Vedanta Law Chambers

Monthly Newsletter

# MONTHLY NEWSLETTER

## April 2021 Edition


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## Newsletter Highlights:



# From the Partner's Desk

## Progressive Amendments under Companies Act, 2013 for MSME

Adv Nivedita Sarda, Partner

With the changing scenario of businesses in past one year due to effect of covid, the need for break evens and economies of scales is more pronounced than before. Even though the law under Section 233 of Companies Act, 2013 provided for a fast track mode for merger of small entities, it is now become more effective with the complete procedure being amended including the definition of small companies.

The advantages and actions thereof for a fast-track merger offered under Section 233 of the **Companies Act, 2013** can be summarised as

(a) separate and simplistic approach and procedure

(b) Judicial approvals are removed and only information for time bound redressal is being incorporated

(c Cost and requirements of public notice is removed

(d) Cost effective and time effective.

**Applicable Provisions**

Fast Track Merger is being defined under Section 233 of the Companies Act, 2013 and procedure is provided under Rule 25 of **Companies (Compromises, Arrangements and Amalgamations) Rules, 2016** further modified with effect from 1st February, 2021

**Eligible Entities**

Fast Track Merger refers to a merger or amalgamation for specified class of Companies as prescribed under the Act:

(a) Merger between **2 or more Small Companies.**

(b) Merger between **holding & and its wholly-owned subsidiary Company.**

(c) Such other companies **as may be prescribed.**

Thus, with effect from 1st February, 2021, A scheme of merger or amalgamation under section 233 of the Act may be entered into between any of the following class of companies, namely:

(a) two or more **start-up companies**; or

(b) one or more **start-up company with one or more small company**.

A. **Start-up Companies: –** An entity shall be considered as start-up if:

(a) It is a **Private Limited company** incorporated under Companies Act up to a **period of 10 years**.

(b) **Turnover** of such company stated above is **less than Rs. 100 Crore**.

(c) Entity is working towards **innovation, development or improvement** of products or processes or services, or if it is a scalable business model with a high potential of **employment generation or wealth creation**.

B. Effective From **01st April 2021** in the definition of Small company paid **up capital and turnover** of the small company has been increased thereby now it states that:

Paid-up Share capital shall not exceed rupees two crores and;

Turnover shall not exceed rupees **twenty crores**.

Thus, any small company which covers about 60% of MSME in India can have the benefit of fast rack merger with the companies for forward, backward integration or even for expansion to achieve economies of scale and to expand inorganically.

Further, with the amendments in the provision of one man company including **conversion of the said companies into private limited company or public limited company** through a simplified process provides for limited liability working for persons who has been working as proprietors from past few years and look forward for expansion and growth.

These amendments shall have a far-reaching impact if utilised and put to action by the business community and industry as a whole.

## Guest Column

# Moratorium interest and other matters

CS Divye Dutt Agarwal, Guest

**Article 32 Constitution of India**

**Small Scale Industrial Manufacturers Association (Regd.) Versus Union of India and Others under Article 32 Constitution of India**

**Held: Supreme Court on 23rd March 2021** ordered that there shall not be any charge of interest on interest/ compound interest/penal interest for the period during the moratorium between 1st March 2020 to 31st August 2020 and any amount already recovered under the same head, namely, interest on interest/penal interest/compound interest shall be refunded to the concerned borrowers and to be given credit/adjusted in the next installment of the loan account.

Bank cannot charge penal interest especially when the moratorium had been announced to help those hit by the lockdown during pandemic, ruled three -judge bench led by Ashok Bhushan. The other members of the bench were R Subhash Reddy and MR Shah.

It rejected plea for the full waiver of all interest on loan not paid during six-month period. The bench also refused to further extend the moratorium period beyond 31st August 2020 or the deadline for resolution of stressed assets beyond 31st December 2020 or grant any other relief sought by badly hit sectors such as power and real estate sectors.

*Interim relief granted earlier not to declare the accounts of respective borrowers as NPA stands vacated.*

**Facts:** The Reserve Bank of India (RBI) had on March 27th 2020 announced a loan moratorium scheme, which allowed lending institutions to grant a temporary relief on payment of installments of term loans falling due between March 1, 2020, and May 31, 2020, due to the pandemic. Later, the moratorium was extended till August 31st this year. Further held that the RBI that Circular dated March 27th 2020 shall be applicable to all banks, non-banking Financial companies, housing finance companies and other financial institutions compulsorily and mandatorily. The move was intended to provide borrowers more time to pay EMIs amid the economic fallout due to COVID-19 pandemic-led nationwide lockdown, without being classified as bad loan.

The pleas, filed before the apex court, seeking relief as follows:

i. A complete waiver of interest or interest on interest during the moratorium period;

ii. That there shall be sector wise Reliefs packages to be offered by the Union of India and/or the RBI and/or the Lenders

iii. Moratorium to be permitted for all accounts instead of being at the discretion of the Lenders

iv. To extend the period of moratorium beyond 31st August 2020.

v. Whatever the relief packages are offered by the Central Government and/or the RBI and/or the Lenders are not sufficient looking to the impact due to Covid-19 pandemic and during the lockdown period due to Covid -19 pandemic.

vi. The last date for invocation mechanism namely 31.12.2020 provided under the 06.8.2020 circular should be extended.

Government had on 23rd October 2020 announced that it would waive the interest on interest only on MSMEs and personal loan not exceeding Rs 2 Crore in eight categories. These included MSME loans, education loans, housing loans, consumer durable loans, credit card dues, automobile loans, personal loans to professionals and consumption loans.

The apex court held that this limit lacked rationale and was discriminatory and extended to all loan payments that were deferred during moratorium except those specifically barred under the scheme –accounts classified as NPAs as on February 29,2020.

In regard to relief packages offered by government, Supreme Court verdict, it is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is

is wise or whether better public policy can be evolved. Wisdom and advisability of economic policy are not amenable to judicial review.

**Impact**

Bankers have welcomed the Supreme Court order that rejected sector wise relief and also removed the stay on bank declaring loans as NPAs. However, the reversal of interest already charged could impact bank revenues. Rating Agency ICRA estimates that the compound interest for six months of moratorium across all lenders will be Rs. 13500-14000 Crore.

**Prudent Practice for Borrowers availed Moratorium**

1. Borrowers need to check whether moratorium availed for the period from March 1, 2020 to August 31, 2020 in respect of the loan availed from the lender bank.

2. Borrowers should request for the revised repayment schedule and statement of accounts for loan availed from the lender bank from **March 1, 2020 to August 31, 2020, till 31st March 2021**. Ascertain whether EMI/tenure is increased in the revised repayment schedule with repayment schedule of sanctioned loan. If any interest on interest/compound interest/penal interest for the period during the moratorium is being debited by the lender bank, accordingly request to be made to such bank for refund the same or adjust in next installments.

3. Borrowers who have availed/opted for moratorium need to check CIBIL to ensure that lender institutions have not wrongly updated any Delay in Deposit Days (DPD) for Equated Monthly Installments (EMI) as it adversely affects CIBIL Score and CMR Ranking. If CIBIL is updated with DPD than made request, to the concern lender institution/CIBIL to update CIBIL with Zero DPD for moratorium period.

**Our Opinion on Supreme Court Verdict**

Supreme Court decision rejected plea for complete waiver of moratorium interest is in favour of Govt. and Banks, as complete interest waiver on the banking system could have been around Rs Six lakh crores. This would have been a shocker for a fiscally constrained government or a capital-starved banking system to absorb. Luckily, SC rejected the demand for a total waiver.

The judgement looks attuned as charging compound interest by banks would have diluted the relief provided by RBI. If we look to analyse the quantum of the compound interest that would be involved, personal and other loans up to Rs. 2 crores would be excluded as relief has already been provided for the same.

Banks would face an impact of

approximately Rs 6,500 – 7,000 crores (approximately 7- 8 bps of the total advances of the banking system). Further, if the government refunds this amount to the banks, there would be no impact on the banks. However, the affected borrowers would receive significant relief.

**Supreme Court** lifted interim stay on banks' asset classification is being welcomed decision for banks for asset classification. It had, on September 3, put a stop on the NPA clock to help COVID-hit borrowers asking bans not to tag accounts that were standard as on August 31, as NPAs. But, this created difficulties for industry in terms of asset classification. The SC has now lifted that stay. After the SC stay, banks were treating bad loan accounts in two different ways. They accounted for bad loans as bad loans, showing proforma gross NPAs while announcing their quarterly financial results. But, when it came to the banks' relation with the defaulted customer, the loan continued to be treated as standard. After the latest SC verdict, banks can return to tagging NPAs as NPAs. Unlikely, Banks have been already reporting proforma NPAs and making additional provisions. Hence, there will be no major impact on banks with the SC lifting the interim stay. Most banks had already adjusted the amount so incremental impact would be negligible.

# Legal Updates

## Insolvency and Bankruptcy Laws

**National Bank for Financing Infrastructure and Development Act, 2021**

The National Bank for Financing Infrastructure and Development Act, 2021 ("Act") received presidential assent on March 28, 2021. The Act seeks to establish the National Bank for Financing Infrastructure and Development ("NBFID") as the principal development financial institution ("DFI") for infrastructure financing

## Company Laws

**Companies (Amendment) Act, 2020**

The MCA has vide notification dated March 24, 2021 brought into force amendments in Section 124(7) of the Companies Act, 2013 which relates to the maintenance of unpaid dividends account by companies and Section 247(3) of the Companies Act, 2013 relating to valuations done by registered valuers. The amendments have reduced the penalties applicable to companies (and its officers) or the registered valuer, as applicable, in case of contraventions with respect to the aforesaid sections.

Adv Sakshi Jain,
Associate

**Companies (Accounts) Amendment Rules 2021**

The MCA has vide notification dated March 24, 2021 notified the Companies (Accounts) Amendment Rules, 2021 ("Accounts Amendment Rules") which amends Companies (Accounts) Rules, 2014, effective from April 1, 2021. The amendments introduced by the Accounts Amendment Rules are as follows:

a) From financial year April 1, 2021, any company that uses software to maintain accounts shall ensure that the software has the ability to record the audit trail for every transaction, and the software is required to create edit logs of all changes in the accounts along with the date of such changes. Further, the companies should not have the ability to disable the audit trail feature in such software.

b) The board report shall also include: (i) details of any applications/ proceedings under the Insolvency and Bankruptcy Code, 2016 for the concerned year, along with the status as at the end of the financial year; and (ii) details relating to the difference between the amount of valuation done at the time of one-time

settlement and the valuation done while taking loan from financial institution or banks (along with reasons therefor).

**Schedule III of Companies Act, 2013 and Companies (Audit and Auditors) Amendment Rules, 2021**

The MCA has vide notification dated March 24, 2021 notified certain amendments to Schedule III of the Companies Act, 2013 effective from April 1 , 2021, which inter alia requires companies to provide additional disclosures relating to the regulatory information in the financial statements of the each company. Some of the key disclosure requirements introduced are as follows:

a. Particulars relating to shareholding of promoters, trade payables, trade receivables, and certain other specified regulatory information, are to be disclosed in the balance sheet of the company;

b. Any company that has advanced/loaned/invested in any other person(s), entity(ies), including foreign entity(ies) ("Intermediary(ies)") with the understanding that the Intermediary shall invest/lend directly or indirectly to other person(s), entity(ies) in any manner by or on behalf of the company or provide guarantee/security on behalf of the company, such company shall disclose: (i) amount and date of advance/loan/investment of the amount in any Intermediaries, and complete detail of such Intermediaries; (ii) amount and date of further advance/loan/investment by Intermediaries to other person(s)/ entity(ies), and complete detail of such person(s)/entity(ies); and (iii) date and amount of any guarantee/security furnished to or on behalf of the company, and declaration that the provisions of Foreign Exchange Management Act, 1999 and the Companies Act, 2013 have been complied with, and the transaction is not in violative of the Prevention of Money Laundering Act, 2002;

c. Any company that has received funds from any other person(s), entity(ies), including foreign entity(ies) ("Funding Party(ies)") with the understanding that such Funding Party shall invest/lend directly or indirectly in other person(s)/entity(ies) in any manner or provide guarantee/security on behalf of the Funding Party, the company shall disclose: (i) amount and date of receipt of such amount from the Funding Party, and complete details of such Funding Party; (ii) amount and date of further advance/loan/investment of such amount, and the details of person(s)/entity(ies) to whom the amounts have been transferred; (iii) amount and date of furnishing of security to or on behalf of Funding Party, and declaration that the provisions of Foreign Exchange Management Act, 1999 and the Companies Act, 2013 have been complied with, and the transaction is

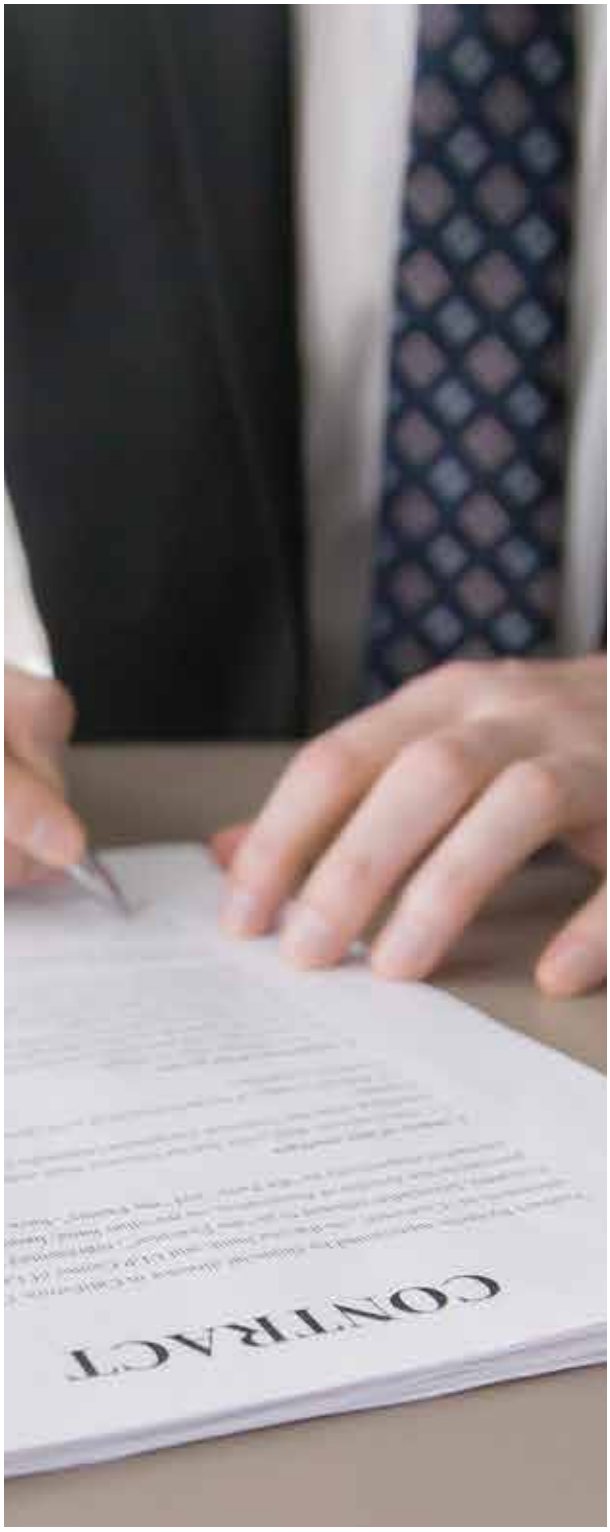
not in violative of the Prevention of Money Laundering Act, 2002; and

d. Any company that is involved in utilising virtual currency/ cryptocurrency by either trading or investing during the financial year, such company shall disclose: (i) profit/loss on such transactions involving crypto currency or virtual currency; (ii) amount of currency held at the reporting date; and (iii) deposits or advances from any person/entity for the purpose of trading/investing crypto currency or virtual currency.

**The International Financial Services Centres Authority (Finance Company) Regulations, 2021**

The International Financial Services Centres Authority (IFSCA) vide Notification No. IFSCA/2020-21/GN/REG010 dated 25 March 2021 has issued the International Financial Services Centres Authority (Finance Company) Regulations, 2021 (Regulations) to provide a framework for finance companies in an International Financial Services Centre (IFSC) in India. The Regulations are aimed at providing a competitive regulatory environment to non-banking financial institutions to complement the role of banking in providing finance, innovative products and services from the IFSC.

The Regulations are aimed at further strengthening the financial ecosystem in the IFSC by promoting participation of non-banking financial institutions alongside the banking units. The Regulations seek to expand the list of 'permissible activities' of the finance companies to include several non-core activities which are connected to the financing activities.



# National Bank for Financing Infrastructure and Development Act, 2021

CA Priyanshi Roongta,
Senior Associate

On 28-03-2021, the National Bank For Financing Infrastructure and Development Act (**the Act**), 2021 received Presidential assent. The Act which seeks to establish the National Bank for Financing Infrastructure and Development (**NBFID**) as the principal Development Financial Institution (**DFI**) to fund infrastructure projects in India was introduced in the Lok Sabha on 22-03-2021 and passed by the Rajya Sabha on 25-03-2021.

The salient features of the Act are as follows:

## 1. Establishment of NBFID

The National Bank for Financing Infrastructure and Development will be established as a Development Financial Institution (DFI) for financing infrastructure projects. It will be set up as a corporate body with authorised share capital of one Lakh Crore Rupees.

Shares of NBFID may be held by:

1. Central Government
2. Multilateral Institutions
3. Sovereign Wealth Funds
4. Pension Funds
5. Insurers
6. Financial Institutions
7. Banks
8. Any other Institution prescribed by the Central Government

Initially, the Central Government will own 100% shares of the Institution which may subsequently be reduced up to 26%.

## 2. Purpose/Objectives of NBFID

NBFID will have both financial and developmental objectives.

- Financial Objectives will be to directly or indirectly lend, invest, or attract investments from private sector investors for infrastructure projects located entirely or partly in India. For the same, the Central Government will prescribe the sectors to be covered under the infrastructure domain.

- The prime developmental objective shall be to establish coordination with the Central and State Governments, Regulators, Financial Institutions, and other relevant stakeholders. Furthermore, facilitating the development of the market for bonds, loans, and derivatives for infrastructure financing.

**3. Functions of NBFID**

Following are the functions of NBFID:

1. To extend loans and advances for infrastructure projects,

2. To take over or refinance such existing loans,

3. To attract investment from private sector investors and Institutional investors for infrastructure projects,

4. To organise and facilitate foreign participation in infrastructure projects,

5. To facilitate negotiations with various Government authorities for dispute resolution in the field of infrastructure financing, and

6. To provide consultancy services in infrastructure financing.

7. Form and manage subsidiaries or joint ventures or branches, in India or outside India;

8. Co-ordinate its operations in the field of infrastructure finance and maintain expert staff to study problems relating to infrastructure finance and be available for consultation to the Central Government, the Reserve Bank and the other Institutions engaged in the field of infrastructure finance;

9. set up trusts under the Indian Trusts Act, 1882 for establishment of funds for such nature as would assist in financing of infrastructure projects located in India;

10. support the development of a deep and liquid market for bonds, loans and derivatives;

11. set aside loans or advances held by the Institution and issue and sell securities based upon such loans or advances so set aside in the form of debt obligations, trust certificates of beneficial interest or other instruments, by whatever name called, and act as a trustee for the holders of such securities;

12. assign securities issued to the Institution etc.

**4. Management of NBFID**

NBFID will be governed by a Board of Directors. The Members of the Board shall include:

1. the Chairperson appointed by the Central Government in consultation with RBI,

2. a Managing Director,

3. up to three Deputy Managing Directors,

4. two Directors nominated by the Central Government,

5. up to three Directors elected by shareholders, and

6. a few independent Directors. The

Board will appoint independent Directors based on the recommendation of an Internal Committee.

5. **Development Financial Institution**

DFIs source funds from the market, Government and multi-lateral Institutions and are set up for the purpose of providing long-term finance. DFIs may be set up by applying to the Reserve Bank of India (RBI). In consultation with the Central Government, the RBI may grant a license for DFI.

6. **Support/Grants from the Government**

The Central Government may support the Institution through grants worth Rs 5,000 Crore by the end of the first financial year. The Government shall also provide a guarantee at a concessional rate of up to 0.1%. This may be used for borrowing from multilateral institutions, sovereign wealth funds, and other foreign funds. Furthermore, costs towards insulation from fluctuations in foreign exchange (in connection with borrowing in foreign currency) may be reimbursed by the Central Government in part or full.

Full text of The National Bank for Financing Infrastructure and Development Bill, 2021 (as introduced in Lok Sabha) may be accessed at https://prsindia.org/files/bill_track/2021-03-22/The%20National%20Bank%20for%20Financing%20Infrastructure%20and%20Development%20Bill,%202021.pdf

# Case Laws

1. **Bank of Baroda v. Gopal Shriram Panda, Civil Revision Application No. 29 of 2011 (Bombay High Court)**

**Held:** The Hon'ble High Court of Bombay in a reference held that the Civil Courts have jurisdiction to decide all matters of civil nature in relation to enforcement of a security interest of a secured creditor excluding those that are to be tried exclusively by the Debt Recovery Tribunal under section 13 and 17 of the SARFAESI Act, 2002.

**Facts:** The Hon'ble High Court noted that the DRT cannot embark on an adjudication of the civil rights claimed vis-à-vis the security interest, such as right of partition, specific performance, reliefs under Section 31 and 34 of the Specific Relief Act, pre-emption, redemption, etc. Further, the Hon'ble high Court reiterated that the DRT has exclusive jurisdiction to decide all matters relating to Section 13 and 17 of the SARFAESI Act, 2002.

Furthermore, the Hon'ble High Court observed that a security interest may at times also involve the common law rights of a citizen, who is not a party to its creation. The Hon'ble High Court in its landmark and elaborate judgment illustrated certain examples where the civil court may have jurisdiction over the security interest, despite Section 34 of the SARFAESI Act, 2002.

**Adv Siddharth Nigotia, Associate**

2. **Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta & Ors., Civil Appeal No. 9241 of 2019 (Supreme Court)**

**Held:** The Hon'ble Supreme Court observed that the National Company Law Tribunal has jurisdiction to adjudicate contractual disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, for adjudication of disputes that arise dehors the insolvency of the Corporate Debtor, the Resolution Professional must approach the relevant competent authority.

**Facts:** The dispute in the present case arose out of a PPA Agreement between the parties to develop and set-up a solar photovoltaic based power project in the State of Gujarat.

The Hon'ble Supreme Court noted that "if the dispute in the present matter related to the non-supply of electricity, the RP would not have been entitled to invoke the jurisdiction of the NCLT under the IBC. However, since the dispute in the present case has arisen solely on the ground of the insolvency of the Corporate Debtor, NCLT is empowered to adjudicate this dispute under Section 60(5)(c) of the IBC."

3. **Mohanraj And Others v. M/S Shah Brothers Ispat Ltd, Civil Appeal No. 10355 of 2018 (Supreme Court)**

   **Held:** The Supreme Court held that the declaration of moratorium under Section 14 of the Insolvency and Bankruptcy Code (IBC) covers criminal proceedings for dishonour of cheque under Section 138 of the Negotiable Instruments Act against the corporate debtor.

   **Facts:** The Hon'ble Supreme Court while deciding the effect of moratorium under Section 14 of the IBC, 2016 on proceedings initiated under section 138/141 of the Negotiable Instruments Act also observed that "it is clear that the moratorium provision contained in Section 14 of the IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act." In other words, a moratorium is applicable only to the corporate debtor and not to natural persons such as the Directors etc. of the company.

4. **Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd, 2021 SCC OnLine SC 253**

   **Held:** The Hon'ble Supreme Court held that there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by Committee of Creditors. The Adjudicating Authority under IBC may disapprove the resolution plan approved by the CoC, but it cannot modify it.

   **Facts:** In this case, the Adjudicating Authority (NCLT) during a Insolvency Proceedings concerning Jaypee Infratech Limited approved a resolution plan with some modifications. The Supreme Court considered the issue of the extent of, and limitations over, the powers and jurisdiction of the Adjudicating Authority while dealing with the resolution plan approved by the Committee of Creditor.

   The Hon'ble Supreme Court noted that the Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Insolvency and Bankruptcy Code, 2016. Within its limited jurisdiction, if the Adjudicating Authority or the Appellate Authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Code and exposited by this Court.

5. **BSNL & Anr. v. M/s Nortel Networks India Pvt. Ltd., SLP (C) 1531-32/ 2021 (Supreme Court)**

   **Held:** The Supreme Court held that the

limitation for filing an application under Section 11 of the Arbitration and Conciliation Act would be governed by Article 137 of the First Schedule of the Limitation Act, and will begin to run from the date when there is failure to appoint the arbitrator.

**Facts:** In this case, the Respondent had filed a Section 11 Application before the Hon'ble Kerala High Court after a considerable delay. The Supreme Court held that (a) limitation period for filing an application under Section 11 would be three years from the date when there is failure to appoint the arbitrator; and (b) a court may refuse to make the reference to arbitration where claims are ex facie time-barred.

The Supreme Court clarified that the limitation period for filing a Section 11 application must not be confused with the limitation period applicable to substantive claims made in the underlying contract as both are distinct.

Separately, the Supreme Court noted that a period of three years for a Section 11 application is unduly long and defeats the very objective of providing expeditious resolution of commercial disputes. The Supreme Court stated that Parliament would have to amend the Act to prescribe a specific limitation period for a Section 11 application.

6. **Deputy Commissioner of Income Tax & Anr. v. M/s. Pepsi Foods Ltd., Civil Appeal No. 1127 of 2021 (Supreme Court)**

**Held:** The Supreme Court while interpreting Section 254(2A) of the Income Tax Act held that "Any order of stay shall stand vacated after the expiry of the period or periods mentioned in the Section only if the delay in disposing of the appeal is attributable to the assesse."

**Facts:** The third proviso to the Section 254(2) of the Income Tax Act provided that an order of stay granted in the favour of an assesse in an appeal shall stand vacated after the expiry of 365 days even if the delay in disposing of the appeal is not attributable to the assesse.

The Supreme Court noted that the third proviso made no differentiation between assesses who are responsible for delaying the proceedings and assesses who are not so responsible. Therefore, the third proviso treated unequals as equals and thereby offending Article 14.

## Quote of the month:

"The secret of getting ahead is getting started"
- Mark Twain

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2. CS Divye Dutt Agarwal
3. Adv Sakshi Jain (Associate)
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