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Fast Track Merger: Regional Director does not have power to reject the Scheme

By **Asish Philip Abraham, Bhusan Porwal, and Aastha Sahay**

The article in this issue of Corporate Amicus provides a detailed discussion of a recent Bombay High Court decision in *Asset Auto* v. *UoI*, which reviews the discretionary power provided to the Regional Director of the central government in respect of fast-track mergers provided under Section 233 of the Companies Act, 2013. According to the High Court, the Regional Director does not have the power to outrightly reject the scheme. It was held that the Regional Director should form an opinion that the scheme is not in public interest or in the interest of creditors and strictly follow the conditions to file an application before NCLT, instead of outrightly rejecting the scheme. The authors also note that the Court did not address whether the Regional Director can decide on matters of solvency. According to them, whether the Regional Director can take any action for the interest of the creditors when the creditors themselves had approved the scheme, is another aspect which needs to be pondered upon.

Fast Track Merger: Regional Director does not have power to reject the Scheme

By Asish Philip Abraham, Bhusan Porwal, and Aastha Sahay

Discretionary powers of RD are not unbridled: Bombay High Court

Introduction

The Fast Track Merger process, as introduced under Section 233 of the Companies Act, 2013, ('**Act**') represented a significant reform aimed at streamlining the merger process for certain classes of companies. This process can be opted for by small companies, start-up companies or merger of a holding company and their wholly owned subsidiary. Fast track mergers eliminate the need for the involvement of the National Companies Law Tribunal ('**Tribunal**'). The merger scheme is instead approved by the Central Government i.e. the Regional Director.

The judgment of the Bombay High Court in *Asset Auto* v. *UoI*[1] reviews the discretionary power provided to the Regional Director and exercise of such discretionary power without following due process. The limitation of the Regional Director's powers is discussed in relation to the companies complying with the conditions as laid down in Section 233. This raises a question on the powers of Regional Director to review and provide comments on the solvency of the company. In this article, we will be providing a detailed discussion of the court order and the reasoning behind the same:

Facts and background

Asset Auto India Private Limed ('**Petitioner 1**') and its four wholly owned subsidiaries ('**Petitioners 2 to 5**'), have approached the Bombay High Court by filing a writ petition to challenge the order of the Regional Director, Western Region, Mumbai ('**Regional Director**') rejecting the scheme outrightly after complying with all the conditions of sub-sections (1) to (4) of Section 233. The Regional Director in its order dated November 12, 2018 ('**Order**') had rejected an application of the Petitioners for processing the scheme of amalgamation between Petitioners 2 to 5 with Petitioner 1 under Section 233 on the ground that the companies are not solvent as per the balance sheet filed along with the application.

[1] 2024 SCC OnLine Bom 2494

Issue

The Petitioners contended that the Regional Director has no authority under law to outrightly reject the fast-track merger scheme under Section 233 of the Act.

Legal provisions and analysis of the Court

The Court analysed Section 233 of the Act in detail.

Section 233(1) of the Act lays down the pre-conditions that parties need to comply with before entering a scheme of merger or amalgamation, such as notice inviting objections and suggestions, if any, from the Registrar and Official Liquidators, filing of declaration of solvency and obtaining approval of creditors/shareholders etc. The Petitioners had complied with the pre-conditions as laid down in sub-clause (1).

Section 233(2) prescribes that the transferee company is required to file a copy of the approved scheme, with the Regional Director, the Registrar and Official Liquidator, where the registered office of the company is situated. This condition was adhered to in the present case.

Section 233(3) provides that the Regional Director has to register the scheme and issue a confirmation to the companies if the Registrar or the Official Liquidator has no objections or suggestions to the scheme. In the present case, there were no objections or suggestions that the Regional Director had received from the Registrar or the Official Liquidator. Considering the same, sub-section (4) which states that objections of Registrar or the Official Liquidator will have to be communicated to the Regional Director within 30 days, was not applicable to the facts of this case.

As per Section 233(5), the Regional Director, if after receiving objections/suggestions or for any other reason opines that a scheme of amalgamation is against the larger public interest or the interest of the creditors; may file an application before the Tribunal within 60 days of receipt of scheme. This application would have to state the objection and request the Tribunal to consider the scheme under Section 232 of the Act. Section 233(5) is as follows:

> *'(5) If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors,* ***it may file an application before the Tribunal*** *within a period of sixty days of the receipt of the scheme under sub-section (2) stating its objections and requesting that the Tribunal may consider the scheme under section 232'*

Opinion to be formed as required under Section 233

In the present case, the Court, after analysing the facts and sequence of events, stated that the Regional Director had erred in complying with the provisions of Section 233(5) in relation to forming the opinion and recording the opinion / reasons for such decision. The adequacy of reasoning of the order was questioned.

Analysis of the phrase 'may'

The Court in the present case analysed the phrase 'may' as used in Section 233 (5). The Court stated that, on a conjoint reading of sub-sections (2), (3), (4) and (5), the word 'may' would have to be construed as mandatory. Therefore, if the Regional Director, after receiving the objections or suggestions or for any reason, is of the view that a scheme is not favourable to the creditors or is detrimental to public interest, then the same should be decided and adjudicated upon by the Tribunal.

The Court also went on to state that if the provision of the Regional Director to approach the Tribunal when they are of the opinion that that scheme is not in the public interest or in the interest of the creditors, was considered optional, then the companies involved in the amalgamation scheme, would face rejections for their schemes without any formal adjudication or without following due process of law.This will be in violation of principles of natural justice

Conclusion

Therefore, it was held that if the Central Government, i.e., the Regional Director, is of the opinion that a scheme would go against the interest of the creditors or is against public interest or any of the conditions are not satisfied, an application would have to be made to the Tribunal to adjudicate and consider the scheme under Section 232 of the Act. The Regional Director does not have the power to outrightly reject the scheme. The Court held that the Regional Director should form an opinion that the scheme is not in public interest or in the interest of creditors and strictly follow the conditions to file an application before Tribunal instead of outrightly rejecting.

LKS Comments

This decision of the Bombay High Court sheds light on the discretionary power of the Regional Director during fast-track mergers. Since the judgment has clarified that the Regional Director does not have the power to directly reject the scheme, the Tribunal will now properly adjudicate schemes in case of any objections or suggestions to the scheme, or if any opinion is

being formed by the Regional Director that the scheme is against the public interest or the interest of the creditors.

In the present case, the scheme was rejected by Regional Director on the ground that the companies are not solvent as per the balance sheet filed with the application. However, the Court did not address whether the Regional Director can decide on matters of solvency, and other related matters which are ordinarily under the jurisdiction of the Official Liquidator or any other authority, when no objection has been raised by such authorities. Additionally, whether the Regional Director can take any action for the interest of the creditors when the creditors themselves have no opposition and have approved the scheme, is another aspect of the Regional Director's discretionary power which needs to be pondered upon.

Curtailing the discretionary power of the Regional Director throughout the various stages of the process of fast-track mergers will encourage more eligible companies to opt for this process and ultimately reduce the burden of Tribunal as well and brings certainty to the process.

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Notifications & Circulars

- Companies (Indian Accounting Standards) Rules, 2015 amended – MCA Notification
- Companies (Accounts) Rules, 2014 amended – MCA Notification
- Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 amended – MCA Notification
- Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 amended – MCA Notification
- Competition Commission of India (Combinations) Regulations, 2024 introduced to enhance the merger control regime in India
- Competition (Criteria for Exemption of Combinations) Rules, 2024 notified – MCA Notification
- Competition (Minimum Value of Assets or Turnover) Rules, 2024 notified – MCA notification
- Competition (Criteria of Combination) Rules, 2024 notified – MCA notification
- Reporting requirements under Liberalised Remittance Scheme for resident individuals revised from monthly to daily reports – RBI Notification
- Investing in securities of companies listed on the SME segment of stock exchanges – SEBI Press Release
- Trading and Settlement of Sovereign Green Bonds in the International Financial Services Centre – RBI notification
- Modification in the timeline for submission of status regarding payment obligations to the stock exchanges by entities that have listed commercial paper – SEBI Circular

Companies (Indian Accounting Standards) Rules, 2015 amended – MCA Notification

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 554(E), dated 9 September 2024, notified certain amendments to the Companies (Indian Accounting Standards) Rules, 2015, particularly concerning Indian Accounting Standard (Ind AS) 116 related to sale and leaseback transactions. Effective from publication in the official gazette, the amendment introduces new guidance for seller-lessees regarding the recognition of right-of-use assets and lease liabilities arising from sale and leaseback arrangements. Given below is a list of the key amendments made under this notification:

1. *Insertion of paragraph 102A*: Following the commencement date, the seller-lessee is required to apply Paragraphs 29–35 to the right-of-use asset arising from the leaseback and Paragraphs 36–46 to the lease liability associated with the leaseback transaction. The seller-lessee must determine 'lease payments' or 'revised lease payments' in such a manner that no gain or loss related to the retained right of use is recognized.

2. *Modifications to Appendix C*: Paragraph C1D has been inserted, stating that the amendments related to Lease Liability in a Sale and Leaseback, shall be applied by the seller-lessee for annual reporting periods beginning on or after April 1, 2024, along with paragraphs 102A and C20E. Furthermore, Paragraph C2 has been substituted to clarify that the date of initial application is the beginning of the annual reporting period in which an entity first applies the Standard, and a new Paragraph C20E has been added, requiring the seller-lessee to apply the Lease Liability in a Sale and Leaseback retrospectively in accordance with Ind AS 8 for transactions entered into after the initial application date.

3. *Insertion of Appendix D*: Appendix D provides illustrative examples related to sale and leaseback transactions, detailing the accounting treatment for both seller-lessee and buyer-lessor under Ind AS 116. It includes scenarios involving fixed payments with above-market terms and variable lease payments, demonstrating the calculation of right-of-use assets, lease liabilities, and recognized gains on rights transferred.

Companies (Accounts) Rules, 2014 amended – MCA Notification

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 587(E), dated 24 September 2024, has notified certain amendments to the Companies (Accounts) Rules, 2014. The amendment notifies the insertion of a new proviso in Rule 12, sub-rule (1B), which mandates that Form CSR-2 has to be filed separately by 31 December 2024, for the financial year 2023-2024. This filing is required to occur subsequent to the submission of Form No. AOC-4, Form No. AOC-4-NBFC (Ind AS), or Form No. AOC-4 XBRL, as specified in the said Rules. The amendment intends to enhance compliance regarding corporate social responsibility reporting obligations.

Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 amended – MCA Notification

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 555(E), dated 9 September 2024, notified certain amendments to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. This amendment aims to clarify and streamline the procedural requirements for certain mergers and amalgamations. Rule 25A of the said Rules has now been amended to incorporate a new sub-rule (5). This provision stipulates the following conditions to be fulfilled when a merger or amalgamation involves a foreign holding company and its wholly owned Indian subsidiary:

1. Both entities must secure prior approval from the Reserve Bank of India;
2. The transferee Indian company is required to adhere to the provisions set forth in Section 233 of the Companies Act;
3. The application shall be submitted by the transferee Indian company to the Central Government in accordance with Section 233, with the relevant provisions of Rule 25 applying to such applications; and
4. The declaration referenced in sub-rule (4) of Rule 25 must be made at the time of applying under Section 233 of the Companies Act.

Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 amended – MCA Notification

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 552(E), dated 9 September 2024, has notified certain amendments to the Investor Education and Protection Fund

Authority (Accounting, Audit, Transfer and Refund) Rules, 2016. The amendments, effective from the date of publication in the official gazette, introduce several key changes aimed at enhancing clarity and procedural efficiency. The key amendments are outlined as follows:

1. *Terminology Change:* The term 'shares' has been replaced with 'securities' throughout the rules to align with updated regulatory language.
2. *Legal Heir Certificates:* New provisions have been added to accommodate legal heir certificates issued by revenue authorities not below the rank of Tahsildar, specifying that a notarized indemnity bond and no objection certificates from all legal heirs are required for the transmission of securities.
3. *Valuation of Securities:* The applicant must quantify the value of securities based on the closing price from a recognized stock exchange or, for unlisted securities, on either the face value or maturity value, whichever is higher.
4. *Increased Monetary Threshold:* The monetary threshold for certain provisions has been increased from INR 5,00,000 to INR 15,00,000.
5. *Self-Declaration for Foreign Nationals:* A new self-declaration option has been introduced for foreign nationals regarding lost or misplaced securities, allowing for notarized or apostilled documentation.
6. *Contingency Insurance Requirement:* Companies are now mandated to obtain special contingency insurance for risks associated with verification reports.

Competition Commission of India (Combinations) Regulations, 2024 introduced to enhance the merger control regime in India

The Competition Commission of India ('**CCI**') *vide* Notification No. F.No.CCI/CD/Comb. Regl./2024, dated 9 September 2024, notified the Competition Commission of India (Combinations) Regulations, 2024. The said Regulations have come into effect from 10 September 2024. Some of the key provisions introduced have been mentioned below:

1. *Deal Value Thresholds:* Transactions exceeding INR 2,000 crore (approx. USD 238 million) involving targets with substantial operations in India will require prior CCI approval, even if they might have previously qualified for a *de-minimis* exemption.
2. *Substantial Business Operations Criteria:* A target has substantial operations in India if it meets any of the

following: at least 10% of global users are in India; its Gross Merchandise Value (GMV) in India exceeds 10% of global GMV and is over INR 500 crore (approx. USD 60 million); or its turnover in India exceeds 10% of global turnover and is above INR 500 crore, excluding digital services.

3. *Reduced Review Timelines:* The CCI must now provide a *prima facie* view or phase I approval within 30 calendar days, reduced from 30 working days. The maximum deemed approval timeline is shortened from 210 to 150 days.

4. *Derogation for Open Offers:* Stock market transactions will not need prior CCI notification if reported within 30 days and no ownership rights are exercised during that time.

Competition (Criteria for Exemption of Combinations) Rules, 2024 notified – MCA Notification

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 549(E), dated 9 September 2024, has notified the Competition (Criteria for Exemption of Combinations) Rules, 2024, which have come into effect on 10 September 2024. The said Rules delineate specific categories of combinations that are exempt from certain compliance obligations. The key exemptions notified include the following:

1. *Acquisition of Shares:* Transactions involving shares acquired in the ordinary course of business, such as the acquisition of unsubscribed shares upon devolvement as per covenant of an underwriting agreement or acquisition as a stockbroker are exempt provided the acquirer holds less than 25% of total shares or voting rights (or 10% for mutual funds) without acquiring control.

2. *Investment-Only Acquisitions:* Acquisitions that do not confer control or board representation, and do not exceed 25% of shares or voting rights, are classified as purely investment activities.

3. *Incremental Acquisitions:* Additional acquisitions of shares by entities that do not change control or board representation are exempt under specified conditions.

4. *Asset Acquisitions:* The acquisition of assets in the ordinary course of business, or assets unrelated to the acquirer's activities, is exempt unless such assets represent substantial business operations.

5. *Mergers and Demergers:* Transactions occurring within the same group or those approved by the Competition Commission of India are exempt, provided they do not result in a change of control.

Competition (Minimum Value of Assets or Turnover) Rules, 2024 notified – MCA notification

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 547(E), dated 9 September 2024, has notified the Competition (Minimum Value of Assets or Turnover) Rules, 2024. The said Rules came into effect on 10 September 2024 and delineated the minimum thresholds for assets and turnover that are pertinent to the regulation of combinations. The value of assets is now set at INR 450 crore, while the minimum turnover threshold is established at INR 1,250 crore. The said criteria have been designed to clarify the parameters for determining whether specific transactions are subject to the provisions of the Competition Act. By specifying these minimum values, the rules aim to enhance the regulatory framework governing mergers and acquisitions, ensuring that only transactions of significant magnitude are subject to scrutiny under the Competition Act. This initiative underscores the government's commitment to streamlining the merger control process while maintaining effective oversight of competition within the market.

Competition (Criteria of Combination) Rules, 2024 notified – MCA notification

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 548 (E), dated 9 September 2024 has notified the Competition (Criteria of Combination) Rules, 2024. The said Rules have come into effect on 10 September 2024. These Rules establish the criteria for parties involved in a combination, including their respective group entities and affiliates, to submit a notice to the Competition Commission of India ('**CCI**') in accordance with Section 6(4) of the Competition Act. The parties may notify CCI if they satisfy the following conditions:

- They do not produce or provide similar, identical, or substitutable products or services; and
- They are not engaged in activities related to the production, supply, distribution, storage, sale, or service of products or services that are at different stages of production or are complementary to one another.

The said Rules further clarify that the parties to a combination and their respective group entities include the ultimate

controlling person of the acquirer, the enterprise being acquired along with its downstream entities, and the enterprises involved in a merger or amalgamation along with their controlling persons. Additionally, an enterprise is deemed an affiliate of another if it possesses 10% or more of the shareholding or voting rights, has the right to board representation, or has access to commercially sensitive information.

Reporting requirements under Liberalised Remittance Scheme for resident individuals revised from monthly to daily reports – RBI Notification

The Reserve Bank of India *vide* Notification No. RBI/2024-25/74 (A.P. (DIR Series) Circular No. 16), dated 6 September 2024, has communicated updates to all Authorised Dealer Category-I Banks ('**AD Cat-I Banks**') regarding the Liberalised Remittance Scheme ('**LRS**') reporting requirements for Resident Individuals. Previously, under the A.P. (DIR Series) Circular No. 36 dated 4 April 2008 and A.P. (DIR Series) Circular No. 11 dated 22 December 2023, the banks were mandated to submit monthly returns to the Centralised Information Management System ('**CIMS**') on the number of applications received and the total amount remitted under the LRS.

Effective from September 2024, the monthly reporting requirement under Return Code: R089 has been discontinued. Instead, banks are now required to submit transaction-wise daily reports under Return Code: R010 by the close of business on the next working day through CIMS. If no transactions occur, a 'NIL' report shall be filed. AD Cat-I Banks are obligated to inform their constituents about these updates, and the RBI's Master Direction on Reporting under the Foreign Exchange Management Act, 1999 ('**FEMA**') will be revised accordingly.

Investing in securities of companies listed on the SME segment of stock exchanges – SEBI Press Release

The Securities and Exchange Board of India *vide* Press Release PR No. 18/2024, dated 28 August 2024, has issued advisory on investing in listed SME Companies. The Small and Medium Enterprises ('**SME**') platform of the Stock Exchanges, operational since 2012, has established itself as a significant funding source for emerging businesses, amassing over ₹14,000 crores in capital over the past decade, including approximately ₹6,000 crores during the fiscal year 2024.

However, SEBI notes concerning practices among certain SME companies and their promoters that misrepresent their

operational status following listing. These entities frequently disseminate public announcements that portray an overly optimistic view of their operations, subsequently engaging in corporate actions such as bonus issues, stock splits, and preferential allotments. Such strategies may generate positive sentiment among investors, thereby enticing them to purchase securities, while simultaneously affording promoters the opportunity to divest their holdings at inflated prices. SEBI states that it has issued orders against these entities, revealing a recurring modus operandi. Therefore, investors are strongly advised to exercise caution and vigilance when considering investments in such securities and to refrain from relying on unverified social media information or investment recommendations based on rumours or tips.

Trading and Settlement of Sovereign Green Bonds in the International Financial Services Centre – RBI notification

The Reserve Bank of India *vide* Notification No. RBI/2024-25/72 (CO.FMRD.FMIA.No.S242/11-01-051/2024-2025), dated 29 August 2024, has introduced the Scheme for Trading and Settlement of Sovereign Green Bonds ('**SGrBs**') in the International Financial Services Centre ('**IFSC**') in India. This initiative, stemming from the bi-monthly Monetary Policy Statement dated 5 April 2024, aims to facilitate eligible foreign investors in trading and investing in SGrBs issued by the Government of India.

Amendments to the Foreign Exchange Management (Debt Instruments) Regulations, 2019, were made through Notification No. FEMA.396(3)/2024-RB, dated 7 August 2024. Foreign investors not situated in high-risk jurisdictions identified by the Financial Action Task Force, along with International Financial Services Centre Banking Units ('**IBUs**') shall be eligible to participate under the new scheme for trading and settlement of SGrBs. While investors can engage in both primary and secondary markets, IBUs shall be restricted to secondary market transactions.

The new SGrBs scheme outlines an operational framework for settlement via authorized depositories and clearing corporations, ensuring secure and timely transactions. It also mandates compliance with the Anti-Money Laundering and Know Your Customer Regulations, significantly enhancing foreign participation in India's SGrBs market through the IFSC. The details of the scheme have been enclosed within the Annexure to the said notification.

Modification in the timeline for submission of status regarding payment obligations to the stock exchanges by entities that have listed commercial paper – SEBI Circular

The Securities and Exchange Board of India ('**SEBI**') *vide* Circular No. SEBI/HO/DDHS/DDHS-PoD-1/P/CIR/2024/117 dated 6 September 2024, has implemented modifications to the timeline for entities that have listed commercial paper to report their payment obligation status to stock exchanges. This amendment specifically pertains to Chapter XVII of the Master Circular regarding the issuance and listing of Non-convertible Securities, Securitised Debt Instruments, Security Receipts, Municipal Debt Securities, and Commercial Paper ('**NCS Master Circular**'), dated 22 May 2024.

In accordance with Regulation 57 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, entities with listed non-convertible securities are required to report the status of their payment obligations within one working day of the payment becoming due. Previously, Paragraph 8.4 of Chapter XVII of the NCS Master Circular mandated that issuers of listed commercial paper submit a certificate confirming the fulfilment of their payment obligations within two days of the payment due date. To align these timelines, Paragraph 8.4 has been amended to require that issuers confirm the fulfilment of their payment obligations within one working day of the payment becoming due.

Ratio Decidendi

- Fresh settlement proposal will not be permitted once Committee of Creditors (CoC) has approved Resolution Plan – *NCLAT New Delhi*
- Not proposing the name of an arbitrator in the legal notice does not vitiate the arbitration proceeding – *Rajasthan High Court*
- In case of a deadlock situation in a company, the impasse should be resolved by one group buying out the shares of the other – *NCLT Mumbai*
- Courts should not delve into the commercial wisdom of the CoC to decide the fairness and reasonableness of the Resolution Plan – *Delhi High Court*
- Arbitration application under Section 11 cannot be entertained without a valid notice under Section 21 – *Telangana High Court*

Fresh settlement proposal will not be permitted once Committee of Creditors (CoC) has approved Resolution Plan

The Hon'ble National Company Law Appellant Tribunal ('**NCLAT**') has held that once the CoC approves a Resolution Plan and the Corporate Insolvency Resolution Process (CIRP) concludes, no new settlement proposal can be submitted. The NCLAT further clarified that if the CoC's decision is made unanimously by the members of the CoC, then the said decision becomes final and can only be contested if it is arbitrary.

Nimitaya Hotel & Resorts Pvt. Ltd. ('**Corporate Debtor**' / '**CD**') had availed various financial facilities from the Indian Bank (Erstwhile known as Allahabad Bank) ('**Financial Creditor**' / '**FC**'). Due to a default of the CD, the Financial Creditor filed a Section 7 application under the provisions of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), which was admitted by the National Company Law Tribunal, New Delhi ('**NCLT**'/ '**Adjudicating Authority**') on 24 December 2021. Aggrieved by the same, one of the shareholders of the Corporate Debtor ('**Appellant**'), preferred a Company Appeal (Insolvency) No. 03 of 2022 ('**Appeal**') challenging the Order of the NCLT. On 4 July 2022, NCLAT, disposed of the Appeal and permitted the Appellant to submit a fresh application under Section 12-A of IBC to the Resolution Professional ('**RP**') for consideration by the CoC, with a settlement offer of around INR 81 crore.

The CoC considered the proposal of the Appellant alongside the Resolution Plan from the successful Resolution Applicant ('**SRA**'). However, the CoC approved the SRA's plan valued at INR 120.01 crore and rejected the Appellant's proposal. After the CoC approved the Resolution Plan, the Appellant submitted another proposal offering INR 118.25 crore. However, the same was not considered by the RP. The Appellant then applied to the NCLT, seeking directions for the RP and CoC to consider the revised settlement proposal that was submitted as per the permission of the NCLT under Section 12-A of IBC. However, the NCLT *vide* its order dated 3 July 2024 upheld the decision of the CoC. Hence the Appellant filed an appeal before NCLAT against the said order of NCLT.

The Appellant referred to the Hon'ble Supreme Court's decision in *Swiss Ribbons Pvt. Ltd.* v. *Union of India*, (2019) 4 SCC 17. However, the NCLAT noted that in the said case, the Hon'ble Supreme Court has held that only an arbitrary rejection of the Resolution Plan by the CoC could be challenged, which was not in the present case. Basis the same, the NCLAT observed that the Appellant's challenge to the rejection of fresh settlement

proposal, was not an arbitrary decision and therefore challenge to COC's decision was not sustainable.

The Hon'ble NCLAT further emphasized that after the approval of the Resolution Plan and the rejection of the Appellant's proposal, the Appellant cannot submit a new proposal or increase the settlement value. The CIRP period had ended on 28 January 2023, and the Appellant's attempt to file fresh proposals post-CIRP was not permissible. Conclusively, the NCLAT dismissed the appeal, holding that it was devoid of merit.

[*Sanjeev Mahajan* v. *Indian Bank and Others* – Decision dated 20 August 2024 in IA No.2594/2023 in Company Petition No. (IB)-1913/ND/2019, National Company Law Appellate Tribunal, New Delhi]

Not proposing the name of an arbitrator in the legal notice does not vitiate the arbitration proceeding

The Hon'ble Rajasthan High Court has held that the invocation of an arbitration clause, which mandates the Petitioner to propose the name of an Arbitrator, remains valid under Section 11 of the Arbitration and Conciliation Act, 1996, ('**Arbitration Act**') even if the arbitrator is not named in the legal notice, since the existence of an arbitration agreement is *prima facie* established.

On 11 January 2023, Movie Time Cinemas Private Limited ('**Petitioner**') and Chetak Cinema ('**Respondent**') executed a registered Lease Deed, which stipulated the transfer of possession of the 5th and 6th floors of Chetak Mall in Udaipur to the Petitioner ('**Lease Deed**'). After the Petitioner took possession on 1 May 2023, the Respondent allegedly tried to establish third-party rights over the leased premises. Hence, being aggrieved by the same the Petitioner invoked the arbitration clause of the Lease Deed by issuing a legal notice.

The Petitioner, due to the non-receipt of any response from the Respondent, filed an application under Section 11(6) of the Arbitration Act, before the Hon'ble High Court, seeking the appointment of an arbitrator **('Section 11 Application')**. However, the issue before the Court was whether the legal notice issued without having any proposed arbitrator would be considered valid for invoking arbitration proceedings.

With regards to the aforesaid, the Court referring to the Supreme Court's judgment in *Cox & Kings Ltd.* v. *SAP India Pvt. Ltd.*, Arb. Pet. No. 38 of 2020, held that the requirement under Section 11 of the Arbitration Act is the *prima facie* existence of an agreement. Since, the Lease Deed contained a valid arbitration clause, which

was sufficient to establish the existence of an arbitration agreement between the parties. The Court held that the Petitioner's legal notice is a sufficient invocation of the arbitration clause, despite the absence of a specific arbitrator's name.

The Court also relied on Supreme Court's judgment in *BSNL & Anr.* v. *Nortel Networks India (P) Ltd.*, (2021) 5 SCC 738, reaffirmed in *NTPC Ltd.* v. *SPML Infra Ltd.*, 2023 SCC OnLine SC 389, wherein it was held that the Court should only interfere under Section 11 of the Arbitration Act when the said application is time-barred, dead, or when no subsisting dispute exists. The Court further emphasised that not mentioning the name of the proposed arbitrator cannot vitiate a Section 11 application preferred under the Arbitration Act.

[*Movie Time Cinemas Pvt. Ltd.* v. *Chetak Cinema S.B.* – Decision dated 11 September 2024 in Arbitration Application No. 48/2023, Rajasthan High Court]

In case of a deadlock situation in a company, the impasse should be resolved by one group buying out the shares of the other

The Hon'ble NCLT Mumbai Bench has held that in situations where shareholders have equal shareholding and director representation, and a deadlock occurs in the company's daily management, the impasse is to be resolved by one group acquiring the shares of the other.

Mr. Hormouz Phiroze Aderianwalla and Delzad Aspy Karani ('**Petitioners**') initiated two separate Company Petitions, accusing the other Directors of engaging in oppression and mismanagement concerning the operations of Del. Seatek India Pvt. Ltd. Both Company Petitions centred on claims of breach of fiduciary duty by the Other Group including illegal meetings and improper management of Company assets and shares. The Petitions also highlighted the fact of holding 50% of the shareholding in the Company thereby creating an impasse in the day-to-day management of the Company. Consequently, the Petitioners *inter alia* sought reliefs including the removal of the Other Group as Directors and permission to buy their shares at fair market value to overcome the deadlock created by 50-50 shareholding in the Company.

Considering the same the NCLT held that there was an absolute deadlock in the functioning of the Company which adversely impacted even the statutory compliances. Thereby, the NCLT placing its reliance on the precedents of *M.S.D.C. Radharamanan* v. *M.S.D. Chandrasekara Raja and Another*, reported in 2008 (6) SCC 750, *Vidharbha Bottles Pvt. Ltd.* v. *Devilal Hardeolal Jaiswal and*

Others, reported in 2016 (3) MHLJ 849, held that in cases of equal shareholding and director representation by the shareholders, where a deadlock arises in the day-to-day management of a company, the deadlock should be resolved by one group purchasing the shares of the other.

In view of the aforementioned, the Tribunal directed Mr Hormouz Phiroze Aderianwalla and Ors. to buy out the shareholding of Other Group in the Company within 6 months, keeping in view the deadlock in the Company and the fact that the warring factions could no longer conduct business together.

[*Hormouz Phiroze Aderianwalla & Anr.* v. *Del. Seatek India Pvt. Ltd. and Ors.* – Decision dated 5 September 2024 in Company Petition/199/MB/2022 & Company Petition/50/MB/2023, NCLT Mumbai]

Courts should not delve into the commercial wisdom of the CoC to decide the fairness and reasonableness of the Resolution Plan

The Hon'ble Delhi High Court has upheld the commercial wisdom of the Committee of Creditors ('**CoC**') even when the CoC rejected Gateway Investment Management Services Ltd.'s ('**Petitioner**' / '**Resolution Applicant**') Resolution Plan, despite it being the highest bid in the e-auction, during the Corporate Insolvency Resolution Process ('**CIRP**') of Helio Photo Voltaic Pvt. Ltd. ('**Corporate Debtor**').

The Petitioner proposed a plan offering INR 109.87 crore to be paid over 12 months, whereas the Successful Resolution Applicant ('**SRA**') only proposed INR 99 crore. However, the CoC did not accept the bid of the Petitioner despite it being the highest bidder among all the Resolution Applicants.

The Petitioner relied on the coordinate bench decision of Hon'ble Delhi High Court in the case of *Kunwar Sachdev* v. *IDBI Bank & Ors* W.P. (C) 10599/2021, dated 12 February 2024 to contend that the CoC is empowered with some fiduciary duties required to follow an established code of conduct to ensure fairness and reasonableness in the CoC's decision-making process. It was further contended that the CoC's decisions while exercising its commercial judgment, must align with the objectives of the Insolvency Bankruptcy Code, 2016 ('**IBC**'), which are to revive the company and maximize the value of its assets.

In contrast to the Petitioner's averments, it was argued by National Asset Reconstruction Company Limited ('**Respondent No. 2**') that in the realm of private contracts and bidding processes, the highest bidder is not necessarily always chosen for the Resolution Plan. The Resolution Plan endorsed by the CoC

must be submitted to the National Company Law Tribunal ('**NCLT**') for final approval, where the Petitioner can voice out their concerns. However, the Petitioner cannot seek redress in the High Court through Writ Jurisdiction, when an alternative remedy to approach NCLT exists.

Considering the contentions of both sides, the Hon'ble High Court held that the NCLT alone has jurisdiction to regulate the conduct of the CoC and make decisions regarding the approval of Resolution Plans. Further, the Hon'ble High Court observed that the guidelines issued by the Insolvency and Bankruptcy Board of India ('**IBBI**') on 6 August 2024 regarding CoC, do not mandate the exercise of judicial review powers or override the authority of the NCLT to examine the commercial wisdom of the CoC, which had rejected the Petitioner's Resolution Plan. Thereby, the Hon'ble High Court declined to exercise its Writ Jurisdiction to override the authority of NCLT regarding the approval of the Resolution Plan.

[*Gateway Investment Management Services Ltd.* v. *Reserve Bank of India and Ors.* – Decision dated 23 September 2024 in W.P.(C) 13278/2024, Delhi High Court]

Arbitration application under Section 11 cannot be entertained without a valid notice under Section 21

The Hon'ble Telangana High Court has held that a valid notice as per Section 21 of the Arbitration & Conciliation Act, 1996 ('**Arbitration Act**') is a mandatory requirement for invocation of arbitration, and an arbitration application under Section 11 of the Act in the absence of such notice shall be deemed non-maintainable.

The parties to the present arbitration application had entered into a Franchise Agreement dated 26 June 2019, whereunder Clause 4 contained the arbitration clause. Subsequently, disputes arose between the parties, owing to which Mrs. Kurnuda Sreenivasa Sasikanth ('**Applicant**') sent a notice dated 16 January 2024 ('**Notice**') to M/S Ananya Child Development and Early ('**Respondent**') claiming a refund of INR 16,29,567/- within a period of one month. The Respondent submitted a reply dated 06 February 2024 to the said Notice. Thereafter, the Applicant filed the present arbitration application seeking the appointment of an arbitrator for the resolution of disputes. It was the case of the Respondent that the Notice does not comply with the statutory requirement of Section 21 of the Arbitration Act, which is a condition precedent for the invocation of an

application under Section 11(6) of the Arbitration Act, and therefore the arbitration application is liable to be dismissed.

The Court referred to the judgment of the Hon'ble Bombay High Court passed in the case of *Malvika Rajnikanth Mehta* v. *JESS Constructions*, Arbitration Application No.425 of 2019, whereunder it was held that the notice under Section 21 of the Act serves certain definite purposes. The purpose includes (a) putting the adversary on notice as to the nature of the claim, (b) providing an opportunity for the adversary to contest the admissibility of the claims on the threshold, (c) allowing the adversary to raise the issue of impartiality of the proposed Arbitrator and the consequent disqualification (d) the date of the receipt of the notice has a bearing upon the date of the commencement of the arbitration.

The Hon'ble Court further referred to the case of *Arif Azim Co. Ltd.* v. *Aptech Ltd.* 2024 SCC OnLine SC 215, wherein the Apex Court had held it was held that the limitation period for filing an application under Section 11(6) commences only after the issuance of a valid notice under Section 21 of the Arbitration Act, thereby emphasizing on the requirement of a valid notice under Section 21 in order to entertain an application under Section 11 of the Act.

Based on the above reasons, the Hon'ble Court clarified that merely stating that a dispute had arisen and claiming amounts arising out of the disputes does not fulfil the requirement under Section 21 of the Arbitration Act. As a result, the Hon'ble Court dismissed the present arbitration application.

[*Kurnuda Sreenivasa Sasikanth* v. *Ananya Child Development* – Decision dated 6 September 2024 in Arbitration Application No. 100 of 2024, Telangana High Court]

News Nuggets

- E-adjudication of violations under Company law introduced
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- CCI okays Tata Motors Finance and Tata Capital merger
- Trade Connect e-Platform launched for exporters
- Drivers of cab aggregators are employees under PoSH
- 54% of IPO shares allotted to investors (excluding anchor investors) are sold within one week – SEBI Press Release

E-adjudication of violations under Company law introduced

In order to boost efficiency, reduce administrative burdens, and facilitate faster dispute resolutions, aligning with its digitalisation goals for corporate compliance, the Central Government has introduced e-adjudication of all the offences under the Companies Act, 2013 and the Limited Liability Partnership Act, 2008 with effect from 16 September 2024. Accordingly, the proceedings of the Registrars of Companies ('**RoCs**') and Regional Directors ('**RDs**') will now be conducted in electronic mode and only through the e-adjudication platform developed by the Central Government, for this purpose. The MCA has also released FAQs on the e-adjudication model which can be accessible at e-Adjudication-module-FAQs.pdf (mca.gov.in).

[*Source*: Live Mint, published on 12 September 2024]

Battery Waste Management Rules – Stringent environmental compensation guidelines introduced

The Ministry of Environment, Forest, and Climate Change (MoEFCC) has introduced stringent environmental compensation guidelines to penalise violations of the Battery Waste Management Rules, 2022. As per news reports, penalties will be enforced not only for non-compliance with battery waste regulations but also for failing to meet metal-wise extended producer responsibility ('**EPR**') targets.

[*Source*: Business Standard, 16 September 2024]

MSME Policy launched in Telangana

The Telangana government has launched the Micro Small and Medium Enterprises (**MSME**) Policy on 18 September 2024 with an allocation of INR 600 crores budget to spread over the next 5 years. The policy focuses on 6 key areas from setting-up to growth phases, i.e., credit access, land availability, raw material access, flexible labour markets, technology adoption, and better market access to the MSMEs. Notably, enhancing the capital investment subsidy under the T-IDEA Scheme; developing one industrial park in each district in five years wherein 20 per cent of such plots will be reserved for MSMEs; developing 10 new common facility centres in 10 districts; 100 per cent discount on stamp duty applicable on the purchase and lease of land by warehouse developers; reimbursement of duty incurred on import of raw material at the time of import; facilitating onboarding of MSME on online platforms that enable B2B transactions and streamline applications for quality

certifications are amongst the 40 measures announced under the MSME Policy.

[*Source*: Government of Telangana, published on 18 September 2024]

MSMEs in Andhra Pradesh to get the much-needed push

The Chief Minister of Andhra Pradesh, Shri N Chandrababu Naidu (**Chief Minister**), while chairing a review meeting on Micro Small and Medium Enterprises (**MSMEs**) in the state, announced a host of measures to be undertaken by the State Government to foster the MSME sector. Accordingly, amongst other measures such as modernisation of auto nagars, completion of MSME parks, the Chief Minister announced an allocation of INR 100 Crore as for credit guarantee for the MSMEs.

[*Source*: New India Express, published on 13 September 2024]

NaBFID notified as a public financial institution

The Central Government, with an aim to strengthen large-scale infrastructure financing, has notified the National Bank for Financing Infrastructure and Development (**NaBFID**) as a 'public financial institution' *vide* the powers exercisable under Section 2 of the Companies Act, 2013. Notably, NaBFID was set up as a development finance institution under the National Bank for Financing Infrastructure and Development Act, 2021 in the year 2021.

[*Source*: Economic Times, published on 12 September 2024]

Quick commerce platforms likely to face CCI scrutiny

The Department for Promotion of Industry and Internal Trade ('**DPIIT**') has forwarded to the Competition Commission of India ('**CCI**'), a complaint it received from All India Consumer Products Distributors Federation ('**AICPDF**') on the alleged unfair business practices being adopted by quick commerce players. Reportedly, the AICPDF has alleged that the quick commerce platforms, delivering goods within 10 to 30 minutes, are resorting to anti-competitive practices thereby creating an adverse impact on the small retailers.

[*Source*: ET Brand Equity, published on 21 September 2024]

CCI okays Tata Motors Finance and Tata Capital merger

The Competition Commission of India ('**CCI**') has given its assent to the proposed merger between Tata Motors Finance

Limited ('**Tata Motors**') and Tata Capital Limited ('**Tata Capital**'). The proposed merger would result in Tata Motors holding a stake worth 4.7 per cent in the newly merged entity by way of Tata Capital issuing equivalent number of shares to the shareholders of Tata Motors. Notably, it is expected that the merged entity shall be a huge player in the space of Non-Banking Financial Companies ('**NBFC**') with Tata Capital already being a NBFC and specializing in a comprehensive range of financial services.

[*Source*: ET Edge, published on 11 September 2024]

Trade Connect e-Platform launched for exporters

The Ministry of Commerce has launched a Trade Connect e-platform which will serve as a one-stop solution, providing exporters with near real-time access to critical trade-related information, while seamlessly connecting them to key government entities such as the Indian Missions abroad, Department of Commerce, Export Promotion Councils, and other trade experts. The platform (Trade Connect Portal), designed to assist businesses at every stage of their export journey, connects more than 6 lakh IEC holders, over 180 Indian Mission officials, over 600 Export Promotion Council Officials, besides the officials from DGFT, DoC, banks, etc. Businesses and entrepreneurs will also be able to learn of the Free Trade Agreement (FTA) benefits that are available to expand their trade.

[*Source*: Press Information Bureau, Press release dated 11 September 2024]

Drivers of cab aggregators are employees under PoSH

The Karnataka High Court has held that drivers-subscribers of a cab aggregator are employees of the aggregator for the purposes of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('**PoSH**'). The Single-Judge Bench in this regard rejected the submissions of the aggregator that it is merely an 'intermediary'.

[*Source*: The Hindu, dated 2 October 2024]

54% of IPO shares allotted to investors (excluding anchor investors) are sold within one week – SEBI Press Release

The Securities and Exchange Board of India *vide* Press Release PR No.19/2024, dated 2 September 2024, states that it had conducted a comprehensive study to examine investor behaviour in Main Board IPOs, utilizing data from 144 IPOs listed between April 2021 and December 2023. The study's key

findings indicate that 54% of IPO shares allotted to retail investors (excluding anchor investors) are sold within one week of listing. Notably, individual investors demonstrated a 'flipping' behaviour, selling 50% of their allotted shares by value within one week and 70% within one year. The analysis also revealed a pronounced disposition effect, with investors exhibiting a greater tendency to sell shares that experienced positive listing gains. When IPO returns surpassed 20%, individual investors liquidated 67.6% of shares by value within one week, in contrast to only 23.3% for shares that posted negative returns. Furthermore, nearly half of the demat accounts that applied for IPOs were established post-COVID. Subsequent to SEBI's interventions in April 2022, there was a significant reduction in oversubscription within the Non-Institutional Investor ('**NII**') category, along with a marked decline in applications from high-value NII investors.

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