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Articles

Scope of 'Any other person' under Companies Act, 2013

By **Noorul Hassan**

In two recently delivered orders of the National Company Law Tribunal (NCLT), the question under consideration was whether a person who is unable to demonstrate having an 'interest' in the affairs of a company, is entitled to obtain copies of such company's statutory registers. This question gives rise to the related concern of what qualifies as having 'sufficient' interest in a company's affairs to be able to exercise the right of inspection of statutory registers.

Relevant Section of the Companies Act, 1956 (1956 Act):

Section 163(2)(b) of the 1956 Act provides that the registers, indices, returns and copies of certificates and other documents shall be open for inspection during business hours to (a) any member or debenture holder *without fee;* and (b) any other person on *payment of fee.* Extracts of any such record, register, etc., may also be obtained by member or debenture holder or by any other person on payment of fee.

Relevant Section of the Companies Act, 2013 (2013 Act):

The right of inspection and right to obtain extracts under Section 94(2) and 94(3) of the 2013 Act, although materially similar to the above-mentioned provisions of the 1956 Act, also include 'other security holders' and 'beneficial owners' within its ambit.

In *Anilkumar Poddar* v. *Futura Commercials Pvt. Ltd.,* [2017] 201 Comp Cas 12 (NCLT) and *Anilkumar Poddar* v. *Reliance Corporate IT Park Ltd. And Others* [2017] 201 Comp Cas 23 (NCLT), the term *'any other person'* as used in Section 163(2)(b) of the 1956 Act has been interpreted. The facts in both the cases are identical. Briefly, the Petitioner (being an outsider and having no interest in the respondent companies), had applied for copies of statutory registers of the respondent companies, which request was denied by the respondent companies. Aggrieved by the denial, the Petitioner approached NCLT under Section 163 of the 1956 Act for issue of directions to furnish copies of statutory registers. Admittedly, the Petitioner neither spelt out the reasons for which he sought the copies from the companies nor explained the interest he had in them.

The NCLT held that the phrase 'any other person' derives its meaning from the preceding words used in Section 163(2)(b) of the 1956 Act, i.e., members, debenture holders, other security holders or beneficial owners - the presence of a commercial interest in the company being a commonality amongst such persons. NCLT held that the term 'any other person' in relation to a company should therefore include any person who has a business interest in such company, such as a creditor, investor, banker, customer, etc., and

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who is not a rank outsider to the company.

In an earlier case, the Company Law Board (CLB) in *HB Stockholdings Limited* v. *Jaiprakash Industries Ltd.* (2003) 116 Comp Cas 28 (CLB), had an opposing view. In this case, CLB observed that the Register of Members is a document which is available not only to the members of a company but also to any other person. In other words, it is a public register and that the purpose or motive to obtain the copies is irrelevant.

To analyze NCLT's recent Orders, the statutory provision may be examined in context of the '*Ejusdem Generis*' rule of construction. *Per* the 'Rule of *Ejusdem Generis*', general words that follow specific words derive their meaning and take the colour of the specific words that precede it. The specific words constituting a genus will be applied to understand the meaning of the succeeding general terms. The Hon'ble Supreme Court has applied the rule of '*ejusdem generis*' in various cases.

The Hon'ble Supreme Court in *Ishwar Singh Bagga & Ors.,* v. *State of Rajasthan* [1987] 1 SCC 101, while interpreting the phrase *'other person authorized in this behalf by the State Government'* as provided under Section 129A of the Motor Vehicles Act, 1939, held that this phrase has to be interpreted in line with the term it succeeds, that is '*any police officer authorized in this behalf*', and therefore the phrase 'other person' had to be read with the expression 'any police officer'.

The phrase 'other person' also came up for consideration before the Hon'ble Apex Court in *The Mysore Electricity Board* v. *Bangalore Woollen, Cotton and Silk Mills Ltd., & Ors.*, 1963 AIR 1128, wherein the word *'other person'* as appearing in Section 76 of the Electricity Act, 1948, was interpreted. The said Section provides that all questions arising between the State Government or the Board and a *licensee or other person* shall be determined by arbitration, and whether such other person includes a consumer or not. Though the Hon'ble Supreme Court did not conclusively decide the issue, it observed that the term 'other person' as used in the whole Act, refers to persons who generate and supply electrical energy and not those who consume it.

Other Provisions of the 2013 Act:

The observation of the Hon'ble Supreme Court in relation to 'other person', may be applied to the provisions of the 2013 Act, to determine whether a rank outsider has any role to play under the said Act vis-à-vis a company. Although the phrases 'other person' and 'any other person' have been referred to in various provisions under the 2013 Act, our analysis focuses on those provisions where the phrase is preceded by the words 'members', 'debentures', 'creditors' or 'any other person'.

- Firstly, Section 13(5) dealing with alteration of memorandum of association, provides that the Central Government shall dispose of the application for alteration after satisfying

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that such alteration has the consent of the creditors, debenture holders and *other person concerned with the company* – The section makes it clear that the term 'other person' refers to the category of persons 'concerned' with the affairs of the company;

- Section 147(3) dealing with liability of the auditor on its conviction for contravention of the provisions of the Act, provides that the auditor shall be liable for damages to company, statutory bodies, or authorities or *to any other person* for loss arising out of incorrect or misleading statements – Here, the term 'any other person' refers to the category of persons who have suffered losses arising out of any incorrect or misleading statement of the statutory auditor of the company;
- Section 213(b)(i) provides that an application for investigation into the affairs of a company can be made if the business of the company is being conducted with intent to defraud its creditors, members or *any other person* – Here, 'any other person' refers to the category of persons having interest in the company and who may potentially have been defrauded by such company;
- Section 224(5) provides that after an investigation into the affairs of a company, if the Inspector's report states that fraud has taken place in a company and due to such fraud, any director, KMP, other officer of the company or *any other person* or entity has unduly benefited, such benefit shall be restored back – This Section indicates the category of recipients of wrongful gain.

Clearly, the amplitude of the phrase 'other person' or 'any other person' referred to in these sections strengthens the view that in the general scheme of the 2013 Act, the phrase denotes a person having commercial and/or legal interest in the affairs of a company.

Provisions of Indian Evidence Act, 1872:

The proposition whether the registers of members, and such documents of a company are 'public documents' allowing unrestricted access to everyone or a 'private document', granting limited access only to certain persons, can be analyzed in reference to Section 74 of the Indian Evidence Act, 1872 (Evidence Act). Section 74 of the Evidence Act, states that documents forming the acts or records of the sovereign authority, official bodies and tribunals, and public officers, legislative, judicial and executive and public records kept in any state of private documents, are in the nature of public documents and Section 75 of the Evidence Act provides that all other documents are private. Section 76 of the Evidence Act casts a duty on every public officer having custody of a public document to allow inspection to public and issue certified copies.

Evidently, the 2013 Act does not specify that statutory registers are public documents.

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Nevertheless, once filed with the Ministry of Corporate Affairs (MCA), they become public documents and certified copies can be issued by the Registrar of Companies.

In Re, *Butt (Deceased)*, (1952) 1 All ER 167 (CA), it was held that if shares are registered in the names of the trustees, the beneficiaries of the trust are not entitled to exercise the right to inspect documents as shareholders.

Possibility of opposite view:

There is also a plausible argument that the 1956 Act or the 2013 Act, in their wisdom, have included the term 'other person' only to distinguish from members, debenture holders, etc., who have vested interest in a company. This view can also be gathered from the provisions of Section 81(2) of the 2013 Act, wherein, the right to inspect the Register of charges was provided to 'any person' without specifying any other category of persons. Should the intention of the legislature be to exclude 'other person' from this right, it should have defined the said term specifically or restricted the right to say that persons who are interested in the company are only allowed, as used in Section 294(4) of 2013 Act, where in the audited accounts filed with the Tribunal shall be open to inspection by *creditor, contributory or person interested.*

Provisions of UK Companies Act, 2006:

A parallel may also be drawn to the Companies Act, 2006 of United Kingdom ('UK Act'). Section 116 (1) (b) of the UK Act stipulates that the register and index of members' names of a company is open to inspection for '*any other person*' on payment of prescribed fee, provided the said person also discloses the '*purpose*' in the request for inspection. However, this requirement of stating the 'purpose' in the application has not been provided neither under the 1956 Act nor under the 2013 Act.

Conclusion:

Importantly, the CLB in *Jaiprakash Industries* case did not deal with the question of eligibility of an 'other person' to inspect and take copies. Rather, the question was that before taking extracts, whether inspection of the company's statutory register is a condition precedent. This question was answered in the affirmative by the CLB, and it was also held that the person inspecting the register need not specify the purpose for which he is inspecting it.

Although the views expressed by NCLT favour a narrower scope for interpreting the term 'other person' as referred to in Section 94 of the 2013 Act and Section 163 of the 1956 Act, these provisions do not explicitly impose the limitation that the 'other person' should be related and/or have a vested interest in the company. While contradictory views were expressed by the CLB earlier in *Jaiprakash Industries* case, and Courts have permitted access to 'outsiders' to company information by allowing applications in this regard after due consideration of the 'proper purpose', it would be interesting to see how this long-standing issue evolves in the Indian scenario.

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E-Waste (Management) Rules, 2016 – Highlights

By **Sudeep Deshmukh**

The Central Government has notified the E-Waste (Management) Rules, 2016 (the EWM Rules, 2016) which supersede the E-Waste (Management and Handling) Rules, 2011, (the EW Rules, 2011). The EWM Rules, 2016, have come into force from 1st October 2016.

The EWM Rules, 2016, apply to every manufacturer, producer, consumer, bulk consumer, collection centres, dealers, e-retailer, refurbisher, dismantler and recycler involved in manufacture, sale, transfer, purchase, collection, storage and processing of e-waste or electrical and electronic equipment listed in Schedule I appended to the rules[1]. It also includes the components, consumables, parts, and spares which make the product operational.

'E-waste' has been defined in the Rules, 2016 as electrical and electronic equipment, whole or in part discarded as waste by the consumer or bulk consumer as well as rejects from manufacturing, refurbishment and repair processes. 'Electrical and electronic equipment' in turn has been defined to mean equipment which are dependent on electric current or electro-magnetic field in order to become functional.

Thus the new Rules cover e-waste generated from the manufacture, use, repair and refurbishment of all kinds of electrical and electronic equipment, including 'information technology and telecommunication equipment' and 'consumer electrical and electronics', specifically listed in Schedule I of the Rules. The EWM Rules, 2016 have brought more clarity by introducing the definitions of consumable, components, channelization, dealer, deposit fund scheme, end-of-life, e-retailer, e-waste exchange, extended producer responsibility - authorization, extended producer responsibility plan, manufacturer, part, producer responsibility organization, refurbishment, refurbisher, spares, and targets.

One of the highlights of the EWM Rules, 2016, is the concept of Extended Producer Responsibility (EPR). The producers of electrical and electronic equipment have to implement the EPR to ensure that the e-waste is properly channelized to authorised recyclers or dismantlers and to achieve environmentally sound management of the e-waste. The Central Pollution Control Board (CPCB) has also published the implementation guidelines for EWM Rules, 2016, in order to ensure that the provisions of the rules are effectively implemented. A target based approach which is adopted from the recent international best practices for e-waste management has been recommended for the effective implementation of the EPR which involves phase wise collection of targeted quantities of e-waste by or on behalf of producers. The producers have to submit

[1] The E-Waste Management Rules, 2016

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their EPR plan in Form 1 while applying to the CPCB for EPR authorization. The EPR plan should involve an estimated total quantity of the e-waste generated from the end-of-life products, general scheme for collecting back and channelization of e-waste to authorised recyclers or dismantlers, estimated budget, proposed awareness programmes, and the details for reduction in the use of hazardous substance (RoHS) compliance[2].

The manufacturers, dealers, e-retailers, and refurbishers have been brought under the ambit of these rules to ensure that the e-waste is effectively channelized and disposed of. Fluorescent and other mercury containing lamps are also covered under the EWM Rules, 2016. The rules prescribe the responsibilities of the manufacturer which were previously not considered in the EWM Rules, 2011. The manufacturer has to undertake authorization from the concerned SPCB, collect the e-waste which is generated during the manufacturing process and channelize it for recycling or disposal, ensure that no damage is caused to the environment during storage and transportation of e-waste, maintain records of e-waste generated, and file annual returns to the concerned SPCB. The EWM Rules, 2016, have also prescribed the responsibilities of the dealer, refurbisher, and the State Government to ensure that the e-waste is effectively channelized and disposed of.

The criteria for implementation of RoHS in the manufacture of electrical and electronic equipment and their components or consumables or parts or spares has been prescribed which would lead to effective implementation of the rules and minimize the generation of e-waste. The EWM Rules, 2016, mandates that the transportation of the e-waste shall be carried out as per the manifest system. Further, the manufacturer, producer, importer, transporter, refurbisher, dismantler, and recycler will be held liable and strict penalty would be imposed for all the damages which would be caused to the environment or any other third party due to improper handling and management of e-waste. The urban local bodies have been assigned the responsibility of collecting back the e-waste arising from the orphan products and channelizing it to authorized dismantler or recycler.

The EWM Rules, 2016, have prescribed strict criteria for achieving effective collection, transportation, storage, channelization, and disposal of the e-waste in an environmentally sound manner. The compliance requirements under the EWM Rules, 2016, have been made more stringent than the EW Rules, 2011. The manufacturer, producer, consumer, bulk consumer, collection centres, dealers, e-retailer, refurbisher, dismantler and recycler involved in manufacture, sale, transfer, purchase, collection, storage and processing of e-waste or electrical and electronic equipment have to take adequate measures and develop a strong compliance management system in order to comply with the requirements prescribed under the rules.

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2 CPCB (2016) Implementation Guidelines for E-Waste (Management) Rules, 2016

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Notifications & Circulars

External Commercial Borrowing by LLPs - Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Second Amendment) Regulations, 2017: The Reserve Bank of India, by its Notification dated March 3, 2017, has amended the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000 (TISPRO Regulations). Regulation 5(9) of TISPRO Regulations, allowing a person resident outside India or an entity registered outside India (not being a Foreign Portfolio Investor or Foreign Institutional Investor or Foreign Venture Capital Investor registered in accordance with SEBI guidelines; not being a citizen of/entity incorporated in Pakistan or Bangladesh) to contribute foreign capital, either by way of capital contribution or by way of acquisition/transfer of profit shares in the capital structure of a Limited Liability Partnership (LLP) under the Foreign Direct Investment Scheme, specifies that such contribution is subject to the terms and conditions provided under Schedule 9 of TISPRO Regulations.

The recent amendment has brought about certain important relaxations to the regime governing foreign direct investment in LLPs provided in Schedule 9 – firstly, the mandatory requirement of having a designated partner who is resident in India has now been removed, thereby allowing even a foreign company to become a designated partner in an Indian LLP. Secondly, earlier, a company having foreign investment could convert into an LLP only upon seeking prior approval from the Government. In an attempt towards promoting ease of doing business in India, such conversion will henceforth not require prior Government approval.

Further, LLPs were previously prohibited to avail any External Commercial Borrowings (ECB). However, as per the revised Schedule 9 of TISPRO Regulations, this provision has now been removed, leaving one to draw the conclusion that the Reserve Bank of India may soon bring corresponding amendments in regulations governing ECB as well, thereby paving the way for LLPs to raise ECB.

Foreign Direct Investment (FDI) in E-commerce Entities - Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fourth Amendment) Regulations, 2017: The Reserve Bank of India, by its Notification dated March 9, 2017, has amended the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000 (TISPRO Regulations). The amendment has defined key terms such as '*e-commerce*', '*e-commerce entity*', etc., and distinguished between an 'inventory based model' and a 'market place model' of e-commerce. While an 'inventory based model' refers to e-commerce activities where the inventory of goods and services is owned by an e-commerce entity who sells such goods/services to consumers directly, a 'market place model' refers to e-commerce activities wherein the e-commerce entity acts only as a facilitator between buyers

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and sellers on an information technology platform.

The amendments to Schedule 1 of TISPRO Regulations reiterate that 100% FDI in B2B e-commerce activities is allowed under the Automatic route, as was the case earlier. However, it has now been made clear that 100% FDI under Automatic route is also allowed in market place model of Business to Business (B2B) e-commerce. It is clarified that FDI in an inventory-based model of e-commerce continues to be strictly prohibited. The Amendment clarifies that marketplace e-commerce entities may also provide support services in respect of warehousing, logistics, call centre, payment collection, etc., to sellers registered on its platform.

Importantly, an e-commerce entity, is not permitted to have more than 25% (twenty five percent) of their sales value on financial year basis, effected through its marketplace from one vendor or its group companies. Further, the e-commerce entity is also required to maintain a level playing field by ensuring that it does not directly or indirectly influence the sale price of goods/services. The amendment also clarifies that guidelines that are applicable to cash and carry wholesale trading shall be applicable to B2B e-commerce activities as well.

SEBI revises regulatory framework for sanctioning scheme of arrangement of listed entities: The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, lists various obligations on listed entities with respect to schemes of arrangement. Through its recent Circular No. CFD/DIL3/CIR/2017/21 dated March 10, 2017 (Circular), SEBI has revised the procedure for sanction of scheme of arrangement for a listed company. The Circular dated March 10, 2017, is not applicable to schemes of merger of a wholly owned subsidiary with its parent company. Nevertheless, for disclosure purposes, such draft schemes are required to be filed with stock exchanges. Schemes already submitted to stock exchanges prior to notification of this Circular shall continue to be governed by the provisions previously applicable, as specified in SEBI's Circular dated November 30, 2015.

A listed entity is required to pay a fee to SEBI at the rate of 0.1% of the paid-up share capital of the listed/transferee/resulting company, whichever is higher, post sanction of the proposed scheme, subject to a cap of Rs.5,00,000 (Rupees Five Lac).

The Circular lists down the requirements to be fulfilled by a listed entity, both before and after a scheme of arrangement is sanctioned by the Hon'ble High Court or National Company Law Tribunal, as the case may be. It includes, inter alia, requirements that are to be fulfilled by a listed entity with respect to disclosures, submission of documents etc., and also, the obligations of stock exchanges and obligations of SEBI to process the draft scheme in a timebound manner.

Importantly, SEBI has introduced additional instances that require mandatory approval of a majority of public shareholders, for a scheme of arrangement to be acted upon. Firstly, majority approval of public shareholders will be required when the scheme of arrangement

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involves (i) a merger of an unlisted entity that results in the reduction of the voting share of pre-scheme public shareholders of the listed entity, in the resulting company, by more than 5% of the total capital of such merged entity and (b) transfer of 'substantially the whole of the undertaking' of the listed entity (i.e. 20% or more of value of company in terms of consolidated net worth or consolidated total income during the previous financial year as specified in Section 180(1)(a)(i) of Companies Act, 2013) or whole of the undertaking, and the consideration for such transfer is not in the form of listed equity shares. Other instances requiring majority public shareholder approval specified under the earlier regime, continue to require such approval under the new Circular. Further, SEBI has mandated listed entities to adopt e-voting, thereby phasing out postal ballot voting by public shareholders.

Where allotment of shares pursuant to a scheme of arrangement is made only to a select group of shareholders or to shareholders of unlisted companies, the issuance of shares is required to be in conformity with SEBI's pricing guidelines provided in SEBI (Issuance of Capital and Disclosure Requirements) Regulations, 2009. In its latest Circular dated March 23, 2017, SEBI has also clarified that the date of the relevant Board meeting in which the Scheme of Arrangement is approved, shall be regarded as the 'relevant date' for computing pricing.

Foreign Parent Company may hedge exposure to transactions of Indian subsidiary: The Reserve Bank of India, *vide* its Notification dated March 17, 2017 read with A.P. (DIR Series) Circular No. 41, dated March 21, 2017, has amended the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000, permitting a non-resident entity to hedge the currency risk arising out of current account transactions relating to its Indian subsidiary. Large multinational organizations generally have a well-defined Risk Management framework in place and are equipped with centralised/ regional treasury functions to handle various foreign exchange transactions. To ease the operational burden on their Indian subsidiaries who may not have such infrastructural support in place, RBI has facilitated non-resident parent entities to directly approach Authorized Dealer banks in India (handling the foreign exchange transactions of their Indian subsidiaries) to hedge currency risk, of and on behalf of their Indian subsidiaries exposed to currency risk.

The profit/loss of such hedging transactions are required to be settled in the books of accounts of the Indian subsidiary. Further, the onus of compliance with rules and regulations applicable to these transactions, shall be that of the Indian subsidiary. Such transactions will be covered under a tripartite agreement between the non-resident parent entity, the Indian subsidiary and the concerned Bank, which should *inter-alia* clearly delineate the exact relationship between the non-resident entity and its Indian subsidiary as well as responsibilities of all parties.

RBI releases Draft Regulations for Payment Systems: On March 20, 2017, the Reserve Bank of India released draft "Master Directions on Issuance and Operation

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of Pre-paid Payment Instruments in India" ('Draft Circular') for public consultation. Although these draft regulations may likely undergo further changes following receipt of stakeholder feedback, the Draft Circular offers a glimpse of the stringent nature of regulatory changes being contemplated for existing and prospective entities in the Pre-Paid Payment Instrument ('PPI') business. Key changes include a significant hike of the minimum positive net worth requirement of an applicant seeking a license/authorization to undertake PPI business in India. RBI proposes to increase the current minimum net worth requirement of INR 1 Crore to INR 25 Crore.

Before granting authorization to an applicant, RBI may also check 'fit and proper' status of the applicant by obtaining inputs from other regulators, government departments and self-declarations of the entities' directors. Additionally, RBI may apply checks on certain aspects like customer service and technical requirements. RBI may first issue only an 'in-principle' approval valid for six months to an applicant. During this six-month period, the entity may be required to submit a 'System Audit Report' to RBI, failing which the in-principle approval would lapse automatically. The System Audit is envisioned to cover technology deployed (e.g. hardware, operating systems, security and controls), compliance as per security best practices, etc. PPI issuers considering introducing any material changes in the processes other than those approved/ authorized, may also be required to obtain prior approval of RBI. Entities granted final authorization may be required to commence business within six months from grant of authorization, failing which their authorization would lapse automatically.

Non-bank PPI issuers may be required to obtain prior permission of RBI for any takeover or acquisition of control or any change in management resulting in change of more than 30% of directors, excluding independent directors. PPI issuers may also be required to have in place a comprehensive 'Security, Fraud prevention and Risk Management' as well as a 'publicly disclosed customer grievance redressal' framework.

Corporate Governance Standards for insurance companies in India: The Insurance Regulatory and Development Authority of India (IRDAI) has, on March 20, 2017, mandated that a 'code for stewardship' containing a set of principles be adopted by insurance companies in India. These principles are intended to encourage insurance companies to play a more active role in general meetings of its investee companies as 'stewards' on behalf of policy holders, thereby improving the corporate governance practices of such investee companies and ultimately enhancing returns of investment for insurance companies as well as policy holders. Henceforth, insurance companies in India shall be required to frame a policy based on the principles outlined by IRDAI, within six months from date of issue of the guidelines, and disclose such policy on their websites within 30 days from approval

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of its Board of Directors. Insurance companies are also required to file a status report on an annual basis with IRDAI – those not complying are required to disclose the reasons for such deviation/non-compliance to IRDAI. These principles are envisioned to be uniformly applicable to other institutional investors in India such as Mutual Funds, Pension Funds, Alternative Investment Funds, etc.

Rationalisation of Appellate Tribunals: Finance Act, 2017 which came into force on 31st of March, 2017 provides for amendments in certain Acts in order to lay down provisions for merger of various Tribunals and other authorities. While the appeals from the Competition Commission of India (CCI) would be heard, from a date yet to be notified, by National Company Law Appellate Tribunal (NCLT) and not Competition Appellate Tribunal (COMPAT), Intellectual Property Appellate Board (IPAB) set-up under the Trade Marks Act, 1999, would hear matters presently handled by the Copyright Board which was set-up under the Copyright Act, 1957. Similarly, matters handled by Appellate Tribunal for Foreign Exchange under FEMA, 1999 would be taken up by the Appellate Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. The amendments also provide for uniform provisions relating to 'Conditions of service of Chairperson and Members of Tribunals, Appellate Tribunals and other authorities'.

Ratio Decidendi

'Offer Period' under Takeover Regulations: The appeal in the Supreme Court was filed against the Order of the Securities Appellate Tribunal, Mumbai ("SAT"), regarding the interpretation of the definition of an 'offer period' for the purposes of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, as amended by SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002 ("Regulations").

Burren Energy India Limited ("Burren"), incorporated under the laws of England and Wales in 2004, was formed to acquire the entire share capital of Unocal Bharat Limited ("UBL"). UBL held 26.01% of the issued share capital of Hindustan Oil Exploration Co. Ltd ("Target Company"). The shares of UBL had previously been acquired in 1996 by Unocal International Corporation ("UIC"). Burren, with an intention to acquire UBL, had entered into a Share Purchase Agreement with UIC on February 14, 2005 ("SPA"). By virtue of the SPA, Burren indirectly came to acquire 26.01% shareholding of the Target Company which was earlier held by UBL.

As the acquisition was beyond the stipulated 15% limit under the Regulations, the requirement on the part of Burren to make a public announcement was attracted. Accordingly, the public announcement for sale/purchase of shares of Target Company was made on February 15, 2005. However, on the date of execution of SPA (i.e. February 14, 2005),

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Burren appointed two of its directors, both on the board of UBL and the Target Company. The said appointments, according to SEBI, amounted to a violation of Regulation 22(7)[3] of the Regulations as they were disputedly made during the subsistence of the offer period.

As per the Regulations applicable to the present case, an acquirer was prohibited from making any appointment on the Board of Directors of Target Company during the 'offer period' (i.e. the period between date of signing of MoU or making of public announcement, as the case may be, and the date of completion of offer formalities). The question before the court was whether the appointments made were during the offer period or not, given that the parties had not executed an MoU.

SAT had interpreted the term 'Memorandum of Understanding' in literal terms and concluded that it fell short of a concluded agreement. According to SAT, in the absence of a MoU, the date of public announcement would trigger commencement of the 'offer period'. As the appointments dated February 14, 2005 were made before the date of public announcement on February 15, 2005, such appointments had not been made during the offer period and thus did not violate Regulation 22(7).

The Supreme Court, reversing the order of SAT and restoring the order of Adjudicating

[3] **Regulation 22- General obligations of the acquirer -** …(7) During the offer period, the acquirer or persons acting in concert with him shall not be entitled to be appointed on the Board of Directors of the target company:

Provided that in case of acquisition of shares or voting rights or control of a Public Sector Undertaking pursuant to a public announcement made under the proviso to sub-regulation (1) of Regulation 14, the provisions of sub-regulation (8) of Regulation 23 shall be applicable:

Provided further that where the acquirer, other than the acquirer who has made an offer under regulation 21A, after assuming full acceptances, has deposited in the escrow account hundred per cent of the consideration payable in cash where the consideration payable is in cash and in the form of securities where the consideration payable is by way of issue, exchange or transfer of securities or combination thereof, he may be entitled to be appointed on the Board of Directors of the target company after a period of twenty-one days from the date of public announcement.

Evolving definition of 'Offer Period' under Takeover Regulations

PREVIOUS REGIME	2002 AMENDMENT	CURRENT REGIME
SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997	SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002	SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
period between date of public announcement of the first offer and date of closure of that offer	*period between date of entering into Memorandum of Understanding or public announcement, as the case may be, and date of completion of offer formalities relating to offer made*	*period between date of entering into an agreement, formal or informal, to acquire shares, voting rights in, or control over a target company requiring a public announcement, or date of public announcement, as the case may be, and date on which payment of consideration to shareholders who have accepted the open offer is made, or date on which open offer is withdrawn, as the case may be.*

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Officer of SEBI, observed that the term 'Memorandum of Understanding' may also include a concluded agreement and further noted that even in cases where a concluded agreement is executed subsequent to an MoU, the 'offer period' would still commence from the date of execution of such MoU. The Supreme Court concluded that if the offer period can be triggered by an understanding between the parties that is yet to fructify into a concluded agreement, there is no reason why such offer period could not commence from the date of a concluded agreement, in the absence of a MoU. Therefore, as the offer period was triggered on execution of SPA dated February 14, 2005, and the appointments dated February 14, 2005, had been made during the subsistence of the offer period, such appointments violated the embargo under Regulation 22(7). [Securities *and Exchange Board of India* v. *Burren Energy India Limited,* Civil Appeal No. 361 of 2007, Supreme Court of India]

Exemption from requirement of making Public Offer in case of inter-se promoter transfer - SEBI clarifies scope: In its recent order dated March 03, 2017, SEBI has rejected a request made by a proposed acquirer for exemption from complying with the requirement of making a public offer in terms of Regulation 3(2) read with Regulation 10(1)(a)(ii) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 ("Takeover Regulations").

Gokul Agro Resources Limited, a public listed company was initially incorporated in 2014 ("Target Company"), as a wholly owned subsidiary of Gokul Refoils & Solvents Limited ("GRSL"). Pursuant to a scheme of arrangement between the Target Company and GRSL, the 'Gandhidham Undertaking' and 'Gandhidham Windmill Undertaking' of GRSL were demerged and vested in the Target Company. Pursuant to the demerger, it was mutually decided that Rajput Group would have exclusive control over GRSL and Thakkar Group would have exclusive control over the Target Company. Consequently, the Thakkar Group proposed to sell its entire shareholding in GRSL to the Rajput Group, simultaneous to Rajput Group selling its entire shareholding in the Target Company to the Thakkar Group.

As on January 25, 2017, the Thakkar Group and Rajput Group collectively held 72.52% of equity shares and voting rights in the Target Company. Mr. KJ Thakker (one of the promoters from Thakkar Group) ("Acquirer") who already held 20.74% of equity shares in the Target Company, proposed to acquire an additional 31.34% shares of the Target Company held by the Rajput Group, constituting the entire shareholding of Rajput Group in the Target Company.

Regulation 3(2) prescribes that no acquirer, who together with persons acting in concert with him, has acquired shares or voting rights in a target company entitling them to exercise 25% or more of voting rights in a target company but less than the maximum

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permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than 5% of the voting rights, unless the acquirer makes an open offer for acquiring such shares. As the Acquirer, along with persons acting in concert with him, already held shares and voting rights exceeding 25% in the Target Company, the proposed acquisition of 31.34% shares of the Target Company (being in excess of 5% in a financial year), would trigger the requirement of making an open offer - unless exempted from making such open offer under the Takeover Regulations.

Regulation 10(1)(a)(ii) exempts acquisitions made pursuant to *inter-se* transfer of shares amongst qualifying persons being promoters, provided such persons are named as promoters (in the shareholding pattern filed by the target company) for not less than three years prior to the proposed acquisition. The regulatory intent of restricting this exemption to such pre-existing relationships of at least three years, is to prevent the abuse of new entities being introduced as qualifying persons under the Takeover Regulations. As this was a case of *inter-se* transfer of 31.34% shares of Target Company from Rajput Group to Thakkar Group, the Acquirer made an application to SEBI for seeking exemption under Regulation 10(1)(a)(ii) from the requirement of making an open offer mandated under Regulation 3(2).

As the Target Company had been incorporated in July 2014, the promoter groups had held shares and voting rights in the Target Company for less than 3 years. However, the Acquirer contended that despite not having been named as promoters of the Target Company for the prescribed 3-year minimum period, both promoter groups had effectively managed and controlled the Target Company for more than 3 years. The Acquirer based his contention on the rationale that as the promoter groups had held shares and voting rights in GRSL for more than 8 years, the Acquirer and transferors were 'in spirit and substance', the promoters of the Target Company's 'Gandhidham Undertaking' and 'Gandhidham Windmill Undertaking' business (erstwhile managed and controlled through GRSL) for more than the minimum 3-year prescribed period.

SEBI referred the matter to the Takeover Panel, which concluded that the broad room for interpretation under the previous regime (i.e. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997), has been substantially reduced under the present Regulations with a view to curb such practices. Therefore, the requirement that the promoters should have been promoters for the last three years should be strictly complied with. In view of the conclusion drawn by the Takeover Panel, SEBI rejected the application made by the Acquirer. [*SEBI/WTM/SR/CFD-DCR/09/03/2017*]

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