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By **Kumar Panda**

In the backdrop of India's commitments made in the UN Climate Change Conference in 2021, the Central Government has recently enacted the Energy Conservation (Amendment) Act, 2022 (**'Amendment Act'**) to amend the two decades old Energy Conservation Act, 2001. The move aims to strengthen the regulatory framework on energy consumption and promote energy efficiency in the country. The article in this issue of Corporate Amicus highlights the significant features of the Amendment Act like, introduction of carbon credit trading, extension of applicability to motor vehicles and vessels, prohibition of manufacture or import of certain goods, applicability to residential buildings, and increase in penalties, etc. The article concludes by stating that the actions of the Government in the recent years are aimed at advancing *'panchamrit'* goals, as presented by India during COP26. According to the author, with renewed focus on sustainable development goals to secure future generations, we may see more policy reforms in future.

Electricity Conservation (Amendment) Act, 2022: An overview

By Kumar Panda

During the UN Climate Change Conference in 2015 ('**COP21**'), as part of its Nationally Determined Contributions ('**NDCs**'), India had committed to route 40 per cent of its installed electricity capacity from non-fossil energy sources by 2030. The Central Government in December 2021 announced achieving this target nine years ahead of schedule.

In the subsequent UN Climate Change Conference in 2021 ('**COP26**'), India has presented five elements (*Panchamrit*) for the country's climate action as follows:

- Achieving non-fossil energy capacity to 500 gigawatts by 2030
- Meeting 50 per cent of its energy requirements till 2030 with renewable energy
- Reducing its projected carbon emission by one billion tons by 2030
- Reducing the carbon intensity of its economy by 45 per cent by 2030; and
- Achieving net zero carbon emissions by 2070.

Further, the NDCs were updated in 2022 to represent the *panchamrit* commitments. Towards meeting the ambitious climate goals, the Central Government has recently enacted the Energy Conservation (Amendment) Act, 2022 ('**Amendment Act**'). This amendment to the two decades old Energy Conservation Act 2001 (Principal Act) has been made to strengthen the regulatory framework on energy consumption and promoting energy efficiency in the country.

Significant features of the Amendment Act:

Introduction of carbon credit trading: The Amendment Act has the provisions for creation of a carbon market by notification of a 'Carbon Credit Trading Scheme' (CCTS) by the Central Government. While the term 'carbon credit' is not defined under the Amendment Act or the Principal Act, this refers to credits that could be earned from the reduction of greenhouse gas emissions which could be traded in accordance with Article 6 of the Paris Agreement (i.e., COP21). The entities registered and complying with the carbon credit trading scheme will be issued a carbon credit certificate. These carbon credit certificates can be purchased by any person on voluntary basis. The practical and implementation aspects of the carbon credit trading will be clearer once the CCTS is notified in future.

Government to specify share of non-fossil sources: The Central Government will now specify a minimum share of consumption of non-fossil sources by designated consumers as energy or feedstock. The designated consumers are listed in the Schedule to the Amendment Act and include industries such as aluminium, steel, cement, fertilizers, paper, sugar, railways, petrochemicals, etc.

Extension of applicability to motor vehicles and vessels: In a significant move, the Amendment Act extends the applicability of the energy conservation regime to vehicles (as defined under the Motor Vehicles Act, 1988) and vessels (which include any watercraft used or capable of being used in inland waters or in coastal waters). Under the extant regime, the Central Government could only specify norms and standards for equipment and appliances. In addition to equipment and appliances, the Amendment Act now empowers the Central Government to specify energy conservation norms to vehicles and vessels.

Prohibition of manufacture or import: The Central Government can now prohibit manufacture or import of any equipment, appliance, vehicle, or vessel which does not conform to the specified energy consumption norms. Further, an industrial unit non-confirming to the norms can be ordered to close its operations.

Applicability to residential buildings: Under the extant regime, a 'building' meant any structure or erection which is having a connected load of 100 Kilowatt (kW), or contract demand of 120 Kilo- volt Ampere (kVA) and above, and is used or intended to be used for commercial purposes. This definition is now expanded to bring in residential buildings within its scope. The existing Energy Conservation Building Code is now replaced with the 'Energy Conservation and Sustainable Building Code' to represent the broader scope of commitment towards sustainability.

Increased penalties: The Amended Act replaces the existing monetary penalties with enhanced limits, and has specific references to vehicle manufacturers and vessels with additional penalties on these classes for non-conforming with energy consumption standards.

Conclusion:

The actions of the Government in the recent years are aimed at advancing the '*panchamrit*' goals. A definitive regulatory framework is necessary for achieving such commitments. The Amendment Act is one such measure. The mandatory condition of non-fossil fuel consumption is also linked to the development of a green hydrogen production capacity and the effective implementation of the Green Hydrogen Policy that was announced last year.

This financial year 2022-23 has also brought in mandatory ESG (Environment, Social, and Governance) reporting in the form of submission of a Business Responsibility and Sustainability Report (BRSR) by the top 1,000 listed entities (by market capitalisation) which can be used as a tool to understand the carbon emissions by Indian corporates and the impact of government policies over them. SEBI has also recently come up with a consultative paper on ESG disclosures, rating, and investments signalling the need to review and revamp the ESG compliance regime for listed entities and other market players. With renewed focus on sustainable development goals to secure future generations, we may see more policy reforms in the future.

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Notifications & Circulars

- Ministry of Corporate Affairs (MCA) notifies amendments to various Rules to revise certain forms
- Declaration of mandatory information on outer retail package – Letter by Department of Consumer Affairs
- Amendments to the Credit Guarantee Fund for Micro Units notified
- SEBI Circular in relation to Transaction in Corporate Bonds through Request for Quote platform by Alternative Investment Funds (AIFs) issued
- Employees' Provident Funds (Amendment) Scheme, 2023 notified
- SEBI (Issue and Listing of Non-Convertible Securities) (Amendment) Regulations, 2023, notified
- Statement on Developmental and Regulatory Policies issued by Reserve Bank of India (RBI)
- Enforcement regarding compliance with standards for non-carbonated water based beverages under Food Safety Regulations
- Reduction in initial application fee for FSSAI license
- Manner of achieving minimum public shareholding – SEBI issues Circular

Ministry of Corporate Affairs (MCA) notified certain amendments under the following rules to revise various forms:

- ***Companies (Management and Administration) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. dated 21 January 2023, has amended the Companies (Management and Administration) Rules, 2014 wherein Form No. MGT 3 and Form No. MGT 14 have been substituted.
- ***Companies (Share Capital and Debentures) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. dated 21 January 2023, has amended the Companies (Share Capital and Debentures) Rules, 2014 wherein Form Nos. SH-7, SH-8, SH-9, and SH-11 have been substituted.
- ***Companies (Registration Offices and Fees) Rules, 2013 amended:*** The MCA *vide* Notification G.S.R. 45(E), dated 20 January 2023, has amended the Companies (Registration Offices and Fees) Rules, 2013 wherein Form Nos. GNL-2, GNL-3, and GNL-4 have been substituted.
- ***Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. dated 19 January 2023, has amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 wherein Form Nos. MR-1 and MR-2 have been substituted.
- ***Companies (Incorporation) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. (E), dated 19 January 2023, has amended the Companies (Incorporation) Rules, 2014 wherein Form RUN, Form Nos. INC-4, INC-6, INC-9, INC-12, INC-13, INC-18, INC-20, INC-20A, INC-22, INC-23, INC-24, INC-27, INC-28, INC-31, SPICe + Part A, SPICe + Part B, INC-33, INC-34, INC-35 and RD-1 have been substituted.
- ***Companies (Prospectus and Allotment of Securities) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. 37(E), dated 20 January 2023, has amended Companies (Prospectus and Allotment of Securities) Rules, 2014 wherein Form Nos. PAS-2, PAS-3, and PAS-6 have been substituted.
- ***Companies (Registration of Foreign Companies) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. 36(E), dated 20 January 2023, has amended Companies (Registration of Foreign Companies) Rules, 2014 wherein Form Nos. FC-1, FC-2, FC-3, and FC-4 have been substituted.
- ***Companies (Authorised to Register) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. 39(E), dated 19 January 2023, has amended Companies (Authorised to Register) Rules, 2014 wherein Form No. URC-1 has been substituted.
- ***Companies (Accounts) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. 40(E), dated 20 January 2023, has amended Companies (Accounts) Rules, 2014 wherein Form No. AOC-5 has been substituted.

- ***Companies (Miscellaneous) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R. dated 20 January 2023, has amended the Companies (Miscellaneous) Rules, 2014 wherein Form Nos. MSC-1, MSC-3, and MSC-4 have been substituted.
- ***Companies (Appointment and Qualification of Directors) Rules, 2014 amended:*** The MCA *vide* Notification G.S.R.(E), dated 20 January 2023, has notified Companies (Appointment and Qualification of Directors) Rules, 2014 wherein Form Nos. DIR-3, DIR-3C, DIR-5, DIR-6, DIR-8, DIR-9, DIR-10, DIR-11, and DIR-12 have been substituted.
- ***Nidhi Rules, 2014 notified:*** The MCA *vide* Notification G.S.R. 35(E), dated 20 January 2023, has notified Nidhi Rules, 2014 wherein Forms No. NDH-1, NDH-3, and NDH-4 have been substituted.

Declaration of mandatory information on outer retail package – Letter by Department of Consumer Affairs

The Legal Metrology Division, Department of Consumer Affairs *vide* Letter I-10/ 02/ 2023-W&M, dated 18 January 2023 has stated that it is essential and mandatory to declare, under Rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011, information regarding the name and address of the manufacturer/packer/importer, country of origin of imported products, common/generic name of the product contained in a package, net quantity of the product, month and year of manufacture/pack/import, expiry date of products used for human consumption, MRP inclusive of taxes, details of consumer care, dimensions of product where relevant, and the Unit Sale Price (which came into effect on 1 February 2023). It was further stated that this mandatory information needs to be declared on every retail package which contains more than one retail package (as a group/combination/multi-piece) under Rule 4 of said rules. Further, MRP, net quantity and date of expiry/ use by date (wherever applicable) shall be declared on the outer package of all the packages, packed inside the combination/ group/multi piece/gift package, required under Rule 6 and Rule 14 of the said rules.

Amendments to the Credit Guarantee Fund for Micro Units notified

The Department of Financial Services, Ministry of Finance *vide* Notification S. O. 457(E), dated 31 January 2023 has amended the Notifications S.O. 1443(E) dated 18 April 2016, S.O. 1261(E) dated 16 April 2020 and S.O. 2668(E) dated 1 July 2021.

Paragraph 8(i)(b) of S.O. 1443(E) is amended to include that *from FY 2023-24, guarantee fee on portfolios (including on accounts turned Non-Performing Assets (NPA) of past years shall be charged on outstanding amount as on April 1 of the Financial Year except in case of working capital accounts where it shall continue to be charged on sanctioned amount.* Further Paragraph 8(ii) is amended to include that "*For subsequent years w.e.f. April 01, 2023, data of live portfolio of accounts (including NPA accounts) of previous years for which guarantee is sought to be continued during the Financial Year will be furnished by the Member Lending Institutions (MLI) on or before July 31 and Annual Guarantee fee shall be paid on or before August 31 or*

such other date as may be decided by NCGTC (National Credit Guarantee Trustee Company) to enable guarantee cover for the Financial Year".

Clause under sub-Paragraph (v)(d) of S.0. 1261(E) is omitted and 'Standard Basic Rate' under S.0. 1443(E), will be read as, "Standard Basic Rate (SBR) of 1% of sanctioned/outstanding amount, as the case may be".

SEBI Circular in relation to Transaction in Corporate Bonds through Request for Quote platform by Alternative Investment Funds (AIFs) issued

The Securities and Exchange Board of India *vide* Circular No. SEBI/HO/AFD/PoD/P/CIR/2023/017, dated 1 February 2023, has notified that Alternative Investment Funds (AIFs) shall undertake at least 10% of their total secondary market trades in Corporate Bonds by value in a month by placing/seeking quotes on the RFQ (Request For Quote) platform. In terms of SEBI Circular SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/142 dated October 19, 2022, quotes on RFQ platform can be placed to an identified counterparty (i.e., 'one-to-one' mode) or to all the participants (i.e., 'one-to-many' mode). In this regard, it is clarified that all transactions in Corporate Bonds, wherein AIF(s) is on both sides of the trade, shall be executed through the RFQ platform in 'one-to-one' mode. However, any transaction entered by an AIF in Corporate Bonds in 'one-to-many' mode which gets executed with another AIF, shall be counted in 'one-to-many' mode and not in 'one-to-one' mode.

Employees' Provident Funds (Amendment) Scheme, 2023 notified

The Ministry of Labour and Employment *vide* Notification G.S.R. 93(E), dated 13 February 2023 has notified the Employees' Provident Funds (Amendment) Scheme, 2023 thereby amending Paragraph 11, sub-Paragraph (1) of Employees' Provident Funds Scheme, 1952. According to the amendment, the Central Board of Trustees shall meet at least twice in each financial year and the Executive Committee and the Regional Committee shall meet at least four times in each financial year.

SEBI (Issue and Listing of Non-Convertible Securities) (Amendment) Regulations, 2023, notified

The Securities and Exchange Board of India (SEBI) *vide* Notification SEBI/LAD-NRO/GN/2023/119, dated 2 February 2023, has amended the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021.

The 2023 Regulations have amended Regulation 2(1)(q) of the original regulation thereby increasing the ambit of "green debt security" to include projects or assets under the category of:

i. pollution prevention and control
ii. circular economy adapted products, production technologies and processes and/or eco efficient products
iii. blue bonds which comprise of funds raised for sustainable water management
iv. yellow bonds which comprise of funds raised for solar energy generation; and

v. transition bonds which comprise of funds raised for transitioning to a more sustainable form of operations, in line with India's Intended Nationally Determined Contributions.

Other changes include: (a) Regulation 15(6) and (7) where changes with respect to compliance in sending notice regarding recall or redemption of non-convertible securities to the eligible holders, (b) under Regulation 18, where a sub-regulation (6A) has been added mandating the appointment of the person nominated by the debenture trustee(s), in accordance with Regulation 15 of the SEBI (Debenture Trustees) Regulations, 1993, and (c) a similar addition under Regulation 23, where sub-regulation (6) has been added to include that if issuer is a company then appointment of person nominated by Debenture trustee shall be in the same manner as stated above. Further, Regulations 33A, 50(5) and Clause 1 under Schedule VI have been inserted, which deal with Period of Subscription, collection of a regulatory fee as specified in Schedule VI, and deposit of a non-refundable fee i.e., 0.00025% of issue size, subject to the minimum of twenty-five thousand rupees and maximum of fifty lakh rupees, as payable to the SEBI Board, respectively.

Statement on Developmental and Regulatory Policies issued by Reserve Bank of India (RBI)

The RBI *vide* a Press Release dated 8 February 2023 set out policy measures pertaining to Financial Markets, Regulation, Payment and Settlement Systems and Currency Management. The policy proposed the following:

a. Introduction of lending and borrowing in government securities to add liquidity to the market

b. Recovery of penal charges on loans instead of penal interests

c. Regulatory initiatives on climate risk and sustainable finance such as adapting a broad framework to accept green deposits, establishing a disclosure framework on financial risks related to climate and guidance on stress testing and climate scenario analysis

d. Expansion of scope of the Trade Receivables Discounting System (TReDS) by introducing insurance facility, taking up of factoring business by institutions resulting in more financiers for the system and enabling secondary market operations

e. Extension of UPI Payments for Inbound Travelers in India, by linking NRE/NRO (Non-Residential External and Non-Residential Ordinary) accounts to the UPI System.

f. For currency management, a QR Code based Coin Vending Machine is to be set up for distribution of coins.

Enforcement regarding compliance with standards for non-carbonated water based beverages under Food Safety Regulations

The FSSAI passed an order dated 12 January 2023, reiterating the amendment passed with respect to the specification of standards for Non-Carbonated Water Based Beverages (Non-alcoholic) with special emphasis on the word 'shall', and directed all regional directors to look into the manufacturing of

such products using water conforming to the standards prescribed, containing ingredients singly or in combination such as sugar, honey, etc., ensuring that the product is not misrepresented as 'water', and checking for specifications of vitamins and minerals in the product and their compliance with the set standard.

Reduction in initial application fee for FSSAI license

The FSSAI has issued an order dated 10 February 2023 stating that the initial application fee for FSSAI License has been reduced to INR 1000 + GST [as applicable]. Once the application is scrutinized and found to be correct, the differential amount of the License Fee i.e., total applicable license fee minus INR 1000 (already paid) along with GST on the differential amount shall be collected from the Food Business Operator (FBO) prior to grant of the License. Such differential amount is to be submitted within 30 days and non-submission of the same shall lead to auto-rejection of the application. The order shall be applicable only for the applications for a new license submitted on or after 10 February 2023.

The above circular is issued in order to promote startups and new businesses, offering the ease as incentive to get registered. The total license fee remains the same as prescribed under Section 3 of the FSS (Licensing and Registration of Food Businesses) Regulations, 2011 and only the application fee shall be bifurcated into INR 1000 and the calculated differential amount.

Manner of achieving minimum public shareholding – SEBI issues Circular

The Securities and Exchange Board of India (SEBI) *vide* Circular SEBI/HO/CFD/PoD2/P/CIR/2023/18 dated 3 February 2023 has re-iterated the manner of achieving minimum public shareholding (MPS) and two additional methods have been introduced as compared to the previous circular issued on the same subject. Accordingly, a listed entity shall adopt any of the following methods in order to achieve compliance with the MPS requirements mandated under Rules 19(2)(b) and 19A of the Securities Contracts (Regulation) Rules, 1957 (SCRR) read with regulation 38 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations):

i. issuance of shares to public through prospectus

ii. offer for sale of shares held by promoters to public through the prospectus

iii. offer for sale of shares through the stock exchange mechanism

iv. the rights issue and bonus issue to public shareholders

v. allotment of equity shares according to SEBI (Issue of Capital and Disclosure Requirements Regulations) 2018

vi. sale of shares held by promoters in the open market; increase in public holding pursuant to exercise of options and allotment of shares and public holding under ESOP scheme; and

vii. transfer of shares by promoter(s) / promoter group to ETFs managed by registered Mutual funds; and such other methods as approved by the SEBI Board on a case-to-case basis in order to achieve compliance with MPS requirements.

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Stock exchanges shall monitor the methods specified and increase entities' public holding, along with ensuring compliance with the MPS Requirements as given in this concerned circular.

Ratio Decidendi

- Adjudication of an avoidance application is independent of resolution of the corporate debtor, and can survive corporate insolvency resolution process – Delhi High Court
- Upon forfeiture of rights under Arbitration Clause, the Court retains its power to appoint the appropriate Arbitral Tribunal – Bombay High Court
- After the approval of resolution plan by CoC, an application to withdraw under IBC Section 12A cannot be entertained – NCLAT, New Delhi

Adjudication of an avoidance application is independent of resolution of the corporate debtor, and can survive Corporate Insolvency Resolution Process (CIRP)

The High Court of Delhi has held that the application made under the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), for avoidance of preferential/ undervalued transactions, should be decided by the adjudicating authority i.e., National Company Law Tribunal ('**NCLT**') or National Company Law Appellate Tribunal ('**NCLAT**'), as the case may be, notwithstanding the fact that the CIRP has been concluded and resolution applicant has also stepped into the shoes of promoter of the erstwhile Corporate Debtor.

Brief facts:

This case stems from the CIRP of Bhushan Steel Limited ('**BSL**') initiated on the instance of Section 7 petition filed by State Bank of India ('**SBI**'). The Resolution Professional ('**RP**') had filed avoidance application under Section 43-51 and Section 66 of the IBC for avoidance of several suspect transactions of BSL entered with Venus Recruiters Private Ltd. (Respondent No. 1). This was filed after the submission of the resolution plan for approval before the NCLT but before its approval. After filing of the avoidance application, NCLT and NCLAT approved the resolution plan filed by Tata Steel Limited ('**TSL**'), as a consequence of which TSL took control of the BSL limited and became Tata Steel Bhushan Steel Limited ('**TSBSL**') (Petitioner).

Thereafter, the NCLT issued notice to Respondent No. 1 in the avoidance application after the completion of CIRP. Respondent No. 1 filed a writ petition praying that the proceeding borne out of the avoidance application be declared void or *non-est* since CIRP had concluded and TSL had assumed the control of BSL. The Ld. Single Judge in the writ petition held that:

(i) RP becomes *functus officio* after the completion of CIRP; and

(ii) Once the CIRP process comes to an end, an application for avoidance of transactions cannot be adjudicated.

Consequently, two Letters Patent Appeals (LPAs) were filed against the order of Ld. Single Judge by the successful resolution applicant, the Appellant TSBSL and Union of India ('UOI').

Submissions by TSBSL/ Appellant:

- It was submitted that the RP is only required to file the avoidance applications before the completion of CIRP. It need not be completed during CIRP and neither will the pendency of the same delay and/or affect the CIRP. Avoidance application being independent of CIRP, can continue in parallel with and beyond CIRP.
- If the view taken in the writ petition is allowed, it will result in all pending avoidance applications post CIRP being declared infructuous and thereby destroying the relevant

provision of the IBC directly causing loss to the creditors and Corporate Debtor in terms of value.

Submission by UOI:

- It was submitted that the avoidance proceedings are not personal to the insolvency professional acting as the RP. A perusal of the nature of orders that can be passed under Section 44 of the IBC suggests that the immediate recipient of the outcome of the avoidance proceedings is the corporate debtor. Therefore, even after the conclusion of the CIRP, the office of the RP does not become functus officio and the avoidance proceedings do not come to an end.
- In arguendo, even if RP becomes functus officio, the avoidance applications can still continue as the RP only has the burden to file an avoidance application before completion of the CIRP. Once such role is discharged, an avoidance application survives CIRP.

Submissions by Resolution Professional:

- It was submitted that Respondent No. 1 cannot be allowed to go scot-free merely because the RP is rendered *functus officio* under Sections 30, 31 of the Code.
- Avoidance application can be pursued by the Corporate Debtor upon the successful resolution of the CIRP.

Submissions by Respondent No. 1:

- It was submitted that IBC being a law providing for resolution of a corporate debtor in a time bound manner does not provide for continuation of an avoidance application after conclusion of CIRP. Continuing the avoidance application after CIRP will not serve the purpose of filing the avoidance application since TSL/ TSBSL are not the parties that entered into the transactions with Respondent No. 1.
- Further, the tenure of RP cannot be extended beyond CIRP hence it becomes *functus officio*, and the CoC has already issued a 'No dues Certificate' after the receipt of monies.

Decision

The Court held that CIRP and avoidance applications, are, by their very nature, a separate set of proceedings wherein, the former, being objective in nature, is time bound whereas the latter requires a proper discovery of suspect transactions that are to be avoided by the adjudicating authority. It was observed that the scheme of the IBC reinforces this difference. Accordingly, it was held that adjudication of an avoidance application is independent of the resolution of the corporate debtor and can survive CIRP. Furthermore, it was held that it cannot be accepted that avoidance applications will be rendered infructuous once CIRP is concluded as such an interpretation will render the provisions pertaining to suspect transactions otiose and let the beneficiaries of such transactions walk away, scot-free.

It was held that the RP will not be *functus officio* for the purpose of pursuing avoidance application even after the completion of CIRP. The method and manner of the RP's remuneration ought to be decided by the Adjudicating Authority itself.

It was lastly held that the amounts that are made available after the transactions are avoided cannot go to the resolution applicant. Such amount is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. Moreover, in pursuance of the scheme of the IBC, benefit acquired from the adjudication of avoidance applications, in cases where treatment of such applications could not be accounted in the plan, must be given to the creditors of the erstwhile corporate debtor.

[*Tata Steel BSL Limited* v. *Venus Recruitment Private Limited & Ors.*, Judgment dated 13 January 2023, Letters Patent Appeal (LPA) No. 37/2021 and Civil Miscellaneous Applications No. 2664/2021, 2665/2021, Delhi High Court**]**

Upon forfeiture of rights under Arbitration Clause, the Court retains its power to appoint the appropriate Arbitral Tribunal

The Bombay High Court has held that even if a party's right to appoint its nominee to the Arbitral Tribunal according to the arbitration clause is forfeited because it failed to exercise its right within the statutory period after receiving the notice invoking arbitration, the Court has the authority to appoint an appropriate Arbitral Tribunal taking into consideration the nature of the dispute.

Brief facts:

The Respondent had floated a tender for the construction of dwelling units and the Petitioner was its successful bidder. The project was delayed due to which disputes arose between the parties, as a result of which the Petitioner sent a notice invoking arbitration to the Respondent, further proposing for the appointment of a sole arbitrator. The Respondent had denied all claims stated in said notice and contended for breach of procedure, since according to the arbitration clause, disputes above INR 1 crore were to be adjudicated by a tribunal of 3 arbitrators in which 2 arbitrators were to be nominated by each party from the panel provided by the Respondent and those arbitrators were to then choose a third arbitrator. Since the Respondent failed to nominate any arbitrator in reply to the notice invoking arbitration, the Petitioner filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 ('**ACA**') before the Bombay HC.

Submissions by the Petitioner:

- Relying on the case of *Voestalpine Schienen GMBH* v. *Delhi Metro Rail Corporation Ltd.* (2017) 4 SCC 665, it was argued that nominating arbitrators from a panel of 3/ 5 arbitrators chosen by the Respondent would amount to unilateral appointment of arbitrator which is hit by Section 12(5) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") read with Seventh Schedule.
- Further, the Respondent lost its right to appoint an arbitrator to the matter due to lapsing of the statutory period pertaining to the arbitration notice sent. This is in line with Section 11(6) of the Arbitration Act.

Submissions by the Respondent:

- It was submitted that Section 12(5) read with Seventh Schedule of the Arbitration Act is not applicable in the

current scenario as the option available to the Petitioner to nominate its arbitrator on the panel counterbalanced the Respondent's rights to appoint an arbitrator, as mandated in the arbitration clause.

- Since the notice sent is invalid and *mala fide*, there exists no loss of rights for the Respondent to appoint an arbitrator, as lapsing of notice period becomes immaterial due to the void nature of the notice itself, stemming from breach of procedure.

Decision:

Referring to the judgment in *Perkins Eastman Architects DPC & Anr.* v. *HSCC (India) Limited,* (2020) 20 SCC 760, the Court held that if only one party had the right to designate a sole Arbitrator, such unilateral appointment would render the arbitration clause void. However, appointment of arbitrators by both parties, who in turn appoint a third arbitrator, results in counterbalancing of rights. The Court further held that the arbitration clause is void if a party appoints an arbitrator from the panel provided by the opposite party, thus being in clear violation of Section 12(5) read with Seventh Schedule of the Arbitration Act. Further, a party's right to appoint its nominee to the Arbitral Tribunal according to the arbitration clause would be forfeited upon the lapsing of the statutory period of a notice sent invoking arbitration, leading to filing of an application under Section 11(6) of the Arbitration Act. It was held that, in the present case, despite the fact that the Respondent surrendered their ability to nominate their candidate, the High Court can still appoint an Arbitral Tribunal in interest of justice. Accordingly, the Court partially granted the petition and appointed two arbitrators who are nominees of the Petitioner and the Respondent each, directing the selection of a third arbitrator to constitute the panel for resolution of the dispute through arbitration.

[*PSP Projects Limited* v. *Bhiwandi Nizampur City Municipal Corporation, through Municipal Commissioner* – Judgment dated 27 January 2023 in Arbitration Petition 89 of 2021, High Court of Judicature at Bombay]

After the approval of resolution plan by CoC, an application to withdraw under Section 12A of the IBC cannot be entertained

The National Company Law Appellate Tribunal ('**NCLAT**'), Delhi has held that once the resolution plan has been approved by the Committee of Creditors ('**CoC**'), the resolution applicant cannot alter or withdraw the plan, and this rule applies to the CoC as well. It was held that, therefore, once the CoC has given its consent the same cannot be withdrawn later, and the application for initiating CIRP cannot be withdrawn as per Section 12A of the Insolvency and Bankruptcy Code, 2016 (IBC).

Brief facts:

In the present case, an application for Corporate Insolvency Resolution Process ('**CIRP**') was approved by the Adjudicating Authority against the Corporate Debtor (Respondent No. 1), following which only one resolution plan was received, which was approved by the CoC by 100% votes in January 2020 The Resolution Professional (RP) also issued a letter of intent to the

successful resolution applicant which was accepted by said applicant unconditionally and a performance bank guarantee was also deposited. An application was filed by the RP before the jurisdictional National Company Law Tribunal ('NCLT') for approval u/s. 30(6) of the IBC, which was pending. Thereafter, the Appellant i.e., Mr. Hem Singh Bharana (the ex-promoter of the Corporate Debtor) herein submitted an application before the NCLT requesting to keep the application filed by the RP seeking approval of the resolution plan in abeyance on account of a settlement plan submitted by him in August 2022, which was rejected by the NCLT. Thereafter, the Appellant preferred the present appeal before the NCLAT.

Submissions by Appellant:

- It was submitted that a revised settlement proposal u/s. 12A of the IBC had been submitted by the Appellant to 2 out of the 3 financial creditors of Corporate Debtor (Respondent No. 3 and 4, who constitute more than 84% vote share in the CoC), which had been accepted by them. Therefore, the RP erred in not submitting said proposal for consideration and voting before the CoC.
- The Appellant relied on the judgment of NCLAT in *Shaji Purushothaman* v. *Union Bank of India & Ors*, Company Appeal (AT) (Insolvency) No.921 of 2019, in which the NCLAT had held that the CoC has the authority to approve of the settlement claims if they consider it to be better than the resolution plan.
- It was also submitted that solely because the resolution plan was approved by the COC, there was no compulsion on them to reject the settlement proposal under Section 12A of the IBC.
- Under Section 33(2) of IBC, CoC, even after the approval of the resolution plan by the Committee but prior to its approval by the Adjudicating Authority has the power to approve of the liquidation of the corporate debtor.

Submissions by the Resolution Professional (Respondent No. 1):

- Once the resolution plan has been approved by the CoC, no further settlement proposal can be entertained and even the CoC is bound by the plan.

Submission by Successful Resolution Applicant (Respondent No. 2):

- It was submitted taking into consideration the law that was laid down by the Apex Court in the case of *Ebix Singapore Pvt. Ltd.* v. *Committee of Creditors of Educomp Solutions Limited and Anr.*, Civil Appeal No.3224 of 2020, that the approval of the resolution plan by the CoC binds both the CoC and the successful resolution applicant.
- Further, the settlement proposal has been submitted by the Appellant more than two years after the approval of the resolution plan by the CoC.

Submission by Edelweiss Asset Reconstruction Company Limited and Bank of India (Respondent No. 3 and 5):

- It was submitted that the CoC has the authority to accept a better proposal, which is by the Appellant. In this case the resolution plan approved by the CoC is still in pre-

approval stage and hence, the CoC was entitled to vote on the proposal u/s. 12A of the IBC.

Decision:

It was held that the intention of the legislating authority does not in any way signify that, post the approval of the resolution plan by the CoC, an application under Section 12A can be entertained by the CoC. The Tribunal held that, in accordance with the Regulation 30A of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an application for withdrawal under Section 12A can only be made post the issuance of expression of interest, and only if they have sufficient reasons to justify the same.

The Tribunal has explained the case of *Ebix Singapore Pvt. Ltd.* v. *Committee of Creditors of Educomp Solutions Limited and Anr.* (*supra*) that the main idea behind this judgment is, after the approval of the resolution plan by the CoC they are bound by it and the CoC has no authority to alter its decision at a later stage. The adjudicating authority found no grounds for abeyance of the application for approval of the resolution plan and therefore, no error was committed in rejecting the application of the ex-promoter/ Appellant. The decision of the adjudicating authority was hence upheld by the bench and the appeal was dismissed.

[*Hem Singh Bharana* v. *Pawan Doot Estate Private Limited and Ors.* – Judgment dated 5 January 2023 Company appeal (AT) Insolvency No. 1481 of 2022, NCLAT Delhi**]**

News Nuggets

- Insolvency – Benefit available under IBC Section 10A only when default occurs during prohibited period – Admission of date of default cannot be ignored
- Insolvency – TDS payments by Corporate Debtor do not amount to acknowledgement of liability
- Insolvency – Landowner is not a Financial Creditor in a development agreement
- Insolvency – Upon breach of consent, nature of financial debt remains the same
- Arbitration – An agreement between the parties to explore conciliation before arbitration is not mandatory in nature
- Arbitration – Claims are not time barred in case of a delay in approaching the appointing authority for the constitution of the tribunal
- Company Law – Liability of a Company Secretary

Insolvency – Benefit available under IBC Section 10A only when default occurs during prohibited period – Admission of date of default cannot be ignored

The National Company Law Appellate Tribunal (NCLAT), Delhi Bench, has observed that the Corporate Debtor admitted default in payment of interest for quarters ending September 2019 and December 2019 vide a letter dated 9 September 2021, and hence, the contention that as per the Debenture Subscription Agreement (DSA) the date of default for repayment of an instalment occurred only on 31 August 2020 was rejected. The NCLAT in the case of *Vishal Agarwal* v. *ICICI Prudential Real Estate AIF-I & Anr* [Judgment dated 23 January 2023] observed that the prohibited period under Section 10A of the Insolvency and Bankruptcy Code, 2016 (IBC) was from 25 March 2020 – 25 March 2021. It was of the view that since there was clear admission on behalf of the Appellant in default in payment of interest for the quarters ending September 2019 and December 2019, Appellant cannot be permitted to contend that the default was committed only on 31 August 2020. Accordingly, it was held that the benefit under Section 10A can only be claimed when there is a clear default during the prohibited period and said benefit cannot be claimed by ignoring the admission of default which was prior to 25 March 2020.

Insolvency – TDS payments by Corporate Debtor do not amount to acknowledgement of liability

The National Company Law Tribunal, Mumbai Bench (NCLT) held that Tax Deducted at Source (TDS) payments does not amount to an acknowledgment of debt. In the case of *Kalpesh Jaysukh Shah* v. *M/s Arch Pharmalabs Limited* [Judgment dated 8 February 2023], NCLT relied upon *P.M. Cold Store Pvt. Ltd.* v *Goouksheer Farm Fresh Pvt. Ltd. & Anr. (2022),* wherein it was held that TDS paid cannot be considered as acknowledgment in writing of the liability by the corporate debtor, to reiterate that the payment of TDS by the corporate debtor shall not be considered as an acknowledgement of debt/liability and hence cannot extend the period of limitation.

Insolvency – Landowner is not a Financial Creditor in a development agreement

The two-judge bench of NCLAT has held that a landowner who is a party to a development agreement cannot be construed as the financial creditor under Section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016 (IBC) and therefore cannot be included in the Committee of Creditors (CoC). In the case of *Ashoka Hi-Tech Builders Pvt. Ltd.* v. *Sanjay Kundra & Anr.* [Judgment dated 18 January 2023], the Tribunal removed the landowner from the CoC as no debt was disbursed against the time value of money. Further, it was also highlighted that the landowner was merely

a collaborator in accordance with said agreement, as only the land was provided by him, and not in any way a financial creditor. The NCLAT relied on *Namdeo Ramchandra Patil and Ors.* v. *Vishal Ghisulal* (2022), wherein the NCLAT had observed that the pre-condition for application of the Explanation (i) of Section 5(8)(f) of the IBC, which allows for any amount raised by an allottee under a real estate project to be considered as financial debt, is for the amount to be raised from the allotment. In the present case, no amount had been raised from the landowners and according to the NCLAT, the mere submission that they are "allotees" within the meaning of Section 2(d) of Real Estate (Regulation and Development) Act, 2016 does not make the current transaction as financial debt within the meaning of Section 5(8)(f) of the IBC.

Insolvency – Even upon breach of consent terms, nature of financial debt remains the same

While deciding whether the nature of financial debt changes when the Corporate Debtor defaulted in making payments pursuant to breach of consent terms entered into after withdrawal of the CIRP petition by the Financial Creditor, the National Company Law Appellate Tribunal, New Delhi (NCLAT) in *Priyal Kantilal Patel* v. *IREP Credit Capital Pvt. Ltd. & Anr* [Judgment dated 1 February 2023] observed that breach of consent terms cannot be treated in parity with the financial debt. The fact that, after breach of consent terms, instead of reviving the original CIRP petition the Financial Creditor filed a fresh petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC), would not be a ground of rejection. It was held that the breach of the consent terms does not change the nature of the financial debt for which a CIRP petition was moved earlier. The appeal was hence dismissed. However, liberty was granted to the Corporate Debtor to file an application under Section 12A of the Insolvency and Bankruptcy Code, 2016 in case any settlement is entered into between the parties.

Arbitration – An agreement between the parties to explore conciliation before arbitration is not mandatory in nature

The Delhi High Court has held that, in accordance with Section 77 of the Arbitration and Conciliation Act, 1996, in certain circumstances the parties can resort to arbitration, even though the conciliation proceedings between the parties are pending, in order to preserve the rights of the parties. In the case of *Oasis Projects Ltd.* v. *Managing Director, National Highway and Infrastructure Development Corporation Ltd. (NHIDCL)* [Judgment dated 7 February 2023], a clause in the concerned contract provided that, in case of any dispute, before resorting to arbitration the parties have to resort to the method of conciliation upon mutual consent. While deciding the matter, the Court relied upon *Ravindra Kumar Verma* v. *BPTP Ltd. & Anr.* (2014) wherein it was held that when arbitration is being resorted to without completion of conciliation, the urgency of the matter has to be taken note of and in order to understand whether there is an urgency or not, the words of the parties have to be taken into consideration. In the present case, the Court held that there was an urgency with respect to the rights of the party and therefore they had decided to appoint an arbitrator. Thus, the appeal was allowed.

Arbitration – Claims are not time barred in case of a delay in approaching the appointing authority for the constitution of the tribunal

The Delhi High Court, in the case of *Kidde India Ltd.* v. *National Thermal Power Corporation Ltd* [Judgment dated 7 February 2023], ruled that the time taken for the constitution of the arbitral tribunal does not render the claims of the party to be barred by time. The Court relied on *Bharat Sanchar Nigam Limited & Anr.* v *Nortel Networks India Private Limited (2021)* wherein it was held that the limitation period within which a party is required to approach the court for seeking constitution of the arbitral tribunal cannot be confused with the limitation period for invoking the arbitration agreement. If there is any delay by the party in taking further steps for constitution of an arbitral tribunal, the same will not render the party's substantive claims to be barred by limitation. The Court, in the present case, observed that the period of limitation has to be assessed according to when the arbitration proceedings are actually commencing as per Section 37(3) of the Arbitration and Conciliation Act, 1996, and when the notice of invoking arbitration is served on the other party under Section 21 of said Act.

Company Law – Liability of a Company Secretary

The Supreme Court has observed that the Company Secretary shall also be liable for actions of the company in relation to buy back of its equity shares without having adequate free shares which had misled the investors. In *Securities and Exchange Board of India* v. *V Shankar* [Judgment dated 8 February 2023], the Court set aside the order of the Securities Appellate Tribunal (SAT) wherein SAT had held that the Company Secretary's role under Regulation 19(3) of SEBI (Buyback of Securities) Regulations, 1998 (Buyback Regulations) was only limited to the grievance redressal of the investor complaints and so he shall not be liable under Section 68 and 77 of the Companies Act, 1956, and under the provisions of Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market Regulations, 2003 (PFUTP Regulations). The Court stated that SAT had relied only upon the latter part of Regulation 19(3) which deals with redressal of the grievances of investors and has erroneously missed the earlier part of the regulation which states that the compliance officer is also required to ensure compliance with the Buyback Regulations. The Court has now remitted the case back to SAT for fresh consideration according to the aforementioned criteria.

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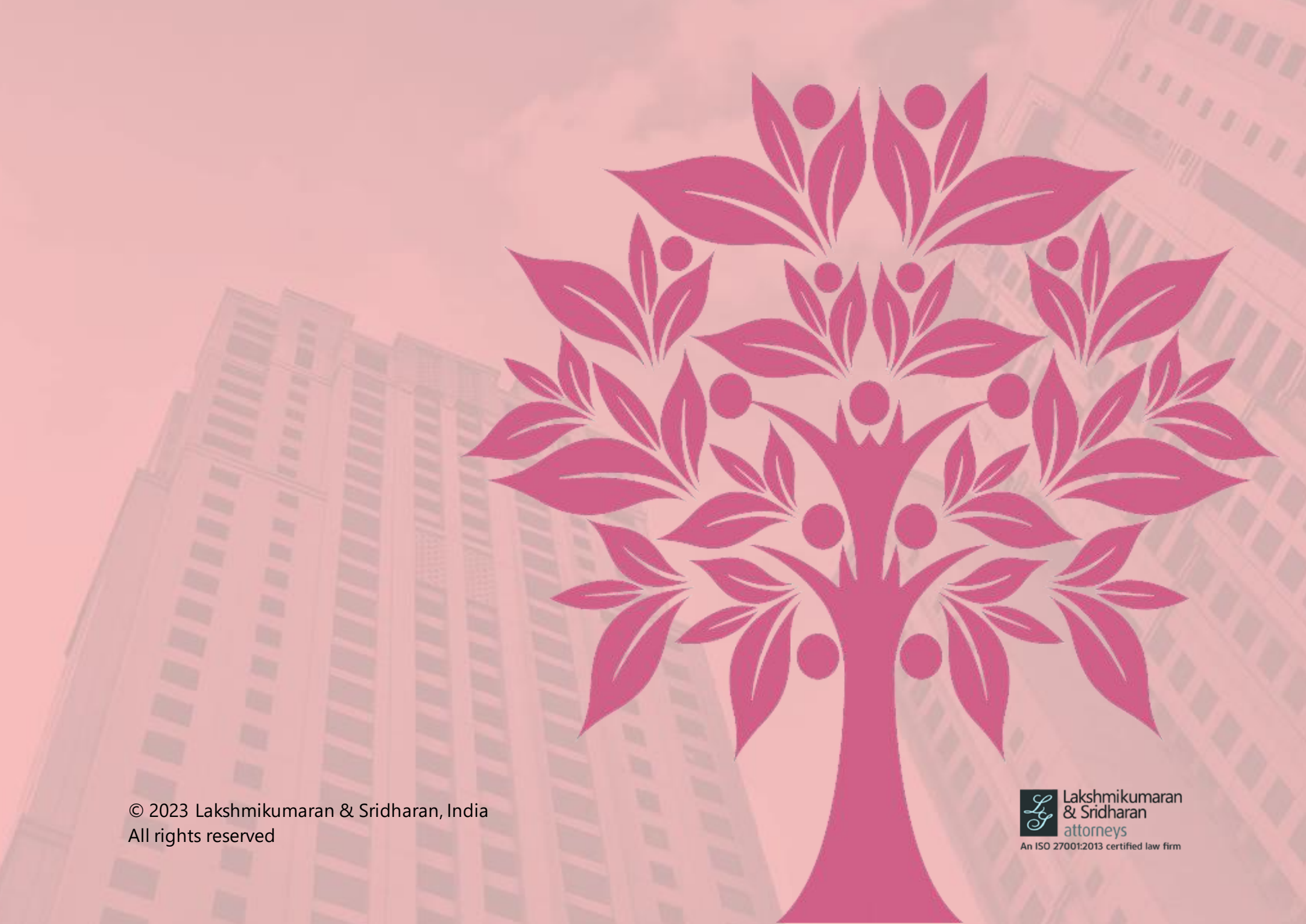

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