

Highlights:**Corporate Brief**

- Circular No. 08/2021 dated 03.05.2021 issued by Ministry of Corporate Affairs in regard to extension of time gap between two board meetings.
- Circular No.07/2021 dated 03.05.2021 issued by Ministry of Corporate Affairs in regard to relaxation of time for filling forms related to creation or modification of charges under Companies Act, 2013.
- Circular No.06/2021 dated 03.05.2021 issued by Ministry of Corporate Affairs in regard to relaxation on levy of additional fees in filling forms under Companies Act, 2013 and LLP Act, 2008.
- Circular No.09/2021 dated 05.05.2021 issued by Ministry of Corporate Affairs clarifying CSR funds to be used for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants' etc.
- Circular dated 03.05.2021 issued by SEBI in regard to relaxation of timelines for compliance with regulatory requirements under SEBI circular dated 12.11.2020.
- Circular dated 14.05.2021 issued by SEBI in regard to relaxation from compliance to REITs and InvITs.
- Circular dated 31.05.2021 issued by SEBI in regard to format of compliance report on corporate governance by listed entities.
- Securities and Exchanges Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2021
- Securities and Exchanges Board of India (Intermediaries) (Second Amendment) Regulations, 2021
- Securities and Exchanges Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021

RERA Brief

- Punjab RERA provides for extension of validity of registration of projects for additional fees;
- Maharashtra RERA issues guidelines for Conciliation and Disputes Resolution Forum;
- Maharashtra RERA issues guidelines for determining the seniority of complaints filed before the MahaRERA;
- Rajasthan RERA provides relaxations in registering Agreement for Sale;
- Rajasthan RERA extends the time for submission of Quarterly Progress Report;
- Bihar RERA extends last date of submission of Occupation Certificate, Completion Certificate among other documents.

NCLT Brief

- *Sesh Nath Singh & anr vs. Baidyabati Sheoraphuli Co-Operative Bank Ltd & anr, Civil Appeal no. 9198 of 2019*

- *Lalit Kumar Jain vs. Union of India & ors, Transferred Case (civil) no. 245/2020*

Litigation Brief

- *The Development Manager shall be included within the definition of a Promoter under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 ("RERA").*

Corporate Brief

➤ **Circular No. 08/2021 dated 03.05.2021 issued by Ministry of Corporate Affairs in regard to extension of time gap between two board meetings.**

- Ministry of Corporate Affairs vide its circular no. 08/2021 dated 03.05.2021 announced that the requirement for holding board meetings of the companies within an interval of 120 days under section 173 of the Companies Act, 2013 is extended by a period of 60 days for first two quarters of the financial year 2021-2022.
- The gap between two consecutive board meetings may be extended to 180 days during the first quarter (April to June) and second quarter (July to September) of the financial year 2021-2022.

➤ **Circular No.07/2021 dated 03.05.2021 issued by Ministry of Corporate Affairs in regard to relaxation of time for filling of forms related to creation or modification of charges under Companies Act, 2013.**

- Ministry of Corporate Affairs vide its circular no. 07/2021 dated 03.05.2021 announced relaxation of time for filling of forms related to creation and modification of charges under Companies Act, 2013.
- Relaxation of time for filling of forms only applicable in following situations:
 - a) Date of creation or modification of charge is before 01.04.2021 but the timeline for filling of form under section 77 of Companies Act, 2013 has not expired; or
 - b) Falls on any date between 01.04.2021 to 31.05.2021. Both the dates are inclusive.
- In a situation mention in point (a) above the period beginning from 01.04.2021 to 31.05.2021 shall not be included for the purpose of counting the number of days for filling of forms under section 77 and 78 of Companies Act, 2013. In case the form is not filled during such period than the first date after 31.03.2021 shall be reckoned as 01.06.2021 for counting the number of days for filling of forms.
- In a situation mention in point (b) above the period beginning from date of creation of charge to 31.05.2021 shall not be included for the purpose of counting the

number of days for filing of forms under section 77 and 78 of Companies Act, 2013. The first day after the creation/modification of charge shall be reckoned as 1.06.2021 for counting the number of days for filing of forms.

- Applicable fees payable in a situation mentioned in point (a) i.e., form is filled on or before 31.05.2021, normal fees as per Fees Rules shall be charged. If the form is filled thereafter fees shall be charges under the Fees Rules after adding the number of days beginning from 01.06.2021 and ending on the date of filing plus the time period lapsed from date of creation of charge till 31.03.2021.
- Applicable fees payable in a situation mentioned in point (b), if the form is filled before 31.05.2021, normal fees as per Fees Rules shall be charged. If the form is filled thereafter, first day after the creation/ modification of charge shall be reckoned as 1.06.2021 and number of days till the date of filing shall be counted for the purpose of counting the fees under the Fees Rules.

⇒ **Circular No.06/2021 dated 03.05.2021 issued by Ministry of Corporate Affairs in regard to relaxation on levy of additional fees in filling forms under Companies Act, 2013 and LLP Act, 2008.**

- Ministry of Corporate Affairs vide its circular no. 06/2021 dated 03.05.2021 announced relaxation on levy of additional fees in filling certain forms under Companies Act, 2013 and LLP Act, 2008.
- Additional time upto 31.07.2021 is granted to Companies/LLPs for filling forms other than CHG-1, CHG-4 AND CHG-9 which were to be filled during the period 01.04.201 to 31.05.2021 without any additional fees for delay fillings. Normal fees shall be payable on such fillings.

⇒ **Circular No.09/2021 dated 05.05.2021 issued by Ministry of Corporate Affairs clarifying CSR funds to be used for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants' etc.**

- Ministry of Corporate Affairs vide its circular no. 09/2021 dated 05.05.2021 issued a clarification in continuation to its circular no. 10/2020 dated 23.03.2020 wherein spending CSR funds for COVID-19 was an eligible CSR activity.
- It further clarified that CSR fund can also be used for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants', 'manufacturing and supply of oxygen concentrators, ventilators, cylinders and other medical equipments for countering COVID-19' or such similar activities. These are eligible CSR activities under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013.

⇒ **Circular dated 03.05.2021 issued by SEBI in regard to relaxation of timelines for compliance with regulatory requirements under SEBI circular dated 12.11.2020.**

- SEBI vide its circular dated 03.05.2021 extended timelines for regulatory compliance under SEBI circular dated 12.11.2020. Extended timelines are as follows:
 - a) Submission of reports/ certifications to Stock Exchanges as per clause 2.1 of SEBI circular dated 12.11.2020 is extended upto 15.07.2021.
 - b) Disclosures on website as per clause 4 of SEBI circular dated 12.11.2020 is extended upto 15.07.2021 for disclosing following:
 - (i) Monitoring of asset cover certificate and quarterly compliance report of the listed entity;
 - (ii) Monitoring of utilization certificate;
 - (iii) Status of information regarding breach of covenants/terms of the issue, if any action taken by debenture trustee; and
 - (iv) Status regarding maintenance of accounts maintained under supervision of debenture trustee.
 - c) Reporting of regulatory compliance as per clause 5 of SEBI circular dated 12.11.2020 is extended upto 31.05.2021.

⇒ **Circular dated 14.05.2021 issued by SEBI in regard to relaxation from compliance to REITs and InvITs.**

- SEBI vide its circular dated 14.05.2021 has after considering the ongoing second wave of the COVID-19 pandemic and restrictions imposed by various state governments, has decided to extend the due to of regulatory filling and compliance for REITs and InvITs for period ending 31.03.2021 by one month over and above the timelines mentioned in the SEBI (Infrastructure Investment Trusts) Regulations, 2014 (InvIT Regulations) and SEBI (Real Estate Investment Trusts) Regulations, 2014 (REIT Regulations) and circulars issued thereunder.

⇒ **Circular dated 31.05.2021 issued by SEBI in regard to format of compliance report on corporate governance by listed entities.**

- SEBI vide its circular dated 31.05.2021 has modified its Circular No. CIR/CFD/CMD/5/2015 dated September 24, 2015 and Circular No. SEBI/HO/CFD/CMD1/CIR/P/2019/78 dated July 16, 2019.
- Prior to this circular format for compliance report on corporate governance was:
 - a) Annex - I - on quarterly basis;
 - b) Annex - II - at the end of a financial year
 - c) Annex - III - at the end of 6 months from the close of financial year.

June, 2021

May Updates

- SEBI has now added another Annex-IV for bringing transparency and to strengthen the disclosures around loans/ guarantees/ comfort letters/ security provided by the listed company directly or indirectly to promoter/ promoter group entities or any other entity controlled by them.
- Amended format for compliance report on corporate governance is:
 - a) Annex - I - on quarterly basis;
 - b) Annex - II - at the end of a financial year
 - c) Annex - III - at the end of 6 months from the close of financial year.
 - d) Annex - IV - on a half yearly basis (w.e.f. first half year of the FY 21-22).

➤ **Securities and Exchanges Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2021**

- SEBI vide its notification dated 05.05.2021 amended the Securities and Exchanges Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Following amendments have been made:
 - a) In regulation 1, in the proviso under sub-regulation (3), the words "Institutional Trading Platform" shall be substituted with the words "Innovators Growth Platform."
 - b) In regulation 3, a new sub-regulation is added after sub-regulation (4) –
" (5) For the purpose of this regulation, any reference to "twenty-five per cent" in case of listed entity which has listed its specified securities on Innovators Growth Platform shall be read as "forty-nine per cent"."
 - c) In regulation 6, a new sub-regulation is added after sub-regulation (3) –
" (4) For the purpose of this regulation, any reference to "twenty-five per cent" in case of listed entity which has listed its specified securities on Innovators Growth Platform shall be read as "forty-nine per cent"."
 - d) In regulation 26, after the first proviso to sub-regulation (6) following new proviso is added-
"Provided further that while providing reasoned recommendations on the open offer proposal, the committee shall disclose the voting pattern of the meeting in which the open offer proposal was discussed."
 - e) In regulation 29, after the existing sub-regulation (1) following new proviso is added-
"Provided that in case of listed entity which has listed its specified securities on Innovators Growth Platform,

any reference to "five percent" shall be read as "ten per cent"."

- f) In regulation 29, after the existing sub-regulation (2) following new proviso is added-
"Provided that in case of listed entity which has listed its specified securities on Innovators Growth Platform, any reference to "five percent" shall be read as "ten per cent" and any reference to "two per cent" shall be read as "five per cent"."

➤ **Securities and Exchanges Board of India (Intermediaries) (Second Amendment) Regulations, 2021**

- SEBI vide its notification dated 05.05.2021 amended the Securities and Exchanges Board of India (Intermediaries) Regulations, 2008.
- After regulation 40 the following regulation is inserted –
"30A. Special procedure for action on expulsion from membership of the stock exchange(s) or clearing corporation(s) or termination of all the depository participant agreements with depository(ies)
 - (1) While disposing of the proceedings under this regulation, the Board shall not be bound by the procedure specified in the foregoing provisions of this Chapter.
 - (2) On receipt of intimation from all the stock exchange(s) or clearing corporation(s) of which the stock-broker or clearing member, as the case may be, was a member, that such stock broker or clearing member, has been expelled from its membership, the Board may issue a notice to such stock broker or clearing member calling upon the noticee to make its submission(s), if any, within a period not exceeding twenty-one days from the date of service thereof, through a written reply, along with documentary evidence, as to why the certificate of registration, granted under the Act or the regulations made thereunder, should not be cancelled.
 - (3) On receipt of intimation from all the depositories where the participant was admitted, that the depository participant agreement has been terminated by the depository(ies), the Board may issue a notice to such participant calling upon the noticee to make its submission(s), if any, within a period not exceeding twenty-one days from the date of service thereof, through a written reply, along with documentary evidence, as to why the certificate of registration, granted under the Act or the regulations made thereunder, should not be cancelled.

- (4) No opportunity of personal hearing shall be granted while disposing of the proceedings under this regulation.
- (5) After considering the facts and circumstances of the case, material on record and the written submissions, if any, the Board shall endeavor to pass an order within twenty days from the date of receipt of written submissions.
- (6) The Board may, while passing such order, impose such conditions upon the person as it deems fit to protect the interest of the investors or its clients or the securities market.
- (7) The Board may require the person concerned to satisfy the Board the factors as it deems fit, including but not limited to the following -
 - a) the arrangements made by the person for maintenance and preservation of records and other documents required to be maintained under the relevant regulations;
 - b) redressal of investor grievances;
 - c) transfer of records, funds or securities of its clients;
 - d) the arrangements made by it for ensuring continuity of service to the clients;
 - e) defaults or pending action, if any.
- (8) On and from the date of cancellation of the certificate, the person concerned shall-
 - a) return the certificate of registration so cancelled to the Board and shall not represent itself to be a holder of certificate for carrying out the activity for which such certificate had been granted;
 - b) cease to carry on any activity in respect of which the certificate had been granted;
 - c) transfer its activities to another person holding a valid certificate of registration to carry on such activity and allow its clients or investors to withdraw or transfer their securities or funds held in its custody or to withdraw any assignment given to it, without any additional cost to such client or investor;
 - d) make provisions as regards liability incurred or assumed by it;
 - e) take such other action including the action relating to any record(s) or document(s) and securities or money of the investors that may be in custody or control of such person, within the time period and in the manner, as may be required under the relevant regulations or as may be directed by the Board while passing order under this Chapter or otherwise.

- (9) A copy of the order passed under this regulation shall be sent to the noticee and also uploaded on the website of the Board.
- (10) The intimation of the cancellation of the certificate of registration shall be sent to the stock exchange(s) or the clearing corporation(s) or the depository (ies), as the case may be."

➤ **Securities and Exchanges Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021**

- SEBI vide its notification dated 05.05.2021 amended the Securities and Exchanges Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. Read more at following weblink: https://www.sebi.gov.in/legal/regulations/may-2021/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-second-amendment-regulations-2021_50100.html

RERA Brief

➤ **PUNJAB**

Vide Circular No. RERA/Pb/2021/ENF/26 dated 18.05.2021, Punjab Real Estate Regulation Authority.

The Authority was faced with a number of cases in which even though extended period of validity of registration allowed under section 6 of the Real Estate (Regulation & Development) Act, 2016 ("**Act**") had lapsed, the project was still not complete as it had not obtained the completion certificate.

In view of the same, the Punjab RERA, on the advice of the Government of Punjab, has agreed to extend the validity of registration of such projects under section 8 of the Act upto the validity of the license granted to the promoter upon application made by the promoter in this regard. A fee of 33% of the normal fees which was paid at the time of registration of project will be levied as one-time fee for such extension.

➤ **MAHARASHTRA**

- i. Vide Circular No. 30/2021 dated 18.05.2021, Maharashtra Real Estate Regulatory Authority ("**MahaRERA**")

To streamline the process of disposal of complaints filed before the MahaRERA by clarifying the issue pertaining to the seniority of the complaints, the MahaRERA issued guidelines for determining the seniority of complaints filed before it.

- If a complaint is referred to the MahaRERA Conciliation and Dispute Resolution Forum (“**Forum**”) for availing the possibility of amicable settlement and if the conciliation between the parties fails, in that event, the complaint will then be referred back to MahaRERA for hearing the same on merits and on receipt thereof, such a complaint would be scheduled for hearing before the MahaRERA as per the original seniority of the said complaint and the seniority of the complaint would be decided as per the date of registration/filing of the complaint before MahaRERA.
 - Therefore, even if the complaint is referred to the Forum, the seniority of the complaint will remain intact. The hearing/decision of such complaints shall be taken up strictly as per their seniority.
 - In the event the seniority of any complaint has been changed, the proper/reasoned justification should be submitted before the Hon’ble Chairperson/ MahaRERA and only on the approval of Hon’ble Chairperson/ MahaRERA, the seniority of such complaint would be changed.
- ii. **Vide Circular No. 31/2021 dated 18.05.2021, Maharashtra Real Estate Regulatory Authority.**

The following procedure is prescribed by the MahaRERA for hearing to be conducted by Forum in referred conciliation matters (online complaints) transferred by MahaRERA:

- Once the complaints are referred to Forum by MahaRERA, the office bearers of the Forum shall first scrutinize the seniority of the complaints and thereafter keeping its seniority intact, assign / distribute those complaints to the concerned functional conciliation benches. Not more than 10 (ten) complaints can be assigned at the initial stage.
- Once the matters are assigned to the bench, the concerned conciliation bench shall issue notice of first hearing to the parties within a period of 1 (one) week from the date of receipt of such assignment and the first hearing on such complaints shall be conducted within 15 (fifteen) days. Only after disposal of the assigned complaints, next lot of 10 complaints can be assigned to the conciliation bench.
- In referred conciliation complaints, all parties will be at liberty to be represented through advocates / authorized representatives, before the Forum.
- If the parties arrive at any mutual agreement, the concerned bench shall record the said proceeding in the roznama and shall refer such complaints to MahaRERA

within a period of 1 (one) week together duly with signed conciliation terms. After placing such matters before the MahaRERA and only after passing final order by MahaRERA, the said complaint will be treated as closed / finally disposed of.

- If the conciliation between the parties fails, such complaints shall be transferred back to MahaRERA within a period of 1 (one) week for taking appropriate decision on merits.

➔ RAJASTHAN

- i. **Vide Order no. F1(146)RJ/RERA/2020/Special IV dated 06.05.2021, Rajasthan Real Estate Regulation Authority**

In view of the ongoing second wave of corona pandemic the directions passed in Order no. F1(146)RJ/RERA/2020/852 dated 15.05.2021, which was earlier applicable till 31.03.2021, have been further extended till 31.03.2022. The directions are as follows:

- On execution of agreement for sale on a stamp paper of appropriate value, the promoter and allottee, pending the registration of the said agreement, will be allowed to proceed with the agreement, provided that the said agreement is subsequently registered by the promoter and the buyer within 4 (four) months, otherwise within 8 (eight) months of execution.
- The allottees are further allowed to deposit instalments and banks / financiers of the allottees are allowed to sanction housing loan for the sold unit and disburse the due amount of loan on the basis of such executed agreement for sale.

It is clarified however, that after registration of such agreement, the registered document shall be deposited with the concerned bank/financial institution. Furthermore, these directions would apply only to such agreements which do not involve transfer of possession of the sold unit.

- ii. **Vide Order no. F1(167)RJ/RERA/QPR/2020/Special VIII dated 31.05.2021, Rajasthan Real Estate Regulation Authority**

It has been ordered that:

The last date for online submission of quarterly progress reports for all earlier quarters as well as for quarter ending on 31.03.2021 has been extended to 30.06.2021 without payment of any processing charges or penalty. Any further delay will attract penalty under Section 61 of the Real Estate (Regulation & Development) Act, 2016 and delay processing charges as well.

➤ BIHAR

Vide Notice dated 31.05.2021, Bihar Real Estate Regulation Authority ("Authority")

With a view to enhance transparency and accountability in the real estate sector and protect the interests of the consumers, It has been notified that:

The last date for submission of certificates / information, by all Promoters / Developers of the real estate projects whose projects have either been completed or the completion date has expired as per the registration certificate, has been extended till 15.06.2021. The certificates / information to be provided as per the notice are:

- Copy of completion certificate ("CC") or occupation certificate ("OC") of the project issued by the Authority.
- In case the CC / OC has not been issued, the copy of application / report submitted for issuance of CC / OC to the competent authority along with receipt of concerned municipal / local authority.
- Copies of registered conveyance deeds of completed apartments / flats.
- Copy of formation of association of allottees / flat owners of the project and registered conveyance deed of common areas of the project in favour of the association of allottees / flat owners.
- Information regarding handing over of necessary documents, insurance papers, sanctioned plans including common areas to the association of allottees.
- In case the project has not been completed by the specified date, then a copy of extension certificate or copy of application made to the RERA, Bihar for extension of registration of the project.

It was further notified that non-submission of application for extension of an ongoing project will make promoter liable for penalty under section 59/61 of the RERA Act 2016, which may extend upto 10 (ten)/ 5 (five)% of the estimated cost of the project.

NCLT Brief

➤ SESH NATH SINGH & ANR Vs. BAIDYABATI SHEORAPHULI CO-OPERATIVE BANK LTD & ANR, CIVIL APPEAL NO. 9198 OF 2019

A. FACTUAL BACKGROUND OF THE CASE

On 22nd March, 2021 a Division Bench of the Hon'ble Supreme Court comprising of Justice Indira Banerjee and Justice Hemant Gupta delivered a landmark judgment on the interplay of the

Limitation Act, 1963 ('Limitation Act') and the Insolvency and Bankruptcy Code, 2016 ('Code').

This Civil Appeal before the Hon'ble Supreme Court was brought under Section 62 of the Code challenging an Order dated 22.11.2019 passed by the Hon'ble National Company Law Appellate Tribunal ('NCLAT'). The Hon'ble NCLAT vide an Order dated 22.11.2019 had dismissed the Order dated 25.04.2019 passed by the Hon'ble National Company Law Tribunal, Kolkata Bench ('NCLT') whereby the Hon'ble NCLT had admitted the Insolvency Application filed under Section 7 of the Code bearing no. CP (IB) No.1202/KB/2018 by the Financial Creditor, thus allowing for initiation of the Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor (Debi Infra tech Private Limited).

In this case, the Corporate Debtor was engaged in the business of textiles including its export. On 08.02.2012, a request was made by the Corporate Debtor to the Baidyabati Sheoraphuli Co-Operative Bank Limited ('Financial Creditor') for sanction of Cash Credit Facility amounting to INR 1,00,00,000/- (One Crore). By virtue of sanction letter dated 15.02.2012, the Cash Credit Facility amounting to INR One Crore was granted to the Corporate Debtor by the Financial Creditor. In this regard, a Cash Credit Facility Account i.e Cash Credit Account No. 482 ('Account') was opened and a Hypothecation Agreement dated 17.02.2012 was executed between both the parties. The Corporate Debtor failed to make repayment of the debt on May, 2012 and subsequently the Account was declared as a Non-Performing Asset ('NPA') on 31.03.2013.

Before delving further into the factual details, it is pertinent to highlight that the entire factual matrix of the case can be divided into three set of proceedings which are - (a) *Insolvency Proceedings before NCLT and NCLAT* (b) *Proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act, 2002')* before the Debt Recovery Tribunal ('DRT') (c) *Writ Proceedings before the Calcutta High Court.*

SARFAESI PROCEEDINGS: Post the default and declaration of the account as NPA, the proceedings under the SARFAESI Act, 2002 were invoked by the Financial Creditor by way of issuance of a notice dated 18.01.2014 under Section 13(2) of the SARFAESI Act, 2002 demanding payment of an INR 1,07, 88, 536/- inclusive of interest as on 28.09.2013. Under the framework of the SARFAESI Act, 2002 the notice also provided that the Financial Creditor be invested with the right to take action under Section 13(4) of the SARFAESI Act, 2002 upon non-payment of the demanded outstanding amount within 60 days from date of notice. The notice dated 18.01.2014 was opposed by the Corporate Debtor by way of a representation which was subsequently rejected by the Financial Creditor. However, in order to get the Account regularized, vide a letter dated

15.07.2014, the Financial Creditor again demanded payment of the outstanding amount worth INR 1,07,88,536.00/-.

Upon non-payment of the outstanding amount, the Financial Creditor issued a notice to the Corporate Debtor under Section 13(4)(a) of the SARFAESI Act calling upon the Corporate Debtor to hand over peaceful possession of the secured immovable property, failing which the Financial Creditor would seek assistance of the District Magistrate at Hooghly for possession of the Secured Assets. Vide a notice dated 24.10.2014, the Authorized Officer of the Financial Creditor informed the Corporate Debtor and the Guarantors that the possession of the secured assets of Corporate Debtor has been taken by the Financial Creditor.

Vide an Order dated 11.05.2017, the District Magistrate, Hooghly ordered for possession of the secured assets of the Corporate Debtor which were hypothecated to the Financial Creditor.

PROCEEDINGS UNDER WRIT JURISDICTION: The notice issued by the Financial Creditor under Section 13(2) and Section 13(4) of the SARFAESI Act, 2002 was challenged by the Corporate Debtor by way of a Writ Petition bearing no. W.P No. 33799 (W) under Article 226 of the Constitution of India before the Calcutta High Court. Vide an Order dated 24.07.2017, an Interim Order was passed by the Calcutta High Court restraining the Financial Creditor from proceeding against the Corporate Debtor under the SARFAESI Act, 2002. While this matter before the Hon'ble Calcutta High Court was pending adjudication, the Financial Creditor approached the Hon'ble NCLT to invoke the Code.

INSOLVENCY PROCEEDINGS

(A) PROCEEDINGS BEFORE THE HON'BLE NCLT, KOLKATA BENCH

The Financial Creditor approached the Hon'ble NCLT by filing an Application under Section 7 of the Code for initiation of the CIRP against the Corporate Debtor. Vide Order dated 25.04.2019, this Section 7 Application filed on behalf of the Financial Creditor was admitted and the Kolkata Bench of the NCLT imposed a moratorium under Section 14 of the Code, allowed for initiation of CIRP and appointed an Interim Resolution Professional for the Corporate Debtor. This Order of admission of the Section 7 Application was challenged before the Hon'ble NCLAT by the Corporate Debtor.

(B) PROCEEDINGS BEFORE THE HON'BLE NCLAT

The primary ground for challenge before the Hon'ble NCLAT was that the Section 7 Application was barred by limitation. During the proceedings before the Hon'ble NCLAT, the Corporate Debtor argued that the Account was declared as NPA on 31.03.2013 and the Insolvency Proceedings were initiated on 27.08.2018 making the total time period from accrual of cause

of action to be five years and five months, thus rendering Section 7 Application barred by limitation.

The Hon'ble NCLAT held the view that the Section 7 Application under the Code was not barred by limitation. The date from which the SARFEASI proceedings were initiated (i.e 18.01.2014) till the Interim Order dated 24.07.2017 passed by the Calcutta High Court, this time period would be excluded under the mandate of Section 14(2) of the SARFEASI Act, 2002. Section 14(2) of the SARFEASI Act, 2002, essentially provides for exclusion for that particular time period which is spent pursuing any other civil proceeding. Hence, considering this exclusion, computing the time period from 31.03.2013 (Date of Declaration of NPA) to 10.07.2018 (Initiation of IBC proceedings) the Application would fall under the three year limitation period from date of accrual of the claim in terms of Article 137 of the Limitation Act.

B. QUESTION OF LAW BEFORE THE HON'BLE SUPREME COURT

- (a) Whether delay beyond three years in filing an Application under Section 7 of the Code can be condoned, in the absence of an Application for condonation of delay made by the Applicant under Section 5 of the Limitation Act, 1963?
- (b) Whether Section 14 of the Limitation Act, 1963 applies to Application under Section 7 of the Code? If so, is the exclusion of time under Section 14 available only after proceedings terminate?

C. ISSUE WISE OBSERVATION DECISION OF THE HON'BLE SUPREME COURT

(a) Limitation of the Application and Condonation of Delay

Arguments Advanced by the Appellant: It was argued by the Appellant in this case that the view held by the Hon'ble NCLAT on the point that the Section 7 Application was not barred by limitation is incorrect in law, as it overlooks the judgment of a larger bench of the Hon'ble NCLAT in the case of *Ishrat Ali Vs. Cosmos Cooperative Private Limited and Anr*, Company Appeal (AT) (Insolvency) No.1121 of 2019. In this case, the Hon'ble NCLAT had held that an action taken by the Financial Creditor under Section 13(2) or Section 13(4) of the SARFAESI Act, 2002 cannot be termed as a civil proceeding at court of first instance or at the court of appeal, thus cannot take the benefit of exclusion of limitation period provided under Section 14 of the Limitation Act

It was also argued by the Appellant that considering that the Section 7 Application was barred by limitation, the fact that the Application was admitted by the Hon'ble NCLT even in absence of an Application for condonation for delay is wrong in law.

Arguments Advanced by the Respondent: It was argued by the Respondent that the Application was within the Limitation period and is protected by exclusion of time period as provided under Section 14 of the Limitation Act.

Decision of the Hon'ble Supreme Court on this issue: The Hon'ble Supreme Court first of all laid down the extent of applicability of the Limitation Act over the Code. The Hon'ble Supreme Court referred to Section 238A of the Code and interpreted the provision literally and held that Section 238A of the Code lays down that the Limitation Act is applicable to the Code. The phrase 'as far as may be' in the aforementioned provision actually means that the Limitation Act shall be applicable to the Code, as long as any provision of the Limitation Act or effect of any provision of Limitation Act is not in conflict with the provisions of the Code.

After settling the question on applicability of the Limitation Act to the Code, the Hon'ble Supreme Court decided whether the Application under Section 7 filed before the Hon'ble NCLT was barred by Limitation. The Hon'ble Supreme Court observed that there is no provision in the Code that particularly deals with Limitation with respect to cases dealt under the Code, in such a scenario reliance is placed on Article 137 of the Limitation Act which provides for a limitation period of three years from the date when cause of action accrues. Considering the fact that, the Account herein was declared as NPA on 31.03.2013, the limitation period would be three years from that date.

The Appellants relied on the *Ishrat Ali* case to buttress their submission that Section 14 of the Code will not be attracted to the present set of facts, as the SARFAESI proceedings are not civil proceedings.

The Hon'ble Supreme Court rejected the argument and held that there is no rationale for the view that the proceedings initiated by a secured creditor against a borrower under the SARFAESI Act, 2002 would not be a civil proceeding. In this regard, the case of *United Bank of India Vs. Satyawati Tandon & Ors*, (2010) 8 SCC 110 was relied upon. Thus, Section 14 of the Limitation Act would be clearly applicable to the present case. With regard to non-filing of the condonation of delay Application under Section 5 of the Limitation Act with the Section 7 Application before NCLT, the Hon'ble Supreme Court held that Section 5 does not speak of any condonation Application. It merely enables the Court to admit an Application or an Appeal if the Applicant satisfies the Court that he had sufficient cause for not making the Application or preferring the Appeal within the prescribed time limit. In summation, the Court held that there is no mandatory requirement for filing of an Application under Section 5 of the Code.

(b) Applicability of Section 14 of the Limitation Act when proceedings pending: It was argued by the Appellant in the instant case that Section 14 of the Limitation Act shall not be applicable to the present case as the provision is applicable only in cases where the civil proceedings pursued by the party for which exclusion of time period is prayed is actually terminated. On this, they referred to Explanation (a) of Section 14 of the

Limitation Act. However, in the instant case the SARFAESI proceedings as well as the matter before the Calcutta High Court were pending, therefore making the provision inapplicable to the present set of facts.

The Respondents argued that Section 14 of the Limitation Act is applicable and that Explanation (a) to Section 14 which has been relied by the Appellant is misplaced. The Respondents have argued that Explanation (a) to Section 14 is clarificatory in nature.

The Hon'ble Supreme Court while interpreting Section 14 of the Limitation Act held that Explanation (a) to Section 14 cannot be construed in a pedantic manner. That Explanation (a) to Section 14 is clarificatory in nature. It essentially implies that in a proceeding in a wrong forum which is unable to entertain the proceedings for want of jurisdiction or other such cases where proceedings have ended, then Explanation (a) to Section 14 provides that exclusion can be claimed from the point proceedings were initiated to the outer limit of termination of proceeding. That is the date of termination of proceedings is the extent till which exclusion can be claimed.

The Hon'ble Supreme Court observed that the date of accrual of the claim is 31.03.2013, the date of initiation of SARFAESI proceedings as 18.01.2014 and the date of filing of the Section 7 Application 10.07.2018. Further, the Court decided to exclude the time period from date of initiation of SARFAESI proceedings till date of filing of the Section 7 Application, thus making the Application fall under the Limitation period provided under Article 137 of the Limitation Act.

Since both the issues were decided in favour of the Respondent, the Hon'ble Supreme Court dismissed the appeal.

➔ **LALIT KUMAR JAIN Vs. UNION OF INDIA & ORS, TRANSFERRED CASE (CIVIL) NO. 245/2020**

A. BRIEF FACTUAL BACKGROUND OF THE CASE

On 21st May, 2021 a Division Bench of the Hon'ble Supreme Court comprising of Justice L. Nageswara Rao and Justice Ravindra Bhat delivered the landmark judgment upholding the constitutionality of the provisions relating to the Insolvency Resolution of Personal Guarantors to Corporate Debtors under the Insolvency and Bankruptcy Code, 2016 ('Code').

The Ministry of Corporate Affairs ('MCA') vide its notification dated 15th November, 2019 had brought into effect provisions relating to Insolvency Resolution Process and Bankruptcy Process of Personal Guarantors to Corporate Debtor ('Impugned Notification'). The Impugned Notification brought into force Part-III of the Code and namely Section 2(e), Section 78 (except with regard to fresh start process), Sections 79, Section 94-187 (both inclusive), Section 239(2)(g), (h) & (i), Section

239(2)(m) to (zc), Section 239 (2) (zn) to (zs) and Section 249 of the Code.

However, several Personal Guarantors across the country were aggrieved by the Impugned Notification and thus approached High Courts across the country by way of Writ Petitions challenging the constitutionality of the Impugned Notification. The Hon'ble Supreme Court vide its Order dated 29.10.2020 in Transfer Petition (Civil) No. (s). 1034 of 2020 directed transfer of all of these Writ Petitions pending before the High Courts to itself.

B. ISSUES BEFORE THE HON'BLE SUPREME COURT

i. *Whether the Impugned Notification is ultra vires the power granted to the Central Government under the terms of Section 1(3) of the Code?*

Arguments advanced by the Petitioners:

- No Intelligible Differentia for carving out limited application of Part-III to Personal Guarantors of Corporate Debtors- It was submitted by the Petitioners that the Impugned Notification is *ultra vires* in so far it notifies provisions of Part-III of the Code. The Petitioners submitted that the exercise of power by the Central Government under Section 1(3) of the Code is unconstitutional.

It was the argument of the Petitioners that Section 1(3) of the Code is an instance of Conditional Legislation, where the Legislature has already enacted the law and the Executive is granted the power to bring the law into operation in any particular time that it may deem fit. The Conditional Legislation only permits the Executive the power to designate the time when the law is to be brought into force.

It was submitted by the Petitioners that Part-III of the Code deals with matters related to Fresh Start, Insolvency Resolution and Bankruptcy of Individuals and Partnership Firms, therefore given the fact that the Impugned Notification only notifies provisions of Part-III only in relation to Personal Guarantors to Corporate Debtors, it actually carves out limited application of Part-III in relation to Personal Guarantors of Corporate Debtors leading to unconstitutional usurpation of Legislative Power by the Executive.

- Impugned Notification suffers from Non-Application of mind - Prior to the operation of the Impugned Notification, the Insolvency Resolution for individuals was being dealt under the Presidency Towns Insolvency Act,

1909 and Provincial Insolvency Act, 1920. It was argued by the Petitioners that after bringing the Impugned Notification in operation which provides for Insolvency Resolution of Personal Guarantors to Corporate Debtors, the Central Government did not notify Section 243 of the Code which deals with repeal of the aforementioned Acts. It was argued by the Petitioners that the Impugned Notification has created two self-contradictory paths for Insolvency Resolution of Personal Guarantors to Corporate Debtors. The Petitioners relied on Section 179 of the Code to highlight that the forum for Insolvency Resolution of Individuals is the Debt Recovery Tribunal, however Section 60(2) and Section 60(3) provides for the National Company Law Tribunal ('NCLT') as the forum for Insolvency Resolution for Individuals (Personal Guarantors) leading to dual path for Insolvency Resolution leading to contradiction.

Arguments advanced by the Respondents:

- It was submitted by the Respondents that the exercise of the Executive Power under Section 1(3) of the Code is *intra vires* and constitutional. To substantiate this argument, the Respondents relied on the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018('2018 Amendment Act'). This very amendment had introduced Section 2(e) to the Code granting Personal Guarantors a distinctive category in the list of entities to which the Code applied. Additionally, the Amendment Act also introduced certain changes to Section 60(2) and Section 60(3) providing the NCLT as the forum for initiating Insolvency Proceedings against the Personal Guarantors and in case such a proceeding is going on in the Debt Recovery Tribunal then such proceeding would be transferred to NCLT.
- It was argued by the Respondents that amendment was primarily made to create unification of Insolvency Proceedings of the Personal Guarantor as well as the Corporate Debtor as such an approach furthers the objective of the Code. It was argued by the Respondents that both the Insolvency

Resolution Process of the Personal Guarantor as well as the Corporate Debtor under one forum allows the Adjudicating Authority to get an idea of the extent of the debt owed by the Corporate Debtor creating likelihood for more optimal Resolution. It was argued by the Respondents that Section 179 of the Code which the Petitioner relied on is subject to Section 60 of the Code, thus NCLT would only be the sole forum for Insolvency Proceedings against the Corporate Debtor as well as Personal Guarantor to the Corporate Debtor.

- The Respondent also relied on the Banking Law Reform Committee Report ('BLRC Report') to press on the fact that a synchronous relationship exists between Personal Guarantors as well as Corporate Debtors under the frame work of the Code especially in light of debt management.

Observations and Decision by the Hon'ble Supreme Court:

The Hon'ble Supreme Court held that the Central Government in its exercise of the Executive Power under Section 1(3) of the Code is empowered to bring provisions of the Code in operation as long as it furthers the objective of the Code. The Court acknowledged the arguments advanced by the Respondent especially with respect to the synchronous relationship between the Insolvency Proceedings of Corporate Debtor and the Personal Guarantor and its co-relation with the amendments introduced by the 2018 Amendment Act. In *Para 101*, it held that the Impugned Notification is not an instance of Legislative Exercise of power, rather it is valid exercise of the Executive Power. Further, there is no compulsion in the Code that it should at the same time be made applicable to all individuals, (including Personal Guarantors) or not at all.

ii. Whether the Insolvency Proceeding against the Personal Guarantor can be initiated after the approval of the Resolution Plan by the Adjudicating Authority?

Arguments advanced by the Petitioners: The Petitioners relied on the case of *COC Essar Steel India Ltd Vs. Satish Kumar Gupta ('Essar Steel')*, 2019 SCC Online SC 1478, to substantiate the argument that once a Resolution Plan is approved by the Adjudicating Authority, an Insolvency Proceeding against the Personal Guarantor cannot be initiated. The Petitioners relied on the *Essar Steel* case and argued that approved Resolution Plan under Section 31(1) of the Code results in extinction of all claims against the Corporate Debtor, consequently leading to extinguishment of liability of the Personal Guarantor which is co-extensive with that of the Corporate Debtor. Another argument

put forward by the Petitioners was that simultaneous Insolvency Proceedings invoked against the Corporate Debtor as well as the Personal Guarantor would allow for unjust enrichment of the Creditor and would open scope for double recovery.

Arguments advanced by the Respondent: The Respondent relied on Section 128 of the Indian Contract Act, 1872 to point out the legal principle that the liability of the Corporate Debtor is co-extensive as that of the Guarantor. The Respondent further emphasized on the word 'co-extensive' to highlight the fact that it essentially indicates towards liability (Debtor or Guarantor) to the extent of debt. Thus, the primary argument put forward by the Respondent was that a Creditor has the liberty to proceed against the Borrower as well as all the Guarantors till his debt is paid, thus the Guarantor is not absolved of his joint and several liability to make the payment of the outstanding debt to the Creditor till the debt is entirely paid.

Observation and Decision of the Hon'ble Supreme Court: The Hon'ble Supreme Court held that the sanction of a Resolution Plan and finality imparted to it by Section 31 does not per se operate as a discharge of the Guarantor's liability as the nature and extent of liability, much would depend on terms of the guarantee itself. The Hon'ble Supreme Court referred to the case of *Maharashtra State Electricity Board Vs. Official Liquidator Ernakulam*, (1982) 3 SCC 358, in this case the liability of a guarantor (in case where liability of the Principal Debtor was discharged under the Insolvency Law or Company Law) was considered and the Hon'ble Supreme Court held that the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

Litigation Brief

The Development Manager shall be included within the definition of a Promoter under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 ("RERA").

IN THE MATTER OF: Gauri Thatte & ors. Vs. Nirmal Developers & Ors. (Final Order passed by the Hon'ble Maharashtra Real Estate Regulatory Authority ["MahaRERA"] on 05.03.2021)

Issues:

Whether the Development Manager appointed under the Development Management Agreement having the exclusiv right to sell is covered within the ambit of Section 2(zk) under RERA?

Facts:

1. The Complainants had booked their flats in "Mumbai Dreams-Olympia C D", Mulund West, Mumbai (hereinafter referred to as the "said Project") developed by Nirmal Developers. The Developer had appointed Lucrative Properties Private Limited ("Development Manager"), a subsidiary of the Shapoorji Pallonji Private Limited ("SPPL") as their Development Management for the said Project.
2. The Complainants while booking their flats were made to believe that SPPL would construct the said Project and the excavation work possibly will start within a period of three months, whereas since the date of booking i.e till January 2019 no construction work had been done on the said Project.
3. The Complainants were of the opinion that Nirmal Developers and Dharmesh Jain ("Promoters") along with SPPL be held liable for refund of amounts, by reason of SPPL being a Promoter under Section 2(zk) of RERA. Furthermore, the Complainants contended that the Development Manager's role in the said Project comply with the requirements of a Promoter under Section 2(zk)(i), (v) and (vi) of RERA .
4. On the contrary, the Development Manager submitted that as per the Development Management Agreement ("DMA") executed between Nirmal Developers and the Development Manager, the Development Manager had the exclusive right to manage, plan and supervise the said Project and use the brand name for the fees to be paid as per the DMA. Further, the Development Manager contended that the DMA was entered at a time when the Nirmal Developers had already sold 1.71 lakh sq. ft. or thereabout residential area to the prospective buyers and their name was mentioned under the category of "other professional" on the webpage of MahaRERA. In addition, as per the DMA the Promoters were solely liable with respect to the purchasers of the units/apartments along with the refund of the money deposited by the Complainants to the Promoters.
5. Therefore, the Complainants aggrieved by the delay in possession and the completion of the said Project moved to MahaRERA for claiming refund of their deposited amounts under Section 12 of RERA.

Court's Observations:

- The Court laid emphasis on various clauses laid down in the DMA concerning the rights of the Development Manager

with respect to (i) exclusive development management rights and obligations as specified; (ii) use of brand name for the purposes of branding and appearance of their logo in the brochures/pamphlets for marketing of the said Project; (iii) undertaking the activities in respect of customer management *inter-alia* including sales process and closure, customer interactions, handover of possession, formation of society, etc. on behalf of the Promoters; (iv) in case of shortfall funding, the funds will be sourced from the Development Manager and the Development Manager shall be entitled to sell the units at discounted rates for such quantum of sales till the said Project meets the shortfall funding as well as fund upto Rs. 100 Crore and formulation of business plans; (v) payment of 10% of the Revenue to the Development Manager towards development marketing fees.

- The Court recommended that the Promoters and the Development Manager shall be liable under Section 2(zk)(vi) of RERA which provides for joint liability of both the categories of promoter i.e the person who constructs or converts the building into apartments or develops the plots for sale and the person who sells the apartments/flats/units.
- The Court suggested that the name of the Development Manager shall be added as a Promoter on the webpage of the said Project within a period of 30 days.
- The Court took appropriate note and decided that the Promoters and Development Manager shall be jointly liable to refund the amounts of the Complainants with simple interest at the rate of 9% (Nine Percent) per annum from the dates of their receipt till their refund.

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