Schedule II. ¹⁹

¹⁹<https://ibclaw.in/ibbi-liquidation-process-second-amendment-regulations-2022/>



E. MINISTRY OF CORPORATE AFFAIRS

- 1. Adjudicating Officer, ROC: Company along with its director shall be liable to pay the requisite fine for the act of not mentioning the Director Identification Number (“DIN”) for filings to be made by ROC.**

Ruling:

In the Order dated September 08, 2022 in the court of Adjudicating Officer, Registrar of Companies, Gujarat, Dadra and Nagar Haveli in the matter of M/s Premier Solution Private Limited ordered that a Company along with its director shall be liable to pay the requisite fine for the act of not mentioning the Director Identification Number (“DIN”) for filings to be made by the Registrar of Companies (“ROC”) in compliance with Section 158 of the Companies Act, 2013 (“Act”). The penalty should be adjudicated in line with Section 172 of the Act.²⁰

- 2. Ministry of Corporate affairs vide notification has amended the definition of small company**

Notification dated September 15, 2022 issued by Ministry of Corporate Affairs in regards to amendment in the Companies (Specification of definition details) Rules, 2014. The Ministry of Corporate affairs vide notification no. GSR 700 (E) amended the definition of small company. As per the amendment a small company shall not exceed paid up share capital of rupees four crores and turnover of rupees forty crore.²¹

F. PREVENTION OF MONEY LAUNDERING ACT

- 1. Delhi High Court: Prosecution under PMLA not possible once accused is acquitted of the Scheduled Offence**

The Delhi High Court observed that the authorities under the PMLA cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed.

Further, the scheduled offence must be registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum and, in the event there is already a registered scheduled offence but the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or quashing of the criminal case of the scheduled offence, there can be no action for money laundering against not only such a person but also any person claiming through him in relation to the property linked to the stated scheduled offence.²²

²⁰<https://www.mca.gov.in/bin/dms/getdocument?mds=MtH%252Bay215Kag5jhle6hd7A%253D%253D&type=open>

²¹<https://www.mca.gov.in/bin/dms/getdocument?mds=tiMs9lFJ8xuPm%252B%252Foxc6fUw%253D%253D&type=open>

²²<https://www.latestlaws.com/case-analysis/hc-prosecution-under-pmla-not-possible-once-accused-is-acquitted-of-the-scheduled-offence-read-judgment-190250/>

2. **Delhi High Court: A mere exculpatory statement to the ED not a reasonable ground to be guilty of an offence under PMLA**

The Delhi High Court ordered that an exculpatory statement to the Enforcement Directorate can never suffice to form a ground, leave alone a reasonable ground to believe that the applicant is not guilty of the offence.

High Court Bench further observed that law by virtue of Explanation (ii) to Section 44(d) of the PMLA empowers the Directorate of Enforcement to investigate and file a charge-sheet and continue investigations, including against the named accused.²³

G. **PRESS INFORMATION BUREAU**

1. **Ministry of Corporate Affairs_ - MCA revises threshold for paid up capital of “small companies”**

Ministry of Corporate Affairs through this notification revised the definition of “small companies” under the Companies Act, 2013 by increasing such thresholds for paid up Capital from “not exceeding Rs. 2 crore” to “not exceeding Rs. 4 crore” and turnover from “not exceeding Rs. 20 crore” to “not exceeding Rs. 40 crore”²⁴

H. **RERA**

1. **MAHARERA- Transfer of rights in a project implies transfer of all accompanying liabilities towards allottees**

Facts:

Complaint was filed in respect of a project named “Willows Twin Tower” in Pune which was a RERA registered project. The Complainant sought refund along with interest and compensation under section 18 of the Real Estate (Regulation and Development) Act 2016 (“RERA Act”) on account of the delay in handing over the possession of flat as promised in the agreement for sale executed between the Complainant and Respondent no. 1.

The Respondent no. 2 contended that the project was taken over by Respondent no. 2 from Respondent no. 1 under section 15 of RERA Act and therefore had no privity of contract with the Complainant. Therefore, the alleged refund, interest and compensation should be claimed only from Respondent no. 1.

Ruling:

It was held that transfer of rights in a project implies transfer of all accompanying liabilities towards

²³<https://www.latestlaws.com/case-analysis/hc-a-mere-exculpatory-statement-to-the-ed-not-a-reasonable-ground-to-be-guilty-of-an-offence-under-pmla-read-judgement-190249/>

²⁴<https://www.mca.gov.in/bin/dms/getdocument?mds=tiMs9IFJ8xuPm%252B%252Foxc6fUw%253D%253D&type=open>

allottees. Section 15 explicitly mentions that the incoming promoter shall comply with all pending obligations of the erstwhile promoter.

Hence, the complaint was allowed. Respondent no. 2 was directed to refund the entire amount paid by the complainant along with interest at SBI's MCLR + @% from date of default till actual realisation of the aforesaid amount.

The Hon'ble Authority allowed the Respondent to claim benefit of "moratorium period" as mentioned in the notifications issued by MahaRERA pertaining to Covid-19 as 'force majeure'.²⁵

3. MahaRERA: Once the OC for Real Estate Project is received from the relevant Planning Authority, the project is assumed to be complete in all aspects as per the sanctioned plan

Facts:

An agreement for sale (AFS) dated 2nd May 2019 was entered into between the Complainant (Allottee) and the Respondent (Promoter) wherein the date of possession for the subject flat was stipulated as 31st May 2019. The Respondent submitted that the occupation certificate (OC) for the project was received on 9th April 2019 and possession was offered on 17th May 2019. However, the Complainant sought preferential car parking and did not take possession until 19th July 2019. The Complaint was filed on 6th July 2019.

Ruling:

The Complaint was dismissed as was not maintainable. The Hon'ble Member noted that the OC was received even before the AFS was registered and that once the OC for any real estate project is received from the relevant Planning Authority; the project is assumed to be complete in all aspects as per the sanctioned plan approved by the aforesaid Authority. Hence, no cause of action remains in terms of section 18 of the Real Estate (Regulation and Development) Act, 2016.²⁶

I. RESERVE BANK OF INDIA

1. Guidelines on Digital Lending

Reserve Bank of India has issued the Guidelines on Digital Lending which shall be applicable to all lenders, including banks. As per the guidelines issued by the RBI, the regulated entities cannot store borrowers' data except for some basic minimal information. The new guidelines are effective immediately for existing customers availing fresh loans and to new customers getting onboarded, and Regulated Entities must ensure that the guidelines are to be implemented within November 30, 2022.²⁷

²⁵<https://www.latestlaws.com/case-analysis/maharera-if-the-promoter-fails-to-handover-the-possession-of-the-flat-to-the-allottee-then-he-will-be-liable-read-judgement-190241/>

²⁶<https://www.latestlaws.com/case-analysis/maharera-once-the-oc-for-real-estate-project-is-received-from-the-relevant-planning-authority-the-project-is-assumed-to-be-complete-in-all-aspects-as-per-the-sanctioned-plan-190246>

²⁷<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=12382&Mode=0>

2. **Review of Prudential Norms – Risk Weights for Exposures guaranteed by Credit Guarantee Schemes (CGS)**

Reserve Bank of India has issued notification on Review of Prudential Norms in relation to the risk weights for exposures guaranteed by credit guarantee schemes (CGS).²⁸

3. **Rupee Drawing Arrangement - Enabling Bharat Bill Payment System (BBPS) to process cross-border inbound Bill Payments**

Reserve Bank of India has issued notification on Rupee Drawing Arrangement - Enabling Bharat Bill Payment System (BBPS) to process cross-border inbound Bill Payments.²⁹

4. **SC enunciates: RBI is obliged to disclose defaulters list, inspection reports, annual statements etc., related to banks under RTI Act**

Petitioners in this case had challenged the action of the respondent-RBI, vide which the RBI issued directions to the petitioners/Banks to disclose certain information, which according to the petitioners is not only contrary to the provisions as contained in the RTI Act, the RBI Act and the Banking Regulation Act, 1949, but also adversely affects the right to privacy of such Banks and their consumers.

SC Division Bench in the present petition observed that the case of Jayantilal N. Mistry did not take into consideration the aspect of balancing the right to information and the right to privacy. The Court further held that A Nine-Judge Constitution Bench of this Court in the case of K.S. Puttaswamy and another has held that the right to privacy is a fundamental right. In case of such a conflict, the Court is required to achieve a sense of balance. It held that the writ petitions under Article 32 can be maintained to challenge such directions regardless of the Jayantilal Mistry case.³⁰

J. **SEBI**

1. **SEBI: Noticee was not covered under the definition of Section 5 (officer who is in default) as evinced from the material on record viz., the board minutes of the company. Thus, the Noticee could not be held under the clutches of vicarious liability under Section 73(2).**

Facts: Dynamic Asset Management Limited (“Dynamic”) raised funds from public through an offer of Redeemable Preference Shares (“RPS”) sans compliance of the Companies Act for which the director (“Noticee”) of Dynamic was being charged with vicarious liability.

Issue: How is the liability of a director as an ‘officer in default’ for the purposes of Section 73(2) of the Companies Act, 1956 (“Act”) established? [Note: Section 73(2) of the Act is touted as Section 40 under the Companies Act, 2013].

²⁸<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=12384&Mode=0>

²⁹<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=12388&Mode=0>

³⁰<https://www.latestlaws.com/case-analysis/rbi-is-obliged-to-disclose-defaulters-list-inspection-reports-annual-statements-etc-related-to-banks-under-rti-act-read-judgement-190251/>

SEBI Ruling: Section 73 of the Act imposes liability on the company and every director of the company who is an 'office in default' to refund of monies for violation of Section 73 which deals with the repayment of money received in pursuance of issue of prospectus in case permission for issue of RPS is not taken from a recognized stock exchange. However, the said liability cannot be imposed if the following conditions are not fulfilled:

- a) Ruling given by the Court that he is an 'officer who is in default' under Section 5.
 - b) The responsibility to prove the charge is upon the prosecution, namely, upon SEBI. It is for SEBI to prove that the director was an 'officer in charge'
- 1. Decision:** The Noticee was not covered under the definition of Section 5 (officer who is in default) as evinced from the material on record viz., the board minutes of the company. Thus, the Noticee could not be held under the clutches of vicarious liability under Section 73(2).³¹

2. Unfair Trade Practices Relating to Securities Market

Final Order in respect of Bharat J. Patel in the matter of fictitious transactions in the scrip of Global Tele-systems Limited

Facts: During the rights issue, the company was required to furnish the financial statements of its subsidiary companies in its 'letter of offer/offer document'. However, certain fictitious and backdated transactions of sale and purchase of shares were undertaken to show a better picture of the financials.

Issue: Whether there is a violation of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulation, 1995 ("PFUTP Regulations")? If yes, what are the remedies?

Reasoning: Regulation 6 of the PFUTP Regulations, 1995 mandates that no person shall in the course of his business, knowingly engage in any act, or practice which would operate as a fraud upon any person in connection with the purchase or sale of, or any other dealing in, any securities and indulge in falsification of the books of accounts.

Analysis: Regulation 11 empowers SEBI to suspend the trading of the security found to be or prima facie found to be involved in fraudulent and unfair trade practice in a recognized stock exchange and impound and retain the proceeds or securities in respect of any transaction violating the PFUTP Regulations.³²

3. SEBI directs entities to submit information on unclaimed securities.

Issue: Some non-convertible securities like non-convertible debt securities, non-convertible redeemable preference shares and perpetual debt instruments remain unclaimed for long time and the same is not communicated to SEBI due to lack of clarity of law.

Law: Under Regulation 61A of the Listing Obligations and Disclosure Requirements Regulations, 2015 and Section 125 of the Companies Act, 2013 ("Act"), amounts that remain unclaimed from

³¹https://www.sebi.gov.in/enforcement/orders/sep-2022/final-order-in-the-matter-of-dynamic-asset-management-limited_62600.html

³²https://www.sebi.gov.in/enforcement/orders/sep-2022/final-order-in-respect-of-jhp-securities-private-ltd-in-the-matter-of-fictitious-transactions-in-the-scrip-of-global-telesystems-limited_62665.html

non-convertible securities for a period of seven (7) years are required to be transferred to Investor Education Protection Fund (“IEPF”). However, before the SEBI direction in this regard, the provisions were ambiguous on whether the rule is applicable to entities that do not fall under the definition of ‘company’ under the Act.

SEBI Direction: Clarifying the existing law, SEBI has directed all entities that don’t fall under the definition of ‘companies’ to submit information regarding unclaimed non-convertible securities. The move will help identify the amount that needs to be transferred to the IEPF.³³

4. SEBI Master Circular on Surveillance of Securities Market dated September 13, 2022 (“Circular”)

In order to moderate the impact of destabilizing price movements, SEBI has decided to adopt the following measures: a) In cases of merger, demerger, amalgamation, capital reduction/consolidation, scheme of arrangement et al, the trading shall take place in trade for trade (TFT) segment for the first 10 days with the applicable price band while keeping the price band open on the first day of trading; b) With reference to requirements of Regulation 6 of SEBI (Prohibition of Insider Trading), 2015 (“PIT Regulations”), the disclosures may be maintained by the company in physical/electronic mode as per the format prescribed by SEBI in the Circular.

SEBI has also prescribed the standard format for reporting violations related to Code of Conduct under PIT Regulations.³⁴

5. SEBI Master Circular on Surveillance of Securities Market dated September 13, 2022 (“Circular”)

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6. SEBI Guidelines on FPIs Registered Under Multiple Investment Managers

SEBI published guidelines on applications for investment advisers.

Further, SEBI recognized BASL, a fully owned subsidiary of BSE, to serve as an Investment Adviser Administration and Supervisory Body (IAASB) for a three (3) year period beginning in June 2021.

³³<https://www.sebi.gov.in/media/public-notices/sep-2022/notice-call-for-information-submission-of-information-pertaining-to-unclaimed-non-convertible-securities-62694.htm>

³⁴https://www.sebi.gov.in/legal/master-circulars/sep-2022/master-circular-on-surveillance-of-securities-market_62914.html

³⁵https://www.sebi.gov.in/legal/master-circulars/sep-2022/master-circular-on-surveillance-of-securities-market_62914.html

BASL has been given authority to manage and oversee Investment Advisers (“IAs”) for registration and post-registration activities.

BASL must oversee IAs both on- and off-site, resolve client and IA complaints, and take administrative measures such as warnings and referrals to SEBI for enforcement action.³⁶

7. Circular issued by SEBI for issuance and listing of Commercial Paper by REITs. Dated:

In accordance to Reserve Bank Commercial Paper Directions, 2017 dated August 10, 2017 REITs having net worth of Rs. 100 crores or higher are eligible to issue commercial paper. Now, it has been decided that REITs need to abide by the guidelines prescribed by Reserve Bank of India (“RBI”) for issuance of commercial papers. Further, REITs have to follow conditions of listing norms prescribed by Securities and Exchange Board of India (“SEBI”) under SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021. Finally, the issuance of listed commercial papers should be within the overall debt limit permitted under SEBI (Real Estate Investment Trusts) Regulations, 2014.³⁷

8. Circular issued by SEBI for issuance and listing of Commercial Paper by InvITs. Dated:

As has been the case for REITs, InvITs having net worth of Rs. 100 crores or higher have been eligible to issue commercial paper. Now, it has been decided that InvITs need to abide by the guidelines prescribed by Reserve Bank of India (“RBI”) for issuance of commercial papers. Further, InvITs have to follow conditions of listing norms prescribed by Securities and Exchange Board of India (“SEBI”) under SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021. Finally, The issuance of listed commercial papers should be within the overall debt limit permitted under SEBI (Infrastructure Investment Trusts) Regulations, 2014.³⁸

9. SEBI daily price limits framework for commodity futures contracts

SEBI comes out with daily price limits framework for commodity futures contracts (September 27, 2022) Capital markets regulator SEBI came out with a new framework for daily price limit for commodity futures contracts in a bid to resolve the difference in closing price at domestic exchange and global bourse. The Daily Price Limits (DPLs) define the maximum range within which the price of a commodity futures contract can move in one trading session. Such limits protect investors from sudden and extreme price movements and provide a cooling-off period to re-assess the information and fundamentals impacting the price of the commodity futures contract. The Indian bourses have informed that closing price on domestic exchange differs from closing price on international exchanges, after necessary currency conversion, because of a difference in methodology of calculation of closing price, the SEBI said in a circular.³⁹

³⁶https://www.sebi.gov.in/legal/circulars/sep-2022/modification-in-the-operational-guidelines-for-fpis-ddps-and-efis-pertaining-to-fpis-registered-under-multiple-investment-managers-mim-structure_63378.html

³⁷ SEBI | Issue and listing of Commercial Paper by listed REITs

³⁸ SEBI | Issue and listing of Commercial Paper by listed InvITs

³⁹https://www.sebi.gov.in/legal/circulars/sep-2022/circular-on-modification-in-daily-price-limits-dpl-for-commodity-futures-contracts_63404.html



10. Supreme Court on Insider Trading: Since shares were not sold with an intent to encash the benefit of the unpublished information. Thus, the same is not covered under the mischief of insider trading

Facts: Mr. Abjijit Rajan, the then chairman and managing director of Gammon Infrastructure Projects Ltd (GIPL) sold shares just before a material event which came under the SEBI scanner.

Issue: How to establish a charge of ‘Insider Trading’?

Test: The Hon’ble Supreme Court devised the test of whether there was an attempt by the ‘insider’ to benefit from the unpublished price sensitive information.

Ruling: The Court distinguished between profit motive and mens rea and held that under the Prohibition of Fraudulent and Unfair Trade Practiced Regulations (“PFUTP Regulations”), mens rea is not an indispensable requirement in respect of matters under the Prevention of Insider Trading Regulations (“PIT Regulations”), the test to be applied is that of profit motive i.e., whether the insider’s actions in dealing in securities represented an effort to gain from or exploit the asymmetrical / unpublished information in his possession.

Decision: On application of the abovementioned test, the Court held that since shares were not sold with an intent to encash the benefit of the unpublished information. Thus, the same is not covered under the mischief of insider trading.⁴⁰

⁴⁰<https://latestlaws.com/corporate-law-news/supreme-court-on-insider-trading-test-is-test-whether-the-act-of-the-insider-in-dealing-with-the-securities-was-an-attempt-to-encash-the-benefit-of-information-in-his-possession-190305/>



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