PKMG LAW CHAMBERS

ADVOCATES AND SOLICITORS

MONTHLY LAW REPORT FOR JANUARY,2020

ADVISOR

Mr. PRADEEP KUMAR MITTAL
B.Com, LL.B., FCS, Advocate
Past Central Council Member
The Institute of Company Secretaries of India
E-mail:pkmittal171@gmail.com
Web site: www.pkmgcorporatelaws.com
: 9811044365, 7678694882

CONSULTANTS

PRAVEEN K. MITTAL & DEEPALI MITTAL
B.Com, LLB **B.Com, LLB**

ASSISTED BY

RAKSHIT PANDEY
B.A.LL.B

TANYA GOEL
B.A. LLB

KANIKA SINGLA

REGULATORY UPDATES
(Notifications/Circulars)

1. MINISTRY OF CORPORATE AFFAIRS General Circular No. 17/2019	**30-12-2019**	**Relaxation of additional fees and extension of last date of filing of CRA-4 (cost audit report for FY 2018-19 under the Companies Act, 2013)** In continuation to this Ministry's General Circular No. 1 2 / 20 19 dated 24 .1O.2019 on the above subject and in view of several representations received from various stakeholders for extension of last date, it is informed that the last date of filing of CRA-4 (cost audit report) for all eligible companies for the Financial Year 2018-19, without payment of additional fee, has been further extended till 29.O2.2O2O. 2. It may be noted that the said extension is given for the entire process starting from 'preparation of Annexure to the Cost Audit Report 'to 'submission of Cost Audit Report by the Cost Auditor to the Company' and finally filing of Cost Audit Report by the Company with the Central Government' 3. This issues with the approval of the competent authority

Companies Act, 2013 Case Studies
By Advocate P.K Mittal, +91-9811044365

- **KIRAN GAKALDAS LAIJAWALA (LAIJA FOOD PVT. LTD) V/S ROC GUJRAT (NCLT) Company. Appeal NO. 214/NCLT/AHM/2019**

  The Authority observed that the appeal filed u/s 252(3) speaks that company is voluntarily struck off from ROC; rather it on the perusal of the records i.e. STK-5 and STK-7 Company was struck off on the instance of ROC. The authority under such circumstances, the application ought to be filed under section 252(1) of the Companies Act which provide when the company struck off on the instance of ROC. However, while referring to the judgment of Hon'ble Supreme Court in V. Nanthagopal vs Union of India and ors. Wherein, the Hon'ble Supreme Court has observed that "Quoting a wrong provision of law will not disentitle the party to the relief" under such circumstances, the instant appeal being treated u/s 252(1) of Companies Act, 2013.Hence the Appeal stand disposed of accordingly.

- **G. VASUDEVAN vs. UNION OF INDIA (HIGH COURT OF MADRAS) WMP no. 33188 of 2019.**

  The Madras High Court upheld the Constitutionality of the proviso to S 167(1) (a) of the Companies act, as inserted by the companies (Amendment) Act. 2017. The court observed that before the proviso was inserted, directors of a Company who had defaulted under section 164(2) would have to vacate their post as director of the defaulting company only. The court further held that this proviso can be justified on 2

grounds: - Firstly, it has been reiterated that the exclusion of directors from vacating their posts in the defaulting company while doing so in all other companies where they hold directorship has been done in order to prevent the anomalous situation wherein the post of director in a company remains vacant in perpetuity owing to automatic application of section 167(a)(1) to all newly appointed directors. Secondly, the underlying object of the proviso to Section 167(1) (a) is seen to be the same as that of section 164(2) both of which exist in the interest of transparency & probity in governance. The court thus holds that the proviso to section 167(1) (a) is neither manifestly or arbitrary nor does it offend any of the fundamental rights guaranteed under part III of the constitution of India.

- **M/S MARTI INDIA PVT. LTD. (Applicant No.1/Transferor Co.) AND RENESCO INDIA PVT. LTD. (Applicant No.2 /Transferee Co.) (NCLT ALLAHABAD BENCH) CA No. 396/ALD/2018**

  In the present case the petition is jointly filed by the Transferor & Transferee Co.'s U/s 230 & 232 of the Companies Act, 2013 for sanction of the proposed scheme of Amalgamation between the Transferor Co. and the Transferee Co. The Authority observed that after going through the reports of ROC, OL and RD the sanctioning of the present scheme is neither against the public policy nor it would be pre-judicial at large. The Authority further observed that all the statutory compliances have been complied with by the Petitioner Companies. Upon scheme becoming effective, the Authorized share capital of the Transferor Co. shall stand merged with the authorized share capital of the Transferee Co.

- **JAI SHANKAR AGRAHARI VS. UNION OF INDIA & ANR. Writ C No. 12498/2019 (ALLAHABAD HIGH COURT)**

  In the present case the court has upheld the constitutional validity of section 164(2) of the Companies Act 2013, which stipulates that a director, whose company has not filed financial statement or annual returns for any continuous period of 3 financial years, shall be disqualified from holding the position for 5 years. The court also holds that the "financial year" for the purpose of the section will start only from 2014-2015, and not prior thereto. The court further held that while the statute provides automatic disqualification of a director in case of a default under section 164, there is no provision which empowers ROC to deactivate DIN, only on the ground that a director has incurred disqualification under section 164(2)(a) or his office has become vacant under section 167(1)(a). Accordingly, the court quashed the action of respondents in deactivating the petitioners DIN & directed the ROC to give a notice to the petitioners to verify & establish the facts whether disqualification alleged to have been suffered by them so as to attract section 164(2) actually existed or not.

- **MUKESH MEHTA AND ORS. VS. SILVER LAND DEVELOPERS PRIVATE LIMITED AND ORS. (NCLAT) MANU/NL/0052/2020**

  The NCLAT observed that while passing the order, it is not necessary for the NCLT to give a finding whether as per agreement of mortgaged, the Respondent 'J.M. Financial Services' can sell the mortgaged property or not. Such finding can be given only after examining the allegations and counter allegations of the oppression and mismanagement leveled against the Respondents. Sub-section (4) of Section 242 of the Companies Act, 2013 provides that the Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating

the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable. Thus, the NCLT has a vast power to pass interim order for regulating the conduct of the company's affairs and it should be just and equitable. We find that the NCLT order is just and equitable. Therefore, we find no ground to interfere with the NCLT order.

- **KAYNET FINANCE LTD. vs. VERONA CAPITAL LTD. (NCLAT) Company Appeal (AT) No. 417-418 of 2018**

  The NCLAT Court observed that the Appellants were not the members, shareholders, Directors, creditors or workmen of the company falling within the ambit of S. 252(3) of the Act and the documentary evidence portrays their capacity as 'Debtors'. That NCLAT Court finally concluded that the Appellants could not claim to be the 'aggrieved persons' and had no locus to seek intervention in company petition. Neither of their legal rights was jeopardized nor was any of their legal right infringed. The appeal was therefore dismissed.

- **BANK OF BARODA vs. ABAN OFFSHORE LTD. (NCLAT) Co. Appeal (AT) No. 35 of 2019**

  The present appeal has been filed by the Appellant i.e. Bank of Baroda U/s 421 of the Companies Act, 2013. The NCLT has dismissed the application of the Appellant solely on the ground that the Appellant being preferential shareholders has no locus standi to file application for redemption of shares U/s 55(3) of Companies Act, 2013 or even U/s 245. The section stipulates that the Co. only with the requisite consent of preference shareholders and filing a petition in this behalf before the tribunal and its consequent approval-can issue further

redeemable preference shares with regard to the unredeemed preference shares.

The Authority observed that the preference shareholders are not remediless & for redemption of preference shares can file application U/s 55(3) of the Companies Act, 2013. They may also file application U/s 245 of the Act as a class action suit & the NCLT while exercising the inherent power viz, Rule 11 of NCLT Rules, can pass appropriate orders.

- **IN THE MATTER OF MAHARASHTRA SEAMLESS LTD. (MSL) Vs. PADMANABHAN VENKATESH & ORS. (SUPREME COURT) CIVIL APPEAL No. 4242 of 2019**

  The Supreme Court has held that there is no requirement under the IBC that resolution plan should match the liquidation value of the Corporate Debtor. The Apex Court held that "No provision in the Code or regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of Insolvency and Bankruptcy Board of India (IBBI)". It was observed that this option is not available to Resolution Applicant. "The exit route prescribed in S. 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking S. 7, 9 & 10 of the Code. In this case, having appealed against the NCLAT order with the object of implementing the resolution plan, MSL cannot be permitted to take a contrary stand in an application filed in connection with the very same appeal".

- **IN THE MATTER OF BIJAY KUMAR AGGARWAL, EX-DIRECTOR OF M/S GEREGROW COMMERCIAL PVT LTD V/S STATE BANK OF INDIA. (NCLAT) COMPANY APPEAL (AT) INSOLVENCY NO. 993 OF 2019.**

  As per Section 145 of the Indian Contract Act, 1872 in every 'Contract of 'Guarantee', there is an implied promise by the 'Principal Debtor' to

indemnify the 'Surety'. That pertinently points out that a 'Financial Debtor' includes Debt owed to the Creditor by both the Principal and the Guarantor. Section 3(11) of the 'I&B' Code refers to a sum that it is due from any person including 'Corporate Debtor'. A mere failure of the Guarantor to pay the 'Financial Creditor' when the principal sum is demanded will come within the purview of default u/s 3(12) of the Code. A 'Financial Creditor' who has a 'Guarantee' on the Debt due can commence proceedings u/s 7 of 'I&B' Code against the 'Guarantor' for failure to repay the sum borrowed by the Principal Borrower. There is no two opinion of a prime fact that there is no fetter in 'I&B' for projecting simultaneously two applications u/s 7 of IBC against (i) the Principal Borrower as well as (ii) the Corporate Guarantor(s) or against both the Guarantors but if, for the same set of claim, when an Application filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor'/'Principal Borrower' or Corporate Guarantor, the second application filed by the same 'Financial Creditor' for the same set of 'claim' and 'default' is not to be admitted against the other 'Corporate Debtor' (The Corporate Guarantor(s) or the Principal Borrower. As far as the present case the Learned Adjudicating Authority had admitted the application u/s 7 of the 'I&B' filed by the Principal Borrower on 02.08.2019, this Tribunal comes to a consequent conclusion that the Application u/s 7 of the 'I&B' Code filed by the 1st Respondent/Bank/'Financial Creditor' against the 'Corporate Debtor' is not maintainable in law and the same is accordingly dismissed. Hence present Appeal is allowed filed by the Corporate Guarantor.

- **IN THE MATTER OF SHYAM SUNDER BHATIYA VS. M/S RAJ BUILDHOME PVT. LTD. (NCLAT) Co. Appeal (AT) Insolvency No. 558 of 2019.**

  The NCLAT Court observed that as per the records the payments have been made by the Appellant/Corporate Debtor prior to the admission of the application. It was concluded that there is no default. Hence, the appeal was allowed and the Corporate Debtor is released from rigor of corporate insolvency Resolution Process. Henceforth the Corporate Debtor will function independently through its Board of Directors.

- **MR. SUDHIR GARG VS. M/S ASG HOSPITAL PVT. LTD. (NCLT JAIPUR) CO. PETITION NO. (IB)- 12/9/JPR/2019.**

  The authority observation that in order to fall under the definition of Operational Creditor, the amount in default must fall within the definition of 'Claim' defined under section 3(6), such claim must be a 'Operational Debt' as defined under section 5(21) of IBC. It was further observed that the Claim arising out of lease of immovable property does neither fall in the category of goods or services including employment or is a debt of the repayment of dues arising under any law for the time being in force of payable to the central Government any state Government or any local authority. Thus, the amount claimed in the present petition is not an unpaid "Operation Debt" the order is made in term of Section 9(5)(11) of IBC Hence, the petition was dismissed.

- **KUNDRAN CARE PRODUCTS LTD. V/S MR. SURYA KANT SATAPATHY & ORS. (NCLAT) Company Appeal (AT) (Insolvency) No. 11 of 2020**

That the Resolution Applicant has no right for renegotiation or further negotiation, after submission of the 'Resolution Plan' the process of evaluation criteria set out in the 'Request for Resolution Applicant' only top three 'Resolution Applicant should be negotiated. The Appellant who ranked 6th cannot have any right to participate for renegotiation over decision of Committee of creditor. Hence, Appeal was dismissed.

- **GOOD MORNING FIN-ADVISORY PVT. LTD. Vs. PC JAIN TEXTILE PVT. LTD. (NCLAT) Company Appeal (AT) (Insolvency) No. 859 of 2019.**

The NCLAT Court observed that no document on record to substantiate the claim of the appellant to pay service charge, as claimed by the appellant, i.e. 1% service charge on the total sanctioned term loan amount. That NCLAT court further observed that documents raised on are not sufficient to show engagement for service charge fixed, and the rate of service charged. Hence, this Adjudicating Authority dismissed the present appeal on the ground that there is the existence of dispute regarding the outstanding amount claimed by the appellant.

- **CALCUTTA RUBBER FACTORY PVT. LTD. Vs. ROC (NCLAT) COMPANY APPEAL (AT) NO.177 OF 2019**

The NCLAT Court observed that sub-section (1) of S.248 of Companies Act, 2013 provides the Registrar has reasonable cause to believe that a company not carrying on any business for a period of two immediately preceding financial years and not made any application within such period for obtaining the status of dormant company under Section 455 the Registrar shall send a notice to the company and all the directors of the

company of his intention to remove the name of the company from the register of companies and requesting them to send their representation along with the 5 Company Appeal copies of relevant documents within 30 days from the date of notice.

- **MR. AJAY KUMAR BISHNOI VS. M/S TAP ENGINEERING (HIGH COURT OF MADRAS) Crl. OP (MD) No. 34996/2019**

The High Court held that acceptance of Corporate Insolvency Resolution Plan U/s 31 IBC, cannot be a ground for quashing the prosecution initiated U/s 138 of NI Act, against the corporate debtor and its officials. The main object of S.138 is to safeguard the credibility of commercial transactions & to prevent bouncing of cheques by providing a personal criminal liability against the drawer of the cheque in public interest. Therefore, even if the resolution plan was approved and made binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders U/s 31, criminal proceedings U/s 138 of NI Act will not abate. The Court also clarified that once the Corporate Debtor comes under the resolution process, its erstwhile managing director/(s) cannot continue to represent the company. "Therefore, it is only the Resolution Professional who can represent the accused company during the pendency of the proceedings under IBC."

- **M/S RASAYANO VS. KATARIYA PET PRIVATE LIMITED (NCLT MUMBAI BENCH-IV) CP (IB) 2144/MB/C-IV/2019**

The NCLAT Court observed that dispute cannot be held to be pre-existing dispute by merely inviting attention to the arbitration clause.

- **PEER AAR AUTOMOTIVES PVT. LTD. Vs. LEEL ELECTRICALS LTD. (ALLAHABAD BENCH) Company Petition (IB) No. 334/ALD/2019**

  The NCLAT Court observed that when demand notice U/s 8 of IBC is delivered for initiation of CIRP proceeding U/s 9 of IBC and if no dispute has been raised by the Corporate Debtor in pursuant of the demand notice issued by the Operational Creditor then requirement is to be considered before triggering the insolvency process.

- **SVM CERA PVT. LTD. VS. BENITO CERAMIC PVT. LTD. (NCLT AHMEDABAD) C.P. (IB) No. 474/NCLT/AHM/2018**

  The issue involved in the present case was whether the application filed U/s 9 of IBC was time-barred or not? The Authority observed that prior to issuance of demand notice no action has been taken by the applicant to recover the alleged debt. According to **part II of First Division of Schedule given under the Limitation Act, 1963** a debt is deemed time barred if the lender or the supplier of goods & services does not recover the money or does not take legal action within 3 years from the due date. In the present case, more than 3 years has been elapsed from the due date, therefore, the debt which is claimed by the applicant through this petition is a time barred debt, and hence the present applicant is not maintainable. The Hon'ble SC in the case of **B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta**, held that the Limitation Act is applicable to applications filed U/s 7 & 9 of the Code from the inception of the code, Article 137 of the Limitation Act gets attracted. "The right to sue" therefore, accrues when a default occurs. If the default has occurred 3 years prior to the date of filing of the application, the application would be barred under Article 137. Therefore, the present petition was

dismissed by the Adjudicating Authority on the ground of maintainability.

- **NAVIN RAHEJA VS. SHILPA JAIN & ORS. (NCLAT) Co. Appeal (AT) (Insolvency) No. 864 OF 2019**

The issue raised in the present case was whether the 'Corporate Debtor' can be held to have committed default, if apartment/flat/premises is otherwise ready but offer of possession was delayed due to the reasons beyond the control of 'Corporate Debtor' such as absence of clearance by the competent authorities/Govt. etc.? The Authority observed that as per S.19 (4) of the RERA, the allottee is entitled to claim the refund of amount paid along with interest at such rate as may be prescribed & compensation in the manner provided under the Act, from the promoter if the promoter fails to comply or is unable to give possession of the apartment, plot or building as the case may be. The allottees are speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They do not want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship & really get back, by way of this coercive measure, monies already paid by it. It was further observed that if the delay is not due to the 'Corporate Debtor' but force majeure, it cannot be alleged that the 'Corporate Debtor' defaulted in delivering the possession. The appeal was therefore allowed as filed by the appellant, shareholder/promoter alleging that the application U/s 7 was barred by limitation and not maintainable on different grounds.

BY: PRADEEP K. MITTAL

DISCLAIMERS

All reasonable care has been exercised in compilation of information in this report. However, the PKMG Law Chambers, its members on panel(s) or advisors or employees shall not in any way be responsible for the consequences of any action taken on the basis of reliance upon the contents.

This report has been sent to you upon your being a client or associate of the PKMG Law Chambers or on the recommendation/suggestion of any of our client or associates. **This is not a spam mail.**

CIRCULATION BY

THIS REPORT IS CIRCULATED
FOR PKMG LAW CHAMBERS,
171, CHITRA VIHAR, DELHI-110092,
PHONES: (011) 22540549
E-MAIL :pkmittal171@gmail.com
Web-Site: www.pkmgcorporatelaws.com