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Corporate Brief**➔ MCA notifies the Limited Liability Partnership (Second Amendment) Rules, 2022**

Vide Gazette Notification dated 04.03.2022, Ministry of Corporate Affairs (MCA) introduced the Limited Liability Partnership (Second Amendment) Rules, 2022 ["Amendment Rules"] to make the following amendment to the Limited Liability Partnership Rules, 2009 ["LLP Rules"] which shall be in effect from 04.03.2022:

The following key provisions of the Amendment Rules have been enlisted below:

- Rule 11(1) Second Proviso:** In second proviso to Rule 11(1) [*Incorporation of Limited Liability Partnership*] of LLP Rules, the limit regarding the number of individuals applying for allotment of Designated Partner Identification Number (DPIN) at the time of incorporation of Limited Liability Partnership (LLP) has been increased to 5 (five) individuals from 2 (two) individuals.
- Rule 11(3):** Under Rule 11(3) [*Incorporation of Limited Liability Partnership*] of LLP Rules, with the issuance of

certificate of incorporation of a new LLP, the Permanent Account Number (PAN) and Tax Deduction Account Number (TAN) would also be allotted and the same shall be mentioned in the said certificate of incorporation issued to such LLP.

- Rule 19(4):** When an existing LLP or a company or a proprietor at the time of making an application under Form 23 (*Application For Direction To Limited Liability Partnership To Change Its Name*) before the Regional Director to seek directions to be passed against a newly incorporated LLP to change its name as, the name issued to new LLP is similar to or resembles with the name of the existing limited liability partnership or company or proprietor, then such existing limited liability partnership or company or proprietor along with application made under Form 23 shall also append a copy of incorporation certificate of their LLP or the company or the registration certification of the entity.
- Rule 24(6):** The statement of account and solvency shall be signed by an Interim Resolution Professional (IRP) or Resolution Professional (RP) or LLP administrator or liquidator in case Corporate Insolvency Resolution Process (CIRP) has been instituted against a LLP under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") or Limited Liability Partnership Act, 2008 ("**LLP Act**"), required under the said amended sub-rule of the LLP Rules.
- Rule (25)(2):** New proviso to Rule 25(2) of LLP Rules has been inserted to postulate that in case CIRP has been instituted against LLP under IBC or LLP Act having a turnover of INR 5,00,00,000/- (Indian Rupees Five Crore Only) during corresponding financial year or contribution up to INR 50,00,000/- (Indian Rupees Fifty Lakh Only) has come under liquidation under the Code or LLP Act, the annual return shall be signed by IRP or RP or LLP administrator or liquidator on behalf of such LLP and no certification shall be required to be furnished by the designated partner of such a LLP.
- Rule 34(3):** In case an alteration occurs in the designated partner or partner of a LLP incorporated and registered outside India, such LLP shall now be required to file Form 28 (*Alteration in incorporation document or place of principal office or designated partners/partners of a foreign LLP*) with the Registrar, within 60 (sixty) days from the closing date of the financial year.
- Rule 36(6):** In case while examining the e-Form or an application furnished by a LLP, the Registrar finds out that it necessary for the LLP to rectify the defects or fill incomplete information rendered in the said form, post

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intimation of such defect or incompleteness by the Registrar by way of email or placement on the website to the LLP, such LLP shall incorporate and rectify the defects or incompleteness as notified by the Registrar by filing Form 32 (*For Filing Of Addendum For Rectification Of Defects Or Incompleteness*).

- (viii) **Rule 37(1A)(II):** In case of a strike off of name of a defunct LLP, such LLP while making an application under Form 24 (*Application To Registrar For Striking Off Name*) shall attach a statement of account disclosing nil assets and nil liabilities certified by Chartered Accountant made up to a date not earlier 30 (thirty) days of filing of Form 24.

➔ FDI Press Note No.1 (2022) Series

Vide DPIIT File No. 5(3)/2021-FDI Policy dated 14.03.2022 ("Press Note"), the Department for Promotion of Industry and Internal Trade had incorporated following amendments to the FDI Policy Circular, 2020 ("FDI Circular"):

The following key provisions of the Press Note have been enlisted below:

- (i) **Definition of "Indian Company":** The definition of 'Indian Company' has been revised vide the Press Note. 'Indian Company' shall mean a company as defined in Companies Act, 2013 which is incorporated in India or a body corporate established or constituted by or under any Central or State Act. Further, it has been clarified that (a) 'Indian Company' will not include society, trust or any entity which is excluded as an investee entity under the FDI Circular; (b) The term 'Company' or 'Indian Company' or 'Investee Company' is qualified by reference to a company under the Companies Act, such term shall mean a company incorporated under the Companies Act but not a body corporate; and (c) Reference to 'company' or 'investee company' or 'transferee company' or 'transferor company' in the FDI Circular also includes reference to a body corporate established or constituted under any Central Act or State Act.
- (ii) **Increase In Time Period Of Conversion Of Equity Shares Issued Under Convertible Note:** A startup company issuing a convertible note for acknowledgment of receipt of money initially as debt, which is convertible into equity shares of such startup company, can now issue a convertible note with shares convertible into equity within a period of 10 (ten) years from the date of issue of such convertible note. In the extant FDI Circular, the convertible note was issuable for shares convertible into

equity within a period of 5 (five) years from the date of issuance of such convertible note.

- (iii) **New Definition Inserted For Term 'Share Based Employee Benefits':** Vide Press Note, a new definition of 'Share Based Employee Benefits' has been inserted. 'Share Based Employee Benefits' shall mean any issue of capital instruments to employees, pursuant to share based employee benefits schemes formulated by a body corporate established or constituted under any central or state act.
- (iv) **New Definition Inserted For Term 'Subsidiary':** Vide Press Note, a new definition of 'Subsidiary' has been inserted. 'Subsidiary' shall mean have the meaning as per the definition provided to it under Companies Act, 2013 amended from time to time.
- (v) **Amendments In Definition of the Term 'Real Estate Business' under Para 5.1(f) and Note (i) to Para 5.2.10.2 of the FDI Policy:** Vide Press Note new definition of the term 'Real Estate Business' has been revised. 'Real Estate Business' shall mean dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships and Real Estate Investment Trusts (REITs) registered and regulated under Securities Exchange Board of India (SEBI) regulations. Further, earning of rent/income on lease of the property, not amounting to transfer, will not amount to real estate business.
- (vi) **Acquisition of shares under Scheme of Merger/Demerger/Amalgamation:** Vide the Press Note, it has been clarified that once a scheme of compromise merger/demerger/amalgamation has been approved by National Company Law Tribunal (NCLT) or any other competent authority, the transferee company or the new company will issue capital instruments to only existing shareholders of the transferor company resident outside India under the conditions viz. (a) percentage of shareholding of persons resident outside India in the transferee or new company does not exceed sectoral cap; and (b) the transferor company or the transferee or the new company is not engage in activities prohibited under the FDI Circular.

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(vii) **Change in respect of conditions related issuance of Employee Stock Option (ESOP) scheme/sweat equity shares/shares based employee benefits:**

Vide the Press Note, an Indian Company may issue 'employee stock option' and/or 'sweat equity shares' or 'shares based employee benefits' to employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/(ies) who are resident outside India subject to following conditions:

- (a) The scheme shall be drawn based on the regulations made under Securities Exchange Board of India Act, 1992 or Companies (Share Capital and Debentures) Rules, 2014 notified under Companies Act, 2013 or any other applicable law, as the case may be.
- (b) The 'employee stock option' and/or 'sweat equity shares' or 'shares based employee benefits' issued to non-resident employees/directors under the applicable rules/regulations or other law, are in compliance with the sectoral cap applicable to such company under the FDI Circular.
- (c) The 'employee stock option' and/or 'sweat equity shares' or 'shares based employee benefits' issued by a company where foreign investment is under approval route shall require prior approval from Government of India.
- (d) The 'employee stock option' and/or 'sweat equity shares' or 'shares based employee benefits' issued under applicable rules/regulations to employee/or director who is a citizen of Bangladesh or Pakistan shall require prior approval from the Government of India.
- (e) The Indian company shall file with the Foreign Exchange Department of the Reserve Bank of India, within 30 (thirty) days of the issue of ESOPs or sweat equity shares or shares issued on exercise of ESOPs, a return in the form of 'ESOP-Reporting'.

Real Estate Brief

Order issued by Tamil Nadu RERA clarifying the purpose for which amounts deposited in account of the scheduled bank may be utilised

Vide Order No. TNRERA/A3/5152/2022 dated 04.03.2022 by Tamil Nadu Real Estate Regulatory Authority, it was decided that since the explicit mandate of Section 4(2)(l)(D) of the Real Estate (Regulation and Development) Act, 2016 ("**RERA Act**") is to deposit the 70% (seventy percent) of the amounts realized from the allottees in separate account in a scheduled bank for utilizing the same toward cost of construction and land cost and for no other purpose, thus, once the development work is completed as

declared by the promoter in Form 'B' and certified by the architect/ licensed surveyor in Form-5, the abovementioned bank account shall not be required in respect of projects pertaining to layouts or sub-divisions. The order was given effect from March 04, 2022.

Order issued by Rajasthan RERA clarifying requirement of registration and cases of exemption from registration

Rajasthan Real Estate Regulatory Authority vide Office Order No. F.1(31)RJ/RERA/2019/550 dated 08.03.2022 clarified the following:

- Any project which satisfies either of the following 2 (two) conditions is required to be registered under RERA:
 - (i) the area of land proposed to be developed exceeds 500 (five hundred) square meters; or
 - (ii) the number of apartments proposed to be developed does not exceed 8 (eight).
- A project which satisfies both of the following 2 (two) conditions is not required to be registered under RERA:
 - (i) the area of land proposed to be developed is less than or equal to 500 (five hundred) square meters; and
 - (ii) number of apartments proposed to be developed are 8 (eight) or lesser.
- The determining factor to be taken into consideration for reckoning the area of land and number of apartments proposed to be developed will be on the basis of marketing of the project and not on-ground construction and development.

Order issued by Rajasthan RERA regarding form and manner of registration of real estate projects

Vide Order No. F1(31)RJ/RERA/2019/593, dated 16.03.2022, Rajasthan Real Estate Regulatory Authority ("**Authority**"), issued the following directions for due compliance by the concerned persons:-

- In case, the promoter is not the owner of project land, then, the Authority would accept a duly executed Power of Attorney in favour of the promoter in lieu of a development agreement, for the purpose of registration, provided that the said Power of Attorney is registered under the Registration Act, 1908. This decision shall be with effect from April 01, 2022.
- Copy of structural drawings, including foundation details, column schedule, retaining wall details, slab and beam

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structural details, etc. which are duly signed and sealed by a qualified civil engineer are mandated to be submitted as part of online application or registration of projects not being plotted development projects. This decision shall be with effect from April 01, 2022.

- On and from April 01, 2022, only the partnership firms which are registered with the Registrar of Firms and whose registration certificate is uploaded as part of the promoter profile shall be allowed to apply for registration of a real estate project under the RERA Act.

⇒ Circular issued by Maharashtra RERA delineating the modified system of filing online complaints

The system of filing online complaints with the Maharashtra Real Estate Regulatory Authority was such that the authorised representatives of the complainants would peruse their own personal user name/ login ID/ password, thereby, barring the complainants to access case information and case status and thus, required modifications for the reasons of (i) providing more transparency to the complainants; and (ii) to resolve administrative issues. To ensure transparency and resolution of the said administrative issues, the form and manner of filing online complaints has been modified with effect from March 30, 2022. Vide Circular No. MahaRERA/Secy/File No.27/88/2022, dated 28.03.2022, Maharashtra Real Estate Regulatory Authority, it was decided that:

- On creating a new registration, the complainant shall be required to fill details such as "Complainant Name", "Complainant Middle Name", "Complainant Last Name", "Complainant Mobile Number" and "Complainant Email ID".
- A new field has been created entitled "Advocate Contact Details, if any" which enables uploading the Vakalatnama/ Memorandum of Authorisation issued in favour of the authorised representatives.
- Under the modified version, emails communicating the date of hearing of the complainants along with link for attending the virtual hearing shall be shared with the complainant as well as with their authorised representative.

⇒ Circular issued by Karnataka RERA stipulating penalty to be levied on defaulting real estate agents

Vide Circular No. RERA/FINANCE/CR/100/2021-22 dated 30.03.2022, the Karnataka Real Estate Regulatory Authority ("Authority") stated that it had observed that many real estate agents are facilitating real estate transactions in contravention to Section 9 of the Act. The Authority issued the abovementioned

circular calling upon all real estate agents to register within the timeline of March 30, 2022. Non-compliance of the same would amount to an offence under Section 62 of the Act. A penalty, which may cumulatively extend up to 5% (five per cent) of the cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority, shall be levied on the defaulting real estate agents.

NCLT Brief

⇒ CASE ANALYSIS: ADITYA KUMAR TIBREWAL Vs. OM PRAKASH PANDEY AND ORS., COMPANY APPEAL (AT) INSOLVENCY NO. 583 OF 2021

This Appeal filed by the Resolution Professional arises out of an order dated **26.02.2021** passed by the Hon'ble Adjudicating Authority, ("**Hon'ble NCLT, Kolkata Bench**") in I.A. No. 742/KB/2020 in CP (IB) No. 518/KB/2018. Vide the aforementioned Order, the I.A. No. 742/2020 filed under the main petition was been rejected.

1. FACTUAL MATRIX OF THE CASE

An Application bearing no. C.P (IB) No. 518/KB/2018 was filed by the Bank of India ("**Financial Creditor**") under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**I&B Code**") against a corporate entity, i.e M/s Sri Balaji Forest Products Private Limited ("**Corporate Debtor**"), before the Hon'ble-A NCLT, Kolkata Bench. Vide Order dated 18.10.2019, the Corporate Insolvency Resolution Process ("**CIRP**") was initiated against the Corporate Debtor. The Resolution Professional ("**RP**") published the Form-A and constituted the 'Committee of Creditors' ("**CoC**"). The Ex-Director created hurdles in smooth conduction of the CIRP by not cooperating with the RP. Resultantly, the RP filed an application under Section 19(2) of the I&B Code. While adjudicating this application under Section 19(2) of the I&B Code, the Hon'ble NCLT, Kolkata Bench, directed the suspended ex-directors to cooperate with the RP. However, the Suspended Ex-Director continued to create hindrances. Thereafter, the RP initiated 'contempt proceedings' against the Suspended Director by filing another Application. The Hon'ble NCLT issued notice on 04.02.2020 to this Application. In response to which, the Suspended Ex-Director filed its reply and this fact came before the Hon'ble Tribunal that all plot, land, machinery pertaining to

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the Corporate Debtor Company have been leased by the Corporate Debtor to Respondent No.3 for a period of 29 years, in a fraudulent manner.

On the Audited Balance Sheet of the Corporate Debtor, transaction audit report was finalised. The RP after the transaction audit report, filed I.A. No. 742/2020 under Section 43 and 45 read with Section 49 and Section 66 and 60(5) of the I&B Code seeking various reliefs. In the Application I.A. 742/2020, the Hon'ble National Company Law Tribunal ("NCLT") issued notice to the Suspended Ex-Director and other Respondents, however no reply was received on behalf of the Suspended Ex-Director and other Respondents. The Hon'ble NCLT vide Order dated 26.02.2021 rejected the I.A. 742/2020 of the RP and held that the Application is hit by Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 and Section 46 of the I&B Code.

2. ARGUMENTS ADVANCED BY THE APPELLANT

- It was argued by the Appellant that the Hon'ble NCLT, Kolkata Bench, has erroneously rejected I.A 742/2020. Regulation 35A is only directory in nature. Therefore, the I.A 742/2020 cannot be rejected on the ground that it has not been filed within the timeline prescribed under Regulation 35A.
- It was argued by the Appellant that the Hon'ble NCLT, Kolkata has placed reliance on Section 46 of the I&B Code in an erroneous manner. It was further argued by the Appellant that Section 46 essentially deals with the look back period with respect to an undervalued transaction and does not cover a fraudulent transaction, thus the Appellant was misplaced in relying on Section 46 of the I&B Code and holding this view that the Lease Deed which was claimed by the Appellant to be fraudulent transaction was executed 2 years earlier from the CIRP commencement date. It was argued that this transaction of lease by which all assets, plants and machinery were given to the related party of a Corporate Debtor on meagre amount was essentially fraudulent transaction undertaken with the intent to defraud the

creditors. It was further argued that the Lease Deed whereby the properties were transferred was not supported by credible document. The Appellant also mentioned that the Financial Creditor has initiated appropriate proceedings under the SARFEASI Act, 2002 against the Corporate Debtor and has taken symbolic possession 09.08.2016. The Lease Deed was executed on 30.11.2016 much later to the transfer of symbolic possession of assets to the Financial Creditor under the SARFEASI proceedings.

3. ARGUMENTS ADVANCED BY RESPONDENTS

(i) Arguments advanced by the Suspended Ex-Director, ("Respondent No.1")

- The first argument advanced by the Counsel for the Suspended Ex-Director was that the act of leasing the property and machineries to Respondent No.3 (alleged related party) was done prior to the commencement of the look back period of two years as prescribed under Section 46 of the I&B Code.
- The Respondent further argued that civil proceedings are going on with respect to the Lease Deed in Civil Court where an order of interim injunction was passed in favour of the Suspended Ex-Director.
- It was submitted by the Suspended Ex-Director that it made several requests to the Financial Creditor for restructuring of their account, however the Bank refused to accede to the requests of the Suspended Ex-Director. The bank rather classified the accounts of the Suspended Ex-Director as NPA. Further, the Suspended Ex-Director, has also filed an appeal challenging the same.
- The other Suspended Ex-Director argued that it does not belong to the family of Respondent No.1 and hence it is not a related party.
- The Counsels for the other three respondents also reiterated the same argument. They reiterated that the very fact that the Appellant herein failed to comply with the requirement provided under Regulation 35A of the

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CIRP Regulations, 2016 and Section 46 of the I&B Code. They also mentioned about the interim injunction which the Suspended Ex-Director had obtained from the Civil Court.

- The Successful Resolution Applicant intervened. The counsel for the Successful Resolution Applicant whose plan had already been approved by the Committee of Creditors submitted that for the Successful Resolution Applicant, that the Respondent No.2 who was also the Ex-Director at the Corporate Debtor was not a related party. It was submitted by the Successful Resolution Applicant that Notice under Section 13(2) of the SARFAESI Act, 2002 was served on the mortgagors including the Corporate Debtor by the Bank of India on 11th February, 2015 in pursuance of which the Indian Bank took symbolic possession of the Bank on 09th August, 2016. The Lease deed dated 30th November, 2016 executed by bypassing the statutory provisions and defraud the creditors.

4. QUESTIONS OF LAW RAISED DURING THE NCLAT PROCEEDINGS

- i. Whether an Application by the Resolution Professional relating to a Transaction covered under Section 43, 45, 49 and 66 is mandatory to be filed within the period of 135th Day of the Insolvency Commencement Date and in event the Application is filed beyond such period, the same is liable to be rejected due to non-compliance of Regulation 35A of CIRP Regulations, 2016?
- ii. Whether time period prescribed under Regulation 35A of the CIRP Regulations, 2016 is mandatory or directory?
- iii. Whether Transaction claimed to be defrauding the Financial Creditor under section 49 and fraudulent trading or wrongful trading within meaning of Section 66 can be questioned only within time period as prescribed under Section 46 i.e, one year or 2 years respectively and Application alleging

defrauding the Creditors and transaction to be fraudulent trading or wrongful trading is liable to be rejected if it is filed beyond the period prescribed under Section 46 of the Code?

- iv. Whether in the Application filed by the Appellant being I.A. No. 742 of 2020 there were any pleadings of fraud as contemplated by Section 49 and 66 of the Code? Whether the Adjudicating Authority committed error in rejecting the Application being I.A. No. 742 of 2020?

III. OBSERVATIONS OF THE HON'BLE NCLAT

- The Hon'ble Appellate Tribunal has decided issue no.1 and issue no.2 in a conjoint manner. The Hon'ble Appellate Tribunal has held that the timeline mentioned under Regulation 35A of the CIRP Regulations is directory in nature and it is not mandatory in nature. To arrive at this conclusion, the Hon'ble Appellate Tribunal relied on the case of **Surendra Trading Company Vs. Juggilal Kamalpat Jute Mills Company Limited and Ors, (2017) 16 SCC 143**, wherein the Hon'ble Supreme Court has held that the timeline of 14 days prescribed under Section 9(5) of the I&B Code, to decide on admission of an Insolvency Application is directory in nature. The law laid down by the Hon'ble Supreme Court in the above judgment which deals with the interpretation of provisions of the I&B Code itself are applicable to interpretation of Regulation 35A of CIRP Regulations and following the above judgment we hold that timeline prescribed in Regulation 35A of CIRP Regulations is directory and not mandatory.
- Application questioning the transactions covered by Section 49 and 66 of the Code are not to be rejected on the ground that Application has been filed beyond the period prescribed under Section 46 of the Code. The Hon'ble Appellate Tribunal held that a plain reading of Section 46 of the I&B Code suggests that the timeline prescribed for transactions under Section 46 of the I&B

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Code does not cover the transactions covered by Section 49 and 66 of the I&B Code.

Litigation Brief

⇒ Supreme Court of India issues landmark directions to reduce the delays in the Execution Proceedings

IN THE MATTER OF: Rahul S Shah Vs. Jinendra Kumar Gandhi & Ors. (Decided by the Hon'ble Supreme Court of India on 22.04.2021) – Civil Appeals No. 1659-1660 of 2021 (@ SLPs No. 7965-7966/2020) along with Civil Appeals No. 1661-1662 of 2021 (@ SLPs No. 11859-11860/2020) and with Civil Appeals No. 1663-1664 of 2021 (@ SLPs No. 11792-11793/2020)

Issues:

1. Whether the High Court has fairly imposed exemplary cost of INR 5 lacs on the Judgment Debtors in each Execution Proceedings, regardless of the outcome of the said Execution Petitions?
2. Whether the High Court has rightly held that the entire exercise, including disposal of the Execution Petitions shall be accomplished within an outer limit of six months?
3. Whether the High Court has rightly referred the matter back to the Executing Court for fresh consideration by appointing an expert person/ official as Court Commissioner for identification and measurement of Suit Properties and consider the entire evidentiary material on record including the previous Commissioner's Report?

Facts:

1. Respondent No.3 executed two Sale Deeds, both dated 13.05.1986, qua two portions of the Suit Property in favor of Respondent No.1 and 2 ("**Decree Holders/ purchasers**").
2. Thereafter, Respondent No.3 and her son, Respondent No.4 ("**Judgment Debtors/vendors**") filed a Suit¹ for declaration that the two Sale Deeds in favor of Respondent No.1 and 2 were void. During pendency of the Suit for declaration, the purchasers filed two Suits² against the vendors for possession.
3. The proceedings in the Suit filed by the vendors and the other two Suits filed by the purchasers were clubbed together. The City Civil Judge, Bangalore by way of a common Judgment, dated 21.12.2006, allowed and decreed the Suits preferred by the purchasers and dismissed the vendor's Suit for declaration. The Decree Holders preferred Execution Proceedings³ before the Executing Court.
4. Aggrieved by the dismissal of the Suit for declaration and decreeing of the Suit for possession, Respondent No.3 filed

First Appeals in the High Court⁴. By a Common Judgment, dated 22.10.2009, the High Court dismissed all the Appeals pending before it. The Special Leave Petition ("**SLP**") preferred by the vendors⁵ was also dismissed by the Hon'ble Supreme Court of India.

5. During the pendency of Execution Proceedings (subsisting for over 14 years) and First Appeals in the High Court, the vendors time and again sold the Suit Property to various other parties. In the meantime, numerous Applications including Criminal Proceedings were initiated questioning the documents, which were a subject matter of the Suits. In between the portions of the Suit Property that had been acquired and it became the subject matter of Land Acquisition Proceedings and disbursement of the compensation. That became the subject matter of Writ and Contempt Proceedings. Various Orders of the Executing Court passed from time to time, also became subject matter of Writ Petitions and Appeals, six of them, in the High Court itself.
6. The present SLP(s)/ Civil Appeal(s) arise out of the Order, dated 16.01.2020, ("**impugned order**") of the Karnataka High Court wherein all of these issues were dealt together in six writ petitions and dismissed by the impugned order.

Court's Observations & Findings:

- ≡ The Hon'ble Supreme Court while dismissing the civil appeal upheld the impugned judgment alongwith the final directions issued by the Hon'ble High Court which included appointment of a Court Commissioner to verify the identity of the Suit Properties, payment of INR 5 lakhs to be paid by the Judgment Debtor and culmination of the process of execution within six months.
- ≡ While delivering the present order, the Hon'ble Supreme Court noted that litigants misuse of the Code of Civil Procedure 1908 ("**CPC**") to prevent or delay the Execution Proceedings and there is urgent need to reduce such delays. In view of this background, the Supreme Court in exercise of its powers and jurisdiction under Article 142 read with Article 141 and 144 of the Constitution of India in larger public interest issued the following directions to be mandatorily complied with by all Courts dealing with Suits and Execution Proceedings:
 1. In Suits relating to delivery of possession, the Court must examine the parties to the Suit under Order X CPC in relation to third party interest and further exercise

¹ O.S. No. 986/1987

² O.S. Nos. 9077/1996 and 9078/1996

³ Execution Cases No. 458 and 459 of 2007

⁴ R.F.A. No.661-663/2007

⁵ S.LP.s (C) No.16349-13651/2010

- the power under Order XI Rule 14 CPC asking parties to disclose and produce documents, upon oath.
2. Where the possession is not in dispute, the Court may appoint Commissioner to assess the accurate description and status of the property.
 3. After examination of parties under Order X CPC or production of documents under Order XI CPC or receipt of commission report, the Court must add all necessary or proper parties to the Suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same Suit.
 4. Under Order XL Rule 1 CPC, a Court Receiver can be appointed to monitor the status of the property in question as custodia legis for proper adjudication of the matter.
 5. The Court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous qua its description and status.
 6. In a money Suit, the Court must invariably resort to Order XXI Rule 11 CPC, ensuring immediate Execution of Decree for payment of money on an oral request.
 7. In a Suit for payment of money, before settlement of issues, the Defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a Suit. The Court may, at any stage, using powers under Section 151 CPC, demand security to ensure satisfaction of any Decree.
 8. The Court exercising jurisdiction under Section 47 CPC or under Order XXI CPC, must not issue notice on an Application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining Application(s) already considered by the Court while adjudicating the Suit or which raises any such issue which otherwise could have been raised and determined during adjudication of Suit if due diligence was exercised by the Applicant.
 9. The Court should allow taking of evidence during the Execution Proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.
 10. The Court, where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Order XXI Rule 98(2) CPC and grant compensatory costs in accordance with Section 35A CPC.
 11. Under Section 60 CPC the term "...in name of the judgment- debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit, or property.
 12. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.
 13. The Executing Court may on satisfaction of the fact that it is not possible to execute the Decree without police

assistance, direct the concerned Police Station to provide police assistance to such officials who are working towards Execution of the Decree.

14. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the Court personnel/ staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the Executing Courts.

≡ The Hon'ble Supreme Court has further directed all the High Courts to update all the Rules (in consonance with CPC) relating to Execution of Decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 CPC within a period of one year to expedite the process of execution with the use of Information Technology tools. Until such time, the above directions shall remain enforceable.

➤ **The Supreme Court has held that Consumer Courts can grant relief to flatbuyers/homebuyers as who are aggrieved with the delay in delivery of the apartment as per the agreement.**

IN THE MATTER OF- Experion Developers Private Limited Vs. Sushma Ashok Shiroor (Civil Appeal No. 6044 of 2019 with Civil Appeal No.7149 of 2019)

Issues:

- Whether the terms of the Apartment Buyer Agreement amount to an 'unfair trade practice' and whether the Hon'ble National Consumer Dispute Redressal Commission (**NCDRC**) is justified in not giving effect to the terms of Apartment Buyer's Agreement as laid down in Pioneer Urban Land and Infrastructure Limited Vs. Govind Raghvan (hereinafter referred to as "**Pioneer case**")?
- Whether the Hon'ble NCDRC has the power under the Consumer Protection Act, 1986 (hereinafter referred to as "**said Act**") to direct refund of the amount deposited by the Consumer with interest?
- Whether the relief granted by the Hon'ble NCDRC requires any modification to serve the ends of justice?

Facts:

1. The M/s Experion Developers Private Limited (hereinafter referred to as "**Developer**") is the promoter of the apartment units, Windchants, Sector 112 Gurgaon, Haryana (hereinafter referred to as "**Project**"). Ms. Sushma Ashok Shiroor (hereinafter referred to as "**Consumer**") booked an apartment measuring 3525 sq. ft. (hereinafter referred to as "**said Apartment**") for a total consideration of Rs. 2,36,15,726/- (Rupees Two Crores Thirty Six Lakhs Fifteen Thousand Seven

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Hundred and Twenty Six Only) and agreed to construction linked payment plan. Thereafter, Apartment buyer agreement, dated 26.12.2012 (hereinafter referred to as “**said Agreement**”) was executed between the Developer and the Consumer. As per the clause 10.1 of the said Agreement, possession was to be given within a period of 42 months of the said Agreement and after obtaining the necessary approvals from the concerned authorities. Subsequently, if the Developer failed to deliver possession within the period stipulated in the said Agreement then Developer shall pay liquidated damages to the Consumer.

2. The Consumer had approached Hon’ble NCDRC by filing a complaint that Consumer has paid total consideration of Rs.2,06,41,379/- (Rupees Two Crores Six Lakhs Forty One Thousand Three Hundred and Seventy Nine Only) and the Developer failed to deliver the possession of the said Apartment till date. In term of the said Agreement, the Developer also failed to provide the delayed interest @ 24% (Twenty Four Percent) p.a. to the Consumer.
3. The Developer submitted before the Hon’ble NCDRC that Occupation Certificate (OC) of Phase-1 Project has already been obtained by the Developer and an application for OC Phase-2 has been submitted before the concerned authority. As per the statements submitted by the Developer the notice of possession for the said Apartment has already been issued to the Consumer. After perusal of the said Agreement the Hon’ble NCDRC was of opinion that the said Agreement was in favour of the Developer and against the Consumer.
4. The Hon’ble NCDRC referred to the Pioneer case and directed the Developer to refund the amount of Rs.2,36,15,726/- (Rupees Two Crores Thirty Six Lakhs Fifteen Thousand Seven Hundred and Twenty Six Only) with interest of 9 % (Nine Percent) p.a. to the Consumer.
5. Thereafter, the Developer aggrieved by the decision of Hon’ble NCDRC filed the captioned Civil Appeal bearing no.6044/2019 before this Hon’ble Court against the order passed by the Hon’ble NCDRC. Further, the Consumer also aggrieved by the decision of Hon’ble NCDRC filed the captioned Civil Appeal bearing no.7149/2019 for grant of an enhanced rate of interest @24% (Twenty Four Percent)p.a.

Court’s Observations:

- **1st Issue** - The Hon’ble Supreme Court upheld the decision of Hon’ble NCDRC and was of the opinion that clauses vide the said Agreement are one-sided and that the Consumer is not obligated to accept the possession of the said Apartment and shall seek refund of the amount deposited by the Consumer with interest.
- **2nd Issue** - The Hon’ble Court reviewed the appellant’s argument that since the Consumer chose to proceed under the said Act, the provisions of Real Estate (Regulation and Development) Act, 2016 (**RERA Act**) shall not apply. The

Hon’ble Court observed in Imperia Structures Limited Vs. Anil Patni and IREO Grace Realtech Private Limited that the said Act and the RERA Act are neither mutually exclusive or contradictory. The said Act and the RERA Act are concurrent remedies operating independently and without primacy. The Hon’ble Court made the following observations in this regard which is mentioned below:

“When Statutes provisioning judicial remedies fall for construction, the choice of the interpretative outcomes should also depend on the constitutional duty to create effective judicial remedies in furtherance of access to justice. A meaningful interpretation that effectuates access to justice is a constitutional imperative and it is this duty that must inform the interpretative criterion.. When Statutes provide more than one judicial fora for effectuating a right or to enforce a duty-obligation, it is a feature of remedial choices offered by the State for an effective access to justice. Therefore, while interpreting statutes provisioning plurality of remedies, it is necessary for Courts to harmonise the provisions in a constructive manner.”

Referring to Section 14 of the said Act, the Hon’ble Court , while dismissing the appeal filed by the Appellant Developer, observed:

“We may hasten to clarify that the power to direct refund of the amount and to compensate a consumer for the deficiency in not delivering the apartment as per the terms of Agreement is within the jurisdiction of the Consumer Courts. Under Section 14 of the Consumer Protection Act, if the Commission is satisfied ...that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to, return to the complainant the price or as the case may be, the charges paid by the complainant. ‘Deficiency’ is defined under Section 2(g) to include any shortcoming or inadequacy in performance which has been undertaken by a person in pursuance of a contract or otherwise relating to any service. These two provisions are reproduced hereinbelow for ready reference.¹³ It is clear from the statutory position that the Commission is empowered to direct refund of the price or the charges paid by the consumer.”

“A consumer invoking the jurisdiction of the Commission can seek such reliefs as he/she considers appropriate. A consumer can pray for refund of the money with interest and compensation. The consumer could also ask for possession of the apartment with compensation. The consumer can also make a prayer for both in the alternative. If a consumer prays for refund of the amount, without an alternative prayer, the Commission will recognize such a right and grant it, of course subject to the merits of the case. If a consumer seeks alternative reliefs, the Commission will consider the matter in the facts and circumstances of the case and will pass appropriate orders as justice demands. This position is similar to the mandate under Section 18 of the RERA Act.”

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- **3rd Issue-** The Hon'ble Court held that for the interest payable on the amount deposited by the Consumer to be restitutionary and also compensatory, interest has to be paid from the date of the deposit of the amounts. The Hon'ble NCDRC in the order has granted interest from the date of last deposit. The Hon'ble Court directed that the interest on the refund shall be payable from the dates of deposit.
- The Hon'ble Court further decided that the interest of 9% (Nine Percent) granted by the Hon'ble NCDRC is fair and the Hon'ble Court finds no reason to interfere in the Appeal filed by the Consumer for enhancement of interest. Pursuant thereto, the Hon'ble Court dismissed the Civil Appeal filed by the Appellant Developer and the amount of Rs.50,000/- (Rupees Fifty Thousand) deposited by the Appellant Developer to be adjusted against the final amount payable by the Developer to the Consumer.

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