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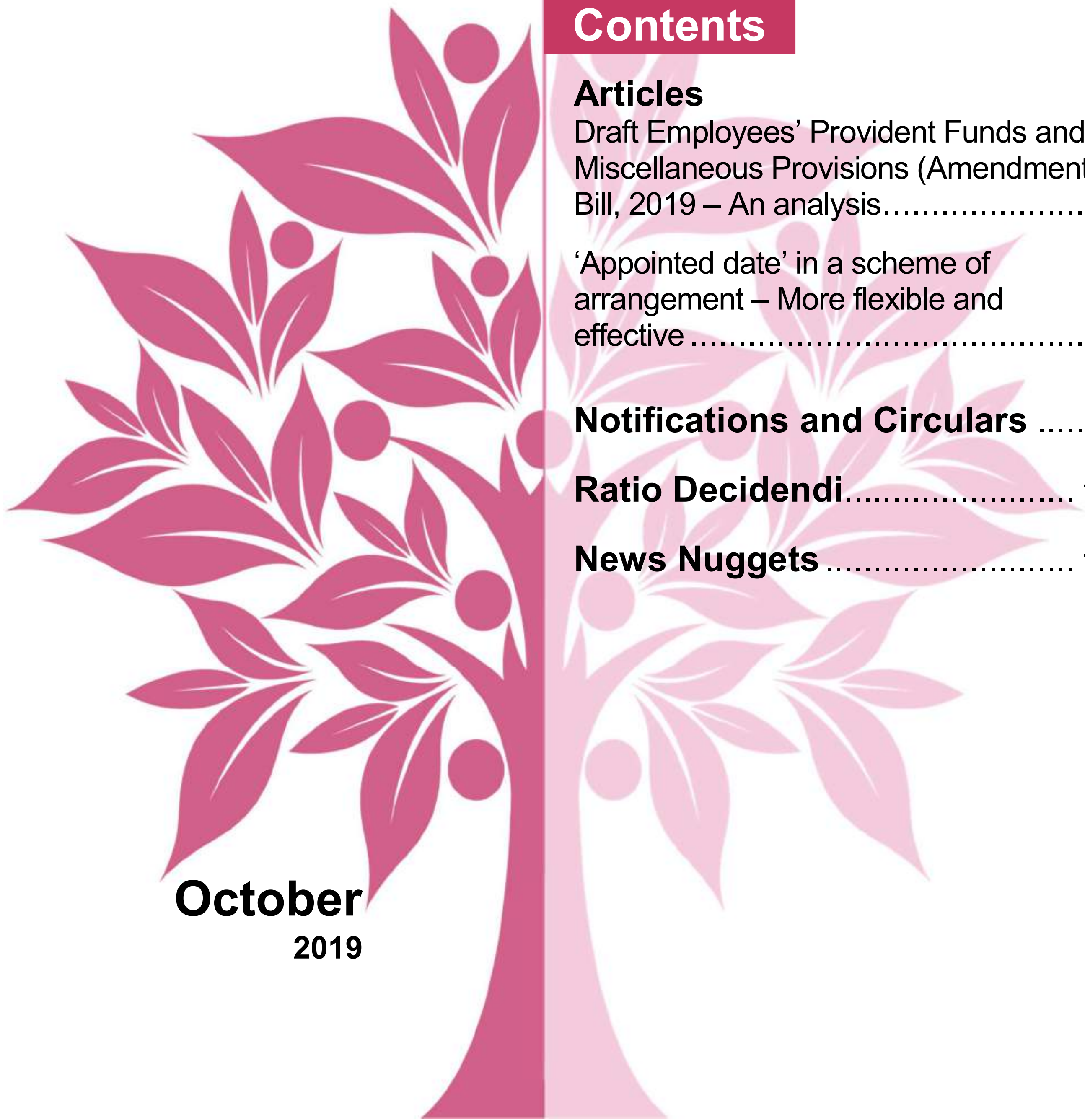

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Articles

Draft Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 2019 – An analysis

By **Ankit Parhar**

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act") is a social welfare legislation which aims to provide social security benefits such as Provident Fund, Superannuation Pension, Invalidation Pension, Family Pension and Deposit-Linked Insurance to employees.

The Employees' Provident Fund Scheme, 1952 ("EPF Scheme"), Employees' Pension Scheme, 1995 ("Pension Scheme") and the Employees' Deposit-Linked Insurance Scheme, 1976 ("Insurance Scheme") have been framed under the EPF Act to establish contributory funds where employers and employees contribute their respective share in terms of the EPF Act and the said Schemes. The contributory funds are administered by the Central Board of Trustees ("Board"). The Board is assisted by the Employees' Provident Fund Organization ("EPFO"). The EPFO is under the administrative control of Ministry of Labour and Employment, Government of India.

In August 2019, the Ministry of Labour and Employment released the draft Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 2019 ("Draft Bill"). Some of the key proposed amendments under the Draft Bill are analysed in this article.

The definition of 'basic wages' to be replaced with the definition of 'wages' in conformity with the Code on Wages, 2019

The EPF Act[1] provides that the contribution payable by the employer and the employee shall be computed at the specified percentage of the 'basic wages', 'dearness allowance' and 'retaining allowance' payable to the employee. The term 'basic wages' is defined[2] to mean all emoluments earned by an employee excluding cash value of food concessions, dearness allowance, house rent allowance, overtime allowance, bonus commission and any presents made by the employer.

The interpretation of the term basic wages and the components to be included or excluded from the basic wages have been considered in numerous cases. There has been a lot of litigation as to whether allowances other than those specifically excluded from the definition of basic wages can be excluded from the basic wages. The leading judgments of the Supreme Court in this regard are *Bridge and Roof Co. (India) Ltd. v. Union of India*[3], *Muir Mills Co. Ltd., Kanpur v. It's Workmen*[4], *Manipal Academy of Higher Education v. Provident Fund Commissioner*[5] and the recent judgment in *RPFC(II) West Bengal v. Vivekananda Vidyamandir and Ors.*[6]. Essentially, the ratio of

[1] Section 6
[2] Section 2(b)
[3] (1963) 3 SCR 978
[4] AIR 1960 SC 985
[5] (2008) 5 SCC 428
[6] 2019 SCC OnLine SC 291

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these judgments is that only the allowances that are variable or linked to any incentive for production can be excluded from the basic wages. Conversely, the allowances that are not variable and are not linked to any incentive for production cannot be excluded from the basic wages.

Now, in the Draft Bill, the definition of 'basic wages' is proposed to be replaced with the definition of 'wages' as provided under the recently enacted Code on Wages, 2019. The proposed amendment defines 'wages' as all remuneration whether by way of salary, allowances or otherwise, expressed in terms of money or capable of being so expressed which would be payable to an employee if the terms of employment, express or implied, were fulfilled. The proposed definition also states that 'wages' would include basic pay, dearness allowance and retaining allowance, if any.

The proposed amendment specifically excludes the following from the definition of wages: statutory bonus; value of house accommodation, medical assistance or any other amenity or service specifically excluded from the computation of wages by order; contributions paid by the employer to the pension fund or provident fund and interest thereon; conveyance allowance or the value of any travelling concession; any sum paid to the employee to defray special expenses by nature of the employment; house rent allowance; remuneration payable under any award or settlement between the parties or any order of a court or tribunal; any overtime allowance; any commission payable; gratuity payable on the termination of employment; and any retrenchment compensation or other retirement benefit payable to an employee ex gratia.

The proviso to the proposed definition provides an overall cap on the quantum of allowances that may be excluded from the wages. The proviso provides that if the sum of the payments made towards the aforesaid heads (other than gratuity payable on the termination of employment and any retrenchment compensation or other retirement benefit payable to an employee ex gratia) is over half the total remuneration, then the excess amount would be included in the wages.

The replacement of 'basic wages' with 'wages' in conformity with the definition in the Code on Wages, 2019 is certainly a positive step and will bring in much needed uniformity across various labour laws. Similarly, the somewhat exhaustive list of exclusions should also bring in the much needed clarity on the components that are to be included or excluded from the 'wages'. However, there are still some grey areas. For instance, the present definition of 'basic wages' specifically excludes 'bonus', 'commission' or 'any other similar allowance' whereas the proposed definition of 'wages' only excludes 'statutory bonus' and 'commission'. As such, it is not clear whether productivity linked bonuses other than statutory bonuses would be excluded from the wages or not. Furthermore, though the aforesaid cap on the allowances should prevent employers from camouflaging wages as allowances in an attempt to reduce their contributions, there may be certain cases where the allowances are genuinely over the said cap.

In any case, employers should review their salary structure and examine the impact of the proposed amendment. Employers should also give their suggestions and comments in respect of the proposed amendment. It is suggested that all productivity linked bonuses should be specifically excluded from the definition of 'wages'. In case an employer camouflages wages as productivity linked bonuses, the competent Provident Fund Commissioner would still have the power to initiate an enquiry under Section 7A of the EPF Act and determine any

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sums due. Similarly, it is also suggested that an appropriate provision be incorporated to enhance the cap on allowances in genuine cases.

Limitation period of five years for initiating an enquiry under Section 7A of the EPF Act to be introduced

Under Section 7A of the EPF Act, the competent Provident Fund Commissioner is empowered to initiate an enquiry against an employer to determine any amount that may be due from the employer. Section 7C provides that where an order under Section 7A has been passed and the Provident Fund Commissioner has reason to believe that any amount has escaped assessment, he may, within a period of five years from the date of communication of the order passed under Section 7A, re-open the case and pass appropriate orders re-determining the amount due from the employer.

The EPF Act does not prescribe any period of limitation within which the enquiry under Section 7A can be initiated or a time period within which the said enquiry is to be completed. In this regard, reference may be made to the judgment of the Supreme Court in *Hindustan Times Limited v. Union of India and Ors.*[7] wherein the Supreme Court observed that in spite of several amendments to the EPF Act, the legislature did not deem it fit to prescribe a period of limitation for initiating an enquiry under Section 7A.

In the past, we have seen the EPFO initiate proceedings under Section 7A for periods going as far back as eight years or more. Also, enquiries under Section 7A tend to go on indefinitely. The Draft Bill proposes to address these issues by inserting a proviso to Section 7A prescribing a period of limitation of five years for initiating an enquiry under Section 7A and a provision to introduce a time limit of two years for the completion of an enquiry under Section 7A.

[7] (1998) 2 SCC 242

The introduction of a limitation period of five years for initiating an enquiry under Section 7A and a time limit of two years for completion of an enquiry under Section 7A are surely welcome amendments. However, the overall period is still quite long. For instance, as per the proposed amendments, an enquiry under Section 7A for defaults committed in April 2015 may be initiated by April 2020. The said enquiry could be completed till April 2022. Thereafter, an enquiry under Section 7C could be initiated till April 2027. Effectively, the overall period upto the commencement of the enquiry under Section 7C comes to twelve years.

It is therefore suggested that the limitation for initiation of an enquiry under Section 7C be reduced to a reasonable period such as one or two years after the completion of the enquiry under Section 7A. Further, it is also suggested that a time limit of two years be provided for the completion of an enquiry under Section 7C.

Penalties under Section 14 of the EPF Act to be enhanced ten-fold and a provision allowing compounding of certain offences to be introduced

The EPF Act provides the penalty for various offences such as:

(i) knowingly making or causing to be made any false statement or representation for the purposes of avoiding any payment to be made under the EPF Act, EPF Scheme, Pension Scheme or the Insurance Scheme[8];

(ii) contravention or default in complying with the provisions relating to payment of contributions under the EPF Scheme or with the provisions relating to the payment of inspection charges or administrative charges[9];

[8] Section 14(1)

[9] Section 14(1A)

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(iii) contravention or default in complying with the provisions relating to payment of contributions to the Insurance Scheme or with the provisions relating to payment of inspection charges[10]; and

(iv) contravention or default in complying with any provision of the EPF Act or any condition subject to which exemption is granted under Section 17 of the EPF Act[11].

(v) commission of any offence under the EPF Act, EPF Scheme, Pension Scheme or the Insurance Scheme by a person having been convicted of the same offence[12].

Presently, the penalties for the aforesaid offences include imprisonment and fines. The period of imprisonment is specified as not less than six months, not less than one year, not less than two years, upto one year, upto three years and upto five years etc. depending upon the offence. Similarly, the fines are specified as four thousand rupees, five thousand rupees, ten thousand rupees and twenty-five thousand rupees depending on the offence Further, the EPF Act does not presently provide for the compounding of any offences.

The Draft Bill, by way of amendments to Section 14, Section 14AA, Section 14AC and by way of insertion of Section 14AD proposes to increase the fines ten-fold and to make all offences other than the offences under Section 14(1), 14(1A) and 14(1B) compoundable.

These are certainly positive and welcome amendments. The fines were last revised in the year 1988 and were no longer proportionate. Therefore, the upward revision of the fines was long overdue. Similarly, the absence of any provision allowing the compounding of offences led to unnecessary litigation and costs for the EPFO and the employers. However, to further reduce the litigation, it is suggested that the offences under Section 14(1A) and 14(1B) should also be made compoundable subject to the employer depositing the outstanding contributions, interest, damages, etc., along with the compounding fee.

Satisfaction of specified pre-conditions for grant of exemption under Section 17 of the EPF Act to be made mandatory

Under Section 17 of the EPF Act, an employer can seek exemption from the applicability of the EPF Scheme and establish its own provident fund provided that the rates of contribution and the benefits enjoyed by the employees under the provident fund established by the employer are not less favourable than the benefits provided under the EPF Scheme. All exemptions under Section 17 are subject to the terms and conditions provided in Appendix - A to the EPF Scheme.

Pertinently, no specific pre-conditions for the grant of an exemption under Section 17 have been provided under the EPF Act or the EPF Scheme. The Standing Committee on Labour in a report presented to the Lok Sabha in 2017 had recommended the framing of strong guidelines for the grant of an exemption relating to past performance, net worth, group performance etc. as well as minimum strength of workers, collections, contributions, corpus etc.

The Draft Bill proposes to insert Section 17(1D) which provides that no exemption shall be granted unless the establishment fulfils the conditions for the grant of an exemption that may be specified in the EPF Scheme. Though the conditions have not yet been specified, principally, the satisfaction of reasonable pre-conditions for the grant of an exemption under

[10] Section 14(1B)
[11] Section 14(2A)
[12] Section 14AA

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Section 17 is also a progressive amendment that should ultimately benefit the employees.

Any amount due under the EPF Act to be the first charge on the assets of the establishment and to be paid in priority to all other debts

As per Section 11 of the EPF Act any amount due under the EPF Act shall be deemed to be the first charge on the assets of the establishment and shall be paid in priority to all other debts. Presently, the EPF Act refers to the Presidency Towns Insolvency Act, 1930 and the Provincial Insolvency Act, 1920. These Acts have been repealed by the Insolvency and Bankruptcy Code, 2016 ("IBC"). Therefore, the Draft Bill proposes to delete the reference to the repealed Acts.

Section 53 of the IBC provides for the distribution of assets in the event of liquidation. The highest and equally ranked debts after the insolvency resolution process and liquidation process costs are the dues of 'workmen' for twenty four months prior to the liquidation commencement date and the debts owed to secured creditors who have relinquished their security interest to the liquidation estate. The wages and unpaid dues of employees other than workmen for a period of one year prior to the liquidation commencement date are ranked immediately under these debts.

As such, any dues under the EPF Act in respect of any employees, whether workmen or not, will be ranked highest along with the dues of workmen and secured creditors followed by any wages and unpaid dues owed to employees other than workmen. This position has been recently reaffirmed by the National Company Law Appellate Tribunal ("NCLAT") in *State Bank of India v. Moser Baer Karamchari Union & Anr*.[13]

[13] Company Appeal (AT) (Insolvency) No. 396 of 2019 decided on 19th August, 2019

Employees to be provided an option to opt for the National Pension System instead of the Pension Scheme

The Pension Scheme has been framed under the provisions of the EPF Act for establishing a Pension Fund. The corpus of the Pension Fund is generated from a part of the employers' contributions towards the Provident Fund. The National Pension System ("NPS") is a separate pension cum investment scheme launched by the Central Government to provide old age security.

The Draft Bill seeks to provide employees an option to opt for the NPS instead of the Pension Scheme. The Draft Bill also seeks to provide employees an option to exit the NPS and re-join the Pension Scheme if they so desire. Though further details are yet to be specified, overall, the option to opt for the NPS instead of the Pension Scheme is a progressive step that would give employees more choices as to their pensionary benefits.

Rates of employees' contributions may be reduced for such period and such class of employees as may be specified without any change in the employer's contribution

The Draft Bill proposes to appropriately amend Section 6 of the EPF Act so as to enable the Central Government to specify establishments or classes of establishments where the rate of contribution shall be ten percent instead of twelve percent. The Draft Bill also proposes to appropriately amend Section 6 so as to enable the Central Government to specify rates of contributions applicable to any class of employees.

The intent behind these proposed amendments is to bring in some flexibility for the employees who may wish to reduce their contributions in order to get a higher sum in

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hand. It may be noted that the rate of the employers' contributions shall remain unchanged.

Even in its present form, the Draft Bill is in line with the recent proactive and progressive steps taken by the EPFO and the Ministry of Labour and Employment such as the Circular dated 28th August 2019 wherein the EPFO has asked its field offices not to initiate roving enquiries into the wage structures adopted by establishments by quoting the judgment of the Supreme Court in *Vivekananda Vidyamandir* (supra) unless there is a credible basis for forming a view that the establishment has *prima facie* indulged in camouflaging the basic wages as allowances.

Overall, the proposed amendments are likely to resolve some issues that regularly arise in the implementation of the EPF Act. However, some further tweaking is required to ensure that the proposed amendments actually achieve their object. All stakeholders should take this opportunity and provide their suggestions and comments on the Draft Bill. The government is likely to implement the proposed amendments quickly as the EPF Act is going to be subsumed into the Code on Social Security which is also currently in the pre-legislative consultation process.

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'Appointed date' in a scheme of arrangement – More flexible and effective

By **Rohit Subramanian**

A scheme for reconstruction of a company or companies involving merger or amalgamation under Chapter XV of the Companies Act, 2013 ("Companies Act") envisages two dates i.e. the "appointed date" and "effective date". The effective date of the scheme denotes the date on which the scheme is sanctioned by the National Company Law Tribunal ("NCLT") or the relevant High Court (under erstwhile Companies Act, 1956), as the case maybe. Ironically, the "appointed date" of the scheme is the day on which the scheme is deemed to have taken effect, which could also be a retrospective date, agreed by the parties to the scheme and approved by the relevant adjudicating authority.

The provisions of sub-section (6) of Section 232 of the Companies Act mandates every scheme proposed by a company or companies to clearly indicate an "appointed date". Although the Companies Act, 1956 ("Erstwhile Companies Act") had no such mandate, the adjudicating High Court(s) were authorized to make requisite provisions, to fully and effectively carry out the reconstruction or amalgamation proposed in the scheme. Unfortunately, the absence of explicit provision(s) on the effectual date of a scheme of arrangement gave rise to various judicial deliberation(s) on the matter.

The Supreme Court, has opined on the "transfer date" stated in an amalgamation scheme, in the matter of *Marshall Sons & Co. [India] Ltd v. Income Tax Officer* [1996 (88) (SC) Comp Cas 528]. The Court observed that the adjudicating authority may, while sanctioning a

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scheme of arrangement, modify the “transfer date” stated therein, depending on the specific facts and circumstances. However, if the Court does not prescribe a specific date but merely sanctions the scheme, the date of amalgamation/date of transfer shall be the date specified in the scheme as “the transfer date” and not otherwise. Further, as a logical consequence of the Court sanctioning the scheme, the business carried on by the transferor company, from the “transfer date” till the actual date of order (scheme/arrangement approved by the relevant High Court), shall deemed to have been carried for and on behalf of the transferee company. In the said case, there were a series of events that occured after the stipulated “transfer date” such as the court sanctioning the scheme, filing of order with the Registrar of Companies (“RoC”), allotment of shares etc. Notwithstanding the above, the date of amalgamation/transfer, shall still be the date stipulated in the scheme.

Pursuant to its efforts to consolidate the existing provisions on company law, the Ministry of Corporate Affairs (“MCA”) issued a concept paper on company law(s) containing model codified law(s)[14]. Although, the MCA did not affirm SC’s view(s) on the appointed/effective date of a scheme of arrangement as stated hereinabove, in review of the provisions of the Erstwhile Companies Act, the MCA contemplates that an order of the scheme of merger will be effective only if a certified copy of the order of the court is filed with the registrar and duly stamped and registered.

The Madras High Court formed a different view, in the matter of *Equitas Finance Limited v. C.I.T.* [C.P. Nos. 119 to 121 of 2016]. The scheme of amalgamation (between affiliated entities), in this matter, did not stipulate a specific calendar date as the effective date of the scheme. The Parties were unable to specify definite terms with respect to the “appointed date”, “effective date or share exchange ratio(s) in the amalgamation scheme, as the reconstitution of the group entities were contemplated only as a pre-condition to the “*in-principal*” approval obtained by the holding entity to establish a Small Finance Bank.

The Madras High Court upon detailed scrutiny of the relevant provisions, was satisfied of the leeway provided under the erstwhile Companies Act, to decide on matters related to the “*appointed date*” of a scheme, suiting the facts and circumstances of each case. Since the Regional Director had not demonstrated that the provisions of the scheme were in any way prejudicial to the members/creditors of the transferor or transferee companies, the Court did not find any reason to modify the provisions of the scheme.

Given the polarizing view(s) of the judiciary, it was pertinent for the MCA to address concerns regarding interpretation of Section 232(6) of the Companies Act. Therefore, after much deliberation, the MCA *vide* General Circular No. 09/2019, dated August 21, 2019 (“Circular”) clarified its stand on the tenability of “appointed date” stipulated in a scheme of arrangement under the Companies Act, which are as follows:

- Section 232(6) of the Companies Act is an enabling provision. Therefore, subject to agreement of the parties and approval of the NCLT, an “appointed date” can be a specific calendar date or any such date which is tied to the occurrence of an event or fulfilment of certain preconditions/requirement(s) as is identified and agreed by the parties;
- In the event the '*appointed date*' is a specific calendar date, it cannot precede the date of

[14]Concept Paper on Company Law issued *vide* Press Note No: 1/2004 dated August 4, 2004

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filing of application of the scheme, for a period beyond 1 (one) year, unless a justification in this regard is specifically brought out in the scheme. Such ante-dated scheme should not be against public interest;

- In the event, the parties agree for the 'appointed date' to be conditional or event specific, such preconditions or events should be appropriately captured in the scheme. If the 'appointed date' happens to precede the date of filing of sanctioned scheme with the relevant RoC, an intimation to the RoC shall also have to be made within the prescribed timelines stated in the Circular;
- As per Indian Accounting Standards-103 (Business Combinations) ("Ind-AS 103"), the acquirer is required to identify an "acquisition date" which shall be the date on which it obtains control of the acquiree. MCA has clarified that the "appointed date" stipulated in the scheme shall be deemed as the "acquisition date" for the purposes of Ind-AS 103.

Since the "appointed date" of the scheme is the date on which operations are transferred from the transferor to the transferee company, there are a numerous factors, that parties to the scheme shall have to bear in mind while agreeing on the appointed date. These factors *inter-alia* include the date of valuation of business(es), employee transfer, accounting practices as well as tax considerations. Moreover, a single scheme of arrangement, cannot have different appointed/effective dates for different purposes. The companies entering into a scheme of arrangement, are required to weigh-out the potential risk(s) and consolidate requirement(s) under various law(s) to arrive at an amenable date of effectuation. This Circular provides companies with much needed flexibility with respect to the timelines and manner of effectuating the provisions of the scheme and is yet another example of the government's drive towards improving the regulatory environment and facilitation of doing business in India.

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Notifications and Circulars

Significant Beneficial Owner - Extension of last date for filing Forms BEN-2 and BEN-1: Rule 3 of the Companies (Significant Beneficial Owners) Rules, 2018 ("SBO Rules") requires an individual being a significant beneficial owner (SBO) in a reporting company, to file a declaration in Form BEN-1, either within 90 (ninety) days of the commencement of Companies (Significant Beneficial Owners) Amendment Rules, 2019 or within 30 (thirty) days of acquiring such significant beneficial ownership or any change therein to the reporting company. Further, in terms of Rule 4 of the SBO Rules, the reporting company, upon receipt of declaration as

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stated hereinabove, shall file a return in Form No. BEN-2 with the relevant Registrar of Companies ("RoC"), within a period of 30 (thirty) days from the date of receipt of the said declaration along with the fees as prescribed under Companies (Registration Offices and Fees) Rules, 2014. The Ministry of Corporate Affairs ("MCA") *vide* General Circular No. 10/2019, dated September 24, 2019 has extended the time limit for filing Form BEN-2 up to December 31, 2019 without payment of additional fee. Thereafter additional fee shall be payable in terms of Companies (Registration Offices and Fees) Rules, 2014. Consequent to the extension in the date of filing of e-Form BEN-2, the date of filing of Form BEN-1 shall be construed accordingly.

'Report on unpaid dues' to be submitted by listed entities to stock exchanges along with the draft scheme: The Securities Exchange Board of India *vide* Circular No. CFD/DIL3/CIR/2017/21 dated March 10, 2017 had laid down framework for Schemes of Arrangement by listed entities and relaxation under Rule 19(7) of the Securities Contracts (Regulation) Rules, 1957. To further streamline the processing of draft schemes, SEBI has inserted Para 11 to the 2017 Circular *vide* Circular No SEBI/HO/CFD/DIL1/CIR/P/2019/192, dated September 12, 2019 ("Amendment Circular"), which requires all listed entities to ensure that all dues to, and/or fines/penalties imposed by SEBI, Stock Exchanges and Depositories are paid/settled before filing the draft scheme with the designated stock exchange. In the event there is unpaid dues/ fines/ penalties, such listed entity is required to submit to stock exchanges a '*Report on the Unpaid Dues'* containing prescribed details as stated in Annexure B to the Amendment Circular prior to obtaining Observation Letter from the stock exchanges on the draft scheme. The said '*Report on the Unpaid Dues'* shall be forwarded by the relevant stock exchanges to SEBI before SEBI communicates its comments on the draft scheme.

Regulation of commercial and technical arrangements entered by broadcaster, distributor and local cable operator for providing broadcasting services relating to television: TRAI on September 4, 2019 has issued The Telecommunication (Broadcasting and Cable) Services Register of Interconnection Agreements And All Such Other Matters Regulations, 2019 ("Service Register Regulations, 2019") repealing the previously existing Register of Interconnect Agreement (Broadcasting and Cable Services) Regulation, 2004. The Service Register Regulations, 2019 aims at promoting transparency and non-discrimination in the broadcasting sector, and *inter-alia* requires every broadcaster through its compliance officer to report to TRAI a Reference Interconnect Offer ("RIO") specifying the terms and conditions on which the other service provider may seek interconnection with such service provider. Under the erstwhile TRAI regulations, broadcasters having average active subscriber base below 1,00,000 (one lakh) were exempted from the said obligation. Since reporting under the Service Register Regulations, 2019 has been shifted online, the said exemption has been done away with.

Harmonization of Turn Around Time (TAT) and customer compensation for failed transactions using authorized Payment Systems: In the statement on developmental and regulatory policies issued by the Reserve Bank of India ("RBI") as part of the Monetary Policy statement dated April 4, 2019, it was proposed that RBI shall formulate framework on TAT for resolution of customer complaints and compensation framework

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across all authorized payment systems. After consultation with various stakeholder(s), RBI has issued this Circular No. RBI/2019-20/67 DPSS.CO.PD No.629/02.01.014/2019-20, dated September 20, 2019 which provides for a TAT framework. The RBI Circular *inter alia* defines "*failed transaction*" as a transaction not fully completed, because of failure in communication links, non-availability of cash in an ATM, time-out of sessions, etc. A failed transaction shall also include credits which could not be effected to the beneficiary account, as a result of incomplete or delay in initiating a reversal transaction.

SEBI eases regulatory framework for Foreign Portfolio Investors (FPI): On March 24, 2019, SEBI released a report submitted by a working committee formed under the chairmanship of Mr. Harun R Khan for public comments. The report recommended the review of SEBI (Foreign Portfolio Investors) Regulations, 2014, with the objective of liberalizing and simplifying the FPI regime. Considering the recommendation(s) of the working committee and comments by the stakeholder(s), the SEBI on September 23, 2019 issued the SEBI (Foreign Portfolio Investors) Regulations, 2019 ("The New FPI Regime") repealing the existing Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014. The New FPI Regime *inter-alia* provides for the following key amendments:

- FPI shall be classified into two categories i.e. Category I FPI which include government and/or related investors such as central banks, sovereign wealth funds, international or multilateral organizations/agencies including entities controlled or at least 75% directly or indirectly owned by such Government and Government related investor, pension and university funds, appropriately regulated entities such as insurance or reinsurance entities, banks, asset management companies, investment managers, investment advisors, portfolio managers, broker dealers and swap dealers, etc. Whereas, Category II FPIs shall include all the investors not eligible under Category I stated hereinabove, such as endowments and foundations; charitable organisations; corporate bodies; family offices; individuals; appropriately regulated entities investing on behalf of their client; and unregulated funds in the form of limited partnership and trusts.
- A foreign portfolio investor registered under the SEBI (Foreign Portfolio Investors) Regulations, 2014 shall be accordingly re-categorised by the designated depository participant.
- Offshore derivative instruments can be issued only by persons registered as Category-I FPI to persons eligible for registration as Category-I FPI, subject to compliance with applicable know your customer norms.

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Ratio Decidendi

Corporate Insolvency Resolution Process initiated under IBC is maintainable even if company's name has been struck off from register of companies

Key Points

- An application filed under Section 7 and/or Section 9 of the IBC is maintainable against a company being the corporate debtor, even if the company's name is struck off from the register of companies under Section 248 of the Companies Act, 2013.
- The National Company Law Tribunal also being the adjudicating authority, for the purposes of Companies Act, has the power to restore the name of the company and all other persons in their respective positions, for initiation of Corporate Insolvency Resolution Process ("CIRP").

Brief Facts

Greater Bombay Co-operative Bank Limited ("Financial Creditor") filed an application under Section 7 of the IBC for initiating CIRP against Penguine Umbrella Works Private Limited ("Corporate Debtor") on account of default in repayment of loan including interest and other charges. The National Company Law Tribunal, Mumbai Bench ("Adjudicating Authority") admitted the application, against which Mr. Hemang Phophalia, ex-director and shareholder of the Corporate Debtor ("Appellant") preferred an appeal to the National Company Law Appellate Tribunal ("NCLAT"). The Appellant's contention is that the name of the company was struck-off under Section 248 of the Companies Act, therefore, an application for initiation of CIRP under IBC cannot be maintainable against a '*non-existent*' company which has no employee or shareholders.

Issue for consideration

Whether an application under Section 7 or Section 9 of the IBC is maintainable against a Corporate Debtor whose name has been struck-off from the register of companies under Section 248 of the Companies Act?

Held

Upon examination of the provisions of Section 248 read with Section 250 of the Companies Act, the NCLAT observed that despite the removal of the name of the company from the register of company, the company's right of realization of all pending dues or it's obligation to discharge payments, liabilities or obligations continued, and therefore, notwithstanding any declarations made by the company's personnel, the assets of the company were to be made available for discharge of liabilities of the company even after the date of removal of the name of the company from the register. It also observed that every director, manager or any other officer or member who was exercising power of management continued to be liable as if the company had not been dissolved and for such purposes the company continued to exist.

It was further examined that Section 252 of the Companies Act entitles any member, creditor or workman aggrieved by the decision of the registrar to strike-off the name of the company from its register, to prefer an appeal to the relevant NCLT within 20 (twenty) years from the date of notice in official gazette for removal of name of company. Accordingly, it was held that the NCLT has the power to restore the position of the company as if the name has not been struck off.

In view of the above, the NCLAT dismissed the appeal and admitted the application under the

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provisions of the IBC. Further, the Corporate Debtor and all its directors, officers, etc., were deemed to be restored under the provisions of Section 252 of the Companies Act for initiation of CIRP.

[*Hemang Phophalia* v. *The Greater Bombay Co-operative Bank Ltd. & Anr.* - NCLAT Company Appeal (AT) (Insolvency) No. 765 of 2019, decided on 12-9-2019, NCLAT]

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News Nuggets

Preliminary draft Code on Social Security Bill 2019 issued

In order to consolidate the laws relating to social security of the workers, the Ministry of Labour and Employment has issued preliminary draft of the Code on Social Security Bill 2019 seeking suggestion from all stakeholders. Under the proposed bill, social security organizations, namely, Central Board of Trustees, Employees State Insurance Corporation, Unorganized Workers Social Security Boards, and the State Building Workers Welfare Boards, will be set up.

As per the Bill, the Central Government shall formulate and notify, suitable welfare schemes for unorganized workers on matter relating to life and disability cover, health and maternity benefits, old age protection and any other benefit as may be determined by the Central Government. The State Government may formulate and notify suitable welfare schemes for unorganized workers, including schemes relating to provident fund, employment injury benefit, housing, educational schemes for children, skill up gradation of workers, funeral assistance and old age homes.

Chapter XII of the draft Code lists offences and penalties liable to penalty and even imprisonment. It also states that where an offence has been committed by a company, every person who was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Interim order to restrain corporate debtor before admission of application, is valid

Taking note of Rule 11 of NCLT Rules 2016 relating to inherent powers of NCLT, NCLAT has upheld the lower Tribunal's interim order, before admitting any application under Sections 7 or 9 or 10 of the IBC, restraining the corporate debtor from selling or creating any third-party interest in its assets. The Appellate Tribunal in the case of *Nui Pulp & Paper Industries (P) Ltd. v. Roxcel Trading GMBH* observed that corporate debtor refused to give any assurance that it would not sell or create any third-party interest in its assets. It held that it is always open to the Tribunal to pass an appropriate interim order to ensure that corporate debtor does not abuse the process of the Tribunal. NCLAT held that once an application under Section 7 or 9 is filed, it is not necessary for adjudicating authority to await hearing of parties for passing order of Moratorium under Section 14 of IBC.

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Insolvency – No provision to discriminate against dissenting financial creditors

In a case where a secured financial creditor was discriminated with other similarly situated secured financial creditors, NCLAT has held the Resolution Plan to be violative of Section 30(2)(e) of the I&B Code. The successful applicant was directed to provide equal treatment. The NCLAT in the case of *Hero Fincorp Ltd v. Rave Scans (P) Ltd.* observed that Insolvency and Bankruptcy Board of India has not provided for separate treatment to dissenting secured financial creditors who did not vote in favour of the resolution plan, and no such amendment has been made in Regulation 38 since amended Section 30(2)(b) came into force, i.e.16-08-2019. Supreme Court's decision in the case of *Swiss Ribbons* was also relied.

Competition - DG can investigate matter beyond CCI order of investigation

The Division Bench of the Delhi High Court has held that an order of CCI under Section 26(1) of the Competition Act which triggers investigation by Director General (DG), does not circumscribe the scope of investigation by the DG only to such matters which are subject matter of the original complaint. The Court noted that the direction given to the DG was to investigate "the matter", and this enabled the DG to examine any other violation also. Setting aside the single-Judge Order, the High Court in the case of *CCI v. Grasim Industries Ltd.* restored the order by CCI and observed that the language of the order passed by CCI is broad enough for the DG to investigate violation of Section 4. CCI had earlier directed the DG to investigate violations of Section 3(3)(a), (b) and (c) of the Competition Act.

Arbitration possible in case of 'simple allegations', not involving fraud

It a case involving allegations relating to affairs of partnership and siphoning of funds and not to any matter in public domain, the Supreme Court has set aside the High Court decision dismissing application for appointment of the arbitrator. The Court in the case of *Rashid Raza v. Sadaf Akhtar* observed that the case involved 'simple allegations' as there was no allegation of fraud vitiating partnership deed or the arbitration clause. Relying upon para 25 of the Supreme Court decision in the case of *A. Ayyasamy v. A. Paramasivam*, Court noted distinction between serious allegations of forgery as opposed to simple allegations.

Legal fiction of arbitration award being a decree not to include appeal

Deciding on maintainability of appeal against order of appointment of receiver in an order passed in execution of arbitral award, the Bombay High Court has held that the legal fiction that the award is to be treated as decree is for a limited purpose and cannot be stretched to include an appeal. Reiterating that adjudication of proceedings under Section 36 of the Arbitration and Conciliation Act 1996 is not under the Code of Civil Procedure, the High Court in the case of *Kakade Construction Company v. Vistra ITCL (India)* held that there is no warrant to distinguish between interim orders and final orders passed in the execution of arbitral award. It upheld the plea that only those appeals which are covered under Section 37 are maintainable. The Court also noted that the decision of the Supreme Court in *Sundaram Finance* [2018 (3) SCC 622] has not set aside or diluted the ratio in *Jet Airways* [2012 (2) AIR Bom 855].

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Arbitration – Limitation – Cause of action and computation of time limit

Observing that limitation period for invocation of arbitration would be 3 years from the date of cause of action, 3-Judges Bench of the Supreme Court has dismissed an appeal filed against the High Court order dismissing, due to limitation, application for appointment of arbitrator. Court in *Geo Miller & Co. v. Chairman, Rajasthan Vidyut Utpadan Nigam* noted that appellant's cause of action arose when the final bill handed over to the respondent became due, and that mere correspondence by writing letters/reminders subsequently would not extend the time of limitation. The Court noted that the period during which the parties were *bona fide* negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation. However, in such cases the entire negotiation history must be specifically pleaded and placed on the record. Further, observing that notice was served to the respondent in 2002, the Supreme Court held that provisions of Arbitration and Conciliation Act, 1996 and not the Arbitration Act 1940 would apply even though the arbitration clause contemplated proceedings under the 1940 Act.

Arbitration – Recourse to Section 9 not available when award enforceable under Section 36

The Bombay High Court has held that once an award has become enforceable under Section 36(2) of the Arbitration and Conciliation Act, the only remedy with award creditor is to execute the award and a recourse to Section 9, for interim relief by Court, is not available. Court in *Centrient Pharmaceuticals India v. Hindustan Antibiotics* observed that Section 9 cannot take away what Section 36(1) provides *qua* enforcement of award. It also noted that a party seeking stay is required to file a separate application and that as per Section 36(3), Court is required to consider Order 41 Rule 1 of CPC.

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