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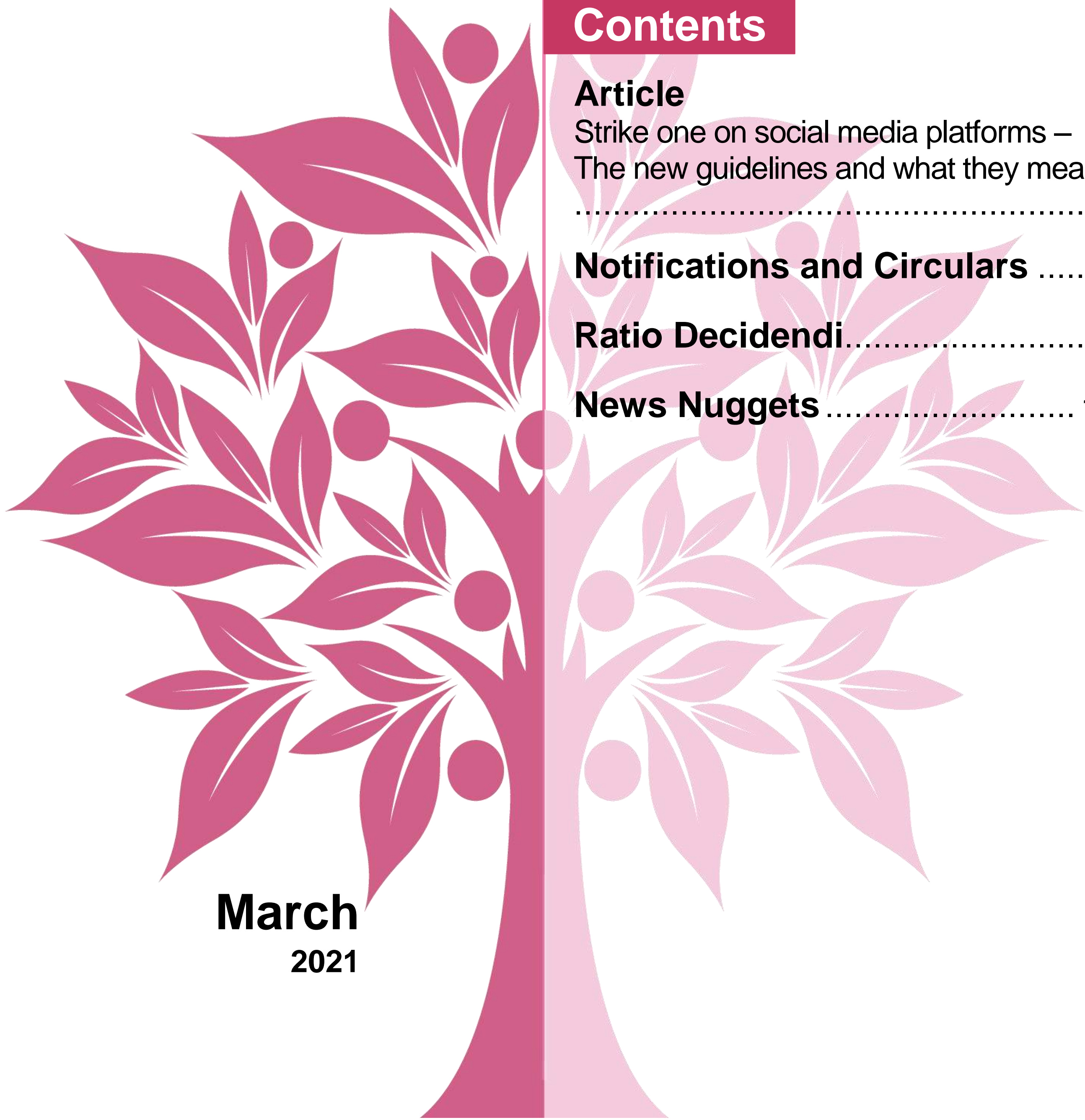

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March
2021

Article

Strike one on social media platforms – The new guidelines and what they mean

By **Dinesh Babu Eedi and Manasa Tantravahi**

The world has been evolving rapidly day-by-day with new technologies. There is major development in social media and over-the-top (OTT) platforms. The large user base and popularity of Facebook, Twitter, Instagram and many other social media platforms prove that people at large are very innovative, and they can create an impact with their voice/text. It goes without saying that, over the years, social media has been playing a vital role in connecting people and building relations without any boundaries. During this process, misuse of social media by miscreants to spread fake news and for other illegal means, has also increased. Thereby, the unethical usage of such platforms has become an issue.

Therefore, the Ministry of Electronics and Information Technology ('**MeIT**'), Government of India, felt the need to strengthen the existing guidelines, being the Information Technology (Intermediary Guidelines) Rules, 2011, by substituting the same with a new set of guidelines to streamline social media platforms and their ethical usage. Accordingly, MeIT in exercise of its powers conferred under Section 87(2) of the Information Technology Act, 2000 ('**IT Act**') had recently on 25 February 2021 notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('**IT Rules 2021**').

The said Rules find its predecessor in the Draft Information Technology (Intermediary Guidelines), 2018 ('**Draft Rules 2018**'). Upon protests made by industry stakeholders and tech giants on the scope for abuse in the provisions of the said Draft Rules, they were directed to be re-worked upon.

The intent behind the IT Rules 2021 is touted to be three-fold being: (i) to ensure social media platforms abide by the Indian law and the Constitution of India, (ii) to ensure greater accountability of these platforms and to prevent misuse and abuse of them, and (iii) to provide an alternate and additional grievous redressal mechanism for the users of these platforms.

Basically, these IT Rules require social media platforms to follow ethics and to take down unlawful content within a specific time frame prescribed. These Rules will also come into effect on the day they are notified by the Central Government and made applicable to most of the entities.

Salient features of the Rules:

The Rules are divided into 3 Parts, with a *Schedule* and an *Appendix.* The salient features of which are listed below:

Part – I

Definitions: Various new definitions, such as '*digital media*', which means digitized content transmitted, stored, edited etc. through (i) an intermediary; or (ii) a publisher of news and current affairs content or a publisher of online curated content; '*social media intermediary*', which means an intermediary that enables online

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interaction between two or more users and allows them to create, upload, share etc. information using its services; and *'significant social media intermediary',* which are intermediaries having more than 50 lakh users, '*Publisher'* of news and current affairs content or online curated content, etc. amongst other defined terms have been introduced *via* the Rules.

Part - II

Due Diligence Mechanism: Due diligence procedures have to be put in place by all intermediaries, including social media intermediaries, such as removing all content that is in infringement of IP/ illegal *per se*, preserving illegal content for a period of 180 days for the purpose of the investigation, and all content published for a period of 60 days etc.

Grievance Redressal by Intermediaries: A grievance redressal mechanism, involving appointment of a Grievance Officer responsible for handling all complaints/ grievances received in lieu of such intermediary by its users, a Chief Compliance Officer for ensuring compliance under the Rules, and a nodal contact person for 24x7 co-ordination with law enforcement agencies is to be implemented by the intermediaries. These three personnel should be residents of India to deal with the grievances of the users.

Significant Social Media/ Messaging Intermediaries: Significant Social Media Intermediaries, providing services primarily of messaging, also need to enable identification of the 'first originator' of the information that has been transferred using their platform, for the purposes of prevention, detection, investigation etc. of an offence related to sovereignty and integrity of India, the security of the State, friendly relations with foreign states, or public order or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material punishable with imprisonment for a term of not less than five years.

Part – III

Code of Ethics in relation to Digital Media: Publishers operating in India or those making their content available in India, are required to follow additional obligations, as outlined in the *Appendix* to the Rules. The Part–III compliances are to be regulated by the Ministry of Information and Broadcasting ('**MIB**').

Grievance Redressal Mechanism by Publishers: A three-level grievance redressal mechanism has been established under the Rules with different levels of self-regulation:

(a) **Level-I:** Self-regulation by the publishers, which is similar to the erstwhile system of grievance redressal, being that if a complaint/ grievance is raised by any user, it must be acknowledged within 24 hours and be addressed by the publisher internally within 15 days of receipt of the complaint,

(b) **Level-II:** Self-regulation by the self-regulating bodies of publishers, which shall address the complaint, upon failure of Level – I process, and dispose the same within 15 days of receiving notice, and

(c) **Level-III:** Oversight mechanism, which is required to be developed by MIB, by establishing an Inter-Departmental Committee, chaired by an Authorised Officer, for addressing grievances on failure of Level–II process.

Others

The Schedule consisting of 2 Parts (General Guidelines for Classification of Films and Entertainment Programs and Issue Related Guidelines), focuses on extra disclaimers or content descriptors to be adopted by all intermediaries and publishers.

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The Appendix mandates following the Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978; and the Programme Code, under section 5 of the Cable Television Networks Regulation) Act, 1995, etc., and classifying all content as per the target audience's age, genre of the content *inter alia,* taking into consideration consumer advice for the same, amongst other conditions.

Shortcomings of the Rules:

As with all new legislations intending to stray an unconventional path, there is a multitude of lapses with the IT Rules 2021. Some of the *prima facie* concerns regarding the Rules are as follows:

Compliance requirements overload for intermediaries and publishers: A bare perusal of the due diligence requirements under the IT Rules 2021 would reveal an increase in paperwork and compliance tracking by all entities in media, including appointing additional personnel, developing high-tech software for detecting content that contravenes the Rules, and publicising heavily the nature of the content, whether sponsored/ verified/ original or duplicitous content, etc. thereby, incurring heavy expenditure. It may also result in confidential business decisions of an entity being exposed to the public and affecting competition amongst players.

This is in addition to ensuring all complaints/ grievances, no matter whether of serious nature, or *malafide* and frivolous, be acknowledged, addressed, and dealt with in a short period of time (15 days from receipt thereof), ensuring significant social media intermediaries implement the due diligence norms within 3 months of notification of the threshold for being identified as a 'significant social media intermediary' and submitting month-to-month compliance reports by all entities, which is a huge cause for concern.

Privacy Concerns: Social media intermediaries providing messaging services, like WhatsApp, Signal, Telegram, etc. have been, till date, adopting end-to-end encryption with the messages.

However, in the name of sovereignty and integrity of India, these intermediaries shall now be required to break the encryption and identify users who are the 'first originator' of information. This could result in lowering of privacy safeguards with regard to the messages transmitted on the sites, increase in surveillance, thereby rendering these platforms ineffective.

In 2018, in the proceedings related to *Antony Clement Rubin* v. *Union of India & Ors.,* Writ Petition No. 20774 of 2018, before the Madras High Court, the notion of tracing messages exchanged through WhatsApp, Facebook, etc., which use end-to-end encryption by default, to identify first originators, was first raised. The matter of whether traceability of originators is technologically feasible is currently *sub-judice* before the Apex Court of India. During such pendency, the Government *via* the IT Rules 2021 seems to have prematurely put an end to such issue.

Scope for abuse of the Rules by statutory authorities: When it comes to publishers, there are multiple criteria given under the *Schedule*, with regard to age, cultural backgrounds, nature of the content (including whether it has sexual content/ discriminatory content/ related to alcohol etc. all of which terms are extremely broad), thereby, it invites the users and the authorities to proceed against any publisher and dole out punishments ranging from warning

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publishers to directing for deletion of content altogether.

Thus, the power to censor any content is handed over directly to these authorities, leading to much litigation in the future by publishers to protect the integrity of their content.

It may also be borne in mind the powers of the Authorized Officer under the Rules to request for interim emergency measures of either blocking specific information/ blocking access to a publisher altogether, under the Rules, if the same is necessary to ensure public order. Unless there is a high threshold for activating these powers, the publishers shall be shuttling back and forth to MIB every time a complaint is instituted of an alleged serious nature.

There is no penalty under the Rules for malicious and frivolous complaints, however, placing the publishers and intermediaries at the receiving end of the consequences under the Rules.

Conclusion:

In-principle, the Central Government has attempted to balance the intent behind the introduction of the Rules, being protection from the spread of fake, derogatory and incendiary content, with the risk of clamping down on free speech and creativity by laying down strict criteria before content restriction/ censoring.

However, in light of the aforesaid gaps in the law, there is heavy scope for abuse and the balance of convenience is not in favour of the intermediaries and the publishers, not to mention privacy concerns arising from the provisions of the Rules against the letter and spirit of the judgment of the Supreme Court of India in *Justice Puttaswamy (Retd.) and Anr.* v. *Union of India and Ors.,* (2018) 1 SCC 809. As a matter of fact, a notice was issued recently by the State Government of Manipur to a talk show, supposedly under the IT Rules 2021, which action was condemned by the Ministry of Information and Broadcasting stating that the State Governments do not have such powers. Such instances are reasonably foreseeable if a legislation of such wide ambit is introduced without any consequences of misuse by either the users of platforms or the Governments themselves.

In this backdrop, it is desirable that necessary precautions are taken while implementing the IT Rules 2021. The thresholds for ordering penal consequences while handling complaints filed by users may also be raised. The authorities may bear in mind the mindset of the demographic of the country and weigh the grievance caused against the possible damage to be caused by restricting/ deleting/ blocking content and social media platforms.

[The authors are Joint Partner and Associate in the Corporate and M&A practice at Lakshmikumaran & Sridharan Attorneys, Hyderabad]

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Notifications and Circulars

Asset management companies – SEBI (Mutual Funds) Regulations 1996 amended: The Securities and Exchange Board of India ('**SEBI**') *vide* Notification dated 4 February 2021, effective from 30th day from the date of publication in the Official Gazette, has amended the SEBI (Mutual Funds) Regulations, 1996. The amendment by SEBI (Mutual Funds) (Amendment) Regulations, 2021 has defined or amended the definition of equity related instruments, exchange traded fund, asset management company, frauds, group, mutual fund, net worth, relative etc. Further, as per changes in Regulation 21 (Eligibility criteria for appointment of asset management company), the asset management company must have a net worth of not less than rupees fifty crores. Provided that where the sponsor does not fulfil the requirements provided in part (iv) of the Explanation to clause (a) of regulation 7 at the time of making application, the asset management company shall be required to have a net worth of not less than rupees one hundred crore and the asset management company shall maintain such net worth till it has profits for five consecutive years. It is also stated that the asset management company of a mutual fund eligible to launch only infrastructure debt fund schemes, shall have a net worth of not less than rupees ten crore. Also, as per amendments in the Fifth Schedule (Code of conduct for asset management company and trustees), the trustees and asset management companies shall ensure that the assets and liabilities of each scheme are segregated and ring-fenced from other schemes of the mutual fund; and bank accounts and securities accounts of each scheme are segregated and ring-fenced.

Small companies – Companies (Specification of Definitions Details) Rules, 2014 amended: The Ministry of Corporate Affairs has issued a notification increasing the threshold limit for paid up capital and turnover for small companies. Small Companies is defined under Section 2(85)(i) and (ii) of the Companies Act, 2013. The definition under the stated section has been changed. Under the earlier definition, only those companies qualified as Small Companies which had the paid-up capital of not exceeding INR 50 lakh and turnover 'not exceeding 2 crore'. However, from 1 April 2021 the threshold limit will be increased to paid up capital 'not exceeding INR 2 crore' which was INR 50 crore earlier and turnover 'not exceeding INR 20 crore' which was INR 2 crore earlier.

The main objective behind this is to increase opportunities for more small companies to evolve without getting trapped in the strict compliances. This development will also reduce the number of penalties for small companies, the overall cost to company which usually go for filling, etc. The Directors are required to hold only two board meetings per year. There is no requirement for small companies to prepare cash flow statement which forms a part of regular financial statement. Mandate on the rotation of auditors has been removed. As per reports, the issuance of the notification may benefit over 2 lakh small companies.

Companies which are not to be considered as listed companies – Companies (Specification of Definitions Details) Rules, 2014 amended: The MCA has amended the Companies (Specification of Definitions Details) Rules, 2014

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for the second time this year to specify the companies which are not to be considered as listed companies. According to new Rule 2A which will come into effect from 1 April 2021, certain public companies including which have not listed their equity shares on a recognized stock exchange but have listed their (i) non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008; and/or (ii) non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013, will not be considered as listed companies. Further, Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 will also not be considered as listed companies.

One-person company and small company – Separate abridged annual return notified: The MCA has notified a separate abridged annual return for one-person companies and small companies. Accordingly, one person company and small company shall now file annual return from the financial year 2020-2021 onwards in the newly notified Form No.MGT-7A. Notification dated 5 March 2021 has been issued for the purpose.

Producer Companies Rules 2021 notified: The Ministry of Corporate Affairs ('**MCA**') *vide* Notification dated 11 February 2021 which is effective from the same date, has notified the Producer Companies Rules, 2021 in supersession of the Producer Companies (General Reserve) Rules, 2003. The new rules specify that for the **change of place of registered office from one State to another,** the Rules 27, 30 and 31 of the Companies (Incorporation) Rules, 2014, including the forms stated therein shall be applied. The rules also specify the **investment of general reserves** of Producer Companies. As per the new rules a Producer Company shall make investments from and out of its general reserves in any one or in combination of the following:

1. In approved securities, fixed deposits, units and bonds issued by the Central Government or State Governments or co-operative societies or scheduled bank; or
2. in a co-operative bank, State co-operative bank, co-operative land development bank or Central co-operative bank; or
3. with any other scheduled bank; or
4. in any of the securities specified in Section 20 of the Indian Trusts Act, 1882 (02 of 1882); or
5. in the shares or securities of any other inter-State co-operative society or any co-operative society; or
6. in the shares, securities or assets of public financial institutions specified under clause (72) of Section 2 of the Companies Act.

Code on Wages (Central Advisory Board) Rules, 2021 notified: The Ministry of Labour and Employment has on 1 March 2021 issued the Code on Wages (Central Advisory Board) Rules, 2021. The Central Advisory Board shall consist of the persons to be nominated by the Central Government representing employers and employees as specified in clauses (a) and (b) of sub-section (1) of Section 42 of the Code of Wages, 2019 and the independent persons and representatives of the State Governments. As per the Rules, in addition to the functions specified in

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sub-section (3) of Section 42, the Board on reference by the Central Government advise that Government on the issue relating to the fixation of minimum wages of working journalists and sales promotion employees.

RBI issues master direction on digital payment security controls: The Reserve Bank of India has implemented stricter rules towards digital payments to improve and widen security which must be complied with by the banks and many more regulatory entities. The 'Master Directives' for banks and other regulatory bodies, namely, Reserve Bank of India (Digital Payment Security Controls) Directions, 2021 was issued by the RBI on 18 February 2021 for this purpose. It states that certain security steps must be taken up by the banking mobile applications, payments banks, internet banking mediums, etc. The directives include customer redressal mechanism and their protection. Additionally, it will become mandatory for the customers to not avoid/ circumvent the usage guidelines which will be provided in customer's preferred languages. The circular added that it is with the due consideration that the financial institutions shall intimate its users of all the risks that they may encounter, alongside laying down the safeguards to these risks. Lastly, it is important to note that the older mobile apps constructed by various financial institutions have been asked to be deactivated in a phased but a time-bound manner. This should not exceed six months from the date of the newly released application.

Ratio Decidendi

1) Debenture Trustee cannot deal in securities except in accordance with SEBI (Debenture Trustees) Regulations, 1993

2) SEBI has jurisdiction over securities transactions of NBFC, including the Debenture Trustees

Brief facts:

SEBI issued show-cause notices to petitioners, who were fellow members of ICAI and were appointed as Debenture Trustees of an incorporated Company, levelling the charges that the company issued Debentures which are deemed public issues without complying with the statutory requirements for public issues. SEBI also alleged that the company appointed Unregistered Debenture Trustees, which violated Section 12(1) of the SEBI Act as well as SEBI (Debenture Trustees) Regulation, 1993.

Aggrieved with the notice, the Petitioners filed a writ petition in the High Court of Kerala to set aside the show-cause notice on the ground that SEBI has no jurisdiction over NBFCs.

Submissions:

The Petitioners submitted that supervisory powers on NBFCs is vested in RBI and SEBI lacks powers and jurisdiction over NBFCs and

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SEBI has no supervisory powers under Companies Act, 1956 over NBFCs, therefore the show-cause notice is liable to be set aside.

The Respondent submitted that SEBI has issued only a show-cause notice and Petitioners can submit their reply to the show-cause notice and agitate the issues including jurisdiction and limitation before SEBI. Also, they argued that the Supreme Court has held that High Court exercising jurisdiction under Article 226 shall not interfere in any proceedings at the show-cause stage.

Decision:

- No Debenture Trustee can deal in securities except under, and in accordance with, the conditions of registration obtained from the SEBI, in accordance with the SEBI (Debenture Trustees) Regulations, 1993.
- Where Petitioners, who were acting as Debenture Trustees were members of ICAI and were not holding registration to act as Debenture Trustees, there was *prima facie* violation of Section 12(1) of SEBI Act, 1992.
- Even though the Company is an NBFC, as far as regulation of issue of Debentures and Non-current Bonds is concerned, it is the bounden duty of SEBI to protect the interest of investors in securities. As long as NBFCs are not specifically excluded from the purview of SEBI Act, 1992, the SEBI will have jurisdiction over securities transactions of an NBFC, including the Debenture Trustees.

[*Unnikrishnan* v. *Union of India* – Judgement dated 12 February 2021 in Civil Petition Nos. 13682 and 22430 of 2020, Kerala High Court]

Insolvency – Petition under IBC Section 7 or 9 is an independent proceeding unaffected by winding up proceedings filed qua same company

Brief facts:

The Appellant, an operational creditor, had filed a winding up petition against the debtor before the Bombay High Court in 2015 and the Court had passed the decree in favour of the Appellant. Respondent filed a petition under Section 7 of IBC before the NCLT which was admitted by the Tribunal. Appellant filed an appeal in Supreme Court and the Court by its Order dated 18 December 2020 had issued notice and stayed further proceedings before the NCLT.

Submissions:

- The Appellant submitted that this matter was concluded in their favour inasmuch as steps have been taken in a winding up petition that has already been admitted by the Bombay High Court, and Section 7 petition that was filed under IBC, would have to be held to be non-maintainable.
- It was also argued that under Section 446 of Companies Act, 1956 / Section 279 of the Companies Act, 2013, no suit or legal proceeding can be initiated once there is admission of a winding up petition and no petition under Section 7 of the IBC can be filed.
- The Respondent however submitted that a Section 7 proceeding under the IBC is an independent proceeding, which can be initiated at any time, even after a winding up order is made. They also argued that Section 238 of the IBC contains a non-obstante clause that if there is any conflict between Section 446 of Companies Act, 1956 / Section 279 of Companies Act, 2013 and IBC, the IBC will prevail.

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Decision:

- Any petition under Section 7 or Section 9 of the IBC is an independent proceeding, unaffected by winding up proceedings that may be filed *qua* the same company.
- IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. *Vis-à-vis* the Companies Act, which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non-obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.
- The Court however observed that only where a company in winding up is near corporate death, no transfer of the winding up proceeding would take place to the NCLT to be tried as a proceeding under the IBC.

[*A. Navinchandra Steels (P.) Ltd.* v. *SREI Equipment Finance Ltd and Ors.* - Judgement dated 1 March 2021 in Civil Appeal Nos. 4230-4234 of 2020, Supreme Court]

Insolvency – Exclusion of Financial Creditor from CoC if 'related party' label circumvented

Brief facts:

The present case relates to two sets of appeals arising out of from the judgment of the NCLAT. This is a case of Insolvency Resolution in which two companies had asked to be joined in the CoC of the Company. The IRP rejected their application, leading to an appeal against that rejection in the NCLT. The NCLT accepted that appeal, leading to an appeal by the other two creditors against their entry into the CoC. NCLT in those appeals held that the nature of credit does not come under the purview of Financial Credit, hence Spade and AAA cannot be in the CoC. This led to further appeal in the NCLAT. After the NCLAT rejected the application, the present appeal was preferred in the Apex Court.

In this case, Spade and AAA were two companies (owned by single person), who claimed to have dues of over INR 100 crores in financial credit. These companies had filed their respective claims before the IRP in May, 2018. But the IRP rejected their claims on the basis that they are 'related party' to the corporate debtor, hence they cannot be admitted in the Committee of Creditors. Subsequent appeals against this rejection by the IRP preferred in front of the NCLT and the NCLAT failed ultimately as both the Tribunals rejected their claims. This led to the present appeal before the Supreme Court.

Submissions:

- The Appellant submitted that the NCLT had allowed the application by Spade and AAA to become a member of the CoC because the issue as to whether Spade and AAA were financial creditors was decided by the NCLT and it was based on the NCLT categorically finding that the amounts received by the Corporate Debtor in the form of deposits by Spade and AAA comes under the purview of Financial Debts.
- The appeals filed by Phoenix and Yes Bank only sought to restrict Spade and AAA from becoming a part of the CoC. But nowhere in the appeals, they have raised the issue of eligibility of Spade and AAA to be in the committee of creditors. They only raised the issue of these two being related parties to the Corporate Debtors.
- In the appeal filed by AAA and Spade, only the issue of whether they were financial creditors or not as decided by the NCLT

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was raised and debated on. Even for this issue, the NCLAT 'admittedly' stated that the sort of deposits made by the two companies would fall under Financial Credit.

- The Respondents contended that the Owner of Spade and AAA had filed a claim with the IRP as a credit which is neither financial nor operational. But later on the claim was changed to that of a financial credit, thus showing *mala fide* intentions.
- The intent of the parties was to circumvent the laws and rules to continue developing the project. This can be seen in the side letter signed between the Corporate Debtor and Spade and AAA, the terms and conditions of which were akin to that of the development letter.

Decision:

- NCLAT observed that the issue of eligibility of Spade and AAA was indeed raised in NCLAT, as per the material produced on record. The Court also noted that the Corporate Debtor had raised the issue of fraud on part of Spade and AAA in terms of the Agreement to Sell and the loans advanced. The Court was also of the view that the loans advanced would not come under the purview of Financial Debt and the MoUs signed and the claims filed before the IRP was collusive in nature.
- The Court also observed that NCLAT had correctly held that the Corporate Debtor and Spade and AAA were related parties and they would not be considered as a part of the CoC, primarily because the loans which they had advanced to the Corporate Debtor would not come under Financial or Operational Credit.
- The Court set aside the decision that Spade and AAA were financial creditors, and affirmed the decisions that Spade, AAA and Corporate Debtor were related parties and could not be a part of the CoC.

[*Phoenix Arc Private Limited* v. *Spade Financial Services Limited & Ors.* – Judgement dated 1 February 2021 in Civil Appeal Nos. 3063 and 2842 of 2020, Supreme Court]

Mutual funds – 'Consent of unitholders' is consent by majority of unitholders who participated in poll and not of majority of all unitholders of the scheme

Brief Facts:

The case arose out of Franklin Templeton's decision in April, 2020 to wind up six of its debt funds, while giving the reason as low liquidity. Those funds affected nearly three lakh investors in the country. As a result, some investors moved various High Courts. These petitions filed in various High Courts were then clubbed together by the Supreme Court on 24 June 2020. The combined petition was then transferred to the Supreme Court in respect to winding up of the debt funds.

Submissions:

- The unitholders of the Debt funds had primarily contended that the AMC had done gross mismanagement, derelict their duties, manipulated the Net Asset Value of the investments, disgorged wrongful payments and other activities.
- The unitholders also contended that the trustees' decision to wind up the six schemes is just a cover to mask their misfeasance and malfeasance, which also brings in the question of liability of the trustees.
- On 15 January 2021, the Net Asset Value of five out of the six schemes was higher

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than their respective NAVs on 23 April 2020 and in one scheme it was marginally lower, and that five of the six schemes have turned cash positive.

- The Respondents also submitted that accumulated distributable cash proceeds of INR 9,122 crores [(as on 15 January 2021) and (subject only to provision for expenses in ordinary course)] is immediately available for disbursement to unitholders; to show that there is no case of mismanagement or concealment of facts or any such thing.

Decision:

- When the unit holders had started seeking redemptions from the scheme, the SC ordered that a poll should be conducted to take consent from the investors for the issue of disbursement. The Court noted that the consent and the simple majority shall only be taken from the poll and the total number of unitholders to be considered for the simple majority should only be counted from the people who are actually participating in the poll and not from the overall number of unitholders with the company. The court also upheld the validity of the process of e-voting and stated in face of such issues that more clarity is required for Mutual Fund Regulations.

[Franklin Templeton Trustee Services Pvt. Ltd. and Anr. v. *Amruta Garg and Others Etc.* – Judgement dated 12 February 2021 in Civil Appeal Nos. 498-501 of 2021, Supreme Court]

News Nuggets

Insolvency – Proceedings under Section 138/141 of the Negotiable Instruments Act cannot continue or be initiated against corporate debtor during period of moratorium

The Supreme Court has held that the institution or continuation of a proceeding under Section 138/141 of the Negotiable Instruments Act, 1881 are covered by the moratorium provision, namely, Section 14 of the Insolvency and Bankruptcy Code, 2016. Deliberating on the language of Section 14(1)(a), the Court held that the expression 'institution of suits or continuation of pending suits' is to be read as one category, and the disjunctive 'or' before the word 'proceedings' (coming just after the phrase 'continuation of pending suits') makes it clear that proceedings against the corporate debtor would be a separate category. The Court was of the view that Section 138 proceeding being conducted before a Magistrate would certainly be a proceeding in a court of law in respect of a transaction which relates to a debt owed by the corporate debtor. Relying on various precedents on interpretation of statutes, the Apex Court also held that the expression 'proceedings' cannot be cut down to mean only civil proceedings *stricto sensu* by the use

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of rules of interpretation such as *ejusdem generis* and *noscitur a sociis*. It observed that the sweep of the provision (Section 14 of IBC) is very wide as it includes institution, continuation, judgment and execution of suits and proceedings. The February 2020 Report of the Insolvency Law Committee was relied upon by the Court in *P Mohanraj and Ors.* v. *Shah Brothers Ispat Pvt. Ltd.* [Judgement dated 1 March 2021] to state that object of a moratorium provision. It was held that a quasi-criminal proceeding under Section 138/141 would directly impact the corporate insolvency resolution process in the same manner as the institution, continuation, or execution of a decree in such suit in a civil court for the amount of debt or other liability.

Arbitration – Appeal maintainable against order refusing to condone delay in filing application to set aside award

The Supreme Court has held that appeal under Section 37(1)(c) of the Arbitration and Conciliations Act, 1996 is maintainable against an order refusing to condone delay in filing an application under Section 34 to set aside an award. According to the Court, a literal reading of the provision would show that a refusal to set aside an arbitral award as delay has not been condoned under sub-section (3) of Section 34 would certainly fall within Section 37(1)(c). The Apex Court emphasised that the expression ‘setting aside or refusing to set aside an arbitral award’ in Section 37(1)(c) does not stand by itself and that it has to be read with the expression that follows – ‘under Section 34’. Setting aside the High Court’s Division Bench decision, the Court in the case *Chintels India Ltd.* v. *Bhayana Builders Pvt. Ltd.* [Decision dated 11 February 2021] remitted the matter back to decide whether the Single Judge’s refusal to condone delay was correct or not.

Arbitration – Supreme Court suggests changes in Sections 11(6) and 37 to bring the provisions in par with Section 8

In a dispute involving appointment of an arbitrator, the Supreme Court has suggested amendments in Sections 11(6) and 37 of the Arbitration and Conciliation Act, 1996 so that orders made under Sections 8 and 11 are brought on par *qua* appealability as well. The Court observed that while in cases decided under Section 8, a refusal to refer parties to arbitration is appealable under Section 37(1)(a), a similar refusal to refer parties to arbitration under sub-section 11(6) read with sub-sections 11(6A) and 11(7) is not appealable. It also noted that when the Parliament enacted the 2015 amendment to the Arbitration and Conciliation Act, pursuant to the Law Commission Report, it followed the Scheme of the Law Commission’s Report *qua* Section 8 and Section 37, however the recommendations of the Commission in respect of sub-sections 11(6) and 11(6A) were not incorporated. The case *Pravin Electricals Pvt. Ltd.* v. *Galaxy Infra and Engineering Pvt. Ltd.* was decided by the 3-Judge Bench on 8 March 2021.

Interlocutory application filed before the admission of appeal is maintainable

Going through the provisions of Section 242(4) of the Companies Act, 2013, the NCLAT has held that it cannot be said that application for interim reliefs are not maintainable or such applications can be filed only after admission of the main Petition or if the interim reliefs claimed in the interlocutory applications are entirely covered by the reliefs sought in the main Petition then the applications are not maintainable. According to the Appellate Tribunal it was very strange that on one hand the NCLT disposed of interlocutory applications as not maintainable before admission of the

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Petition, on the other hand, without admitting the Petition the matter was posted for consideration of interim reliefs. The appeal in the case *Macquarie SBI Infrastructure Investment Pte. LTD.* v. *Soham Renewable Energy India Pvt. Ltd.* was decided on 12 February 2021.

PLI Schemes for 3 new sectors: IT hardware, telecom and pharmaceutical

In furtherance to the '*Atmanirbhar Bharat*' and '*Made in India*' initiative, the Government of India has announced Production Linked Incentive ('**PLI**') Schemes for 13 sectors. The Schemes provide financial incentive to boost local manufacturing and to make India the global hub for exports. In furtherance to this, various Ministries have come up with schemes related to their relevant sector. The Ministry of Electronics and Information Technology has launched PLI scheme in IT Hardware sector with a financial outlay of INR 7,325 crores with the Scheme covering products like laptops, tablets, all-in-one PCs and servers. The Ministry of Chemicals and Fertilizers (Department of Pharmaceuticals) has also rolled out PLI Scheme for the product category of drug manufacturing with a financial outlay of INR 15,000 crores. The Department of Telecom, Ministry of Commutations has announced PLI Scheme for the product category Telecom & Networking Products with a financial outlay of INR 12195 crores.

Influencer advertising on digital media platforms – Advertising Standards Council of India releases draft guidelines

The Advertising Standards Council of India ('**ASCI**') has released draft guidelines for influencers advertising on digital media. As per the draft guidelines,

- a disclosure label must be added from the list of approved labels,
- the disclosure label used to highlight advertising content needs to be upfront,
- disclosure label must be in English or translated into the language of the advertisement in a way that it is well understood by the average consumer who is viewing the advertisement,
- blanket disclosures in a profile/bio/about section will not be considered adequate because people visiting the site might read individual reviews or watch individual videos without seeing the disclosure on another page.

Further, filters should not be applied to social media advertisements if they exaggerate the effect of the claim that the brand is making. The influencer must do their due diligence about any technical or performance claims made by them such as 2X better, effect lasts for one month, fastest speed, best in class etc. These guidelines will be applicable to all social media platforms like Instagram, Facebook, Twitter, YouTube, etc. At present the last date for submission of feedback is 21 March 2021. As per the press release, the guideline will be applicable to all promotional posts published on or after 15 April 2021.

J&K – Incentive-based new Central Sector Scheme for Industrial Development of Union Territory of Jammu & Kashmir launched

The Ministry of Commerce and Industry has come up with the New Central Sector Scheme for Industrial Development of Union Territory of Jammu & Kashmir *vide* Notification dated 19 February 2021 which is effective from 1 April 2021. The Scheme will remain in force up to 31 March 2037. The main purpose of the scheme is to generate employment, industrial

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development, skill development and attract new investments and nurture the existing ones. The total financial outlay of the scheme is of INR 28,400 crores. Under the scheme following incentives will be provided:

a. **Capital Investment Incentive:** 30 per cent to 50 per cent of incentive on the investment made on Plant & Machinery or construction of building will be given.

b. **Capital Interest subvention:** At the annual rate of 6% for maximum 7 years on loan of up to INR 500 Crores for investment in plant and machinery will be provided.

c. **GST Linked Incentive:** 300 per cent of the eligible value of actual investment made in plant and machinery will be provided for 10 years.

d. **Working Capital Interest Incentive:** For all existing units at the annual rate of 5 per cent for maximum 5 years limited to 1 Crore will be provided.

RBI permits resident individuals to make remittances under LRS to IFSCs set up in India under the Special Economic Zone Act, 2005

RBI *vide* Circular RBI/2020-21/99 A.P. (DIR Series) Circular No. 11, dated 16 February 2021 has permitted resident individuals to make remittances under the Liberalised Remittance Scheme ('**LRS**') to International Financial Services Centres ('**IFSCs**') set up in India under the Special Economic Zone Act, 2005. As per reports this will help in deepening the financial markets in IFSCs and provide an opportunity to resident individuals to diversify their portfolio. Under the following conditions the banks may allow resident individuals to make remittances under LRS to IFSCs in India:

a. The remittance shall be made only for making investments in IFSCs in securities, other than those issued by entities/companies resident (outside IFSC) in India

b. Resident Individuals may also open a non interest bearing Foreign Currency Account ('**FCA**') in IFSCs, for making the above permissible investments under LRS. Any funds lying idle in the account for a period up to 15 days from the date of its receipt into the account shall be immediately repatriated to domestic INR account of the investor in India.

c. Resident Individuals shall not settle any domestic transactions with other residents through these FCAs held in IFSC.

The Circular also states that banks, while allowing such remittances, shall ensure compliance with all other terms and conditions, including reporting requirements prescribed under the Scheme.

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NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

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