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Corporate Brief

Companies (Amendment) Act, 2019

The Companies (Amendment) Act, 2019 was enacted on July 31st, 2019 and this Amendment largely contemplates the changes based of the Companies (Amendment) Ordinance, 2018. Following are the key changes envisaged,

- Companies having share capital which have been incorporated after the commencement of the Ordinance, 2018 are under a mandatory obligation to file with the Registrar of Companies a declaration within 180 days that all subscribers to the memorandum have paid the subscription money and a verification of its registered office before they can commence their business or start trading in shares.
- Provisions regarding Corporate Social Responsibility [CSR] have been made more stringent under the Act, 2019. In case the target amount is unspent, (i) requisite amount will be contributed to Funds given under Schedule VII (ii) any amount reserved for an ongoing project which is unspent will be transferred to a special account which will be utilized towards the implemention of CSR policy. Non compliance will amount to a civil offence.
- Under Section 7 of the Amendment Act, the scope of companies making public offers in securities in dematerialsed form has been broadened to include a class (es) of unlisted companies as may be notified from time to time.
- Under the Amendment Act, 2019 applications regarding (i) conversion of a public company to a private company and (ii) adoption of different financial year by a corporate body having an associate/subsidiary company incorporated outside of India which is required to stick to a different financial year in order to consolidate its accounts outside of India, are now supposed to be filed with the Central Govt and not the National Company Law Tribunal [NCLT].
- In situations of corporate fraud, the Amendment Act empowers the Government to apply to the National Company Law Tribunal [NCLT] for passing orders related to disgorgement of properties/assest/profits of any officer or entity of the company which has received undue benefit.

The Insolvency and Bankruptcy Code (Amendment) Act, 2019

The Parliament passed this Amendment Act which aims to address certain inconsistencies in the existing Act as well as pertinant judicial pronouncements. Some of the key changes are,

- The Amendment has made the 14 days time period for disposal of Resolution Application by the National Company Law Tribunal [NCLT] a mandatory provision, and failure to comply will require the National Company Law Tribunal [NCLT] to give reasons in writing for such delay. The aim of this provision is to ensure that this time period is extended only in exceptional circumstances.
- The timeline for completion for a corporate insolvency resolution process will now be mandatorily concluded within 330 days without any exceptions including litigation and related processes. A relaxation period of 90 days is given to only those Corporate Insolvency Resolution Processes [CIRP] which are ongoing and had already breached the given time period when the Amendment Act commenced.
- The nuances of resolution plans have been clarified to include merger, demerger and amalgamations as modes of corporate restructuring. This clarification legitimises the existing means for commercial resolution.
- The new amendment makes the approved resolution plans binding on the Central government, State government or any other local authority to whom the payment of debts is owed. This amendment helps in reducing the delay caused by the government authorities.
- The amendment has caused great impact on the stakeholders by clarifying on the scope of powers with the Committee of Creditors [CoC] in decisions regarding

the liquidation of the corporate debtor at any time before the information memorandum is prepared.

- Competition Commission of India formulates Policy: "Making Markets Work on Affordable Healthcare"
- The primary aim of the Competition Commission of India is to ensure that markets work in a manner which allows competition to determine the market results. While there are many ways of undertaking this, one of the most popularly used measures remains to be its advocacy measures.
- While employing this measure, the Competition Commission of India has recently come up with a policy which is aimed at making the market work in a manner so that affordable healthcare can be easily availed. A technical workshop was conducted in this regard where the following recommendations were made,
  - Replacing the intermediaries with electronic platforms of trading drugs to eliminate unreasonably high trade margins set by drug companies and associations who are acting as middlemen.
  - Improve the quality perception of a drug by ensuring that it complies with the set standards so that "branded generic drugs" can be eliminated from the Indian market.
  - There is a need to ensure that healthcare services are chosen on the basis of an informed decision by taking into consideration various health parameters like morality rate, competency of doctors, consistently accredited disgnostics labs etc.
  - A uniform system of regulation is required to harmonize the procedure for getting a new drug approved. For this, certain mandatory guidelines are required to streamline the process.
  - Encourage people to opt for a general health insurance.

Proposed Amendments under the Arbitration and Conciliation Bill, 2019

The amendments envisaged in this Bill are made with the singular aim of transforming India into a hub of arbitration on both domestic and international level. The chief highlights of this Bill are,

- Appointment of arbitrators will now be done through arbitration institutions designated for the same by the High Court or Supreme Court.
- It envisages the establishment of an Arbitration Council of India which will given the duty of grading arbitral institutions, providing accreditation to arbitrators and framing regulations to discharge its functions given under the Act.
- A time frame of 06 months, has been provided to conclude the statement of claim and defence with a view to expedite proeedings, from the date on which the arbitrator recieves notice of appointment.
- Any information exchanged during the arbitration proceedings are subject to confidentiality and cannot be used in any subsequent suits or legal proceedings which may arise from such arbitral proceedings.
- The application of Section 26 of the Arbitration and Conciliation (Amendment) Act 2015 has been restricted only to proceedings of arbitration which began on or after 23rd October, 2015 and any such court proceedings which may have arisen.

NCLAT declares that statutory tax dues are 'Operational Debt' in insolvency proceedings

On 20th March, 2019, the National Company Law Appellate Tribunal [NCLAT] declared that under the Insolvency and Bankruptcy Code the statutory dues like value added tax and income tax would fall within the ambit on 'Operational Debt' and the associated tax authorities are to be treated as 'Operational Creditor'.

An appeal was filed by the Income Tax and Sales Department of the states against orders passed by the National Company Law Tribunal [NCLT] of Hyderabad and Mumbai that approved tax assistances to the corporate debtor without impleading the taxation departments in the proceedings. They also claimed that statutory dues do not fall within the ambit of operational debts of a company and enjoy the standing of 'first charge' under the law.

The National Company Law Appellate Tribunal [NCLAT] while deciding observed that these statutory dues fall within the ambit of operational dues as they arise when the company is operational and they have direct nexus with the company operations.

Undertaking Director Identification Number (DIN) KYC to follow new mechanism

With reference to circular dated 27th June, 2019 the Ministry of Corporate Affairs has planned a new mechanism for undertaking DIN KYC where now every individual who has already filed a DIR-3 KYC in the previous financial year, i.e. 2017-18, will only be needed to undertake the KYC through the means of a simple web-based verification service, with pre-filled information based on the Ministry records, for ease of verification. However, if an individual wish to update their mobile number or e-mail address, then they would be

required to file an e-form DIR-3 KYC, as this update facility is not being proposed in the web-service. In case of any other personal detail update, an e-form DIR-6 can be filed for updating the same before the completion process of KYC prior the web-based service.

Real Estate Brief

PUNJAB RERA :

➲ Clarification issued regarding, "Partial Completion Certificate", "Occupancy Certificate" and "Completion Certificate" dated 9.07.2019:

- ❑ Earlier issued circular being dated 26.10.2018 ("Initial Circular") on the above subject has been reconsidered in view of the clarifications received from the Government of Punjab, Department of Housing and Urban Development. As per the earlier circular dated 26.10.2018 in the case of Group Housing Projects, a Partial Completion Certificate would be considered valid only if the promoter could prove that the supporting infrastructure relevant to that particular part (say a tower) was also complete. However as per the circular dated 9.07.2019 ("Clarificatory Circular"), Partial Completion Certificate is given for a portion of the total project wherein services are found to be complete in all respects.
- ❑ Similarly according to the Initial Circular an "Occupation Certificate" would be valid only if the project in which it was located had been granted a "Completion Certificate", or a "Partial Completion Certificate". However as of the Clarificatory Circular "Occupancy Certificate" is issued for dwelling units after due field enquiry and a "Completion Certificate" is to be issued once the entire project is complete and all services are found to be in order.
- ❑ This Clarificatory Circular supersedes the Initial Circular and compliance with the same is to be noted.

RAJASTHAN RERA:

➲ Standard fee added to existing registration charges to be paid by promoter*:*

- As per the Circular, a standard fee has been added to the existing registration charges, which will be effective from September 1, 2019. Developers working on housing schemes will be directed to pay Rs. 20 per sq m as a standard fee. Furthermore if developers delay the registration of ongoing projects with RERA, they are to deposit a penalty along with the prescribed registration fee till December 31, 2019. Developers will also have to pay 50% of the registration fee if they want an extension on the registration deadline.

SUPREME COURT JUDGMENT:

➲ In the matter of Pioneer Urban Land and Infrastructure Limited & Anr ("Petitioners") Vs. Union of India & Ors ("Respondent"), the Supreme Court held that home buyers deserve same protection that other financial creditors enjoy under the IBC.

Facts:

A batch of over 150 petitions filed by real estate developers challenging the constitutional validity of the amendments made to the Insolvency and Bankruptcy Code, 2016 ("**Amendment Act**"). The challenge was primarily to explanation added to Section 5(8)(f) of the Insolvency Bankruptcy Code (IBC/ Code) that "any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of borrowing."

Issue:

Challenged the constitutional validity of Section 5(8)(f) on the agrument that the amendments to Insolvencency Bankruptcy Code (IBC) amounted to duplication as to homebuyers already had remidies under RERA Act.

Observations:

- ❑ The Hon'ble Supreme Court observed that under the IBC, 'financial creditor' means any person to whom a 'financial debt' is owed and includes a person to whom such debt has been legally assigned or transferred to. In the context of home buyers, the Supreme Court relied upon the recommendations made by the Insolvency Law Committee Report, and emphasised the fact that the amounts raised from home buyers contributes significantly to the financing of the construction of such flats/ apartments.
- ❑ Section 5(8) of the Code defines 'financial debt' to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and inter alia includes money borrowed against payment of interest, etc. The current definition of 'financial debt' under section 5(8) of the Code uses the words "includes", thus the kinds of financial debts illustrated are not exhaustive.
- ❑ The phrase "disbursed against the consideration for the time value of money" has been the subject of interpretation only in a handful of case under the Code. Thus the words "time value" have been interpreted to

mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment. The Committee in its Report deliberated that the amounts so raised are thus used as a means of financing the real estate project, and are thus in effect a tool for raising finance, and on failure of the project, money is repaid based on time value of money. Thus the Court held that on a plain reading of section 5(8)(f), it is clear that it is a residuary entry to cover debt transactions not covered under any other entry, and the essence of the entry is that "amount should have been raised under a transaction having the commercial effect of a borrowing."

- The Supreme Court observed that the sale agreement between developer and home buyer would have the 'commercial effect' of a borrowing, which means that money is paid in advance for temporary use so that a flat/apartment is given back to the home buyer. The Supreme Court clarified that both parties have 'commercial' interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by such sale of the apartment. The Supreme Court thus came to the conclusion that the amounts raised from the home buyers under real estate agreements, with profit as the main aim, are, in fact, subsumed within the definition of 'financial debt' under Section 5(8)(f) of the IBC, even without adverting to the explanation introduced by the Amendment Act.
- The Supreme Court considered allottees as financial creditors and not operational creditors and observed that the real estate developers fall squarely within the object of the IBC, as originally enacted, insofar as they are financial debtors and not operational debtors. The Court pointed out differences in this regard, that in operational debts generally, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money – the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services.
- The Supreme Court also held that the retrospective applicability of the amendment to IBC by holding that home buyers were included in the main provision, i.e. Section 5(8)(f) of the IBC with effect from the inception of the IBC. It has further clarified that the explanation was added later in the year 2018 only to clear up any doubts that had arisen in its implementation.
- In addition, the home buyers being financial creditors are entitled to be represented in the Committee of Creditors (CoC) through their authorised representative.
- Further the Court held that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies.
- The States and Union territories in which adjudicating officers and/or Appellate Tribunal have not been appointed/established, such States/Union territories are directed to appoint permanent adjudicating officers, Real Estate Regulatory Authority and Appellate Authority within three months from the date of the judgment.

Held:

- Through the Amendment Act, the 'real estate allottees' (home buyers), as defined under Section 2(d) of the RERA, were brought within the ambit of 'financial creditor' under the IBC.
- Thus in view of the above, it has been held by the Court that the home buyers deserve same protection that other financial creditors enjoy under the IBC.
- The Court held that Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.
- The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.
- Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.

NCLT Delhi Principle Bench Order

➲ In the matter of Mr. Sunil Handa and Ors ("**Financial Creditors/Applicants**") vs Today Homes Noida India Limited ("**Corporate Debtor/Respondent**") for admission of application to initiate Corporate Insolvency Resolution Process against the builder:

Facts:

- An application was filed under section 7 of the Insolvency and Bankruptcy Code, 2016, read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, jointly by Financial Creditors who are also 'homebuyers', with a prayer to trigger Corporate Insolvency Resolution Process in respect of M/s Today Homes Noida Private Limited.

Issue:

1. *Whether the provisions of RERA can override the non-obstante clause laid down under Section 238 of the IBC.*
2. Whether the petition under section 7 of the Insolvency and Bankruptcy Code, 2016 deserves to be admitted by a 'homebuyer'.

Observations:

- Section 88 of RERA provides that RERA shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. Further section 89 of the RERA provides that the provisions of RERA shall have effect, notwithstanding anything inconsistent contained in any other law for the time being in force. Likewise both statutes operates in different fields and in any case section 238 has a non-obstante clause which would prevail over the provisions of RERA, section 238 of the IBC provides that the provisions of the IBC are to have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.
- The NCLT accepted the contention raised by Financial Creditors that the period of default has commenced from the date when the corporate debtor was required to deliver possession of the respective units. In the present case, the flat buyer agreements in respect of all the applicants was executed between 2011-2013. Accordingly, the corporate debtor was required to deliver possession of the respective units latest by the year 2016-2017. Thus, NCLT held that the period of default has commenced and is still subsisting. Merely because the Respondent has been provided a different time line for completion of the project under RERA would not cut any ice because the IBC would override RERA.
- It is a settled principle of law that wherever time is the essence of a contract in such types of construction contracts, the builder is required to adhere to the date of delivery mentioned in the builder buyer agreement despite the presence of similar reservations in the contract.
- It is a settled principle of law that a non-obstante clause has effect only in case of conflict between two statutes. It is submitted that RERA and IBC work in two different fields, while the former has been enacted with a view to regulate and promote the real estate sector while ensuring the protection of consumer interest; the latter seeks to consolidate the law relating to insolvency and bankruptcy and ensure resolution of insolvency of corporate persons, firms and individuals in a time bound manner. Moreover RERA was notified in May 2016 and IBC was notified later, commencing from August 2016. The provisions of Section 238 were enforced with effect from December 2016. It is well settled that the later statutes override the earlier statutes.

Held:

- The judgment on this matter could not be pronounced earlier as the issue concerning constitutional validity of explanation to subsection 8 (f) of section 5 of the code, 2016 was subject matter of challenge before the Supreme Court. In the lead case titled as Pioneer Urban Land and Infrastructure Limited and Another V. Union of India and Ors., the order has now been pronounced on 9.08.2019. As per the order this petition deserves to be admitted.
- All the requirements of section 7 of the code for initiation of Corporate Insolvency Resolution Process by a financial creditor stand fulfilled. There is overwhelming evidence to prove default.
- In pursuance of Section 13(2) of the Code, this Tribunal directed that Interim Insolvency Resolution Professional shall immediately make a public announcement with regard to admission of this application under section 7 of the Code.

Litigation Brief

Can an Arbitral Award Be Set Aside by Invoking Wri Jurisdiction? SC Reaffirms its Stand

➲ Sterling Industries vs. Jayprakash Associates Ltd. (CA Nos. 7117-7118 of 2017)

Factual Matrix

- The Appellant had filed an Appeal before the Supreme Court assailing the order of the Allahabad High Court.
- The Allahabad High Court had aside the partial award in a Writ filed by the Respondent herein under Article 227 of the Constitution of India.
- An application was made by the Respondent to the District Judge against a partial award made under Section 16 of the Arbitration & Conciliation Act, 1996 (hereinafter "the Act").
- The appellant, Sterling Industries, had preferred this appeal to the Hon'ble Supreme Court.

Observations by the Supreme Court

- The Supreme Court while delivering the judgment heavily relied upon SBP & Co. vs. Patel Engineering Ltd. & Anr, (2005) 8 SCC 618. The Hon'ble Court observed that there have been instances wherein various High Courts have entertained writ petitions assailing the orders passed by the arbitrator. The Court held that there is no warrant in this approach.
- The Hon'ble Court elaborated that the Act itself provides remedies to the aggrieved party. While the final award passed by the Arbitrator can be challenged under Section 34 with a provision of further appeal under Section 37 of the Act. The partial award made by the Arbitrator under Section 16 of the Act can be assailed under Section 37 of the Act.
- The Apex Court in the referred judgment has examined the scheme of the Act and held that the party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the final award is passed by the Tribunal. The arbitral tribunal is after all the creature of a contract between the parties to the arbitration agreement. The courts may only interpret the contract and not create or force a contract upon the parties. Therefore the Supreme Court has disapproved the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being set aside by the High Courts under Article 226 or 227 of the Indian Constitution. Such an intervention by the High Courts is not permissible.
- The Hon'ble Court prima facie was of the opinion that the application to the District Judge under Section 16 of the Act was not tenable and, therefore, a writ petition filed against such an order is non-maintainable and contrary to law.
- Thus, the Hon'ble Court ruled that the judgment of the High Court is liable to be set aside.

➲ Chandigarh State Consumer Protection Commission: Coaching Centres Shouldn't Be Money Collection Machines.

In the case of "***Shinjini Tewari Vs. FIITJEE Limited & Another", CC/448/2018***, before the Chandigarh State Consumer Protection Commission, decided on 09.04.2019.

The Opposite Party preferred an Appeal before the Chandigarh State Consumer Disputes Redressal and the impugned order of the District Forum was upheld.

Facts of the Case

- In this case, the Complainant in respect of her Son, had paid the fees of Rs.1,83,850/- (Rupees One Lac Eighty Three Thousand Eight Hundred and Fifty Only) in advance for a four-year (2016-2019) coaching programme at FITJEE Limited, Chandigarh.
- However, due to acute medical reason, it became impossible for the child to attend the coaching classes, after November, 2017. The Child had attended first two (2) years of the coaching and very few classes of third year in the beginning before he withdrew from the course.
- On this account, the parents asked for a refund but the same was denied by the Opposite Party's Organisation.
- Moreover, the Opposite Party stated that the Complainant and his Child were made aware of all the terms and conditions at the time of taking admission and after going through all the documents, they chose to accept and sign along with the declaration.
- The Complainant alleged unfair trade practice and deficiency in service and chose to file a Consumer Complaint with the Chandigarh District Consumer Protection Commission.

Issue(s) to be decided

- Whether the Complainant's Child could leave the Coaching Classes midway and terminate the Agreement, qua his Medical Condition.
- Whether the terms and conditions of the Agreement were one sided and biased.

Observations Made

- The Opposite Party could not charge full advance fee for two (2) years and the same is illegal. The State Commission relied upon the judgement of Islamic Academy of Education **Vs.** State of Karnataka, wherein, it was also observed that an educational institution can only charge prescribed fees for one semester/year.
- The Coaching Centres are entitled legally to charge fee only for the services, which they actually provide to the student and not more than that.
- When a student or his/her parents sign the Admission Form, they have no bargaining power to negotiate, or refuse to sign any particular clause and such clauses should not be held against the student.
- A student or a trainee may leave midstream if he finds the service deficient, substandard and non-yielding, and to tell him that fees once paid are not refundable was an unfair trade practice.
- The Opposite Party is in dominating position and as such maneuvered to get the signature of parents of students on pre-settled printed enrolment undertaking.

Held

The Opposite Party was directed to refund the entire fee after deducting Rs.1000/- as processing fee, with interest @9% p.a., from the date of making such request till the actual date of realization.

➲ SALIENT FEATURES OF THE CONSUMER PROTECTION BILL, 2019

The Consumer Protection Bill, 2019 was introduced in Lok Sabha by the Minister of Consumer Affairs, Food and Public Distribution, Mr. Ram Vilas Paswan on July 8, 2019. The Bill replaces the Consumer Protection Act, 1986. Key features of the Bill include:

- Central Consumer Protection Authority (CCPA) acting as a National Level Regulator would be dealing with matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which ae prejudicial to the interests of public and consumers. It also the power to impose penalties on manufacturers and endorsers for misleading advertisement. **(Refer Chapter III)**
- The issue of Misleading Advertisements have also been dealt with wherein the CCPA is empowered to impose penalty upto Rs. 10 (ten) Lacs and every subsequent offence would attract imprisonment for a term which may extend upto five years and fine which may extend to fifty lakh rupees. **(Refer Amended Section 21 and 89)**
- The issue of negligent endorsing by popular celebrities have been catered for as the endorser can be levied with penalty up to rupees ten lakhs by the CCPA for false and misleading advertisements. **(Refer Amended Section 21)**
- The definition of "deficiency" has been expanded to include the acts of negligence, omission or commission and deliberate withholding of relevant information by such person to the consumer. **{Refer Amended Section 2(11)}**
- The Bill has also enhanced the pecuniary limits of the commission(s) to entertain the Complaints in the following manner:
- District Forum: Not exceeding Rs. One Crore. **(Refer Amended Section 34)**
- State Commission: Exceeding Rs. One Crore but not exceeding Rs. 10 Crore. **(Refer Amended Section 47)**
- National Commission: Exceeding Rs. 10 Crore. **(Refer Amended Section 58)**
- The Bill also provides that the Cognizance of Offence can only be taken up by a Court only on a Complaint filed by the CCPA or on behalf of any officer authorized by it. (**Refer Amended Section 92)**
- For the first time, "consumer rights" have been crystallized in a six-fold manner as part of the Bill. **{Refer Amended Section 2(9)}**

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