

Highlights:**Corporate Brief**

- MCA notifies the Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021;
- MCA notifies the Companies (Registration of Foreign Companies) Amendment Rules, 2021;
- MCA notification dated 05.08.2021 notifying exemptions from provisions of sections 387 to 392 (both inclusive);
- SEBI circular dated 04.08.2021 modifying the Operational Guidelines for FPIs and DDPs pursuant to amendment in SEBI (Foreign Portfolio Investors) Regulations, 2019;
- SEBI issues circular dated 13.08.2021 on the Automation of Continual Disclosures under Regulation 7(2) of SEBI (Prohibition of Insider Trading) Regulations, 2015 – System driven disclosures – Ease of doing business;
- SEBI issues circular dated 17.08.2021 on the Penalty for Repeated Delivery Default.

Real Estate Brief

- Order dated 06.08.2021 issued by the Maharashtra Real Estate Regulatory Authority ("MahaRERA") extended the period of validity of a registered project by six months.
- Notification dated 06.08.2021 issued by the Rajasthan Real Estate Regulatory Authority issued directions for the curtailment of size, splitting up, or modification of a registered project.
- Notification dated 18.08.2021, issued by Uttar Pradesh Real Estate Regulatory Authority granting extension of one year for registration of all eligible projects.
- Circular dated 24.08.2021 issued by the Maharashtra Real Estate Regulatory Authority launched a toll-free helpdesk/call centre to aid the citizens.
- Notification dated 27.08.2021 issued by the Rajasthan Real Estate Regulatory Authority directed that a hardcopy of registration application must be submitted for online submission of the same.

NCLT Brief

- Ramesh Kymal Vs. M/S Siemens Gamesa Renewable Pvt. Ltd. [2021 SCC Online SC 72]

Corporate Brief**⇒ MCA notifies the Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021:**

The Ministry of Corporate Affairs ("MCA") vide notification dated 19.08.2021 notified the Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021 and made the following amendments to the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019. These rules shall come into force on the date of their publication in the Official Gazette i.e., 19.08.2021.

- The MCA vide the above-mentioned notification has added a new provision after Rule 5 of the Companies (Creation and Maintenance of databank of Independent Directors) Rules 2019 regarding the annual report on the capacity building of independent directors. The newly added Rule 6 of the Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021 ("Second Amendment Rules") provides that the Indian Institute of Corporate Affairs (IICA), shall within 60 (sixty) days from the end of every financial year send an annual report to every individual whose name is included in the data bank and also to every company in which such individual is appointed as an independent director.
- The Second Amendment Rules also provide the format of the Annual Report on Capacity Building of Independent Director to be submitted by the IICA in the Schedule appended to the Second Amendment Rules.

⇒ MCA notifies the Companies (Registration of Foreign Companies) Amendment Rules, 2021:

The MCA vide notification dated 05.08.2021, notified the Companies (Registration of Foreign Companies) Amendment Rules, 2021 to make the further amendments to the Companies (Registration of Foreign Companies) Rules, 2014 which shall be in effect from 05.08.2021:

- The Companies (Registration of Foreign Companies) Amendment Rules, 2021 ("Amendment Rules") provides for an explanation to clause 2(1)(c) of the Companies (Registration of Foreign Companies) Rules, 2014 (i.e., the definition of the term 'electronic mode'). The explanation is regarding the term electronic mode and states that electronic based offerings of securities, subscription thereof or listing of securities in the International Financial Services Centers set up under section 18 of the Special Economic Zones Act, 2005 (28 of 2005) shall not be construed as 'electronic mode' for the purpose of clause (42) of section 2 of the Companies Act, 2013.

⇒ MCA notification dated 05.08.2021:

The MCA vide notification dated 05.08.2021, notified exemptions from the provisions of sections 387 to 392 (both inclusive, in the following manner:

- In exercise of the powers conferred by section 393A of the Companies Act, 2013, the Central Government vide notification dated 05.08.2021 exempted from the

provisions of sections 387 to 392 (both inclusive), the following:

- foreign companies;
- companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India,

insofar as they relate to the offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centers set up under section 18 of the Special Economic Zones Act, 2005.

⇒ **SEBI circular dated 04.08.2021 modifying the Operational Guidelines for FPIs and DDPs pursuant to amendment in SEBI (Foreign Portfolio Investors) Regulations, 2019:**

SEBI vide circular dated 04.08.2021 modified the Operational Guidelines for FPIs and DDPs pursuant to amendment in SEBI (Foreign Portfolio Investors) Regulations, 2019:

- Section 9A of the Income Tax Act, 1961 (IT Act) was introduced by the Finance Act 2015 and subsequently amended vide Finance Act 2020 to facilitate setting up of fund management activity in India with respect to offshore funds.
- In order to enable Resident Indian fund managers to benefit from the provisions of Section 9A of the IT Act, clause (c) of Regulation 4 of the SEBI (Foreign Portfolio Investors) Regulations, 2019, was amended vide Gazette Notification dated August 03, 2021.
- For operationalizing the amendment to the SEBI (Foreign Portfolio Investors) Regulations, 2019, the explanation provided under Para 2 (ii)(b) of Part A of the Operational Guidelines for FPIs and DDPs was modified by SEBI circular dated 04.08.2021 and now reads as follows:
 - The contribution of resident Indian individuals shall be made through the Liberalized Remittance Scheme (LRS) notified by the Reserve Bank of India and shall be in global funds whose Indian exposure is less than 50%.

- DPPs and Custodians are requested vide the aforementioned circular to bring the contents of the circular to the notice of their clients.

⇒ **SEBI issues circular dated 13.08.2021 on the Automation of Continual Disclosures under Regulation 7(2) of SEBI (Prohibition of Insider Trading) Regulations, 2015 – System driven disclosures – Ease of doing business.**

SEBI vide circular dated 13.08.2021 provided for clarification on the Automation of Continual Disclosures under Regulation 7(2) of SEBI (Prohibition of Insider Trading) Regulations, 2015 – System driven disclosures – Ease of doing business.

- SEBI vide circular dated 09.09.2020 implemented the System Driven Disclosures in phases, under SEBI (Prohibition of Insider Trading) Regulations, 2015.
- It has been confirmed by Stock Exchanges and Depositories that they have implemented the System Driven Disclosures in line with the circular dated September 09, 2020 and the same has gone live from April 01, 2021.
- The circular dated 13.08.2021 clarifies that for listed companies who have complied with requirements of the circular dated September 09, 2020, the manual filing of disclosures as required under Regulation 7(2) (a) & (b) of the SEBI (Prohibition of Insider Trading) Regulations, 2015 is no longer mandatory.
- The Stock Exchanges are advised to bring the provisions of this circular to the notice of all listed companies and also disseminate the same on their websites.

⇒ **SEBI issues circular dated 17.08.2021 on the Penalty for Repeated Delivery Default.**

SEBI vide circular dated 17.08.2021 issued the Penalty for Repeated Delivery Default as follows:

- As per the circular, SEBI had stipulated that there was a need to put in place a suitable deterrent mechanism to address instances of repeated delivery defaults. This is expected to further strengthen the delivery mechanism and ensure market integrity.
- In view of the above, SEBI, in consultation with the Clearing Corporations (CCs) decided the following:

- In the case of repeated default by a seller or a buyer, for each instance of repeated default, an additional penalty shall be imposed, which shall be 3% of the value of the deliver default.
- Repeated Default shall be defined as an event, wherein a default on delivery obligations takes place 3 times or more during a six months period on a rolling basis.
- The penalty levied shall be transferred to Settlement Guarantee Fund (SGF) of the Clearing Corporation.
- This circular shall be effective after one month from the date of issuance of this circular.

extension that has been granted. In the cases of re-registration, a fee equal to the currently payable fee shall be levied, without any penalty payable on account of delayed registration.

- Modify the estimated date of completion when no booking, allotment, sale, or offer for sale has been made, through the online module for project modification. However, preponing an estimated date of completion, may be done even if booking, allotment, sale, or offer for sale has been made.

➤ **Notice issued by Uttar Pradesh Real Estate Regulatory Authority granting extension of one year for registration of all eligible projects:**

Pursuant to the impact of Covid-19 pandemic on the real estate sector, submissions were made by CREDAI and NAREDCO to the UP Real Estate Regulatory Authority ("Authority") to grant the following reliefs:

- Declaring the period between 1.03.2020 to 31.12.2021 as *force majeure* period;
- An extension on the completion and registration dates of projects ending on 1.03.2020;
- Waiver of fees/penalties on extension; and
- Direction to all concerned authorities to extend validity of maps/NOCs for this extended period without levying penalties.

Pursuant to the above-mentioned submissions and the power granted unto the Authority under the Act, the Authority vide its notification dated 18.08.2021 provided for the following reliefs:

- All eligible projects would obtain an extension of one year on the registration, and additional time would be provided to file QPRs (Quarterly Progress Report) and annual audit reports for all projects registered under the Authority.
- Such extension would be granted to the projects whose registration ended, or is ending not later than 31.12.2021, and promoters would be required to submit a financial plan to finance the remaining construction and development of the project, to avail the same.
- Extension for a maximum period of 15 (fifteen) months in the NCR region, and 12 (twelve) months to districts outside the NCR region would be granted, which includes the initial six-month extension.
- For promoters seeking an extension beyond the above-mentioned period, a written agreement from the Association of Allottees (AoA) shall be submitted to the Authority.

Real Estate Brief

➤ **Order issued by the Maharashtra Real Estate Regulatory Authority declared a force majeure period of six months, i.e. from 15.04.2021 to 14.10.2021:**

MahaRERA vide its order dated 06.08.2021, in exercise of its powers under the Real Estate (Regulation and Development) Act 2016 ("Act"), without affecting the rights of the allottees under the Act, stated that:

- The time limits for the compliances by the promoter under the Act have been extended by 6 (six) months, and the period of validity for the registration of the registered projects under the MahaRERA for which the completion date or the revised completion date expired on or after 15th April, now stands extended from 15th April 2021 to 15th October, 2021.

➤ **Notification issued by the Rajasthan Real Estate Regulatory Authority issued directions for the curtailment of size, splitting up, or modification of a registered project:**

Rajasthan RERA vide its notification dated 06.08.2021, has issued the following directions:

- For a registered project, a promoter may:
 - Curtail the size through the online module for map revision, by getting the deleted part re-registered at any time before making any advertisement, marketing, booking, allotment, sale, or offer for sale in such part of the project.
 - Split the project in two or more phases, after its booking, sale, offer for sale, or allotment through the online module for map revision. In such cases, the estimated date of completion that was declared at the time of registration cannot be changed, except for any

- No fees would be charged by the authority for granting an extension on the basis of a *force majeure* clause only. If there are other causes for extension, the promoter would be required to pay the prescribed fee.
- In case the Authority finds that the promoter obtained the extension by misrepresentation of facts, the certificate of extension would stand cancelled, with immediate effect, and such promoter shall liable to a penalty for every day the default continues, extending up to 5% (five percent) of the estimated cost of the project.

⇒ Circular issued by the Maharashtra Real Estate Regulatory Authority launched a toll-free helpdesk/call center to aid the citizens:

MahaRERA vide its circular dated 24.08.2021 launched a Toll-Free and fully equipped Citizen Helpline call centre/helpdesk to make the process of resolving queries of the citizens much more efficient, which will be functional every day, from 7:00am to 11:00pm (except on Sundays and government holidays).

⇒ Notification issued by the Rajasthan Real Estate Regulatory Authority directed that a hardcopy of registration application must be submitted for online submission of the same:

Rajasthan RERA vide its notification dated 27.08.2021, and as per the powers conferred on it under the Act directed that:

- For submitting the application of the registration of a project a hardcopy of the registration application, along with the documents that are needed to be uploaded must be submitted within 7 (seven) days of online registration.
- In case of failure to do so, delay processing charges would be applicable at INR 1,000/- (Indian Rupees One Thousand Only) per day, with a maximum cap of 5% (five percent) of the registration fee.
- While submitting the online application, the promoter is also required to upload Form A in Project Profile. The form can be found on the website under the "Other approvals as may be required and obtained for the project" tab.
- The submitted hardcopy must contain a print out of the Registration Certificate, an online summary sheet, Promoter profile, and fee receipts, along with all other documents that have been uploaded online.
- Hardcopy must be submitted in a hardbound file with details of the promoter and project written on the cover. The documents must be properly indexed and placed in the order mentioned in the index template, placed on the top. Numbering of pages on the top right corner, starting

from the last page, and all numbers must be shown in the index.

- The promoter is required to keep a parallel hardcopy of all submitted documents.

NCLT Brief

⇒ Ramesh Kymal Vs. M/S Siemens Gamesa Renewable Pvt. Ltd. [2021 SCC Online SC 72]

A. BRIEF FACTUAL BACKGROUND OF THE CASE

This case law deals with a judgement dated 09.02.2021 delivered by a Division Bench of the Hon'ble Supreme Court consisting of Justice Dhananjay Y Chandrachud and Justice M.R Shah.

In this instant matter, the Appellant claimed that a sum of INR 104, 11, 76,479 (Indian Rupees One Hundred and Four Crore Eleven Lakhs Seventy Six Thousand Four Hundred and Seventy Nine) was due and payable to him by virtue of the entitlements receivable pursuant to his resignation.

The Operational Creditor ('Appellant') has submitted his resignation to the Respondent along with the claim under Employment and Incentive Agreements (**Employment Agreements**). The Corporate Debtor ('Respondent') confirmed the payments which were due and payable to the Appellant under the letter of resignation. However, a termination letter was addressed to the Appellant by the Respondent. Consequently, the Appellant issued a Demand Notice dated 30.04.2020. Thereafter the Appellant filed an Application under Section 9 of the Insolvency & Bankruptcy Code, 2016 ('**the Code**') dated 11.05.2020 on the ground that there was a default in payment of his operational dues under the Employment Agreements. Thereafter, the Respondent filed a Reply before National Company Law Tribunal, Chennai ('**Hon'ble Tribunal**') opposing the main petition filed by the Appellant under Section 9 of the Code on the ground that, as the date of default is 30.04.2020, hence the initiation of proceedings under Section 9 of the Code is suspended by virtue of Section 10(a) of the code.

Section 10(a) of the Code reads as follows: Suspension of initiation of Corporate Insolvency Resolution Process.

"Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period."

It is pertinent here to mention that Section 10A has been inserted into the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020. The provision was introduced

into the Code keeping in light the pandemic situation prevalent in the country.

A. DECISION OF THE HON'BLE NCLT

The Hon'ble Tribunal dismissed the Section 9 Application on the ground that in view of Section 10A, which was inserted to the Code with retrospective effect from 5th June, 2020, the Application was not found to be maintainable vide Order 09.07.2020.

B. DECISION OF THE HON'BLE NCLAT

The Hon'ble Appellate Authority affirmed the view of the Hon'ble Tribunal and further dismissed the Application filed under Section 9 of the Code. He filed an appeal to the Supreme Court.

Thereafter, the Appellant moved an Appeal before the Hon'ble Supreme Court under Section 62 of the Code

C. ISSUE BEFORE THE HON'BLE SUPREME COURT

- (i) Whether Section 10(a) of the Code was applicable to an Application under Section 9 of the Code, filed before 5.06.2020 (the date on which the provision came into force) in respect of a default which has occurred after 25th March, 2020?

D. ARGUMENTS ADVANCED BEFORE THE HON'BLE SUPREME COURT

Arguments advanced on behalf of the Appellant:

- (i) Section 10(a) of the Code creates a bar to 'filing of applications' under Sections 7, 9 and 10 in relation to defaults committed on or after 25.03.2020 for a period of six months, which can be extended up to one year;
- (ii) The Ordinance and the Act which replaced it do not provide for the retrospective application of Section 10(a) of the Code either expressly or by necessary implication to applications which had already been filed and were pending on 5.06.2020;
- (iii) Section 10(a) prohibits the filing of a fresh application in relation to defaults occurring on or after 25.03.2020, once Section 10(a) has been notified (i.e., after 5.06.2020);
- (iv) Section 10(a) of the Code uses the expressions "shall be filed" and "shall ever filed" which are indicative of the prospective nature of the statutory provision in its application to proceedings which were initiated after 5 June 2020.
- (v) The Code makes a clear distinction between the "initiation date" under Section 5(11) of the code and the "insolvency commencement date" under Section 5(12) of the code. On the above premises, it has been submitted that Section 10(a) will have no application. It has also been urged that in each case it is necessary for

the Court and the tribunals to deduce as to whether the cause of financial distress is or is not attributable to the Covid-19 pandemic. In the present case, it was asserted that the onset of Covid-19, which was the reason for the insertion of Section 10(a), has nothing to do with the default of the respondent to pay the outstanding operational debt of the Appellant, which owes its existence even before the onset of the pandemic. Hence, it has been submitted that the event of default (30 April 2020) in the notice of demand cannot be read in isolation.

Contention on Behalf of Respondent:

- (i) The legislative intent behind the insertion of Section 10(a) of the Code was to deal with an extraordinary event, the outbreak of Covid-19 pandemic, which led to financial distress faced by corporate entities;
- (ii) Section 10(a) of the Code is prefaced with a non-obstante clause which overrides Sections 7, 9 and 10; and
- (iii) Section 10(a) of the code provides a cut-off date of 25.03.2020 and it is evident from the substantive part of the provision, as well as from the proviso and the explanation, that no application can be filed for the initiation of the Corporate Insolvency Resolution Process ('CIRP') for a default occurring on and after 25.03.2020, for a period of six months or as extended upon a notification.

E. OBSERVATION AND DECISION OF THE HON'BLE SUPREME COURT:

The Supreme Court ('Hon'ble Apex Court') in this present case held that adopting the interpretation as argued by the Appellant would defeat the object and intent of the underlying insertion of Section 10(a) of the Code. The onset of the Covid-19 pandemic is a cataclysmic event which had serious repercussions on the financial health of corporate enterprises. "We have already clarified that the correct interpretation of Section 10(a) of the code cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it".

The Hon'ble Apex Court further held that "Section 10(a) of the code does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the Covid-19 pandemic." Parliament has stepped in legislatively because of the widespread distress caused

by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies (this as we have seen was referred to in the recitals to the Ordinance), which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern. Section 10(a) does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the Covid-19 pandemic.

The Supreme Court upheld the order of the Hon'ble NCLAT by which it dismissed the petition filed by the Appellant.

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