

Highlights:**Corporate Brief**

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- MCA notifies Companies (Management and Administration) Amendment Rules, 2021;
- MCA notifies Companies (Accounts) Amendment Rules, 2021;
- MCA notifies amendment to Part II of Schedule V of the Companies Act, 2013;
- SEBI Circular on guidelines for Business Continuity Plan and Disaster Recovery (DR) of Market Infrastructure Institutions;
- SEBI Circular regarding prior approval for change in control: Transfer of shareholdings among immediate relatives and transmission of shareholdings and their effect on change in control.

RERA Brief

- Circular dated 08.03.21, issued by Maharashtra Real Estate Regulatory Authority regarding the new formats introduced for filing applications.
- Circular dated 09.03.21, issued by Rajasthan Real Estate Regulatory Authority ("Rajasthan RERA") regarding reminder for submission of application for availing extension on finish date of the projects.
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- Order dated 12.03.21, issued by Rajasthan Real Estate Regulatory Authority to the applicants for recall of ex-parte orders.
- Notice dated 08.03.21, issued by Bihar Real Estate Regulatory Authority regarding shifting of Legal and Complaint section of RERA office.
- Notice dated 10.03.21, issued by Bihar Real Estate Regulatory Authority to the promoters and developers, who have registered their projects or have applied for registration for submission of annual accounts of their company.
- Order dated 16.03.21, issued by Kerala Real Estate Regulatory Authority to the promoters for the submission of application for the construction of villas.

NCLT Brief

- Whether the National Company Law Tribunal & National Company Law Appellate Tribunal can exercise jurisdiction under the Insolvency & Bankruptcy Code, 2016 over contractual disputes?

Litigation Brief

- Amendment of Section 138 of the Negotiable Instruments Act, 1881 to permit one trial for multiple cases from single transaction for expeditious trial of cheque bounce cases

Corporate Brief**➤ MCA notifies the Companies (Audit and Auditors) Amendment Rules, 2021:**

The Ministry of Corporate Affairs ("MCA") vide notification dated 24.03.2021 notified the Companies (Audit and Auditors) Amendment Rules, 2021 and made the following rules to further amend the Companies (Audit and Auditors) Rules, 2014. These rules shall come into effect from 01.04.2021.

- The MCA now requires the management of the company to give a representation that no funds have been advanced or loaned or invested by the company to or in any other persons or entities, including foreign entities ("intermediaries"), with the understanding that the Intermediary shall directly or indirectly lend or invest in other persons or entities identified in any manner whatsoever by or on behalf of the company ("Ultimate Beneficiaries") or provide any guarantee, security or the like on behalf of the Ultimate Beneficiaries.
- The company is also required to give a representation that no funds have been received by the company from any persons or entities including foreign entities ("Funding Parties"), with the understanding that that the company shall, whether, directly or indirectly, lend or invest in other persons or entities identified in any manner whatsoever by or on behalf of the Funding Party ("Ultimate Beneficiaries") or provide any guarantee, security or the like on behalf of the Ultimate Beneficiaries.
- Further the company is required to represent that the dividend declared or paid during the year by the company is in compliance with the Companies Act, 2013.
- The company is now also required to use such accounting software for maintaining its books of account which has a feature of recording audit trail (edit log) facility and the company is required to represent that the same has been operated throughout the year for all transactions recorded in the software and the audit trail feature has not been tampered with and the audit trail has been preserved by the company as per the statutory requirements for record retention.

➤ MCA notifies Companies (Management and Administration) Amendment Rules, 2021:

The MCA vide notification dated 05.03.2021, notified the Companies (Management and Administration) Amendment Rules, 2021 ["Amendment Rules"] to make the following amendment to the Companies (Management and Administration) Rules, 2014 which shall be in effect from 05.03.2021:

- The Amendment Rules bifurcated the filing of annual return based on type of companies. Under Rule 11(1), every

company, except a One Person Company and a Small Company, shall file its annual return in Form No. MGT-7. One Person Company and Small Company shall file its annual return in Form No. MGT-7A.

- In Rule 12, the Amendment Rules removed the compliance of attaching an extract of the annual return with the Board's Report. Rule 12 is now limited to filing a copy of annual return with the Registrar with specified fees.

⇒ **MCA notifies Companies (Accounts) Amendment Rules, 2021:**

The MCA vide notification dated 24.03.2021, notified the Companies (Accounts) Amendment Rules, 2021 ["Accounts Amendment Rules"] to make the following amendment to the Companies (Accounts) Rules, 2014 ["Accounts Rules"] which shall come into effect from 01.04.2021:

- For the financial year commencing on or after 01.04.2021, for every company that uses an accounting software to maintain books of accounts, the following proviso was inserted.
 - ≡ The company shall use such an accounting software that has a feature of recording the audit trail of each and every transaction, thereby creating an edit log of each change made in the books of accounts along with the date of such change.
 - ≡ The proviso adds that companies shall ensure that the feature of audit trail cannot be disabled.
- The report of the board, in addition to the existing information under Rule 8(5) of the Accounts Rules, shall also contain:
 - ≡ Details of application made or any proceeding pending under the Insolvency and Bankruptcy Code, 2016 during the year, along with their status as at the end of the financial year.
 - ≡ Details of difference between amount of valuation done at the time of one-time settlement and the valuation done while taking loans from Banks or Financial Institutions, along with reasons thereof.

⇒ **MCA notifies amendment to Part II of Schedule V of the Companies Act, 2013**

The MCA vide notification dated 18.03.2021 made the following amendments to Part II of Schedule V of the Companies Act, 2013:

- The MCA vide commencement notification dated 18.03.2021 appointed the 18th of March as the date on which the

provisions of Section 32 and Section 40 of the Companies (Amendment) Act, 2020 ["Act of 2020"] shall come into force.

- ≡ Vide Section 32 of the Act of 2020, Section 149(9) of the Companies Act, 2013 was amended to include the proviso that in the event a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under section 197(5) in accordance with the provisions of Schedule V. This allows for independent directors to receive remuneration in case of no or inadequate profit.

- ≡ Vide Section 40 of the Act of 2020, Section 197(3) of the Companies Act, 2013 was amended to include any other non-executive director, including an independent director. This was done in order to bring section 197(3) in line with section 149(9).

- The MCA in order to bring Schedule V of the Companies Act, 2013 in consonance with the amendments above, amended Schedule V in the following manner:

- ≡ Under Section I of Part II – the remuneration payable by companies having profits in a financial year was amended to bring into its ambit "*other director or directors*" as well.

- ≡ Under Section II of Part II – the remuneration payable by companies having no or inadequate profit was amended to include "*other directors*" and the limit of yearly remuneration payable was revised.

- ≡ Under Section III of Part II- the remuneration payable by companies having no or inadequate profit in certain special circumstances was widened to include in its ambit "*other director*" as well, except under clause (i) of the proviso.

- As per the explanation added via the amendment for the purpose of Sections I, II, III the term "*other director*" shall mean a non-executive director or an independent director.

⇒ **SEBI issues "Guidelines for Business Continuity Plan (BCP) and Disaster Recovery (DR) of Market Infrastructure Institutions (MIIs)"**

SEBI vide circular dated 22.03.2021 issued the following guidelines for Business Continuity Plan (BCP) and Disaster Recovery (DR) of Market Infrastructure Institutions (MIIs):

- Stock Exchanges, Clearing Corporations and Depositories (collectively referred as Market Infrastructure Institutions – MIIs) shall have in place BCP and Disaster Recovery Site (DRS) so as to maintain data and transaction integrity.

- Apart from DRS, all MIIs including Depositories shall also have a Near Site (NS) to ensure zero data loss.
- The DRS should preferably be set up in different seismic zones and in case, due to certain reasons such as operational constraints, change of seismic zones, etc., minimum distance of 500 kilometers shall be ensured between Primary Data Centre (PDC) and DRS so that both DRS and PDC are not affected by the same disaster.
- The manpower deployed at DRS/NS shall have the same expertise as available at PDC in terms of knowledge/awareness of various technological and procedural systems and processes relating to all operations such that DRS/NS can function at short notice, independently. MIIs shall have sufficient number of trained staff at their DRS so as to have the capability of running live operations from DRS without involving staff of the PDC.
- The Technology Committee of the MIIs shall review the implementation of BCP-DR policy approved by the governing board of the MII on a quarterly basis.
- MIIs shall conduct periodic training programs to enhance the preparedness and awareness level among its employees and outsourced staff, vendors, etc. to perform as per BCP policy.
- The circular also expounded on requirements for configuration of DRS/NS with PDC as well as procedure for DR drills/Testing and the requirement for a DR Policy Document.

⇒ **SEBI Circular regarding “Prior Approval for Change in control: Transfer of shareholdings among immediate relatives and transmission of shareholdings and their effect on change in control”**

SEBI issued clarification vide circular dated 25.03.2021 with respect to transfer of shareholding among immediate relatives and transmission of shareholding:

- As per the circular, in the following scenarios, change in shareholding of the intermediary will not be construed as change in control:
 - ≡ Transfer of shareholding among immediate relatives. Immediate relative includes any spouse of that person, or any parent, brother, sister or child of the person or of the spouse;
 - ≡ Transfer of shareholding by way of transmission to immediate relative or not, shall not result into change in control.

- In case of an intermediary being a proprietary concern, the transfer or bequeathing of the business/capital by way of transmission to another person results in a change in the legal formation or ownership and therefore will be considered a change in control. The legal heir/transferee in such cases is required to obtain prior approval and thereafter fresh registration shall be obtained in the name of legal heir/transferee.
- In case of an intermediary being a partnership firm, the circular further clarified that change in partners and their ownership interest of the partnership firm shall be dealt with in the following manner:
 - ≡ In case a SEBI registered entity is registered as a partnership firm with more than two partners, then inter-se transfer amongst the partners shall not be construed to be change in control.
 - ≡ Where the partnership firm consists of 2 (two) partners only, the same would stand as dissolved upon death of one of the partners. However, in case a new partner is inducted into the firm, the same would constitute as change in control, requiring fresh registration and prior approval from SEBI.
 - ≡ Bequeathing of partnership right to legal heirs by way of transmission shall not be considered a change in control.
- Incoming entities/ shareholders becoming part of controlling interest in the intermediary pursuant to transfer/ transmission as contemplated above, need to satisfy the *Fit and Proper Person* criteria under Schedule II of SEBI (Intermediaries) Regulations, 2008.

Real Estate Brief

⇒ **Circular issued by Maharashtra Real Estate Regulatory Authority (MahaRERA) regarding the new formats introduced for filing applications:**

Maharashtra RERA vide its circular dated 08.03.21, stated that:

- As per the Real Estate (Regulation and Development) Act, 2016 (the “Act”) read with Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website) Rules (the “Rules”):
 - a. a copy of the latest legal title report reflecting the flow of title of the land and authenticated by a practicing advocate, is required to be submitted with every project registration application. To give effect to this, a new format

(Format-A) has been introduced, for attaching the same, instead of the legal title report.

- b. A new format 'Format-B' has been introduced for making an application for the extension of completion date after obtaining the consent of at least 51% of allottees.
- c. A new format 'Format-C' has been introduced for making an application for making major alterations in the sanction plan after obtaining written consent of two third allottees.

⇒ **Circular issued by Rajasthan Real Estate Regulatory Authority ("Rajasthan RERA) regarding reminder for submission of application for availing extension on finish date of the projects:**

- Rajasthan RERA in its public notice dated 09.03.2021 announced a reminder regarding the last date for submission of applications by promoters, for availing the one-year special extension for estimated finish date and the extension for period of validity of registration of projects, which was earlier announced vide order no. F1(146) RJ/RERA/2020/848 dated 13.05.2020.
- A special window was created on its web portal for online submission of such applications. The last date of such application is on or before 31.03.2021 (midnight).

⇒ **Public Notice issued by Rajasthan Real Estate Regulatory Authority ("Rajasthan RERA") to the Promoters of Real Estate Projects:**

With respect to the order dated 13.05.2020, the requirement for the consent of two-thirds of the allottees for updation of revised maps for any project has been done away with. Subsequently, Rajasthan RERA issued a public notice dated 10.03.2021 regarding the submission of updated revised maps/ phase plans online, on its web portal latest by 31.03.2021.

⇒ **Oder issued by Rajasthan Real Estate Regulatory Authority to the applicants for recall of ex-parte orders:**

A meeting of the Rajasthan RERA ("**Authority**") was held on 24.02.2021 wherein, discussion regarding the question, whether "*the Authority can and should allow its ex-parte orders to be recalled*", was held. With respect to the powers conferred to it under the Real Estate (Regulation and Development) Act, 2016 (the "**Act**") for the purpose of speedy dispute redressal and disposal of all complaints within prescribed ordinary time limit of 60 days, the Authority shall have the power to regulate its own procedure, rectify and review its orders, and with respect to the powers conferred to the Authority under the Code of Civil Procedure ("**CPC**"), it may decide the application(s) for recall of its *ex-parte* orders

Having considered the above, Authority cannot allow an unlimited opportunity of hearing to the parties before it, therefore, in exercise of the powers under the Act and the CPC, the following was issued through this order dated 12.03.21:

- Party to the complaint that is affected by an *ex-parte* order shall be allowed for recall, upon submission of an application for the same online on the web portal of the Authority on payment of Rs 5000/- as fee in each case.
- Declaration and Undertaking has to be submitted by the applicant for the argument on original matter on merits on the date of the application, without seeking an adjournment.
- A notice shall be issued to all the parties of *ex-parte* order, before allowing the application.
- Such applications will be allowed only in matters which are decided by the Authority without considering the oral or written arguments of the applicant and that, notice for hearing was not duly served on the applicant and even otherwise he had no knowledge of the date of hearing or that he was prevented by any sufficient cause from attending the hearing on the scheduled date and time.

⇒ **Notice issued by Bihar Real Estate Regulatory Authority regarding shifting of Legal and Complaint section of RERA office:**

Bihar RERA issued a notice dated 08.03.21, wherein, the Complaint and Legal Section of Bihar RERA was shifted from 4th floor of Bihar State Building Construction Corporation to the 2nd floor. The works that will be done from the new premises, include, submission of all the complaint documents, support for online registration of complaints, agents and payment of fees and submission of application and fees for issue of certified copies of order and documents.

⇒ **Notice issued by Bihar Real Estate Regulatory Authority to the promoters and developers, who have registered their projects or have applied for registration:**

In its notice dated 10.03.21, Bihar RERA directs all promoters and developers, to submit audited annual accounts of their company, duly certified and signed by a practicing chartered accountant, along with the Statutory Auditor's certificate for the year 2019-20, by 31.03.21, enclosing therewith, verification report that the amount collected has been kept in a separate bank account, and has been withdrawn in proportion to the percentage of completion of the project and utilized for such project.

Order issued by Kerala Real Estate Regulatory Authority regarding submission of application by the Promoter for construction of villas:

Kerala RERA vide its order dated 16.03.21 stated that, for registration of real estate projects consisting of development of land into plots along with construction of villas therein each plot, the earlier practice followed by promoters of procuring the Development Permit and Layout approval for the plotted development and obtaining the building permit in the name of the individual purchaser of each plot has been done away with. Now, such promoters shall submit the fee and application for registration for the entire project land as well as all the villas and building proposed to be constructed in the project as a whole.

NCLT Brief

Whether the National Company Law Tribunal & National Company Law Appellate Tribunal can exercise jurisdiction under the Insolvency & Bankruptcy Code, 2016 over contractual disputes?

[Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta & Others [Civil Appeal No. 9241/2019] - Supreme Court of India.

Brief Background of the Case:

- Gujarat Urja Vikas Nigam Limited (“GUVNL”) and Astonfield Solar Private Limited (“Corporate Debtor”) had entered into a Power Purchase Agreement (“PPA”) on 30.04.2010. As per the PPA, GUVNL was required to procure power generated from the solar power plant (“Plant”) of the Corporate Debtor for a period of 25 years.
- On account of persistent default by the Corporate Debtor in undertaking payments to various lenders, the lenders declared the Corporate Debtor as a Non-Performing Asset (“NPA”) on 04.05.2018.
- Post declaration of the NPA, the Corporate Debtor filed an application under Section 10 of the Insolvency & Bankruptcy Code, 2016 (“Code”) before the National Company Law Tribunal (“NCLT”). The said application was admitted by the NCLT on 20.11.2018, and the Corporate Insolvency Resolution Process (“CIRP”) of the Corporate Debtor was initiated.
- On 01.05.2019, GUVNL issued two Default Notices to the Corporate Debtor. Firstly to remedy the event of default under the PPA that arose on account of the initiation of the CIRP of the Corporate Debtor, and secondly requesting the Corporate Debtor to remedy the default of operation and maintenance of the Plant of the Corporate Debtor. The Default Notices stated that the PPA would be terminated if

the Corporate Debtor failed to cure the defaults provided in the Default Notices.

- In response to the above notices, the Resolution Professional (“RP”) of the Corporate Debtor filed an application under Section 60(5) of the Code before the NCLT praying for issuance of an injunction restraining GUVNL from terminating the PPA. The said Application was allowed vide Order dated 29.08.2019, and GUVNL was restrained from terminating the PPA.
- GUVNL filed an appeal against the above Order before the National Company Law Appellate Tribunal (“NCLAT”). The NCLAT while dismissing the appeal held that the PPA cannot be terminated solely on the ground that the CIRP of the Corporate Debtor was initiated. Aggrieved by the above Order, GUVNL approached the Supreme Court of India (“Supreme Court”).

Issues and Observations of the Supreme Court:

A. The jurisdiction of the NCLT/NCLAT on disputes arising from contracts such as PPA

- The first issue determines the nature of jurisdiction exercised by the NCLT/NCLAT under Section 60(5) of the Code. The Code has an exclusive jurisdiction on matters relating to insolvency so as to avoid multiple proceedings by/against the corporate debtors in different forums.
- The Supreme Court placed reliance on the case of *ArcelorMittal (India) (Private) Limited vs. Satish Kumar Gupta (2019) 2 SCC 1*, wherein it was observed that no other forum except NCLT/NCLAT has the jurisdiction to entertain or dispose of the applications and proceedings by or against a corporate debtor under the Code.
- In the present case, the PPA was terminated solely on the ground of insolvency of the Corporate Debtor since the event of default contemplated in the PPA was triggered on the commencement of the CIRP proceedings *qua* the Corporate Debtor. The other ground namely, operation & maintenance of Plant was cured by the Corporate Debtor. Therefore, it was held that the termination is not on a ground independent of the insolvency, hence, the present dispute solely arose out of and relates to the insolvency of the Corporate Debtor.
- Since the dispute in the present matter was premised on the ground of insolvency of the Corporate Debtor, the NCLT was empowered to adjudicate the dispute under Section 60(5) of the Code.

B. Jurisdiction of NCLT and Gujarat Electricity Regulatory Commission

- Section 86(1)(f) of the Electricity Act, 2003 provides for the adjudicatory jurisdiction of Gujarat Electricity Regulatory Commission (“GERC”) for disputes arising between the licensees and the generating companies. However, as the dispute in the present case arose solely on the ground of insolvency of the Corporate Debtor, therefore, it was held that the jurisdiction to adjudicate upon the same solely vested with the NCLT and not the GERC.

C. Residuary jurisdiction of NCLT under Section 60(5) of the Code

- The Supreme Court also defined the scope of jurisdiction of NCLT under Section 60(5) of the Code. The court held that the NCLT under Section 60(5) of the Code has a wide jurisdiction to adjudicate on disputes arising from or in relation to insolvency proceedings, however, NCLT cannot exercise jurisdiction on matters dehors the insolvency proceedings since such matters would fall outside the realm of the Code.

D. Right of GUVNL to terminate the PPA

- The Supreme Court observed that in case of termination of the PPA, the Corporate Debtor would no longer remain as a “going concern”. PPA being the sole contract for the sale of electricity by the Corporate Debtor, its continuation was important for the successful completion of the CIRP.
- The Supreme Court while premising their decision on the recognition of the PPA for successful completion of the PPA held that the NCLT was empowered to restrain GUVNL from terminating the PPA. The court further clarified that the jurisdiction of the NCLT under Section 60(5) cannot be invoked in matters where a termination takes place on a ground unrelated to insolvency and also in an event of legitimate termination of the contract based on ipso facto clause like Article 9.2.1(e) of the PPA.

Keeping in view the above findings the Supreme Court dismissed the appeal of GUVNL, thereby, setting aside the termination of PPA and directing GUVNL to make payment for the electricity procured from the Corporate Debtor.

Litigation Brief

Amendment of Section 138 of the Negotiable Instruments Act, 1881 to permit one trial for multiple

cases from single transaction for expeditious trial of cheque bounce cases

IN THE MATTER OF: SUO MOTO WRIT PETITION (CRL.) 2 OF 2020

In Re: Expeditious Trial of cases under S. 138 of the N.I. Act, 1881 (Order passed by the Hon’ble Supreme Court on 16.04.2021)

Issues:

Whether the gargantuan pendency of complaints filed under S.138 of the N.I. Act has had an adverse effect in disposal of other criminal cases?

Facts:

- The Special Leave Petition (Criminal) No. 5464 of 2016 were pertaining to dishonor of cheques on 27.01.2005 for an amount of Rs. 1,70,000/- (Rupees One Lac and Seventy Thousand only). The dispute has remained pending for the past 16 (Sixteen) years and concerned with the large number of cases filed under S.138 the Negotiable Instruments Act, 1881 (hereinafter referred to as “the Act”) pending at various levels, a Division Bench of this Hon’ble Court consisting of The Chief Justice of India and the Judge L. Nageswara Rao (hereinafter referred to as “Bench”) decided to examine the reasons of delay in disposal of such cases.
- The Registry was directed to register a Suo Moto Writ Petition (Criminal) captioned as “expeditious Trial of Cases under S. 138 of the Act. Mr. Sidharth Luthra, learned Senior Counsel was appointed as Amicus Curiae and Mr. K. Parmeshwar, learned Counsel was assisting him in the captioned matter.
- The learned Amici Curiae Senior Advocates Sidharth Luthra, R. Basant and Advocate K. Parmeshwar submitted a preliminary report on 11.10.2020. On 10.03.2021, the Hon’ble Bench formed a committee of experts headed by Justice RC Chavan, former Bombay High Court Judge to suggest measures to expedite trial in cheque bounce cases.
- Hence, this Hon’ble Court passed directions accepting the recommendations made in the preliminary report.

Court’s Observations:

- The Court observed that the Hon’ble High Courts shall be requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.
- The Court was of the opinion that inquiry shall be conducted on receipt of complaints under S. 1138 of the Act to arrive at

sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the Court.

- For the conduct of inquiry under Section 202 of Code of Criminal Procedure, 1973 (hereinafter referred to as “**the Code**”), evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the enquiry to examination of documents without insisting for examination of witnesses.
- The Court recommended that appropriate amendments shall be made to the Act for provision of one trial against a person for multiple offences under S. 138 of the Act committed within a period of 12 (Twelve) months, notwithstanding the restriction in S.219 of the Code.
- The Court suggested that the Hon’ble High courts shall be requested to issue practice directions of the Trial Courts to treat service of summons in one complaint under S.138 of the Act forming part of a transaction, as deemed service in respect of all the complaints filed before the same Court relating to dishonor of cheques issued as part of the said transaction.
- The Judgments of this Hon’ble Court in **Adalat Prasad v Rooplal Jindal and others (2004) 7 SCC 338 and Subramaniam Sethuraman v State of Maharashtra (2004) 13 SCC 324** have interpreted the law correctly and reiterated that there is no inherent power of Trial Courts to review or recall the issue of summons and this does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the Court's notice that it lacks jurisdiction to try the complaint.
- The Court observed that S. 258 of the Code is not applicable to complaints under S.138 of the Act and findings of **Meters and Instruments Private Limited and Another v Kanchan**

Mehta and others (2018) 1 SCC 560 do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider summons in respect of complaints under S. 138 of the Act shall be considered by the Committee constituted by the order of this Hon’ble Court dated 10.03.2021

- The Court concluded that the suggestions in the preliminary report, which have not been considered by this Hon’ble Court, will be subject to further deliberations by the Committee.

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