Recent Case Studies in Multidisciplinary Case Studies

For-CS Professional Programme (Syllabus 2017) For December, 2019 Attempt

6/9/2019

BY YOGESH G CHANDAK

Case Study No. 01

KANODIA KNITS PVT LTD

v.

REGISTRAR OF COMPANIES DELHI & HARYANA [NCLAT]

Company Appeal (AT) No.216 of 2018

A.I.S. Cheema & Balvinder Singh. [Decided on 28/01/2019]

Companies Act, 2013 – Section 248 – Striking of name of the company documents could not prove that the company was working – Whether name to be restores – Held, No.

Brief facts:

The name of the appellant company was struck off by the Registrar of Companies, as the company had not been carrying on business or nor in operations for two immediately preceding financial years and the company had not obtained the status of dormant company under Section 455 of the Companies Act, 2013 ("Act" in brief).

The appellant filed the appeal before NCLT claiming that it had not been served with Notice under Section 248(1) of the Act and the Registrar of Companies (ROC) had proceeded to issue notice under Section 248(5) of the Act and the name of the appellant company was then struck off. The appellant claimed that the company had been doing business and was in operation and audited financial statements for the year financial year 2012-13 to FY 2016-17 were filed.

The NCLT considered the case put up before it as well as the documents and came to the conclusion that the appellant company failed to prove that it was carrying on business or was in operation when its name was struck off and dismissed the appeal which was filed before it. Against the dismissal the present appeal has been filed and the same claim is put up by the appellant referring to the documents which were filed before NCLT.

Decision: **Appeal dismissed.**

Reason:

The ROC filed reply before us and affidavit of ROC claims that the appellant company had not filed financial statements from the financial year ending 31.3.2004 till 31.3.2011. The balance sheet and annual return was filed for the year ending 31.3.2012 and thereafter again there was no filing and according to ROC, STK-1 notice was duly issued to company on 21.3. 2017 and the copy of the same has been filed. According to the ROC the appellant did not respond to the notice and further steps to strike off the company were taken. According to ROC, later on public notice as per Section 248(5) was issued.

We have no reasons to doubt the affidavit filed before us by the ROC attaching copy of the Notice dated 21.3.2017 as per STK 1 and the affidavit which claims that such notice was issued to the appellant company as per the official records of the ROC. Apart from this the appeal filed before NCLT itself admitted that notice under Section 248 was published in the official gazette, copy of notice STK 5 also gave opportunity to the appellant to move the ROC if it was aggrieved by the proposed removal of the company name. After such notice the appellant made no effort to move the ROC and put up its case that the appellant was in business or in operation when the name was struck off. Thus we are not accepting the contention that opportunity to the appellant was not given. Regarding the merits of the claim that the appellant was in business or in operation the documents filed before us include two income tax returns for the assessment years 2016-17 and 2017-18. The return for 2016-17 claims that the gross total income of the year was Rs.504 and the income tax return for 2017-18 claims that the gross total income was Rs.1473/-. If the invoices are seen, the seller is shown as Kanodia Hosiery Mills and buyer is Kanodia Knit (P) Ltd. If the address of the seller is perused in these invoices it is 35, North Basti Harphool Singh, Sadar Thana Road, Delhi. This is the same address of the appellant, Kanodia Knits Pvt Ltd, also. How much weight such documents should be given is a foregone consequence. We are not impressed by such documents to claim that the company was in business or in operation. Perusal of the impugned order shows that the NCLT considered the documents placed before it.

Having heard the appellant, and seeing the documents when we have considered the above findings and observations of the NCLT, we do not find any reason to differ from NCLT. There is no substance in this appeal. The appeal is rejected. No order as to costs.

Case Study No. 02

JOHN THOMAS

v.

Dr. K. JAGADEESAN [SC]

Appeal (Crl.) 688 of 2001(Arising out of SLP (Crl.) No.1875 of 2001)

K.T.Thomas & R. P. Sethi, JJ. [Decided on 12/07/2001]

Equivalent citations: (2001) 6 SCC 30; 2001 SCC (Crl) 974; (2001) 106 Comp Cas 619.

Companies Act,1956 read with Indian Penal Code, 1860 – Defamatory publication against a reputed hospital – Director filed defamation case against the publisher – Whether director has locus standi to file such case – Held, Yes

Brief facts:

A renowned hospital in the Metropolis of Madras (Chennai) has been caricatured in a newspaper as the abattoir of human kidneys for trafficking purposes. When the Director of the Hospital complained of defamation, the publisher of the newspaper sought shelter under the umbrage that the libel is not against the Director personally, but against the hospital only and hence he cannot feel aggrieved. The accused/publisher, who raised the objection before the trial court, on being summoned by the court to appear before it, succeeded in stalling the progress of the trial by clinging to the said contention which the trial magistrate has upheld. But the High Court of Madras disapproved the action of the magistrate and directed the trial to proceed. Hence the accused has come up to this Court by filing the special leave petition.

Decision: Appeal dismissed.

Reason:

The appellant contended that the imputations contained in the publication complained of are not per se defamatory. After reading the imputations we have no doubt that they are prima facie libellous. The only effect of an imputation being per se defamatory is that it could relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public. However, even if the imputation is not per se defamatory, that by itself would not go to the advantage of the publisher, for, the complaining person can establish on evidence that the publication has in fact amounted to defamation even in spite of the apparent deficiency. So the appellant cannot contend, at this stage, that he is entitled to discharge on the ground that the imputations in the extracted publication were not per se defamatory.

The contention focussed by the learned senior counsel is that the respondent, who filed the complaint, has no locus standi to complain because he is only a Director of K.J. Hospital about which the publication was made and that the publication did not contain any libel against the complainant personally. It is not disputed that the complainant is the Director of K.J. Hospital.

Explanation 2 in Section 499 of the IPC reads thus:

"Explanation 2. - It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such."

In view of the said Explanation, it cannot be disputed that a publication containing defamatory imputations as against a company would escape from the purview of the offence of defamation. If the defamation pertains to an association of persons or a body corporate, who could be the complainant? This can be answered by reference to Section 199 of the Code. The first subsection of that section alone is relevant, in this context. It reads thus:

> "***199. Prosecution for defamation.*** - (1) No court shall take cognizance of an offence under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence."

The collocation of the words "by some persons aggrieved" definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the court depending upon the facts of each case. If a company is described as engaging itself in nefarious activities its impact would certainly fall on every Director of the company and hence he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it. If K.J. Hospital is a private limited company, it is too farfetched to rule out any one of its Directors, feeling aggrieved on account of pejoratives hurled at the company. Hence the appellant cannot justifiably contend that the Director of the K.J. Hospital would not fall within the wide purview of "some person aggrieved" as envisaged in Section 199(1) of the Code.

The learned senior counsel made a last attempt to save the appellant from prosecution on the strength of the decision of this Court in K.M. Mathew v. State of Kerala {1992 (1) SCC 217}. In that case prosecution against Chief Editor was quashed for want of necessary averments in the complaint regarding his role in the publication. That part of the decision rests entirely on the facts of that case and it cannot be imported to this case. It is pertinent to point out, in this context, that the appellant did not have any such point either when he first moved the High Court for quashing the proceedings or when he moved the trial court for discharge. Hence it is too late in the day for raising any such point, even apart from non-availability of that defence to the appellant on merits. We, therefore, dismiss this appeal.

Case Study No. 03

JAIPUR METALS & ELECTRICALS EMPLOYEES ORGANISATION

v.

JAIPUR METALS & ELECTRICALS LTD & ORS [SC]

Civil Appeal No. 12023 of 2018 [Arising out of SLP(C) No.18598 of 2018]

R F Nariman & M R Shah, JJ. [Decided on 12/12/2018]

Companies Act, 2013 read with Insolvency and Bankruptcy Code, 2016 – Winding up of sick company – Pending in High Court – Application moved to transfer the same to NCLT – Refused – Whether correct – Held, No.

Brief facts:

The present appeal has been filed by an employees' union challenging the judgment of the High Court of Judicature for Rajasthan, in which the High Court has refused to transfer winding up proceedings pending before it to the National Company Law Tribunal ("NCLT"), and has set aside an order of the NCLT by which order a financial creditor's petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Insolvency Code" or "Code") has been admitted.

Decision: Appeal allowed.

Reason:

It is clear that under Section 434 as substituted by the Eleventh Schedule to the Code vide notification dated 15.11.2016, all proceedings under the Companies Act, 2013 which relate to winding up of companies and which are pending immediately before such date as may be notified by the Central Government in this behalf shall stand transferred to the NCLT. The stage at which such proceedings are to be transferred to the NCLT is such as may be prescribed by the Central Government.

It is clear that the present case relates to Rule 5(2) alone. Despite the fact that Section 20 of the SIC Act speaks of a company being wound up under the Companies Act, 1956 under the just and equitable provision, which is Section 433(f) of the Companies Act, 1956, yet, since cases that fall under Section 20 of the SIC Act are dealt with separately under Rule 5(2), they cannot be treated as petitions that have been filed under Section 433(f) of the Companies Act, 1956, which are separately specified under Rule 6. The High Court is therefore not correct in treating petitions that are pursuant to Section 20 of the SIC Act as being pursuant to Section 433(f) of the Companies Act, 1956 and applying Rule 6 of the 2016 Transfer Rules.

However, though the language of Rule 5(2) is plain enough, it has been argued before us that Rule 5 was substituted on 29.06.2017, as a result of which, Rule 5(2) has been omitted. The effect of the omission of Rule 5(2) is not to automatically transfer all cases under Section 20 of the SIC Act to the NCLT, as otherwise, a specific rule would have to be framed transferring such cases to the NCLT, as has been done in Rule 5(1). The real reason for omission of Rule 5(2) in the substituted Rule 5 is because it is necessary to state, only once, on the repeal of the SIC Act, that proceedings under Section 20 of the SIC Act shall continue to be dealt with by the High Court. It was unnecessary to continue Rule 5(2) even after 29.06.2017 as on 15.12.2016, all pending cases under Section 20 of the SIC Act were to continue to be dealt with by the High Court before which such cases were pending. Since there could be no opinion by the BIFR under Section 20 of the SIC Act after 01.12.2016, when the SIC Act was repealed, it was unnecessary to continue

Rule 5(2) as, on 15.12.2016, all pending proceedings under Section 20 of the SIC Act were to continue with the High Court and would continue even thereafter. This is further made clear by the amendment to Section 434(1) (c), with effect from 17.08.2018, where any party to a winding up proceeding pending before a Court immediately before this date may file an application for transfer of such proceedings, and the Court, at that stage, may, by order, transfer such proceedings to the NCLT. The proceedings so transferred would then be dealt with by the NCLT as an application for initiation of the corporate insolvency resolution process under the Code. It is thus clear that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of the SIC Act pending before the High Court are to continue as such until a party files an application before the High Court for transfer of such proceedings post 17.08.2018. Once this is done, the High Court must transfer such proceedings to the NCLT which will then deal with such proceedings as an application for initiation of the corporate insolvency resolution process under the Code.

The High Court judgment, therefore, though incorrect in applying Rule 6 of the 2016 Transfer Rules, can still be supported on this aspect with a reference to Rule 5(2) read with Section 434 of the Companies Act, 2013, as amended, with effect from 17.08.2018. However, this does not end the matter. It is clear that Respondent No. 3 has filed a Section 7 application under the Code on 11.01.2018, on which an order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No. 3 at any time before a winding up order is passed to apply under Section 7 of the Code.

The ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule of the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court’s judgment.

Case Study No. 04

BANK STREET SECURITIES PVT LTD & ORS.

v.

REGIONAL DIRECTOR, NORTHERN REGION [NCLAT]

Company Appeal (AT) No.340 of 2018

A.I.S. Cheema & Balvinder Singh. [Decided on 17/01/2019]

Companies Act, 2013 – Amalgamation – Petition filed under old Act transferred to NCLT – Based on the report of the RD amalgamation was rejected – Whether correct – Held, Yes.

Brief facts:

It appears that the appellants had filed first motion before the Hon'ble High Court of Delhi and the Court was pleased to dispense with the requirement of convening meetings of equity shareholders, secured and unsecured creditors of the Companies in view of their consent being obtained. The appellant then filed joint petition for sanction of scheme of amalgamation before the Court vide second motion under Section 391 to 394 of Companies Ac, 1956 ("Old Act" in short). Notice was issued to the Registrar of Companies/Regional Director and Official Liquidator. Notice by newspaper publication was also directed. The second motion petition, before it could be decided came to be transferred to the Learned NCLT in view of the powers getting vested with NCLT.

It is stated that when the matter came up before NCLT, NCLT heard the same and considered report of the Regional Director and concluded that certain companies in the scheme were carrying on NBFC activities and approval of Reserve Bank of India had not been taken and the petition required to be rejected.

Decision: **Appeal dismissed.**

Reason:

We have heard the learned counsel for the appellant and perused the record. A copy of the report of Regional Director has been filed at Annexure-21. The report shows that the Regional Director had issued query to the appellant company by letter dated 8th March, 2016 and the letters returned undelivered. Then one Advocate Mr. Ashish Middha by letter dated 15th March, 2016 filed reply with the Regional Director on behalf of the company. The impugned order shows that the ROC during the pendency of the matter before NCLT took action under Section 12(1) r/w Section 12(4) of the Companies Act, 2013 and imposed penalty which came to be reduced by Regional Director in an appeal and which penalty was paid by the appellants. This relates to not giving notice of change of the registered office to the Registrar of Companies. This should reflect on working of these appellant companies with regard to how bona fide their actions are.

It is apparent, from paras 7, 8 and 9 of the report of the Regional Director, that the appellants who had made their submissions to the Regional Director through letter dated 15.03.2016 were unable to convince the Regional Director regarding the issue of NBFC. Report shows that Regional Director was satisfied that the appellant companies were prima facie engaged in investment activities or extending loans and advances to certain parties like corporate bodies and there was no mention that these companies are registered with RBI as NBFC to carry on such business.

The learned counsel for appellants argued that if the appellant company No.1,2,4,5,6 had 'zero' income and transferee company also had 'zero' income and so it cannot be said that both the conditions i.e. more than 50% of assets should be invested in financial activities and more than 50% of income should be from financial activities were satisfied.

Having gone through the matter if the transferor companies show 'zero' income from operations and still show huge investments to be their assets, the Regional Director rightly observed that the intrinsic value of these investment (assets) is not known and the reasonableness of the proposed exchange ratio could not be ascertained. Such accounts showing 'zero' income and showing huge investments as assets must be said to be not inspiring confidence. If there are huge investments as assets and it shows that financial assets are more than non-financial assets and income from operation is zero without its break up between financial income and non-financial income, the required criteria to determine the principal business of the company being finance company gets met. The NCLT not being satisfied from the case put up by the appellant declined to accept the scheme and we find it difficult to interfere with the impugned order.

Looking to these definitions as mentioned above, when the report of the Regional Director shows that the appellant companies were engaged in investment activities or extending loans and advances, these above provisions would be attracted. Even with or without the circular of Reserve Bank of India dated 19th October, 2006, keeping in view the above legal provisions, the appellants have not been able to satisfy the Regional Director or the NCLT that they are not involved in NBFC activities. The counsel for the appellants has not been able to satisfy us also. The appeal does not even plead that the appellants are not indulging in NBFC activities. The appeal memo while referring to the appellant companies merely stated that the objects of the companies were as amended from time to time and which have been set out in Memorandum of Association of the different companies. No such Articles of Association or Memorandum of Association have been produced before us to show what are aims and objects of these companies. No documents are shown as to what are the activities of these companies. Thus no material has been brought to satisfy that the impugned order is erroneous and deserves to be interfered with.

Case Study No. 05

THE ASSOCIATED JOURNALS LTD & ANR

v.

LAND & DEVELOPMENT OFFICE [Del]

LPA 10/2019 & CM Nos. 566/2019 & 649/2019

Rajendra Menon & Kameshwar Rao, JJ. [Decided on 28/02/2019]

National Herald case – Companies Act – Acquisition of shares principle of piercing corporate veil – Delhi High Court reiterates the principle.

Brief facts:

Though this case covered law on various aspects of the issue such as cancellation of lease, right to re-entry, transfer of property by transfer of shareholdings, we are concerned with the issue of 'piercing the corporate veil' and how and when the smoke screen of corporate identity could be pierced to identify the real beneficiaries in the camouflaged transaction. The following are relevant facts for the above issue.

Indian National Congress sometimes referred to as AICC had advanced a loan of Rs.90 crores to AJL. On 13th August 2010, an application was made for incorporation of a charitable non-profit company (a company under Section 25 of the Companies Act) named Young India and ultimately on 23rd November 2010 Young India was incorporated with Sh. Suman Dubey and Sh. Sam Pitroda as its founder Directors. This company had an authorized share capital of 5,000 shares of Rs.100/- each valued at Rs.5, 00,000/- and the paid up share capital was 1100 shares of Rs.100/- each valued at Rs.1, 10,000/- and the company at that point of time had two shareholders, (a) Shri Sam Pitroda - 550 shares valued at Rs.100/- each and (b) Shri Suman Dubey - 5,000 shares valued at Rs.100/- each.

On 13th December 2010, the first Managing Committee Meeting of Young India took place and Shri Rahul Gandhi was appointed as its Director, namely, a non-shareholder and Shri Motilal Vora and Shri Oscar Fernandes as ordinary members. Within five days thereafter, that is, on 18th December 2010, by a deed of assignment the loan of Rs.90 crores and odd outstanding in the books of Indian National Congress as recoverable from Associated Law Journals for the period 2002 to 2011 was transferred to Young India. Three days thereafter, on 21st December, 2010, a Board Meeting of AJL called for an EGM which was subsequently held on 24th December, 2010 and on the said date a loan of Rs.1 crore was received by Young India from another company M/s Dotex and thereafter on 28th December, 2010 i.e. within a week a formal deed of assignment was executed by AICC assigning the loan of Rs.90 crores in favour of Young India.

Immediately thereafter on 21st January, 2011, an EGM of Associated Law Journal was held approving fresh issue of 9.021 crores shares to Young India and on 22nd January, 2011 i.e. on the next day the second Managing Committee of Young India was held in which Smt. Sonia Gandhi, Mr. Motilal Vohra and Mr. Oscar Fernandes were appointed as Directors and the 550 shares of the existing shareholders of Young India - Suman Dubey and Sam Pitroda were transferred to Smt. Sonia Gandhi and Mr. Oscar Fernandes and on the same day fresh allotment of Young India shares were made in the following manner: (a) 1,900 shares having paid up value of Rs.1,90,000/- to Shri Rahul Gandhi, (b) 1,350 shares with a paid up amount of Rs.1,35,000/- in the name of Smt. Sonia Gandhi, (c) 600 shares with a paid up value of Rs.60,000 in the name of Sh. Motilal Vohra and (d) 50 shares with a paid up value of Rs.5,000 in the name of Sh. Oscar Fernandes and after issuance of PAN by the Income Tax Department a bank account was opened by Young India with Citibank on 14th February, 2011 and the cheque issued by M/s Dotex for Rs.1 crore was deposited in the Young India Bank account on the said day and on 26th February, 2011 Young India issued a cheque of Rs.50 lakhs to AICC as consideration for assignment of Rs.90 crore debt payable by ALJ to AICC. On the same day, i.e., 26th February, 2011, ALJ allotted 9, 02, 16,899 equity shares to Young India in pursuance to the AGM Meeting decision held on 21st January, 2011 and the ALJ Board Meeting on 26th February, 2011 and thereafter Young India applied for exemption under Section 12-Aon 29th March, 2011 and on 9th May, 2011 the Income Tax Authorities granted the exemption with effect from the F.Y. 2010-11.

Decision: Appeal dismissed.

Reason:

We have heard the learned counsel for the parties at length and we have also gone through the written submissions filed by them.

Be that as it may, by the aforesaid transaction that had taken place, Young India acquired beneficial interest on AJL’s property which on the said date was valued at more than Rs.400 crores on payment of a sum of Rs.50 lakhs to AICC. This, according to the respondent, if viewed in the backdrop of the purpose of transfer lease and the modus operandi adopted is nothing but a devise to transfer the property held on lease from the Government by AJL, Young India which became 99% or rather 100% shareholder of AJL. With these facts, we now propose to examine the judgments relied upon by both the parties to evaluate the legal implication and the principles culled out from these judgments and examine their applicability in the present factual matrix to decide the issue of breach of conditions of the lease on this count.

On a consideration of the argument as canvassed by Dr. Singhvi, at the first instance, the same looks very attractive and the findings recorded may look to be unsustainable and perverse, however, it is an equally settled principle of law that in public interest and for assessing the actual nature of a transaction or the modus operandi employed in carrying out a particular transaction, the theory of lifting of the corporate veil is permissible and a Court can always apply this doctrine to see as to what is the actual nature of transaction that has taken place, its purpose and then determine the question before it after evaluating the transaction or the modus operandi employed in the backdrop of public interest or interest of revenue to the State etc. The theory and doctrine of lifting of corporate veil had been considered by the Supreme Court in the case of *Gotan Lime Stone* (*Supra*) and in the said case, judgments in the case of *Vodafone* (*supra*) and *Skipper Construction* (*supra*) etc. have been taken note of and in para 30, specific reference has been made to the Constitution Bench judgment in the case of *Bacha F. Guzdar* (*supra*).

If we consider the transaction in the present case in the backdrop of the aforesaid principles laid down by the Hon'ble Supreme Court, we have no hesitation in holding that the purpose for which the doctrine of lifting of the veil is applied is nothing but a principle followed to ensure that a corporate character or personality is not misused as a device to conduct something which is improper and not permissible in law, fraudulent in nature and goes against public interest and is employed to evade obligations imposed in law. If that is the purpose for which the doctrine of lifting of the veil is to be employed and if we see the transaction that has taken place in the present case with regard to how the transfer of shares between AJL and Young India took place, we find that within a period of about three months, that is, between 23rd November, 2010 to 26th February, 2011, Young India was constituted. It took over the right to recover a loan of more than 90 Crores from All India Congress Committee for a consideration of Rs.50 Lakhs, thereafter replaced the original shareholders of Young India by four new entities including Sh.Moti Lal Vohra, Chairman of AJL and Young India after acquiring 99% of shares in AJL, became the main shareholder with four of its shareholders acquiring the administrative right to administer property of more than 400 Crores. Even though Dr.Singhvi had argued that there is nothing wrong in such a transaction and it is legally permissible, but if we take note of the principles and the doctrine for which the theory of lifting of the corporate veil has received legal recognition, we have no hesitation in holding that the entire transaction of transferring the shares of AJL to Young India was nothing but, as held by the learned writ Court, a clandestine and surreptitious transfer of the lucrative interest in the premises to Young India. In fact, the contention of Dr. Singhvi has to be rejected and rightly so was rejected by the Single Judge even though without applying the principle of lifting of the corporate veil.

In case the theory of lifting of the corporate veil, as discussed hereinabove, is applied and the transaction viewed by analysing as to what was the purpose for such a transaction, the so called innocent or legal and permissible transaction as canvassed before us, in our considered view, is not so simple or straight forward as put before us, but it only indicates the dishonest and fraudulent design behind such a transaction.

Apart from the aforesaid judgments, there are various other judgments which have been brought to our notice wherein the said theory of lifting of the corporate veil has been approved and we have no hesitation in holding that the transfer in question, if analysed in the backdrop of the principles as discussed hereinabove, we see no error in the findings recorded by the learned writ Court to hold that the transfer in question comes within the prohibited category under clause XIII (3) of the lease agreement.

Accordingly, finding no ground made being out for making any indulgence into the matter, we dismiss the appeal.

Case Study No. 6

STEEL AUTHORITY OF INDIA LTD.

V.

SHRI AMBICA MILLS LTD. & ORS [SC]

CIVIL APPEAL NO.2889 OF 1985

M.M. PUNCHHI & K. VENKATASWAMI, JJ. [DECIDED ON 17/10/1997]

EQUIVALENT CITATIONS: (1998) 92 COMP CAS 120; (1997) 27 CLA (SN) 38

Companies Act, 1956 – Government company – Whether department of the government – Held, No.

Brief facts

Though this case involves a main dispute arose as to the issuance of advance license and its rejection, the question as to whether a government company in which the major shareholder is the government becomes a department of the government or remains as a separate entity was also decided.

The Respondent obtained an advance license and submitted to SAIL for the supply of rolled strips in coils under a special scheme. As the licence was defective SAIL rejected the license and refused to supply the goods at concessional price. Respondent company contended that the license issuing authority and the major shareholder of SAIL are the same government and because of this SAIl could not have rejected the defective advance license. We are primarily concerned with this issue here.

Decision: Appeal allowed.

Reason

Coming to the merits of the case, we accept the contention of the appellant that the High Court went wrong in holding that SAIL was a department of the Union of India. In Dr. S.L. Agarwal v. The General Manager, Hindustan Steel Ltd, AIR 1970 SC 1150 and Western Coalfields Ltd. vs. Special Area Development Authority, Korba & Anr, AIR 1982 SC 697 this court had held that the companies which are incorporated under the Companies Act have a corporate personality of their own, distinct from that of Government of India.

In the view of the above decisions of this Court, we have no hesitation to hold that the High Court erred in thinking that SAIL was a department of the Union of India and most of the reasons given in the judgment are based on this wrong premise.

The High Court held that the licensing authority and the appellant being two different wings/departments of Union of India, the appellant on receipt of rectified documents on 26.8.1983 must register the indent as if it was presented on 20.8.1983. We are afraid, we cannot accept the above reasoning of the High Court as we have pointed out that the basic error committed by the High Court was in assuming that the appellant was a Department of Union of India. We have already noticed that there are number of judgments of the Court taking the view that a company though fully owned by Union of India when incorporated takes its own entity/identify and cannot be considered as department of the Union of India. In view of our above conclusion, it is not necessary for us to consider and decide the other points raised by learned counsel for the appellant.

Case Study No. 07

USHA MARTIN VENTURES LTD. & ORS.

v.

USHA MARTIN LTD. & ANR [NCLAT]

Company Appeal (AT) No. 94 of 2019

S.J. Mukhopadhaya, A.I.S Cheema & Kanthi Narahari. [Decided on 22/04/2019]

Companies Act, 2013 – Sections 242 & 242 – Oppression and mismanagement proceedings – Impleadment of creditor bank allowed by NCLT – Whether correct – Held.-Yes

Brief facts

The Appellant filed Petition under Section 241 & 242 of the Companies Act, 2013 alleging oppression and mismanagement against Respondents. The State Bank of India filed an intervention application, which was allowed by National Company Law Tribunal. Appellants challenged the impleadment of SBI in this appeal.

Decision: Appeal dismissed.

Reason

Learned counsel appearing on behalf of the Appellants/ Petitioners submitted that State Bank of India being a lender is not a necessary party nor a formal party and, therefore, it cannot be impleaded as Respondents in a petition under Section 241 & 242 of the Companies Act, 2013.

Referring to the impugned order, it is submitted that even the Tribunal observed that the State Bank of India is not a necessary party, inspite of the same, it has allowed to intervene the Respondents.

Counsel for the Respondent – State Bank of India submitted that the bank has a nominee Director in the Board of Directors of the company who is required to be present in board meetings in the interest of the company.

Having heard learned counsel for the parties, as we find that the lender State Bank of India has a nominee as one of the Director of the Company and the petitioner have alleged mismanagement of the company, we hold that the Tribunal rightly allowed the State Bank of India to intervene in the matter. The appeal is accordingly dismissed. No cost.

Case Study No. 08

MEL WINDMILLS PVT. LTD.

v.

MINERAL ENTERPRISES LIMITED & ANR [NCLAT]

Company Appeal (AT) No. 04 of 2019 with connected appeals

Bansi Lal Bhat & Balvinder Singh. [Decided on 27/05/ 2019]

Companies Act, 2013 – Section 230 – Merger and amalgamation – Investigations pending against one of the merging companies – NCLT rejected the scheme – Whether correct – Held, No.

Brief facts:

These appeals arise out of common order passed by the NCLT Bengaluru Bench (hereinafter referred to as 'Tribunal') by virtue whereof the Tribunal declined to sanction the scheme of demerger on the ground that several issues were pending finalization and certain investigations were pending in relation to the business of the demerged company. However, liberty was granted to file afresh after the pending investigations are disposed of. Since, the parties and subject matter are common, all the three appeals were heard together and are proposed to be disposed of by a common judgment.

Admittedly, the Demerged Company in para IV (h) of its application disclosed the factum of pendency of certain proceedings in relation to the mining business of the Demerged Company which on clarification turned out to be investigations registered arising out of charge sheet lodged by Special Investigation Team, wherein proceedings are stated to have been stayed by Hon'ble High Court of Karnataka. According to Appellants the said proceedings have no bearing and cannot be an impediment in considering approval of the scheme of demerger.

Decision: Appeals allowed.

Reason:

We have given our anxious consideration to the submissions made at the bar and scanned through the record.

On a plain reading of the aforesaid provisions it comes to fore that the Tribunal, while dealing with an application under Section 230 of the Act, on being satisfied that the compromise or arrangement has been proposed in connection with a scheme for the reconstruction of the company or companies involving merger/ amalgamation of two or more companies and under the scheme property or liabilities of the transferor company is required to be transferred to transferee company or divided among/ transferred to two or more companies is required to order meeting of the creditors or members, as the case may be, to be called. Sub-section (9) thereof empowers the Tribunal to dispense with calling of a meeting of creditors where such creditors, having at least 90% value agree to and confirm the scheme of compromise or arrangement. The creditors/ members are required to file an affidavit stating that they agree to and confirm the scheme of compromise or arrangement. It is abundantly clear that where the creditors/ members having at least 90% value signify their consent to the scheme of compromise or arrangement by filing affidavits, the Tribunal will have the discretion to dispense with calling of meeting of creditors/ members. This is to be done at the very threshold stage and precedes an order by the Tribunal under Sub-Section (6) sanctioning a compromise or arrangement which can be passed by the Tribunal only after majority of the persons representing three-fourths in value of the creditors or members as the case may be agree to any compromise or arrangement. Once the companies concerned approach the Tribunal for sanctioning of a compromise or an arrangement, the Tribunal, at the very outset is required to order a meeting of the creditors/ members to be held for according consideration to the proposed scheme. This is a sine quo non for proceeding further and any order of sanctioning or refusing to sanction such compromise or arrangement by the Tribunal would be without jurisdiction unless the Tribunal has dispensed with calling of such meeting of creditors/ members in terms of Sub-section (9). It is manifestly clear that at the stage of calling of meeting of creditors/members for consideration of the scheme of compromise or arrangement the Tribunal is not required to examine the merits of the scheme qua the proposed compromise/ arrangement. Any such indulgence on the part of Tribunal would fall foul of the provision engrafted in Section 230 (1) of the Act and would be without jurisdiction.

As noticed elsewhere in this judgment, the Tribunal declined to sanction the proposed scheme of demerger, albeit on account of several issues pending finalization, without either considering prayer for dispensation of meeting of creditors and members of the three Appellant Companies or in the alternative directing convening of a meeting of the creditors and members of these companies for considering the proposed scheme of demerger. The mandate of law engrafted under Section 230(1) of the Act requiring the Tribunal to order calling of meeting of the creditors/ members of the concerned companies not being complied with and the mandatory provisions being observed in breach, the impugned order cannot be supported. The Tribunal, at the very threshold stage, was not required to venture into the merits of the proposed scheme of demerger which had to be examined only after obtaining the consent of creditors/members with requisite majority. For proper exercise of jurisdiction vested in the Tribunal it was imperative either to call the meeting of creditors/ members for consideration of the proposed scheme of demerger or to dispense with such meeting by invoking Sub-section (9) of Section 230 as 100% of shareholders of each company, 100% of creditors of Resulting Companies and 97.18% of creditors of the Demerged Company had filed consent affidavits. The Tribunal failed to adhere to the mandate of law which was mandatory and imperative in nature. This goes to the root of the impugned order which cannot be sustained.

Apart from what has been stated hereinabove, the pending issues could not be construed as an impediment in sanctioning the proposed scheme of demerger. It is so for more than one reason. First being the case of Appellants - Petitioners before the Tribunal, that the demerger scheme proposed by the Appellants was not with regard to business of Mining which would continue with the Demerged Company and the pending investigation would continue unhindered against the Director of the Demerged Company without having any impact on the proposed scheme of demerger. Second, because pendency of investigation would not stand as a legal impediment in sanctioning the proposed scheme of demerger for any civil action or criminal proceedings in respect of past events/ transactions. In identical circumstances, the Hon'ble Gujarat High Court sanctioned the modified composite scheme of arrangement in terms of its judgment dated 1st March 2007 rendered in Core Health Care Limited v. Nirma Ltd reported in 2007 SCC Online Guj 235.

For the foregoing reasons the impugned order cannot be supported. The Tribunal seriously erred in dismissing the application on merit when the stage of consideration of the proposed scheme of demerger was yet to arrive. The impugned order suffers from serious legal infirmity and the same is set aside. The appeals are accordingly allowed. The matter is remanded back to the National Company Law Tribunal.

Case Study No. 09

ADJUDICATING OFFICER, SEBI

v.

BHAVESH PABARI [SC]

Civil Appeal No(s).11311 of 2013 with connected appeals

Ranjan Gogoi, Deepak Gupta & Sanjeev Khanna, JJ. [Decided on 28/02/2019]

SEBI Act – Section 15J read with sections 15A to H – Powers of adjudicating officer in levying penalty – Supreme Court clarifies law.

Brief facts:

Two primary questions, in a way interconnected, have been referred by the Referral judgment and order dated 14th March 2016 passed in Siddharth Chaturvedi Vs. Securities and Exchange Board of India (2016) 12 SCC 119. The questions referred can be enumerated and summarized as follows:

I. Whether the conditions stipulated in clauses (a), (b) and (c) of Section 15J of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI Act") are exhaustive to govern the discretion in the Adjudicating Officer to decide on the quantum of penalty or the said conditions are merely illustrative?

II. Whether the power and discretion vested by Section 15J of the SEBI Act to decide on the quantum of penalty, regardless of the manner in which the first question is answered, stands eclipsed by the penalty provisions contained in Section 15A to Section 15HA of the SEBI Act?

Decision & Reasoning :

For the purposes of the present reference, we may proceed to consider the provisions contained in Chapter VIA of the SEBI Act. Sections 15A to 15HA are the penalty provisions whereas Section 15I deal with the power of adjudication and Section 15J enumerates the "factors to be taken into account by the Adjudicating Officer" while adjudging the quantum of penalty. So far as the second question is concerned, if the penalty provisions are to be understood as not admitting of any exception or discretion and the penalty as prescribed in Section 15A to Section 15HA of the SEBI Act is to be mandatorily imposed in case of default/ failure, Section 15J of the SEBI Act would stand obliterated and eclipsed. Hence, the question referred. Sections 15A(a) to 15HA have to be read along with Section 15J in a manner to avoid any inconsistency or repugnancy. We must avoid conflict and head on clash and construe the said provisions harmoniously. Provision of one section cannot be used to nullify and obtrude another unless it is impossible to reconcile the two provisions. The explanation to Section 15 J of the SEBI Act added by Act No.7 of 2017, quoted above, has clarified and vested in the Adjudicating Officer a discretion under Section 15J on the quantum of penalty to be imposed while adjudicating defaults under Sections 15A to 15HA. Explanation to Section 15J was introduced/added in 2017 for the removal of doubts created as a result of pronouncement in M/s. Roofit Industries Ltd. case (supra).

We are in agreement with the reasoning given in reference order dated 14th March 2016 that M/s Roofit Industries Ltd. had erroneously and wrongly held that Section 15J would not be applicable after Section 15 A(a) was amended with effect from 29th October 2002 till 7th September 2014 when Section 15A(a) of the SEBI Act was again amended. It is beyond any doubt that the second referred question stands fully answered by clarification through the medium of enacting the Explanation to Section 15J vide Act No.7 to

2017, which also states that the Adjudicating Officer shall always have deemed to have exercised and applied the provision. We, therefore, deem it appropriate to hold that the provisions of Section 15J were never eclipsed and had continued to apply in terms thereof to the defaults under Section 15A(a) of the SEBI Act.

Reference Order in Siddharth Chaturvedi & Ors. (supra) on the said aspect has observed that Section 15A(a) could apply even to technical defaults of small amounts and, therefore, prescription of minimum mandatory penalty of Rs.1 lakh per day subject to maximum of Rs.1 crore, would make the Section completely disproportionate and arbitrary so as to invade and violate fundamental rights. Insertion of the Explanation would reflect that the legislative intent, in spite of the use of the expression “whichever is less” in Section 15A(a) as it existed during the period 29th October 2002 till 7th September 2014, was not to curtail the discretion of the Adjudicating Officer by prescribing a minimum mandatory penalty of not less than Rs. 1 lakh per day till compliance was made, notwithstanding the fact that the default was technical, no loss was caused to the investor(s) and no disproportionate gain or unfair advantage was made. The legislative intent is also clear as Section 15A(a) was amended by the Amendment Act No.27 of 2014 to state that the penalty could extend to Rs. 1 lakh for each day during which the failure continues subject to a maximum penalty of Rs. 1 crore. This amendment in 2014 was not retrospective and therefore, clarificatory and removal of doubt Explanation to Section 15J was added by the Act No. 7 of 2017.

Normally the expression “whichever is less” would connote absence of discretion by prescribing the minimum mandatory penalty, but in the context of Section 15A(a) as it was between 29th October,2002 till 7th September, 2014, read along with Explanation to Section 15J added by Act No.7 of 2017, we would hold the legislative intent was not to prescribe minimum mandatory penalty of Rs.1 lakh per day during which the default and failure had continued. We would prefer read and interpret Section 15A(a) as it was between 25th October, 2002 and 7th September, 2014 in line with the Amendment Act 27 of 2014 as giving discretion to the Adjudicating Officer to impose minimum penalty of Rs.1 lakh subject to maximum penalty of Rs.1 crore, keeping in view the period of default as well as aggravating and mitigating circumstances including those specified in Section 15J of the SEBI Act.

This will require us to consider the first question referred. Having dealt with the submissions advanced by the rival parties, (both parties have actually canvassed for a wider and more expansive interpretation of Section 15J), we are inclined to take the view that the provisions of clauses (a), (b) and (c) of Section 15J are illustrative in nature and have to be taken into account whenever such circumstances exist. But this is not to say that there can be no other circumstance(s) beyond those enumerated in clauses (a), (b) and (c) of Section 15J that the Adjudicating Officer is precluded in law from considering while deciding on the quantum of penalty to be imposed.

A narrow view would be in direct conflict with the provisions of Section 15I (2) of the SEBI Act which vests jurisdiction in the Adjudicating Officer, who is empowered on completion of the inquiry to impose “such penalty as he thinks fit in accordance with the provisions of any of those sections.”

Therefore, to understand the conditions stipulated in clauses (a), (b) and (c) of Section 15J to be exhaustive and admitting of no exception or vesting any discretion in the Adjudicating Officer would be virtually to admit/concede that in adjudications involving penalties under Sections 15 A, 15B and 15C, Section 15J will have no application. Such a result could not have been intended by the legislature. We, therefore, hold and take the view that conditions stipulated in clauses (a), (b) and (c) of Section 15 J are not exhaustive and in the given facts of a case, there can be circumstances beyond those enumerated by clauses (a), (b) and (c) of Section 15J which can be taken note of by the Adjudicating Officer while determining the quantum of penalty.

There is a distinction between a continuing offence and a repeat offence. The continuing offence is a one which is of a continuous nature as distinguished from one which is committed once and for all. The term "continuing offence" was explained and elucidated by giving several illustrations in State of Bihar vs. Deokaran Nenshi & Ors. (1972) 2 SCC 890. In case of continuing offence, the liability continues until the rule or its requirement is obeyed or complied with. On every occasion when disobedience or noncompliance occurs and reoccurs, there is an offence committed. Continuing offence constitutes a fresh offence every time or occasion it occurs. In Union of India & Anr. Vs. Tarsem Singh (2008) 8 SCC 648, continuing offence or default in service law was explained as a single wrongful act which causes a continuing injury. A recurring or successive wrong, on the other hand, are those which occur periodically with each wrong giving rise to a distinct and separate cause of action. We have made reference to this legal position in view of clause (c) of Section 15J of the SEBI Act which refers to repetitive nature of default and not a continuing default. The word "repetitive" as used therein would refer to a recurring or successive default. This factum has to be taken into consideration while deciding upon the quantum of penalty. This dictum, however, does not mean that factum of continuing default is not a relevant factor, as we have held that clauses (a) to (c) in Section 15J of the SEBI Act are merely illustrative and are not the only grounds/factors which can be taken into consideration while determining the quantum of penalty.

Case Study No. 10

PVP GLOBAL VENTURES PVT LTD

v.

SEBI [SAT]

Appeal No. 451 of 2018 with batch of connected appeals

Tarun Agarwala, Dr. C.K.G. Nair & M.T. Joshi. [Decided on 12/04/2019]

Section 28A of the SEBI Act, 1992 read with section 220 of the Income Tax Act,1961 – Recovery proceedings – Interest imposed by recovery officer – Whether tenable – Held, Yes.

Brief facts

This batch of appeals involves a common issue and, therefore, the same are being decided together. Penalty imposed on the appellants, by the adjudicating Officer, attained finality and thereafter the recovery officer issued a certificate of recovery which included interest on the penalty and in the process attached the bank account of the appellants. Against this, appellants have filed the present appeals before the Tribunal challenging that interest cannot be levied by the recovery officer and that a separate demand notice for the recovery is required to be issued.

Decision: Appeals dismissed.

Reason

The object and intention of inserting Section 28A to the SEBI Act was to provide a mechanism for recovery of the amount due to SEBI. Instead of prescribing an independent mechanism for collection and recovery of the amounts due to SEBI, the legislature deemed it fit to follow the mechanism provided under the Income Tax Act and accordingly inserted Section 28A to SEBI Act wherein the provisions of the Income Tax Act relating to collection and recovery have been incorporated. Thus, the legislature by inserting Section 28A to SEBI Act has provided that if a person fails to pay the amounts referred in Section 28A, then the Recovery

Officer shall draw up a statement/certificate and proceed to recover the amounts specified in the certificate by any one or more of the five modes specified therein.

This Tribunal in *Dushyant N. Dalal & Anr.* v. *SEBI* decided on March 10, 2017 (Appeal No. 41 of 2014) which judgment was affirmed by the Supreme Court reported in 2017 SCC OnLine SC 1188, after considering the provision of Section 28A of SEBI Act read with Section 220 of the Income Tax Act held that the liability to pay interest under Section 28A read with Section 220 is automatic and arises by operation of law.

We further find that the Adjudicating Officer in its order while imposing penalty had also directed the appellant to pay the penalty amount within 45 days. In our view this order of penalty would also be deemed to include a notice of demand and thus a formal requirement for issuance of a separate notice of demand pursuant to the order of penalty is no longer required. Thus, the contention raised by the appellant is not sustainable and is rejected.

The contention that interest was impliedly waived when the penalty was reduced by the Tribunal or that interest cannot be imposed with retrospective effect is patently misconceived. Hon'ble Supreme Court while affirming the judgment of this Tribunal in *Dushyant Dalal's case* (*supra*).

From the aforesaid, it becomes clear that interest was not only chargeable under Section 28A read with Section 220(2) of the Income Tax Act but the provisions of Interest Act, 1978 could also be taken into consideration and interest could be charged from the date on which the penalty became due.

In the light of the aforesaid, we are of the view that the Recovery Officer was justified in charging interest from the date of the order passed by the Adjudicating Officer. In view of the aforesaid, we find no merit in these appeals and are dismissed. In the circumstances there shall be no order on costs.

Case Study No. 11

THERM FLOW ENGINEERS PVT. LTD.

v.

SEBI [SAT]

Appeal No.349 of 2018

Tarun Agarwala, Dr. C. K. G. Nair, M.T. Joshi. [Decided on 01/05/2019]

SEBI takeover code read with SEBI Act – Takeover of company – Acquisition of minuscule proportion above the permitted limit – Transfer of shares between promoters via open market – No public announcement made – WTM directed public announcement – Whether correct – Held, No.

Brief facts

The appellant is aggrieved by the order of the Whole Time Member where under the present appellant was directed to make public announcement to acquire shares of M/s. Patel Airtemp (India) Limited (hereinafter referred to as "Target Company") within a period of 45 days from the date of the order and to pay interest at the rate of ten percent per annum as detailed in the order. The appellant is promoter of the Target Company consisting of a consortium of individual promoters.

Decision: Appeal partly allowed.

Reason

In the present case, we have found that the acquisition is of miniscule proportion above the permitted limit, that too between the promoters. In the case of *Nirma Industries Ltd & Anr* v. *SEBI* (2013) 8 SCC 20, the Hon'ble Supreme Court in para 17 observed that in the given set of circumstances of that case the withdrawal of the open offer to acquire 20 percent of shared of the Company was neither in the interest of the investor nor in the development of the securities market. Thus, the case of Nirma was decided in its own circumstances.

In the case of *SEBI* v. *Kishore R. Ajmera* (2016) 6 SCC 368, the Hon'ble Supreme Court found that the manipulative and fraudulent market practices are required to be curbed by brining a comparative legislative to bring about some clarity and certainty which cannot be disputed.

Considering all the aspects of the case that violation of the Takeover Regulation is only to the extent of 0.04 percent and that too due to transfer of shares between the promoters via open market, in our view the direction of the WTM to make public announcement to acquire shares would be disproportionate. In the circumstance, the directions as provided by Rule 32(1) (b) of the Takeover Regulations as cited supra would meet the ends of justice. The appellant can be directed to transfer 0.04 percent shares i.e. 2000 shares through open market and to direct to deposit an amount of Rs.3,60,300/- (2000 shares x Rs.180.15 : purchase price) in the Investor Protection and Education Fund would meet the ends of justice. Hence the following order:

Order

1. The appeal is hereby partly allowed. The order of the WTM directing the appellant to make public announcement to acquire shares of the target company and to pay interest at the rate of 10 percent as detailed in the order is hereby set aside.
2. Instead it is hereby directed that the appellant shall transfer 2000 shares in open market within a period of 4 weeks and shall deposit an amount of Rs.3, 60,300 in the Investor Protection and Education Fund established by SEBI within a period of six weeks from the date of this order.
3. In default, the amount shall carry interest at the rate of 12 percent p.a. from the date of this order till the date of deposit.

Case Study No. 12

GRD SECURITIES LTD.

v.

NATIONAL STOCK EXCHANGE & ANR [SAT]

Appeal No. 285 of 2018

Tarun Agarwalla, C.K.G. Nair & M.T. Joshi. [Decided on 10/06/2019]

SEBI Act – Currency derivative segment transaction – Margin money deposited with delay – Heavy penalty levied – Whether correct – Held, No.

Brief facts:

This appeal is filed challenging the decision of the Disciplinary Action Committee ('DAC' for short) of the National Stock Exchange of India Limited ('NSE' for short) whereby the review application of the appellant was rejected. Consequently, the earlier decision of the DAC which directed the appellant to pay a penalty of Rs. 2,05,43,900/- and face suspension of one trading day in the currency derivative segment of the Exchange stood confirmed.

The appellant is a member broker in the Capital Market (CM), Futures and Options (F&O) and Currency Derivatives (CD) segments of the NSE. During a regular inspection of the books and records of the appellant for the calendar year 2016 in February 2017 NSE noticed that the appellant falsely reported margin amounting to Rs. 2,05,43,947/- in the CD segment in respect of two clients on two occasions on April 26, 2016 and June 21, 2016. Accordingly, DAC in its meeting held on January 12, 2018, after considering the oral and written submissions of the appellant, imposed a monetary penalty to the tune of Rs. 2,05,43,900/- and suspension of one trading day in the CD segment after giving three weeks' notice. This was communicated to the appellant on February 8, 2018. This matter came up in appeal before this Tribunal which quashed the said order passed by the DAC of NSE on March 1, 2018 and directed the appellant to file a review application before the DAC. The order impugned in this appeal is issued by the DAC of NSE further to giving another opportunity of personal hearing to the appellant and considering their written submissions.

Decision: Appeal partly allowed.

Reason:

We do not agree with the contentions of the appellant that it was only a technical violation. It is quite evident from the facts that though cheques may have been received from the clients the appellant had not credited these amounts to the account upfront which is a basic requirement of margin collection from clients. Moreover, in respect of client Monotype India it is not even clear whether the margin was ever collected. The submission that margin requirement as on T + 5, not as on the trading day, is what is relevant is not correct and hence not admissible. Upfront collection of margins is an important mechanism for ensuring prompt settlement and in promoting market integrity. As such any explanation to the contrary is not sustainable.

However, we are not able to agree with the stand of SEBI and NSE that no discretion in imposition penalty can be exercised, once a violation is established. The Circular issued by SEBI dated August 10, 2011 specifies different percentages of penalty with respect to short collection / non-collection of margins from clients in equity and currency derivatives segment. While it specifies small proportion of 5% to 10% of margin short fall as penalty for non-reporting, it specifies that 100% of the short collection shall be imposed as penalty. If such violation is noticed at the time of inspection, then in addition to 100% penalty one day suspension has to be imposed. The said circular does not differentiate between situations involving upfront collection of cheques but late depositing or late crediting of the said amount and no upfront collection at all and hence suffers from the proportionality principle. In order to incorporate proportionality, as is provided for small percentages of short falls in margin collection in the same circular itself, the word 'shall' in the circular has to be read as 'may' as it would enable the Exchange authorities to distinguish between no collection of margin at all and delayed collection of margin, particularly, in situations like no impact on the settlement or market at all. Accordingly, we are unable to agree with the interpretation of the spirit of the circular provided by SEBI as well as NSE.

In this matter before us the penalty imposed is Rs. 2, 05, 43,900/- and suspension from trading in the Currency Derivatives segment for one day. The appellant before us submits that the annual income from brokerage from CD segment is only to the tune of about Rupees three lakh which is not disputed. While we totally agree that upfront collection of margin is an important regulatory tool to safeguard market integrity, at the same time we are equally concerned with proportionality while imposing a penalty of a very heavy amount which can completely ruin an entity for a single violation. It is an undisputed fact that the appellant has not committed any other violation. While the SEBI circular is quite mechanical in directing the Exchanges to impose a fixed penalty, the Exchange Rules provide for an appeal / review and empowers the authority to review / rescind / reconsider the penalty imposed. Given these factors we are of the considered view that based on the facts and circumstances of the present matter, the law has to be interpreted in its spirit invoking proportionality.

Though we are inclined to reduce the penalty given these facts, the penalty has to be in tune with the violation. The appellant's submission that brokerage from the CD segment is only just over Rs. 3 lakh is incomplete since it has not disclosed the total earnings including that from other segments of the market. Moreover, it is imperative to underscore the importance of prompt upfront margin collection for promoting market integrity. Balancing all these, a penalty of Rupees Fifty Lakh and one day suspension from the CD segment would meet the ends of justice in the matter. Appellant is directed to pay the penalty within four weeks from today. Respondent NSE shall implement the one-day suspension after giving fifteen days' notice to the appellant.

Case Study No. 13

EMAAR MGF LAND LIMITED

v.

AFTAB SINGH [SC]

Review Petition (C) Nos. 2629-2630 of 2018 IN Civil Appeal Nos.23512-23513 of 2017

Ashok Bhushan & U U Lalit, JJ. [Decided on 10/12/2018]

Consumer Protection Act, 1985 read with Arbitration and Conciliation Act, 1996 – Flat buyer's agreement – Consumer dispute – Agreement contained arbitration clause – Purchaser filed consumer complaint – Whether liable to be referred to arbitration – Held, No.

Brief facts:

A Buyer's agreement was entered into between the appellant and the respondent. In the Buyer's agreement, there was an arbitration clause providing for settlement of disputes between parties under the 1996 Act. On 27.07.2015, the respondent filed a Consumer Complaint before the NCDRC against the appellant praying for delivery of possession of the built up Villa, adjustment of excess payment and compensation for deficiency of service. Appellant filed an application under Section 8 of the 1996 Act for referring the matter to arbitration for and on behalf of the appellant. The single judge referred the issue to the larger Bench and the larger bench dismissed the application on the ground that the consumer dispute is not arbitrable. On appeal, The Supreme Court also concurred with the National commission but the appellant sought a review of the judgement under the present review petition.

Decision: Petition dismissed.

Reason:

This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above.

Not only the proceedings of Consumer Protection Act, 1986 are special proceedings which were required to be continued under the Act despite an arbitration agreement, there are large number of other fields where an arbitration agreement can either stop or stultify the proceedings. For example, any action of a party, omission or commission of a person which amounts to an offence has to be examined by a criminal court and no amount of agreement between the parties shall be relevant for the said case. For example, there may be a commercial agreement between two parties that all issues pertaining to transaction are to be decided by arbitration as per arbitration clause in the agreement. In case where a cheque is dishonoured by one party in transaction, despite the arbitration agreement party aggrieved has to approach the criminal court. Similarly, there are several issues which are non- arbitrable. There can be prohibition both express or implied for not deciding a dispute on the basis of an arbitration agreement.

We have already noted several categories of cases, which are not arbitrable. While referring to judgment of this Court in Booz Allen & Hamilton Inc v. SBI Home Finace ltd & Ors (2011) 5 SCC 532 those principles have again been reiterated by this Court in A. Ayyasamy v .A. Paramasivam & Ors (2016) 10 SCC 386.

The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in National Seeds Corporation Limited(supra) is no more a good law cannot be accepted. The words “notwithstanding any judgment, decree or order of the Supreme Court or any Court” were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall entitle to look into various facets of the arbitration agreement, subject matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning.

We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration. We, thus, do not find that any error has been committed by the NCDRC.

Case Study No. 14

CARLSBERG BREWERIES A/S

v.

SOM DISTILLERIES AND BREWERIES LTD [Del-FB]

C.S. (COMM) 690/2018 & I.A. No.11166/2018

S. Ravindra Bhat, Hima Kohli, Vipin Sanghi, Valmiki. J. Mehta & Vibhu Bakhru, JJ. [Decided on 14/12/2018]

Infringement of design and passing off of the plaintiff’s trade dress – Composite suit filed – Whether maintainable – Held, Yes.

Brief facts:

The reference to this larger, Special Bench of five judges, was occasioned by the detailed speaking order of a learned Single Judge, in the present suit, which sought the reliefs of infringement of design and a decree for injunction against passing off. The learned Single Judge, by the order dated 02.05.2017, referred the question as on the whether the decision in Mohan Lal v. Sona Paint, 2013 (55) PTC 61 (Del) (FB) - hereafter "Mohan Lal" on the aspect of maintainability of a composite suit in relation to infringement of a registered design and for passing off, where the parties to the proceedings are the same needs re-consideration by a larger bench in the light of Order II Rule 3 CPC, which permits joinder of causes of action. The decision in Mohan Lal (supra) was by a Full Bench of three judges, which held that "infringement of design" and "passing off" cannot be combined in a composite suit.

The present suit (out of which this reference arose) was filed, complaining of infringement of a registered design as well as passing off (of the plaintiff's trade dress) in respect of the bottle and overall get up of the "Carslberg" mark. The defendant objected to the frame of the suit, pointing out that per Mohan Lal (supra), the two claims (for passing off and reliefs regarding design infringement) could not be combined in one suit. The single judge analysed parties‟ submissions and felt that the issue decided in Mohan Lal (supra) required a second look; he therefore, referred the matter for appropriate orders to the Chief Justice.

Decision: Composite suit is maintainable

Reason:

The issue therefore which is required to be squarely addressed by this Full Bench is as to whether there would arise common questions of facts and law in the two causes of action of infringement of registered design and passing off so that these two causes of action can be joined under Order II Rule 3 CPC, and which is an issue which was not decided either in Dabur India Limited v. K.R. Industries, (2008) 10 SCC 595 or in the case of Dhodha House v. S.K. Maingi, (2006) 9 SCC 41. Before however we go on this aspect, the general law with respect to joinder of causes of action under Order II Rule 3 CPC can be usefully referred to and as held in the case of Prem Lata Nahata & Anr v. Chandi Prasad Sikaria, (2007) 2 SCC 551.

The ratio of the judgment in the case of Prem Lata Nahata & Anr (supra) is that with respect to entitlement or otherwise of joinder of causes of action, the question to be asked is as to whether the evidence to be led in the two causes of action would be common, and if the substantial evidence of two causes of action would be common, then there can be joinder of causes of action under Order II Rule 3 CPC. Putting it negatively if the evidence is for the most part different of the two causes of action, then there cannot be joinder of causes of action.

Therefore since the crux of the matter for joinder of causes of action under Order II Rule 3 CPC is to see if common questions of law and facts arise in two separate causes of action and whereupon there can be joinder of causes of action under Order II Rule 3 CPC in one composite suit which joins two causes of action, therefore we now proceed to examine as to whether there would exist common questions of law and fact in the two causes of action of infringement of registered design and passing off. For so deciding first it would be necessary to refer to the meaning of cause of action.

Let us now accordingly examine as to what are the bundle of facts, or the bundle of material facts, in the two causes of action of infringement of a registered design and passing off, and as to whether there would arise common questions of law and fact in the two bundle of facts of the two causes of action of infringement of registered design and passing off.

To decide the issue of existence of common questions of law and fact in the two causes of action of infringement of a registered design and passing off, at this stage it would be instructive to refer to a judgment passed by the Division Bench of this Court in the case of M/s. Jay Industries v. M/s. Nakson Industries, 1992 SCC Online Del 84; AIR 1992 Del 338 because this judgment lays down the ratio for the issue at hand as to when there can be joinder of causes of action.

A reading of the observations made in the judgment of M/s. Jay Industries (supra) shows that the Division Bench was of the view that two different causes of action in fact can be a part of the same transaction. The same transaction is that transaction of the selling of goods by the defendant by packing and labelling them in such a manner which infringes the trademark and the copyright of the plaintiff. In such facts there would be common bundle of facts in the two causes of action of infringement of trademark and copyright, because there is a single and same transaction of sale of the goods by the defendant of its goods in cartons under being similar to the cartons in which the plaintiff sells its goods and which as per plaintiff results in violation of his rights in his registered trade mark and copyright in his label.

The Division Bench has concluded that since the transaction of sale by the defendant in effect results in the infringement of both the trademark rights and violation of copyright of the plaintiff, therefore under Order II Rule 3 CPC it is permissible to join the two causes of action against the same defendant and that in fact in such cases the joinder of causes of action would result in avoidance of multiplicity of proceedings.

It is therefore seen that once a transaction of sale which is impugned by the plaintiff results in infringement of two rights of the plaintiff of infringement of plaintiff's trademark and violation of plaintiff's copyright, since there would be common questions of law and facts because it is the transaction of sale with its bundles of facts which is impugned being common in both the causes of action, therefore joinder of causes of action can take place under Order II Rule 3 CPC, and ought to be done because this will avoid multiplicity of proceedings.

The reference is answered by holding that one composite suit can be filed by a plaintiff against one defendant by joining two causes of action, one of infringement of the registered design of the plaintiff and the second of the defendant passing off its goods as that of the plaintiff on account of the goods of the defendant being fraudulent or obvious imitation i.e. identical or deceptively similar, to the goods of the plaintiff.

Case Study No. 15

HINDUSTAN INFRASTRUCTURE CONSTRUCTION CORPORATION LTD.

v.

M/S. R.S. WOODS INTERNATIONAL & ORS [DEL]

C.R.P. No.19/2018 & C.M. Nos.4276-4277/2018

Vinod Goel, J. [Decided on 13/12/2018]

Indian Partnership Act, 1932 read with Negotiable instruments Act, 1881 – Dishonour of cheque – Civil suit filed by unregistered partnership firm – Whether suit is barred under section 69(2) – Held, No.

Brief facts:

In the suit filed by the Respondent, the petitioners/defendants Nos. 2 & 3 have filed an application under Order VII Rule 11 CPC for rejection of the plaint on the ground that the suit is barred under Section 69 (2) of the Indian Partnership Act, 1932 ('the Act').

By the impugned order, the learned ADJ dismissed the application of the petitioners by relying upon a judgment of the Kerala High Court in Afsal Baker v. Maya Printers 2016 SCC OnLine Ker 29914. The petitioners have challenged the above judgement in the present revision petition.

Decision: Petition dismissed.

Reason:

The above provision i.e. Section 69 deals with the effect of non-registration of a partnership firm and bars filing of a suit by or on behalf of such firm to enforce a right arising from a contract by or on behalf of such firm against any third party.

Admittedly the respondents/plaintiff has filed a Civil Suit for recovery of Rs.24,41,967/- against the petitioners/defendant on account of dishonour of cheques bearing no.482933 dated 18.11.2013 for Rs.5 lacs, no.482934 dated 19.11.2013 for Rs.5 lacs, no.482935 dated 20.11.2013 for Rs.5 lacs , no.709846 dated 18.11.2013 for Rs.5 lacs and no.709845 dated 20.11.2013 for Rs.4,41,967/-, total of which comes to Rs.24,41,967/-, which is the suit amount.

The Kerala High Court in Afzal Baker (surpa) observed as under:- "10. In the instant case, as noticed above, by virtue of Section 30 and 37 of the Negotiable Instruments Act, on the dishonour of a cheque, the statute creates a liability on the drawer, apart from the general law of contracts. The right to sue on the contract is available and open to the party. However, apart from that, the statute creates a liability as against the drawer of the instrument. If the suit is on the original cause of action based on the original contract between the parties, there is no doubt, the suit would be hit by Section 69 (2) of the Indian Partnership Act. But, in the instant case, what is sought to be enforced is the liability created under the Negotiable Instruments Act. It is not a case where suit is filed on the original cause of action by producing the cheques as a piece of evidence to prove the liability under the original contract. Here, the suit itself is laid on the instrument. A reading of the plaint leaves no room for doubt regarding that. The bar under Section 69(2) of the Indian Partnership Act would apply only where the suit is sought to be laid on a contract and not in a case where statutory right/liability is sought to be enforced. In the instant case, the suit being purely based on the liability under Section 30 and 37 of the Negotiable Instruments Act, it is a suit based on statutory liability dehors the contract between the parties. The suit cannot be held to be barred under Section 69(2) of the Indian Partnership Act."

In the instant case, the respondent is seeking enforcement of the liability of the petitioners created under Section 30 and 37 of the Negotiable Instruments Act, 1881 as the cause of action for the plaint is based on the dishonour of the said cheques. Since, the suit is not based on any contract between the parties, the bar under Section 69 (2) of the Act would not apply.

In view of this, I do not find any illegality or infirmity in the impugned order. Accordingly, the revision petition along with application, being C.M. No.4276/2018, is dismissed with no order as to costs.

Case Study No. 16

M/S. SICAGEN INDIA LTD

v.

MAHINDRA VADINENI & ORS [SC]

Criminal Appeal Nos. 26-27 of 2019 (Arising out of SLP (Crl.) Nos. 6789-6790 of 2015)

R Banumathi & Indira Banerjee, JJ. [Decided on 08/01/2019]

Negotiable Instruments Act, 1881 – Section 138 – Dishonour of cheque – Complaint filed on the basis of second notice – Whether maintainable – Held, Yes.

Brief facts:

Case of the appellant-complainant is that they had business dealings with the respondents and in the course of business dealings, the respondents had issued three cheques, which when presented for collection were dishonoured and returned with the endorsement "insufficient funds". The appellant-complainant had issued first notice to the respondent(s) on 31.08.2009 demanding the repayment of the amount. The cheques were again presented and returned with the endorsement "insufficient funds". The appellant had issued a statutory notice on 25.01.2010 to the respondent(s). Since the cheque amount was not being paid, the appellant-complainant had filed the complaint under Section 138 of the Negotiable Instruments Act based on the second statutory notice dated 25.01.2010.

The respondent(s)-accused filed petition before the High Court under Section 482 Cr.P.C. seeking to quash the criminal complaint filed by the appellant-complainant on the ground that the complaint was not filed based on the first statutory notice dated 31.08.2009 and the complaint filed based on the second statutory notice dated 25.01.2010 is not maintainable. The High Court quashed the complaint by holding that "the amount has been specifically mentioned in the first notice and, thereafter, the complainant himself has postponed the matter and issued the second notice on 25.01.2010 and the complaint filed on the same cause of action was not maintainable.

Decision: Appeal allowed.

Reason:

The issue involved whether the prosecution based upon second or successive dishonour of the cheque is permissible or not, is no longer res integra. In Sadanandan's case [(1998) 6 SCC 514] it was held that while second and successive presentation of the cheque is legally permissible so long as such presentation is within the period of six months or the validity of the cheque whichever is earlier, the second or subsequent dishonour of the cheque would not entitle the holder/payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. The correctness of the decision in Sadanandan's case was doubted and referred to the larger bench.

Three-Judge Bench of this Court in MSR Leathers v. S. Palaniappan & Anr 2013 ((1) SCC 177 held that there is nothing in the provisions of Section 138 of the Act that forbids the holder of the Cheque to make successive presentation of the cheque and institute the criminal complaint based on the second or successive dishonour of the cheque on its presentation.

In the present case as pointed out earlier that cheques were presented twice and notices were issued on 31.08.2009 and 25.01.2010. Applying the ratio of MSR Leathers (supra) the complaint filed based on the second statutory notice is not barred and the High Court, in our view, ought not to have quashed the criminal complaint and the impugned judgment is liable to be set aside.

The Complaint CC No. 4029 of 2010 before the Court of XVIII, Metropolitan Magistrate at Saidapet, Chennai is restored to the file of the Trial Court and the Trial Court shall proceed with the matter in accordance with law after affording sufficient opportunity to both the parties.

Case Study No. 17

UNION OF INDIA

v.

KHAITAN HOLDINGS (MAURITIUS) LTD & ORS [DEL]

CS (OS) 46/2019, I.As. 1235/2019 & 1238/2019

Prathiba M. Singh, J. [Decided on 29 /01/2019]

Arbitration under bilateral investment treaties – BIT between India and Mauritius – Investment in India by Mauritius entity – Dispute – Arbitration proceedings initiated under BIT by investor – Government of India sought anti-arbitration injunction – Whether grantable – Held, No.

Brief facts:

Arbitration as a means for resolution of disputes is well entrenched in most judicial systems. In the context of commercial arbitration, there are two types - domestic arbitration and international commercial arbitration. In all these disputes, minimum judicial interference in the conduct of arbitral proceedings is the norm. There is yet another species of arbitration which is the subject matter of the present case i.e., Arbitral proceedings under Bilateral Investment Treaties. While traditional arbitrations arise out of commercial contracts entered into between individuals and companies, arbitrations under BITs arise out of agreements signed between two sovereign nations. Under these agreements, each of the States, signatory to the Agreement agrees to provide Fair and Equitable Treatment to investors from the other State, as also extend protection against arbitrary, discriminatory and unfair practices. The investments made by investors of the State are to be safeguarded against any expropriation and remedies are also provided for adjudication of disputes through international dispute settlement mechanisms. The dispute settlement mechanisms can be triggered both by the aggrieved State as also an aggrieved investor from a State which is party to the Agreement, against the other State. Interference by domestic courts in arbitral proceedings that may be commenced under BITs is permissible but only in `compelling circumstances, in `rare cases. Courts are hesitant to interfere in the arbitral process once the Tribunal is constituted and is seized of the dispute.

The Union of India seeks an anti-arbitration injunction against the arbitral proceedings initiated by Defendant No.1 - M/s Khaitan Holdings (Mauritius) Ltd. a Mauritius based company, under the Agreement entered into between the Republic of India and the Republic of Mauritius for the Promotion and Protection of Investments (hereinafter "BIT agreement").

Decision: Injunction refused.

Reason:

The genesis of the dispute, which has been encapsulated in the notice invoking arbitration is the judgement of the Supreme Court in CPIL (supra) of the Supreme Court by which the Supreme Court cancelled the licences granted to various companies including Loop Telecom. The judgment of the Supreme Court resulted in fresh recommendations being made by the Telecom Regulatory Authority of India, and thereafter an auction being conducted for allocation of the spectrum and award of licenses.

It can be seen that in the era of BIT agreements, even judgements of Courts could trigger investment disputes under the BITs resulting in enormous claims being raised against the Government. This is so because under public international law which primarily governs BIT agreements, the Articles of State Responsibility specifically provide that the conduct of any organ of the State can be called to question. The grounds on which the Republic of India seeks an anti-arbitration injunction are inter alia as under:

- That Khaitan Holdings is not a genuine investor due to the clear link and control by Sh. Ishwari Prasad Khaitan and Smt. Kiran Khaitan of both Khaitan Holdings (Mauritius) and Loop Telecom;
- That the BIT cannot be invoked by an entity, though incorporated in Mauritius, but is actually controlled by Indian citizens;
- That there has been no expropriation as due process has been followed and the decision to cancel the licences was rendered by the Supreme Court of India in public interest;
- That the entire foreign investment, being through the automatic route, was subject to Indian laws under the UASL;
- That Loop Telecom has already availed of its remedies against the cancellation of its licences under Indian law and hence rights under the BIT stand waived;
- Overlapping nature of the claims raised by Loop Telecom before TDSAT and Defendant no.1 in the arbitral proceedings;

All the above grounds, are those that can be that with and decided by the Arbitral Tribunal. The arbitration having been invoked in 2013 and the Tribunal having been constituted and being seized of the dispute, it is not for this Court to adjudicate on these issues. The above issues ought to be raised by the Republic of India before the Arbitral Tribunal, which under Article 21, would rule upon the same. The proceedings which are already underway cannot be termed as being oppressive, vexatious or an abuse of process at this stage. The prayer for adinterim relief seeking stay of the arbitral proceedings commenced by Khaitan Holdings under the BIT, is accordingly rejected, at this stage.

Case Study No. 18

BIR SINGH

v.

MUKESH KUMAR [SC]

Criminal Appeal Nos.230-231 of 2019 arising out of (@ SLP (CRL) Nos. 9334-35 of 2018)

R Banumathi & I Banerjee, JJ. [Decided on 06/02/2019]

Negotiable Instruments Act,1882 – Section 138 & 139 – Issuance of cheque admitted by drawer – Objection raised that payee filled in the cheque and the cheque was given as security – Trial court and first appellate court convicted the drawer – High Court reversed the decision-whether correct – Held, No.

Brief facts:

The respondent-accused issued a cheque in the name of the appellant towards repayment of a "friendly loan" of Rs.15 lakhs advanced by the appellant-complainant to the respondent accused. On 11-4-2012, the appellant-complainant deposited the said cheque in his bank, but the cheque was returned unpaid with the endorsement "Insufficient Fund". The appellant complainant again presented the cheque to his bank, but it was again returned unpaid with the remark "Insufficient Fund".

The appellant-complainant filed a Criminal Complaint against the respondent-accused, where the Judicial Magistrate convicted the respondent-accused. On appeal by the accused, the Appellate Court upheld the conviction of the respondent accused and confirmed the compensation of Rs.15 lakhs directed to be paid to the appellant- complainant. The sentence of imprisonment was however reduced to six months from one year. The respondent-accused filed a Criminal Revision Petition in the High Court challenging the Judgment and order of the Appellate Court. The appellant- complainant also filed a Criminal Revision Petition challenging the reduction of the sentence from one year to six months.

By a common final Judgment and order, the High Court has reversed the concurrent factual findings of the Trial Court and the Appellate Court and acquitted the respondent, observing, inter alia, that there was fiduciary relationship between the appellant- complainant, an Income Tax practitioner, and the respondent-accused who was his client.

Decision: **Appeal allowed.**

Reason:

In passing the impugned judgment, the High Court misconstrued Section 139 of Negotiable Instruments Act, which mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.

[After referring to various judgements] The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion.

Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant-complainant, it may reasonably be presumed that the cheque was filled in by the appellant-complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent accused of the charge under Section 138 of the Negotiable Instruments Act.

Case Study No. 19

ROHITBHAI J PATEL

v.

THE STATE OF GUJARAT [SC]

Criminal Appeal No. 508 of 2019 (Arising out of S L P (Crl.) 1883 of 2018)

A M Sapre & D Maheshwari, JJ. [Decided on 15/03/2019]

Negotiable Instruments Act – Section 138 &139 – Preseumption as to cheque drawn in favour of complainant – Yet trial court put the onus on the complainant to prove the liability – Whether correct – Held, No.

Brief facts:

This appeal is directed against the common judgment and order whereby, the High Court of Gujarat has reversed the respective judgment and orders as passed by the 8th Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Vadodara in 7 criminal cases pertaining to the offence of dishonour of 7 cheques in the sum of Rs. 3 lakhs each, as said to have been drawn by the accused-appellant in favour of the complainant- respondent No. 2. In the impugned judgment and order High Court has disapproved the acquittal of the accused-appellant and, while holding him guilty of the offence under Section 138 of the NI Act, has awarded him the punishment of simple imprisonment for a period of 1 year with fine to the extent of double the amount of cheque (i.e., a sum of Rs. 6 lakhs) with default stipulation of further imprisonment for a period of 1 year in each case; and, out of the amount payable as fine, the complainant-respondent No. 2 is ordered to be compensated to the tune of Rs. 5.5. Lakhs in each case.

Decision: Appeal dismissed.

Reason:

Having given anxious consideration to the rival submissions and having examined the record, we are clearly of the view that as regards conviction of the accused-appellant for the offence under Section 138 NI Act, the impugned judgment and order dated 08.01.2018 does not call for any interference but, on the facts and in the circumstances of this case, the punishment as awarded by the High Court deserves to be modified.

In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/ circumstances which could be of a reasonably probable defence.

Hereinabove, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier cheques in the rains though the office of the complainant being on the 8th floor had also been of irrelevant factors for consideration of a probable defence of the appellant.

On perusing the order of the Trial Court, it is noticed that the Trial Court proceeded to pass the order of acquittal on the mere ground of 'creation of doubt'. We are of the considered view that the Trial Court appears to have proceeded on a misplaced assumption that by mere denial or mere creation of doubt, the appellant had successfully rebutted the presumption as envisaged by Section 139 of the NI Act. In the scheme of the NI Act, mere creation of doubt is not sufficient.

The result of discussion in the foregoing paragraphs is that the major considerations on which the Trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the Trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the Trial Court and after examining the evidence on record as a whole, found that the findings of the Trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter. For what has been discussed hereinabove, the findings of the High Court convicting the accused-appellant deserves to be, and are, confirmed.

Case Study No. 20

BHARAT BROADBAND NETWORK LTD.

v.

UNITED TELECOMS LTD [SC]

Civil Appeal No.3972 of 2019 (Arising out of S L P(C) No.1550 of 2018)

R.F. Nariman & Vineet Saran, JJ. [Decided on 16/04/2019]

Arbitration and Conciliation Act, 1996 – Section 12 – Appointment of arbitrator – Agreement provided for CMD as arbitrator – CMD disqualified and became ineligible to be appointed as arbitrator – Whether such disqualified person can appoint an arbitrator – Held, No.

Brief facts:

The Chairman & Managing Director of the appellant, had the right to appoint the arbitrator as provided in the arbitration clause in the purchase order dated 30/09/2014 (contract). Since disputes and differences arose between the parties, the respondent, by its letter dated 03.01.2017, invoked the aforesaid arbitration clause. The appellant's Chairman and Managing Director, by a letter dated 17.01.2017, nominated one Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen between the parties.

The Supreme Court, by its judgment in TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377 (rendered on 03.07.2017), held that since a Managing Director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be null and void.

The appellant therefore made an application to the sole arbitrator praying that since he (arbitrator) is de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. The application was rejected and on appeal High court also rejected the appeal stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. Hence the present appeal before the Supreme Court.

Decision: Appeal allowed.

Reason

From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub- section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such.

Under this provision, any prior agreement to the contrary is wiped out by the non- obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule.

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility", i.e., to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

We thus allow the appeals and set aside the impugned judgment. The mandate of Shri Khan having terminated, as he has become de jure unable to perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties.

Case Study No. 21

ANJUM HUSSAIN & ORS

v.

INTELLICITY BUSINESS PARK PVT LTD & ORS [SC]

Civil Appeal No. 1676 of 2019

Arun Mishra & Uday Umesh Lalit, JJ. [Decided on 10/05/2019]

Consumer Protection Act, 1986 – Section 12 – Class action by consumers – Delay in handing over possession of office/flats – All buyers filed a joint complaint before the NC – NC dismissed the case as not maintainable as class action – Whether correct – Held, No.

Brief facts:

The Appellant No.1 had booked an office space admeasuring about 440 sq. ft. in a project consisting of residential units, shops and offices launched by the respondent. The Builder – Buyer Agreement was executed between the Appellant No.1 and the respondent on 02.12.2013, where under the respondent was to deliver possession of the office unit within four years. Similar such Agreements were entered between the appellant nos.2 to 44 and the respondent in respect of various units from the same project.

Since the respondent had failed to honour its commitments of delivering possession in four years and as the project was still at the stage of excavation, consumer complaint Case No. 2241 of 2018 was filed, as class action, by the appellants 1 to 44 seeking refund of the amounts paid by them to the respondent along with interest and compensation. The National Commission vide the impugned judgement/order concluded that the case could not be accepted as class action and dismissed the same. The dismissal of the case as class action is questioned in this appeal.

Decision: Appeal allowed.

Reason:

According to the National Commission, though all the appellants had a common grievance that the respondent had not delivered possession of the respective units booked by them and thus the respondent was deficient in rendering service, it was not shown how many of the allottees had booked the shops/commercial units solely for the purchase of earning their livelihood by way of self-employment. In Chairman, Tamil Nadu Housing Board, Madras v. T. N. Ganapathy (1990) 1 SCC 608 it was held by this Court that the persons who may be represented in a Suit under Order 1 Rule 8 of Civil Procedure Code need not have the same cause of action and all that is required for application of said provision is that the persons concerned must have common interest or common grievance. What is required is sameness of interest. Very same issue was dealt with by Full Bench of the National Commission in Ambrish Kumar Shukla and Ors. v. Ferrous Infrastructure Pvt. Ltd. [Consumer Case No.97 of 2016, decided on 07.10.2016]. The National Commission relied upon the decision of this Court in T.N. Housing Board (supra)

It was observed by this Court in T.N. Housing Board (supra) that the provision must receive an interpretation which would subserve the object for its enactment. It is in this light that the Full Bench of the National Commission held that oneness of the interest is akin to a common grievance against the same person.

However, the National Commission in the instant case, completely lost sight of the principles so clearly laid down in the decisions referred to above. In our view, the approach in the instant case was totally erroneous.

We, therefore, allow this appeal, set aside the Order under appeal. The application preferred by the appellants is held to be maintainable. Case No. 2241 of 2018 is restored to the file of the National Commission and shall be proceeded with in accordance with law.

Case Study No. 22

LALIT MISHRA & ORS

v.

SHARON BIO MEDICINE LTD. & ORS. [NCLAT]

Company Appeal (AT) (Insolvency) No. 164 of 2018

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 19/12/2018]

Insolvency and Bankruptcy Code, 2016 – Resolution plan – Personal guarantor claimed his subrogation right – Whether tenable – Held, No.

Brief facts:

The Appellants are the promoters of 'Sharon Bio Medicine Ltd.'- ('Corporate Debtor'). In the appeal they have challenged the order passed by the National Company Law Tribunal [NCLT], whereby and where under, the 'Resolution Plan' submitted by the 3rd Respondent- 'Successful Resolution Applicant' has been approved.

The Appellants have challenged the order of approval of the 'Resolution Plan' on two counts namely –(i) The Appellants, promoters were the shareholders and for them no amount has been provided under the 'Resolution Plan'; and (ii) Some of the Appellants, promoters are also 'personal guarantors' who have been discriminated.

Decision: Appeal dismissed.

Reason:

The restructuring of the financial debt as part of the 'Resolution Plan' approved by the Adjudicating Authority under the 'I&B Code' does not envisage complete discharge of the liability of personal guarantors of the 'Corporate Debtor'. This will be evident from Clause 12 of Section 5 of the 'Resolution Plan' which deals with 'treatment of security'. Therein it is mentioned that all securities/ collaterals/ margin money/ fixed deposit with lien provided by the Company shall be deemed to be released immediately on Effective Date. It is subsequently mentioned that the personal guarantee provided by the existing promoters of the Company, shall result in no liability towards the 'Company' or the 'Resolution Applicants'. This 'treatment of security' and with regard to personal guarantee provided by the existing promoters of the Company is alleged to be in violation of Section 140 and Section 133 of the 'Indian Contract Act'.

However, the aforesaid submissions cannot be accepted, as on approval of the 'Resolution Plan', the claim of the entire stakeholders stand cleared and the 'Personal Guarantor' thereafter cannot claim that they have been discriminated. All the stakeholders have already been cleared by the 3rd Respondent- 'Successful Resolution Applicant'. It was open to them to say that the personal guarantee will not result into any liability towards the 'Company' or the 'Resolution Applicant'.

It was not the intention of the legislature to benefit the 'Personal Guarantors' by excluding exercise of legal remedies available in law by the creditors, to recover legitimate dues by enforcing the personal guarantees, which are independent contracts. It is a settled position of law that the liabilities of guarantors is co-extensive with the borrower.

This Appellate Tribunal held that the resolution under the 'I&B Code' is not a recovery suit. The object of the 'I&B Code' is, inter alia, maximization of the value of the assets of the 'Corporate Debtor', then to balance all the creditors and make availability of credit and for promotion of entrepreneurship of the 'Corporate Debtor'. While considering the 'Resolution Plan', the creditors focus on resolution of the borrower 'Corporate Debtor', in line with the spirit of the 'I&B Code'.

The present appeal has been preferred by the promoters, who are responsible for having contributed to the insolvency of the 'Corporate Debtor'. The 'I&B Code' prohibits the promoters from gaining, directly or indirectly, control of the 'Corporate Debtor', or benefiting from the 'Corporate Insolvency Resolution Process' or its outcome. The 'I&B Code' seeks to protect creditors of the 'Corporate Debtor' by preventing promoters from rewarding themselves at the expense of creditors and undermining the insolvency processes.

For the aforesaid reasons, it will be evident from the 'I&B Code' that the powers of the promoters as the members of the Board of Directors of the 'Corporate Debtor' are suspended. The voting right of the shareholders, including promoter shareholders, are suspended and shareholders' approval is deemed to have been granted for implementation of the 'Resolution Plan' as apparent from explanation to Section 30(2)(f) of the 'I&B Code'. The promoters, being 'related parties' of the 'Corporate Debtor', have no right of representation, participation or voting in a meeting of the 'Committee of Creditors'.

Admittedly, the shareholders and promoters are not the creditors and thereby the 'Resolution Plan' cannot balance the maximization of the value of the assets of the 'Corporate Debtor' at par with the 'Financial Creditors' or 'Operational Creditors' or 'Secured Creditors' or 'Unsecured Creditors'. They are also ineligible to submit the 'Resolution Plan' to again control or takeover the management of the 'Corporate Debtor'.

In the aforesaid background, if no amount is given to the promoters/ shareholders and the other equity shareholders who are not the promoters have been separately treated by providing certain amount in their favour, the Appellant cannot claim to have been discriminated.

Case Study No. 23

FORECH INDIA LTD.

v.

EDELWEISS ASSETS RECONSTRUCTION CO LTD & ANR [SC]

Civil Appeal No. 818 of 2018

R F Nariman & Navin Sinha, JJ. [Decided on 22/01/2019]

Insolvency & Bankruptcy Code,2016 – Section 7&11 – Financial creditor filed an insolvency petition against the corporate debtor – Appellant objecting to the admission on the ground of continuance of winding up petition under the old Act – Objection rejected – Whether correct – Held, Yes.

Brief facts:

The present matter arises from an Operational Creditor's appeal to continue with a winding up petition that has been filed by the said creditor way back in 2014. The facts relevant for disposal of this appeal are as follows:-

A winding up petition, being No. 42 of 2014, was filed by the present appellant before the High Court of Delhi on 10.01.2014, against Respondent No. 2-Company, in which notice had been served, as is recorded by an order of the High Court of Delhi. Further orders which have been pointed out to the Court have gone on to state that there is a debt or liability which is, in fact, admitted.

It transpires that another operational creditor, viz., SKF India Ltd. had filed an application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (in short 'the Code'), against Respondent No. 2, which was allowed to be withdrawn so that the aforesaid operational creditor could go to the High Court in a winding up petition which would then be heard along with the Company Petition No. 42/2014.

Meanwhile, Respondent No. 1, being a financial creditor of the self- same corporate debtor, moved the National Company Law Tribunal (NCLT) in an insolvency petition filed under Section 7 of the Code sometime in May/June 2017. This petition was admitted on 07.08.2017. Against the aforesaid order, an appeal was filed by the appellant herein which was dismissed by the Appellate Tribunal, in which Section 11 of the Code was referred to, and it was held by the Appellate Tribunal that since there was no winding up order by the High Court, the financial creditor's petition would be maintainable, as a result of which the appellant's appeal has been dismissed.

Decision: Appeal disposed of with direction.

Reason:

The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgment which is contained in Jaipur Metals & Electricals Employees Organization vs. Jaipur Metals & Electricals Ltd. & Ors. being a judgment by a Division Bench of this Court dated 12.12.2018.

Section 11 is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.

Though, we are not interfering with the Appellate Tribunal's order dismissing the appeal, we grant liberty to the appellant before us to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code.

Case Study No. 24

SWISS RIBBONS PVT LTD.

v.

UNION OF INDIA [SC]

Writ Petition (Civil) No. 99 of 2018 with batch of petitions

R F Nariman & Navin Sinha, JJ. [Decided on 25/01/2019]

Insolvency and Bankruptcy Code, 2016 – Whether constitutionally valid – Held, yes.

Brief facts:

The present petitions assail the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 ["Insolvency Code" or "Code"]. Since we are deciding only questions relating to the constitutional validity of the Code, we are not going into the individual facts of any case.

Decision: Constitutional validity upheld.

Reason:

The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.

We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have been disposed of by the Adjudicating Authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. Eighty cases have since been resolved by resolution plans being accepted. Of these eighty cases, the liquidation value of sixty-three such cases is INR 29,788.07 crores. However, the amount realized from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, the Reserve Bank of India has come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016-2017, to INR 9161.09 crores in 2017-2018, and to INR 13195.20 crores for the first six months of 2018-2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14530.47 crores in 2016-2017, to INR 18469.25 crores in 2017- 2018, and to INR 18798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter‘s paradise is lost. In its place, the economy‘s rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs.

Case Study No. 25

SHALINI PUBLICITY CREATIVE PVT. LTD.

v.

DENA BANK [NCLAT]

Company Appeal (AT) (Insolvency) No. 153 of 2019

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 18/02/2019]

Insolvency & Bankruptcy Code,2016 – Section 7 – Default in repayment of loan by corporate debtor – OTS proposal failed financial creditor filed petition – NCLT admitted the petition whether correct – Held, Yes.

Brief facts:

Appellant Corporate Debtor is aggrieved of the impugned order passed by the Adjudicating Authority (NCLT), Mumbai Bench by virtue whereof application of Respondent – Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') has been admitted, moratorium slapped and Interim Resolution Professional appointed with certain directions. Before the Adjudicating Authority the Financial Creditor alleged default on the part of the Corporate Debtor in repayment of facilities granted to the Corporate Debtor to the extent of Rs.28,15,26,092/-.The Financial Creditor relied upon the 'sanction letter' dated 26th December, 2015 in terms whereof facilities comprising of cash credit, term loan and bank guarantee accumulated at Rs.14,69,00,000/- were granted to the Corporate Debtor, repayment whereof was secured by various security documents. Financial Creditor also relied upon the 'statement of accounts' substantiating its claim with regard to the amount in respect whereof default was alleged.

Decision: Appeal dismissed.

Reason:

The Adjudicating Authority taking note of the fact that the One Time Settlement (OTS) proposal made by the Corporate Debtor had been rejected by the Financial Creditor and that the 'debt' and 'default' was established, proceeded to admit the application thereby initiating Corporate Insolvency Resolution Process against the Corporate Debtor. Learned counsel for the Appellant tried to make a vain attempt to assail the impugned order raising the issue of limitation. In the first place be it seen that no such plea was raised before the Adjudicating Authority. That apart, under Article 137 of the Limitation Act, the right to sue accrues when a default occurs. The period of three years, as envisaged under aforesaid Article, would therefore have to be reckoned from the date of default unless there is a continuing cause of action. It emanates from record that the Financial Creditor relied upon various security documents connected with the sanction of loan facilities. In addition thereto reliance was also placed on notice issued under Section 13(2) of SARFAESI Act, 2002 demanding a sum of Rs.16, 31, 06,448/- as on 17th February, 2016.

Once the debt was acknowledged on 26th February, 2015 and the suit for recovery was filed before the Debts Recovery Tribunal-3, Mumbai on 19th October, 2016, the claim cannot be held to be barred by limitation. Even otherwise, the objection in regard to the claim being barred by limitation has to be determined during the Corporate Insolvency Resolution Process only. Triggering of Corporate Insolvency Resolution Process on grounds of default of a debt that's payable in law or in fact is different from admission or rejection of a claim of a creditor during such process.

Section 7 of I&B Code providing for initiation of Corporate Insolvency Resolution Process by Financial Creditor came into force on 1st December, 2016. Remedy by way of triggering of insolvency resolution process on the ground of default committed qua the financial debt was admittedly not available to a Financial Creditor prior to such date. It is not disputed by learned counsel for the Appellant that the application under Section 7 of I&B Code came to be filed by the Financial Creditor on 12th October, 2018. The triggering of Corporate Insolvency Resolution Process, therefore,` cannot be said to be beyond limitation, more so as there has been acknowledgement of debt on 26th February, 2015 and remedy for initiation of Corporate Insolvency Resolution Process in terms of Section 7 of I&B Code was not available prior to 1st December, 2016. That apart, there has been continuing cause of action as OA 1194 of 2016 filed by the Financial Creditor against the Corporate Debtor before the Debts Recovery Tribunal, Mumbai on 19th October, 2016 is still pending adjudication.

Learned counsel for the Appellant made feeble attempt to contend that the debt acknowledgement letter dated 26th February, 2015 was manipulated and fictitious and same could not be made a basis for either reckoning the period of limitation or for entertaining claim. In absence of such plea having been raised before the Adjudicating Authority besides no complaint alleging forgery, fabrication/ fudging of record being lodged, this argument must be rejected with the contempt that it deserves. On one hand the Appellant was seeking restructuring of loan in terms of RBI Guidelines seeking more time for One Time Settlement (OTS) but on the other hand alleges fabrication and manipulation. What prompted the Corporate Debtor to seek restructuring of loan through One Time Settlement is explainable on no hypothesis other than the one that the Corporate Debtor had committed default qua the outstanding amount which was payable.

For the foregoing reasons, I am of the considered opinion that the appeal is devoid of any merit. The appeal is accordingly dismissed.

Case Study No. 26

COAL INDIA LTD.

v.

GULF COIL LUBRICANTS INDIA LTD & ANR [NCLAT]

Company Appeal (AT) (Insolvency) No. 807 of 2018

S.J. Mukhopadhaya & Bansi Lal Bhat. [Decided on 11/02/2019]

Insolvency & Bankruptcy Code, 2016 – Section 9 – Petition filed by operational creditor admitted – NCLT overlooked the fact of the payment of principal amount under a settlement – Whether correct – Held, No.

Brief facts:

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) was filed by Operational Creditor) for initiation of the 'Corporate Insolvency Resolution Process' against corporate debtor. The said application has been admitted by impugned order by the Adjudicating Authority (NCLT). While passing the impugned order, the Adjudicating authority had overlooked the factum that the principal amount has been paid and settled and no interest was required to be paid. The present appeal has been preferred by the corporate Debtor.

Decision: **Appeal allowed.**

Reason:

Learned counsel of the Operational Creditor accepts that the principal amount was paid prior to the admission of the application under Section 9 and interest has been paid and matter has been settled by agreement dated 26th January, 2019. It is submitted that such settlement has already been made prior to the constitution of the 'Committee of Creditors'.

In the case of Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors. – Writ Petition (Civil) No. 99 of 2018**,** the Hon'ble Supreme Court observed as follows:

> "52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case."

In view of the fact that the parties have now settled the matter prior to the constitution of the 'Committee of Creditors' and the Adjudicating Authority has failed to notice that the principal amount has already been paid and original plea of the 'Corporate Debtor' was that no interest was payable in terms of the Agreement/ Contract, we set aside the impugned order dated 19th December, 2018 passed by the Adjudicating Authority.

In effect, order (s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and the 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional' for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

Case Study No. 27

AFFINITY FINANCE SERVICES PVT LTD.

v.

KIEV FINANCE LTD [NCLAT]

Company Appeal (AT) (Insolvency) No.171/2019

Bansi Lal Bhat & Balvinder Singh. [Decided on 26/04/2019]

Insolvency and Bankruptcy Code, 2016 – Corporate insolvency proceedings – Liquidation order passed – Recall rejected – Whether refusal to recall the liquidation order correct – Held, Yes.

Brief facts

The appellant, operational creditor, filed petition under Section 9 of the Insolvency & Bankruptcy Code, 2016 seeking initiation of corporate insolvency resolution process against the Respondent, Corporate Debtor for committing default in paying of its debt. The petition was admitted by the Adjudicating Authority and Interim Resolution Professional was appointed and Committee of Creditors came to be constituted. Subsequently appointment of IRP was confirmed as Resolution Professional. The COC had as many as six meetings but did not receive any resolution plan during the period of 180 days.

Resolution Professional approached the Adjudicating Authority for liquidation of the Corporate Debtor. The Adjudicating Authority passed the liquidation order qua the corporate debtor and the Resolution Professional was appointed as Liquidator.

However, subsequently an application appears to have been filed by the Liquidator seeking recall of the liquidation order, which was dismissed on the ground that the order of liquidation of corporate debtor passed by it could not be subjected to review or revocation. It was also noticed by the Adjudicating Authority that corporate debtor could be sold as an ongoing concern during the liquidation process. The application seeking review was also accordingly dismissed. Hence the present appeal.

Decision: Appeal dismissed.

Reason

After hearing learned counsel for the appellant for a while we find no merit in the instant appeal. Admittedly no resolution applicant came forward with a resolution plan during the corporate insolvency resolution process and the Resolution Professional was left with no option but to seek an order of liquidation from the Adjudicating Authority. Learned Adjudicating Authority also did not have any option but to pass order for liquidation of the corporate debtor. Even if it is accepted that any resolution applicant did intend to submit a resolution plan before the order of liquidation was passed, same could be evaluated for considering its feasibility, viability and financial matrix only during the period of Insolvency Resolution Process. The Resolution Professional, in terms of Section 30(3) is required to present to the COC for its approval such resolution plans which confirm the conditions referred to in sub-section (2) of Section 30. It is only thereafter that feasibility and viability of such resolution plan is considered by the COC and the resolution plan is subjected to vote. All this has not been done. In fact review was sought on the ground that the proposed resolution applicant intended to file a resolution plan which in fact could not be evaluated and subjected to scrutiny for determining its viability and feasibility by the COC unless the same had been submitted within the prescribed time frame. This, coupled with the fact that the order of liquidation goes un-assailed, did not justify recalling of the order of liquidation at the instance of appellant, operational creditor, who claims to be sole member of COC. The impugned order declining to recall the liquidation order does not suffer from any legal infirmity and we do not find any justifiable ground to interfere. The Adjudicating Authority has rightly pointed out in the impugned order that even during the liquidation process corporate debtor can be sold as an ongoing concern. That should allay the apprehension of the appellant, if any, with regard to fair value of the Assets of the Corporate Debtor. For the aforesaid reasons, the appeal is dismissed.

Case Study No. 28

JK JUTE MILL MAZDOOR MORCHA

v.

JUGGILAL KAMLAPAT JUTE MILLS LTD & ORS [SC]

Civil Appeal No.20978 of 2017

R.F. Nariman & Vineet Saran, JJ. [Decided on 30/04/2019]

Insolvency and Bankruptcy Code, 2016 – Whether trade union is an 'operational creditor' when representing the interests of the workmen – Held, Yes.

Brief facts

The present appeal raises an important question as to whether a trade union could be said to be an operational creditor for the purpose of the Insolvency and Bankruptcy Code, 2016 ["Code"]. The facts of the present case reveal a long-drawn saga of a jute mill being closed and reopened several times until finally, it has been closed for good on 07.03.2014. Proceedings were pending under the Sick Industrial Companies (Special Provisions) Act, 1985. On 14.03.2017, the appellant issued a demand notice on behalf of roughly 3000 workers under Section 8 of the Code for outstanding dues of workers. This was replied to by respondent No.1 on 31.03.2017. The National Company Law Tribunal ["NCLT"], on 28.04.2017, after describing all the antecedent facts including suits that have been filed by respondent No.1 and referring to pending writ petitions in the High Court of Delhi, ultimately held that a trade union not being covered as an operational creditor, the petition would have to be dismissed. By the impugned order dated 12.09.2017, the National Company Law Appellate Tribunal ["NCLAT"] did likewise and dismissed the appeal filed by the appellant before us, stating that each worker may file an individual application before the NCLT.

Decision: Appeal allowed.

Reason

On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of “person” under Sections 3(23) of the Code. This being so, it is clear that an “operational debt”, meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly. Further, a registered trade union recognised by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which inter alia is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

Even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. We must never forget that procedure is the handmaid of justice, and is meant to serve justice.

The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union would come within the definition of “person” under Section 3(23) of the Code. Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all. For all these reasons, we allow the appeal and set aside the judgment of the NCLAT. The matter is now remanded to the NCLAT who will decide the appeal on merits expeditiously as this matter has been pending for quite some time. The appeal is allowed accordingly.

Case Study No. 29

PRANAMI TRADING PVT LTD.

v.

KIEON DEVELOPERS PVT. LTD [NCLAT]

Company Appeal (AT) (INS) No.96 of 2019

S.J. Mukhopadhaya, A.I.S. Cheema & Kanthi Narahari. [Decided on 11/06/2019]

Insolvency and Bankruptcy Code, 2016 – Section 238 – Application of Limitation Act to proceedings – Petition of operational creditor rejected by NCLT on the ground of limitation – Whether correct Held, No.

Brief facts:

The Appellant had filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the NCLT against the Respondent which came to be rejected on the ground of limitation.

The Appellant had booked a flat with the Respondent on 16th May 2012 and paid an amount of Rs.60 Lakhs and the allotment letter was issued to the Appellant. Subsequently, on 16.07.2012, an MOU (Annexure – D - Page – 42) was executed between the Appellant and Respondent and both the parties cancelled the booking on terms and conditions as laid down in the MOU. The Respondent agreed to pay the Appellant the amount of Rs.60 Lakhs within 18 months from the date of receipt of the boking amount, i.e. on or before 15th November 2013. In addition, Respondent agreed to pay Rs.8, 10,000/- every six months to the Appellant till entire booking amount was duly paid. Other conditions were also incorporated. According to the Appellant, in furtherance to the MOU and undertaking, the Respondent paid Rs.3, 24,000/- each on 16.11.2012 and 15.05.2013. Even Respondent had issued some cheques for refund of the amount but on 6th January 2014, wrote letter to the Appellant that the cheques are to be replaced. When the Appellant presented two cheques, the same bounced. The Appellant claimed that no interest had been paid on the booking amount, i.e. the principal amount of Rs.60 Lakhs after 15th May 2013 and the principal amount had also not been repaid.

The Appellant wanted to invoke second condition of the MOU with regard to the allotment of the flat, but Respondent did not comply and created third party rights which led to the Appellant filing L.C. Suit No.954 of 2014. In the written statement dated 21st July 2017, Respondent claimed that it was a pure loan transaction and accepted that the Respondent had received the money. The Appellant claims that on 16.07.2018, it filed Section 7 proceeding before the Adjudicating Authority, but it was wrongly dismissed on the ground of limitation.

The Impugned Order shows that the Adjudicating Authority took into consideration the Application filed under Section 7 and the Affidavit filed by the Corporate Debtor claiming that the amount concerned was barred by limitation. The date of default was stated to be 21.07.2017 which was date of the written statement in the Suit. The Adjudicating Authority observed that written statement filed in the Suit did not amount to acknowledgement of the debt and could not reset the limitation. Consequently, the Application was rejected.

Decision: Appeal allowed.

Reason:

Admittedly, the Appellant had paid Rs.60 Lakhs and allotment letter was issued on 16th May 2012. The Memorandum of Understanding (Annexure – D) shows that the parties mutually agreed to cancel the booking on the "terms and conditions arrived at between the two parties" as mentioned in the documents.

It appears that the Appellant received some amounts which now Appellant classifies as towards the "interest" component and thereafter, neither the principal nor interest, which was recurring, was paid and the Appellant invoked the third para of the Terms and Conditions. The Appellant –Plaintiff filed Suit (Annexure – F) seeking Decree of the flat and in the written statement dated 21.07.2017 (Annexure G – Page 73), the Respondent – Defendant accepted that the respondent had received consideration amount from the Plaintiff as per the statement and claimed that it was a loan transaction.

Thus, the provisions of the Limitation Act shall apply "as far as may be" [s.238 of IBC]. Although the Adjudicating Authority has observed that admission in the written statement will not amount to acknowledgement, we need not deliberate to settle that issue looking to the Term – 1 of the MOU which we have reproduced above. In the transaction, the term clearly shows liability of Rs.8, 10,000/- getting created every 6 months for the Respondent to pay the Appellant "till the entire booking amount has not been repaid". When the entire booking amount has not been paid, this component keeps getting attracted and liability invoked and when Section 7 Application was filed, the amount due and outstanding was clearly more than Rs.1 Lakh and thus, in our view, the Application under Section 7 could not have been rejected as time barred. There was a debt which was due, and the default was of more than Rs.1 Lakh and therefore, it was sufficient to trigger Section 7 proceeding.

Neither the parties nor the Impugned Order shows that there was any other defect in the Section 7 Application which had been moved so as to say that the Application was not complete. In that view of the matter, the Application filed before NCLT deserves to be admitted. For reasons mentioned, the Appeal is allowed. We remit back the matter to the Adjudicating Authority.

Case Study No. 30

COMPETITION COMMISSION OF INDIA

v.

BHARTI AIRTEL LTD & ORS [SC]

Civil Appeal No(S). 11843 of 2018 (Arising out of SLP (C) No. 35574 of 2017) with connected appeals Bench: A.K. Sikri & Ashok Bhushan, JJ. [Decided on 05/12/2018]

Competition Act,2002 read with TRAI Act- telecom sector- allegation of cartel- investigation by CCI- whether CCI has jurisdiction – Held, Yes only after TRAI returns a finding thereto – initial jurisdiction rests with TRAI.

Brief facts:

Reliance Jio Infocomm Limited (hereinafter referred to as 'RJIL') and two other individual complainants has filed information under Section 19(1) of the Competition Act, 2002 (hereinafter referred to as the 'Competition Act') before the Competition Commission of India (for short, 'CCI') alleging anti- competitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited (Incumbent Dominant Operators) (hereinafter referred to as the 'IDOs'). These were registered by the CCI as Case Nos. 80- 81, 83 and 95 respectively. These IDO's and Cellular Operators Association of India [COAI] filed writ petitions before the High court on the ground that the CCI did not have any jurisdiction to deal with such a matter. The High Court has allowed these writ petitions and quashed/set aside the order passed by the CCI and consequently notices issued by the Director General of the CCI have also been quashed. CCI appealed to the Supreme Court.

Our discussion:

Jurisdiction of the CCI is the principal issue which is the bone of contention.

In the instant case, dispute raised by RJIL specifically touches upon these aspects as the grievance raised is that the IDOs have not given POIs as per the licence conditions resulting into non- compliance and have failed to ensure inter se technical compatibility thereby. Not only RJIL has raised this dispute, it has even specifically approached TRAI for settlement of this dispute which has arisen between various service providers, namely, RJIL on the one hand and the IDOs on the other, wherein COAI is also roped in. TRAI is seized of this particular dispute.

It is a matter of record that before the TRAI, IDOs have refuted the aforesaid claim of RJIL. Their submission is that not only required POIs were provided to RJIL, it is the RJIL which is in breach as it was making unreasonable and excessive demand for POIs.

We are of the opinion that as the TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by the TRAI in the first instance. These are jurisdictional aspects. Unless the TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that the CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed

RJIL vide letter dated September 06, 2016 that the matter related to inter-connectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated September 27, 2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated October 21, 2016 on the issue of inter-connection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that interconnectivity is not provided by the IDOs in terms of the licenses granted to them. TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIS. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned.

We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by the TRAI which would bring on record findings on the aforesaid aspects, the CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 56 and 82 above are determined by the TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage the CCI can go into the question as to whether violation of the provisions of TRAI Act amounts to 'abuse of dominance' or 'anti-competitive agreements'.

This takes us to the next level of the issue, viz. whether TRAI has the exclusive jurisdiction to deal with matters involving anticompetitive practices to the exclusion of CCI altogether because of the reason that the matter pertains to telecom sector?

The matter cannot be examined by looking into the provisions of the TRAI Act alone. Comparison of the regimes and purpose behind the two Acts becomes essential to find an answer to this issue. We have discussed the scope and ambit of the TRAI Act in the given context as well as the functions of the TRAI. No doubt, we have accepted that insofar as the telecom sector is concerned, the issues which arise and are to be examined in the context of the TRAI Act and related regime need to be examined by the TRAI. At the same time, it is also imperative that specific purpose behind the Competition Act is kept in mind. This has been taken note of and discussed in the earlier part of the judgment. As pointed out above, the Competition Act frowns the anti-competitive agreements. It deals with three kinds of practices which are treated as anti-competitive and are prohibited.

The CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti-competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act.

The CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b)of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. The CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI. In Haridas Exports, this Court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act. Section 27 empowers the CCI to pass certain kinds of orders, stipulated in the said provision, after inquiry into the agreements for abuse of dominant position.

Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of the CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the ‘comity’ between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained.

The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.

We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified.

Case Study No. 31

MAHYCO MONSANTO BIOTECH (INDIA) PVT LTD.

v.

COMPETITION COMMISSION OF INDIA & ORS [DEL]

LPA 637/2018 & CM. Nos. 47926/2018 and 47927/2018

Rajendra Menon (CJ) & V. Kameswar Rao, J. [Decided on 18/12/2018]

Competition Act, 2002 – Section 48 – Vicarious liability – Directors and officers of offending enterprise – Whether applicable to contravention of sections 3 & 4 also – Held, Yes.

Brief facts:

These appeals have been filed by the appellants challenging the order passed by the learned Single Judge whereby the learned Single has dismissed the writ petitions by relying upon the judgment of the Coordinate Bench of this Court in Cadila Healthcare Ltd. and Anr. V. Competition Commission of India, LPA No. 160/2018.

Main Issue: the main issue was "Whether Section 48 of the Competition Act, which provides for vicarious liability of persons in-charge and responsible for the conduct of business of the Company, will apply only on contravention of orders of CCI or DG under Sections 42 to 44 of the Competition Act and not to contravention of Sections 3 and 4 of the Competition Act."

Decision: Appeal dismissed.

Reason:

We may state at the outset that, we proceed to answer this issue, on the premise that Officers / Directors can be proceeded against, along with Company. We also say that the Officers / Directors can only be liable if the CCI were to come to the conclusion that they were the key persons who were In-charge and responsible for the conduct of the business of the Company.

On a perusal of Section 27 of the Act, it is clear that it stipulates, the CCI on a finding that there is a contravention of Section 3 or Section 4, can pass orders against an 'enterprise' and a 'person' i.e. individual, who has been proceeded against, imposing penalty.

There cannot be any dispute that if the Company and the Officers/ Directors are being proceeded against for violation of Sections 3 and 4, there has to be a consequence for violation. The appellant's plea was that the word 'turnover' would not be applicable to Officers / Directors. The appellant's plea appears to be appealing on a first blush, but on a deeper consideration, if we agree with this submission then the very provision of penalty to be imposed on the Officers / Directors being 'persons' in terms of Section 27(b) would be rendered otiose / nugatory. In other words, there would not be any stipulation of penalty to be imposed on Officers / Directors even if they are found to be violating Sections 3 and 4. That cannot be the intent of Sections 27(b) and 48. Such a stipulation, surely requires a purposive interpretation.

Insofar as the plea that Section 48 as it falls under Chapter VI, only relates to the contravention of Sections 42 to 44 of the Act, is also not appealing, inasmuch as the Section contemplates "on contravention of the provisions of the Act", one shall be liable to be proceeded against and punished accordingly. The contravention of the provisions of the Act includes Sections 3 and 4, as is clear from Section 46, which is also in Chapter VI, stipulates lesser penalty for violating Section 3 in certain eventualities. If the interpretation as sought to be advanced, is to be accepted / agreed to, then Section 48 shall become nugatory, and there shall be no penalty for violating the Act.

Suffice it to state, in view of our conclusion above, the judgments so relied upon by the appellants have no applicability. We see no reason, to refer the writ petition for consideration by a larger Bench. In view of our discussion above, we are of the view, that the impugned order needs no interference. The appeals are dismissed. No costs.

Case Study No. 32

JASPER INFOTECH PVT LTD (SNAPDEAL)

v.

KAFF APPLIANCES (INDIA) PVT. LTD [CCI]

Case No. 61 of 2014

A K Gupta, Augustine Peter & U. C. Nahta [Decided on 15/01/2019]

Competition Act,2002 – Section 3 – Online market – Kitchen products heavy discount offered by online portal – Manufacturer cautioned public that products sold through the online portal was without its authorisation and counterfeit – No warranty services shall be provided by it for such products – Whether anti-competition restriction – Held, No.

Brief facts:

The Informant had displayed the OP's products on its online portal 'Sanpdeal' at a discounted price, aggrieved by which the OP displayed a caution notice on its website (hereinafter, the 'Caution Notice') alleging that the OP's products sold by the Informant through its website are without its authorization and are counterfeit. Further, the Caution Notice stated that the OP will not honour warranties on its products sold through the Informant's website and any purchase made from these websites shall be at customers' own risk.

Aggrieved by the said Caution Notice, the Informant served a legal notice (hereinafter, the 'Legal Notice') to OP for withdrawal of the said Caution Notice from its website alleging violation of the provisions of the Act. In response, the OP stated that it does not permit any online sale of its products and has not authorized any of its dealers in this regard. Furthermore, the OP stated in its Legal Notice that the Informant neglected to disclose the source of procuring such products and the name of the vendors supplying the alleged counterfeit /defective products on its website.

The Informant alleged in the information that the main grievance of the OP was not with respect to the authenticity of the products sold on Snapdeal but the discounted price at which such products were sold by the Informant through its website.

The Informant submitted that the OP was attempting to impose a price restriction in the form of Minimum Operating Price ('MOP'), on the Informant's website to make sales at a minimum price and threatened to ban online sales if such prices were not maintained. This, as per the Informant, resulted in a contravention of Section 3(4) (e) of the Act.

The Informant also stated that through this threat of not honouring warranties on products sold on the online markets/ websites, the OP attempted to cut off supplies to distributors who were aiming to sell through online channel. Such a restriction allegedly operated as an absolute ban on any internet sales by e- commerce companies, and amounted to a violation of Section 3(4) (d) of the Act.

Decision: **Complaint dismissed.**

Reason:

On a consideration of the aforesaid material, the main issue that arises for determination by the Commission in the present matter is whether the allegation of the Informant against the Opposite Party with regard to imposition of resale price maintenance, in contravention of the provisions of Section 3(4) (e) read with Section 3(1) of the Act, is established on the basis of the facts and evidence on record.

Upon a bare perusal of the provisions and the material available on record, it is evident that the Informant's online portal, i.e. Snapdeal, is offering an online distribution service to various distributors/dealers. It may also be relevant to highlight that the Commission has earlier held, though not in a case involving similar issues, that online retail portals are a part of distribution channel. The Commission, in Deepak Verma v. Clues Network (Case No. 34/2016, order dated 26.07.2016), while determining the dominance of an online retail portal, held that online and offline are not two different relevant markets, but are two different channels of distribution to the same relevant market. Similarly, in the case of Confederation of Real Estate Brokers Association of India v. Magicbricks.com & Ors.(Case No. 23/2016, order dated 03.05.2016), while determining the relevant market, the Commission held that online and offline services of brokers cannot be distinguished. Both are alternative channels of delivering the same service.

The Commission, therefore, observes that in the instant case also, when the distributors/ dealers are using the services of Informant while selling the products of the OP, it ipso facto becomes a part of distribution/vertical chain and thus, it would be incorrect to state that the Informant is only a market place facilitating interaction of the buyers and sellers online. It is not necessary in such evolving markets that any entrant in the downstream level of the value chain should join at the behest of the manufacturer or with its explicit concurrence. What may be relevant is to examine as to whether such player provides any active service to the end customer in availing the product or service involved, which given the facts of the present case can be answered in affirmative.

Based on the material available on record, the Commission is of the view that in the present case there was no AAEC. Further, the presence of a large number of dealers who were competing with each other suggests a fair degree of intra-brand competition. The data collected by the DG showed that there were 1,422 dealers selling OP's kitchen appliances all over India during the relevant time period who were found to be competing for the turnover linked incentives. Discounts were variable in nature and linked to the target being achieved. Since incentives were variable, the net landing price for each dealer was also different. This enabled different dealers to offer different prices to customers for the same product. Moreover, competition among distributors was found to be even stiffer as they were exclusively dealing with the OP's products.

Thus, the Commission is of the view that vis-à-vis the dealers the evidence did not reveal the existence of any price restriction or minimum RPM. As regards the Informant, though the existence of Caution Notice, Legal Notice and Email has been established, it has not been conclusively established that they were used as instruments for imposing a minimum RPM on the Informant. Further, since vertical agreements falling under Section 3(4) read with Section 3(1) are subjected to rule of reason analysis, even if there exists a price restriction by the OP, AAEC needs to be established. As highlighted above, the actual impact of the conduct of OP did not demonstrate any adverse effect on competition. Furthermore, the existence of intra-brand competition among dealers/distributors negate the anti-competitive impact of the OP's alleged conduct. Thus, no contravention of the provisions of Section 3(4) (e) of the Act is found against the OP, in the facts and circumstances of the present case.

For the foregoing reasons, the Commission is of the view that the evidence on record does not establish a case of contravention against the OP within the provisions of Section 3(4) (e) read with Section 3(1) of the Act. Hence, the case is hereby directed to be closed.

Case Study No. 33

VEDANTA BIO SCIENCES

v.

CHEMISTS AND DRUGGISTS ASSOCIATION OF BARODA [CCI]

Case No. C-87/2009/DGIR

A K Gupta, Augustine Peter & U. C. Nahta [Decided on 15/01/2019]

Competition Act, 2002 – Section 3 – Anti-competition agreements insisting for NOC and fixing minimum margins – Cease and desist order passed along with imposition of penalty.

Brief facts:

The allegation contained in the complaint/information are as under:

- The OP, an unregistered body, is imposing unfair conditions in sale of pharmaceutical products of different companies.
- The OP has formulated guidelines for its members which require any person including a member to obtain permission/ NOC (No-Objection Certificate) prior to becoming a stockist of a particular company.
- The OP forced additional/new stockists not to sell products of a pharmaceutical company unless NOC is obtained by the existing stockist from the OP.
- The OP insists on procuring NOC from it before a pharmaceutical company launches new products, without which the company is not allowed to launch new product.
- A circular dated 02.03.2009, was issued by the OP, wherein permission has been granted to some distributors to become stockists of certain pharmaceutical companies, which indicates that procurement of such NOC is necessary.
- The OP was also engaged in fixation of margins for pharmaceutical products.

Decision: Complaint allowed. Penalty imposed.

Reason:

On a consideration of the aforesaid material, the following issues arise for determination in the present matter:

Issue 1: Whether the OP was mandating NOC prior to the appointment of stockist by pharmaceutical Companies in contravention of the provisions of Section 3(1) read with Section 3(3) (b) of the Act?

In many past cases concerning the conduct of regional/ district/ State level chemists and druggists associations, the Commission has held that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling the supply of drugs in the market, contravening Section 3(3)(b) read with Section 3(1) of the Act. By mandating an NOC requirement as a pre-requisite for appointing a stockist by pharmaceutical companies, the chemists and druggists associations discourage new/existing stockists to enter/expand the market amounting to an entry barrier for them. Appointment of a new stockist should be the exclusive right of a pharmaceutical company, without any interference by any third party. Any influence or interference with the choice of a distributor, to take decisions based on its commercial consideration and business requirements, by a pharmaceutical company would restrict its freedom to do business with persons of its choice. Such interference not only disrupts the distribution chain, but also results in limiting and controlling the supply of drugs in the market, as many-a-time the diktats are sanctioned by consequent boycott of the pharmaceutical companies not following the directions of the association(s).

Though the present matter dates back to an information filed in 2009, nevertheless the aforesaid observations of the Commission made in later cases involving similar allegations are pertinent to this matter too. The OP has not denied the existence of the practice of seeking NOC in literal sense, but has vehemently contended that the said practice was voluntary in nature and there was no coercion by the OP on any of the stockists or pharmaceutical companies. Further, it has been submitted that the OP was acting in order to safeguard the interest of its members.

The aforesaid evidences (documents, circulars, policies, cross-examinations and other evidences), both oral and documentary, clearly reveal that indeed the OP was indulging in imposing the requirement of NOC prior to appointment of stockists. The OP had raised serious objections to the statements recorded as well as questionnaire survey conducted by the DG. During the hearing held on 13.12.2018, the learned counsel for the OP also highlighted another questionnaire survey purportedly conducted by the OP and enclosed with its earlier submissions filed on 05.05.2011. As per the OP, the results of this questionnaire survey are contradictory to the results of the survey conducted by the DG. The Commission is not fully convinced with the objections taken by the OP with regard to the questionnaire survey. However, in view of the objections raised by the OP, the Commission decides not to rely on the said questionnaire survey. Notwithstanding, the existence of cogent documentary evidence available on record establishes the case against the OP. Moreover, the Statements, along with their cross-examination, do not further the case of the OP as highlighted in the foregoing paragraphs. Though the OP has highlighted certain contradictions in relation to one or two witnesses, the Commission notes that the majority of the deponents have confirmed their original statements in the cross- examination and the veracity of which has not been whittled down in any manner. Rather they have confirmed the anti- competitive practices carried out by the OP. Based on such evidence, the Commission is of the view that the practices carried on by the OP has resulted in limiting and controlling the supply of drugs in the market in the Baroda district, in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Act.

Issue 2: Whether the OP was fixing the trade margins for wholesalers or retailers in contravention of the provisions of Section 3(1) read with Section 3(3) (a) of the Act?

The Commission notes that besides mandating the requirement of NOC prior to the appointment of stockists by pharmaceutical companies, the OP was also involved in the fixation of trade margins of the non-DPCO drugs which had the potential to determine the sale price of drugs.

The circular dated 02.03.2009 and the other evidence dealt with in Issue 1 also confirms the practice of fixation of trade margins for non-scheduled/non-DPCO products by the OP to the tune of 10% for the wholesaler and 20% for the retailers. The Commission observes that the OP has not denied fixation of such margins. Rather the OP has tried to justify the adequacy of such margins for the betterment of wholesalers/retailers. Further, it has been argued that these margins are as per industry norms and that the DG has not investigated whether such margins led to any adverse impact or not.

The Commission finds no merit in any of these contentions raised by the OP. Even if the margins are as per industry norms and for the betterment of the wholesalers/retailers, the association is not within its legitimate right to impose the said margins on wholesaler or retailers. It should be an independent commercial decision of every entity in the vertical chain to decide the margin it wants to secure or pass on from the upstream entity or the downstream entity, respectively. Further, the decisive criteria is not whether the said practice was for the benefit of wholesalers/retailers or not but whether the association replaced an entity's independent commercial decision by its own decisions. If many entities independently find a certain percentage as the appropriate margin and voluntarily decide to adopt it, it may not be a competition issue but if they collude/decide together or if an association decides on behalf of such entities and mandates that such entities are required to follow it, it will amount to a contravention of the provisions of the Act. Further, the contention that it was an industry norm and purportedly prescribed by AIOCD would not absolve the OP from its liability under the Act. Even if the trade margins of 10% (for wholesalers) and 20% (for retailers) are not fixed by the OP but were prescribed by AIOCD, there is evidence that the OP was ensuring that this anti-competitive practice is scrupulously followed by its members.

In view of the findings elucidated in the earlier part of this order, the Commission directs the OP to cease and desist from indulging in the practice of mandating NOC and fixation of trade margins, which has been held to be anti-competitive in terms of the provisions of Section 3 of the Act.

Further, it is necessary that such anti-competitive conduct is penalised to discipline the erring party for the said contravention. Accordingly, the Commission deems it appropriate to impose a penalty on the OP at the rate of 10% of its relevant income based on the income and expenditure account for three financial years filed by it for the relevant years during the earlier proceedings before the Commission.

Case Study No. 34

RAVI PAL

v.

ALL INDIA SUGAR TRADE ASSOCIATION & ANR [CCI]

Case No. 25 of 2018

A.K. Gupta, U.C. Nahta & Sangeeta Verma [Decided on 22/03/2019]

Competition Act, 2002 – Section 3 – Price fixing of sugar – CCI dismisses the complaint.

Brief facts:

The Informant has alleged the following against the Ops:

(i) Collecting and disseminating pre-determined purchase price of sugar amongst the cartel members through WhatsApp and SMS;

(ii) Restrict the market for other competitors whose bids are based on market forces;

(iii) Vitiate the tender process so that an enterprise floating the tender has no option but to accept the prices determined by the OPs;

(iv) Control the supply of sugar in the market where it is sold to wholesalers and consumers; and

(v) Affecting players of the market in other states (Uttar Pradesh/ Karnataka) who are selling/supplying sugar in the same market as the OPs because the former is compelled to lower the prices of sugar due to elimination of market forces.

Decision: Dismissed.

Reason:

Bereft of too many details, the primary allegation arising from the facts, as per the Informant, is that OP-2 during the relevant period purportedly shared “price sensitive information” pertaining to sugar prices over the WhatsApp group which in turn were allegedly used to quote lower prices in the tenders floated by the sugar millers for sale of sugar, in the state of Maharashtra.

In order to buttress his argument, the Informant placed on record certain WhatsApp messages pertaining to the relevant period, allegedly for the state of Maharashtra. During the preliminary conference, the learned counsel of the Informant contended that the messages contained the sugar prices for variants of sugar, namely, S-30 and M-30 and other international future prices of sugar etc. Based on the same, it was argued that the price of sugar (as displayed in WhatsApp messages) was allegedly the price of last successful bid (bidding done on daily basis) and the same was made the basis for quoting their bids by leading traders, who were members of the WhatsApp group (mainly traders) in the subsequent tenders of millers in the state of Maharashtra.

Moreover, when the Commission inquired from the counsel of the Informant about the basis for alleging the “price sensitivity” of data by the Informant, the same could not be addressed by the Informant. It was stated by the Informant that the average prices at APMC were lower than the prices on WhatsApp messages and hence, the same could only be as a result of collusion. The Commission does not find any merit in this argument, as the Informant himself has explained, in the information filed by him, the process followed in the daily tenders and has stated that the sugar prices circulated were on the basis of last successful bids. This means that such information was already available in public domain post the award of the tender by the sugar mills and the circulation of the same, per se, does not imply that it would become sensitive information. Further, with regard to the information purportedly exchanged on WhatsApp group, the Commission observes that it is not clear from the records as to how such alleged acts can be said to have affected free play of the market forces with respect to prices of sugar. Further, the Informant has enlisted the objectives of OP-1, wherein collection of information and dissemination of information is one of the primary objectives. Therefore, unless it is indicated by the Informant, based on cogent evidence, that there was any meeting of minds amongst the OPs for placement of bids for tenders or with respect to prices to be quoted in such bids, it is not possible to form a prima facie view in the matter under Section 26(1) of the Act, warranting an investigation.

The Commission notes that the members of the WhatsApp group also comprise millers (two). There does not seem to be any rationale as to how millers (as sellers) who have an interest in getting higher prices of sugar, as against that of traders, who want to procure at lower prices, would be agreeable to sell the sugar at lower prices. As noted above, no material has been placed on record related to tenders floated by the millers during the relevant period and the bid details etc. The information is lacking in material particulars as to how there had been bid rigging or collusive bidding in any specific tender, rather the averments made are general in nature. Therefore, on account of lack of credible material and information, the Commission does not find any merit in the allegations posited by the Informant.

The Commission further notes that certain documents which were filed by the Informant (vide index dated 31.10.2018) indicating the rate at which sugar was purchased after the tender. Though the documents were not explained by the Informant during the preliminary conference, however, after perusal, it is apparent that the documents were not for the relevant period (the same are in respect of certain months of 2014 and 2015) and are, thus, inconclusive in the light of allegations raised by the Informant in respect of the relevant period.

Furthermore, the sugar commodity is subject to the provisions under the Essential Commodities Act, 1955 and orders issued thereunder and, thus, the final market price of sugar is dependent upon numerous factors. Therefore, the allegation of the Informant that the alleged practices affected the market price in the absence of any evidence is without merit and does not warrant any investigation.

After appreciation of the allegations of the Informant and documents submitted including the oral submissions made by the Informant, the Commission is of the view that no evidence has been provided by the Informant to show that there was any meeting of minds between the OPs to establish correlation between bids submitted in any specific tender with the alleged sugar prices circulated over the WhatsApp group. Presumptive inference and analysis provided by the Informant cannot be the basis for forming a prima facie opinion as to order investigation in the matter. Therefore, the Commission observes that, based on the facts stated in the information and the evidence adduced by the Informant, a prima facie case under Section 26(1) of the Act is not made out against the OPs.

Case Study No. 35

SUN ELECTRONICS PVT LTD

v.

ELECTEK SOLUTIONS PVT LTD & ORS [CCI]

Case No. 02 of 2019

A.K.Gupta, U.C. Nahta & Sangeeta Verma [Decided on 22/04/2019]

Competition Act, 2002 – Sections 3 & 4 – Non execution of work demand of additional sum – Whether issues for investigation made out – Held, No.

Brief facts

The case of the Informant against OP-1 is that OP-1 has not abided by its obligation as per the work order dated 06.05.2017; has sought additional sum of Rs.10 Lakhs from the Informant for completing the assigned work; has insisted that the Informant should buy additional AV equipment, appoint a MEP consultant and has withheld the XP8S license key from the Informant. The Informant's case against OP-2 (dealer and distributor) as well as OP-3 and OP-4 is that though they are the manufacturers of RTI Home Solutions and suppliers of OP-1, they have not taken any action against OP-1 despite repeated complaints by the Informant. On the contrary, OP-2 has asked the Informant to obtain an NOC from OP-1 for assigning the said work relating to RTI Home Solutions to some other vendor. Thus, the Informant has alleged violation of the provisions of Section 3 and Section 4 of the Act by the OPs.

Decision: Dismissed.

Reason

In this regard, the Commission observes that so far as the allegation pertaining to contravention of the provisions of Section 3(3) of the Act are concerned, suffice to note that the Informant has not been able to show any 'agreement' amongst the OPs which can be examined within the framework of Section 3(3) read with Section 3(1) of the Act. Similarly, the Commission notes that the Informant has alleged abuse of dominance by all the OPs by averring in the Information that "... [A]ll the respondents together in collusion are tactically are accomplishing such unlawful acts or are able to make such demands due to the dependence of the consumer on the enterprise." Such allegations made by the Informant alleging abuse of dominance by all the OPs, do not warrant any examination as the present scheme of Section 4 of the Act does not envisage or provide for joint or collective dominance.

With respect to the relevant geographic market, the Commission is of the view that Smart Home Solutions can be bought from anywhere in India as there are many suppliers of the same providing a variety of services on customized basis. As such, it appears that the relevant geographic market would be 'India'. Accordingly, the Commission is of the view that the relevant market in the instant matter appears to be 'the market for supply and installation of smart home solutions in India.'

In this market, the Commission observes that there are many players providing smart home solutions in India.

Some of these players are Schneider, Electric, Smartify, Z-wave, Pert, Cubical, Odessi, Infineon etc., who provide Smart Home Automation Solutions to the consumers by offering a variety of services. As such, in the view of the Commission, the OPs are not found to be dominant in the relevant market delineated supra, be it OP-1 or OP-2, owing to the presence of several other integrators/ distributors who are vendors of the competitors of OP-3/ OP-4. Further, in the absence of any material to the contrary, it is also observed that OP-3/ OP-4 as supplier/ manufacturer of RTI Home Automation Solutions may also be facing inter-brand competition from other suppliers/ manufacturers operating in the relevant market defined supra. Upon perusing the material and literature in public domain, it appears that this market is evolving in India with the presence of many players who are offering Smart Home Solution to the consumers. Further, there is nothing on record to suggest that OP-1 is the only integrator to design Smart Home Solution in Mumbai or that OP-2 is the only distributor offering Smart Home Solutions or that the consumers are dependent on OP-1 and/ or OP-2, as the case may be. Based on the above assessment, the Commission is of the view that none of the OPs individually are found to be dominant in the relevant market defined supra. In the absence of the dominance of an entity, the question of assessment of abuse does not arise.

Coming to the allegations made by the Informant pertaining to contravention of the provisions of Section 3(4) of the Act, it is observed that it inter alia proscribes any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Thus, for a case to be examined under Section 3(4) of the Act, the parties should be operating at different stages or levels of the production chain in different markets. In this regard, it is observed that while OP-1 is stated to be an integrator and supplier of RTI Home Automation Solution in the State of Maharashtra, OP-2 is the dealer and distributor of such products across India. Similarly, OP-3 and OP-4 are companies engaged in the business of providing RTI Home Solutions and Automation products in India and abroad respectively. In view of the above discussion, the Commission is of the view that no case of contravention of the provisions of Section 3 or Section 4 of the Act has been made out and the matter is accordingly ordered to be closed forthwith under the provisions of Section 26 (2) of the Act.

Case Study No. 36

Ms. DEJEE SINGH & ORS

v.

SANA REALTORS PVT LTD [CCI]

Case No. 06 of 2019

A.K.Gupta, U.C. Nahta & Sangeeta Verma [Decided on 23/04/2019]

Competition Act, 2002 – Sections 3 & 4 – Delay in handing over possession of shop – Whether constitute abuse of dominance – Held, No.

Brief facts:

The present information has been filed by the informants alleging abuse of dominant position by the OP in the real estate market for "Small Office Home Office" (hereinafter "SOHO"). As per the brochure of the OP, the SOHO units are modern architectural masterpiece that will serve as a home as well as an office. It takes care of all the basic needs so that one can work from the comfort of a home. The primary grievance of the Informant seems to stem from delay in handing over of possession of the units which was promised to be delivered by the OP by the year 2013 as per the Agreement, and which according to the Informants has violated the provisions of Section 4 (2) (a) of the Act.

Decision: Dismissed.

Reason

The Commission notes that the OP has advertised the model of Small Office Home Office as "small and affordable office space to ensure beauty and comfort catering to the needs of the corporate, small and medium enterprises". The Commission therefore is of the view that the primary use of the space, therefore, relates to office use only. Furthermore, the particulars of the place are marked as office in the Agreement as well. The only distinguishing feature of the project for office space offered by the OP is the unit for a bedroom in the proposal, allowing the comfort of a home office. Though OP has stated in his offering that this is an additional feature that might make the OP's product preferable to consumers/ buyers in a differentiated product market, the Commission notes that such an additional feature can be added by the consumer on his own in any office space he/ she prefers, as it is up to the discretion of the consumer to style his/ her office space in the way he/ she desires, subject however to any limitations under the contract or any law. The said feature, therefore, is not sufficient to qualify the product as a separate relevant product market altogether. The Commission, therefore, is of the opinion that the relevant market in the present case may be defined as "market for commercial units for office space".

Choice of a consumer for office space depends on various factors such as development of the region, supply of land, location of business establishment, etc. A buyer of office space is likely to take into account all these factors while exercising his choice, and therefore a buyer desirous of setting office in Gurugram may not be willing to establish office in areas other than Gurugram, as market conditions that exist in Gurugram can be distinguished from the conditions prevailing in the neighbouring areas. This may be due to factors like proximity of his/ her customers, better connectivity/ transport facilities/ infrastructure, etc. to name a few. Thus, geographical area of Gurugram region has to be taken as the relevant geographic market in the instant case, and "the market for commercial units for office space in Gurugram" is accordingly considered as the relevant market in the instant case.

As per information available in the public domain, there have been many established and bigger organised real estate companies such as DLF Limited, Omaxe, etc. offering their projects in the relevant market at the relevant time. The Commission notes that the presence of other players in the relevant market indicates that competing products are available to consumers in the relevant market and the OP, therefore, doesn't appear to be dominant in the relevant market as delineated above. In the absence of dominance, its conduct cannot be examined under the provisions of Section 4 of the Act.

The Commission further notes that no facts, evidence, or even appropriate provisions of Section 3 of the Act are set out in the Information. Thus no case of contravention of Section 3 of the Act is also made out in the present case. In view of the foregoing, the Commission is of the view that based on Information filed, no case of contravention of the provisions of the Act is made out against the OP and the matter is ordered to be closed.

Case Study No.37

KANHAIYA SINGHAL

v.

INDIABULLS HOUSING FINANCE LTD & ORS [CCI]

Case No. 11 of 2019 A.K. Gupta, U. C. Nahta & Sangeeta Verma. [Decided on 24/05/2019]

Competition Act, 2002 – Section 3 & 4 – Provision of housing loan change in the interest rate – Whether abuse of dominance – Held, No.

Brief facts

The present information has been filed by the Informant against OP-1 and its representatives/ employees (hereinafter, 'OP-2 to OP-18') alleging, inter alia, violation of the provisions of Section 3 and 4 of the Act.

It is stated in the information that the Informant had availed a Home Loan facility from OP-1, for which he entered into a Loan Agreement with OP-1 on 21.06.2018. Thereafter, he was extended a home loan of Rs. 1,00,00,000/- (Rupees One crore only) at a rate of interest of 8.75% p.a. repayable in 240 equated monthly instalments ('EMI') of Rs. 88,372/- (Rupees Eighty-Eight Thousand Three Hundred and Seventy-Two only).

The Informant was primarily aggrieved by increase in the rate of interest charged by OP-1 on the home loan facility availed by him and is also aggrieved with the terms and conditions of the Loan Agreement, which are alleged to be one- sided and discriminatory in nature. Further, the Informant has alluded that in-spite of RBI reducing the market interest rate, OP-1 is not passing on those benefits to the Informant. Based on the above, the Informant alleged that the conduct of OPs amount to be in violation of Sections 3(1), 3(4) and Section 4 of the Act.

Based on the above averments and allegations, the Informant has prayed that the Commission direct OPs to discontinue such practices of abuse of dominant position and to modify the Loan Agreement to an extent as may be specified by the Commission.

Decision: Dismissed.

Reason

The Commission has carefully analysed the information filed by the Informant, the documents annexed therewith, and the information available in the public domain in this regard.

Before examining the allegations, it is appropriate to examine the role of OP-2 to OP-18 in the matter. It is observed that OP-2 to OP-18 are officials / employees of OP-1. Further, the Informant has not provided any evidence to show that OP-2 to OP-18 have indulged in any conduct which are in violation of the provisions of Sections 3 and 4 of the Act.

The Commission observes that the Informant has not suggested any relevant market in the matter. From the facts and circumstances, it is evident that the main grievances of the Informant relates to increase in rate of interest charged by OP-1 on the home loan. It is observed that home loan is distinct from other types of loans such as personal loan, property loan, vehicle loan, etc. Further, home loan can be distinguished from other types of loans based on the factors such as intended use, rate of interest charged, term of payment, etc. That banks and home finance companies extend home loans and compete with each other for providing home loan services, therefore, the Commission does not deem it necessary to distinguish between home loans offered by various lending entities. Based on the above, home loan can be considered as a distinct product or service. Thus, the relevant product market in the instant case is delineated as the "market for provision of home loans."

With regard to the relevant geographic market, the Commission observes that there are many service providers that are providing the said services in the aforesaid relevant product market and are also competing with each other for providing home loans to borrowers. There exists no distinction between one region and another with reference to availing home loan services within India. Therefore, the relevant geographic market in the instant case can be considered to be "India". Accordingly, the relevant market in the instant matter is delineated as 'market for provision of home loans in India'.

On the assessment of dominance, the Commission notes that home loan market in India has many providers including Banks, Non-Banking Financial Companies (NBFCs) and Housing Finance Companies (HFCs). Few prominent home loan providers are State Bank of India (SBI), Punjab National Bank (PNB), ICICI Bank, HDFC Bank and DHFL. The housing finance market in India is fragmented, with 80-plus players. The Commission further observes that as per the Report on Trend and Progress of Housing in India, 2018 published by National Housing Bank1, the outstanding housing loans disbursed by banks and HFCs was about Rs. 17,00,000 crore. As per the annual report of SBI for the year 2017-182, the housing loans disbursed by SBI were Rs. 3,13,106 crore. In other words, SBI had a market share of 18.42% in the relevant market delineated above. Further, it is observed that as per the annual report of OP-1 for the year 2017-18, it had disbursed approximately Rs. 23,329 crore as loans to the housing sector which amounts to roughly a market share of 1.37% in the relevant market delineated above. Considering the large number of players operating in the relevant market which suggests that not only the market is competitive in nature but also that OP-1 does not seem to have the ability to operate independently of the competitive forces, OP-1 is not found to be dominant in the relevant market defined supra. In the absence of dominance, the issue of abuse of dominant position against the OP-1 does not survive.

With regard to the allegations made under Section 3(1) read with Section 3(4) of the Act, the Commission observes that the Informant has not suggested existence of any agreement, as envisaged under Section 3 of the Act, involving the OPs. Be that as it may, the Commission after examining the facts of the case has not found anything that would suggest that there exists any kind of horizontal/ vertical agreement that could be brought under the purview of Section 3 of the Act.

In light of the above analysis, the Commission finds no case of contravention of the provisions of Section 3 or Section 4 of the Act against the OPs in the instant case. The matter is thus closed forthwith in terms of the provisions of Section 26(2) of the Act.

Case Study No. 38

OIL COUNTRY TUBULAR LTD.

v.

MAHARASHTRA SEAMLESS LTD [CCI]

Case No. 48 of 2018

A.K. Gupta, U. C. Nahta & Sangeeta Verma. [Decided on 23/05/2019]

Competition Act, 2002 – Section 3 & 4 – Refusal to supply – Tender for green pipes – Informant placing orders of supply at the eleventh hour – Supply could not be made before the tender closing date whether non-supply results in refusal to supply – Held, No.

Brief facts:

It is the case of the Informant that in respect of a tender floated by ONGC (Tender No. ZNCVC18004), it approached to MSL by way of e-mail dated 17.10.2018 stating its requirement therein in detail for procurement of green pipes and had also requested for a price quote. The Informant has alleged that MSL did not respond to its said e-mail. Further, the Informant has alleged that it also sent 3 more e-mails on 25.10.2018, 26.10.2018 and 01.11.2018 to obtain competitive prices for green pipes. However, it was submitted by the Informant that MSL did not respond to these e-mails as well.

In the aforesaid backdrop, the Informant has filed the instant Information alleging that MSL will not supply green pipes to it in respect of the tender floated by ONGC for procurement of seamless casing pipes. It has been pointed out that MSL has not responded to the e-mails of the Informant in respect of its requirement for procurement of green pipes. Accordingly, the Informant has alleged contravention of Section 4(2)(c) and Section 4(2)(a)(i) read with Section 4(1) of the Act. Contravention of Section 3(4)(d) read with Section 3(1) of the Act is also alleged.

Decision: Complaint dismissed.

Reason:

The Commission has perused the information and the documents filed therewith besides holding preliminary conference with the parties. The parties have also filed their respective written submissions.

In this regard, it is observed that though the Informant has stated in the Information that it approached to MSL by way of an e-mail on 17.10.2018 in respect of the tender floated by ONGC, from the tender documents, it appears that the original date for submission of tenders was 17.10.2018 itself. Thus, it is evident that the Informant kept on waiting till the last date of submission of tenders to write an e-mail to MSL. Even thereafter, when the last date for submission of tenders was extended up to 31.10.2018, the Informant sent its reminders on 25.10.2018 and 26.10.2018 only. In fact, the Informant's reminder sent on 01.11.2018 was post the extended date of submission of bid i.e. 31.10.2018.

In the aforesaid backdrop, having perused the material on record and after hearing the learned counsel for the parties, the Commission notes that the conduct of the Informant in approaching MSL at such a belated stage for supply of green-pipes, does not seem to be diligent. Such a conduct does not appear to be consistent with the ordinary course of business behaviour. Accordingly, the Commission is of the view that the conduct of the Informant in writing e-mails to MSL lacked bonafide. MSL categorically pointed out that the Informant never approached it for supply of green pipes before October 2018.

Moreover, MSL has sought to explain non-response to such e-mails of the Informant by referring to the Integrity Pact which prohibits such discreet arrangements between the bidders. It is not in dispute that both the Informant and MSL were potential competitors in respect of the tender floated by ONGC.

Be that as it may, the Commission is of the opinion that the claim of the Informant that the conduct of MSL amounted to refusal to deal besides denial of market access, stands falsified from the sequence of events as adumbrated above and material available on record.

From the submissions made by MSL, the Commission also notes that the Steel Policy of 2017 which restricts import of green pipes, itself provides for waivers where supply requirement in the government procurement cannot be met through domestic sources. In fact, MSL has pointed out that an exemption from restriction under the Steel Policy was granted for one of the ONGC's tenders bearing No. ZNCKC16005 and a copy of the minutes dated 22.08.2017 of the second meeting of Grievance Committee on Domestically Manufactured Iron & Steel Products containing details of such exemptions has been annexed in support of the contention.

The Commission also takes on record the submission made by MSL that it has no market presence in the upstream market which has been defined by the Informant as the relevant market in as much as it manufactures green pipes only for its captive consumption as raw material required for processing casing pipes. It has been categorically pointed out by MSL that it does not supply green pipes to any other entity in India, neither does it export any green pipes, as claimed by the Informant during the hearing. It has also been highlighted that contrary to the oral submissions made on behalf of the Informant, MSL usually does not have any surplus green- pipes which can be supplied to other entities.

In view of the foregoing, the Commission is of the opinion that it is unnecessary to dilate anything further on the other issues raised by the parties regarding the delineation of the relevant market and dominant position. No case of contravention of the provisions of Section 4 or Section 3 of the Act is made out against the Opposite Party and the Information is ordered to be closed forthwith.

SWOT ANALYSIS : THE FULCRUM OF STRATEGIC DECISION MAKING

Introduction

All businesses have goals that involve creating a sustainable competitive advantage over their competitors. This requires companies to develop effective business strategies that exploit their operational advantages over competitors, while minimizing their disadvantages. SWOT Analysis is very important tool for starting of new projects, ensuring their proper progress by monitoring their stages of development and implementing changes in the project, whenever required. This tool allows multidimensional analysis of the current subject's conditions of a business organisation as well as internal (usually controllable) and external (usually uncontrollable or difficult to control) factors to maximize the benefits minimize negative consequences of certain actions and, the most importantly to ascertain that whether the objective is attainable or not. An effective strategic development procedure that links internal organizational strengths and weaknesses, with external opportunities and threats, is SWOT (strengths, weaknesses, opportunities, and threats) analysis.

SWOT Analysis is a technique which helps to gain insight into the past and find solutions for sake of current or future blemish, useful for an existing company as well as a new plan. SWOT analysis helps to reduce weaknesses, while maximizing strong sides of the company.

Strategic planning and Decision making – How SWOT works

A SWOT analysis is a useful tool for brainstorming, strategic planning and decision making. Strategic decision-making is the process of charting a course of action based on long-term goals and a longer term vision. Strategic decision making aligns short-term objectives with long-term goals, and a mission that defines the company's bigger picture of the purpose of its existence. Short term goals are expressed in quantifiable milestones that assist in gauging the success and in ensuring adherence to the organisation's vision.

It is to be noted that SWOT analysis does not cover the entire business, so management should be cautious at the time of strategic decision making. To be successful, businesses must utilize their strengths, improve upon their weaknesses, and guard against their external threats and residual, internal vulnerabilities. Simultaneously, companies need to evaluate their external environment to identify and exploit new opportunities before their competitors. The brief components of SWOT analysis are as under:

Building on Strengths

The first step in conducting a SWOT analysis involves identifying the strengths a company possesses relative to its competitors. Strengths come from the knowledge, abilities, and resources available to the firm that gives it a comparative advantage in the industry. The capability to obtain resources, the quality of those resources, and the effective and efficient allocation of resources plays a pivotal role in creating a competitive advantage. Moreover, a company's ability to adapt to environmental changes in order to maintain sustainable growth, and to create or penetrate new markets can be its potential strengths. Some of the major strengths are excellent sales staff with strong knowledge of existing products, good relationship with customers, good internal communications, successful marketing strategies, and reputation for innovation etc.

Minimising Weaknesses

Second, a business needs to identify the vulnerabilities within its organization that competitors could exploit. Weaknesses are any limitation or deficiency in the firm's resources and competencies that could hinder its performance. Common sources of a company's weaknesses include ineffective management, insufficient resources, inefficient processes, and obsolete technology, high rental costs, obsolete market research data, Cash flow problems, holding too much stock, poor record keeping etc.

Seizing Opportunities

The third step requires a business to determine potential opportunities to be pursued in the industry. There may be plentiful business opportunities in an industry that may call for pondering over the opportunities by the management of a company while evaluating their effectiveness. A company must clearly define the type of goods or services it proposed to offer, the targeted market for the goods or services, resources and other facilities needed for production of goods or services, projected returns and the magnitude of risk involved. Potential opportunities can result from identifying an overlooked market segment, changing industry regulations, advancements in technology, and improvements in buyer or supplier relations, loyal customers, high customer demand of the company's product etc. Moreover, a business can exploit the weaknesses of the competitors by targeting and attacking their frail positions to gain market share.

Counteracting Threats

Finally, every SWOT analysis requires a business to identify its potential threats. Any situation that puts a company in an unfavourable position or impedes its efficient operations can be classified as a threat. To adequately identify these situations, the organization needs to evaluate its industry's macro-environment and assess the industry's social, economic, political, technological, natural, and international segments. For instance, changes in consumer preferences or advancements in technology can render a product or service obsolete. Additionally, economic and regulatory changes or the exhaustion of natural resources can make production infeasible. Global competitors are entering in to the company's market which tends to increase competition in domestic market.

Objectives of SWOT Analysis

- To make a summary analysis of external and internal factors.
- To prepare strategic options with reference to the risks and problems to be addressed.
- To conduct a sales forecast in agreement with market conditions and study the capabilities of the company in general.
- To identify key items for the management of the organization, which involves establishing priorities for actions which in turn helps in strategic decision making.
- Thoroughly diagnose the company: strengthen the positive points, improvement areas and growth opportunities etc.
- Internal environment (Strengths and Weaknesses) – the integration and standardization of processes, the elimination of inefficiencies and focus on the core aspects of the business.

- External environment (Opportunities and Threats) – to have reliable and trustworthy data, to receive information quickly to support management in strategic decision making and to reduce errors.

The SWOT analysis is one of the most popular tool for defining an organisation's strategic action. The beauty of SWOT is its internal scrutiny of the organisation's capabilities, followed by environmental scanning to identify appropriate opportunities and threats. However, it has its flaws:

- No straightforward methodology has been proposed to identify strengths and weaknesses.
- There is no indication of causality among the strengths and weaknesses, nor are they ranked into any hierarchy.
- The SWOT analysis is typically a one-time event lacking mechanisms for acting upon and monitoring the changes in strengths and weaknesses over the longer term.

Case Study No. 39

Gujarat Cooperative Milk Marketing Federation Ltd. (GCMMF) is India's largest food product marketing organisation. It is the apex organisation of the Diary Cooperatives of Gujarat popularly known as AMUL which aims to provide remunerative returns to the farmers and also serve the interest of consumers by providing quality products. AMUL is considered as one of the most well recognized and iconic brands in the country. It operates through 61 sales offices and has a network of 10000 dealers and 10 lakh retailers. Its product range comprises milk, milk powder, health beverages, ghee, butter, cheese, Pizza Cheese, Ice cream, Paneer, chocolates and traditional Indian sweets etc.

Based on the above information, do the SWOT analysis of AMUL?

SWOT Analysis of a Renowned Dairy Business – AMUL

Following is the SWOT analysis of AMUL, a strong and dominant brand in the dairy business.

Investment in Technology; Market Share, Production Capacity, Quality, Brand value, Large Consumer Base **Strength**	**High Operational Costs, Lack of success in portfolio expansion, legal issues** **Weakness**
High Milk Consumption, Global Expansion, Product Portfolio Expansion **Opportunities**	**Increasing Competition, growing trends of veganism** **Threats**

Strengths of AMUL

Investment in Technology

Amul has experienced exponential growth in the last few decades. The company is continually investing in adaptive and revolutionary technologies within the dairy industry.

Market Share

Amul has transformed itself into the market leader of milk and dairy products in the country. Amul has expanded its ice cream product and business portfolio by opening standalone Amul ice cream stores all over the country.

Production Capacity

Amul is one of the largest manufacturers of milk and dairy products in the world. The company is managed by the Gujarat Co-operative Milk Marketing Federation Limited, which is a dairy producers cooperative which supplies the company with almost 18 million liters of milk daily.

Quality

One of the primary reasons for Amul being one of the most trusted brands in Indian and having a strong and loyal consumer base is its quality. Amul has never faced any significant issues pertaining to its quality within the Indian market. The company has also maintained transparency concerning its quality control practices.

Strong Brand Value

Amul is one of the most recognizable and valuable brands in India. The Amul girl, the company's mascot which features on its advertisements is one of the oldest and most iconic brand mascots which Amul uses even today.

Large Consumer Base

The company has a large consumer base which spreads across the urban and rural regions of the country. This wide-reaching consumer base has allowed the company to maintain distinct leverage over its competitors.

Weaknesses of AMUL

High Operational Cost

Amul has a high operational cost due to its massive size and complex structure. This can become problematic for the company if the company experiences fall in demand.

The company also heavily depends on the dairy unions and communities for its supply of milk. As the needs of the dairy community are changing with them demanding higher prices for their produce. These issues can add up to the operational cost of the company and lower its profit margins.

Lack of Success in Certain Areas of Portfolio Expansion

Amul has expanded its product portfolio to add products such as butter, ghee, buttermilk, flavored milk, ice cream, chocolates, cheese, creams, sweets and more.

However, not every product of Amul within its portfolio has same amount of success.

Frequent Legal Issues

The company has faced legal issues in the recent past wherein Amul chose to advertise its products while disparaging the brand and products of its rivals. This caused the company a lot of embarrassment and has also contributed to tarnishing the public image of the company.

Opportunities for AMUL

High per capita Milk consumption

India is a high milk consuming nation with milk and dairy products being an essential component of the Indian diet. India has 130 crore population which is only increasing. This growth in population and high milk consumption opens up opportunities for AMUL to expand its production capacities and acquire new consumers.

International Expansion

AMUL can serve global markets. The brand can expand into overseas markets such as the Middle-East and the Asian markets by aggressively targeting Indian expats living in these countries.

Expansion of Product Portfolio

AMUL can invest in research and development or adopt a mergers and acquisition strategy to expand its product line. AMUL has an extensive distribution network which can be used to sell its new products into the market, and the substantial brand value and trust of the consumers will also enable easier acceptance from the consumers.

Threats for AMUL

Increasing Competition

AMUL is facing increasing competition in milk and dairy products sector from brands such as Mother Dairy, Kwality Ltd, HUL and other local players. AMUL is also facing increasing competition within the ice cream market from Kwality Walls, Baskin Robins, Havmor, London Dairy and other domestic brands.

Growing trend of Veganism in India

Many people in India are turning towards veganism, which implies that these people do not consume dairy or dairy products. This can impact the demand for Amul's milk and dairy products if the popularity of veganism increases and spreads across different parts of the country.

Findings of SWOT Analysis of AMUL

As per the SWOT analysis of AMUL, the company can easily identify and analyse the internal and external factor which help it to take the strategic decisions. The company can achieve a dominant global position by maintaining its quality standards, investing in advertising and promotions and localizing products as per the taste of the international markets. Thus, it has the opportunity to go 'Glocal', i.e. *think globally but act locally*.

What are the quick tips, you will suggest for a successful SWOT analysis?

Following are the tips for a successful SWOT analysis

- Keep SWOT short and simple, but remember to include important details. For example, if the staff in an organisation is a strength, include specific details, such as specific skills and experience possessed by the concerned staff members, as well as why they are strengths and how they can help to meet the goals of the organisation.
- When SWOT analysis is completed, prioritise the results by listing them in order of the most significant factors that affect the business to the least.
- Obtain multiple perspectives for those SWOT analysis that have been given a final shape and implemented; Ask for input from various stakeholders like employees, suppliers, customers and partners.
- Apply SWOT analysis to a specific issue, rather than to the entire business. Then after conduct separate SWOT analysis on individual issues and combine them.
- Look at where business is now and think about where it might be in the future.
- Consider the competitors and have a realistic assessment of the organisation's competitive strength in the industry.
- Think about the factors that are essential to the success of an organisation and the products or any other services, like superior after sale services, free delivery, warranty / guarantee etc. an organisation can offer customers that may exert an impact on the competitors, in order to have a competitive advantage. It is essential to take into consideration the factors relating to competitive advantage while conducting the SWOT analysis.
- Use goals and objectives from overall business plan in SWOT analysis.

Conclusion

The business world is highly competitive, traditional industries are getting shocked by the rise of the technology businesses, thousands of start-ups blooming every day while thousands of businesses withering every day. The key to the survival of the business is the strategy an organisation adopts and implements.

SWOT analysis helps the organisation to specify the objectives of the business venture or project and identifying the internal and external factors that are favourable and unfavourable to achieve that objectives. Identification of **SWOT** is important because they may be of immense assistance in chalking out the business plan to meet the objectives of the business.

The significance of SWOT analysis is that it provides a good way for companies to examine both positive and negative attributes within a single analysis, determining how best to compete in the market at large. SWOT assists the management to map out the best possible opportunity well in advance which helps business to begin planning to deliver a quality solution and to make a marketing plan.

FUNCTIONAL LEVEL STRATEGIES –AN EFFECTIVE TOOL TO ACHIEVE ORGANIZATIONAL GOALS

Introduction

In a highly competitive business environment and unattainable economic situation managers are increasingly seeking for strategies, approaches to accomplish, improve and sustain organizational performance and competitive advantage. Strategy and its formulation play a vital part in the firm's management process. The strategy gives the direction that a business has in mind and which way they want to achieve their goals. Amongst the many strategies implemented in firms, competitive strategy has been proven as an essential tool globally for any business to remain in the competitive market environment and become stronger. Competitive strategy means consciously choosing to carry out activities differently or to perform different activities than competitors to survey a unique mix of value.

Present business environment is characterized by high levels of competition, dynamism and technological sophistication. This is especially challenging to organizational managers since they have to design and implement strategies that can achieve and sustain competitive advantages. Consequently, the topic functional level strategy plays a pivotal role as organizations aim at gaining industry leadership.

Case Study No. 40

In 2017, a chain of coffee retailer, closed a decade of astounding financial performance. Sales had increased from \$700 million to \$8 billion and net profits from \$40 million to \$600 million. In 2017, The Company' was earning a return on invested capital of 25 %, which was impressive by any measure, and the company was forecasted to continue growing earnings and maintain high profits through to the end of the decade. How did this come about?

Thirty years ago Company was a single store in its local Market selling premium roasted coffee. Today it is a global roaster and retailer of coffee with more than 12,000 retail stores, some 3,000 of which are to be found in 40 countries outside its Home Country. The Company set out on its current course in the 1980s when the company's director of marketing, Srinivas Santharaman, came back from a trip to Italy enchanted with the Italian coffeehouse experience. Srinivas Santharaman, who later became CEO, persuaded the company's owners to experiment with the coffeehouse format – and the Coffee House experience was born.

Santharaman basic insight was that people lacked a "third place" between home and work where they could have their own personal time out, meet with friends, relax, and have a sense of gathering. The business model that evolved out of this was to sell the company's own premium roasted coffee, along with freshly brewed espresso- style coffee beverages, a variety of pastries, coffee accessories, teas, and other products, in a coffeehouse setting. The company devoted, and continues to devote, considerable attention to the design of its stores, so as to create a relaxed, informal and comfortable atmosphere.

Underlying this approach was a belief that Santharaman was selling far more than coffee— it was selling an experience. The premium price that the Company charged for its coffee reflected this fact.

From the outset, Santharaman also focused on providing superior customer service in stores. Reasoning that motivated employees provide the best customer service, Company executives developed employee hiring and training programs that were the best in the restaurant industry. Today, all Company's employees are required to attend training classes that teach them not only how to make a good cup of coffee, but also the service oriented values of the company. Beyond this, Company provided progressive compensation policies that gave even part- time employees stock option grants and medical benefits – a very innovative approach in an industry where most employees are part time, earn minimum wage, and have no benefits.

Unlike many restaurant chains, which expanded very rapidly through franchising arrangement once they have established a basic formula that appears to work, Santharaman believed that Company needed to own its stores. Although, it has experimented with franchising arrangements in some countries, and some situations its home country such as at airports, the company still prefers to own its own stores wherever possible.

This formula met with spectacular success in the Country, where Company went from obscurity to one of the best known brands in the country in a decade. As it grew, Company found that it was generating an enormous volume of repeat business.

Today the average customer comes into a Company' store around 20 times a month. The customers themselves are a fairly well- healed group – their average income is about $85,000.

As the company grew, it started to develop a very sophisticated location strategy. Detailed demographic analysis was used to identify the best locations for Company's stores. The company expanded rapidly to capture as many premium locations as possible before imitators. Astounding many observers, Company would even sometimes locate stores on opposite corners of the same busy street— so that it could capture traffic going different directions down the street.

By 2005 with almost 700 stores across the Country, Starbucks began exploring foreign opportunities. First stop was Japan, where Starbucks proved that the basic value proposition could be applied to a different cultural setting (there are now 600 stores in Japan). Next, Companys embarked upon a rapid development strategy in Asia and Europe. By 2011, the magazine *Bigdemandchannel* named Company one of the ten most impactful global brands, a position it has held ever since. But this is only the beginning. In late 2016, with 12,000 stores in operation, the company announced that its long term goal was to have 40,000 stores worldwide. Looking forward, it expects 50% of all new store openings to be outside of its Home Country.

Case Discussion Questions

1. What functional strategies help the company to achieve superior financial performance?
2. Identify the resources, capabilities, and distinctive competencies of Company?
3. How do Company's resources, capabilities, and distinctive competencies translate into superior financial performance?
4. Why do you think Company prefers to own its own stores wherever possible?
5. How secure is Company competitive advantage?

Case Study No. 41

THOMAS CHACKO

v.

THE CHIEF MANAGER, BANK OF INDIA & ORS [KER]

OP (DRT).No. 45 of 2018

Dama Seshadri Naidu, J. [Decided on 01/11/2018]

Constitution of India – Article 227 – Supervisory powers of the High court – DRT having seat at Ernakulum – DRAT having seat at Chennai – matter emanating from Ernakulum – Whether High Court of Kerala has jurisdiction to direct DRAT at Chennai – Held, Yes.

Brief Facts:

A wary purchaser of a secured asset is caught in the litigious cross fire between the borrowers and the banker. Spent his money, burnt his fingers (as he claims), and now wants to salvage the situation. The purchaser wants to withdraw from the sale and get his money back. But he faces uncertainty. After suffering an adverse order before the DRT, the Bank has filed an appeal before the DRAT, Chennai. And its disposal assumes importance for the purchaser to press his claim for refund. He wants the Appellate Tribunal to dispose of the appeal early. Now the question is, Can this Court, in Kerala, assume supervisory jurisdiction over the Appellate Tribunal in Chennai, Tamil Nadu?

A question of territorial jurisdiction must be resolved.

Decision: Petition allowed.

Reason:

Plainly read, Article 227 confers on every High Court superintendence over all courts and tribunals throughout the “territories” over which the High Court exercises its jurisdiction. Then, should we reckon “territories” in the literal, geographical sense or in the figurative, legal sense as fiction.

In Ambica Industries v. Commissioner of Central Exercise (2007) 6 SCC 769, the appellant carried on business at Lucknow. A dispute involving the appellant, however, arose before the CESTAT, New Delhi. The Tribunal exercises its jurisdiction over the cases from the State of Uttar Pradesh, National Capital Territory of Delhi, and the State of Maharashtra. Against the Tribunal’s order, the appellant filed an appeal under Section 35G of the Central Excise Act before the Delhi High Court. A Division Bench held that it had no territorial jurisdiction; it dismissed the appeal. So the matter reached the Supreme Court.

In the above factual backdrop, Ambica Industries has held that as for Article 227 of the Constitution of India, as also Clause (2) of Article 226, the High Court exercises its discretionary jurisdiction over the orders passed by the Subordinate Courts within its territorial jurisdiction. And even if any part of the cause of action has arisen within its territory that will suffice. But this principle cannot be applied, holds Ambica Industries, when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State. Then, “the High Court situated in the State where the first court is located” should be the proper forum.

Without much ado, I may hold that Ambica Industries’s assertion clinches the issue: when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State, then the High Court in the State where the first court is located should be the proper forum. Indeed, here the first or the primary forum is the DRT, Ernakulum. So this Court can eminently exercise its supervisory jurisdiction over the DRAT, Chennai. Here, the petitioner wants a direction to the Appellate Tribunal to dispose of the appeal early.

That said, this Court cannot be oblivious to the docket pressure the Appellate Tribunal faces. Nor can it set impracticable deadlines, for adjudication is not akin to answering a multiple-choice question paper. It is much more. A back-breaking, brain-racking exercise.

So I queried with the learned Central Government Counsel about the Appellate Tribunal's convenience and the feasibility of an early disposal. He has, presumably on instructions, submitted that the Appellate Tribunal will dispose of the AIR (SR) No.460 of 2017 in three months' time.

Under these circumstances, I hold that the DRAT, Chennai, will dispose of the AIR (SR) No.460 of 2017 expeditiously in three months.

Case Study No. 42

CEMENT WORKERS MANDAL

v.

GLOBAL CEMENTS LTD (HMP CEMENTS LTD) & 0RS [SC]

Civil Appeal No.5360 of 2010

A M Sapre & Dinesh Maheshwari, JJ. [Decided on 14/02/2019]

Constitution of India – Article 226 – Writ jurisdiction of High court – A Kolkatta based company had a cement unit in Porbandar in Gujarat – Unit became sick and wages were not paid – Labour court passed award in favour of workers – Lender in Kolkata attached company's properties and sold in public auction – Workers filed writ before Gujarat High Court seeking deposit of 50% of their dues by the lender – Single judge overruled the jurisdiction issue in favour of workers while division bench allowed the objection – Whether correct – Held, No.

Brief facts:

Respondent Company having its registered office at Calcutta, have a cement factory at Porbandar in the State of Gujarat. The appellant is a Union of workers. These workers (as many as 500), were working, at all relevant time, in the cement factory of respondent at Porbandar. Respondent, however, closed the cement factory somewhere in the year 1998 for myriad reasons without paying the wages to its workers.

A dispute, therefore, arose between the appellant Union and Respondent Company (employer) regarding the non-payment of outstanding wages payable to the workers. The Labour Court directed Respondent Company to pay a sum of Rs.81, 50,744/ with a cost of Rs.50,000/ to the workers. This was followed by issuance of recovery certificate dated 04.09.2000 for Rs.60, 35,379/ by the Collector, Junagadh as arrears of land revenue. The said certificate, however, has remained unexecuted.

Meanwhile, Respondent Bank had initiated recovery proceedings against Respondent Company, for the recovery of loan before the Debt Recovery Tribunal (for short "the DRT) at Calcutta, which was allowed. The DRT also appointed one Receiver to take appropriate steps in this regard. The Receiver informed the appellant-Union accordingly.

The appellant Union filed a petition (Special Civil Application No.12212 of 2004) in the High Court of Gujarat, inter-alia, praying therein to direct the respondent Bank to deposit the 50% amount of the sale proceeds of the Porbandar H.M.P. Cement with the District Collector, Porbandar, and the District Collector be directed to pay by account payee cheque to each of the workmen proportionately towards the part payment of the legal dues to the individual workman concerned.

The respondents raised an objection that the High court of Gujarat has no territorial jurisdiction inasmuch as no part of the cause of action in relation to the subject matter of the SCA has arisen in the State of Gujarat. The Single Judge overruled the preliminary objection and held that the Gujarat High Court has the territorial jurisdiction to entertain the SCA. On appeal by the Respondent Company, the Division Bench set aside the order of the Single Judge and dismissed the SCA. The Division Bench held that the Gujarat High Court has no territorial jurisdiction to entertain the SCA in question because no part of the cause of action has accrued to file such petition (SCA) in the Gujarat High Court.

It is against this order of the Division Bench, the Union (petitioner in SCA) felt aggrieved and has filed the present appeal in this Court after obtaining the special leave to appeal.

Decision: **Appeal allowed.**

Reason:

The short question, which arises for consideration in this appeal, is whether the Division Bench was justified in holding that the SCA filed by the appellant was not maintainable for want of territorial jurisdiction of the Gujarat High Court.

Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned order of the Division Bench restore the order of the Single Judge.

In our considered opinion, the Division Bench erred in not noticing Article 226(2) of the Constitution of India while deciding the question arising in this case. In other words, the question as to whether the Gujarat High Court has territorial jurisdiction to entertain the appellant›s petition (SCA) or not, should have been decided keeping in view the provisions of Article 226(2) of the Constitution read with Section 20 of the Code of Civil Procedure, 1908 (for short, “CPC”).

Article 226(2) of the Constitution, in clear terms, empowers the High Court (let us say “A” High Court) to entertain the writ petition if the cause of action to file such writ petition against the respondents of the said writ petition has arisen wholly or in part within the territorial jurisdiction of “A” High Court.

Clause (2) further empowers a High Court to issue any order, directions or writ as provided in clause (1) of Article 226 of the Constitution in such writ petition notwithstanding that seat of such Government or the Authority or the residence of such person against whom the writ petition is filed does not fall within the territories of the “A” High Court but falls in the territories of the “B” High Court.

Coming to the facts of this case, we find from the averments of the petition(SCA) that firstly, Respondent Company has its factory at Porbandar, which is a part of State of Gujarat; Second, the Labour Court, Junagadh, which is also a part of State of Gujarat, entertained the dispute between the appellant Union and respondent Company and passed a recovery order; and Third, one of the reliefs claimed in the petition(SCA) pertains to non-payment of outstanding wages payable to the workers by respondent Company.

In the light of these three reasons, we are of the view that the part of the cause of action as contemplated in Article 226 (2) of the Constitution has arisen within the territorial jurisdiction of the Gujarat High Court for filing the petition(SCA) to claim appropriate reliefs in relation to such dispute against respondent No.1 Company.

In our considered opinion, the expression “the cause of action, wholly or in part, arises” occurring in Article 226(2) of the Constitution has to be read in the context of Section 20(c) of CPC which deals with filing of the suit within the local limits of the jurisdiction of the Civil Courts.

In the light of the foregoing discussion, we are of the view that the appellant›s petition(SCA) was maintainable in the Gujarat High Court inasmuch as the part of the cause of action to file such petition did accrue to the appellant herein (petitioner) within the territorial jurisdiction of the Gujarat High Court. In these circumstances, the SCA was required to be decided on merits by the Gujarat High Court.

In view of the foregoing discussion, the appeal succeeds and is hereby allowed.

Case Study No. 43

MANAGEMENT OF THE BARARA COOPERATIVE MARKETING-CUMPROCESSING SOCIETY LTD.

v.

WORKMAN PRATAP SINGH [SC]

Civil Appeal No. 7 of 2019 [Arising out of SLP (C) No. 17975 of 2014]

A.M. Sapre & Indu Malhotra, JJ. [Decided on 02/01/2019]

Industrial Disputes Act, 1947 – Section 25H – Workman accepted the compensation in lieu of his right of reinstatement in service – Later workman seeking reemployment – Whether tenable – Held, No.

Brief facts:

This appeal is directed against the final judgment and order passed by the High Court of Punjab & Haryana whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the judgment passed by the Single Judge of the High Court by which the respondent herein was ordered to be reinstated into service with back wages.

Decision: **Appeal allowed**.

Reason:

In our considered opinion, there was no case made out by the respondent (workman) seeking re-employment in the appellant's services on the basis of Section 25 (H) of the ID Act.

In the first place, the respondent having accepted the compensation awarded to him in lieu of his right of reinstatement in service, the said issue had finally come to an end; and Second, Section 25 (H) of the ID Act had no application to the case at hand.

In order to attract the provisions of Section 25(H) of the ID Act, it must be proved by the workman that firstly, he was the "retrenched employee" and secondly, his ex-employer has decided to fill up the vacancies in their set up and, therefore, he is entitled to claim preference over those persons, who have applied against such vacancies for a job while seeking reemployment in the services.

The case at hand is a case where the respondent›s termination was held illegal and, in consequence thereof, he was awarded lump sum compensation of Rs.12, 500/ in full and final satisfaction. It is not in dispute that the respondent also accepted the compensation. This was, therefore, not a case of a retrenchment of the respondent from service as contemplated under Section 25(H) of the ID Act.

That apart and more importantly, the respondent was not entitled to invoke the provisions of Section 25 (H) of the ID Act and seek re employment by citing the case of another employee (Peon) who was already in employment and whose services were only regularized by the appellant on the basis of his service record in terms of the Rules. In our view, the regularization of an employee already in service does not give any right to retrenched employee so as to enable him to invoke Section 25 (H) of the ID Act for claiming re employment in the services. The reason is that by such act the employer do not offer any fresh employment to any person to fill any vacancy in their set up but they simply regularize the services of an employee already in service. Such act does not amount to filling any vacancy.

In our view, there lies a distinction between the expression 'employment' and 'regularization of the service". The expression 'employment' signifies a fresh employment to fill the vacancies whereas the expression 'regularization of the service' signifies that the employee, who is already in service, his services are regularized as per service regulations.

In our view, the Labour Court was, therefore, justified in answering the reference in appellant›s favour and against the respondent by rightly holding that Section 25(H) of the ID Act had no application to the facts of this case whereas the High Court (Single Judge and Division Bench) was not right in allowing the respondent's prayer by directing the appellant to give him reemployment on the post of Peon.

In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. Impugned order is set aside and the award of the Labour Court is restored.

Case Study No. 44

EMPLOYEES STATE INSURANCE CORPORATION

v.

VENUS ALLOY PVT. LTD. [SC]

Civil Appeal No. 1464 of 2019 (arising out of SLP(C) No. 12812 of 2015)

A M Sapre & Dinesh Maheshwari, JJ. [Decided on 01/06/2019]

ESI Act, 1948 – Section 2 – Director – Whether an employee – Held, Yes.

Brief facts:

The short question calling for determination in this appeal is as to whether the Directors of respondent-Company, who are receiving remuneration, come within the purview of "employee" under sub-section (9) of Section 2 of the Employees' State Insurance Act, 1948 ('the ESI Act')?

Decision: Appeal allowed

Reason:

In the case of Employees' State Insurance Corporation v. Apex Engineering Pvt. Ltd. 1997 (77) F.L.R. 878, the Board of Directors of respondent-Company resolved to elect one of its Directors as Managing Director of the Company and to grant him annual remuneration of Rs. 12,000/- for rendering services as Managing Director. The question was as to whether the said Managing Director was an "employee" within the meaning of Section 2(9) of the ESI Act? Though the High Court and the ESI Court had answered this question against the Corporation, but this Court allowed the appeal and, inter alia, held that the Managing Director, even when to be treated as principal employer, could also be an employee and could carry such dual capacity.

We are clearly of the view that what has been observed and held by this Court in Apex Engineering (supra), in relation to the Managing Director of a Company, applies with greater force in relation to a Director of the Company, if he is paid the remuneration for discharge of the duties entrusted to him.

It is noticed that in the present case, the appellant-Corporation in its impugned order dated 06.04.2005 specifically asserted that the Directors of the Company were paid remuneration at the rate of Rs. 3,000/- p.m. and they were falling within the definition of "employee" under the ESI Act and hence, contribution was payable in regard to the amount paid to them. Interestingly, even while seeking to challenge the aforesaid order dated 06.04.2005 by way of proceedings under Section 75 of the ESI Act, the respondent-Company chose not to lead any evidence before the Court. Hence, there was nothing on record to displace the facts asserted on behalf of the appellant-Corporation in its order dated 06.04.2005; rather the factual assertions in the said order remained uncontroverted. The order dated 06.04.2005 had been questioned by the respondent-Company only on the contention that the Directors do not fall within the category of "employee" but no attempt was made to show as to how and why the remuneration paid to its Directors would not fall within the purview of "wages" as per the meaning assigned by subsection (22) of Section 2 of the ESI Act? The ESI Court cursorily attempted to distinguish the decision of this Court in Apex Engineering (supra) only with reference to the fact that therein, the amount was being received by the Managing Director. The High Court, on the other hand, overlooked the said decision of this Court and relied only on the decisions of the Bombay High Court though the propositions in the referred decisions of the Bombay High Court stood effectively overruled by the decision in Apex Engineering (supra) where this Court held in no uncertain terms that the High Court was in error in taking the view that the Managing Director of the Company was not an employee within the meaning of Section 2 (9) of the ESI Act. The said decision directly applies to the present case and we have no hesitation in concluding that the High Court in the present case has been in error in assuming that the Director of a Company, who had been receiving remuneration for discharge of duties assigned to him, may not fall within the definition of an employee for the purpose of the ESI Act. There had been no reason to interfere with the order dated 06.04.2005 as issued by the appellant-Corporation.

Case Study No. 45

DELHI TRANSPORT CORPORATION

v.

SATNARAIN [DEL]

W.P. (C) 2405 of 2017 Rekha Palli, J. [Decided on 19/02/2019]

Industrial dispute – Conductor dismissed from service – Labour court directed to reinstate him with service continuity and consequential benefits – Employer reinstated the workman but did not pay the benefits – Whether tenable – Held, No.

Brief facts:

The respondent who was working as a Conductor in the DTC, was issued a charge-sheet alleging that he had failed to deposit the wage bill for the cash received by him. The respondent was thereafter removed from service based on the findings of a domestic inquiry held against him. Upon the respondent raising an industrial dispute, a reference was made to the learned Labour Court regarding the validity of the respondent's termination. The learned Labour Court, after considering the material produced on record, passed an Award directing reinstatement of the respondent with continuity of service and all other consequential benefits, excluding back wages.

After the dismissal of the petitioner's writ petition, the respondent was reinstated in service on 13.12.2014, without being granted any benefits for the period from 06.09.2010, i.e., the date of publication of the Award, till his reinstatement, thereby compelling the respondent to move the Labour Court seeking release of wages from the period from 6th September, 2010 to 12th December, 2014 along with interest. The said application was allowed by the learned Labour Court vide its impugned order. The present writ petition has been filed by the petitioner/ DTC impugning the above said order.

Decision: Petition dismissed.

Reason:

I have heard the learned counsel for the parties and with their assistance, perused the record. In my view, even though the learned counsel for the petitioner has raised two contentions, the same are inter-related. The only question which really needs to be determined by this Court is as to whether the petitioner having filed a writ petition, thereby preventing the respondent from joining service, can the petitioner still deprive the respondent of the wages for the said period during which he was very much willing and ready to join back his duties.

In my view, once an employee is prevented from joining duties not because of his fault/inaction but because of the employer not permitting him to join duties, he would be certainly entitled to get the benefit for the said period. Once the petitioner's writ petition was dismissed, it is evident that this Court did not find any infirmity in the impugned Award directing the petitioner's reinstatement. In these circumstances, it would be most unjust to deprive the respondent of the benefits under the Award which has ultimately been upheld by this Court. There is no merit in the petitioner's contention that merely because this Court, while dismissing the writ petition, did not pass any specific order directing payment of wages for the said to the respondent for the period that the petition remained pending, the respondent would not be entitled to wages for the period during which he has admittedly not worked. The aforesaid contention overlooks the fact that this Court, while dismissing the writ petition, found no infirmity in the impugned Award where under the respondent was entitled to be reinstated and therefore, once it is evident that the respondent was denied reinstatement only because the petitioner chose to file a misconceived writ petition, he cannot be denied the benefit for the period he was willing to re-join his duties but could not for no fault of his own.

I also do not find any merit in the petitioner's submission that as there was no predetermination of the amount towards wages for the period from 06.09.2010 till 12.12.2014, the learned labour Court could not have entertained the application under Section 33(C)(2) of the Act. In my view, once the amount of wages to which the respondent would have been eligible had he been reinstated in terms of the Award, is not in dispute, it cannot be said that the amount being claimed by the respondent under the Application, was not quantifiable and therefore, I find no reason as to why the application was filed was not maintainable.

For the aforesaid reasons, I find absolutely no perversity or infirmity in the impugned order. The writ petition being meritless, is dismissed along with pending application.

Case Study No. 46

CENTRAL BOARD OF TRUSTEES

v.

STANDING CONFERENCE OF PUBLIC ENTERPRISES [DEL]

W.P. (C) No.1663 of 2017 Rekha Palli, J. [Decided on 14/02/2019]

Employees Provident funds and miscellaneous Provisions Act,1952 – Section 7A – Scope of enquiry – Employees employed through contractors – Liability of principal employer – No examination of contractors during the enquiry – Whether determination of liability tenable – Held, No.

Brief facts:

The petitioner initiated proceedings [through the concerned PF commissioner] under Section 7-A of the Act against the respondent for determination of the provident fund dues payable by the respondent towards the employees engaged through by its contractors. Without examining the contractors, the PF commissioner determined the contribution dues and directed the respondent to deposit the contribution for workers of the contractors also. On appeal this order was set aside and remanded back to the PF commissioner to decide the issue after making proper enquiry and examining the witness of the contractors. The petitioner challenged this judgement of the appellate tribunal.

Decision: Petition dismissed.

Reason:

I have heard the learned counsel for the parties at length and with their assistance, perused the records.

The issue in the present case is as to whether merely because it is the duty of the principal employer to comply with the provisions of the Act, even qua the employees employed through its contractors, can the competent authority while conducting an inquiry under the provisions of Section 7-A of the Act, simply claim the amount from the principal employer without even making at least a bona fide attempt to determine the contributions made by the contractors and thereafter determine the shortfall, if any, required to be deposited by the principal employer.

The facts of the present case reveal that the petitioner, had initiated proceedings under the Act after an inordinate delay of twelve years which in itself would have made it very difficult for the respondent to obtain the requisite information from its contractors and in these circumstances, in my view, there was no reason as to why the petitioner ought not to resort to its statutory powers under Section 7-A of the Act to enforce the presence of the contractors in order to make a proper assessment of the dues which were payable by the respondent towards the employees engaged through the contractors. Even though the petitioner may be under no obligation to approach the contractors engaged by the respondent, but once a specific request for summoning the contractors, was made by the respondent, the petitioner by issuing summons to the contractors on a solitary occasion and by recording the statement of the sole contractor i.e. M/s A.P.Bansal & Company, who had appeared before the Enforcement Officer, had merely offered lip service to its statutory duty under Section 7-A of the Act by not making any bona fide efforts to enforce the presence of the other contractors. Merely because it is the respondent's duty to ensure compliance with the provisions of the Act in respect of the employees engaged through the Contractors also, cannot absolve the petitioner/organization of its statutory duty to carry out an enquiry as envisaged under the Act. There is a reason as to why section 7A of the Act gives such vide powers to the Provident Fund Commissioner while making an inquiry under the Act and the reason obviously is to ensure that a proper and just assessment is made by collecting all available evidence.
Thus, the question would not only be as to whether the principal employer produces relevant material but it would also be whether the provident fund commissioner who is the statutory authority, has exercised the powers vested in him to collect the relevant evidence before determining the payable amount.

I have also considered the decisions relied on by the petitioner. These decisions, however, do not deal with the issue arising in the present petition which pertains to the scope of the statutory enquiry, required to be conducted before passing an assessment order. On the other hand, the decision relied upon the respondent, deals with exactly the same question as arising in the present case wherein while dealing with a somewhat similar fact situation.

In the light of the aforesaid decision of the Supreme Court in Food Corporation of India v. The Provident Fund Commissioner & Ors. 1990 (60) F.L.R. 15, that there can be no doubt about the fact that it was incumbent upon the petitioner while making an inquiry in accordance with Section 7A of the Act to take all possible steps as set out in the Act to make a correct and proper assessment of the dues. It needs no reiteration that while making such an inquiry, the Commissioner has ample powers not only to summon any witness but also has powers to enforce the attendance of any person or summon him on oath. In these circumstances, once the tribunal found that the petitioner, had not taken adequate steps to summon all the contractors, by enforcing their attendance and that too in a case where the petitioner had initiated proceedings after an inordinate delay of twelve years, which in itself would have made it very difficult for the respondent to obtain information from its erstwhile contractors as also the fact that the assessment order itself is made on the basis of ad hoc calculations, I find absolutely no infirmity in the order of the tribunal directing the petitioner to summon all the contractors and then carry out the requisite assessment.

Case Study No. 47

THE REGIONAL PROVIDENT FUND COMMISSIONER

v.

VIVEKANANDA VIDYAMANDIR & ORS [SC]

Civil Appeal No. 6221 of 2011 connected with batch of appeals

Arun Misra & Navin Sinha, JJ. [Decided on 28/02/2019]

EPF Act – Definition of basic wages – Special allowances – Whether becoming part of basic wages – Held, Yes.

Brief facts:

The appellants with the exception of Civil Appeal No. 6221 of 2011, are establishments covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"). The appeals raise a common question of law, if the special allowances paid by an establishment to its employees would fall within the expression "basic wages" under Section 2(b)(ii) read with Section 6 of the Act for computation of deduction towards Provident Fund. The appeals have therefore been heard together and are being disposed by a common order.

Decision: Department's appeal allowed and appeals of establishments dismissed.

Reason:

Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The aforesaid provisions fell for detailed consideration by this Court in Bridge and Roof Co. (India) Ltd. v. Union of India, (1963) 3 SCR 978 when it was observed as follows:

> "8. Then we come to clause (ii). It excludes dearness allowance, house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", S.6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s.6 which lays down that contribution shall be 61/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover

some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in S.6. It seems that the basis of inclusion in S.6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under S.6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in S.6; but house rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of «basic wages», even though the basis of payment of house rent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from «basic wages». Similarly, commission or any other similar allowance is excluded from the definition of «basic wages» for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in S.6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by S.6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through S.6."

Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "basic wages" was considered in Muir Mills Co. Ltd., Kanpur Vs. Its Workmen, AIR 1960 SC 985 observing:

"11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"…"

The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4 SCC 37, it was observed as follows:

"10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance."

That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8 SCC 90.

Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

Resultantly, Civil Appeal No. 6221 of 2011 is allowed. Civil Appeal Nos. 396566 of 2013, Civil Appeal Nos. 396768 of 2013, Civil Appeal Nos. 396970 of 2013 and Transfer Case (C) No.19 of 2019 are dismissed.

Case Study No. 48

MODERN TRANSPORTATION CONSULTATION SERVICES PVT. LTD. & ANR.

v.

C.P.F. COMMISSIONER [SC]

Civil Appeal No. 7698 of 2009

A M Sapre & D Maheshwari, JJ. [Decided on 26/03/2019]

EPF Act – Section 2(f) – Excluded employee – Employees retiring from Railways – Withdrawing their accumulated contribution – Joined another establishment – Whether to be treated as excluded employee
– Held, No.

Brief facts:

The basic question arising for determination in this appeal is as to whether the retired employees of Railways, who had withdrawn all the superannuation benefits, including full amount of accumulations in their provident fund accounts, are to be treated as “excluded employees” in terms of Paragraph 2(f) of the Scheme of 1952? If to be treated as “excluded employees”, the said retired employees of Railways, on being re-employed by the appellants, may not be required to join the Fund created under the said Scheme of 1952 and consequently, the appellants may not be obliged to make any contribution in that regard.

Decision: **Appeal dismissed.**
Reason:

It is not a matter of much debate in this case that the appellants otherwise answer to the description of “employer” under the Act of 1952 and their establishment is covered thereunder. The basic contention urged in this matter on behalf of the appellants is that the persons engaged by them had been the members of General Provident Fund while working as the employees of Railways and had withdrawn the full amount of accumulations in GPF and are, therefore, to be treated as “excluded employees”. This contention has fundamental shortcomings as pointed out infra.

The crucial aspect to be considered in this matter is as to whether the definition of “excluded employees” in Paragraph 2(f) as also the stipulation in Paragraphs 26 and 69 of the Scheme of 1952 refer to any provident fund or only to the Fund under the Scheme of 1952? As noticed above, in the setup and structure of the Act of 1952, specific distinction is maintained between the Fund, which is created by the Central Government under Section 5(1) of the Act and any other provident fund, which is created by an employer. Significantly, clause (f) of Paragraph 2 of the Scheme of 1952 refers to “the Fund” and not to “any Fund”; and Paragraphs 26 and 69 also refer to “the Fund” and not to “any Fund”. The determiner “the”, as occurring in Paragraph 2(f) as also Paragraph 69 before the expression “Fund” makes it clear that the reference therein is only to the Fund which is created under the Scheme of 1952 and it is not a general reference to any Fund. The requirement of joining the Fund under Paragraph 26 ibid. is also of joining that Fund which is created under the Scheme of 1952. In other words, obviously and undoubtedly, the Fund referred to in Paragraphs 2(f), 26 and 69 of the Scheme of 1952 is that Fund, which is created under the Scheme of 1952 and the reference is not to any other Fund. Thus, to be covered under the expression “excluded employee” by virtue of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) ibid., the employee must be such who was a member of the Fund established under the Scheme of 1952 and who had withdrawn full amount of his accumulations in the said Fund on retirement from service after attaining the age of 55 years.

On the plain interpretation aforesaid, we have not an iota of doubt that the retired Railway employees, who had withdrawn their accumulations in General Provident Fund or any other Fund of which they were members, could not have been treated as “excluded employees” for the purpose of the Scheme of 1952 for the reason that such a withdrawal had not been from the Fund established under the Scheme of 1952. In fact, there was no occasion for them to make any withdrawal from the Fund established under the Scheme of 1952 because they were never the members of the said Fund. In other words, the employees in question were not answering to the requirements of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) of the Scheme of 1952 and hence, were not the “excluded employees”. The Division Bench of the High Court has rightly rejected the contention of appellants that every employee, who had withdrawn full amount from any provident fund, should be treated as an “excluded employee”. In our view, the answer by the Division Bench of the High Court is in accord with law and deserves to be approved.

To summarise, in the framework and setup of the Scheme of 1952, the concept remains plain and clear that if a person is member of the Fund created thereunder i.e., under the Scheme of 1952 and withdraws all his accumulations therein, he may not be obliged to be a member of the same Fund under the Scheme of 1952 over again and could be treated as an “excluded employees”. However, such is not the relaxation granted in relation to an employee who was earlier a member of any other Fund but later on joins such an establishment where he would be entitled to membership of the Fund created under the Scheme of 1952. This framework of the provisions and stipulations appears to be best serving the interest of employees, while providing them with continued financial security. Therefore, we find no reason to take any view different than the one taken by the Division Bench of the High Court in this case.

Case Study No. 49

DELHI TRANSPORT CORPORATION

v.

JASBIR SINGH [SC]

W.P.(C). No. 3451 of 2017

Vipin Sanghi & Rekha Palli, JJ. [Decided on 28/03/2018]

Employee dismissed for causing accident – Admitted his guilt and paid compensation in the criminal court – Tribunal directing reinstatement with 50% back wages – Whether correct as to reinstatement – Held, Yes. Whether correct as to 50% back wages – Held, No.

Brief facts:

The respondent was appointed as a driver and while he was on probation, he was involved in an accident. The petitioner Delhi Transport Corporation (DTC) assails the order passed by the Central Administrative Tribunal, which has allowed the Original Application preferred by the respondent and set aside the show cause notice, termination order, and the appellate orders. The Tribunal has directed reinstatement of the respondent with 50 % back wages.

Decision: Appeal partially allowed.

Reason:

Having heard learned counsels, we are of the view that the direction issued by the Tribunal for payment of Rs. 50% back wages were not justified in the facts and circumstances of the case. The respondent was also responsible for the state in which he found himself. While on probation, he was involved in an accident and he went ahead and confessed before the Court with regard to his guilt. He also compounded the offence under by depositing a fine of Rs. 50,000/-. The aforesaid being the position and considering the fact that the respondent had not actually served - post his termination, in our view, there is no justification in directing payment of 50% back wages.

To that extent, the impugned order is set aside. We direct the petitioner to reinstate the respondent positively within two weeks. In case, this direction is not complied with, the respondent shall be entitled to wages from the last date fixed for his reinstatement.

Case Study No. 50

GLOBE GROUND INDIA EMPLOYEES UNION

v.

LUFTHANSA GERMAN AIRLINES & ANR [SC]

Civil Appeal Nos. 4076-4077 of 2019 [Arising out of S.L.P. (C) Nos.25341-42 of 2017]

R. Banumathi & R. S. Reddy, JJ. [Decided on 23/04/2019]

Industrial Disputes Act,1947 – Section 10 – Employees of subsidiary company raised dispute over retrenchment – Impleadment of the holding company sought – Whether permissible – Held, No.

Brief facts:

Globe Ground India Private Ltd [Respondent No.2 herein] is subsidiary of Lufthansa German Airlines [Respondent 1 herein]. Appellant is the employees union representing the employees of Respondent No.2.

The appellant raised the industrial dispute which was referred by the Central Government to Industrial Tribunal-cum-Labour Court. In the proceedings the appellant sought to implead the respondent No.1 also as it was the holding company of respondent No.2. The impleadment application was allowed by the Tribunal, which was on appeal reversed by the High Court. Hence the present appeal before the Supreme Court seeking the impleadment of the respondent No.1 holding company in the industrial reference made against the subsidiary Respondent No.2 Company.

Decision: Appeal dismissed.

Reason

Having heard learned counsel on both sides, we have perused the material placed on record. The only question which is required to be considered is whether, the first respondent – Lufthansa German Airlines is to be impleaded as a party respondent or not, in adjudication proceedings to answer the reference referred by the Central Government to the Industrial Tribunal-cum-Labour Court vide order dated 4.2.2010. From a reading of the reference, which is referred to Industrial Tribunal, it is clear that the reference which is required to be answered by the Industrial Tribunal is that, whether the action of the Management of M/s Globe Ground India (Pvt.) Limited, in closing down their establishment on 15.12.2009 and retrenching the services of 106 workmen is justified and legal. At this stage, it is apt to refer to Section 10 of the Industrial Disputes Act. It is clear from the above said section, whenever, the appropriate Government refers the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points only and matters incidental thereto.

Whenever, an application is filed in the adjudication proceedings, either before the Industrial Tribunal in a reference made under the Industrial Disputes Act, 1947 or any other legal proceedings, for impleadment of a party who is not a party to the proceedings, what is required to be considered is whether such party which is sought to be impleaded is either necessary or proper party to decide the lis. The expressions "necessary" or "proper" parties have been considered time and again and explained in several decisions. The two expressions have separate and different connotations. It is fairly well settled that necessary party, is one without whom no order can be made effectively. Similarly, a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings.

Reverting back to the facts of the case on hand it is clear that the first respondent had a subsidiary, namely, Globe Ground Deutschland GmbH, which was holding 51% shares along with 49% shares held by the Bird Group in the second respondent company. Further, it is clear that the Bird Group had floated another company, Bird Worldwide Flight Services Ltd. to provide ground handling and ancillary services which started from the month of January, 2009. It is the allegation of the appellant's union that even after the formation of a new company, such new company is utilizing same equipment and vehicles belonging to the second respondent. It is also the allegation of the appellant that after the formation of the new company, it has retained most of the employees, except the trade union activists. The appellant workers' union does not seek employment of the alleged retrenched workers in the first respondent.

Further, we are of the view that even in a subsidiary company which is an independent corporate entity, if any other company is holding shares, by itself is no ground to order impleadment of parent company per se. In the case at hand, it is clear that the second respondent itself is a company in which the subsidiary of the first respondent, namely, Globe Ground Deutschland GmbH, was holding 51% shares and 49% shares were held by the Bird Group. As per the case of the appellant, the Bird Group has floated another company and started handling services from the month of January, 2009 by uitlizing the same equipments and vehicles belonging to the second respondent. Further, having regard to limited scope of adjudication, to answer the reference, which is circumscribed by Section 10(4) of the Industrial Dispute Act, 1947, we are of the view that the first respondent is neither necessary nor proper party, to answer the reference by the Industrial Court. Further, we do not find any error in the order passed by the learned Single Judge or in the order of the Division Bench passed by the High Court of Delhi in the impugned judgment, so as to interfere with such reasoned and concurrent findings recorded by the courts. Thus, these civil appeals are devoid of merits and the same are accordingly dismissed, with no order as to costs.

Case Study No. 51

THE STATE BANK OF INDIA & ORS.

v.

P. SOUPRAMANIANE [SC]

Civil Appeal No. 7011 of 2009

L. Nageshwar Rao & M.R.Shah, JJ. [Decided on 26/04/2019]

Banking service – Messenger – Convicted for assault and later discharged on probation – Dismissed from service for moral turpitude – Whether tenable – Held, No. What is moral turpitude-explained.

Brief facts

The Respondent who was working as a Messenger in the State Bank of India at Puducherry was discharged from service by an order dated 15.05.1986 on the ground of his conviction by a criminal court for an offence involving moral turpitude. The respondent was convicted for the offence committed under section 324 of the IPC [assault] and sentence of 3 months imprisonment was given. The appellate court released him under section 360 of the CrPC on probation on the ground that the Respondent was employed as a Messenger in a Bank and any sentence of imprisonment would affect his career.

The appeal filed by the Respondent against the order of discharge was dismissed and the Staff Union took up the cause of the Respondent and made a representation on his behalf which was also rejected. Challenging the aforementioned orders, the Respondent filed a Writ Petition in the High Court of Judicature at Madras which was dismissed by a learned Single Judge. Aggrieved thereby, the Respondent filed a Writ Appeal which was allowed by the Division Bench of the Madras High Court. The order of discharge of the Respondent from service was set aside and the Appellants were directed to reinstate the Respondent. The Appellants were directed to pay 1/4th of the salary from the date of discharge till the date of reinstatement as back wages. Now the appellant bank is before the Supreme Court.

Decision: Appeal dismissed.

Reason

We do not agree with the reasons given by the High Court for setting aside the order of discharge and directing the reinstatement of the Respondent in service. A show cause notice was issued to the

Respondent in which it was categorically mentioned that the Respondent cannot continue in service after his conviction in a criminal case involving moral turpitude in view of Section 10(1) (b) (i) of the Banking Regulation Act, 1949. After considering the explanation of the Respondent, an order of discharge was passed. The High Court is not right in holding that no reasons had been given by the bank for discontinuing the Respondent from service. The High Court committed an error in holding that the order of discharge should be set aside on the ground that the provision of law under which the Respondent was discharged was not mentioned in the order. Yet another reason given by the High Court for interference with the order of discharge is that the criminal court released the Respondent on probation only to permit him to continue in service. The release under probation does not entitle an employee to claim a right to continue in service. In fact the employer is under an obligation to discontinue the services of an employee convicted of an offence involving moral turpitude. The observations made by a criminal court are not binding on the employer who has the liberty of dealing with his employees suitably.

Though we do not agree with the reasons given by the High Court for setting aside the order of discharge of the Respondent from service, it is necessary to examine whether Section 10 (1) (b) (i) of Banking Regulation Act is applicable to the facts of the case. Conviction for an offence involving moral turpitude disqualifies a person from continuing in service in a bank. The conundrum that arises in this case is whether the conviction of the Respondent under Section 324 IPC can be said to be for an offence involving moral turpitude.

There can be no manner of doubt about certain offences which can straightaway be termed as involving moral turpitude e.g. offences under the Prevention of Corruption of Act, NDPS Act, etc. The question that arises for our consideration in this case is whether an offence involving bodily injury can be categorized as a crime involving moral turpitude. In this case, we are concerned with an assault. It is very difficult to state that every assault is not an offence involving moral turpitude. A simple assault is different from an aggravated assault. All cases of assault or simple hurt cannot be categorized as crimes involving moral turpitude. On the other hand, the use of a dangerous weapon which can cause the death of the victim may result in an offence involving moral turpitude. In the instant case, there was no motive for the Respondent to cause the death of the victims. The criminal courts below found that the injuries caused to the victims were simple in nature. On an overall consideration of the facts of this case, we are of the opinion that the crime committed by the Respondent does not involve moral turpitude. As the Respondent is not guilty of an offence involving moral turpitude, he is not liable to be discharged from service.

For the aforementioned reasons, we affirm the judgment of the High Court. The Appeal is dismissed accordingly.

Case Study No. 52

REGIONAL MANAGER, U.P.S.R.T.C. & ANR

v.

MASLAHUDDIN (DEAD) [SC]

Civil Appeal No. 3959 of 2019 [Arising out of SLP (C) No. 29305 of 2008] with connected appeals.

L. Nageshwar Rao & M.R. Shah, JJ. [Decided on 16/04/2019]

Superannuation of employees – Initially employed in category D – Retirement age 60 years – Subsequently placed in category C with retrospective effect – Retirement age 58 years – Accordingly retired at 58 years – Employees claimed they are entitled service up to 60 years – Whether tenable – Held, No.

Brief facts:

As common question of law and facts arise in these appeals, as such, arising out of the impugned judgment and order passed by the High Court, all these appeals are being disposed of by this common judgment and order.

Respondents were appointed as drivers by the appellant Corporation and placed them under category D, for which the retirement age is 60 years. During the course of their service their pay scale have been revised and due to this they have been placed under category C, for which the retirement age is 58 years. The appellant retired them at the age of 58 years and the respondents raised a dispute over this and the labour court as well as the High Court held that the respondents' retirement age should be 60. Hence the present appeal of the appellant Corporation.

Decision: Appeals allowed.

Reason

We have heard the learned counsel appearing on behalf of the respective parties at length. The issue in the present appeals is in a very narrow compass. The short question which is posed for consideration by this Court is whether the respective respondents Drivers would fall in Group "D" or Group "C"?

It is required to be noted that all those employees who were getting the salary less then Rs.200/ would fall in Group "D" category. As per the Rules prevailing at the relevant time, the employees getting salary more than Rs.200/ would fall in Group "A", "B" or "C" as per the classification and those who would not fall in either Group "A", "B" or "C" category, they would fall in Group "D" category. As per the Rules prevailing at the relevant time, the age of superannuation of Group "D" employees was 60 years and for the others, i.e. Group "A", "B" and "C", the age of retirement was 58 years.

It appears, (from the affidavit of the appellant), that at the time when the respective respondents Drivers were appointed, they were in the pay scale of Rs.185/- and under the normal circumstances they would fall in Group "D" category and therefore their age of superannuation would be 60 years. However, in the year 1982 the pay scale of all the employees of the Corporation was revised, including the Drivers, and the pay scale of the Drivers of the Corporation was revised to Rs.335/- from Rs.200/-. That the pay scale of the respondents was also revised to Rs.335/ w.e.f. the date of their initial appointment and they were also paid the arrears from the date of their initial appointment till August, 1981. That, in the year 1984, it was resolved to fix the age of superannuation of the Drivers and Conductors as 58 years and place them in Group "C". In the year 1985, the Board of Directors resolved that the classification of posts of all the employees would be revised in view of the recommendations of the Second Pay Commission and that the pay scale of the Drivers and Conductors was again revised to Rs. 335/- and above and that they would be placed in Group "C". That the above resolution was notified on 10.06.1985 and it was also clarified that the revision in classification will be applicable while determining the age of retirement of the employees.

There is no further counter on behalf of the respondents to the rejoinder filed on behalf of the appellant Corporation. Therefore, the averments in the rejoinder on behalf of the appellant Corporation had gone uncontroverted.

In view of the above, both the Labour Court as well as the High Court have committed a grave error in holding that the respective respondents Drivers were in Group "D" category and that their age of superannuation would be 60 years. As the pay scale of the respective respondents Drivers was revised to Rs.335 with retrospective effect and in fact they were paid the arrears also, thereafter it was not open for the respondents Drivers to contend that as per their original pay scale, their salary was less than Rs.200/-, they would be in Group "D" category. Once having taken the advantage of the revised pay scale retrospectively and that their pay scale was revised to Rs. 335 /- with retrospective effect and they were paid the arrears which the respective respondents accepted, in that case, they would fall in Group "C" category and, therefore, considering the Rules, their age of superannuation would be 58 years and not 60 years, as contended on behalf of the respective respondents Drivers. Therefore, the appellant Corporation rightly retired/superannuated the respective respondent Drivers on completion of 58 years of age.

In view of the above and the reasons stated above, all these appeals succeed and the impugned common judgment and order passed by the High Court is hereby quashed and set aside. In the facts and circumstance of the case, there will be no order as to costs.

Corporate Governance Case Studies.

Case Study-1

Dr. Sen, an industrial chemist with 15 years of experience, has recently been appointed to the post of Chief Executive Officer (CEO) of Pharma Ltd., a listed company. He has previously been employed in the company as Research Director. In preparation for his new assignment he has been trying to get to grips with the concept of corporate governance and all that it entails.

The board of Pharma Ltd. comprises of total ten directors (including one women director), six non-executive directors and five were considered independent. The board is responsible for overseeing strategy, approving major corporate initiatives and reviewing performance. There are three board committees - the Audit Committee, Remuneration Committee and Investors Grievance Committees. However, there is no Nomination Committee.

As the Company Secretary and Compliance Officer of Pharma Ltd, he is seeking your assistance to clarify some issues of concern.

You have been asked to prepare a brief report in which you:

(a) Provide Dr. Sen with a robust definition of corporate governance and a brief explanation of what you understand corporate governance to be.
(b) Comment on the board composition of Pharma Ltd. with respect to the Companies Act, 2013 and SEBI LODR Regulations, 2015. Also comment whether Dr. Sen should be Chairman of the Company.
(c) Explain whether Nomination Committee is mandatory under Companies Act, 2013 and what should be the role of Nomination Committee.

Suggested Solution:-

(a) Corporate Governance has a broad scope. It includes both social and institutional aspects. Corporate Governance encourages a trustworthy, moral, as well as ethical environment. In other words, the heart of corporate governance is transparency, disclosure, accountability and integrity. It is to be borne in mind that mere legislation does not ensure good governance. Good governance flows from ethical business practices even when there is no legislation.

    Good corporate governance promotes investor confidence, which is crucial to the ability of entities listed to compete for capital. Good corporate governance is is essential to develop added value to the stakeholders as it ensures transparency which ensures strong and balanced economic development. This also ensures that the interests of all shareholders (majority as well as minority shareholders) are safeguarded. It ensures that all shareholders fully exercise their rights and that the organization fully recognizes their rights.

Some other good definitions are given hereunder for better understanding:-"Corporate Governance is the application of best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility for sustainable development of all stakeholders."

The Institute of Company Secretaries of India

"Corporate Governance is concerned with the way corporate entities are governed, as distinct from the way business within those companies are managed. Corporate governance addresses the issues facing Board of Directors, such as the interaction with top management and relationships with the owners and others interested in the affairs of the company".

Robert Ian (Bob) Tricker

(b) **Board Composition:** Section 149(1) of the Companies Act 2013 provides that every company shall have a Board of Directors consisting of individuals as directors and shall have—

- A minimum number of three directors in the case of a public company,
- Atleast two directors in the case of a private company, and
- Atleast one director in the case of a One Person Company; and
- A maximum of fifteen directors provided that a company may appoint more than fifteen directors after passing a special resolution.

Section 149(4) provides that every public listed company shall have at- least one third of total number of directors as independent directors.

Regulation 17(1)(a) of SEBI LODR Regulations, 2015 provides that Board of directors shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty per cent of the board of directors shall comprise of non-executive directors.

The board of Pharma Ltd. comprises of total ten directors, six non-executive directors and five were considered independent. The total number of directors is more than the minimum required directors and at-least one third of total number of directors are independent directors.

Also as per SEBI Regulations, more than fifty per cent of the board of directors comprises of non-executive directors and one women director. Therefore, the board composition of Pharma ltd. is optimum as per the laws and regulations.

Separation of Chairman and CEO: First proviso to Section 203(1) of the Companies Act, 2013 provides for the separation of role of Chairman and Chief Executive Officer subject to conditions thereunder. It specifies that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,–

(a) the articles of such a company provide otherwise;

(b) the company does not carry multiple businesses:

Regulation 17(1B) of SEBI (LODR) Regulations, 2015 provides that effect from April 1, 2020, the top 500 listed entities shall ensure that the Chairperson of the board of such listed entity shall -

(a) be a non-executive director;

(b) not be related to the Managing Director or the Chief Executive Officer as per the definition of the term "relative" defined under the Companies Act, 2013:

Also, it is perceived that separating the roles of chairman and chief executive officer (CEO) increases the effectiveness of a company's board. It is the board's and chairman's job to monitor and evaluate a company's performance. A CEO, on the other hand, represents the management team. If the two roles are performed by the same person, then there is less accountability. A clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/CEO promotes balance of power. The benefits of separation of roles of Chairman and CEO can be:

- **Director Communication**: A separate chairman provides a more effective channel for the board to express its views on management
- **Guidance**: A separate chairman can provide the CEO with guidance and feedback on his/her performance
- **Shareholders' interest**: The chairman can focus on shareholder interests, while the CEO manages the company
- **Governance**: A separate chairman allows the board to more effectively fulfill its regulatory requirements
- **Long-Term Outlook**: Separating the position allows the chairman to focus on the long-term strategy while the CEO focuses on short-term profitability
- **Succession Planning**: A separate chairman can more effectively concentrate on corporate succession plans.

Therefore, on the basis of above mentioned laws and regulations and the potential benefits of separating Chairman and CEO, Dr. Sen should not be made Chairman of the Company as he is already CEO of the Company.

(c) Yes, it is mandatory under the Companies Act, 2013 to constitute the Nomination and Remuneration Committee. Section 178(1) of the Act read with rule 6 of the Companies (Meetings of the Board and its Powers) Rules, 2014 and Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that the board of directors of following classes of companies is required to constitute a Nomination and Remuneration Committee of the Board-

- every listed public companies;
- All public companies with a paid up capital of 10 crore rupees or more;
- All public companies having turnover of 100 crore rupees or more;
- All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.

Since Pharma Ltd. Is a listed company, it is mandatory to the Nomination and Remuneration Committee which shall perform following functions:

- Identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance [Section 178(2)]
- Formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. [Section 178(3)]

Case Study-2

In the year 2014, Chief Executive Mr. Roy of Sunny Ltd, a global internet communications company, announced an excellent set of results. Mr. Roy announced that, compared to 2013, sales had increased by 50%, profits by 100% and total assets by 80%. The dividend was to be doubled from the previous year.

Three months later, Mr. Roy called a press conference to announce a restatement of the 2014 results. He said this was necessary because of some 'regrettable accounting errors'. He also disclosed that in fact the figures for 2014 were increases of 10% for sales, 20% for profits and 15% for total assets. The proposed dividend would now only be a modest 10% more than last year.

Later that month, the company announced that following an internal investigation, there would be further restatements, all dramatically downwards, for the years 2012 and 2013. This caused another mass selling of shares of Sunny Ltd resulting in a final share value the following day of $1. This represented a loss of shareholder value of $12 billion from the peak share price.
Mr. Roy resigned and SEBI ordered an investigation into what had happened at Sunny Ltd. The shares were suspended by the stock exchange. A month later, Sunny Ltd. was declared bankrupt. Nothing was paid out to shareholders whilst suppliers received a fraction of the amounts due to them.

The Chief Executive confessed to having orchestrated an accounting fraud for several years. He admitted to manipulating the firm's accounts to report profits that were more than 10 times the actual figures and reported a cash balance of US$1 billion that was non-existent. Sunny Ltd. has also committed systemic fraud in its worldwide regulatory filings. For a multinational company with the illustrious Board and significant foreign and institutional shareholding, one would expect corporate governance of highest order; however, the reality was different.

Based on the above fact, answer the following:

(a) Is the given case an example of intentional fraud by the top executive of the Company? Can such frauds be reported under the Companies Act 2013? What are the penalties for not reporting of frauds under Companies Act 2013?

(b) Can independent directors be held liable for frauds perpetrated by or with the support of the top management? Critically examine.

(c) A number of directors resigned from the company after the fraud became public. Examine the role directors could have played to protect shareholders' interests?

(d) What is the role of audit committee in fraud risk oversight? Draft some questions which the audit committee consider to effectively manage fraud risks.

Suggested Solution-

(a) Yes, above case is an example of intentional fraud by the top executives of the Company. Since the Chief Executive himself confessed to having orchestrated an accounting fraud for several years. He admitted to manipulating the firm's accounts to report profits that were more than 10 times the actual figures and reported a cash balance of US$1 billion that was non-existent.

Fraud is a deliberate action to deceive another person with the intention of gaining some things. Fraud can loosely be defined as "any behavior by which one person intends to gain a dishonest advantage over another". In other words, fraud is an act or omission which is intended to cause wrongful gain to one person and wrongful loss to the other, either by way of concealment of facts or otherwise.

Section 25 of the Indian Penal Code, 1860 defines the word, “Fraudulently”, which means, a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

The Companies Act 2013 has also explained fraud. Explantion to Section 447 defines “fraud”, which reads as under: “fraud” in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

Reporting of fraud under the Companies Act, 2013: Frauds by executives in the company can be reported under the Act under the Section 143(12) of the Companies Act, 2013 which requires the statutory auditors or cost accountant or company secretary in practice to report to the Central Government about the fraud/suspected fraud committed against the company by the officers or employees of the company. It includes only fraud by officers or employees of the company and does not include fraud by third parties such as vendors and customers.

Consequence of non-compliance: Sub-section 15 of section 143 states that if any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.

(b) Schedule IV of the Companies Act 2013 provides that the independent directors shall have certain duties like-

- seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company;
- participate constructively and actively in the committees of the Board in which they are chairpersons or members;
- where they have concerns about the running of the company or a proposed action, ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting;
- keep themselves well informed about the company and the external environment in which it operates;
- not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;
- ascertain and ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use;
- report concerns about unethical behaviour, actual or suspected fraud or violation of the company’s code of conduct or ethics policy;
- [“act within their authority”], assist in protecting the legitimate interests of the company, shareholders and its employees etc.

So, it is expected from independent directors that they perform duties properly. However, Section 149(12) of the Companies Act 2013 provides that an independent director and a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Regulation 25(5) of SEBI (LODR) regulations, 2015 provides that an independent director shall be held liable, only in respect of such acts of omission or commission by the listed entity which had occurred with his knowledge, attributable through processes of board of directors, and with his consent or connivance or where he had not acted diligently with respect to the provisions contained in these regulations.

(c) A director is "bound to take such precautions and show such diligence in their office as a prudent man of business would exercise in the management of his own affairs." The Duties and Responsibilities can be broadly classified into two categories:

- The duties, liabilities and responsibilities which promotes corporate governance through the sincerest efforts of directors in efficient management and swift resolution of critical corporate issues and sincere and mature decision making to avoid unnecessary risks to the corporate entity and its shareholders.
- Keeping the interests of company and its stakeholders ahead of personal interests.

The following duties of the directors have been provided under Section 166 of the Companies Act, 2013 and apply to all types of directors-

- A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
- A director of a company shall not assign his office and any assignment so made shall be void.
- If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Clearly, the fraud could not have been gone un-noticed, if the directors have discharged their duties diligently. Directors certainly could have played a major role in highlighting the discrepancies in the financial statements long before declaring the company bankrupt and could have protected the shareholders' interests.

(d) The audit committee must be equipped to assess, monitor and influence the tone at the top to aim at enforcing a zero-tolerance approach to fraud. The audit committee should be sensitive to the various business pressures on management – to meet earnings estimates and budget targets, meeting incentive compensation targets, hiding bad news, etc. – and how small adjustments can trigger bigger problems. The audit committee's objective should be to ensure that arrangements are in place for the receipt and proportionate independent investigation of alleged or suspected fraudulent actions and for appropriate follow-up action.

Some of the Symptoms of potential fraud are –

- Overly complex and / or opaque corporate structures.
- Overly dominant senior executives with unfettered powers and highly leveraged reward schemes.
- Frequent changes in finance, other key personnel or auditors.
- Implausible explanations as to surpluses, or projections those are "too good to be true".
- Organisations significantly outperforming the competition.
- Aggressive accounting policies and frequent changes thereto.

Key questions for audit committees to consider:

- Is management taking sufficient responsibility for the fight against fraud and misappropriation?
- Is the tone from the top unequivocal in insisting on an anti-fraud culture throughout the organisation?
- Do record-keeping policies and procedures minimise the risk of fraud?
- Are appropriate diagnostic assessments of fraud risks performed and updated periodically?
- Are all significant fraud risks properly included in the enterprise risk management approach, linked to relevant internal controls and monitored?
- Do codes of conduct contain adequate, user-friendly and up-to-date behavioural guidelines in respect of fraud and other misconduct?
- Are they adopted across the organisation and do they apply evenly to business partners and subcontractors?
- What is the level of assurance gained related to the effectiveness of anti-fraud controls by management, internal and/or external audit and is it appropriate in the circumstances?
- Are anti-fraud controls designed to detect or prevent financial reporting fraud from the early stage (i.e. before small adjustments snowball into bigger issues)?
- Are fraud-tracking and -monitoring systems and fraud response plans in place and are they fit for purpose?
- Do staff members at all levels have appropriate skills to identify the signs of fraud and do they receive fraud awareness training relevant to their role?

Case Study-3

You are the company secretary of a listed food manufacturing company. Your chairman informs you that he has been asked to meet with two major shareholders of the company. These are institutional investors who together own about 6% of the company's equity shares. Both of them have stated publicly their policy of socially responsible investment and the purpose of the meeting will be to discuss social and environmental issues and the company's policy on corporate social responsibility.

As a company secretary you are required to write a briefing note for the chairman including a discussion of the following issues:

(a) Role of institutional investors in good corporate governance.

(b) The socially responsible investment principles for institutional investors and the ways in which institutional investors may pursue a socially responsible investment strategy.

Suggested Solution-

(a) Institutional investors are those financial institutions which accept funds from other parties for investment by the institution in its own name but on their clients/beneficiaries behalf. The different kinds of institutional investors are banks, development financial institutions, insurance companies, mutual funds, foreign institutional investor, provident funds and proposed private fund managers. They are now significant players in the global economy.

Institutional investors are entrusted with funds from the public and most of the household income is with these institutional investors. They are safe keepers of public money and act in a fiduciary capacity. They are obligated to take decisions which best serve the companies' interests and steer the company to function in an ethical manner.

There is a mutual relationship between institutional investors and the good corporate governance of a company. The corporate governance practices followed by a company are very important to determine the number of institutional investors who would like to invest in the firm and the extent to which they would like to invest.

Most governance sensitive institutional investors would like to invest in firms which already have their governance mechanisms in place. Institutions with corporate governance mechanisms in place are better to invest in as this would mean decreased monitoring costs. The institutional investors would not have to play a proactive role in monitoring the practices followed by the company.

(b) The Institutional investors generally follow the given six Principles for Responsible Investment

- Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.
- Principle 2: We will be active owners and incorporate ESG issues into ownership policies and practices.
- Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which they invest.
- Principle 4: We will promote acceptance and implementation of the Principles within the investment industry.
- Principle 5: We will work together to enhance effectiveness in implementing the Principles.
- Principle 6: We will each report on their activities and progress towards implementing the Principles.

Institutional Investors activities may include

- Monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration.
- Engagement in purposeful dialogue with companies on major issues.
- Decision-making on matters such as allocating assets, awarding investment mandates, designing investment strategies, and buying or selling specific securities.
- They set the tone for stewardship and may influence behavioural changes that lead to better stewardship by asset managers and companies.
- Asset managers, with day-to-day responsibility for managing investments, are well positioned to influence companies' long-term performance through stewardship.

Case Study- 4

A multinational manufacturing company Alpha Ltd. had developed a complex governance structure to hide its fraudulent accounting activities. Each department had its own Finance unit which would report to a central Finance team headed by the CFO. Each unit was unaware of the performance of other departments. The top management consisted of a few professionals and family members. Also all top executives were allotted large quantities of shares to ensure that they had incentives to take actions that would help boost the stock price.

Alpha Ltd. had a whistleblower policy supervised by the Audit Committee. Ms. Xia, a senior qualified accountant working in the company had approached the finance director with her concerns about the financial statements but she failed to get the answers she needed and had threatened to tell the press. When her threat came to the attention of the board, she was intimidated to keep quiet.

Another employee had written to an independent director stating that the books of the firm had been manipulated. Although this letter was circulated among the board, no action was taken. The audit committee also failed to take any action.

Later that year, the fraud became public and the company was declared bankrupt eroding the shareholders value and interest.

Based on the above fact, answer the following:

(a)Explain the role of audit committee for effective oversight of matters pertaining to whistleblower complaints?

(b) What are the challenges of effective implementation of a whistleblower policy in a company such as Alpha Ltd.?

(c) As a Company Secretary provide some pointers for audit committee to consider regarding whistle blowing possibilities in the Company.

Suggested Solution- Case Study-4

(a) While the ultimate responsibility of vigil mechanism is with the board as a whole, audit committees are tasked with the principal oversight of whistle-blowing systems, with the direct responsibility for antifraud efforts generally residing with management including internal audit. Whistle-blowing procedures are a major line of defence against fraud and audit committees should ensure such procedures are effective. By focusing on whistle-blowing channels and considering it within the context of the organisation's overall approach to enterprise risk management – the audit committee can help strengthen internal controls, financial reporting and corporate governance.

The audit committee must be properly informed and actively engaged in overseeing the process while avoiding taking on the role or responsibilities of management. To this end, it should seek input from the legal counsel, internal and/ or external audit.

The audit committee should seek to ensure that management has considered all risks that are likely to have a significant financial, reputational or regulatory impact on the organisation. For any such risks, a rigorous assessment of the relevant internal controls – including their ability to detect or prevent fraud – should be made. Effective monitoring of these internal controls and periodic re-assessments of their effectiveness are key elements to stay abreast, together with management's active engagement in the process. The audit committee should consider whether effective fraud awareness programmes are in place, updated as appropriate and effectively communicated to all employees.

(b) Some of the barriers to effective whistle blowing are-

- Operational like is the whistle blowing process fully embedded within the organisation? Do all staff members know what to do, what to look for? Do the hotlines and reporting lines actually work?

- Emotional and cultural barriers like Whistle blowers are commonly viewed as snitches, sneaks, grasses and gossips. This perception can make it difficult to blow the whistle even though individuals recognise that it is good for the company, employees, shareholders and other stakeholders.
- Potential whistle blowers often fear reporting incidents to management. Areas such as legal protection, fear of trouble and potential dismissal all play a part when an individual is considering whistle blowing.

(c) Some pointers for audit committee to consider regarding whistle blowing possibilities in the Company

- Are whistle-blowing policies and procedures documented and communicated across the organisation?
- Does the whistle-blowing policy ensure that it is both safe and acceptable for employees to raise concerns about wrongdoing?
- Were the whistle-blowing procedures arrived at through a consultative process? Do management and employees "buy into" the process? Are success stories publicised?
- Are concerns raised by employees responded to within a reasonable time frame?
- Are procedures in place to ensure that all reasonable steps are taken to prevent the victimisation of whistleblowers and to keep the identity of whistle- blowers confidential?
- Has a dedicated person been identified to whom confidential concerns can be disclosed? Does this person have the authority and statute to act if concerns are not raised with, or properly dealt with, by line management and other responsible individuals?
- Does management understand how to act if a concern is raised? Do they understand that employees (and others) have the right to blow the whistle?
- Has consideration been given to the use of an independent advice centre as part of the whistle-blowing procedures?
- In cases where no instances are being reported though the whistle-blowing channel did management reassess the effectiveness of the procedures?

Case Study – 5

Hotsun Company is a medium-sized listed company. Mr. Mohan is a wealthy business entrepreneur and the original founder of the company. He owns 28% of the ordinary shares and is the major shareholder, but he is no longer a member of the board of directors, having resigned several years ago when the company obtained its stock market quotation.

Although he is no longer a director, Mohan continues to show considerable interest in the business affairs of the company. Recently he has been demanding that the board should consult him on issues of business strategy and dividend policy. He also believes that at least two non-executive directors should resign because they contribute nothing of value to the board. Two members of the board agree, and argue that Mohan should be consulted regularly on important issues, given his success in leading the company in the past. However, the majority of the board members are hostile and resent Mohan's continual interference.

After a recent argument with the chairman, Mohan has threatened to sue members of the board for gross dereliction of their duties as directors. He has also demanded the resignation of a board member who is the owner of a property company that has just sold a property to Hotsun Company at a price that Mohan considers excessive. The chairman was unaware of this matter.

Required

As company secretary, prepare a report for the chairman advising him about

(a) the powers of the board under the Companies Act, 2013

(b) the appropriate measures for dealing with Mohan and responsibility of the board towards Mohan.

(c) the provisions of RPT considering the allegations made by Mohan.

Suggested Solution- Case Study-5

(a) **Powers of the Board:** As per Section 179(3) read with Rule 8 of Companies (Meetings of Board and its Powers) Rules, 2014, the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—

- to make calls on shareholders in respect of money unpaid on their shares;
- to authorise buy-back of securities under section 68;
- to issue securities, including debentures, whether in or outside India;
- to borrow monies;
- to invest the funds of the company;
- to grant loans or give guarantee or provide security in respect of loans;
- to approve financial statement and the Board's report;
- to diversify the business of the company;
- to approve amalgamation, merger or reconstruction;
- to take over a company or acquire a controlling or substantial stake in another company;
- to make political contributions;
- to appoint or remove key managerial personnel (KMP);
- to appoint internal auditors and secretarial auditor.

(b) Mr. Mohan was one of the founder directors of the Company and a major shareholder of the company holding 28% of the shares. A responsible business acts with care and loyalty towards its shareholders and in good faith for the best interests of the corporation. Business therefore has a responsibility to:

- Apply professional and diligent management in order to secure fair, sustainable and competitive returns on shareholder investments.
- Disclose relevant information to shareholders, subject only to legal requirements and competitive constraints.
- Conserve, protect, and increase shareholder wealth.
- Respect shareholder views, complaints, and formal resolutions.

(c) According to Section 2(76) of Companies Act 2013, "related party", with reference to a company, means –

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager is a member or director;

(v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. (2%) of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act: Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is –

- a holding, subsidiary or an associate company of such company; or
- a subsidiary of a holding company to which it is also a subsidiary;

Section 188 (1) of the Companies Act 2013 deals with the related party transactions with respect to:

- Sale, purchase or supply of any goods or materials
- Selling or otherwise disposing of, or buying, property of any kind
- Leasing of property of any kind
- Availing or rendering of any services
- Appointment of any agent for purchase or sale of goods, materials, services or property
- Related party's appointment to any office or place of profit in the company, its subsidiary company or associate company, and
- Underwriting the subscription of any securities or derivatives thereof, of the company.

Also, Section 188(1) of the Companies Act 2013 provides that a company shall enter into any contract or arrangement with a related party with respect to Related party transactions only with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to certain conditions as prescribed under Rule 15 of the Companies (Meetings of board and its Powers) Rules, 2014.

Here, one of the board members had sold his property to Hotsun Ltd. at a price which Mohan considers excessive. The board member is related party as per Section 2(76) of Companies Act 2013 and selling property of any kind is a related party transaction as per Section 188 (1) of the Companies Act 2013.

The law in India does not prohibit RPTs. Instead, the law puts into place a system of checks and balances, such as requirements for approval from the board of directors/shareholders, timely disclosures and prior statutory approvals, to ensure that the transactions are conducted within appropriate boundaries. RPTs are required to be managed transparently, so as not to impose a heavy burden on a company's resources, affect the optimum allocation of resources, distort competition or siphon off public resources.

Therefore, if the related party transaction has taken place with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to certain conditions as prescribed under Rule 15 of the Companies (Meetings of board and its Powers) Rules, 2014, then it is allowed as per the laws and regulations and the allegations of Mr. Mohan will not hold much significance.

Case Study-6

You are the Company Secretary of a large Indian multinational company operating in the energy sector. Your company has operations in 25 different countries, some of which are developing economies, and it has raised debt finance, as well as equity finance, in 15 of these countries. You are aware that there have been protests from environmental lobby groups in several areas regarding oil pipelines. There have also been demonstrations about the impact of operations on local communities.

Your company has an internal audit committee, an audit committee, and a reasonably well-developed system of internal control system. However, the board has decided that perhaps it should form a new committee, a 'risk committee', which will deal with risk management and internal control specifically.

Accordingly, the board has asked you to prepare a briefing paper which summarises following-

(a) the main risks facing the business at present and the relative importance of managing these risks to the business.

(b) legal provisions and role and functions of risk management committee.

(c) draft a risk management policy for the company.

Suggested Solution - Case Study – 6

(a) Various financial risk and non-financial risk are present in any situations which need to be managed and understood. The risk which has some direct financial impact on the entity is treated as financial risk. This risk may be Market risk, Credit risk, and Liquidity risk, Operational Risk, Legal Risk and Country Risk. The following chart depicts some of the various types of financial risks. This type of risks do not usually have direct and immediate financial impact on the business, but the consequences are very serious and later do have significant financial impact if these risks are not controlled at the initial stage. This type of risk may include, Business/Industry & Service Risk, Strategic Risk, Compliance Risk, Industry Fraud Risk, Reputation Risk, Transaction risk, Disaster Risk.

- *Business risk:* This is risk arising from the possibility of unexpected developments in the business environment for oil companies. There is a business risk arising from potential variations in the price of oil. This creates huge difficulties for oil companies. When oil prices fall to a very low level, it may be difficult to operate at a profit. The variations in price were linked to the condition of the global economy and the demand for oil.
- *Environmental risk:* Oil companies face environmental risk, which is the risk of changes in environmental conditions that could affect the company. An obvious risk is the limit to the supply of oil and gas as natural resources, and the problems of finding new sources of supply. There are also risks from environmental pollution in the extraction and movement of oil, which could expose the company to heavy fines.
- *Combination of business risk and environmental risk:* Climate change is bringing a demand for renewable sources of energy. Multinational oil companies are aware of this, and are investing in green technology. This will create major business opportunities in the future, but there is also the risk that a competitor will be more successful in developing products and technologies based on renewable energy. The combination of business risk and environmental risks are therefore possibly the biggest risks facing the company.
- *Health and safety risk and legal risk:* The risks from failure to comply with health and safety requirements. Injuries to employees or the general public from accidents at processing plants could result in high penalties.

- *Political risk:* Oil companies operate in many countries where the government may be unstable, or where the government is challenged by rebel groups. There is a risk of government action against companies, for example, the risk of nationalisation or part-nationalisation, or by political groups or local populations opposed to central government. At least one offshore oil platform of a major multinational has been attacked by regional "bandits".
- *Financial risks:* The company operates in 25 countries and has raised finance in 15 countries (an unusually large number of countries). It operates globally, and presumably has raised money in a variety of different currencies. It is therefore exposed to a variety of financial risks. These are risks of losses or threats to the stability of the business from unexpected changes in financial conditions, such as major changes in interest rates or foreign exchange rates.

Risk management plays vital role in strategic planning. It is an integral part of project management. An effective risk management plan focuses on identifying and assessing possible risks. Some of the key advantages of having risk management are as under:

- Risk Management in the long run always results in significant cost savings and prevents wastage of time and effort in firefighting. It develops robust contingency planning.
- It can help plan and prepare for the opportunities that unravel during the course of a project or business.
- Risk Management improves strategic and business planning. It reduces costs by limiting legal action or preventing breakages.
- It establishes improved reliability among the stake holders leading to an enhanced reputation.
- Sound Risk Management practices reassure key stakeholders throughout the organization.

(b) **Risk Management committee:** Regulation 21 of the SEBI (LODR) 2015 deals with the Risk Management Committee and provides as under:

(1) The board of directors shall constitute a Risk Management Committee.

(2) The majority of members of Risk Management Committee shall consist of members of the board of directors.

(3) The Chairperson of the Risk management committee shall be a member of the board of directors and senior executives of the listed entity may be members of the committee.

(3A) The risk management committee shall meet at least once in a year.

(4) The board of directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit (such function shall specifically cover cyber security).

(5) The provisions of this regulation shall be applicable to top 500 listed entities, determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

(c) **Model Risk Management Policy:** A risk management policy serves two main purposes: to identify, reduce and prevent undesirable incidents or outcomes and to review past incidents and implement changes to prevent or reduce future incidents. A risk management policy should include the following sections:

- Risk management and internal control objectives (governance)
- Statement of the attitude of the organisation to risk (risk strategy)
- Description of the risk aware culture or control environment
- Level and nature of risk that is acceptable (risk appetite)
- Risk management organisation and arrangements (risk architecture)
- Details of procedures for risk recognition and ranking (risk assessment)
- List of documentation for analysing and reporting risk (risk protocols)
- Risk mitigation requirements and control mechanisms (risk response)

- Allocation of risk management roles and responsibilities
- Risk management training topics and priorities
- Criteria for monitoring and benchmarking of risks
- Allocation of appropriate resources to risk management
- Risk activities and risk priorities for the coming year

Case Study – 7

A company Surya Ltd. has been mis-reporting its financial statements since more than 10 years which none of the stakeholders noticed for years. When the situation of the Company went from bad to worse and it had no option but to declare it bankrupt, the company issued a press statement that there is disparity between actual and reported results due to accounting errors.

The first question from shareholders of the Company was why the auditors had not spotted and corrected the fundamental accounting errors?

The auditor of the Company, WNC partnership (one of the largest audit firm in the country), had compromised its independence by a large audit fee and also consultancy income worth several times the audit fee. Because Surya Ltd. was such an important client for WNC, it had knowingly signed off inaccurate accounts in order to protect the management of the Company. The investigation also found a number of significant internal control deficiencies including no effective management oversight of the external reporting process and a disregard of the relevant accounting standards.

Based on the above fact, answer the following:

(a) Does the case highlight importance of independence of auditors? Explain provision under the Companies Act 2013 which promotes independence of auditors.

(b) Can such situations be voided with the provision of rotation of auditors? Critically examine

(c) NFRA constituted under the Companies Act 2013 has been vested with powers for action against the auditors. Explain powers and functions of NFRA.

Suggested Solution - Case Study – 7

(a) Yes, the given case very much highlights the importance of independence of directors. If directors had been independent and not under the influence of the client they would have performed their duties more diligently rather than signing inaccurate accounts statements.

Section 141 of the Companies Act 2013 provides that to maintain independence of the auditors the following cannot be appointed Auditors –

1. An officer or employee of the company.
2. A person who is partner or who in the employment, of an officer or employee of the company.
3. A person who or his relative or partner
   - → Who is holding any security or interest in the company or the subsidiary or the holding? Anyway latest can hold security or interest in the company of the face value which should not exceed Rupees 1 lakh.
   - → Who has indebted to the company or a subsidiary to hold and Associate Company is subsidiary or such holding company.
   - → Who has provided the guarantee for any security in the connection with if the indebtness of any third person of the company arises.

4. "A person or a firm who (whether directly or indirectly) has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company".
5. A person whose relative is a director or is in the employment of the company as a director or any other key managerial post.
6. A person who is in full time employment elsewhere or a person or a partner of a firm holding employment as its auditor, if such person or partner is at the date of such appointment, holding appointment as auditor of more than 20 companies.
7. A person who has been convicted by the court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction.
8. Any person whose subsidiary or associate company or any other form of entity is engaged as on the date of appointment in consulting and specialized services as provided in Section 144 (auditors not to render certain services).

Auditor's Remuneration and Non- Audit Services: Though Companies Act, 2013 does not specify any restrictions on auditor's remuneration it should be reasonable, adequate but not excess, keeping the scope of the audit and auditors capabilities in mind. Excess Remuneration is an incentive to retain the client and reduces their objectivity. Non – audit services may affect the independence of the auditor hence the following are prohibited under Section 144.

→ accounting and book keeping services;
→ internal audit;
→ design and implementation of any financial information system;
→ actuarial services;
→ investment advisory services;
→ investment banking services;
→ rendering of outsourced financial services;
→ management services; and
→ any other kind of services as may be prescribed.

Oversight of Auditors: To ensure independence and effectiveness of statutory auditors, the audit committee will review and monitor the auditor's independence, the audit scope and process, and performance of the audit team and accordingly recommend appointment, remuneration and terms of appointment of auditors of the company.

(b) Another important issue highlighted by the case is rotation of auditors. If the auditors have been changed after 4- 5 years, they would have different opinion on the financial statements. Since same auditors were continuing for a long time, the company was able to mis-report financial statement for more than 10 yrs. A mandatory audit rotation rule which sets a limit on the maximum number of years an audit firm can audit a given company's financial statements is a means to preserve auditor independence and possibly to increase investors' confidence in financial reports.

Mandatory audit firm rotation is defined in the Sarbanes-Oxley (SOX) Act as the imposition of a limit on the period of years during which an accounting firm may be the auditor of record. Mandatory audit firm rotation is often discussed as a potential way to improve audit quality – typically gaining attention when public confidence in the audit function has been eroded by events such as corporate scandals or audit failures.

When the same auditors continue in the same company for years and years, it results in a close relationship between management and auditors which increases the chances of fraud. Section 139(2) read with Rule 5 of the Companies (Audit and Auditors) Rules, 2014 provides that no listed company or a company belonging to the following classes of companies excluding one person companies and small companies:-

→ all unlisted public companies having paid up share capital of rupees 10 crore or more;

→ all private limited companies having paid up share capital of rupees 20 crore or more;

→ all companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crore or more

shall appoint or re-appoint –

→ an individual as auditor for more than one term of five consecutive years; and

→ an audit firm as auditor for more than two terms of five consecutive years.

Also, an individual auditor who has completed his term of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term. An audit firm which has completed two terms of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term. Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

(c) Since auditors are guilty of signing false accounts statement, there should be some authority to take action against defaulting auditors. The National Financial Reporting Authority (NFRA) is an independent regulator established under Section 132 of the Companies Act, 2013 to oversee the auditing profession. It is similar to the Public Company Accounting Oversight Body set by in the USA by the Sarbanes Oxley Act 2002. NFRA has the investigative and disciplinary powers. NFRA can:

❖ investigate either suo moto or on the reference made to it by Central Government into the matters of professional or other misconduct, committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949.

❖ impose penalties of not less than 1 lakh which may extend to five times of the fees received, in case of individuals professionals and of not less than 10 lakhs which may extend to ten times of the fees received, in case of professional firms; if the misconduct is proved.

❖ debarring the member or the firm from engaging himself or itself from practice as the member of the Institute of Chartered Accountant of India for a minimum period of six months which may extend to a period of 10 years.

❖ NFRA has also been vested with the same powers as are vested in civil courts under the Code of Civil Procedure, 1908 while trying a suit, relating to:

  ✓ discovery and production of books of account and other documents, as may be specified by the National Financial Reporting Authority;

  ✓ summoning, enforcing the attendance of persons and examination them on oath;

  ✓ issuing commissions for the examination of witnesses or documents;

  ✓ inspection of any books, registers and other documents of any person to whom NFRA has summoned, enforced the attendance and examined on oath;

It is also being provided in section 132 of the Act that no other institute or body shall initiate or continue any proceedings in such matters of misconduct where the NFRA has initiated an investigation under this section. However, any person aggrieved by any order of the NFRA may appeal before the Appellate Authority constituted for this purpose.

The NFRA have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of **chartered accountants.** And no other institute or body shall commence or continue any proceedings in such matters of delinquency or misconduct where the National Financial Reporting Authority has initiated an investigation.

Case Study - 8

Ms. Jaya is a director of finance for a charitable organisation. Aspiring to improve standards, she has worked hard to introduce tighter internal systems and to enhance inter-departmental relationships, and this has helped mould the finance staff into a more effective and dedicated team.

Two years ago she recruited a deputy, Dev, who, while technically competent, has increasingly sapped her own job satisfaction. Some of her longer-serving staff has commented informally to her that they find it irritating how Dev often seems unwilling to share information without being pressed. Some volunteers and staff have also told her that his attitude to them has made them consider resigning. However, no staff has formally complained or yet left the organisation.

There is tension between herself and Dev. He seems to resent any suggestions that she offers and to be incapable of receiving even mild criticism without taking offence. He has implied, several times, that he feels he is being unfairly harassed and bullied.

Jaya has discussed this situation informally with the chief executive. Although she has found Dev sometimes awkward and defensive, and she knows that another director also considers him somewhat abrasive, she has identified nothing that would warrant disciplinary action. Dev informs Jaya that he has been shortlisted for director of finance at another charity and he believes he is a strong candidate.

Quietly, Jaya feel elated at the prospect that he might be leaving. The following day she receives a letter from Dev's prospective new employer. (Dev has offered her name as referee without seeking her agreement.) The letter asks questions concerning the ability of the candidate to work in teams, to motivate volunteers and to accept advice.

For several reasons, Jaya would very much like Dev to be offered the position with the other charity. However, she is concerned that an honest response to the enquiries would jeopardise his chances of success, as such a response can only be negative.

Based on the above fact, answer the following:

(a) Discuss and highlight the key issues regarding the inherent ethical dilemmas.
(b) Discuss the fundamental ethical principles and the dilemma of Jaya?
(c) Briefly explain the course of action Jaya can take.

Suggested Solution - Case Study – 8

(a) The ethical dilemma consideration takes us into the grey zone of business and professional life, where things are no longer black or white and where ethics has its vital role today. A dilemma is a situation that requires a choice between equally balanced arguments or a predicament that seemingly defies a satisfactory solution.

An ethical dilemma is a moral situation in which a choice has to be made between two equally undesirable alternatives. Dilemmas may arise out of various sources of behaviour or attitude, as for instance, it may arise out of failure of personal character, conflict of personal values and organizational goals, organizational goals versus social values, etc. A business dilemma exists when an organizational decision maker faces a choice between two or more options that will have various impacts on the organization's profitability and competitiveness; and its stakeholders. In situations of this kind, one must act out of prudence to take a better decision.

Some of the key issues regarding the inherent ethical dilemmas in business are –
Fundamental Ethical Issues: The most fundamental or essential ethical issues that businesses must face are integrity and trust. A basic understanding of integrity includes the idea of conducting business affairs with honesty and a commitment to treating every customer fairly. When customers think a company is exhibiting an unwavering commitment to ethical business practices, a high level of trust can develop between the business and the people it seeks to serve.

Diversity and the Respectful Workplace: An ethical response to diversity begins with recruiting a diverse workforce, enforces equal opportunity in all training programs and is fulfilled when every employee is able to enjoy a respectful workplace environment that values their contributions. Maximizing the value of each employees' contribution is a key element in your business's success.
Decision-Making Issues: A useful method for exploring ethical dilemmas and identifying ethical courses of action includes collecting the facts, evaluating any alternative actions, making a decision, testing the decision for fairness and reflecting on the outcome. Ethical decision-making processes should center on protecting employee and customer rights, making sure all business operations are fair and just, protecting the common good, and making sure the individual values and beliefs of workers are protected.

Compliance and Governance Issues: Businesses are expected to fully comply with environmental laws, federal and state safety regulations, fiscal and monetary reporting statutes and all applicable civil rights laws.

(b) The four fundamental ethical principles are-

- **The Principle of Respect for autonomy:** Autonomy is Latin for "self-rule" We have an obligation to respect the autonomy of other persons, which is to respect the decisions made by other people concerning their own lives. This is also called the principle of human dignity. It gives us a negative duty not to interfere with the decisions of competent adults, and a positive duty to empower others for whom we're responsible.
- **The Principle of Beneficence:** We have an obligation to bring about good in all our actions. We must take positive steps to prevent harm. However, adopting this corollary principle frequently places us in direct conflict with respecting the autonomy of other persons.
- **The Principle of non-maleficence:** We have an obligation not to harm others: "First, do no harm. Corollary principle: Where harm cannot be avoided, we are obligated to minimize the harm we do. Corollary principle: Don't increase the risk of harm to others. Corollary principle: It is wrong to waste resources that could be used for good. Each action must produce more good than harm.
- **The Principle of justice:** We have an obligation to provide others with whatever they are owed or deserve. In public life, we have an obligation to treat all people equally, fairly, and impartially. Corollary principle: Impose no unfair burdens.

Jaya should think of her actions in terms of the fundamental ethical principles given above and provide her feedback accordingly.

(c) The course of action available for Jaya is described below –

i. **Analyse the available options:** List the alternative courses of action available.

ii. **Consider the consequences:** Think carefully about the range of positive and negative consequences associated with each of the different paths of action available.
− Who/what will be helped by what is done?
− Who/what will be hurt?
− What kinds of benefits and harms are involved and what are their relative values?

− What are the short-term and long-term implications?

iii. **Analyse the actions:** Actions should be analysed in a different perspective i.e. viewing the action per se disregard the consequences, concentrating instead on the actions and looking for that option which seems problematic. How do the options measure up against moral principles like honesty, fairness, equality, and recognition of social and environmental vulnerability? In the case you are considering, is there a way to see one principle as more important than the others?

iv. **Make decision and act with commitment:** Now, both parts of analysis should be brought together and a conscious and informed decision should be made. Once the decision is made, act on the decision assuming responsibility for it.

v. **Evaluate the system:** Think about the circumstances which led to the dilemma with the intention of identifying and removing the conditions that allowed it to arise.

Case Study - 9

Flora Garments is a large clothes retailer and exporter in India. Its business strategy is based around vigorous cost leadership and it prides itself on selling fashionable garments for men, women and children at very low prices compared to its main rivals. For many years, it has achieved this cost leadership through carefully sourcing its garments from countries where labour is cheaper and where workplace regulation is less.

As a company with a complex international supply chain, the board of Flora Garments regularly reviews its risks. It has long understood that three risks are of particular concern to the Flora Garments shareholders: exchange rate risk, supply risk and international political risk. Each one is carefully monitored and the board receives regular briefings on each, with the board believing that any of them could be a potential source of substantial loss to the shareholders.

For the past decade or so, Flora Garments has bought in a substantial proportion of its supplies from Country X, a relatively poor developing country known for its low labour costs and weak regulatory controls. Last year, 65% of Flora Garments's supplies came from this one country alone. Country X has a reputation for corruption, including government officials, although its workforce is known to be hard-working and reliable. Most employees in Country X's garment industry are employed on 'zero hours' contracts, meaning that they are employed by the hour as they are needed and released with no pay when demand from customers like Flora Garments is lower.

Half of Flora Garments' purchases from Country X are from Gloria Company, a longstanding supplier to Flora Garments. Owned by the Fusilli brothers, Gloria outgrew its previous factory and wished to build a new manufacturing facility in Country X for which permission from the local government authority was required. In order to gain the best location for the new factory and to hasten the planning process, the Fusilli brothers paid a substantial bribe to local government officials.

The Fusilli brothers at Gloria felt under great pressure from Flora Garments to keep their prices low and so they sought to reduce overall expenditure including capital investments. Because the enforcement of building regulations was weak in Country X, the officials responsible for building quality enforcement were bribed to provide a weak level of inspection when construction began, thereby allowing the brothers to avoid the normal Country X building regulations.

In order to save costs, inferior building materials were used which would result in a lower total capital outlay as well as a faster completion time. In order to maximise usable floor space, the brothers were also able to have the new building completed without the necessary number of escape doors or staff facilities. In each case, bribes were paid to officials to achieve the outcomes the Fusilli brothers wanted. Once manufacturing began in the new building, high demand from Flora Garments meant that Gloria was able to increase employment in the facility. Although, according to Country X building regulations, the floor area could legally accommodate a maximum of 500 employees, over 1,500 were often working in the building in order to fulfil orders from overseas customers including Flora Garments. After only two years of normal operation, the new Gloria building collapsed with the loss of over 1,000 lives. Collapsing slowly at first, the number of people killed or injured was made much worse by the shortage of escape exits and the large number of people in the building. As news of the tragedy was broadcast around the world, commentators reported that the weakness in the building was due to the 'obsession with cheap clothes'.

Flora Garments was severely criticised in the local as well as international platform for being part of the cause, with many saying that if retailers pushing too hard for low prices, was one consequence of that. In response, Flora Garments' public relations department said that it entered into legal contracts with Gloria in order to provide its customers with exceptional value for money. Flora Garments said that it was appalled and disgusted that Gloria had acted corruptly and that the Flora Garments board was completely unaware of the weaknesses and safety breaches in the collapsed building.

Jessica, who was also the leader of a national pressure group 'Protect workers' rights' (PWR) lobbying the Country X government for better working conditions and health and safety practices for workers in the country questioned whether multinational companies such as Flora Garments should be allowed to exert so much economic pressure on companies based in developing countries. Jessica also wrote a letter to the board of Flora Garments, stating that Flora Garments was an unethical company because it supplied a market in its home country which was obsessed with cheap clothes. As long as its customers bought clothes for a cheap price, she believed that no-one at Flora Garments cared about how they were produced. She said that large international companies such as Flora Garments needed to recognise they had accountabilities to many beyond their shareholders and they also had a wider fiduciary duty in the public interest.

The defective Gloria factory in Country X, she argued, would not have existed without demand from Flora Garments, and so Flora Garments had to recognise that it should account for its actions and recognise its fiduciary duties to its supply chain as well as its shareholders. At the same time as events in Country X unfolded, the business journalists reporting on the events and Flora Garments' alleged complicity in the tragedy also became aware of a new innovation in business reporting called integrated reporting, an initiative of the International Integrated Reporting Council (IIRC).

The board of Flora Garments discussed the issues raised by the well-publicised discussion of Jessica's open letter and the comments from business journalists about integrated reporting. The board was, in principle, a supporter of the integrated reporting initiative and thought it would be useful to explain its position on a range of issues in a press release.

Required:

(a) How this case has affected reputation of Flora Garments? Provide some suggestions for reputation risk management to the company.

(b) Draft a statement for the board of Flora Garments explaining the role of Flora Garments's as a 'corporate citizen' given its international supply chain.

(c) Explain the concept of sustainable development to Flora Garments and also state the principles provided by the National Guidelines on Responsible Business Conduct (NGRBC), 2019

(d) Describe the basic framework of integrated reporting, and the potential benefits to Flora Garments' reporting on different capital types.

Suggested Solution - Case Study – 9

(a) Reputation Risk as the risk arising from negative perception on the part of customers, counterparties, shareholders, investors, debt-holders, market analysts, other relevant parties or regulators that can adversely affect a bank's ability to maintain existing, or establish new, business relationships and continued access to sources of funding (eg. through the interbank or securitization markets).

Reputational risk is multidimensional and reflects the perception of other market participants. Furthermore, it exists throughout the organisation and exposure to reputational risk is essentially a function of the adequacy of the bank's internal risk management processes, as well as the manner and efficiency with which management responds to external influences on bank-related transactions.

The reputation of Flora Garments was badly damaged after the incident of building collapsed. Flora Garments was severely criticised in the local as well as international platform for being part of the cause, with many saying that if retailers pushing too hard for low prices, was one consequence of that.

Jessica, who was also the leader of a national pressure group 'Protect workers' rights' (PWR) lobbying in the Country X government for better working conditions and health and safety practices for workers in the country questioned whether multinational companies such as Flora Garments should be allowed to exert so much economic pressure on companies based in developing countries. She also wrote a letter to the board of Flora Garments, stating that Flora Garments was an unethical company because it supplied a market in its home country which was obsessed with cheap clothes. Flora Garments' loss of reputation may have long lasting damages like:

→ It destroys the Brand Value
→ Steep downtrend in share value.
→ Ruined of Strategic Relationship
→ Regulatory relationship is damaged which leads to stringent norms.
→ Recruitment to fetch qualified staff as well the retention of the old employees becomes difficult.

Some of the suggestions for effectively managing the reputation risk include following-

→ Integration of risk while formulating business strategy.
→ Effective board oversight.
→ Image building through effective communication.
→ Promoting compliance culture to have good governance.
→ Persistently following up the Corporate Values.

- → Due care, interaction and feedback from the stakeholders.
- → Strong internal checks and controls
- → Peer review and evaluating the company's performance.
- → Quality report/ newsletter publications
- → Cultural alignments

(b) Corporate citizenship is a commitment to improve community well-being through voluntary business practices and contribution of corporate resources leading to sustainable growth. Corporate responsibility is achieved when a business adapts CSR well aligned to its business goals and meets or exceeds, the ethical, legal, commercial and public expectations that society has of business.

The term corporate citizenship implies the behaviour, which would maximize a company's positive impact and minimize the negative impact on its social and physical environment. It means moving from supply driven to more demand led strategies; keeping in mind the welfare of all stakeholders; more participatory approaches to working with communities; balancing the economic cost and `benefits with the social; and finally dealing with processes rather than structures. The ultimate goal is to establish dynamic relationship between the community, business and philanthropic activities so as to complement and supplement each other. Corporate citizenship is being adopted by more companies who have come to understand the importance of the ethical treatment of stakeholders.

As a good corporate citizen, Flora Garments is required to focus on the following key aspects:

- → Absolute Value Creation for the Society
- → Ethical Corporate Practices
- → Worth of the Earth through Environmental Protection
- → Equitable Business Practices
- → Corporate Social Responsibility
- → Innovate new technology/process/system to achieve eco-efficiency
- → Creating Market for All
- → Switching over from the Stakeholders Dialogue to holistic Partnership
- → Compliance of Statutes
- → Effective supply chain management

(c) Sustainable development is a broad concept that balances the need for economic growth with environmental protection and social equity. It is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations. Sustainable development is a broad concept and it combines economics, social justice, environmental science and management, business management, politics and law.

The goal of sustainable development is to maintain economic growth without environment destruction. Sustainable Development indicates development that meets the needs of the present generation without compromising with the ability of the future generations to meet their needs. The principle behind it is to foster such development through technological and social activities which meets the needs of the current generations, but at the same time ensures that the needs of the future generation are not impaired. For example, natural energy resources, like Coal and Petroleum etc., should be prudently used avoiding wastage so that the future generation can inherit these energy resources for their survival also.

The contribution of sustainable development to corporate sustainability is twofold. First, it helps set out the areas that companies should focus on: environmental, social, and economic performance. Secondly, it provides a common societal goal for corporations, governments, and civil society to work towards ecological, social, and economic sustainability. However, sustainable development by itself does not provide the necessary arguments for why companies should care about these issues. Those arguments come from corporate social responsibility and stakeholder theory.

Corporate sustainability encompasses strategies and practices that aim at meeting the needs of the stakeholders today while seeking to protect, support and enhance the human and natural resources that will be needed in the future.

The nine thematic pillars of business responsibility provided by the National Guidelines on Responsible Business Conduct (NGRBC), 2019 are:

- Businesses should conduct and govern themselves with integrity in a manner that is Ethical, Transparent and Accountable.
- Businesses should provide goods and services in a manner that is sustainable and safe
- Businesses should respect and promote the well-being of all employees, including those in their value chains.
- Businesses should respect the interests of and be responsive to all their stakeholders.
- Businesses should respect and promote human rights.
- Businesses should respect and make efforts to protect and restore the environment.
- Businesses, when engaging in influencing public and regulatory policy, should do so in a manner that is responsible and transparent.
- Businesses should promote inclusive growth and equitable development.
- Businesses should engage with and provide value to their consumers in a responsible manner.

(d) Integrated reporting is a new approach to corporate reporting which is rapidly gaining international recognition. Integrated reporting is founded on integrated thinking, which helps demonstrate interconnectivity of strategy, strategic objectives, performance, risk and incentives and helps to identify sources of value creation. Integrated reporting is a concept that has been created to better articulate the broader range of measures that contribute to long-term value and the role, organisations play in society. Central to this is the proposition that value is increasingly shaped by factors additional to financial performance, such as reliance on the environment, social reputation, human capital skills and others. This value creation concept is the backbone of integrated reporting.

In addition to financial capital, integrated reporting examines five additional capitals that should guide an organisation’s decision-making and long-term success — its value creation in the broadest sense. While integrated reports benefit a broad range of stakeholders, they’re principally aimed at long-term investors. Integrated reporting starts from the position that any value created as a result of a sustainable strategy – regardless of whether it becomes a tangible or intangible asset — will translate, at least partially, into performance. Market value will therefore be impacted.

Integrated Reporting is one step ahead of sustainability reporting and its set to become the way companies report their annual financial and sustainability information together in one report. The aim of an integrated report is to clearly and concisely tell the organization’s stakeholders about the company and its strategy and risks, linking its financial and sustainability performance in a way that gives stakeholders a holistic view of the organization and its future prospects.

Conceptually, integrated reporting would build on the existing financial reporting model to present additional information about a company's strategy, governance, and performance. It is aimed at providing a complete picture of a company, including how it demonstrates stewardship and how it creates and sustains value.

The primary purpose of an integrated report is to explain to providers of financial capital how an organisation creates value over time. An integrated report benefits all stakeholders interested in an organisation's ability to create value over time, including employees, customers, suppliers, business partners, local communities, legislators, regulators and policy-makers.

International Integrated Reporting Framework (IIRC) has developed an International Integrated Reporting Framework to establish Guiding Principles and Content Elements that govern the overall content of an integrated report, and to explain the fundamental concepts that underpin them.

Benefits of integrated reporting to Flora Garments on different capital types:

As a business owner or manager, securing your customers', suppliers', finance providers', and other external stakeholders' trust is paramount. Using trust in the business is built by succinctly highlighting what drives value. Through integrated thinking, Flora Garments can build a better, more concrete understanding of the factors that determine its ability to create value over the short, medium, and long term.

Integrated Reporting uses the term "capitals" and a multi-capital model to recognize the fact that value is not stored in financial capital alone, but in all sorts of capitals. Just like financial capital, when these other capitals are properly understood and managed, they can continue to release value over time, while simultaneously growing in their capacity to continue to drive value in the future. Integrated reporting identifies these other capitals as manufactured, intellectual, human, social and relationship, and natural.

- *Financial capital* – the equity, debts, and grants available to Flora Garments to be used in the provision of goods or services.
- *Manufactured capital* – the tangible goods and infrastructure that Flora Garments owns, leases, or has access to that are used in the provision of goods or services.
- *Intellectual capital* – the knowledge, intellectual property, systems, and processes that Flora Garments has at its disposal that provide it with a competitive advantage and positively affect its future earning potential.
- *Human capital* – the skills, experience, and motivation that employees and management in Flora Garments possess that provide the foundation for future development and growth.
- *Social and relationship capital* – Flora Garments' brands and reputation, including its relationships with the community in which it operates, its customers, and business partners and others in its value chain, such as various government agencies.
- *Natural capital* – Flora Garments' access to environmental resources that it can use to provide a return and/or that it affects through its activities or the goods and services it creates.

Case Study – 10

Growmart, a grocery and general merchandise store and the global retailer has more than 5000 retail units in 20 different countries. In 2017, Growmart was caught using child labour in a developing country X-Land. At the end of year, media made public the news that Growmart was using child labour at two factories in X-Land. Children aged 10-14 years old were found to be working in the factories for less than $50 a month making products of the Growmart brand for export. The company had zero tolerance policy for underage workers and ceased business with the two factories immediately and alleged that despite its effort to inspect all factories, it is difficult to enforce its own corporate code of conduct with thousands of subcontractors around the world.

Now, on the basis of advice from an NGO from country X-Land that if Growmart cuts business with these factories, many workers could be laid off for lack of production, suppliers will hide abuses and workers will not tell the truth to auditors in order not to lose their jobs; Growmart resumed operations with two factories after giving warning that if underage workers were found or the company did not make corrections, the factory would be permanently banned from Growmart's production. Growmart has a strict corporate code of conduct in the industry but according to investigations Growmart is not able to enforce its code in developing countries.

Thus, Growmart changed its zero tolerance child labour policy due to NGO advice. Now, instead of immediately cutting business relationships with suppliers hiring up to two underage workers, they receive a warning and are obliged to take corrective measures for the next audit. Only when the supplier has hired more than two underage workers and has not corrected the situation does Growmart permanently terminate business relationships. This new policy was adopted in order assure that suppliers report the reality of working conditions.
Also, Growmart requires its suppliers who produce toys in China to sign up to the ICTI CARE Process. The ICTI CARE Process was created by the international toy industry to achieve a safe and human working environment for toy factory workers worldwide. In addition, Growmart conducts internal validation audits by Growmart's Ethical Sourcing team. These validation audits ensure that the ICTI CARE process is properly implemented and that it meets Growmart's Standards for Suppliers.

Growmart has updated policies against discrimination. Its GRI Report emphasizes gender equality, a diverse workforce and appointing women to top management positions. The report even dedicates a separate paragraph on 'Empowering women at Growmart'.
Based on the above case:

(a) Explain the concept of CSR and why successful companies like Growmart should adopt CSR in its strategy of growth?

(b) Explain triple bottom line approach of CSR.

(c) Highlight the factors which affect CSR with the examples from the given case.

Suggested Solution - Case Study – 10

(a) Business entity is expected to undertake those activities, which are essential for betterment of the society. Every aspect of business has a social dimension. Corporate Social Responsibility means open and transparent business practices that are based on ethical values and respect for employees, communities and the environment. It is designed to deliver sustainable value to society at large as well as to shareholders.

Corporate Social Responsibility is nothing but what an organisation does, to positively influence the society in which it exists. It could take the form of community relationship, volunteer assistance programmes, special scholarships, preservation of cultural heritage and beautification of cities. The philosophy is basically to return to the society what it has taken from it, in the course of its quest for creation of wealth. With the understanding that businesses play a key role of job and wealth creation in society, CSR is generally understood to be the way a company achieves a balance or integration of economic, environmental, and social imperatives while at the same time addressing shareholder and stakeholder expectations.

CSR is generally accepted as applying to firms wherever they operate in the domestic and global economy. The way businesses engage/involve the shareholders, employees, customers, suppliers, Governments, non-Governmental organizations, international organizations, and other stakeholders is usually a key feature of the concept. While an organisation's compliance with laws and regulations on social, environmental and economic objectives set the official level of CSR performance, it is often understood as involving the private sector commitments and activities that extend beyond this foundation of compliance with laws. Essentially, Corporate Social Responsibility is an inter-disciplinary subject in nature and encompasses in its fold:

- Social, economic, ethical and moral responsibility of companies and managers,
- Compliance with legal and voluntary requirements for business and professional practice,
- Challenges posed by needs of the economy and socially disadvantaged groups, and
- Management of corporate responsibility activities.

Even successful companies like Growmart should incorporate CSR because it is very important strategy as wherever possible, consumers want to buy products from companies they trust; suppliers want to form business partnerships with companies they can rely on; employees want to work for companies they respect; and NGOs, increasingly, want to work together with companies seeking feasible solutions and innovations in areas of common concern.

Growmart's reputation had gone down because of employing child labour. The company adopted CSR approach towards the issue and gave warning to the supplier instead of immediately cutting business relationships with suppliers. Thus, CSR is a tool in the hands of corporate like Growmart to enhance the market penetration of their products, enhance its relation with stakeholders. CSR activities carried out by the enterprises affects all the stakeholders, thus making good business sense, the reason being contribution to the bottom line. The social responsibility of business can be integrated into the business purpose so as to build a positive synergy between the two.

- CSR creates a favourable public image, which attracts customers.
- It builds up a positive image encouraging social involvement of employees, which in turn develops a sense of loyalty towards the organization, helping in creating a dedicated workforce proud of its company.
- Society gains through better neighborhoods and employment opportunities, while the organisation benefits from a better community, which is the main source of its workforce and the consumer of its products.
- The company's social involvement discourages excessive regulation or intervention from the Government or statutory bodies, and hence gives greater freedom and flexibility in decision-making.
- The good public image secured by one organisation by their social responsiveness encourages other organizations in the neighborhood or in the professional group to adapt themselves to achieve their social responsiveness.
- The atmosphere of social responsiveness encourages co-operative attitude between groups of companies. One company can advise or solve social problems that other organizations could not solve.

(b) Triple Bottom Line (TBL) is based on the premise that business entities have more to do than make just profits for the owners of the capital, only bottom line people understand. "People, Planet and Profit" is used to succinctly describe the triple bottom lines. **"People"** (Human Capital) pertains to fair and beneficial business practices toward labor and the community and region in which a corporation conducts its business. **"Planet"** (Natural Capital) refers to sustainable environmental practices. It is the lasting economic impact the organization has on its economic environment A

TBL company endeavors to benefit the natural order as much as possible or at the least do no harm and curtails environmental impact. **"Profit"** is the bottom line shared by all commerce. The need to apply the concept of TBL is caused due to –

- Increased consumer sensitivity to corporate social behavior
- Growing demands for transparency from shareholders/stakeholders
- Increased environmental regulation
- Legal costs of compliances and defaults
- Concerns over global warming
- Increased social awareness
- Awareness about and willingness for respecting human rights
- Media's attention to social issues
- Growing corporate participation in social upliftment

While profitability is a pure economic bottom line, social and environmental bottom lines are semi or non-economic in nature so far as revenue generation is concerned but it has certainly a positive impact on long term value that an enterprise commands. But discharge of social responsibilities by corporates is a subjective matter as it cannot be measured with reasonable accuracy.

The current generation people are well aware of what goes on around them. People today know a lot about environment, how it affects them, how things we do affects the environment in turn. For the aware and conscientious consumers today, it is important that they buy products that do not harm the environment. They only like to deal with companies that believe and do things for the greater good of planet earth.

(c) Many factors influence CSR activities of companies:

- Globalization – Growmart was a global company and supplier's activities in some other developing part of the world made it to change its policy and work together with suppliers. Thus, focus on cross-border trade, multinational enterprises and global supply chains is increasingly raising CSR concerns related to human resource management practices, environmental protection, and health and safety, among other things.
- Governments and intergovernmental bodies, such as the United Nations, the Organisation for Economic Co-operation and Development and the International Labour Organization have developed compacts, declarations, guidelines, principles and other instruments that outline social norms for acceptable conduct. In the given case advise of NGO was important factor in changing the CSR policy of Growmart.
- Advances in communications technology, such as the Internet, cellular phones and personal digital assistants, are making it easier to track corporate activities and disseminate information about them. Non-governmental organizations now regularly draw attention through their websites to business practices they view as problematic.
- Consumers and investors are showing increasing interest in supporting responsible business practices and are demanding more information on how companies are addressing risks and opportunities related to social and environmental issues.
- Numerous serious and high-profile breaches of corporate ethics have contributed to elevated public mistrust of corporations and highlighted the need for improved corporate governance, transparency, accountability and ethical standards.
- Citizens in many countries are making it clear that corporations should meet standards of social and environmental care, no matter where they operate.

- There is increasing awareness of the limits of government legislative and regulatory initiatives to effectively capture all the issues that corporate social responsibility addresses.
- Businesses are recognizing that adopting an effective approach to CSR can reduce risk of business disruptions, open up new opportunities, and enhance brand and company reputation.

Case Study – 11

Ms. Sania, a fund manager at institutional investor - Investo House, was reviewing the annual report of one of the major companies in her portfolio. The company, Sunway Ltd, had recently undergone a number of board changes as a result of a lack of confidence in its management from its major institutional investors of which Investo House was one.

The problems started two years ago when a new chairman at Sunway Ltd started to pursue what the institutional investors regarded as very risky strategies whilst at the same time failing to comply with a stock market requirement on the number of non-executive directors on the board.

Sania rang Sunway Ltd's investor relations department to ask why it still was not in compliance with the requirements relating to non-executive directors. Also when she asked how its board committees could be made up with an insufficient number of nonexecutive directors, the investor relations manager said he didn't know and that Sania should contact the chairman directly. She was also told that there was no longer a risk committee because the chairman saw no need for one.

Sania telephoned the chairman of Sunway Ltd. She began by reminding him that Investo House was one of Sunway Ltd's main shareholders and currently owned 17% of the company. She went on to explain that she had concerns over the governance of Sunway Ltd's and that she would like him to explain his noncompliance with some of the requirements of SEBI LODR Regulations, 2015 and also why he was pursuing strategies viewed by many investors as very risky.

The chairman reminded Sania that Sunway Ltd had outperformed its sector in terms of earnings per share in both years since he had become chairman and that rather than questioning him, she should trust him to run the company as he saw fit. He thanked Investo House for its support and hung up the phone.

Required:

(a) Explain what an 'agency cost' is and discuss the problems that might increase agency costs for Investo House in the case of Sunway Ltd.

(b) Describe, with reference to the case, the conditions under which it might be appropriate for an institutional investor to intervene in a company whose shares it holds.

(c) Evaluate the contribution that a risk committee made up of non-executive directors could make to Sania's confidence in the management of Sunway Ltd.

Suggested Solution - Case Study - 11

(a) Definition of agency costs: Agency costs arise from the need of principals (here shareholders) to monitor the activities of agents (here the board, particularly the chairman). This means that principals need to find out what the agent is doing, which may be difficult because they may not have as much information about what is going on as the agent does. Principals also need to introduce mechanisms to control the agent over and above normal analysis. Both finding out and introducing mechanisms will incur costs that can be viewed in terms of money spent, resources consumed or time taken.

Problems with agency costs in Sunway Ltd.

- **Attitudes to risk**: The first reason for increased agency costs is that the company's attitude to risk is a major area of concern on which Investo House requires more information, since the risk appetite appears significantly greater than what would normally be expected in this sector.
- **Unwillingness of chairman to be monitored**: Agency costs will certainly increase because he is unwilling to supply any information about the reasons for his policies, certainly indicating arrogance and also a lack of willingness to accept accountability. This means that Investor will have to find out from other sources, for example any nonexecutive directors who are on the board. Alternatively they may contact other investors and take steps to put more pressure on Chairman, for example by threatening to requisition an extraordinary general meeting.
- **Inadequacy of existing mechanisms**: Agency costs will also increase because existing mechanisms for communicating concerns appear to be inadequate. There are insufficient non-executive directors on the board to exert pressure on the Chairman. There is no risk management committee to monitor risks. The investor relations department is insufficiently informed and unhelpful. The Chairman has abruptly dismissed the one-off phone call. Because of the seriousness of the concerns, ideally there should be regular meetings between Chairman and the major shareholders, requiring preparation from both parties and increasing agency costs.

(b) The conditions under which it might be appropriate for an institutional investor to intervene in a company whose shares it holds are-

- Institutional shareholders may intervene if they perceive that management's policies could lead to a fall in the value of the company and hence the value of their shares.
- There could be concerns over strategic decisions over products, markets or investments or over operational performance. Although they can in theory sell their shares, in practice it may be difficult to offload a significant shareholding without its value falling.
- Institutional investors may intervene because they feel management cannot be trusted like in the case Chairman has done away a key component of the control system (the risk committee) without good reason.
- Institutional investors may take steps if they feel that there is insufficient influence being exercised by nonexecutive directors over executive management.
- Intervention would be justified if there were serious concerns about control systems.
- Even if there is no question of dishonesty, there may be intervention if institutional investors feel that management is failing to address their legitimate viewpoints.

(c) Importance of Risk Management Committee: Risk committees are considered to be good practice in most worldwide governance regimes; particularly in situations like this where there are doubts about the attitudes of executive management. A risk committee staffed by non-executive directors can provide an independent viewpoint on Sunway Ltd.'s overall response to risk; a significant presence of non-executive directors, as required by governance guidelines, would be able to challenge Chairman's attitudes.

- The committee can pressurize the board to determine what constitutes acceptable levels of risk to reduce the incidence and impact on the business.
- Once the board has defined acceptable risk levels, the committee should monitor whether Sunway Ltd. is remaining within those levels, and whether earnings are sufficient given the levels of risks that are being borne.

- There should be a regular system of reports to the risk management committee covering areas known to be of high risk, also one-off reports covering conditions and events likely to arise in the near future. This should facilitate the monitoring of risk.
- The committee should monitor the effectiveness of the risk management systems, focusing particularly on executive management attitudes towards risk and the overall control environment and culture.
- A risk management committee can judge whether there is an emphasis on effective management or whether insufficient attention is being given to risk management due to the pursuit of high returns.