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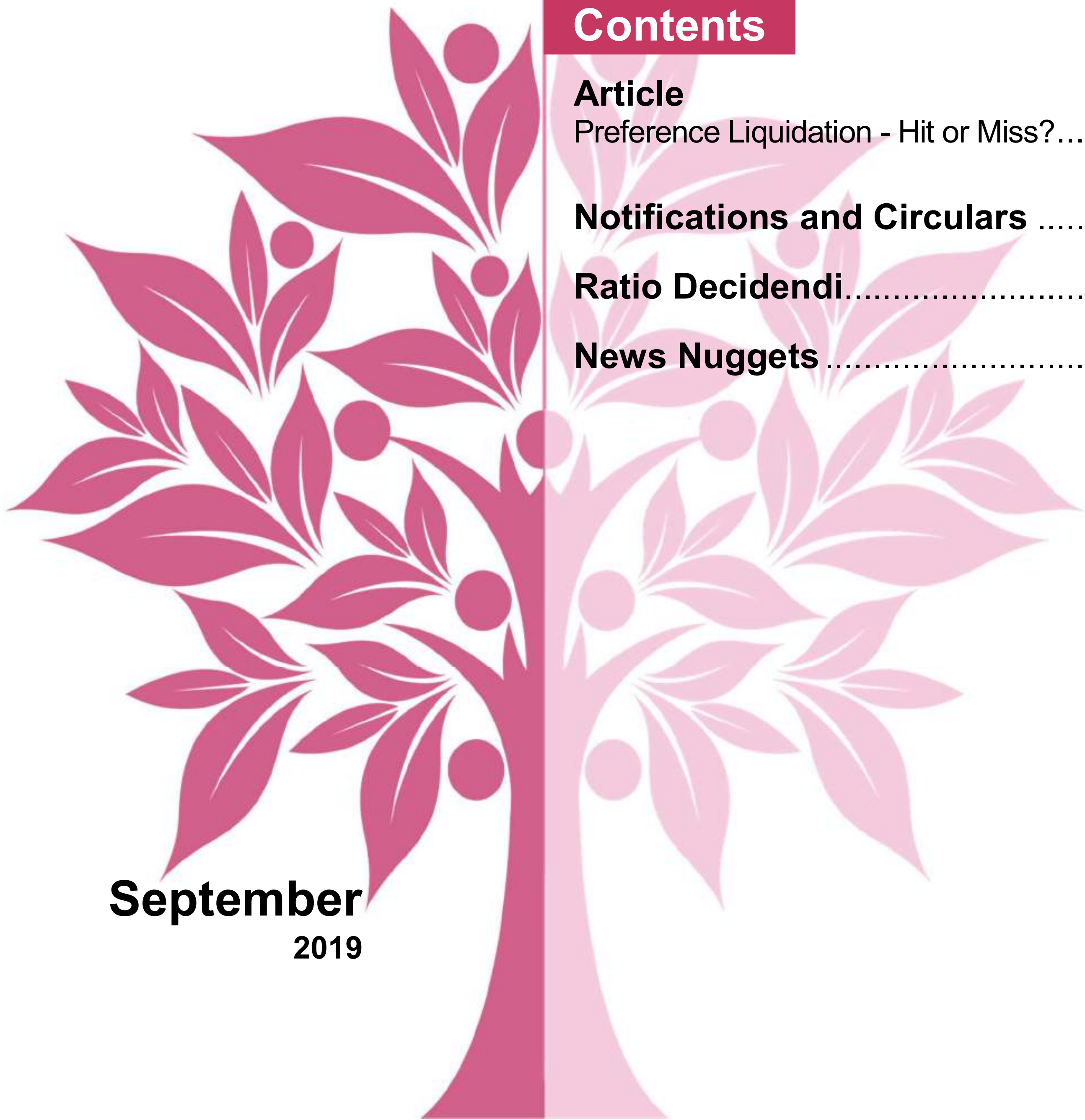

September
2019

Article

Preference Liquidation - Hit or Miss?

By **Priyanshi Singhal**

The terms of the transaction documents for mergers and acquisitions are often dictated by the economics of investment and the bargaining position of the parties. The terms so contractually agreed upon must, however, always be within the operative legal framework.

Liquidation Preference ("**LP**") is a tool often used to embolden investors seeking security of their investment. LP is crucial, especially where the investors anticipate exit at a value lower than their initial investment. It is for this reason that LP, in its various forms, is becoming increasingly popular with investors seeking to invest in India, even though its enforceability has not yet been tested in Indian courts.

For an LP clause to come to pass, a lot depends on the nature of the liquidity event. The application of laws in case of sale, transfer or swap of securities of an Indian company is slightly different from that in the event of court ordered liquidation or winding-up.

The Companies Act, 2013 does not restrict contractual agreements that determine distribution of monies amongst investors in event of transfer or sale of securities.[1] However, the manner of distribution of funds out of liquidation and winding up is prescribed under law.[2] Any contractual agreement that might undermine the liquidation waterfall or the priority of payment upon liquidation of assets as prescribed under law is strictly prohibited. However, valid inter-creditor and subordination agreements are required to be respected in the liquidation waterfall under law.[3]

Any issue or transfer of shares by way of sale or swap to a person resident outside of India is required to be in compliance with and subject to *inter alia* the pricing guidelines, specified by the Reserve Bank of India (**RBI**). The pricing guidelines provide threshold for determining *inter alia*: (i) price in the event of issue of capital instruments of an Indian company to a person resident outside India; (ii) price in the event of transfer of capital instruments of an Indian company from a person resident outside India to a person resident in India and vice versa; and (iii) price in case of swap of capital instruments of an Indian Company to or by a person resident outside India (**Pricing Guidelines**).

Foreign exchange laws prohibit the guarantee of an assured return at a predetermined price to a foreign investor.[4] However, there is not much clarity on what principles of the Pricing Guidelines must be followed in case of liquidation or winding up of an Indian company, the shares of which may be held by foreign investors. LP intends to protect an investor from exiting the company at a price lower than what was initially expected out of its

[1] Kindly refer to **Liquidation Preference: Relevance in Private Companies**, as accessed at <https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/liquidation-preference-relevance-in-private-companies>.

[2] Overriding preferential payments – section 326 and preferential payments – section 327 of the Companies Act, 2013 and distribution of assets – section 53 of the Insolvency and Bankruptcy Code, 2016.

[3] Treatment of subordination agreements within the liquidation waterfall, Report of the Insolvency Law Committee, March 2018.

[4] Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 dated November 7, 2017.

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investment at the time of a liquidity event by providing them a downside protection. Given the prohibition on assured returns, it is highly plausible that this right to downside protection may be construed as an assured return.

For the purposes of understanding what would constitute 'assured returns' in the context of foreign exchange laws, the following judgments which interpret the phrase strictly in terms of investment and divestment and not damages, are noteworthy:

- In *Cruz City 1 Mauritius Holdings v. Unitech Limited*[5], the High Court of Delhi rejected the objections on enforcement of a foreign award where assured returns would be deemed to be recovered by way of damages for breach of contract, as being violative of provisions of the extant foreign exchange laws. The court clarified that since the assured returns' provisions in the contract were contingent on performance of contractual obligations and were not an assurance of exit at a pre-determined return, enforcement of these would not be in violation of Foreign Exchange Management Act, 1999.
- Similarly, in *NTT Docomo Inc. v. Tata Sons Limited*[6], the High Court of Delhi highlighted the impact of honouring contractual commitments on foreign direct investment inflow and the strategic relationship between the countries where parties to the contract are located. While the court made reference to the RBI's internal noting filed in this case, wherein the RBI distinguished between assured returns and downside protection, the judgment does not provide a view on how the FEMA provisions with regard to price protection at the time of exit, have to be interpreted.

One must also understand that remittance out of the assets of Indian companies under liquidation under the provisions of the Companies Act, 2013 is governed by the Foreign Exchange Management (Remittance of Assets) Regulations, 2016. While these Regulations lay down qualifications for remittance of liquidation/winding up proceeds of companies in India, no clarification is provided on the above proposition.

In the absence of sufficient legal precedent, or any clarification by the department, on whether returns featuring out of liquidation and/or winding up proceedings would qualify as 'assured returns', accommodating an LP clause under the extent foreign exchange laws, in light of the existing Pricing Guidelines, appears to be a tricky proposition.

What might be helpful is an understanding of various ways in which LP clauses can be drafted for foreign investors to ensure successful implementation. Some basic questions that arise are-

- Can downside protection be in the nature of contractually agreed upon damages, provided they are not penal in nature or could such protection be as indemnity and most importantly, would such contractual clauses be enforceable?
- Can protection of investment be achieved without changing the nature of the instrument from equity to debt?

The judgements discussed above point at the inclination of the judiciary towards a flexible and investor friendly interpretation of the strict regulatory provisions. But can LP in its current form thrive? Only time will tell.

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[5] 239(2017) DLT 649.
[6] 241(2017) DLT 65.

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Notifications and Circulars

Mergers and Acquisitions - MCA clarifies on 'Appointed date' for Section 232(6) of Companies Act: Ministry of Corporate Affairs *vide* circular dated August 21, 2019, has clarified that companies may choose an 'appointed date' of the merger/amalgamation under Section 232(6) of the Companies Act, 2013 thereby enabling the companies concerned to agree upon a date from which the scheme shall come into force.

It has been clarified that this date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfilment of any preconditions or any other requirements agreed upon by the parties, which are relevant to the scheme. The 'appointed date' so identified under the scheme shall also be deemed to be the 'acquisition date' and the date of transfer of control for the purpose of conforming to the relevant accounting standards.

It has been clarified further that the 'appointed date' may precede the date of filing of the application for scheme of merger/amalgamation in the National Companies Law Tribunal. However, if such date is beyond a year from the date of filing, the same shall be justified under the scheme and shall not be against public interest. In case the 'appointed date' is based on a trigger event relevant to the scheme, the same must be indicated within the scheme. Further, if such event-based date is a date subsequent to the date of filing the order with the Registrar under section 232(5), the company shall file an intimation of the same with the Registrar within 30 days of such scheme coming into force.

Penalty for non-compliance with SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 clarified: Securities Exchange Board of India (SEBI) has issued a circular on August 19, 2019 on non-compliance with certain provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018. This circular is issued in supersession to the circular bearing reference number CIR/CFD/DIL/57/2017, issued by SEBI on June 15, 2017, which specifies the fines to be imposed by the stock exchanges for non-compliance with certain provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Under the new circular, a penalty of INR 20,000 (twenty thousand) is applicable if the bonus issue is delayed beyond 15 days from the date of approval of the issue by the board of directors, in cases where shareholders' approval for making the bonus issue is not required. In cases where shareholders' approval for making the bonus issue is required a period of 2 (two) months is allowed from the date approval of the issue by the board of directors. Penalty is also applicable on listed entities that do not complete the conversion of convertible securities and allot the shares within 18 (eighteen) months from the date of allotment of such securities. Listed entities that fail to make an application to exchange/s for listing in event of further issue of equity shares within 20 (twenty) days from allotment or fail to make application for trading approval to the stock exchange/s within 7 (seven) working days from the date of grant of listing approval are also liable to pay the said penalty.

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The exchanges shall issue notices to the non-compliant listed entities to ensure compliance and collect fine within 15 (fifteen) days from the date of such notice and the fine so received shall be credited to the "Investor Protection Fund" of the concerned exchange. The concerned stock exchange shall also disseminate on its website the names of non-compliant listed entities that are liable to pay fine for non-compliance, the amount of the fine imposed, details of fines received, etc. Failure to pay fine by any non-compliant entity authorises the stock exchange to initiate appropriate enforcement action, including prosecution.

With respect to bonus issue delays, it is clarified that approvals for the listing and trading of promoters' bonus shares may be granted by the concerned stock exchange, only after payment of the requisite fine by the listed entity. However, approvals for the listing and trading of bonus shares may be granted for bonus shares allotted to persons other than the promoter(s) in the interest of the investors, subject to compliance with other requirements.

Issue of shares with differential rights under Companies Act, 2013 – Companies (Share Capital and Debentures) Rules amended: The Ministry of Corporate Affairs *vide* a notification dated August 16, 2019, has introduced the Companies (Share Capital and Debentures) Amendment Rules, 2019. These rules amend the provisions relating to issue of shares with differential rights and the requirements regarding Debenture Redemption Reserves (DRR) under Companies (Share Capital & Debentures) Rules, 2014.

The said amendment revises the cap on the issue of shares with differential rights from 26 (twenty six) per cent of the total post issue paid up equity share capital to 74 (seventy four) per cent of the total voting power in the company. It also relinquishes the eligibility requirement for the company to have distributable profits for last 3 (three) years for issuing shares with differential rights.

Other modifications to the said rules include *inter alia:*

i. Waiver of the requirement to maintain DRR in case of public issue as well as private placement of debentures by listed and registered Non-Banking Financial Companies and Housing Finance Companies and by other listed Companies;
ii. Waiver of the requirement to maintain DRR in case of private placement of debentures by unlisted and registered Non-Banking Financial Companies and Housing Finance Companies; and
iii. Requirement that unlisted companies (other than All India Financial Institutions and Banking Companies) maintain 10% of the value of the outstanding debentures as DRR.

Further, the certificates of shares issued by the company, where the shares are not in dematerialised form, may be signed by the company secretary instead of the director of the company. In event of issue of employee stock options by a start-up company, as defined in notification number G.S.R. 127(E), dated February 19, 2019 issued by the Department for Promotion of Industry and Internal Trade, the exemption from application of restrictions on the promoters/persons belonging to the promoter group/directors holding more than 10% of equity shares has been enhanced from 5 (five) years to 10 (ten) years from the date of incorporation of the start-up.

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Foreign Exchange Management (Deposit) Regulations, 2016 amended – Acceptance of Deposits by issue of Commercial Papers: The Reserve Bank of India, on August 16, 2019 notified changes to the Foreign Exchange Management (Deposit) Regulations, 2016. It notified deletion of sub-regulation (3) of Regulation 6 of the Regulation, with a view to bring in consistency in statutory provisions/regulations relating to commercial papers vis-à-vis other statutes/regulations – notably Section 45U(b) of the RBI Act, 1934, Rule 2(c) of Companies (Acceptance of Deposits), Rules 2014 and Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, *vide* Government of India Notification No. FEMA 5(R)(2)/2019-RB dated July 16, 2019.

Section 45U(b) of RBI Act, 1934 describes commercial paper as one of the money market instruments and Rule 2(c) of Companies (Acceptance of Deposits), Rules 2014 which excludes any amount received against issue of, inter alia, commercial papers from definition of deposits. The said notification also noted that the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, already allow investments in commercial papers issued by the Indian companies.

Alternative Investment Funds incorporated in IFSC to make investments as per provisions of SEBI (Alternative Investment Fund) Regulations, 2012: SEBI on August 09, 2019 released a circular titled 'Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015 - Permissible investments by Alternative Investment Funds operating in IFSC'.

The circular harmonises the provisions governing investments by Alternate Investment Funds (AIFs) incorporated in International Financial Services Centres (IFSC) with those provisions regarding investments applicable for domestic AIFs. Based on consultations held with stakeholders, SEBI has permitted AIFs incorporated in IFSC to make investments as per the provisions of the SEBI (Alternative Investment Fund) Regulations, 2012, and the guidelines and circulars issued thereunder, including the operating guidelines for AIFs in IFSC.

Master Direction on KYC – Certificate of proof of address if individual in jail: The Master Directions on KYC dated February 25, 2016 were amended by the Reserve Bank of India on August 9, 2019 in accordance with the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 notified on May 28, 2019.

A proviso has been now added to condition (b) of Section 23 of the Master Direction to the effect that, where the individual is a prisoner in a jail, the signature or thumb print shall be affixed in presence of the officer in-charge of the jail and the said officer shall certify the same under his signature and the account shall remain operational on annual submission of certificate of proof of address issued by the officer in-charge of the jail.

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Ratio Decidendi

Maintainability of Company Petition filed under Section 140(5) of Companies Act, 2013 against past auditor cannot be challenged citing literal interpretation

Key Points

Maintainability of the Company Petition filed under Section 140(5) of the Companies Act, 2013 (**Act**) against past auditor cannot be challenged on the ground of jurisdiction of the National Company Law Tribunal (**Tribunal**) to apply the said provisions to a past auditor.

Brief Facts

Section 140(5) of the Act provides for removal of the auditor of a company by the Tribunal, either *suo motu* or on an application made to it by the Central Government or by any person concerned, if the Tribunal is satisfied that the auditor of the company has acted in a fraudulent manner or has abetted or colluded in any fraud by the company or its directors of its officers. The said sub-section also provides that the Tribunal may appoint another auditor in place of the auditor so removed. Further, the said sub-section makes the auditor so removed by the order of the Tribunal ineligible to be appointed as the auditor for any company for a period of 5 (five) years from the date of passing of the order and liable for action under section 447 of the Act.

The respondent had filed a Company Petition seeking a declaration that the applicants be deemed to be removed as the statutory auditor of the company for previous financial years for which it acted as an auditor after the applicants had already vacated the office, thereby seeking to create a deeming fiction in the said section.

The applicants challenged the maintainability of the said Company Petition on the ground that Section 140(5) of the Act pertains to removal, resignation of existing auditor and does not apply to an auditor who has already resigned on account of rotation (i.e. by operation of law).

It has to be noted that the applicants had resigned as the auditor of the said company after filing of the Company Petition against the applicants in the Tribunal by the Central Government. Citing cessation of the applicants as the auditor of the company, the applicants had challenged the jurisdiction of the Tribunal to ban them for a period of 5 (five) years.

Issue for consideration:

Whether a petition under Section 140(5) of the Act can be filed against an auditor who has already resigned on account of rotation (i.e. by operation of law).

Held:

The NCLT ruled against the applicants on their petition challenging the jurisdiction of Tribunal over them, decisively rejecting their key contention that Section 140(5) of the Act only deals with removal/change of an existing auditor and cannot apply to a past auditor or an auditor who has resigned during the pendency of the petition before Tribunal.

The Tribunal also observeed that since the opening sentence of sub-section (5) of Section 140 of the Act reads *"Without prejudice to any action under the provisions of this Act or any other law for the time being in force"*, the said sub-section is applicable irrespective of any action under the provisions of the Act or any other law for the time being in force.

The Tribunal, giving a purposive reading to Section 140(5) of the Act, relied on the Supreme Court ruling in *Carew & Co. Ltd. vs. Union of*

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India, wherein it was held that a statute must be interpreted to give regard to the letter and spirit. The Tribunal remarked that the Supreme Court had laid down the principle that if the language used in a statute could be construed widely so as to salvage the remedial intendment, is must be adopted. It elaborated that allowing an auditor to escape the disqualifications under Section 140(5) of the Act by resigning from the post of auditor of the company would defeat the purpose of the law.

The Tribunal highlighted the vast difference between the resignation and removal of an auditor of any company. The direct consequence of removal of the auditor from a company is on his eligibility to act as an auditor in any company for a period of 5 (five) years. If an auditor has resigned on his own, then he can be re-appointed as an auditor of the same company within a period of 5 (five) years. Citing this difference, the Tribunal held that the resignation of the auditor during the pendency of the case does not render a petition filed under section 140 of the Act infructuous.

The Tribunal emphasised that literal interpretation should be given to a statute if the same does not lead to absurdity. It observed that the legislature contemplated that in a situation where the auditor has resigned or has rotated out on completion of its statutory term, suitable orders other than directing a change of the auditor may be passed and that the emphasis here was on the word “may” and not “change” (which becomes inconsequential in an appropriate case). The Tribunal further observed that the second proviso to Section 140(5) of the Act providing that an auditor who acts in a fraudulent manner and against whom an order has been passed by the Tribunal, ‘shall not be eligible’ to be appointed as an auditor for a period of 5 (five) years, indicate that the intention of the said section was not confined to merely changing the auditor in a company but making that auditor ineligible to be appointed as an auditor in any company for a period of 5 (five) years.

The Tribunal stressed that giving a purposive interpretation to statute would not mean that the court had legislated or enacted a provision. The court by favourably interpreting the provision in a manner that advanced the remedy and supressed the evil as the legislature envisioned, when two interpretations are feasible, had performed the interpretive function of the court, that is, to discover the true legislative intent.

The Tribunal thus concluded that the applications filed by the applicants on the premise, that Section 140(5) of the Act only deals with removal/change of an existing auditor, whose appointment is continuing on the date of the petition and could not be applied to the past auditor or the auditor who has resigned during the pendency of the petition, were not maintainable and deserved to be rejected.

[*Deloitte Haskins and Sells LLP and Ors.* v. *Union of India* - MA 2258/2019, MA 2505/2019, MA 2506/2019, MA 2268/2019 and MA 2270/2019 in CP 2062/140(5)/2019, decided on 9-8-2019, NCLT, Mumbai]

Appointment of arbitrator – Section 11 of Arbitration Act when not applicable

The 3-Judge Bench of the Supreme Court has upheld the view that Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of arbitrator by the Court, is not applicable in a dispute involving NHAI as National Highway Act, 1956 provides for appointment of arbitrator by the Central Government. The Court was of the opinion that in view of the power being vested exclusively with the Central Government to appoint an Arbitrator under Section 3G(5) of the Act 1956, being a special enactment, the application filed under Section 11(6) of the Act 1996 for appointment of an Arbitrator was not maintainable.

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The Court observed that the legislature intended the 1956 Act to act as a complete code, and that the application of general law would impliedly be excluded. It noted that Section 3G(6) of 1956 Act stipulates that provisions of Arbitration Act will apply subject to provisions of 1956 Act. Rejecting the contention that as the Central Government did not appoint the arbitrator within 30 days of the application, it lost its competence to appoint same, the Supreme Court held that if the Central Government does not appoint an Arbitrator within a reasonable time, it is open for the party to avail the remedy either by filing a writ petition under Article 226 of the Constitution or a suit for the purpose, but, the remedy of Section 11 of Act 1996 is not available.

The Court in this regard also observed that there is no statutory limitation provided under sub-section (5) of Section 3G of Act 1956 for the Central Government to appoint an arbitrator. [*NHAI* v. *Sayedabad Tea Company Ltd.* - Civil Appeal No(s). 6958-6959 of 2009, decided on 27-8-2019, Supreme Court Larger Bench]

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News Nuggets

Liquidation – Workers provident, pension and gratuity funds are not assets

NCLAT has upheld the NCLT order that Provident fund, Pension fund and Gratuity fund of the workers are not assets of the corporate debtor and cannot be distributed under Section 53 of the Insolvency and Bankruptcy Code. It held that Section 53(1)(b) read with Section 36(4) of the I&B Code will have an overriding effect on Section 326(1)(a) of the Companies Act and that meaning of workmen's dues in Section 53 cannot be derived from Section 326. Tribunal in *SBI v. Moser Baer Karamchari Union* observed that as per Section 53(1)(b)(i), workmen dues are confined to 24 months preceding liquidation, whereas Section 326(1)(a) is not confined to any period.

Summary suit by factor against assignor/guarantor maintainable

Delhi High Court has held that suit under CPC Order XXXVII is maintainable against the assignors and the guarantors in a transaction governed by Factor (Assignment of Receivables) Act 2011. Court observed that Section 16 of Act of 2011 which provides broader rights to assignee (factor) to sue the debtor not mean that no suit can be filed against assignor and guarantor. It also held that moratorium under IBC does not apply to guarantor. Court in *IFCI Factors v. Ramsarup Indus.* observed that purpose of 2011 Act was to extend benefit of summary procedure for recovery of debts.

No person other than Corporate Debtor can challenge admission under IBC Section 7

NCLAT has held that after admission of application under Section 7 of the IBC, if another person claims that it is one of the Financial Creditor, it can file claim before the Resolution Professional. Tribunal in the case of L&T Infrastructure Finance Company v. Gwalior Bypass Project Ltd. however held that the said person cannot challenge admission of application in the absence of challenge by the

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Corporate Debtor, on ground that it has first charge on asset of Corporate Debtor or has superior claim over other Financial Creditors. It also held that such person has no right to intervene admission of application under Section 7.

Mortgage when not a 'preferential transaction' under Section 43(2)(a) of IBC

NCLAT has held that mortgage created by a corporate debtor to secure debt of related party (holding company), cannot be annulled on the ground of 'preferential transaction' in terms of IBC Section 43(2)(a). Tribunal in the case of *Axis Bank v. RP for Jaypee Infratech* observed that interest on property of corporate debtor was not created in favour of appellants-financial creditors of an antecedent financial debt owed by corporate debtor. It was also held that transactions were neither covered as undervalued transactions for Section 45, nor as fraudulent or wrongful trading for Section 66.

Committee of creditors is not required to record reasons for replacing RP

NCLAT has held that Committee of Creditors is not required to record any reason for replacing Resolution Professional (RP) which may otherwise call for proceedings against such RP. The Appellate Tribunal in the case of *PNB v. Kiran Shah* observed that CoC having decided with 88% voting share to remove RP, it was not open to the adjudicating authority to interfere with such decision, till it is shown that such decision by the CoC is perverse or without jurisdiction. It was also held that for proceedings reported to IBBI, CoC cannot await IBBI decision for replacement.

Time limit prescribed in arbitration agreement is sacrosanct

Supreme Court has set aside the High Court order wherein the lower Court had dismissed the plea that the arbitrator had become de jure unable to perform its functions due to lapse of time as agreed in the agreement. The agreement had prescribed time period for arbitration proceedings with the proviso for extension with the consent of the parties. The Court in the case of Jayesh H. Pandya v. Subhtex India Ltd. noted that the proceedings stood terminated as appellant gave no consent for extension. It observed that the time restriction was within the scope and purport of the Arbitration and Conciliation Act.

No restoration of company if past directors could be brought to liability under Section 179 of Income Tax Act

NCLAT has dismissed an appeal by the Income tax department against striking-off of the name of company from RoC. It held that in absence of any proof to show that company was not defunct and possessed of assets and liabilities, there is no fault in striking off. Plea that Revenue falls within meaning of creditors under Section 252(3) of the Companies Act 2013, was also rejected. Tribunal in *Pr. Commr. v. RoC* questioned the Revenue as to why it insisted on restoration of the company, when its erstwhile directors can be brought to liability under Section 179 of the Income Tax Act to pay income tax.

Country specific warranty policy prima facie anti-competitive: CCI

Competition Commission of India has held that providing warranty on goods only when same are bought from an authorized dealer in India, *prima facie*, has potential to lead to denial of

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market access to the parallel importers. The Opposite party (OP) was not providing warranty services in case of products bought from parallel importers. CCI in the case of *Matrix Info Systems v. Intel Corp.* directed the DG to conduct investigation, *prima facie* opining that India specific policy of the OP was in contravention of Section 4(2) of Competition Act. It noted that such differential treatment was not followed by the OP in other places.

Combinations (M&A) – CCI amends regulations to provide green channel approvals

Competition Commission of India (CCI) has amended CCI (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011 to provide for approval of certain specified combinations under Green Channel. As per new Regulation 5A, effective from 15-8-2019, parties to categories of combinations as specified in new Schedule III may give notice in Form I (under Regulation 5) along with a declaration as per new Schedule IV, and upon such filing and its acknowledgment, the combination will be deemed to have been approved.

DGFT's Export Policy cannot be questioned under Section 4 of Competition Act

Competition Commission of India has held that change in export policy by the DGFT in pursuance of its statutory duties and implementation thereof by the Indian Rare Earths Ltd., a Government of India undertaking, are not amenable for examination within the framework of Section 4 of the Competition Act. Commission in the case of *Beach Minerals Producers Association v. DGFT* observed that policy formulation regarding export of Beach Sand Minerals under the provisions of Foreign Trade (Development and Regulation) Act 1992 and Foreign Trade Policy does not fall within the ambit of CCI and therefore cannot be questioned.

Arbitration – Deemed existence of arbitration agreement and doctrine of 'Group of companies'

Relying on facts, Supreme Court has rejected the preliminary objection that there was no written arbitration agreement between parties. Court perused minutes where CoD had asked parties to take recourse to arbitration, sharing of draft arbitration agreement between them, and recording of consent for arbitration. Court in *MTNL v. Canara Bank* also noted that statement of claim and defence filed before arbitrator would constitute evidence of existence of such agreement, which was not denied by the other party, under Section 7(4)(c) of Arbitration and Conciliation Act 1996. Court also invoked the doctrine of 'group of companies', to join Respondent No. 2 –the wholly owned subsidiary of Respondent No. 1, in the arbitration proceedings pending before the Sole Arbitrator. It observed that there was clear intention of the parties to bind both Canara Bank, and its subsidiary to the proceedings.

Arbitration – 1940 Act not valid for arbitration starting after 1996 Act

Larger Bench of Supreme Court has held that provisions of Arbitration Act, 1940 including the State amendment namely para 7A of Section 24 of UP Civil Laws (Reforms and Amendment) Act, 1976 will have no application to proceedings commencing after enforcement of Arbitration and Conciliation Act, 1996 even though the agreement was dated earlier to the later Act. Setting aside the High Court order, the 3-Judges Bench of the Apex Court in the case of *Shahi and Associates v. State of UP,* relying on Section

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31(7)(b) of the 1996 Act, allowed interest @ 18% from date of arbitration award.

Draft e-commerce guidelines for consumer protection, issued

Department of Consumer Affairs in the Ministry of Consumer Affairs has recently released draft Model Framework for Guidelines on e-Commerce for consumer protection. As per the advisory, the guidelines will be the guiding principles for e commerce business for preventing fraud, unfair trade practices and protecting the legitimate rights and interests of consumers. The e-commerce entity will accordingly have to comply with a set of conditions for conduct of business. The guidelines also list various liabilities of e-commerce entity and the seller.

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