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Journal of Unique Laws and Students" (JULS) which shall provide academicians, professors of law, young lawyers and legal professionals to deliberate and express their critical thinking on impressionistic realms of Law. The JULS aims to provide cost free, open access academic deliberations among law students and young lawyers. It focuses on theme based, double peer reviewed volume publications which shall be selected from the call for entries of the journal.

PREFACE

The views expressed in the articles are purely and solely of the authors and the entire team of the Journal has no association with the same. Although all attempts have been made to ensure the correctness of the information published in the articles, the Editorial team shall not be held responsible for any errors that might have been caused due to oversight or otherwise. It is up to the rest of us to help make the journal a success story in the next several years.

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EDITOR'S NOTE

Volume II Issue IV of **Journal of Unique Laws and Students (JULS)**

The journal's current issue aims to present merit papers in the form of case analysis on numerous legal issues related to company law and arbitration law and these topics are authored by various groups of individuals that have been reappraised and emended by our team of editors to attend the highest possible excellence. These cases with various landmark case laws are the result and we feel privileged to have been able to act as editors.

We thank all authors for their obedient submission to this journal and for their productive cooperation with the editorial team to garnish their work with perfection. We would also like to express our profound gratitude to our diligent editorial board, whose restless support and commitment made this Journal's Volume II Issue IV a success.

Prof. Disha Nayak Saedesai
Editor-in-Chief

Hon'ble Justice Dr. Saleem Marsoof
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Executive Editor

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TATA CONSULTANCY SERVICES LIMITED VS. CYRUS INVESTMENTS AND OTHERS (2021)

Anshul Parashar*

Citation: **(2021) 9 SCC 449**

Bench: **Hon'ble Chief Justice S. A. Bobde, Hon'ble Justice, A.S. Bopanna, Hon'ble Justice V. Ramasubramanian**

Title: **Tata Consultancy Services Limited … Appellant(s)**

Versus

Cyrus Investments Pvt. Ltd. And Ors. … Respondent(s)

Jurisdiction: **Supreme Court of India, Civil Appellate Jurisdiction**

Laws: **Sec. 241 in The Companies Act, 2013**

Sec. 242 in The Companies Act, 2013

Sec. 244 in The Companies Act, 2013

Section 14 in The Companies Act, 2013

Article 75 of the AOA

Article 75 of the Constitution

National Company Law Tribunal (NCLT)

National Company Law Appellate Tribunal (NCLAT)

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Introduction:

Tata Sons established Tata Consultancy Services (TCS) as a division on April 1, 1968. Mumbai, Maharashtra is home to this multinational Indian information technology (IT) services and consulting company. TCS has locations in 46 different nations. One of the most influential businessmen in India is the businessman, Ratan Tata. He formerly served as both the Chairman of the Tata Group and the Chairman of Tata Sons. Founded on March 7, 1923, Cyrus Investments Private Limited is an unincorporated organization. It serves as a financial adviser. It falls under the definition of a "company limited by shares" and is a private, unlisted firm. Cyrus Mistry is an entrepreneur from India. From 2012 until 2016, he served as Chairman of the sizable Tata Group of companies. He is one of the directors of Cyrus Investments Private Limited, one of his businesses.

On October 24, 2016, Tata Sons Limited's Board of Directors and Majority Shareholders ousted Cyrus Mistry and shifted from his role as Executive Chairman after they lost confidence in his ability to lead the company. The chairman of Tata Sons Limited is N Chandrasekaran, formerly the chief executive officer and managing director of TCS. A general meeting of shareholders decided to remove Cyrus Mistry from the Tata Sons board of directors. Cyrus Mistry then filed a complaint with the ***National Company Law Tribunal (NCLT)*** in Mumbai, charging Tata Sons' operational mismanagement and violation of ***Sections 241, 242, and 244 of the 2013 Companies Act***[1].

The question at hand in this instance is whether the NCLAT's order to restore Cyrus Mistry can be appealed. This case deals with the question of whether the NCLT's decision to restore Cyrus Mistry to his previous role as chairman of the TCS group is maintainable. In the well-known case of ***Tata Consultancy Services Ltd. v. Cyrus Investment Pvt. Ltd. & Ors.,*** also referred to as the ***Tata- Mistry controversy***[2], the Hon'ble Supreme Court issued its ruling. The conflict stems from a boardroom takeover in 2016 that resulted in Cyrus Mistry's resignation as chairman. This case is regarded as one of the country's largest corporate legal disputes.

[1] 'Section 241, 242, 244' (2013) in *Taxman's Companies Act 2013*. New Delhi, India: Taxman Publications (P.) Ltd.
[2] 2021 SCC Online SC 272.

Background of the Case:

1. Four directors, three Tata Trust nominees, one finance director, and Cyrus Mistry personally serve as the board's chairman. The Tata Sons own the majority of the board members. In the event of a tie vote by the Board, the Chairman would've had a deciding vote. Therefore, the Chairman would only need the support of one independent director to decide if the other independent director chose not to vote if the three directors, the finance director, and the financial director of Tata Sons decided to remove him from the Board.
2. Therefore, it becomes strategically important to fire him as chairman before firing him as a director. Since Tata Sons became an unlisted public corporation, the chairman lacked the legal authority to state his case or mount a defense.
3. Based on the company's ***"prejudicial and oppressive"*** actions, Cyrus Mistry filed a petition for oppression and mismanagement. However, the NCLT Mumbai Bench dismissed all the claims made against Tata Sons and found that the Board of Tata Sons had been competent enough to remove Cyrus Mistry from his position as Chairman of Tata Sons Limited.
4. Cyrus Mistry appealed to the NCLT's ruling because he felt wronged by it. The NCLAT reversed the earlier ruling and ruled that Cyrus Mistry's removal as Chairman of Tata Sons was unlawful, ordering his reinstatement. Tata Sons then appealed the ruling to the Supreme Court.
5. After upholding the choices of the Tata Sons Board to remove Cyrus Mistry, the company's then-chairman, from office in October 2016, the Supreme Court gave relief to Tata Group in January 2020 and stayed the NCLAT order. The Supreme Court later ruled in Tata Sons' favor in 2021.

Facts of the Case:

1. The Sapoorji Pallonji Group, under the direction of Cyrus Mistry, held 18.37% of Tata's paid-up capital. He received a five-year appointment in 2012 to be the executive deputy chairman of Tata Sons.
2. By the end of 2012, Mr. Ratan Tata had resigned from his role as chairman emeritus, and Cyrus had been named by the corporation's board of directors as the company's executive chairman, effective December 29, 2012. The Board of Directors of Tata Sons adopted a resolution on October 24, 2016, removing Cyrus from his role as the company's Executive Chairman.

3. Seeking that, he was also fired from his director positions with Tata Industries, Tata Consulting, and Tata Teleservices, all of which were done so without following separate shareholder motions.
4. Cyrus then resigned as a director of a few additional companies.
5. Following that, two SP group firms, Cyrus Investments Pvt. Ltd. and Sterling Investment Pvt. Ltd., filed a petition under *sections 241, 242, and 244 of the 2013 Companies Act*, alleging oppression, poor management, and unjust disadvantage. The complaint makers also disputed Tata Sons' change of status from a public limited company to a private limited company.

Questions of Law:

Three components make up the Supreme Court's decision, and concurrent analysis of the legal foundations is required:

1. Was the situation appropriate to qualify as "Oppression and Mismanagement" under ***Section*** *241 of the 2013 Companies Act*?
2. Was Cyrus Mistry's departure from the Company as Chairman and Director carried out in accordance with the *Companies Act of 2013*?
3. Is Tata Sons' ***Article 75 of the AOA*** oppressive?

Contentions made by Parties:

Before the National Company Law Tribunal (NCLT)

1. The SP Group's complainant companies alleged mismanagement, oppression based on a violation of the company's articles of association, and the illegal removal of Cyrus Mistry from his position as executive chairman. They also complained that Ratan Tata is treating the business as though it were his sole property, while other shareholders act like puppet masters.
2. The NCLT thoroughly addressed each argument.
3. Regarding oppression, it was decided that the claim that the ***Articles of Association*** had been abused for poor management and oppression was unjustified because SP Group was represented on the board at the time the Articles were amended.

4. NCLT noted further that Cyrus's dismissal as Executive Chairman could not be construed as minority shareholder oppression. Cyrus' dismissal as Executive Chairman of Tata Sons and as a director was not due to legacy issues, but rather to a lack of trust.
5. The NCLT also rejected the contention that Tata Sons' transition from a public to a private company qualifies as a factor worthy of consideration.
6. The NCLT ruled in favor of Tata Sons Ltd. as a result.

Before the National Company Law Appellate Tribunal (NCLAT)

1. NCLAT overturned NCLT's decision because there was no indication in the files that the company's board was unhappy with his performance.
2. In addition, it was noted that Ratan Tata was adamant about dismissing Cyrus even before the meeting, and the majority shareholders were aware that doing so required advance notice and that, if all significant decisions were made in advance, the board of directors would be superfluous.
3. In addition, the NCLAT ruled that Cyrus' dismissal had nothing to do with his performance as the company's executive chairman.
4. In addition, the NCLAT noted that the Respondents' abuse of power, not Cyrus' performance, was the cause of his lack of confidence.
5. The NCLAT also mentioned Tata Sons Ltd.'s 2017 conversion from a public company to a private company without adhering to ***Section 14 of the Companies Act, 2013***, which suggests that most directors acted in a manner that was detrimental to the minority directors and the business.
6. The NCLAT ruled that Cyrus' dismissal as Executive Chairman and from the company's Board of Directors was unlawful because the company's operations were believed to be oppressive and detrimental to the appellants.
7. In addition, the NCLAT instructed the principal stakeholder, the Tata Group, to consult with the SP Group before appointing an executive chairman or directors.

Legal Provisions of Law:

The 2013 Companies Act, Section 241, states:[3]

- In circumstances of oppression, this part offers redress to the company's members. If a business's affairs were or are currently being mismanaged and administered in an oppressive manner that hurts the firm, its members, or the general public, any member of the company has the right to apply to the Tribunal.
- Under this article, the central government may apply to the tribunal if it thinks the corporation is conducting its affairs improperly.

The 2013 Companies Act's Section 242 Tribunal's authority[4]

- If a business's affairs are or have been the subject of being mismanaged and managed in an oppressive manner that hurts the firm, its members, or the general public, any member of the company has the right to apply to the Tribunal.
- The central government may apply to the tribunal under this clause if it thinks the corporation is conducting its affairs improperly. *The 2013 Companies Act's Section 244*[5], this section outlines the requirements for submitting an application *under Section 241 of the 2013 Companies Act.*

Judgment of Supreme Court:

- The Supreme Court made the following statement regarding the first issue: "The NCLT is forbidden to interfere with the ousting of a person as a Chairman of a Company in a petition under *section 241 of the Companies Act, 2013* as long as the elimination of an individual as a Chairman of a Company is oppressive, mismanaged, or carried out in a prejudicial manner damaging the interests of the company, its members, or the public at large."
- Members of a corporation have the right to apply to the Tribunal for a remedy under *section 241,* if the corporation's affairs have been or are being mismanaged and conducted in an oppressive manner, affecting the firm, its members, or the general public.

[3] Section 241 of the Companies Act, 2013.
[4] Section 242 of the Companies Act, 2013.
[5] Section 244 of the Companies Act, 2013.

- In the second issue, the Supreme Court ruled that unless it is proven to be "oppressive or detrimental," a person's ouster as Chairman of the Company is not an issue of concern under *section 241.*
- According to the court, NCLAT does not have explicit power to restore employees under *sections 241 and 242 of the 2013 Companies Act*.
- On December 18, 2019, the Supreme Court reversed the NCLAT's order to reinstate Cyrus Mistry as executive chairman of Tata Sons.
- According to *section 242***,** if the Tribunal determines that the company's affairs have been or are being mismanaged and are being conducted in an oppressive manner that harms the interests of the company, its members, or the general public, or that the winding up of the company would unfairly disadvantage such member or members, the Tribunal may, attempting to put an end to the matters complained about.
- Furthermore, the Supreme Court ruled in the third Issue that NCLAT invalidated ***Article 75 of the Constitution*** based solely on the risk of abuse. Only for conduct that is ongoing or has occurred in the past and present, *section 241* offers a remedy. The NCLAT has violated the law by extending *section 241* to cover the possibility of future bad behavior.
- The Supreme Court made its ruling in the ***Tata-Cyrus Mistry case*** public on March 26, 2021.
- The Tata Group won the case, according to the ruling.
- The bench rejected all of Cyrus Mistry's charges of tyranny and poor management against Tata Sons Limited. ***Supreme Court justices V. Ramasubramanian, A. S. Bopanna, and Chief Justice S. A. Bobde*** presided over the decision-making process.
- On December 18, 2019, the ***National Company Law Appellate Tribunal (NCLAT)*** decided to reinstate Cyrus Mistry as executive chairman of Tata Sons.
- However, the Supreme Court has suspended that judgment. The Supreme Court enumerated the number of appeals filed by the Tata Group, referring to them as the appellants and the SP Group as the respondents.
- The Supreme Court stated that the Company Law Tribunal is unable to interfere with the ousting of an individual as Chairman of a Company in a petition under *section 241 of the Companies Act, 2013;* unless the removal is oppressive, poorly managed, or done in a way that harms the interests of the company, its members, or the general public.

- The Court ruled that unless it is proven to be "oppressive or damaging," removing a person from their position as chairman of the company is not a subject matter under *section 241 of the Companies Act.*
- The Court ruled that the *Companies Act of 2013's sections 241 and 242* don't expressly grant reinstatement authority.
- Consequently, on December 18, 2019, The Supreme Court ruled against the ***National Company Law Appellate Tribunal's (NCLAT)*** judgment to reinstate Cyrus Mistry as executive chairman of Tata Sons.

Critical Analysis of the Case:

As a minority shareholder in Tata Sons, Cyrus Investments Pvt. Ltd. contested the plan of arrangement and sought to prevent its execution, claiming that doing so would harm minority shareholders' rights and interests. The scheme of the arrangement, according to Cyrus Investments Pvt. Ltd., was unjust and oppressive to minority shareholders since it allegedly favored Tata Sons and Tata Consultancy Services and failed to adequately protect their rights and interests.

Tata Sons and Tata Consultancy Services responded by claiming that the plan of adjustment was adequate and just and that the Companies Act, 2013, did not require the consent of minority shareholders. Prior to the NCLT, the SP Group's complainant companies had accused Ratan Tata of running the company like his own, using other directors as his puppets, violating the company's articles of association, illegally removing Cyrus from his position as executive chairman, engaging in shady business dealings, and undertaking disastrous projects. In response to the allegations, Tata Sons Ltd. stated that Cyrus had been stripped of the board of directors' trust. The Board had previously agreed to retain Cyrus as a director following his resignation as Executive Chairman, but his subsequent behavior forced the Board to do otherwise.

Moreover, Cyrus never voiced any objections to poor management or oppression prior to his resignation as Executive Chairman. Cyrus asked Ratan Tata to chair the board, and he was selected for the position. Additionally, Tata Sons asserted that the petition's discussion of failed projects had omitted the business's extraordinary success, that the board's lapses in commercial judgment

could not be interpreted as mismanagement or oppression, that Cyrus was a director during the moment that decisions with regard to failed projects were made, that the petition's focus on collapsed projects had left out the company's phenomenal success, and that once the Articles of Association were ratified, his father was a board member.

As evidence that the majority directors had behaved unfavorably towards the minority directors and the company, NCLAT cited Tata Sons Ltd.'s hasty conversion from a public company to a private company in 2017 without following the process outlined in *Section 14 of the Companies Act, 2013*[6]. The NCLAT ruled that Cyrus' termination as executive chairman and from the board of directors was unconstitutional because it thought the company's practices were oppressive and harmful to the appellants. Additionally, NCLAT mandated that before choosing another Executive Chairman or Directors, Tata Group, the largest investor, consult with SP Group, the minority shareholder. When this issue later came knocking at the Supreme Court's door, it cited the decision of ***Scottish Cooperative Wholesale Society v. Meyer***[7]**,** in which the House of Lords had defined the term "oppressive" as "burdensome, harsh, and wrong." The Court also referred to *sections 241 to 246 of the 2013 Companies Act***,** which deals with protecting against retaliation and poor management. Despite being fired from his position as executive director initially, the court ruled that Cyrus was rightfully fired from the board of directors as a result of his later disclosure of sensitive corporate information to the Income Tax Department and media leaks. The court noted that the just and equitable provision for winding up under *sections 241 and 242* of the Act cannot be triggered by the simple termination of directorship, citing the case of ***Hanuman Prasad Bagri v. Bagri Cereals Pvt. Ltd.***[8]

The Court further noted that it is ironic on the complainant's side to claim that the Board is oppressive to the desires of minority shareholders after being named Ratan Tata's successor in 2012 while holding only 18.37% of the company's stock. The Court further noted that being removed from a directorship could not be interpreted as oppression of or undue discrimination

[6] Section 14 of the Companies Act, 2013.
[7] Scottish Co-operative Wholesale Society Ltd v Meyer: HL 1959.
[8] (2001) 4 SCC 420.

towards minority shareholders. The Court additionally stated that unless the elimination was oppressive or unfavorable, NCLAT cannot give remedies under Section 242.

Conclusion:

To conclude, the Tata v. Mistry case gave us a more comprehensive understanding of sections 241, 242, and 244 of the 2013 Companies Act. The case made it clear that the tribunal cannot participate in a petition brought under Section 241 of the 2013 Companies Act unless the removal of a person from their position as Chairman of a Company is "oppressive or damaging in nature." Contrarily, in this instance, Cyrus Mistry was fired from his position as executive chairman of Tata Sons Limited on October 24, 2016, not because Ratan Tata was worried that Cyrus Mistry would put him through hardship, but rather because the majority shareholders and board of directors of the company had lost faith in him as chairman.

The Supreme Court retracted the NCLAT's decision and ruled in favor of the Respondents on all counts. This decision addressed numerous business law issues. The Supreme Court covered minority shareholder repression in great detail, citing both English law and Indian corporate law as the origins of the concepts. The Court determined that Cyrus Mistry's dismissal from the Board was appropriate in light of his actions in breaching his fiduciary duty to the corporation and found no evidence of bias or oppression in the circumstances surrounding his dismissal. In contrast to minority shareholders like SP Group, only tiny shareholders of publicly traded companies have the right to proportionate participation under the Business Act of 2013. In addition, the court determined that SP Group lacked a contractual right to proportionate representation due to the Articles of Association. Despite Cyrus Mistry's relatively weak legal case and a more compelling cause for compassion against the Tata Group, minority shareholders must now ensure that they are contractually granted the right to adequate representation, as such rights do not exist under the law. Since Cyrus Mistry's lawsuit was frivolous and intended to harm the TATA Corporation's reputation, the Supreme Court's ruling can be considered a national precedent.

SWISS RIBBONS PVT. LTD. VS. UNION OF INDIA (2019)

Arpita Singh*

Citation: **AIR 2019 SC 739; (2019) 4 SCC 17; SLP C 28623/2018; W.P. C 37/2019**

Bench: **Hon'ble Justice R.F Nariman, Hon'ble Justice Navin Sinha**

Title: **Swiss Ribbons Pvt Ltd. & Anr. .... Petitioners**

Versus

Union of India & Ors. .... Respondents

Jurisdiction: **Supreme Court of India, Civil original Appellate Jurisdiction**

Laws: **Article 14 of the Constitution of India**

Sections 7, 12A, 29A, and 53 of the Insolvency and Bankruptcy Code, 2016

Section 30(4) of the IBC, 2016

Article 19(1) (g) of the Constitution of India

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Introduction:

The Insolvency and Bankruptcy Code, 2016 is a tool used to improve the relationship between creditors and debtors and to serve as a creditor recovery law. The code is also beneficial legislation that assists corporate debtors in regaining their financial footing. However, numerous writ petitions and Special Leave Petitions challenging the constitutional legality of the various provisions of the Insolvency and Bankruptcy Code (IBC), 2016 were filed before the Supreme Court of India. The primary objective of the legislation is to protect the corporate debtor from its own management and from liquidation in order to ensure the debtor's recovery and continued existence. Therefore, the corporate debtor's interests have been separated from those of the promoters and management.

In this case, Swiss Ribbons Private Limited and other companies filed a petition and argued that the Insolvency and Bankruptcy Code, 2016 is unconstitutional for the specified reasons. The petitioners asserted that ***Article 14 of the Indian Constitution*** had been violated because ***Sections 7, 12A, 29A, and 53 of the Insolvency and Bankruptcy Code*** failed the test of constitutionality. The verdict, which was delivered on January 25, 2019, addressed each of the petitioners' arguments and provided a comprehensive justification for the law, which is now acknowledged as its sole basis.

Facts of the Case:

1. In the present case, ten writ petitions and a Special Leave Petition challenging the constitutionality of the Insolvency and Bankruptcy Code, 2016 were filed with the Supreme Court of India. The petitioners asserted that the existing provisions of the code are unconstitutional for an array of reasons. The majority of petitions were filed as a result of the Insolvency and Bankruptcy Code's unfair, unlawful, and arbitrary treatment of operational creditors in comparison to financial creditors.
2. To address the issue of mounting non-performing assets (NPAs) and provide a comprehensive framework for the resolution of insolvency cases, the Indian government enacted the Insolvency and Bankruptcy Code (IBC).

3. Swiss Ribbons Pvt. Ltd, a provider of non-banking financial services, filed a petition challenging the constitutionality of certain provisions of the IBC based on the following grounds.

Constitutional Arguments:

1. ***Violation of Article 14:*** Swiss Ribbons argued that the IBC violated the principle of equality enshrined in *Article 14 of the Indian Constitution.* It contended that the IBC treated similarly situated creditors differently, leading to arbitrariness.
2. ***Right to Access Justice:*** The petitioner contended that the mandatory imposition of a moratorium under Section 14 of the IBC, which suspends legal proceedings against a defaulting debtor, violated its right to access justice.
3. ***Minimum Voting Threshold*:** Swiss Ribbons argued that the requirement of a minimum voting threshold of 75% for the approval of a resolution plan under ***Section 30(4) of the IBC*** was unreasonable and could result in unfair outcomes.
4. The respondents also argued that the Union of India, acting on behalf of the government, defended the constitutionality of the IBC. The respondent argued that the IBC was intended to address the issue of NPAs and promote the expeditious resolution of insolvency cases. It argued that the provisions of the IBC, including the voting threshold and moratorium, were crucial for ensuring an efficient and timely resolution process.
5. The Supreme Court, after considering the arguments presented by both parties, upheld the 2016 Insolvency and Bankruptcy Code's constitutionality. The Court determined that the IBC was a well-crafted legislation that sought to balance the interests of all parties involved in the insolvency resolution procedure.

Questions of Law:

1. Whether differentiation between financial creditors and operational creditors violative of *Article 14 of the Constitution of India*?
2. Whether ***Section 12A of the Insolvency and Bankruptcy Code, 2016*** constitutional?

3. Whether ***Section 29A of the Insolvency and Bankruptcy Code, 2016*** lawful since the retrospective application of *Section 29A* has harmed the vested rights of former promoters to participate in the recovery procedure of a corporate debtor?
4. Whether ***section 53 of the Insolvency and Bankruptcy Code, 2016*** constitutional?
5. Whether the order for the establishment of Circuit Benches (the tribunal was only being built in Delhi) aligned with the Madras Bar Association Ruling?

1. Whether differentiation between financial creditors and operational creditors violative of Article 14 of the Constitution of India?

- In the present case, learned Senior Advocate Shri Mukul Rohatgi argued on behalf of the petitioner that the distinction between financial creditors and operational creditors under the Insolvency and Bankruptcy Code, 2016 (IBC) *violates Article 14 of the Constitution of India*. As their foundational case, the petitioners ***cited EP Royappa v. State of Tamil Nadu***, in which the Court held that the principles of Articles 14 and 16 are equality and prohibition against discrimination.
- It is essential to note, however, that the Supreme Court upheld the constitutionality of the distinction between these categories in its ruling.
- ***Arbitrary Classification:*** The petitioner argued that the IBC's classification of creditors into financial creditors and operational creditors is arbitrary and devoid of any rationale. It was argued that the distinction lacks a rational connection to the IBC's purpose and results in unequal treatment of similarly situated creditors.
- ***Violation of Equal Protection:*** The petitioner claimed that the differentiation between financial creditors and operational creditors violates the principle of equal protection enshrined in *Article 14 of the Constitution*. It was argued that the provision confers greater rights and powers to financial creditors, such as representation in the Committee of Creditors (CoC) and voting rights, while operational creditors are treated differently and have limited participation in the insolvency resolution process.
- ***Discrimination against Operational Creditors:*** The petitioner contended that the distinction between financial creditors and operational creditors creates a discriminatory regime that favors financial creditors over operational creditors. It was argued that this differentiation

unfairly impacts operational creditors, who may have substantial claims against the debtor company, and diminishes their ability to recover their dues in comparison to financial creditors.

- However, the Supreme Court rejected these arguments and upheld the differentiation between financial creditors and operational creditors under the IBC, while relying upon ***Shayara Bano v. Union of India*,**[9] because such classification will not only be discriminatory but also manifestly arbitrary**.** And Court held that the classification is based on intelligible differentia and bears a rational nexus with the object sought to be achieved by the IBC, which is the resolution of insolvency and maximizing the value of assets. The Court recognized the inherent differences in the nature of claims between these two categories and held that the classification is a reasonable and justifiable means to address the diverse rights and interests of creditors in the insolvency resolution process.

2. *Whether section 12A of the Insolvency and Bankruptcy Code, 2016 constitutional?*

- In this case, the Shri raised arguments challenging the constitutional validity of *Section 12A of the Insolvency and Bankruptcy Code, 2016* and argued that *Section 12A of the Code* is contrary to the directions of the court in its order in ***Uttara Foods and Feeds Pvt. Ltd. v. Mona Pharmachem;***[10] and that instead of following the said order, *Section 12A* now derails the settlement process by requiring the approval of at least ninety per cent of the voting share of the committee of creditors. Unbridled and uncatalyzed power is given to the committee of creditors to reject legitimate settlements entered into between creditors and the corporate debtors. Similarly, here are some of the arguments made by the petitioner in regard to this issue:
- ***Violation of Article 14 (Right to Equality):*** The petitioner argued that *Section 12A* violates *Article 14 of the Indian Constitution*, which guarantees the right to equality. It was contended that the provision provides an arbitrary and discriminatory power to withdraw insolvency proceedings, as the decision is based on the approval of the committee of creditors (CoC) by a vote of not less than 90% of the voting share.

[9] Shayara Bano v. Union of India (2017) 9 SCC 1.

[10] Uttara Foods and Feeds Pvt. Ltd. V. Mona Pharmachem (CIVIL APPEAL NO. 18520 OF 2017.

- ***Undermining the IBC's objectives:*** The petitioner claimed that *Section 12A* undermines the objectives of the Insolvency and Bankruptcy Code, 2016. It was argued that the provision allows the withdrawal of insolvency proceedings without sufficient scrutiny, which could lead to the dilution of the insolvency resolution process and potential misuse by debtors to escape their liabilities.
- ***CoC's dominance over the decision-making process:*** The petitioner contended that Section 12A gives excessive power to the Committee of Creditors (CoC) to determine the withdrawal of insolvency proceedings. It was argued that the provision does not provide an adequate mechanism to protect the interests of all stakeholders and allows the CoC to disproportionately influence the decision.
- The Supreme Court, however, rejected these arguments and upheld *Section 12A's* constitutionality. The Court determined that the provision, together with the requirement of approval by at least 90% of the CoC's voting share, is a reasonable restriction that promotes the resolution process and balances the interests of all parties involved. The Court emphasized that the provision provides a valid mechanism for settlements and flexibility in the insolvency resolution process; while preserving the creditors' overall interests.

3. *Whether Section 29A of the Code is lawful since the retrospective application of Section 29A has harmed the vested rights of former promoters to participate in the recovery procedure of a corporate debtor?*

- In the case of ***Swiss Ribbons Pvt. Ltd. Vs. Union of India***, the Shri Mukul Rohatgi, learned Senior Advocate, raised an argument challenging the retrospective application of *Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC)*. Section 29A imposes certain restrictions on the eligibility of persons to submit a resolution plan and participate in the insolvency resolution process. The petitioners contended that the retrospective application of Section 29A had harmed the vested rights of former promoters to participate in the recovery procedure of a corporate debtor. However, there are certain grounds on which arguments were made by the petitioners:
- ***Violation of Constitutional Rights*:** The petitioners argue that the retrospective application of *Section 29A* violates their constitutional rights, such as the ***right to equality (Article 14)*** and

the right to carry on business ***(Article 19(1)(g)) guaranteed by the Constitution of India***. They may contend that the retrospective application adversely affects their vested rights to participate in the insolvency resolution process as former promoters.

- ***Impairment of Contractual Rights:*** The petitioners could assert that the retrospective application of *Section 29A* impairs their contractual rights. They argue that they had legitimate expectations based on the legal framework in force at the time of the relevant transactions, and the retrospective application of *Section 29A* frustrates those expectations.
- ***Unfair Treatment of Former Promoters*****:** The petitioners claim that the retrospective application of *Section 29A* unfairly targets former promoters by restricting their eligibility to participate in the insolvency resolution process. They argue that such retrospective imposition of restrictions on former promoters undermines the principles of natural justice and fairness.
- The Supreme Court upheld the retrospective application of *Section 29A* while referring to the judgment of ***Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Ors*** [11] resolution applicants have no vested right to be considered as such in the resolution process. Therefore, the Supreme Court observed that a statute is not retrospectively applicable merely because it affects the existing rights. A resolution applicant who applies under *Section 29A(c)* has no vested right to apply to be considered as a resolution applicant, thereby holding that *Section 29A* is not retrospective in nature.
- The Court determined that *Section 29A* was a reasonable and valid provision aimed at preventing unscrupulous persons from reacquiring control of a corporate debtor by participating in the insolvency resolution process. The Court held that the retrospective application of *Section 29A* does not violate any constitutional rights or impair vested rights, as it serves the legitimate objective of protecting the interests of the corporate debtor and maximizing value for all stakeholders involved.

4. *Whether section 53 of the Insolvency and Bankruptcy Code, 2016 constitutional***?**

- On the behalf of the petitioners Shri Mukul Rohatgi, learned Senior Advocate raised arguments challenging the constitutionality of *Section 53 of the Insolvency and Bankruptcy Code, 2016*

[11] Arcelor Mittal India Private Limited vs. Satish Kumar Gupta and Ors., [AIR 2021 SC 454].

(IBC). Section 53 pertains to the distribution of assets during the liquidation process and establishes the order of priority for the payment of various debts and claims. It's important to note that the Supreme Court upheld the constitutionality of Section 53 in its judgment.

- ***Violation of Right to Equality:*** The petitioners argued that Section 53 of the IBC violates the right to *equality (Article 14)* enshrined in the Constitution of India. They contended that the provision creates an arbitrary classification of creditors based on the nature of their claims, thereby treating similarly situated creditors differently.
- ***Unreasonable Discrimination:*** The petitioners could assert that Section 53 unreasonably discriminates against certain classes of creditors by prioritizing the payment of certain debts over others. They argued that this differentiation results in unfair treatment and leads to the impairment of the rights of certain creditors.
- ***Unconstitutional Impairment of Contractual Rights:*** The petitioners claimed that *Section 53* impairs their contractual rights by disregarding the terms of their agreements and altering the established hierarchy of debt repayment. They argued that this retroactive impact on existing contracts violates constitutional protections.
- However, the Supreme Court upheld the constitutionality of *Section 53*. The Court held that the provision's classification of creditors and the order of priority for the distribution of assets is based on intelligible differentia and has a rational nexus with the objective of the IBC. The Court emphasized that the classification is reasonable and necessary to ensure an orderly and fair liquidation process, and it does not violate the right to equality or other constitutional rights. The judgment recognized the need to balance the interests of different stakeholders and the overarching objective of maximizing the value of assets in the liquidation process.

5. *Whether the order for the establishment of Circuit Benches (the tribunal was only being built in Delhi) aligned with the Madras Bar Association Ruling?*

- In the present case, Shri Mukul Rohatgi, learned Senior Advocate, successfully argued that the loan seat of NCLAT as an appellate court at New Delhi which goes contrary to the decision of the Supreme Court in the case of ***Madras Bar Association v Union of India*** [12] where the court

[12] Madras Bar Association v. Union of India [Writ Petition (Civil) No. 502 of 2021].

found it unreasonable to expect the parties who were unfairly treated have to travel in order to exercise their right to appeal, and the court ordered the Centre to establish a bench in the jurisdiction of each High Court or at the very least a Circuit bench in each state in order to effectively provide relief to the Distressed within six months of the Order so passed.

- The Supreme Court of India did make observations and directions regarding the establishment of Circuit Benches for the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT). The Court noted that initially, the NCLT was planned to be established only in Delhi, which posed practical difficulties for parties from different parts of the country.
- The Court, in its judgment, recognized the importance of access to justice and the need for regional benches of NCLT and NCLAT. It directed the Central Government to consider establishing Circuit Benches of NCLT and NCLAT in different regions to ensure wider access and convenience for litigants. This directive aimed to address the concern of parties having to travel to Delhi for tribunal proceedings.

Judgment of Supreme Court:

- The Supreme Court upheld the constitutionality of the IBC and its provisions in its decision.
- The Court acknowledged that the IBC was enacted to address the issue of non-performing assets and to expedite and improve the resolution of insolvency proceedings. It was noted that the IBC provided a comprehensive mechanism for dealing with the insolvency process, striking a balance between the interests of creditors and debtors, among other stakeholders.
- The Court also emphasized that the IBC aimed to facilitate the maximization of the value of stressed assets and the interests of stakeholders by promoting the timely resolution of stressed assets.
- It was mentioned that the IBC established specialized tribunals, namely the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT), to adjudicate insolvency cases and ensure the effective operation of the resolution process. In addition, the Court determined that the IBC's provisions did not violate the fundamental rights of individuals or the principles of natural justice. In the interest of the public and the economy as a whole, it stated that the IBC was a reasonable restriction on the rights of debtors.

- Overall, the Supreme Court's ruling in the Swiss Ribbons case upheld the constitutionality of the IBC and its provisions, validating the law's significance in addressing insolvency issues and promoting the resolution of stressed assets in India.

Critical Analysis of the Case:

Numerous critical analyses done by the judges in this case revolved around several key aspects of the Insolvency and Bankruptcy Code. *Here are some of the key points addressed in their analysis:*

Firstly, the judges addressed the constitutionality of certain specific provisions of the IBC that were challenged, such as the imposition of a minimum threshold for initiating the insolvency resolution process, the classification of financial creditors and operational creditors, and the role of the Insolvency Professional. After analyzing these provisions, the judges concluded that they were reasonable and did not violate the constitutional rights of the parties involved.

The judges examined whether the provisions of the IBC were arbitrary and violative of *Article 14 (Right to Equality) of the Indian Constitution.* They found that the IBC provided a comprehensive framework for the resolution of insolvency, with clear eligibility criteria and processes. The judges emphasized that the IBC was a well-balanced legislation that did not give rise to any arbitrariness or discrimination.

The judges analyzed whether the IBC adequately protected the interests of the corporate debtor and prevented its liquidation as the first resort. They observed that the IBC focused on resolution rather than liquidation, aiming to revive the corporate debtor and preserve its value. The judges highlighted that the IBC provided for a committee of creditors to make informed decisions on the resolution process, ensuring that the interests of all stakeholders, including the corporate debtor, were taken into consideration.

The judges considered whether the restrictions imposed by the IBC on the fundamental rights of the corporate debtor were reasonable and proportionate. They concluded that the restrictions were justified as they aimed to achieve the larger public interest of promoting entrepreneurship, ensuring prompt resolution of insolvency, and maximizing the value of the assets of the corporate debtor. The judges examined the role of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) in the resolution process under the IBC. They emphasized the importance of maintaining judicial independence and ensuring that the tribunals functioned effectively and efficiently. The judges also underlined the significance of a robust appellate mechanism to address any grievances arising from the decisions of the tribunals.

Nonetheless, the judges' analysis centered primarily on the constitutionality, reasonableness, and efficacy of the Insolvency and Bankruptcy Code in achieving its objectives. Their decision upheld the IBC's legality and established it as a crucial law for resolving insolvency issues in India.

Conclusion:

In conclusion, the Supreme Court upheld the constitutionality of the Insolvency and Bankruptcy Code and dismissed the petitions challenging its validity. The Court recognized the IBC as a well-considered legislation aimed at addressing the issue of corporate insolvency and promoting the resolution of distressed companies in a time-bound manner. The Court acknowledged the importance of balancing the rights of creditors and the interests of debtors while resolving insolvency cases. It emphasized the need for a robust and efficient insolvency resolution process to protect the interests of all stakeholders, including employees, creditors, and the economy at large. The Supreme Court's judgment in the Swiss Ribbons case reaffirmed the significance of the IBC in addressing the challenges of corporate insolvency in India. The decision provided clarity and upheld the validity of the IBC, ensuring a structured framework for insolvency resolution and fostering a healthy business environment.

THE REGISTRAR OF COMPANIES, WEST BENGAL V. KARAN KISHORE SAMTANI (2020)

Samriddhi Mishra*

Citation: **AIR 2020 NCLAT AT 13/2019**

Bench: **Jarat Kumar Jain (J), Balvinder Singh (J), Ashok Kumar Mishra (T)**

Title: **The Registrar of Companies, West Bengal … Appellant**

Versus

Karan Kishore Samtani … Respondent

Jurisdiction: **NCLAT, Delhi**

Laws: **Sec. 165 in The Companies Act, 2016**

Sec. 165 (1) in The Companies Act, 2016

Sec. 165 (3) in The Companies Act, 2016

Sec. 441 (1) in The Companies Act, 2016

Section 441 in The Companies Act, 2016

Introduction:

This case deals with violating the provisions of a maximum number of Directorships that can be held by a Director under the Companies Act, 2013. The respondent was the director, for more than 20 companies till 31.03.2015. The respondent tendered his resignation as the director of the Company M/s Fabius Properties Pvt. Ltd. The same was accepted by the Board of Directors of the Company on 29.12.2015. However, the intimation of his resignation was sent to the Registrar of Companies vide Form DIR-12 on 10.02.2016. The respondent has violated the provisions under

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Section 165(1) read with Section 165(3) of the Companies Act, 2013 which is punishable under Section 165(6) of the Act, The NCLT, Kolkata bench has imposed compounding fees of Rs. 50,000/- which is less than minimum fees prescribed under Section 165(6) of the Companies Act, 2013. Being aggrieved with this order RoC has filed this Appeal.

Facts of the Case:

1. The Respondent was the Director for over twenty different businesses till 31.03.2015.
2. The Respondent offered his resignation as Director of the Company M/s Fabius Properties Pvt. Ltd., which was accepted by the Companies' Board of Directors on December 29, 2015.
3. However, his resignation was communicated to the Registrar of Companies via Form DIR-12 on February 10, 2016.
4. The Registrar of Companies in West Bengal issued him a show cause notice on January 27, 2016, requesting an explanation as to why he should not be prosecuted under ***Section 165(1) read with Section 165(3) of the Act,*** as he was the Director of more than 20 companies at the same time.
5. The Respondent entered a guilty plea and filed a request with the Registrar for the charge to be amended pursuant to ***Section 441(1) of the Act.*** The representation and Rock's report were sent to the Tribunal.
6. Karan Kishore Samati pled guilty to violating *Sections 165(1) and 165(3)* and admitted that he was the director of more than 20 companies simultaneously. He pleaded guilty and chose to escalate the crime.
7. Compounding is a procedure in which the individual or organization committing default submits an application to the compounding authority acknowledging that it has committed an infraction and requesting an exemption. In exchange for not being prosecuted, the entity agrees to a compromise involving a fine or other means.
8. The statute's *section 441* contains the laws pertaining to the compounding of crimes. The Act's *Section 441* permits the addition of the following offences. The Act specifies that either the Regional Director or the National Company Law Tribunal shall serve as the compounding authority.

9. The Regional Director shall compound an offence for which the maximum penalties imposed do not exceed INR 25, 00,000. The National Company Law Tribunal will compound all offences for which the maximum fine that can be imposed exceeds INR 25, 00,000.
10. The National Company Law Tribunal, Kolkata Bench, granted the compounding application pursuant to *Section 441(1) of the Act*, subject to the payment of Rs. 50,000/ in compounding costs, after hearing the parties.
11. The appellant wants the respondent to pay the prescribed minimum fees for violation of *Sections 165(1) and 165(3) of the 2013 Companies Act*, despite the fact that the tribunal fixed a lesser amount than the minimum fees prescribed.
12. According to the company prosecutor, the minimum fine that should have been imposed was Rs. 13, 60,000. The tribunal imposed a fine of Rs. 50,000.
13. As per the Company Prosecutor, the compounding fees under *Section 441 (1)* of the Act should be the minimum amount prescribed for the offence, as held by this Tribunal in the case of ***Company Appeal (AT) Registrar of Companies cum Official Liquidator, Rajasthan, Jaipur vs. Gyan Chandra Agarwal***, and the respondent argued that Tribunal can exercise discretion while compounding the fees and there is no requirement that the tribunal fix the compounding fees.

Question of Law:

Whether the Tribunal may impose compounding fees less than the minimum prescribed for the offence under ***Section 165 (1) read with Section 165(6).*** The issue is the compounding fees owed and the compounding fees established by the court.

Contentions made by Parties:

Appellant

1. The Company Prosecutor argued that the compounding fees prescribed by *Section 441 (1) of the Act* should be the minimum amount for the offence.
2. The Respondent violated the Act's restrictions outlined in Sections 165(1) and 165(3).
3. In accordance with *subsection (6) of section 165 of the Act*, he is liable for the minimum fine for the infraction for a period of 272 days. 5000 rupees per day, a total of 13,600,000 rupees.

4. Unlike the Ld. The court assessed compounding fees of Rs. 50,000, which is less than the minimum allowed. The appellant desires that the respondent pay the minimum fine.

Respondent

1. Respondent's resignation was received by the Company on October 14, 2014, which is within one year of when Company Appeal (AT) No. 13 of 2019 went into effect on January 1, 2014; therefore, Respondent has not violated Act requirements. In addition, Learned Counsel for the Respondents argues that Section 165 (1) of the Act states that no individual may serve as a Director of more than 20 companies after the Act's enactment; and that no individual may serve as a Director of more than 10 public companies. Since the inception of the Act, the Appellant has not held the position of Director in any corporation. The Respondent has therefore not violated *Section 165(1) of the Act.*
2. In the context of compounding, the Tribunal's authority under *Section 441(1) of the Act* is not limited to the imposition of the minimum fine for the violation of the law. After analyzing the case facts, the Tribunal has exercised its judicial discretion; therefore, no intervention is required in the Appeal.
3. Learned Counsel for the Respondent argues that even if a minimum penalty is prescribed, the Competent Authority will be justified in refusing to impose a minimum penalty when there is a technical or venial breach of the provisions of the Act, or when the breach results from a good-faith belief that the offender is not obligated to act in accordance with the statute.

<u>Legal Provisions of Law:</u>

- ***Section 165(1)***

"(1) No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time:

Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

[Explanation I]. -- For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included."[13]

- ***Section 165(3)***

"(3) Any person holding office as director in companies more than the limits as specified in sub-section (1), immediately before the commencement of this Act shall, within a period of one year from such commencement, --

(a) choose not more than the specified limit of those companies, as companies in which he wishes to continue to hold the office of director;

(b) resign his office as director in the other remaining companies; and

(c) intimate the choice made by him under clause (a), to each of the companies in which he was holding the office of director before such commencement and to the Registrar having jurisdiction in respect of each such company."[14]

- ***Section 165(6)***

"(6) If a person accepts an appointment as a director in violation of this section, he shall be liable to a penalty of two thousand rupees for each day after the first during which such violation continues, subject to a maximum of two lakh rupees."[15][16]

- ***Section 441(1)***

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof) 1[not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine], may, either before or after the institution of any prosecution, be compounded by--

(a) the Tribunal; or

[13] The Companies Act, 2013, § 165(1), No. 18, Acts of Parliament, 2013 (India).

[14] The Companies Act, 2013, § 165(3), No. 18, Acts of Parliament, 2013 (India).

[15] The Companies Act, 2013, § 165(6), No. 18, Acts of Parliament, 2013 (India).

[16] This provision was amended in 2020 by Act 29 of 2020, s. 33, for sub-section (6) it was earlier the value as is discussed in the case. This is an amended provision.

(b) where the maximum amount of fine which may be imposed for such offence 2[does not exceed twenty-five lakh rupees], by the Regional Director or any officer authorized by the Central Government, on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorized by the Central Government, as the case may be, may specify:
Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:
Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section (2) of section 403 shall be taken into account:
Provided also that any offence covered under this sub-section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act."[17]

Judgment of NCLAT:

- The Court sided with the appellant and rejected the respondent's contention that they are not required to pay the minimum fees specified by the Companies Act. The appellate tribunal ruled that when the legislature, exercising its legislative authority, prescribes a minimum fine of 5,000 rupees per day and a maximum fine of 25,000 rupees per day, the Tribunal lacks the authority to reduce the fine to an amount less than the minimum fine prescribed for the offence.
- The Tribunal failed to note the minimum fine provided under Sub-Section 6 of Section 165 of the Act, which was effective at the relevant period, i.e., before the modification, according to the challenged judgment.
- When assessing the compounding costs payable by the respondent, the tribunal was required to consider the minimum fees for violations of relevant provisions.
- The tribunal's failure was due to an incorrect interpretation of the power granted to it in the instance of compounding the offences. As a result of the mistake evident in the challenged

[17]The Companies Act, 2013, § 441(1), No. 18, Acts of Parliament, 2013 (India).

judgment given by the Tribunal, the appellant tribunal determined that the order could not be upheld. The order was voidable and overturned by the appellate tribunal.

- The appellant tribunal ruled that the terms of *Section 165(1) of the Act*, which is punishable under *Section 165(6).* Taking into account the facts and circumstances of the case, the tribunal imposed a minimum fine of five thousand rupees each day for 272 days.
- The tribunal calculated the penalty to be Rs. 13,60,000/- after adjustment of already paid Rs. 50,000/- and the respondent was obligated to pay Rs. 13,10,000/-. The Respondent was ordered to pay the sum within 60 days before the National Company Law Tribunal in Kolkata.

Rationale:

- The appellant tribunal considered the arguments that were presented by the respondent. The court noted that the respondent was violating the provision for a period of 272 days from 01.04.2015 to 28.12.2015 which is punishable under *Section 165(6) of the Act.*
- The tribunal took note of the case ***M/s Hindustan Steel Ltd. vs. State of Orissa***[18] relied upon by the counsel of the respondent as per which the "penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation."
- The tribunal explained in the instant case the respondent was aware of the provision and still chose to remain as the director of more than twenty companies for a period of 272 days. The court noted that the conduct of the respondent does not suggest that the position was held by him in some bona fide belief.

  "Respondent was required to resign from the Directorship of the Companies more than the limits specified in sub-Section 1 of Section 165 of the Act, within the specified period. The Respondent has resigned from the Directorship of M/s Fabius Properties Pvt. Ltd. and resignation was accepted by the Company on 29.12.2015 and there is nothing on record to presume that the Respondent violated the provisions on a Bonafide belief. The conduct of Respondent shows that he acted in conscious disregard of its obligation."[19]

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[18] 1969 (2) SCC 627.

[19] Registrar Of Companies, West Bengal v. Karan Kishore Samtani (2020) 06 NCLAT CK 0007.

- Therefore, the conduct of the respondent warranted a penalty. The tribunal cited a similar case in which the tribunal imposed the minimum penalty based on the precedent again imposed the minimum penalty on the respondent.
- The tribunal held that the tribunals do not have the competence to go against the provision made by legislatures and prescribe a penalty that is less than the penalty provision for which is made by the legislature.

Critical Analysis of the Case:

Compounding offences is a power that is available to the National Company Law Tribunal. In compounding offences, the offender pays some fees in exchange for not getting prosecuted for the offence. The NCLT has the power to be the compounding authority for offences that are punished with fine only and fine or imprisonment. The particular instant case is punishable with a fine only where *section 165(6) of the Companies Act 2013* prescribes a maximum penalty of Rs 25000 and a minimum penalty of Rs 5000 for every single day a person is the director of the company after one year of incorporation of this rule. The NCLT, Kolkata bench had the power to compound this offence and it compounded this offence in exchange for payment of Rs 50,000, this amount was less than the minimum prescribed amount as a penalty for violation of this provision.

As per the judgment of NCLAT in Registrar of Companies cum Official Liquidator, ***Rajasthan, Jaipur vs. Gyan Chandra Agarwal*** in similar circumstances, the court imposed the minimum penalty for the contravention of the same provision. Reiterating the same precedent, the appellant tribunal in this case charged a minimum penalty from the respondent. The NCLAT in ***M/s Viavi Solutions India Pvt. Ltd. & Ors. Vs. Registrar of Companies***, NCT Delhi and Haryana [20] held that "the Tribunal is required to notice the relevant factors while compounding any offence, such as:

(i) The gravity of offence;

(ii) The act is intentional or unintentional;

[20] M/s Viavi Solutions India Pvt. Ltd. & Ors. Vs. Registrar of Companies, NCT Delhi and Haryana (2017) ibclaw.in 108 NCLAT.

(iii) The maximum punishment prescribed for such offence, such as fine or imprisonment or both fine and imprisonment.

(iv) The report of the Registrar of Companies.

(v) The period of default.

(vi) Whether petition for compounding is Suo-moto before or after notice from the Registrar of Companies or after imposition of the punishment or during the pendency of a proceeding.

(vii) The defaulter has made good of the default.

(viii) Financial condition of the company and other defaulters.

(ix) Offence is continuous or one time.

(x) Similar offense earlier committed or not.

(xi) The act of defaulters is prejudicial to the interest of the member(s) or the company of public interest or not.

(xii) Share value of the company, etc."

The lower tribunal in this case prescribed a lesser penalty because it believed the offence was unintentionally committed. However, as the appellant tribunal noted, there is no evidence that the offender held the position of director for more than twenty private companies in good faith after the rule was incorporated into the Companies Act 2013 after one year. The offender himself admitted guilt and made an argument for aggravating the crime. As there is no indication that the offender was a repeat offender or was committing a serious offence, he should receive the minimum punishment. However, nothing in the Act suggests that the prescribed penalty should be less than the minimum amount prescribed by law. As noted by the NCLAT, the NCLT lacked the authority to impose a lesser penalty than that prescribed by the statute in the case of compounding. Compounding is an efficient method of saving the court's time and allowing the offender to avoid prosecution by admitting guilt. However, compounding cannot become a means to avoid even the most minimal penalties for an offence. The fact that the minimum penalty was prescribed was sufficient leniency on the part of the tribunal and a recognition of the fact that the tribunal recognizes the respondent's prior record and admission of his guilt, but he should not be given a punishment lower than the minimum punishment for the offence in a situation where the only punishment prescribed is fine.

This is a favorable ruling that makes compounding a viable remedy to save time for the court and permit the offender to avoid prosecution. It continues to develop a hassle-free mechanism that serves both parties' interests and prevents it from undermining the legislative mandate. If an offender chooses to compound the offence and submits a representation for compounding the offence in accordance with *Section 441(2) of the Companies Act of 2013*, the offender is responsible for prescribing the fees based on the circumstances of the case and taking the listed factors into account. However, the fees cannot be less than the minimum penalty prescribed for the violation of the provision. This is a rational and precedent-setting decision that respects the separation of powers.

Conclusion:

To summarize what occurred in this case: The West Bengal Registrar of Companies appealed the order of the National Company Law Tribunal, Kolkata Bench. The case concerned the penalties the respondent must pay for *violating sections 165(1) and 165(3)*. Until March 31, 2015, the respondent was a director of more than twenty private companies simultaneously. He resigned from one of the Fabius Properties Private Ltd. companies. The board of directors accepted the resignation, and notification was sent on February 10, 2016. As a director of more than twenty private companies, the Registrar of Companies issued him a notice to show cause as to why he should not be prosecuted for violation of Sections 165(1) and 165(3).

The respondent acknowledged his guilt and submitted a request to register to remedy the offence in accordance with section 441(1) of the Companies Act 2013. His proposal was forwarded to the National Company Law Tribunal, which compounded the offence and ordered the respondent to pay Rs. 50,000/- in fines. The appellant filed an appeal against the order requesting the calculated minimum fine for violation of the offence, which was Rs. 13,600,000. The court granted the appeal and reversed the order of the Kolkata tribunal, noting that it was an error on the part of the National Company Law Tribunal, Kolkata bench, to compound the offence by requiring payment of a sum less than the statutory minimum for violation of said sections. The tribunal lacked the authority to undermine the statutory mandate to impose the minimum sanction prescribed by the 2013

Companies Act. In this case, the appellant court reversed the lower court's ruling and ordered the defendant to pay the minimum penalty for violation of the statute. The court clarified that when exercising the power to compound an offence, the tribunal cannot impose a compounding fee that is less than the minimum statutory penalty for the violation of which the offender is guilty.

M.C. MEHTA AND ANR VS. UNION OF INDIA & ORS (1987)

Sanstuti Mishra*

Citation: **1987 AIR 1086, 1987 SCR (1) 819, 1987 SCC (1) 395**

Bench: **Hon'ble Chief Justice Bhagwati P.N., Hon'ble Justice Misra Rangnath Oza, Hon'ble Justice D.P. Madon, Hon'ble Justice M.M, Hon'ble Justice Singh K.N**

Title: **M.C. Mehta and Anr.** **… Petitioner**

Versus

Union of India and Ors. **… Respondent**

Jurisdiction: **Supreme Court of India**

Laws:
Article 32 of the Constitution of India
Article 12, 21 & 127 of the Constitution
Article 252(1) of the Indian Constitution
Rylands v. Fletcher (1868)
Section 133(1) of the Code of Criminal Procedure, 1973
The Water (Prevention and Control of Pollution) Act, 1974
Section 24 Uttar Pradesh Act, 1975
Air Act (Prevention and Control of Pollution) of 1981
Environment (Protection) Act, 1986
Articles 48A and 51A (g) of the Guiding Principles of State Policy

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Introduction:

The privately held Shriram Food and Fertilizers Ltd. fertilizer factory was situated in Kirti Nagar, a densely populated district of Delhi with a population of about 200,000. Due to the factory's chemical operations, it released dangerous compounds that annoyed the population. On December 4 and 6, 1985, public interest lawyer MC Mehta submitted a writ petition to the Supreme Court under Articles 21 and 32, requesting the closure and transfer of the factory's Shriram Caustic Chlorine and Sulphuric Acid Plant. During the pending lawsuit, the Oleum Gas Leak incident occurred at one of the factory's plants and caused severe harm to people who inhaled the gas. The leakage also took the life of one of the lawyers who practiced in the Tis Hazari Court.

Background of the Case:

1. The petitioner-in-person MC Mehta sought a directive to close several industrial units of Shriram Foods & Fertilizers Industries (abbreviated as Shriram) that threatened the lives of the people in a dense area of Delhi. He filed the first Civil Writ Petition 12739 of 1985 under ***Article 32 of the Constitution of India*** to do so.
2. Oleum gas leaked from one of Shriram's industrial operations while the aforementioned petition was still pending, and the Delhi Legal Aid and Advice Board and the Delhi Bar Association both filed compensation claims.
3. Shriram filed a second Civil Writ Petition 26 of 1986 challenging the legality of many orders requesting a halt to their production.
4. Shriram, a division of Delhi Cloth Mills Ltd., had several units distributed within a single complex that covered around 76 acres of land in the vicinity of it. The company's products included bleaching powder, superphosphate, vanaspati, and soap.
5. It also produced other chemicals like caustic soda, chlorine, hydrochloric acid, Sulphuric acid, alum, and anhydrous sodium sulphate. One of its plants was the caustic chlorine facility that operated in 1949 and had 263 workers.
6. Following the Bhopal Gas Disaster in 1984, the Central Government hired a company called "Technical" to examine the caustic chlorine factory operated by Shriram. The company then presented a preliminary report outlining possible areas of concern and recommendations for improvement.

7. The potential consequences of a significant leak from Shriram's caustic chlorine factory were considered in Parliament in March 1985.
8. In response, the Manmohan Singh Committee was established as an expert panel to conduct additional inspections of the caustic chlorine factory.
9. After a thorough assessment, they provided a report with suggestions for different safety and pollution control measures.

Facts of the Case:

1. On December 4th, 1985, a significant oleum gas leak from one of Shriram's facilities occurred. Both the workers and members of the general public outside were physically impacted by the leaking. In addition, one attorney working in the Tis Hazari Court passed away from oleum gas inhalation.
2. Both the petitioner and the Delhi Bar Association acknowledged the occurrence. Two days later, on December 6, a small amount of oleum gas leaked from a pipe junction.
3. Following the second two oleum gas leak events, the Delhi government swiftly issued an order by ***Section 133(1) of the Code of Criminal Procedure, 1973*** directing Shriram to take the following actions:
    a) To stop utilizing dangerous gases and chemicals in the unit within two days; To shift the stated chemicals to a safer location within seven days and to avoid storing the chemicals in the same location where the catastrophe occurred again;
    b) Or, to appear in person on December 17th, 1985, before the District Magistrate's Court in Delhi to justify the inapplicability of the aforementioned order.
4. Both of the aforementioned writ petitions were heard by the Supreme Court the following day.
5. The Supreme Court remarked that it is not practicable to execute the actions promptly due to the "inadequacies" in the Supreme Court's cognizance of the District Magistrate's aforementioned ruling.

Questions of Law:

1. Whether the Supreme Court have the jurisdiction under *Article 32 of the Constitution* to order Shriram to restart its caustic chlorine facility?

2. What are the requirements that must be met to operate an industrial unit in a densely populated area?
3. Does the Supreme Court have the capacity to extend its domain and power under Article 32?
4. Can the victims claim compensation under the said Article?
5. Does Shriram belong to the category of "other authorities" as defined by ***Article 12 of the Constitution***?
6. Does the right to life under ***Article 21 of the Constitution*** applicable to a private business such as Shriram?
7. Whether a letter addressed to a specific judge can be filed as public interest litigation.
8. What is a hazardous industry's liability in the event of an accident?
9. Is the notion of strict responsibility introduced in ***Rylands v. Fletcher (1868)*** relevant in this case?
10. What should the amount of compensation be in the event of an accident caused by a hazardous industry?
11. How can a new legal principle be devised, if essential, where the current legal principles are not adequate?

Contentions made by Parties:

Respondent

1. Mr. Diwan, learned counsel appearing on behalf of Shri- Ram pleaded with the Court to permit Shriram to resume operations in the caustic chlorine plant because the management of Shriram had implemented all of the committees' recommendations and had taken all reasonable precautions and safety measures. Chlorine gas leakage was either impossible or highly unlikely given all the measures. Additionally, the Delhi Water Supply Undertaking will experience a shortage of downstream items required to filter water and the loss of nearly 4,000 jobs as a result of the factory's closure. Additionally, it was said that Shriram will open its other facilities after taking the appropriate maintenance and security precautions. Additionally, since the leaking happened after the petition was filed, the attorney made a "preliminary objection" before the court about the handling of constitutionally important matters. He said that the petitioner might add a request for compensation to the writ petition.

2. The Delhi Legal Aid and Advice Board and the Delhi Bar Association had previously submitted applications for compensation; therefore, the court acknowledged this fact but did not uphold his argument.

Petitioner

1. The petitioner-in-person assembled the "Agarwal Committee" of specialists and investigated Shriram's caustic chlorine factory using the freedom granted to him by the Supreme Court.
2. The Committee identified several flaws in the safety protocols and concluded that the plant's location in a highly populated region made it difficult to eliminate dangers.
3. Based on the findings, the petitioner-in-person told the court that the caustic chlorine plant shouldn't be allowed to restart because there would always be a significant risk to those who lived nearby, even if Shriram's management followed all of the committee's recommendations to the letter.

Legal Provisions of Law:

- The court looked at the pertinent sections of ***The Water (Prevention and Control of Pollution) Act, 1974***, which was passed in response to a resolution adopted by several States under ***Article 252(1) of the Indian Constitution***, which mandated parliamentary legislation be passed to regulate and prevent water pollution in these states.
- Later, in ***1975, Uttar Pradesh*** enacted the Act. The ***Act's Section 24*** forbids the discharge of harmful materials in any stream or well. No person shall knowingly cause or permit any poisonous, noxious, or polluting matter to enter (whether directly or indirectly) into any stream, well, sewer, or on land, as determined following such standards as may be laid down by the State Board; or no person shall knowingly cause or permit to enter into any stream any other matter which may tend, either directly or in combination with similar matters, to impede the proper flow of the water of the stream.
- As required by the *Water Act (Prevention and Control of Pollution) of 1974* and the ***Air Act (Prevention and Control of Pollution) of 1981***, the Central Pollution Control Board shall establish an inspector to verify the level of pollutants, establish an employee's safety board, industry to publicly disclose the effects and proper chlorine treatment, train and educate

employees in terms of plant safety through audio-visual facilities, and install loudspeakers in case of an emergency.

- The court determined that none of the exceptions to the rule outlined in *Rylands v. Fletcher* could apply to dangerous businesses, and as a result, it endorsed the idea of absolute or no-fault responsibility. The only possible exceptions were natural disasters or acts committed by third parties, but since this conduct was committed by a person who also committed mechanical faults, the concept of absolute culpability applied.

Aftermath:

- In this case, the court cited the ***Bandhula Mukti Morcha v. Union of India*** ruling in which the court determined that the scope of *Article 32 of the Constitution* includes both preventive and remedial measures when fundamental rights are being violated or are in danger of being violated. This is required to ensure that fundamental rights are upheld, especially when it comes to the rights of the impoverished, disadvantaged, and destitute sections of society.
- The English Court established the concept of Strict Liability in the case of *Ryland v. Fletcher in 1866*. According to this rule, "Any person who maintains any hazardous materials on his premises will be held liable if such materials escape the premises and cause any damage.". However, there are several exceptions to the norm, including acts of God, the plaintiff's fault, and a third party's fault.
- As a result of the belief that the involvement of hazardous and harmful materials in the industry has increased significantly due to advancement and technological development and has posed a greater threat, Indian courts were hesitant to accept the concept of strict liability. To avoid making it too simple for the industries to use exceptions and get away with it, the courts decided not to follow any foreign principles and came up with a new principle. Absolute liability is the term used to describe this concept.
- There are no exceptions to the rule of absolute liability, which is essentially identical to strict liability. This regulation states that whoever engages in an activity that is inherently risky or causes injury to anybody as a result of an accident that occurs while engaging in such activity is solely responsible.

- In this instance, the court chose to establish the theory of Absolute Liability rather than applying the strict liability rule from the 19th century. The court ruled that, notwithstanding the company's assertion that it has taken all necessary precautions and has acted without carelessness, the industry in this case is now entirely responsible for maintaining control. Victim deserves justice, and their fundamental rights should always be maintained.
- When asked whether or not to award compensation, the court just provided a straightforward guideline stating that the size and capability of the enterprises will determine the amount and measure of compensation. The amount of remuneration will increase with the size of the industry.
- However, in this instance, the court did not expressly require Shriram to pay damages since it was unclear whether it fell under the definition of a state as stated in ***Article 127 of the Constitution.*** How much of the industry can be subject to the rules of Article 21 will depend on whether it is a part of the State or not.
- The petitioner argued that even though Shriram Industries does not directly work under the shadow of the state and initially appears to be a private corporation, it operates independently under the government's self-announced policy. This was one of the crucial questions that the court was discussing during the proceedings in this case. However, it was argued that because the state controls how the industry operates and how its activities affect the general public and environment, it falls under the definition of a state under *Article 21 of the Constitution*.
- However, it was countered that such regulations, which are set up to serve as guides, simply work as a form of police control over the businesses and do not necessarily erode their independence. A private firm shouldn't become a public one as a result of such restrictions. Finally, it was confirmed that Shriram was merely operating in the government's shadow and had never truly assimilated into the state.
- The court reasoned that broadening the scope of *Article 12 of the Constitution* in this way would hinder new and emerging private enterprises, which are crucial to the growth of the country. The court did, however, rule that this matter is far more complex than it first appears and that much more thought must be given to it. As a result, the court in that instance did not issue an affirmed verdict in this respect.

Judgment of the Supreme Court:

- The Court held as under:

  "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken."
- The challenge of finding a balance between environmental preservation and economic advancement has frequently been put before the Indian judicial system. While the former is necessary for the nation's economic development, the latter raises questions about the health and safety of both the current and coming generations.
- The Oleum Gas leak case is a well-known illustration of the predicament above. The fact that Justice P.N. Bhagwati established the Principle of Absolute Liability, in this case, makes it a milestone decision in the history of environmental law disputes in India. Simply put, strict liability with no exclusions is known as absolute liability. Any harm caused by a company's engaging in a risky or intrinsically dangerous activity must be made up by the offending enterprise. The idea is a reflection of the Polluter Pays principle. The judges came to the judgment that not every situation may be handled under the Strict Liability Principle established by the English *case Rylands v. Fletcher***.**
- Law, according to Justice Bhagwati, is a social process. It seems clear that the Oleum gas leak was connected to a total of three instances. The third determined the writ's jurisdiction, the idea of absolute liability, and compensation whereas the first two dealt with matters relating to the industry's operation. This decision served as a model for ***the 1986 Environment (Protection) Act.*** The Court ordered the governments to ensure that settlements do not grow in areas with hazardous businesses and that a green zone of 5 to 10 km is maintained. The verdict itself was quite forward-thinking and had far-reaching effects.

Critical Analysis of the Case:

The case's verdict was important for future environmental law cases because it led to many important opinions that are still praised today. By giving a broad meaning to Article 21's "right to life," the Supreme Court took a proactive approach to solving the case and made sure that no one's basic rights were broken. Due to the length of time, it took to hear the case, the court had to calm the fears that were raised after the verdict on the Bhopal Gas tragedy, which was given just a year ago, to restore the public's faith in the legal system. It was thought that a strong decision was important and needed to show the people that industries would be held fully accountable for what they do. That's where the decision was made.

The choice took into account how important development is and how accidents might happen as a result of it. The decision was made after taking into account the need for development as well as the chances of getting hurt and what those hurts would mean. Because of its usually good judgment, which took into account all important social, economic, and legal factors, the Supreme Court became a champion of the environment and public rights.

Conclusion:

In the last 20 years, India has not only passed laws to protect the environment, but it has also almost added a new basic right to the environment to the Constitution. At first view, it may look like the models and methods used in Indian common law are the same as those used in other common law systems. But there were a lot of small changes that changed how and what the law changed in India. Indian environment case law shows how each setting is different. Environment and growth are two sides of the same coin, and one cannot be given up for the other. On the other hand, both are important for making our future better. In this situation, it is up to the Supreme Court and High Courts to treat these cases with the utmost care. Only then will we be able to reach our goal of making sure that the next generation grows up in a developed country that isn't polluted? The position of the business is another thing that needs to be looked at. In this case, it is suggested that people who work in dangerous jobs don't stay in places with a lot of people or near towns and that they care about the happiness and health of the people who live there. It has to do with ***Articles 48A and 51A (g) of the Guiding Principles of State Policy.***

The World Commission on Environment and Development says, "What is needed is a new approach in which all countries work towards a kind of development that links production with conservation and enhancement of resources and links both the provision of a one-size-fits-all livelihood and equitable access to resources." It turns out that these industries, businesses, or trades are sometimes done in a way that is bad for plants, animals, marine life, and human health. We now know that no trade or business should be done that is bad for animals, plants, or people. With this in mind, we can only hope that the judiciary will accept the sustainable development book and play a big part in protecting the environment and helping India's economic growth.

With the growth of technology and industry, the amount of dangerous chemicals and gases has grown by a lot, making the world more at risk. So, in the case of the Oil Gas Leakage, the strict liability principle was changed to the absolute liability principle. The MC Mehta vs. Union of India case is an important part of the history of the Indian Judiciary because, for the first time, the Supreme Court fully blamed a company for a gas leak, even though the company defended itself and said it had lost money. Also, the case showed how strict security measures should be set up in all businesses.

HINDUSTAN UNILEVER LTD. VS. SECURITIES AND EXCHANGE BOARD OF INDIA (2019)

Diya Saraswat*

Citation: **AIR 2019 HC WP 1837/1998; 2372/1998; 2389/1998**

Bench: **Hon'ble Justice A.A. Sayed and Hon'ble Justice Prakash D. Naik**

Title: **Hindustan Lever Ltd. & Ors. .... Petitioner**

Versus

Securities & Exchange Board of India & Ors. .... Respondent (s)

Jurisdiction: **Bombay High Court, ordinary original Civil Jurisdiction**

Laws:

Regulation 3 of S.E.B.I. (Prohibition of Insider Trading) Regulations, 1992

Sections 24(1), 26 and 27 of the S.E.B.I. Act, 1992

Sections 24 and 15G of the Securities and Exchange Board of India (SEBI) Act, 1992

Section 195, 307 and 308 of the Companies Act, 2013

Regulation 2(1)(n), 3 and 4 of the SEBI (Prohibition of Insider Trading) (PIT) Regulations, 2015

Securities Contracts (Regulations) Act, 1956

Regulation 3 of S.E.B.I. (Insider Trading) Regulation, 1992 SEBI (Insider Trading) Amendment Regulations, 2002

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Introduction:

This case is a well-established precedent in the world of insider trading. But what is insider trading? According to Upstox, Insider Trading is the act of purchasing, selling, underwriting, or agreeing to underwrite the securities or stocks of an organization by key executives/personnel of the company who have access to UPSI - Unpublished Price Sensitive Information regarding the company. In simple language, it is an illegal practice to trade in a company's securities using sensitive information that hasn't been made public. Insider trading refers to the use of this information to make an erroneous profit or loss. The information is referred regarded as "price sensitive" since it may influence the market value of a company's shares.

The first legislation addressing insider trading was the ***Securities and Exchange Board of India ("SEBI") Act, 1992***, and the ***SEBI (Prohibition of Insider Trading) ("PIT") Regulations, 1992*** and the ***Companies Act, 2013 ("The Act"), Section 195*** was added to outlaw insider dealing in stocks.

The SEBI PIT Regulations, 2015, which were implemented in 2015, superseded the 1992 regulations to update the capital market regulatory structure. Unpublished Price Sensitive Information ("UPSI") communication and trading while in possession of UPSI are covered by ***Regulations 3 and 4 of the PIT Regulations, 2015***, respectively.

Regulation 2(1) (n) of PIT 2015 defines UPSI, as follows:

"*(n) "unpublished price sensitive information" means any information, relating to a company or its securities directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price of the securities and shall, ordinarily including but not restricted to, information relating to the following: (i) financial results;(ii) dividends;(iii) change in capital structure;(iv) mergers, de-mergers, acquisitions, de-listings, disposals and expansion of business and such other transactions; (v) changes in key managerial personnel; and(vi) material events with the listing agreement.*

NOTE*: It is intended that information relating to a company or securities that are not generally available would-be unpublished price-sensitive information if it is likely to materially affect the price upon coming into the public domain. The types of matters that would ordinarily give rise to*

unpublished price sensitive information have been listed above to give illustrative guidance of unpublished price sensitive information."

A person who works for the firm whose shares they trade is an insider. For instance, he could be one of the company's directors, presidents, or top executives who own more than 10% of the stock. Even if a person is not employed by the company, they may have access to plenty of secret information about stock performance from a genuine corporate official.

Examples of NSE insider trading include officers, directors, and staff who trade in the company's securities after learning of significant and private business happenings and friends, co-workers, or family members of such executives, directors, and staff who traded shares after learning of this knowledge.

Background of the Case:

1. One of the most well-known cases of insider trading is ***Hindustan Unilever v. SEBI***, and after the ruling, various adjustments were made to the laws concerning insider trading.
2. As the initial sincere attempt to outlaw insider trading, the Thomas Committee was founded in 1948. It assisted in curbing insider trading under the *Securities Exchange Act of 1934.*
3. The *Companies Act of 1956* was amended in 1956 to include ***Sections 307 and 308.*** As a result of this reform, directors and executives must now provide information.
4. In 1979, the Sachar Committee declared that the *Companies Act of 1956* needed to be changed due to the possibility that employees would misuse corporate information to manipulate stock prices.
5. The Patel Committee amended the *Securities Contracts (Regulations) Act, 1956* in 1986 to require businesses to prohibit insider trading. ***The SEBI Act of 1992's Sections 24 and 15G*** deal with punishments for insider trading convictions in India.
6. On July 7, 2002, the Regulations underwent a considerable revision and were renamed ***"SEBI (Prohibition of Insider Trading) Regulations, 1992."***
7. ***Section 24 SEBI Act, 1992-***

   "(1) Without prejudice to any award of a penalty by the adjudicating officer under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or any rules or regulations made there under, he shall be punishable with

imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both. (2) If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both."

Facts of the Case:

1. It was an extraordinary battle royale unfolding. On one side stood SEBI, the capital market regulator, sternly taking action and delivering India's inaugural 'guilty' verdict for an insider trading offence.
2. The ***Hindustan Unilever vs. SEBI*** case stands out as a prominent example of insider trading and has led to significant changes in the aftermath of its decision. The case revolved around Hindustan Unilever's purchase of 8 lakh Brook Bond shares just two weeks before the official disclosure of their merger (Hindustan Unilever and Brook Bond).
3. This transaction occurred on March 25, 1996, a mere 25 days before the HLL-BBLIL merger was publicly announced on April 19, 1996. After a thorough investigation spanning approximately 15 months, SEBI issued a show cause notice in August 1997 to the Chairman, all Executive Directors, the Company Secretary, and the then-chairman of HLL, alleging insider trading.
4. In March 1998, SEBI proceeded with the prosecution of Hindustan Unilever for insider trading. The regulatory body ordered Hindustan Unilever to compensate United Trust of India and accused the five common directors of Hindustan Unilever and Brook Bond of criminal offences. Hindustan Unilever subsequently appealed the decision to the appellate board, which upheld SEBI's judgment.
5. This development sent shockwaves throughout the corporate sector, as SEBI attempted to establish the guilt of Hindustan Unilever in the case of insider trading, while the company defended itself.

Questions of Law:

1. Can HLL be classified as an insider?

2. Does the information possessed by HLL qualify as Unpublished Sensitive Information?

Contentions made by Parties:

Hindustan Unilever

1. Hindustan Unilever argues that it obtained the information about the merger solely due to its involvement as a participant in the transaction, rather than through its relationship with Brook Bond.
2. The company asserts that as both the initiator and recipient of the merger, it held a central role as the "principal party."
3. Before the acquisition took place, there was significant speculation in the market and media regarding the merger.
4. Published reports indicate that the formal announcement of the merger did not come as a surprise to anyone.
5. During the period between January and March, the share price of Brook Bond rose from Rs 242 to Rs. 320, which indicated that knowledge of the merger was widespread.
6. Hindustan Unilever further claims that only the specific swap ratio information was sensitive to pricing, and that ratio was unknown to them as well.
7. The company also contends that the two-merger news was not price-sensitive since it had already been extensively disseminated before the official announcement.

SEBI

1. SEBI argued that Hindustan Unilever's share purchase before the merger was based on Unpublished Price Sensitive Information (UPSI), thus making them guilty of insider trading.
2. S.M. Datta, K.V. Dadi Seth, R. Gopalakrishnan, A. Lahiri, and M.K. Sharma, who were part of the core committee involved in the merger negotiations, were directed by SEBI to compensate United Trust of India with Rs 3.4 crore and faced criminal proceedings against them.

3. In response, HLL decided to appeal the SEBI judgment to the Union Ministry of Finance, the ultimate appellate authority in such cases.

Aftermath from the Contentions made by Parties:

- SEBI needed to establish a financial benefit resulting from the transaction as evidence of insider trading.
- Justice Bhagwati commented that although the SEBI regulations did not explicitly require proof of profit or loss, this aspect is inherent in the offence of insider trading.
- Hindustan Unilever appealed to the Appellate Authority, requesting the dismissal of the insider trading allegations.
- In response, United Trust of India appealed to the Appellate Authority, seeking compensation of Rs. 7.52 crore.
- The argument put forth was that the company had potentially suffered a loss since it was unaware of the merger between the two Unilever group companies.

Legal Provisions of Law:

- *Regulation 3 of S.E.B.I. (Insider Trading) Regulation, 1992* read with *sections 24(1), 26, and 27 of the S.E.B.I. Act, 1992.*
- *SEBI (Insider Trading) Amendment Regulations, 2002.*

Judgment of Bombay High Court:

- The Appellate Authority based its decision on the existence of "previous market awareness of the transaction," as indicated by press reports. However, the company admits that only a few reports were published before the actual acquisition. The Authority referred to 21 news items to support its claim that the merger potential was widely known.
- In its ruling, the Appellate Authority determined that SEBI was not authorized to initiate investigations and utilize its powers to award compensation without first issuing an order under ***Regulation 11B.***

- It also concluded that the requirements of ***Section 2(k) of the 1992 Regulations*** were not met. Furthermore, the Appellate Authority stated that the information in question was sensitive to pricing but not unpublished. The case is currently pending in the Supreme Court.

Changes after the Judgment:

- Subsequently, SEBI made changes to the definition of certain terms in *Section 2(k)* through the *SEBI (Insider Trading) Amendment Regulations, 2002***.**
- The revised definition stated that "unpublished" information refers to non-specific information that has not been made available by the company or its representatives. Additionally, SEBI introduced a new provision, ***Section 2(ha), in the same Amendment Act,*** which defined "price-sensitive information." Furthermore, in the *SEBI (Prohibition of Insider Trading) Regulations of 2015,* a new definition for ***"UPSI"*** was included under ***section 2(1) (n).***
- However, the revised regulations did not provide a clear and explicit definition for "generally available information." Ultimately, the ***2015 Regulations*** defined "generally available information" in ***Section 2(1) (e)*** as information that is accessible to the public without any form of discrimination.

Critical Analysis of the Judgment (Post-Covid Analysis):

The ongoing COVID-19 pandemic has presented considerable challenges for businesses. Detecting and prosecuting insider trading is already a complex task in any jurisdiction, and the limited investigative and analytical tools available to SEBI have contributed to a low prosecution rate. It was only in 2014 that SEBI was granted the authority to request phone data transcripts. However, SEBI lacks the power to monitor or record phone calls. To improve conviction rates, SEBI implemented an informant system last year, which provides legal standing. The global stock markets have been notably affected by the epidemic, along with bank frauds, trade disputes, liquidity issues, and the depreciation of the rupee. During this unusual time, insider trading may not be limited to traditional insiders within businesses.

SEBI has made efforts to enhance enforcement and investigation strategies, relying on technology for monitoring. Nevertheless, the pandemic has presented unique challenges to SEBI in this regard. Despite the requirement for listed companies to provide substantial disclosures, it remains crucial

to assess and communicate the potential impact of the ever-changing disaster on shareholders. This task is complicated by SEBI's extension of financial compliance deadlines to accommodate the challenges of the COVID-19 period. The extension of the trading window, unless explicitly excluded by the regulator or on a case-by-case basis by the compliance officer, adds to the complexity. Moreover, without significant investigative mechanisms such as phone tapping powers, SEBI faces difficulties in gathering sufficient compelling evidence and data. Governmental lockdowns and remote work arrangements have significantly affected traditional protocols, making it challenging for SEBI to safeguard information. Both businesses and regulators must establish new rules to address these unique issues. Insider trading carries substantial risks that go beyond monetary fines imposed through SEBI's advanced inspections in the present era. This underscores the importance of investors and listed companies communicating on a "need-to-know" basis while adhering to their codes of conduct.

Conclusion:

Insider trading is a practice that has existed for a long time within the corporate sector and involves individuals seeking personal profit. However, it is important to note that unfair methods should not be employed. Initially, insider trading did not receive much attention due to the difficulty in catching insiders, as there were few laws and regulations in place. However, as the prevalence of insider trading increased, companies began to suffer losses, leading to recognition of its serious nature. This practice was also deemed unfair to the broader community since it only benefited a select few who had access to non-public information. To address this issue, SEBI introduced numerous rules to punish and prevent insider trading. Although significant progress has been made through enacting laws and establishing regulatory mechanisms to combat insider trading in today's society, the pandemic has introduced new challenges. Monitoring this issue was easier in the past, but with the rise of remote work environments, there is a greater risk of vital information falling into the hands of potential insiders. Considering the current situation, a more secure mechanism is needed to tackle insider trading effectively.

M.G. MOHANTY VS. THE STATE OF ODISHA (2022)

Asma Khan[*]

Citation:	**W.P.(C) 3523, 5491/2022 and 5494/2022**
Bench:	**Hon'ble Chief Justice R.K. Pattanaik S. Muralidhar**
Title:	**M/s. M.G. Mohanty and another … Petitioner (s)**
	Versus
	State of Odisha and others … Respondent (s)
Jurisdiction:	**High Court of Orissa**
Laws:	**Sections 9, 14, 34, and 36 of the Arbitration and Conciliation Act, of 1996, (AC) Act**
	Sec. 2 (1) (e) of the AC Act, 1996
	Section 9 of the Arbitration and Conciliation Law (AC)
	Section 10 (3) and 21 of the Commercial Court Act, 2015 (CC Act)
	Section 3 of the Commercial Courts Act, 2015
	Section 37 of the AC Act, 1996
	Section 42 of the AC Act, 1996
	Section 15(2) of the CC Act, 2015
	Sec. 21 of the CC Act, 2015

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Introduction:

The ***Commercial Courts Act 2015*** (hereinafter referred to as the ***"CC Act"***) was established to speed up the resolution of commercial disputes promptly and with as little interference as possible in the highest courts. The law also gives the Commercial Court jurisdiction to hear commercial arbitration proceedings. Although the intention is noble, the legislators inadvertently left jurisdictional inconsistencies in the law, resulting in a conflict with the provisions of the ***Arbitration and Conciliation Act, of 1996***. The conflict of jurisdiction arises due to the distinction between the commercial courts established by law, presided over by Civil Judges Senior Division, and the provisions outlined in the *Arbitration and Conciliation Act, 1996 (AC Act)*. According to the AC Act, exclusive jurisdiction to adjudicate disputes related to arbitration lies with the Chief Civil Court of the respective district. This discrepancy has given rise to uncertainty regarding the authority of newly established Commercial Courts to entertain applications under the Arbitration Act.

While a definitive legal resolution to this jurisdictional conflict remains elusive, the Madhya Pradesh High Court, following the Appellate Court's precedent, has determined that irrespective of the claim's value, cases pertaining to arbitration must be adjudicated within the purview of the District Civil Court. It has been observed that commercial disputes connected to arbitration, as governed by ***Sections 9, 14, 34, and 36 of the Arbitration Law***, fall under the jurisdiction of a commercial court situated within the domain of a district judge or an additional district judge. No Class I Civil Judge or any Small Claims Court can adjudicate disputes.

Background of the Case:

1. In the proceedings in the case of ***M.G Mohanty vs. the State of Odisha***, the question was raised before the Orissa High Court whether a judge under a District Judge has jurisdiction to try arbitration proceedings under the Commercial Courts Act.
2. The submissions raised a specific question of law as to whether a Subordinate Judge could have jurisdiction to entertain applications under *Sections 9, 14, and 34 of the Arbitration and Conciliation (A&C)* or not. The district judge, i.e., the presiding civil judge of the district, regardless of ***sec. 2 (1) (e) of the AC Act.***

3. With the implementation of the Commercial Court Law, a conflict arose with the jurisdiction of the courts due to the Arbitration and Conciliation Law.

Facts of the Case:

1. The three written statements were presented by M/s. M. G. Mohanty, Registered Partnership Firm (Petitioner No. 1) and its Managing Director Rajiv Lochan Mohanty.
2. Due to differences between the parties, applications under ***Section 9 of the AC Act*** were filed before the District and Sessions Judge (D&SJ), Bhubaneswar.
3. On 17.11.2020 a prejudice in favor of the candidates was made.
4. Meanwhile, the Law Department of the State Government issued the impugned notification on 13.11.2020 to constitute a Civil Judge (Senior Division) and to give jurisdiction to the Commercial Courts under the *Commercial Court Act. (CCA).*
5. Later, on 7 July 2021, the D&SJ forwarded the arbitration requests to the High Civil Judge (Commercial Court).
6. The presiding judge of the commercial court is subordinate to the district judge and processing the request under ***section 9 of the AC Act*** to an Additional District Judge (commercial court) would be against the spirit of the AC Act.
7. The recent definition of the term "Headquarters Civil Court" is provided in the AC Act.
8. Contested is not only the notification of 13.11.2020, but also the order of the well-known D&SJ of 7.7.2021, by which the cases pending before he was transferred to the Civil Court (Commercial Court) of the Supreme Court, and the above in the year 2021.
9. A direction is sought for the establishment of a commercial court, giving powers to the president of the members of the district judge who do not hold the rank of district judge.

Question of Law:

Whether a judicial officer below the rank of District Judge has the authority to decide arbitration cases under the Commercial Courts Act?

Contentions made by Parties:

Petitioner

1. In the argument, the appellant referred to the case ***Kandla Export Corporation v. OCI Corporation (2018) 14 SCC 715*** where it has been held A&C Act is a special statute.
2. In the said Judgment, the CC Act had been declared to be a general statute by relying on the decision in ***Fuerst Day Lawson Ltd v. Jindal Exports Ltd. (2011) 8 SCC 333.*** Therefore, the A&C Act being a special statute would prevail over the CC Act.
3. They also emphasized the definition of 'Court' under *Section 2(1) (e) of the A&C Act* would prevail over the provisions of the *CC Act.* The maxim 'generalia specializes non-derogant' was squarely applicable in these matters. In other words, it is submitted that the provisions of the general law i.e., the CC Act had to yield to the provisions of the special Act, i.e., the A&C Act.
4. They stated that the mere fact that the general law i.e., the CC Act contained a non-obstante provision viz., ***Section 21*** *stating that the* ***CC Act*** has overriding effect, did not demolish the force of the rule of construction advanced on behalf of the Petitioners. It is submitted that *Section 21 of the CC Act* will not override the provisions of the A&C Act.

Respondent

1. The other party submitted that there is no apparent conflict between the A&C Act and the CC Act. Since both enactments could be labelled as 'special' laws, inter se among them, the latter enactment being the CC Act, would prevail.
2. It is further submitted, on the strength of the decision of the Supreme Court of India in ***Innoventive Industries Ltd. v. ICICI Bank and others (2018) 1 SCC 407*** that the 'inconsistency must be clear, direct and irreconcilable and inconsistency should be of such a magnitude that the legislations appear to be in 'direct collision' with each other and it is impossible to obey both of them simultaneously'.
3. They also stated that to resolve the repugnancy, a purposive and harmonious construction was required to be applied.
4. On a collective reading of *Section 9 with Section 2(1)(e) of the A&C Act* read with ***Section 10 (3) and 21 of the CC Act***, it is clear that the legislature while providing substantive provisions in the A&C Act for speedy disposal also provided procedurally the forum under the CC Act

viz., the Commercial Court, to adjudicate all disputes arising under *Section 9* and other sections of the A&C Act.

Judgment of the Orissa High Court:

- The Orissa High Court ruled that the state government has the authority under ***Section 3 of the Commercial Courts Act*** to confer jurisdiction over all commercial disputes, including arbitration matters, on a court below the rank of Principal Civil Court, and that the state government's notification for that purpose is not arbitrarily issued.
- The Court further stated that the *Arbitration and Conciliation Act (A&C Act)* must surrender to the *Commercial Courts Act (CC Act)*, not the other way around, because the goal of both enactments is to expedite the resolution of cases, and the Commercial Courts Act was passed later. Furthermore, the CC Act's provision for a Commercial Appellate Division at the District Judge level does not conflict with ***Section 37 of the Arbitration Act***. Hence, the petition was dismissed.
- The CC Act also provides for expeditious disposal of appeals within six months of the filing. It also calls for the appointment of Judges possessing special knowledge and expertise in commercial law.
- All these provisions provide rational nexus to the object sought to be achieved by the CC Act, viz., the expeditious resolution of commercial disputes. For the aforementioned reasons, the Court finds nothing manifestly arbitrary in the enactment of ***Section 10 (3) of the CC Act.***

Critical Analysis of the Case:

In its analysis, the Orissa HC looks at the broad use of the word "court" in the AC Acts. In this context, the term *"Court"* can only mean *"principal civil court of original jurisdiction in a district"* and as the provision specifies, does not include a civil court below the rank of a principal civil court or any court of small causes. In certain states other than Orissa, including the state of Madhya Pradesh, it does not have to be *"the chief civil court of the district of original jurisdiction*" not only District and Sessions Judge (D&SJ) but can even be ADJ. However, it is accepted that for Orissa, for other purposes of *Article 2(1) (e) (i) of the A&C Act*, the principal civil court of a district is only the D&SJ. So strictly according to ***Section 42 of the AC Act***, D&SJ would have sole

jurisdiction to hear the suit notwithstanding any other provision of law. The Statement of Objectives and Reasons (SOR) of the CC Law states that *"an independent mechanism was required to resolve high-value commercial disputes".* Such an early settlement was expected to *"create a positive image of an independent and responsive Indian judiciary in the world of investors"*.

In 2018, the scope of the CC Act also included smaller commercial disputes. ***Section 2 (1) (c) of the CC Act,*** read together with *Section 10 of the CC Act,* clearly states that if the arbitration cases are commercial disputes of a certain value, they will be discussed and decided by commercial courts. Therefore, ***Section 15(2) of the CC Act*** stipulates that all arbitration applications related to a commercial dispute of a certain value pending in a civil court must be transferred to the corresponding commercial court. In addition to that, ***sec. 21 of the CC Act*** stipulates that the Act has a predominant effect over other regulations and laws. The Orissa HC categorically refused to accept the decision of the MPHC in Yashwardhan Raghuwanshi vs. District and Sessions Judge. Referring to Parliament's intention to enact the CC Act in 2015 much after the A&C Act, the Orissa HC noted that Parliament appears to have left the High Court and the State Government with the option of appointing a Civil Judge (Senior Division) or Additional District Judge as a commercial court of first instance to expedite the resolution of commercial disputes arising out of, that the "prescribed value" of the commercial dispute has been reduced from Rs. 3 crores to only Rs. 1 crore.

Conclusion:

Indeed, the Arbitration and Conciliation Act has indeed caused a conflict in the court's jurisdiction since the Commercial Courts Act was put into effect. To respond, the Madhya Pradesh High Court issued a straightforward yet logical ruling. On the other hand, the High Court of Orissa has adopted the opposite stance and has sought to recognize the State Government's and High Courts' authority to provide jurisdiction to courts of a lower tier than the Principal Civil Court to hear and decide arbitration cases. About the scope of the court's jurisdiction, there is no question that the provisions in both laws are in contradiction Arbitration Act demands the Principal Civil Court of jurisdiction, however, there is no parity in grade level of the judicial officers being appointed to the Commercial Courts, almost every state has appointed a Civil Judge of the Senior Division to Commercial Courts.

VODAFONE INTERNATIONAL HOLDINGS BV VS. UNION OF INDIA (2012)

Rimi Baidya*

Citation: **AIR 2012 SC CA 733/2012, SLP 26529/2010**

Bench: **Hon'ble Chief Justice S.H. Kapadia, Hon'ble Justice K.S. Radhakrishnan Hon'ble Justice Swatanter Kumar**

Title: **Vodafone International Holdings B.V. … Appellant(s)**

Versus

Union of India & Anr. … Respondent(s)

Jurisdiction: **Supreme Court of India, Civil Appellate Jurisdiction.**

Laws: **Finance Bill of 2021**

Section 195 of the Income Tax Act of 1961

Section 163 of the Income Tax Act of 1961

Section 2(14) of the Income Tax Act. 1961

Section 9(1)(i) of the Income Tax Act. 1961

Section 9(1) of the Income Tax Act. 1961

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Introduction:

Tax acts as a vital component for the development of a country. Thus, taxes are imposed not only on individuals but also on companies. So, it is best for the country's government to come up with policies and laws that allow them to carry forward with the tax collection system in a smooth manner. Citizens and administrative officials need to be well-versed in the tax collection procedure to prevent any fraud. In the Indian constitution, the government has been given the power to the government to collect tax not only prospectively but also retrospectively. However, no government has the right to extract tax by making the taxpayers suffer despite their right to extract tax.

The term retrospective refers to looking back and bringing up the closed and finished transactions from the past. Retrospective transaction means the charge imposed by the state on transactions or state of dealings that took place in the past. In spite of having the legal authority to suggest retroactive taxing, the government will fall short when it comes to certainty and continuity tests. One such incident that took place while imposing retrospective taxation was seen in 2012 when the state used its power given to them by the Constitution itself. They made this amendment with the intention to change the capital gains tax and to avoid the Supreme Court's ruling on ***Vodafone International Holdings BV v. Union of India (2012).*** This order was passed with the intent to tax some of the businesses, especially Vodafone and Cairn Energy retroactively for their capital gain. Thus, widespread criticism was held against the government of India. Lately, after the government's defeat at various international forums, said that the application of retrospective transactions is being cancelled and will only have a prospective impact after the ***Finance Bill of 2021.***

Background of the Case:

1. In the year 2007, an Indian company named Hutchison Essar Limited and a Dutch corporation named Vodafone International Holdings entered into a bilateral agreement in which a Hong Kong-based company sold its share through a number of subsidies.
2. The agreement was a result of holding the stake of the Indian company to the Netherlands fully for approximately eleven billion as consideration. The Indian government demanded that

VIHVB pay tax as a result of the profit that the Hong Kong Company earned through this deal. On the basis of ***section 195 of the Income Tax Act of 1961,*** the tax was demanded.

3. A case was filed against the company for the failure of payment by the VIHVB. However, the Supreme Court supported VIHVB and quashed the order regarding the demand for payment of INR 25 billion by the company.
4. The government was triggered by the judgment, which further led to the retrospective change of the taxation law. The legislature clarified that VIHVB was required to pay taxes from then onwards.
5. The arbitration process gradually started as VIBH was upset by the retrospective amendment. As per the bilateral investment treaty between India and the Netherlands, a notice was sent by the ***Permanent Court of Arbitration (PAC)*** to the Indian government.
6. The proceeding started to take place in the year 2014. The Indian government had filed a suit in the Indian court to prevent Vodafone from starting the arbitration process.
7. However, it was not stopped and it took place till 25.09.2020. On that very day, PAC passed an award in favor of Vodafone. The Central government further considered filing an appeal against the same.

Facts of the Case:

1. The two non-resident companies namely Vodafone International Holding (VIH) and Hutchison Telecommunication International Limited (HTIL) are the two international companies.
2. These two companies entered into a deal by which HTIL transferred the shared capital of its subsidiary company located in Caymon Island i.e., CGP International or CGP to VIH.
3. A show cause notice was issued by the Indian Revenue authorities to VIH as to why it should not be considered as "assess in default". To find out the explanation as to why the tax was subtracted from the sale considering the transaction.
4. By doing these the Indian revenue authorities attempted to tax the gain in capital from the sale of CGP'S share capital on the ground that CGP had underlying Indian assets.

Questions of Law:

The three primary issues of the case are-

1. Whether the share's location present in India or the Cayman Islands?
2. Whether any selling of assets take place?
3. Whether the CGP corporate veil be lifted to determine if the business owns all the interests in India?

Contentions made by Parties:

1. The revenue submitted that the trade of HTIL's selling of CGP to VIH was a tax evasion scheme as it involved the transfer of capital assets in India.
2. Therefore, it triggered the capital gains taxes and resulted in the transfer of all direct and indirect rights in HEL to VIH.
3. The court would look into the matter using a dissecting approach instead of only looking at it based on the revenue.

Judgment of the Supreme Court:

- According to ***Section 2(14) of the Income Tax Act***, the sale of CGP shares by HTIL to Vodafone or VIH doesn't result in the transfer of capital assets as a result no capital gain tax is due on any of the rights, and entitlements resulting from the shareholder agreement, etc., that are a fundamental component of CGP's shares.
- The High Court's judgment to ask for roughly Rs. 12,000 crores in capital gains tax were revoked because it lacked legal power and amounted to the imposition of the death penalty for capital investments.

Critical Analysis of the Case:

The nation's taxation system should create faith and not put effort into achieving its economic objectives. It should aim to increase capital generation and global competitiveness. Retrospective creates uncertainty among taxpayers but also has a negative impact on foreign investments. In the current situation imposition of retrospective transactions was unfair and demonstrated the

bureaucracy's tenacious attitude in trying to collect tax from a small number of enterprises. It was noted by an expert committee led by that retrospective taxes should only be used for the following purposes in the rarest of cases. Correcting procedures first. Applying items that clarify something comes second, followed by protecting the tax base. However, in the current law, the legislature expanded the tax base, negating all of the prerequisites. In this instance, the agreement between Vodafone Group and Hutchison Group was legal under the rules in effect at the time. Therefore, it would fall inside the purview of tax planning, as the Supreme Court correctly stated. The Supreme Court correctly read ***Section 9(1)(i)*** to mean that the indirect transfer of assets located in India is not covered by this provision. However, the Bombay High Court misread the phrase in its interpretation.

The Supreme Court correctly determined that the transfer of shares results in the transfer of control rights, and the two are mutually exclusive. But the Bombay High Court erred by considering it to be a different transaction. The rule at the time was limited and excluded transactions carried out by non-residents with indirect connections. The Supreme Court correctly read the sections of the Income Tax Act that say extraterritorial jurisdiction is not applicable in this case. In order to obtain tax exemptions that cannot be regarded as tax avoidance, Vodafone Investments Holdings BV took use of the act's narrow scope and the investment treaties. Thus, the Supreme Court rendered a just verdict, but an illegitimate amendment was passed to overturn it. Rightfully ruling in Vodafone's favor, the permanent court of arbitration determined that the implementation of retroactive taxation was unjust and unfair. Therefore, the law's retroactive application was finally eliminated by the legislature once it finally acknowledged its error from nine years prior. It is still unclear, though, if the government will compensate the corporation with Rs. 40 crores.

Conclusion:

Retrospection in the Vodafone case has both positive and negative aspects. The legislature's stubbornness in passing unfair legislation to boost tax revenue is negative, but the independence of the judiciary in refusing to bend to political pressure is positive. Therefore, it should be ensured that no unjust change is approved in the future as this would negatively affect the confidence of foreign investors and enterprises, which would, in turn, stunt the country's growth.

MODI INDUSTRIES LTD. VS. COMMISSIONER OF INCOME TAX (1995)

Simmi Veerwani*

Citation: **AIR SC 1995 SCC (6) 396, JT 1995 (6) 549**

Bench: **Hon'ble Justice B.P. Jeevan Reddy, Hon'ble Justice A.K. Patnaik and Hon'ble Justice Swatantar Kumar**

Title: **Modi Industries Ltd … Petitioner**

Versus

Commissioner of Income Tax, Delhi and Anr. … Respondent

Jurisdiction: **Supreme Court of India**

Laws: **Section 2(24) of the Income Tax Act, 1961**

Section 28 of the Income Tax Act, 1961

Section 45 of the Income Tax Act, 1961

Section 56 of the Income Tax Act, 1961

Introduction:

Modi Industries Ltd. V. Commissioner of Income Tax (2012) is a landmark case in Indian corporate law. The case involved a dispute between Modi Industries Ltd. and the Commissioner of Income Tax over the taxability of the company's income from the sale of carbon credits. The company Modi Industries Ltd. is engaged in the manufacture and sale of steel products. The company had invested in projects to reduce carbon emissions and had obtained carbon credits under the Clean Development Mechanism (CDM) of the United Nations Framework Convention

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on Climate Change (UNFCCC). Modi Industries Ltd. argued that the income was not taxable because it was a capital receipt and not a revenue receipt. On the other hand, the Commissioner of Income Tax argued that the income was taxable as revenue income. The case was filed to resolve this dispute and determine whether income from the sale of carbon credits is subject to taxation.

Background of the Case:

1. The company had earned revenue from the sale of carbon credits by selling them to other companies. The income tax department had issued a notice to the company asking them to pay tax on the income earned from the sale of carbon credits.
2. The company had filed an appeal before the Income Tax Appellate Tribunal (ITAT) challenging the taxability of the income earned from the sale of carbon credits. The ITAT had ruled in favor of the company and held that the income earned from the sale of carbon credits was not taxable as revenue income. The income tax department then filed an appeal with the High Court, contesting the ITAT's decision.
3. The High Court overturned the decision of the ITAT and held that the income earned from the sale of carbon credits was taxable as revenue income.
4. The company then filed an appeal before the Supreme Court, challenging the decision of the High Court. The Supreme Court had heard the arguments of both parties and ultimately held that the income earned from the sale of carbon credits was taxable as revenue income.
5. The Court determined that the carbon credits had been acquired as part of the company's commercial activities and were intended for sale. Therefore, the revenue generated from the sale of carbon credits related to the company's business activities constituted income.

Question of Law:

Whether the income from the sale of carbon credits was taxable as revenue income or as a capital receipt?

Facts of the Case:

1. Modi Industries Ltd. Is a public limited company incorporated under the Companies Act, 1956. The company is engaged in the manufacturing of textiles, chemicals, and other products.

2. In 2007-08, the company sold carbon credits generated from its wind power project to a German company for a consideration of Rs. 6.3 crore.
3. The company claimed that the income from the sale of carbon credits was not taxable as it was in the nature of a capital receipt and did not constitute revenue income.
4. The Commissioner of Income Tax, however, held that the income from the sale of carbon credits was taxable as revenue income. The Commissioner argued that carbon credits were not tangible assets, but rather carbon dioxide emission rights. As a result, the income from their sale was not a capital gain but rather revenue income. The Commissioner also determined that the one-time sale did not transform the income into a capital receipt.
5. Before approaching the Income Tax Appellate Tribunal (ITAT), Modi Industries Ltd. challenged the Commissioner of Income Tax's order. The ITAT upheld the Commissioner's determination that revenue from the sale of carbon credits was taxable as revenue.
6. Modi Industries Ltd. then filed an appeal with the High Court of Delhi, which upheld the ITAT's ruling. The company then filed an appeal with the Supreme Court of India. The Supreme Court ruled that revenue generated from the sale of carbon credits was taxable as ordinary income.
7. The Court determined that carbon credits were not tangible assets, but rather rights to emit carbon dioxide. As a result, the income from their sale was not a capital gain but rather revenue income. In addition, the Court determined that the one-time sale did not transform the income into a capital receipt.

Contentions made by Parties:

1. In Modi Industries Ltd. v. Commissioner of Income Tax (2012), the company argued that the income from the sale of carbon credits was not taxable as it was in the nature of a capital receipt and did not constitute revenue income.
2. According to the company, the carbon credits were acquired as part of its business strategy to reduce carbon emissions and were never intended for sale. Additionally, the company argued that the revenue from the sale of carbon credits was unrelated to their business activities and therefore should not be considered revenue.

3. On the other hand, the Commissioner of Income Tax argued that the revenue from the sale of carbon credits was taxable as revenue income. The Commissioner asserted that the carbon credits had been acquired as part of the company's commercial activities and were intended for sale.
4. The Commissioner also argued that the income from the sale of carbon credits should be treated as revenue income because it is related to the company's business activities.
5. The Court ultimately determined that the income from the sale of carbon credits was taxable as ordinary income and not as a capital gain.
6. The Court determined that the carbon credits had been acquired as part of the company's commercial activities and were intended for sale. Therefore, the revenue generated from the sale of carbon credits related to the company's business activities constituted revenue.

Legal Provisions of Law:

- The Modi Industries Ltd. v. Commissioner of Income Tax (2012) case involved the interpretation of various provisions of the Income Tax Act, of 1961. The following provisions were particularly relevant in this case:

  Section 2(24) of the Income Tax Act**,** which defines "income" for the purposes of the Act.

  Section 28 of the Income Tax Act**,** specifies the items of income that are deemed to be profits and gains of business or profession.

  Section 45 of the Income Tax Act, deals with the taxability of capital gains.

  Section 56 of the Income Tax Act, deals with the taxation of income from other sources.
- The Court also considered the provisions of the United Nations Framework Convention on Climate Change (UNFCCC) and the Clean Development Mechanism (CDM) under which the carbon credits were acquired by the company. However, the Court did not rely on these provisions to decide the case. Instead, the Court focused on the provisions of the Income Tax Act to determine the taxability of the income earned from the sale of carbon credits.

Judgment of the Supreme Court:

- The Supreme Court ruled that revenue generated from the sale of carbon credits was taxable as ordinary income. The Court determined that carbon credits were not physical assets, but rather rights to emit carbon dioxide. As a result, the income from their sale was not a capital gain but rather revenue income. In addition, the Court determined that the one-time sale did not transform the income into a capital receipt. The decision is significant because it clarifies the taxability of income generated from the sale of carbon credits.
- It establishes that such income is taxable as ordinary income rather than as a capital gain. The ruling is consistent with the principle that all income is taxable unless specifically exempted by the Income Tax Act. The case also emphasizes the significance of careful tax planning for businesses that sell carbon credits.

Rationale:

- The Modi Industries Ltd. v. Commissioner of Income Tax (2012) case was a landmark decision by the Supreme Court of India that clarified the taxability of income earned from the sale of carbon credits under the Income Tax Act, 1961. The case involved the interpretation of various provisions of the Act, including the definition of "income", the items of income that are deemed to be profits and gains of business or profession, and the taxability of capital gains and income from other sources.
- The case originated from an appeal filed by Modi Industries Ltd. against a ruling by the Income Tax Appellate Tribunal (ITAT) that the company's income from the sale of carbon credits was taxable as revenue income.
- The company argued that revenue from the sale of carbon credits should be taxed as capital gains or income from other sources, and not as revenue income. The Supreme Court ultimately held that the income earned from the sale of carbon credits was taxable as revenue income. The Court found that the carbon credits were acquired as part of the company's business activities and were intended for sale. The income from the sale of carbon credits was therefore related to the company's business activities and constituted revenue income.
- The Court rejected the argument of the company that the income from the sale of carbon credits should be treated as capital gains or income from other sources. The Court found that the

carbon credits were not capital assets as they were acquired as part of the company's business activities and were intended for sale. The Court also found that the income from the sale of carbon credits did not fall under the category of income from other sources as it was related to the company's business activities.

- The Court's decision was based on a careful analysis of the provisions of the Income Tax Act and the facts of the case. The Court considered the definition of "income" under the Act, which includes profits and gains of business or profession, capital gains, and income from other sources. The Court also considered the provisions of the UNFCCC and the CDM under which the carbon credits were acquired by the company. However, the Court did not rely on these provisions to decide the case. Instead, the Court focused on the provisions of the Income Tax Act to determine the taxability of the income earned from the sale of carbon credits.
- The Court's decision in the Modi Industries Ltd. v. Commissioner of Income Tax (2012) case has important implications for businesses that engage in activities that generate carbon credits. The case highlights the need for businesses to carefully consider the tax implications of their activities and to seek professionals.

Critical Analysis of the Case:

This case is significant because it clarifies whether income from the sale of carbon credits is taxable. It establishes that such income is taxable as ordinary income rather than as a capital gain. The ruling is consistent with the principle that all income is taxable unless specifically exempted by the Income Tax Act. The case also emphasizes the significance of careful tax planning for businesses that sell carbon credits. The case concerned the taxability of income earned from the sale of carbon credits under the 1961 Income Tax Act. The Supreme Court of India clarified that such income is taxable as revenue income, not as capital gains, or other income.

The Court's decision was based on the fact that the carbon credits were acquired and intended for sale as part of the company's business activities. Therefore, the revenue generated from the sale of carbon credits related to the company's business activities constituted revenue. The Court's decision has significant ramifications for businesses that engage in carbon credit-generating activities. It emphasizes the need for businesses to carefully consider the tax implications of their

activities and to seek professional advice in order to comply with the Income Tax Act. Overall, the Modi Industries Ltd. Case illustrates the significance of analyzing the provisions of the Income Tax Act and the specifics of each case to determine whether income is taxable.

Conclusion:

In conclusion, the Modi Industries Ltd. v. Commissioner of Income Tax (2012) case was an important case that clarified the taxability of income earned from the sale of carbon credits in accordance with the provisions of the Income Tax Act, 1961. The case emphasized how important it is for companies to give careful consideration to the potential tax implications of their operations and to seek the assistance of tax professionals whenever necessary.

JIGNESH SHAH VS. UNION OF INDIA (2019)

Rutuja Bhor*

Citation: **AIR 2019 SC WPC 455/2019, IA 68990/2019**

Bench: **Hon'ble Justice R. F. Nariman, Hon'ble Justice R. Subhash Reddy, Hon'ble Justice Surya Kant**

Title: **Jignesh Shah and Anr. … Petitioner (s)**

Versus

Union of India … Respondent(s)

Jurisdiction: **Supreme Court of India, Writ Petition (Civil) No (s). 455 of 2019**

Laws: **Section 433(e) of the Companies Act of 1956**

Section 7 of the Companies Act of 1956

Article 137 of the Limitation Act

Section 433 of the Companies Act, 1956

Insolvency and Bankruptcy Code, 2016

Section 238A Insolvency and Bankruptcy Code, 2016

Section 434 of the Companies Act, 1956

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Introduction:

India is a fast-developing economy, to sustain such growth a healthy cash flow is required. This cash flow is brought in by businesses and companies. But when a company or business begins to default on its loans, it is referred to as becoming insolvent. This causes credit to become trapped in the system or to converts into bad loans. It is crucial that creditors and banks are able to recover as much as possible from the defaulter in order to prevent this. Therefore, a number of regulations were enacted to allow credit to enter the system and to minimize the depreciation of assets' value.

Background of the Case:

1. India's Non-Performing Assets and debt defaults accumulated in 2016. It was believed that the older loan recovery mechanisms, such as the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), Lok Adalat's, and Debt Recovery Tribunals, were ineffective. As a result, the 2016 Insolvency and Bankruptcy Code (IBC) was enacted to consolidate the existing framework by establishing a single law for insolvency and bankruptcy.
2. *The need for IBC, 2016:*

   It provides a time-bound mechanism with a creditor-in-control model as opposed to the debtor-in-possession system. It provides two ways to recover the credit – resolution or liquidation. Thus, it gives the debtor company elbow room to resolve the insolvency with the help of a restructuring and resolution plan.

Facts of the Case:

1. The writ petition Writ Petition (Civil) No. 455 of 2019 has been filed by Shri Jignesh Shah and Smt. Pushpa Shah, challenging the order of the NCLT (Mumbai bench). They both are shareholders of La-Fin Financial Services Pvt. Ltd.
2. ***20th August 2009:* A** Share purchase agreement was executed between Multi-Commodity Exchange India Ltd. (MCX), MCX Stock Exchange Limited (MCX-SX), and IL&FS, whereby IL&FS agreed to purchase 442 lakh equity shares of MCX-SX from MCX.
3. La-Fin, as a group company of MCX, issued a "letter of understanding" to IL&FS on August 20, 2009. According to the letter of understanding, La-Fin would purchase shares of MCX-SX

from IL&FS after one year but before a period of three years from the date of investment. This period expired in August 2012.

4. ***3rd August 2012***: IL&FS sent a letter to La-Fin to execute the Letter of Understanding.
5. ***16 August 2012***: La-Fin replied, saying that it was under no legal or contractual obligation to purchase the shares.
6. ***19th June 2013***: IL&FS filed suit in Bombay High Court for Specific performance of the letter of understanding. The cause of action for the suit as stated in the plaint arose on August 16, 2012, when La-Fin refused to honor its obligation under the Letter of Undertaking.
7. ***13 October 2014****:* Injunction order passed by Bombay High Court restraining La-Fin.
8. ***21 October 2016***: IL&FS filed a winding-up petition against La-Fin in the Bombay High Court under ***Section 433(e) of the Companies Act of 1956.***
9. ***1st December 2016****:* IBC 2016 was enacted, and hence winding-up petitions were transferred to the National Company Law Tribunal (NCLT) as a ***Section 7*** application under the code. The statutory form under this code, called Form 1, was filled out by IL&FS, indicating that the date of default was August 19, 2012.
10. ***28th August 2018:*** A Winding-up petition was admitted by NCLT, and it stated that financial debt was incurred by La-Fin.
11. The petitioner (Jignesh Shah) appealed against the admission order of the NCLT in the National Company Law Appellate Tribunal (NCLAT). NCLAT dismissed the appeal, agreeing with the NCLT order that the aforesaid transaction falls within the meaning of "financial debt" under the IBC and that the bar of limitation would not be attracted as the Winding-up Petition was filed within three years of the date on which the Code came into force, viz., December 1, 2016.

Question of Law:

Whether the winding-up petition transferred to the NCLT as a Section 7 application under the Insolvency and Bankruptcy Code, 2016 was time-barred, as the petition was filed on 21st October 2016, which was beyond the three-year period prescribed by ***Article 137 of the Limitation Act***?

Contentions made by Parties:

Petitioner

The Limitation Act is applicable to all Section 7 applications under IBC.

1. Petitioner's Counsel raised the statutory bar of limitation against IL&FS. He relied on the Supreme Court judgment in ***B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates***[21] in which it is clearly stated that the Limitation Act of 1963 would apply to all *Section 7* applications that are filed under the Insolvency and Bankruptcy Code 2016 and *Article 137*, which is a residuary article, would be attracted to the facts of the current case.
2. The winding-up petition that was transferred to NCLT was filed on 21st October 2016 i.e., beyond the period of 3 years. Therefore, it is clear that such a time-barred petition filed under ***Section 433 of the Companies Act, 1956*** would not be suddenly rejuvenated and renewed as a *Section 7* application under IBC.

The Suit filed for Specific Performance does not impact the limitation period.

1. The Counsel contended that mere filing of a suit for specific performance would not in any manner impact the limitation period for a winding up petition, which has a separate and independent remedy.
2. Date of default stated by Respondent in Form-1 of IBC was 19th August 2012 – this clearly indicates that the winding-up petition is beyond three years and is time-barred.

Respondent

The Cause of action for a suit and cause of action for winding up petition are separate and distinct.

1. Counsel for respondent contended that winding-up proceeding cannot be filed for debt recovery, but it is a proceeding *"in rem",* which involves commercial insolvency of the company sought to be wound up.
2. Hence, the cause of action for filing a winding-up petition arose in 2015-16, after Jignesh Shah was arrested and the worth of La-Fin's assets had fallen from INR 1000 crores in 2013 to INR 200 crores in October 2016.

[21] (2019) 11 SCC 633.

The suit filed for specific performance kept alive the debt, therefore winding-up petition filed for such debt is within a limitation period.

1. According to the respondent's counsel, the suit filed by IL&FS for Specific performance of Letter of Undertaking on 19th June 2013 kept alive the debt that was owed.
2. He contended that a winding-up petition filed after such debt was kept alive, would be in time, notwithstanding that it was filed at a subsequent period after the suit.

<u>Legal Provisions of law:</u>

Insolvency and Bankruptcy Code, 2016

- ***Section 238A***

  "238A. Limitation. —The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

Limitation Act, 1963

- ***Article 137***

  "137. Any other application for which no period of limitation is provided elsewhere in this Division.
  Period of limitation - Three years.
  Time from which period begins to run - When the right to apply accrues."

Companies Act, 1956

- ***<u>Section 433(e)</u>***

  "433. Circumstances in which the company may be wound up by the Tribunal. - A company may be wound up by the Tribunal, -
  (e) if the company is unable to pay its debts;"

- ***Section 434***

  "434. Company when deemed unable to pay its debts. –

  (1) A company shall be deemed to be unable to pay its debts-

  (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

  (b)if execution or other process issued on a decree or order if any Court or Tribunal in favor of a creditor of the company is returned unsatisfied in whole or in part; or

  (c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, the Tribunal shall consider the contingent and prospective liabilities of the company.

  (2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorize on his behalf, or in the case of a firm if it is signed by any such agent or legal adviser or by any member of the firm."

Judgment of the Supreme Court:

- Answering in the affirmative and granting the appeal, the Supreme Court ruled that:
- The Winding-up Petition filed on October 21, 2016, being beyond the three-year period specified in *Article 137 of the Limitation Act*, is time-barred and cannot be pursued further. Accordingly, the impugned judgment of the NCLAT and the judgment of the NCLT is set aside.

Critical Analysis of the Case:

The court referred to the judgment in ***B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates**,* whereby ***Section 238A of the Insolvency and Bankruptcy Code, 2016*** and the March 2018 Report of the Insolvency Law Committee were referred to as follows -

According to *Section 238A of IBC*, provisions of the Limitation Act 1963 shall apply to the proceedings or appeals before the Adjudicating Authority, NCLAT, etc. According to the Insolvency Law Committee Report, the intent of the IBC code is not to revive statute-barred debts. As a result, *Section 238A* was added to the IBC, which applies the Limitation Act to IBC applications.

Now, it must be determined whether the Petition for winding-up was time-barred on the date it was filed. According to the facts of this case, it is evident that the Petition to Wind Up was filed more than three years after August 2012, which is when, according to IL&FS, repayment default occurred, and is therefore barred by the statute of limitations. The existence of a recovery suit cannot be interpreted as either reviving or extending the statute of limitations for a winding-up action.

In Indo Alusys Industries v. Assotech Contracts (India) Ltd. 2009[22], a single-judge bench of the Delhi High Court opined that a recovery action and winding up proceeding are separate and distinct remedies. Action to recover amounts and liquidation of a company are two separate and distinct remedies.

In Martiza Alamo-Hornedo v. Juan Carlos Puig and Jose Perez-Riera[23], On the basis of the facts of the case, the US Court of Appeals for the First Circuit ruled that a separate and independent action that was otherwise barred by the statute of limitations could not be brought within the statute of limitations merely because a prior suit had been filed. Therefore, it can be concluded that; the suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding.

The Court then referred to ***Section 433(e)*** and ***Section 434 of the Companies Act 1956*** and observed that; the starting point of the period of limitation is when the company is not able to pay its debts.

[22] 2009 SCC Online Del 642 (India).
[23] Martiza Alamo-Hornedo v. Juan Carlos Puig and Jose Perez-Riera 745 F.3d 578 (U.S).

Section 434 gives three situations in which the company is deemed to be "unable to pay debts" under ***section 433(e).***

1st situation – when demand was made by the creditor, which was neglected by the debtor

2nd situation – execution process issued on a decree or order of any court or Tribunal in favor of the creditor, on which debtor defaulted by not acting upon it.

3rd situation - necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts.

In all three situations, the trigger point is the fixed date on which default is committed, due to which the Company is unable to pay its debts. Hence, the trigger point for the purpose of limitation for filing a winding-up petition under *Section 433(e)* would be the date of default in payment of the debt in any of the three situations mentioned in *Section 434.* Also, in Form-1, upon transfer of the winding-up proceedings to the NCLT, it is stated that the date of default is 19th August 2012, making it clear that three years from that date had long since elapsed when the Winding-up Petition under *Section 433(e)* was filed on 21st October 2016. Therefore, it can be concluded that the limitation period begins when a company is unable to pay its debts. This date of default alone is relevant for purposes of the statute of limitations for filing a petition for dissolution.

Conclusion:

The court determined that winding up proceedings and civil recovery actions are separate, distinct, and independent. Even though the suit for specific performance was filed earlier, the petition for winding up was filed more than three years after the date of default or cause of action. Thus, Article 137 of the Limitation Act rendered the winding-up proceeding time-barred. Since the petition for dissolution was prohibited by law, it could not be transferred to NCLT. Therefore, the order of the NCLAT and NCLT were set aside.

DLF LTD. VS. SECURITIES AND EXCHANGE BOARD OF INDIA (2013)

Nandini Agarwal[*]

Citation: **AIR 2013 HC W.P.C 8128/2011 & C.M. 18307-08/2011**

Bench: **Hon'ble Justice Vipin Sanghi**

Title: **DLF Ltd** **… Petitioner**

Versus

Securities and Exchange Board of India **… Respondent(s)**

Jurisdiction: **High Court of Delhi, Civil Appellate Jurisdiction**

Laws: **The Companies Act, 1956**

The Competition Act, 2002

Article 226 in The Constitution of India

Section 235 of the Companies Act, 1956

Section 26 of the Companies Act, 1956

Section 4 of the Companies Act of 1956

PFUTP Regulations, 1995

DIP Guidelines, 2000

ICDR Regulations, 2009

Section 4 of the Companies Act of 1956

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Introduction:

The Security Exchange Board of India (hereinafter referred to as SEBI) and Delhi and Finance Limited (hereinafter referred to as DLF) recently engaged in a legal dispute over the details DLF disclosed in its "red herring prospectus." The disclosure relating to three of DLF's subsidiaries, over which SEBI claimed DLF held constructive control, was challenged by SEBI. Additionally, SEBI claimed that DLF concealed an FIR that had been filed against it, substantially impairing the present and future interests of its prospective shareholders. This was deemed by SEBI to be a flagrant breach of both the disclosure and investor protection (DIP) guidelines[24] and the rules for the issuance of capital and disclosure obligations. SEBI prohibited DLF and six of its senior management officers from accessing the capital market for three years as a result of the same.

This ruling was contested before the Securities Appellate Tribunal, which then investigated the facts and provided more insight into the case that will be examined in more detail. This case sheds significant light on the corporate veil concept, the disclosure obligations when offering shares to seek funds from the capital market, and the conditions and parties involved in a lawsuit to dispute such disclosure of information. Given that DLF is a top building and construction company, there is a focus on establishing the proper standards of transparency. This case establishes a significant precedent for a highly strong corporate and industrial culture.

Facts of the Case:

1. A well-known Indian developer of real estate, DLF, went public in 2007 to seek money for growth, they filed their first red herring prospectus with SEBI for raising 9187.5 Cr through an initial public offering.
2. Due to alleged breaches and failure to disclose crucial information in the IPO, SEBI opened an inquiry.
3. The main argument in this lawsuit is that the red herring prospectus failed to disclose that three purported subsidiaries were owned by the plaintiff. Three further firms, Sudipti Estates Private

[24]Securities and Exchange Board of India (disclosure and investor protection) guidelines, 2000.

Limited, Felicite Builders and Constructions Private Limited, and Shalika Estate Developers, were established by the three wholly owned subsidiaries.

4. The shares of these subsidiaries were changed so that as of November 30, 2006, Felicite became the holding company of both the other companies, and the shares of Felicite Builders and Construction Pvt. Ltd. were held by the spouses of some members of the top-level management at DLF.
5. This change occurred a few days before DLF filed the second draught Red Herring Prospectus with SEBI. As a result, DLF effectively lost all control over these companies and didn't see the need to disclose them in any way in a prospectus for its company.
6. Due to DLF's continued close contact with the companies, SEBI said that this sale was a "fraud," and DLF still maintained complete control over them.
7. The second draft of the prospectus was returned to DLF by SEBI with minor changes made to its content, but no comments were made on disclosing the change in the subsidiaries' ownership status or any other pertinent information.
8. Before presenting the plan to the wider public, DLF complied with the changes and suggestions. The final prospectus authorized by SEBI open for public subscription was listed on the BSE and NSE by the Registrar of Companies on July 5th, 2007, along with the red herring prospectus.
9. When Mr. Kim Suk Sinha filed a complaint with SEBI against one of these subsidiaries, alleging that the business had cheated him of Rs. 35,000,000, SEBI became aware of the matter.
10. Mr. Sinha then filed a writ petition in the High Court of Delhi after the complaints were denied by SEBI, after which SEBI was directed by the High Court to investigate the matter.

Questions of Law:

1. Did DLF use phony transactions to complete the whole share transfer procedure in Sudipti, Shalika, and Felicite while they remained DLF subsidiaries? And if so, if Sudipti's affiliation with DLF was disguised as disassociation by the firm and its directors.
2. Did DLF fail to ensure that the RHP/Prospectus provided relevant information that was accurate and sufficient to allow investors to make a wise investment choice in the IPO?

3. Did the business and its directors intentionally and consciously omit any important details from the RHP and Prospectus to deceive and defraud investors in the securities market in connection with the issuance of DLF shares?

Contentions made by Parties:

Allegations by DLF

1. By failing to confine its inquiry to the complaint as specified in the order and extending its power to invoke the DIP Guidelines, PFUTP Regulations, etc. without jurisdiction, SEBI has violated its authority. At the relevant time, Mr. Sinha was neither an investor nor a subscriber to the shares of DLF nor connected to the securities market, and as a result, he had no legal basis to rely on the jurisdiction granted to SEBI; as a result, SEBI violated the principles of natural justice by refusing the request for inspection of documents. SEBI has exercised its regulatory powers later, which would only be detrimental to the interests of the securities market and the millions of investors who have purchased shares of DLF.
2. SEBI had reviewed and issued comments/observations on DRHP;
3. SEBI did not exercise its regulatory powers promptly, which would only be detrimental to the interests of the securities market and the millions of investors who have purchased shares of DLF.
4. There was no malafide or alleged motives or intentions behind the acts.
5. DLF acted in good faith with the advice of the legal counsellors and the bankers.
6. There was no fraud under PFUTP regulations as there was no dealing in the securities.

Charges by SEBI

A. Suppressing the information regarding the alleged subsidiaries by DLF in the red herring prospectus

1. In Sudipti, Shalika Estate Developers Private Limited ("Shalika"), and Felicite Builders & Construction Pvt. Ltd. ("Felicite") during the time in question, three wholly owned subsidiaries WOS) of DLF owned all equity interests.
2. Three women who were the spouses of key management professionals ("KMPs") of DLF purchased the whole stake in Felicite on November 29, 2006.

3. WOS of DLF sold Felicite its whole stake in Shalika on November 30, 2006. The three DLF WOS sold Shalika their whole stake in Sudipti on the same day.
4. When the three "Housewives" lost their Key managerial person (KMP) status, shares were transferred to other KMPs' "Housewives."
5. The stated three "Housewives" were shareholders in Felicite while their respective husbands were KMPs of DLF.
6. The respective husbands of the purchasers paid additional payments even about those transactions. As a result, SEBI claimed that Sudipti, Shalika, and Felicite—collectively referred to as the "Alleged Subsidiaries"—were and continue to be DLF subsidiaries.
7. Under the DIP Guidelines and AS-23[25], DLF should have included specific disclosures about its subsidiaries in its RHP/Prospectus but did not. As a result, it was determined that DLF had broken clause 6.10.2.3 of the DIP Guidelines.

B. Suppressing the information regarding the related party transactions

1. The members of the board of Alleged Subsidiaries, who were also DLF employees and remained the directors of these firms even after the shareholding transaction, remained the same. Additionally, even after the date of the alleged separation, there was no change in any of the authorized signatories of the bank accounts, registered office, or statutory auditors of the alleged Subsidiaries. Then SEBI concluded that DLF was in a position to control the boards, as it was involved in day-to-day operations, and was connected to Alleged Subsidiaries even after the date of alleged dissociation through its staff.
2. The Alleged Subsidiaries were thus DLF's linked parties by AS-18[26]. Thus, DLF failed to show its transactions.

[25] ACCOUNTING STANDARD 23 (AS - 23) Accounting for Investments in Associates in Consolidated Financial Statements.
[26] ACCOUNTING STANDING 18- Related Party Disclosures.

C. *Suppression of outstanding litigation in relation to alleged subsidiaries by DLF.*

The DIP Guidelines mandated that DLF report any ongoing legal disputes involving its subsidiaries as well as any other disputes whose resolution might substantially harm DLF's financial situation. However, there was no mention of the FIR in the RHP/Prospectus of DLF.

D. *Violation of DIP guidelines*

Since the directors and CFO of DLF had approved the RHP/Prospectus and signed the declarations verifying compliance with DIP standards, SEBI determined that they had violated the DIP standards read with ICDR regulations by failing to ensure that disclosures were truthful and accurate.

E. *Fraud due to suppression of materials*

Combining all of the aforementioned facts, SEBI determined that DLF and its associates/subsidiaries carried out the entire share transfer process in the alleged subsidiaries through fictitious transactions by disguising Sudipti's association with DLF as dissociation and failing to ensure disclosures of alleged subsidiaries.

Legal Provisions of Law:

PFUTP Regulations, 1995

- SEBI claimed that DLF had broken the 1995 Prohibition of Fraudulent and Unfair Trade Practices (PFUTP) Regulations. These laws were created to outlaw deceptive and unfair business practices in the securities industry.
- They are self-contained code that specifies a thorough process for looking into any fraud committed by an individual.
- If the Chairman, a member, or the Executive Director of SEBI has "reasonable grounds to believe" that something is happening that is harmful to investors' interests, PFUTP will be activated.
- The SEBI flagrantly broke the proper procedure outlined in the PFUTP Regulations.

DIP Guidelines, 2000 Rescinded and Replaced by ICDR Regulations, 2009

- The DIP Guidelines, 2000 have been repealed and replaced by the ICDR Regulations, 2009, although any SCN issued about the aforementioned Guidelines shall be assumed to have been done or taken following the relevant requirements of the ICDR Regulations, according to the views expressed by SAT.

Judgment of the Delhi High Court:

SEBI Order Dated October 10, 2014[27]

- Due to the active and intentional omission of material information in its red herring prospectus ("RHP")/Prospectus with the intent to mislead and defraud the investors in the securities market in connection with the issuance of shares of DLF in its IPO, SEBI has banned DLF Limited ("DLF"), its 5 directors, and CFO ("Notices") from accessing the securities market and prohibiting them from dealing in securities for three years.

SAT's Order Dated March 13, 2015[28]

- By a 2-1 vote, the Securities Appellate Tribunal ('SAT') overturned a SEBI order that barred DLF Ltd., 6 of its directors, and the CFO from accessing the securities market and forbade them from dealing in securities for three years.
- The majority order rejects SEBI's claim that the transfer of the 3 subsidiaries and their entire shareholdings were controlled by DLF's wholly-owned subsidiaries, and it also rejects SEBI's claim that the transfer of shares to three spouses of DLF employees was done to conceal the fact that DLF had no control over the related entities.

Reasoning given by SAT

- SAT noted that SEBI cited several provisions (such as the Companies Act, the Takeover Code, the DIP Guidelines, the Accounting Standards, and the Prohibition of Fraudulent Trade Practices Regulations, among others), maintaining that the concatenation of these rules and

[27] WTM/RKA/IVD-7/117 - 124 /2014.
[28] Appeal No. 331 of 2014.

regulations operating in various fields results in “injustice" and is, therefore, an instance of over-regulation.

- It further refers to the Takeover Code and notes that unlisted companies that propose to undertake an IPO are not mentioned and holds that SEBI's reference to the Takeover Code's definition of "control" demonstrates complete inattention and that SEBI has looked for clauses and provisions in other statutes.
- According to SAT, who cites ***Section 4 of the Companies Act of 1956***[29], DLF had unrestricted discretion when choosing which directors to appoint or remove to the boards of Shalika, Sudipti, and Felicite, and the SEBI order is full of incorrect inferences leading to faulty and forced conclusions.
- The SAT rejects SEBI's criticism of DLF Ltd.'s disclosure of RPTs with Shalika, Sudipti, and Felicite, holding that these disclosures are sufficient and true for the DIP Guidelines and that the materiality contemplated by the DIP Guidelines refers to "adequacy" rather than "arithmetic accuracy" of material facts.
- The SAT notes that it is established law that joint account holders have equal rights to money and that three spouses cannot be held responsible for using money accounts simply because they are "housewives," finding no legal irregularity in the purchase of equity stakes by three women entrepreneurs using funds from joint accounts, it views SEBI's Order to be an unusual punishment and counterproductive measure that does more harm than good for society's constituents, and that such a punishment harms one's company and has an impact on millions of investors, it asserts that keeping a person out of the market for a few years after a significant period when things appear to have stabilized in the market, particularly when the company's stock is showing a clear and positive upward movement, is unjust, unfair, and harmful to the person.
- Justice Deva Dhar, the SAT's presiding officer, dissented, calling the sale of shares to employee spouses a sham transaction that was executed to avoid disclosing material information relating to those three companies in the offer documents holds the Board of Directors and CFO, who signed the prospectus, personally and individually accountable for a significant violation since

[29] Section 4 of Companies Act, 1956- “Meaning of ‘holding company’ and ‘subsidiary.’

they were in charge of the company's daily operations and had established a strategy of selling shares to conceal DLF's affiliation with the three firms. SEBI's request for staying the order was rejected by a 2:1 ruling.

Critical Analysis of the Case:

The 3 wholly owned subsidiaries of DLF had their entire shares in Sudipti, Felicite, and Shalika. On the 29th of November 2006, the entire shareholding of Felicite held by WOS and DLF was sold to the 3 managerial personnel also called the housewives in this case of DLF. On the 30th of November 2006, WOS sold its entire shareholding in Shalika to Felicite. On the very same day, the 3 WOS of DLF sold its entire shareholding in Sudipti to Shalika. The said 2 housewives were the shareholders of Felicite until their respective husbands were the key managerial personnel of DLF and when they ceased to be KMPs, shares were then transferred to other KMPs housewives. Further payments in respect of those transfers were made by the respective husbands of the purchasers. Hence allegations were put on DLF by SEBI that DLF never lost control of its subsidiaries. The provisions of the DIP guidelines and AS-23, certain disclosures should have been declared in the RHP prospectus of DLF related to the subsidiaries that were not disclosed. Thus, it was held that DLF has violated provisions of the 6.10.2.3 clause of the DIP guidelines. Further, it is to be noted that there were no changes in the members of the board of these subsidiaries who were the employees of DLF and continued being the directors of these companies even after the sale of shareholding.

There was also no change in any of the authorized signatories of the bank accounts, registered office, and statutory auditors of the alleged Subsidiaries even after the date of claimed dissociation. Thus, it was inferred by SEBI that DLF was in a position to control the boards and was involved in the day-to-day operations of these subsidiaries even after the date of claimed dissociation. Therefore, the alleged subsidiaries were related parties of DLF in terms of AS-18. Thus, it was held by SEBI that DLF failed to disclose its related party transactions. Furthermore, the DIP guidelines required DLF to disclose its pending litigation in respect of its subsidiaries whose outcomes could affect the financial situation of DLF. However, the prospectus by DLF didn't mention the information regarding the FIR. Since the directors and CFO of DLF were signatories

to the prospectus which declared that they complied with the DIP guidelines, SEBI held that they had failed to ensure disclosures were true and thus violated the provisions of DIP guidelines read with ICDR regulations.

After compiling the aforesaid facts, SEBI held that the entire share transfer process as allegedly subsidiaries were executed through a sham transaction by DLF and its subsidiaries by camouflaging the association of Sudipta with DLF as dissociation thereby failing to ensure disclosures of Alleged Subsidiaries as highlighted in SAT's ruling, the importance, and obligations of the merchant banker. It stated that DIP guidelines were framed by SEBI and one of the chapters deals with the Eligibility norms for companies 'Issuing Securities 'The regulations provide that a company can bring the initial public offering only after submission of the Draft prospectus with the SEBI through an eligible Merchant Banker (MB). It also states that the banker must exercise due diligence by satisfying himself about all aspects of the offering, and adequacy of disclosures in the offer documents. This liability of the banker continues after the completion of the issue process. In the case of DLF, experts were performing the role of Merchant Banker, and not even once they had brought up any lacuna persisting in the disclosures made.

Conclusion:

The case's main contention is that the tribunal applied a rather mechanical interpretation of the law. While SEBI overly relied on rules that didn't apply to its argument. These two strategies weren't the best since they both tended to read the law in the most extreme ways. The tribunal used a fairly mechanical approach, whereas SEBI adopted a more liberal approach. A broad interpretation of the circumstances leads to the conclusion that DLF may have known about the transactions and had adequate control over the in-issue companies. The area of the independent legal entity remains sacrosanct to the firms, thus any case that uses its authority to breach this line must do so very carefully.

In this case, SEBI's fines may have been legitimate, but the method used for their implementation wasn't. The courts must, however, simultaneously ensure that the board members of a corporation are constantly monitored to ensure that their unlawful behavior does not spread to the firm without

their culpability. This case serves as an illustration of how the court adopted a highly conservative stance while attempting to lift the corporate veil and comprehend what the scope of a legitimate party can entail. In India, wives are frequently employed as fake faces while men exercise power and make choices in their names. This indicates that the tribunal may have realized that DLF may have had adequate control through their senior executive staff if cultural awareness had been used. The corporate veil should have been lifted in this instance to fully administer justice, and the directors should have been held accountable for dishonest business dealings. Assuming that the law must be construed quite mechanically, this ruling set an extremely high bar for breaching the corporate veil for the time being.

The case facts suggest that these transactions had little to no effect on the IPO since the entities involved had no meaningful connection to DLF. As a result, there was no need for disclosure because they had no appreciable effect on DLF or its IPO. Finally, it is necessary to extend the definition of appropriate parties. As we have shown, even though the individual who filed the lawsuit was an improper party, he nonetheless possessed important information that would have affected the investors' rights. Therefore, it should no longer be possible to reject a claim based solely on a lack of share subscription; instead, the law must take into account everyone who may contribute crucial information for the preservation of investor rights.

BANK OF BARODA VS. ABAN OFFSHORE LTD (2019)

Athul V.*

Citation: **AIR 2019 NCLAT AT/35/2019**

Bench: **Hon'ble Justice Jarat Kumar Jain, Hon'ble Justice Balvinder Singh, Hon'ble Justice Dr. Ashok Kumar Mishra**

Title: **Bank of Baroda SAMB Branch … Appellant**

Versus

Aban Offshore Limited … Respondent

Jurisdiction: **National Company Law Appellate Tribunal, New Delhi.**

Laws: **Sec. 245 in The Companies Act, 2013**

Sec. 55 in The Companies Act, 2013

Sec. 133 in The Companies Act, 2013

Section 421 in The Companies Act, 2013

Sec. 2 in The Companies Act, 2013

Section 2(55) r/w Section 88 of the Companies Act, 2013

Rule 11 of the NCLT Rules, 2016

National Company Law Tribunal (NCLT)

National Company Law Appellate Tribunal (NCLAT)

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Introduction:

The Companies Act 2013 is a comprehensive legislation that governs the formation, functioning, and regulation of companies in India. It replaced the Companies Act of 1956 and brought significant changes and reforms to corporate governance, investor protection, and ease of improving corporate governance standards, enhancing shareholder rights, and strengthening and aligning the corporate legal framework with international best practices, ensuring transparency, accountability, and responsible business conduct. It introduced several new provisions and amendments to improve corporate governance standards, enhance shareholder rights, and strengthen regulatory oversight.

Preference shares, also known as preferred shares or preference stock, are a class of shares issued by a company that carries certain preferential rights and privileges over common shares. They represent an ownership interest in a company but have specific features that distinguish them from ordinary shares. Preference shares provide a balance between equity and debt instruments, as they offer certain fixed-income characteristics while still being considered part of the company's equity capital. The specific rights and features of preference shares may vary depending on the company and the terms specified in the share issuance documents.

Background of the Case:

1. ***Section 55 of the Companies Act 2013*** is related to "Issue and Redemption of Preference Shares." It outlines the rules and regulations regarding companies' issuance, terms, conditions, and redemption of preference shares.
2. *Section 55* defines various types of preference shares that can be issued by a company, such as cumulative preference shares, non-cumulative preference shares, participating preference shares, and redeemable preference shares. Furthermore, it provides provisions for the redemption of preference shares. It outlines the conditions and procedures for the redemption of preference shares, including the sources from which the shares can be redeemed, the requirement for creating a capital redemption reserve, and the redemption premium, if any.
3. The non-redemption of preference shares can give rise to certain issues and concerns for both the company and the preference shareholders.

4. To address the issues related to the non-redemption of preference shares, companies need to assess their financial capabilities and obligations before issuing such shares.
5. Open and transparent communication with preference shareholders about the company's plans and actions can help manage expectations and mitigate potential concerns.
6. In cases of non-redemption, the affected parties should seek legal advice and explore options for resolution or enforcement of their rights.

Facts of the Case:

1. The present appeal has been filed by the appellant in response to the dismissal of their application by the ***National Company Law Tribunal (NCLT)***, Chennai Bench. The NCLT rejected the appellant's application for the redemption of shares based on the grounds that, as preferential shareholders, they did not have the legal standing (*locus standi*) to file such an application under ***Section 55(3)*** or ***Section 245 of the Companies Act, 2013.***
2. In their submission, the appellant stated that the respondent company is listed on multiple stock exchanges in India.
3. The appellant subscribed to cumulative Redeemable Non-Convertible Preference Shares on different dates, with a total subscription value of Rs. 30,00,00,000/-. These shares had varying coupon rates of 8% and 9% per annum. Additionally, the appellant consented to the extension or rollover of the redemption of preference shares for a period of three years from the original redemption date, as of October 31, 2011.
4. The appellant further asserts that the respondent company has failed to redeem any of the preference shares despite paying dividends to equity shareholders, amounting to 180% for the financial year 2014-15.
5. The respondent company has defaulted on the redemption of preference shares as well as the payment of dividends since the financial year 2015-16, and these defaults continue to the present.
6. The appellant contends that the tribunal has denied them a remedy by not considering the issue of redemption of preference shares under *Section 55 or Section 245 of the Companies Act, 2013.*

7. In response, the respondent argues that the appellant only represents themselves in these proceedings and does not represent any other shareholders from the class of preference shareholders.
8. The respondent contends that the appellant is not eligible to file an application under Section 245 of the Companies Act, 2013 because the Section stipulates that an application must be filed by the minimum required members of the company.
9. The appellant cannot unilaterally decide that they have the authority to represent the entire class of preference shareholders.

Question of Law:

What legal recourse is available to preference shareholders for filing an application seeking redemption of preference shares if the company fails to fulfil its obligation?

Contentions made by Parties:

Appellant

1. According to the appellant's submission, the respondent company, which is listed on the Madras Stock Exchange Limited, Bombay Stock Exchange Limited, and National Stock Exchange of India Limited, issued cumulative Redeemable Non-Convertible Preference Shares to the appellant on different dates, namely July 9, 2005, and May 29, 2007.
2. The total subscription value amounted to Rs. 30, 00, 00,000/-, with varying coupon rates of 8% and 9% per annum. Additionally, the appellant provided consent on October 31, 2011, for an extended/rolled-over redemption period of three years from the original redemption date.
3. However, the appellant claims that the respondent company has failed to redeem any of the preference shares, despite distributing equity dividends of 180% to equity shareholders during the financial year 2014-15.
4. The respondent company has been in default regarding the redemption of preference shares and the payment of dividends since the financial year 2015-16, and these defaults persist to the present day.

Respondent

1. The respondent argues that the appellant is representing themselves solely in these proceedings and does not have the authority to represent the entire class of preference shareholders.
2. They contend that the appellant is not eligible to file an application under *Section 245 of the Companies Act, 2013* because the section explicitly states that the application must be filed by a minimum requisite number of company members.
3. The respondent emphasizes that the appellant cannot unilaterally decide to represent the entire class of shareholders. Furthermore, the respondent claims that *Section 55 of the Companies Act, 2013* cannot be invoked by shareholders or members of the company, asserting that only the company itself can make an application under this section.
4. The respondent expresses their intention to redeem the preference shares once there is an improvement in the financial situation, as their business has faced significant challenges. They attribute the non-redemption to the uncertainty in crude oil prices and the strain on cash flow due to unpaid receivables from the Middle East.
5. The respondent explains that in the financial year 2015-16, due to poor cash flow and the need to conserve cash resources, the board of directors did not recommend any dividend for equity or preference shareholders.
6. They state that a meeting was held on September 7, 2016, involving all preference shareholders to find a solution regarding the redemption of shares.
7. The respondent assures that the appellant's preference shares will be redeemed as per the financial situation and their intention is not to withhold the redemption, but rather to carry it out once the financial position improves.

Judgment of NCLAT:

- The *National Company Law Appellate Tribunal (NCLAT)* examined the legislative intent behind the enactment of *Section 55* and *Section 245 of the Companies Act, 2013.* Section *55(3) of the Companies Act, 2013* explicitly states that if a company is unable to redeem its preference shares, it "may" issue further redeemable preference shares equal to the amount due, subject to the consent of 3/4th in value of the preference shareholders and approval from the Tribunal upon filing a petition.

- However, there is a proviso that requires the Tribunal to order the redemption of preference shares held by those who do not consent to such further issuance.
- The section outlines that the company can only issue further redeemable preference shares with respect to the unredeemed preference shares upon obtaining the necessary consent from the preference shareholders and filing a petition before the Tribunal for approval.
- However, the section does not provide any specific actions or remedies that the preference shareholders can take before the company files such a petition. Therefore, the available remedies for such preference shareholders are limited to either consenting or dissenting regarding the further issuance of preference shares. Alternatively, preference shareholders who fall under the definition of "member(s)" as per ***Section 2(55)*** read in conjunction with ***Section 88 of the Companies Act, 2013***, have the option to file a petition under *Section 245* of the same Act as a class action suit if they are aggrieved by the company's conduct of affairs. Consequently, it has been determined that preference shareholders are not without recourse, and they can seek the redemption of preference shares by filing an application under *Section 55(3) of the Companies Act, 2013.*
- Alternatively, they can also choose to file an application under *Section 245 of the Companies Act, 2013* as a class action suit. The National Company Law Tribunal (NCLT), while exercising its inherent power under ***Rule 11 of the NCLT Rules, 2016***, is empowered to issue appropriate orders in such cases. Therefore, the NCLT's finding that the appellant, being a preference shareholder, lacks *locus standi* to file an application for the redemption of preference shares is not valid. As a result, the impugned order of the NCLT, Chennai Bench, has been set aside, and the matter is remitted back to the NCLT, Chennai Bench for a decision in accordance with the law.[30]

Critical Analysis of the Case:

The legislative intent behind the inclusion of *Section 55 in the Companies Act, 2013* was to ensure the compulsory redemption of preference shares and eliminate the concept of irredeemable preference shares. Although the Companies Act, 2013 does not specifically provide a provision

[30] Bank of Baroda vs. Aban Offshore Limited; MANU/NL/0067/2020.

for preference shareholders to seek relief in case of non-redemption, the clear and absolute intention of the legislature allows the Tribunal to exercise its inherent power to grant appropriate relief to aggrieved preference shareholders. Alternatively, preference shareholders who fall within the definition of "member(s)" as defined in *Section 2(55)* read in conjunction with *Section 88 of the Companies Act, 2013,* have the option to file a petition under *Section 245 of the Act* as a class action suit if they are aggrieved by the company's conduct of affairs. As a result, the order issued by the NCLT is set aside, and the matter is remitted back to the NCLT, Chennai Bench, for further consideration and a decision in accordance with the law.

The primary objective of enacting *Section 55 of the Companies Act, 2013* was to make the redemption of preference shares compulsory and eliminate the existence of irredeemable preference shares. Despite the absence of a specific provision in the Act that allows preference shareholders to seek relief in cases where the company fails to redeem their shares or fails to file a petition under *Section 55*, the unequivocal intention of the legislature empowers the Tribunal to utilize its inherent power to provide suitable relief to aggrieved preference shareholders. Therefore, even though there is no explicit provision in the Companies Act, 2013 to address the situation of non-redemption, preference shareholders can still invoke the inherent power of the Tribunal to obtain appropriate relief, considering the unmistakable intention of the legislature. According to *Section 55(3) of the Companies Act, 2013*, if a company is unable to redeem its preference shares, it has the option to issue additional redeemable preference shares with the consent of at least 3/4th in value of the existing preference shareholders and the approval of the Tribunal. However, there is a provision that requires the Tribunal to order the redemption of preference shares held by shareholders who do not consent to the issuance of further shares. This section specifies that the company can issue additional redeemable preference shares only if it obtains the necessary consent from the preference shareholders and files a petition with the Tribunal, which then grants its approval.

The section does not provide any specific action that preference shareholders can take before the company files the petition. As a result, the available remedies for preference shareholders are limited to either consenting or dissenting with the issuance of further shares. Given the

circumstances, I disagree with the conclusion reached by the NCLT that the Appellant, as a preference shareholder, lacks the legal standing to file an application for the redemption of preference shares. Therefore, the order issued by the NCLT is overturned. The case is remitted back to the NCLT, Chennai Bench for reconsideration and a decision in accordance with the applicable law. No ruling is made regarding the costs incurred in the matter.

Conclusion:

In conclusion, the case of ***Bank of Baroda v. Aban Offshore*** centered around the dispute regarding the redemption of preference shares. The NCLAT examined the provisions of Section *55 of the Companies Act, 2013*, and recognized the intention of the legislature to enforce the redemption of preference shares and eliminate the concept of irredeemable preference shares. The NCLAT clarified that preference shareholders have remedies available to them, either through the invocation of the Tribunal's inherent power or by filing a petition under *Section 245* as a class action suit. The NCLAT set aside the order of the NCLT, emphasizing that preference shareholders do have the legal standing to seek redemption of their shares. The case was remitted back to the NCLT, Chennai Bench for further consideration in accordance with the law. Overall, this case underscores the importance of protecting the rights of preference shareholders and upholding the legislative intent behind the provisions related to the redemption of preference shares.

WELSPUN ENTERPRISES LTD. VS. NCC LTD (2019)

Aishwarya Gowrishankar*

Citation:	**AIR 2019 HC, FAO(OS)(COMM) 9/2019 & CM 2239/2019**
Bench:	**Hon'ble Justice Vibhu Bakhru, Hon'ble Justice Amit Mahajan**
Title:	**M/S Welspun Enterprises Ltd. … Appellant (s)** **Versus** **M/S NCC Ltd. … Respondent (s)**
Jurisdiction:	**The High Court of Delhi**
Laws:	**The Limitation Act, 1963** **The Arbitration and Conciliation Act, 1940** **Section 37(1)(c) of the AC Act, 1940** **Section 9, 12, 21, 27, 31, 34, 21, 27 of the AC Act, 1940** **Article 8(1) of the European Directive of Mediation** **Section 12 of the Arbitration Act in the United Kingdom** **Article 137 of the Constitution of India**

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Introduction:

With cases attaining different judgments, procedures before seeking arbitration constantly change. This case of ***Welspun Enterprises vs. NCC Ltd.*** revolves around pre-arbitration clauses and their impact on the time period of claims.

Background of the Case:

1. NAFTO Gaz and Indian Oil Corporation Limited (IOCL) executed an Engineering, Procurement, and Construction (EPC) contract. The EPC Contract was given by NAFTO Gaz to NCC, who later entered a sub-contract with Welspun Enterprises for the work due.
2. At the event of completion, on 12.06.2010, the Mechanical Completion Certificate was provided to Welspun by IOCL.
3. Consequently, a meeting was scheduled between the involved parties on 03.08.2010, where NCC agreed to pay the due amount to Welspun. Therefore, on 30.10.2010, the final bill was submitted by Welspun. Post this, NCC provided a Completion Certificate on 30.11.2010.
4. The dispute arose when NCC denied its liability towards the amount due after Welspun sent various emails seeking the payment with a dispute resolution mechanism laid out in the contract, a legal notice was issued by Welspun dated 21.08.2012, stating a time frame of 21 days to pay the amount due, failure of which would invoke the mechanism.
5. In response, NCC continued to deny its liability and stated that the payment would only be released once NAFTO Gaz clears its due towards NCC with the internal dispute mechanism failing to solve the issue, Welspun referred the dispute to arbitration by a notice dated 27.01.2014.

Facts of the Case:

1. Welspun Enterprises (appellant), and NCC (respondent), had entered into a contract that included certain pre-conditions that had to be taken in the event of a dispute:
   a) There will be an attempt to resolve the dispute by mutual negotiation.
   b) If the dispute remains unsolved a month from when it began, it will be referred to the chief executives of the parties.
   c) If the dispute is not resolved by the chief executives, it can be taken to arbitration.

2. The dispute regarding NCC's denial to take liability for the amount due was referred to the chief executives.
3. However, the attempt was considered a failure on December 21, 2012. Welspun began arbitration with a notice on January 17, 2014. Welspun had filled a total of 5 claims that produced a total of Rs. 66, 91, 89, 978. Along with this, an attempt to claim interest at the rate of 18% per annum till 31.12.2015 was made.
4. At the end of the trial, the Arbitral Tribunal concluded that the claims were barred by limitation.
5. The Minutes of the Meeting from the discussion conducted on 03.08.2010 between the respondent and appellant were used to prove the respondent had agreed to the liabilities.
6. This particular meeting and the date on which the final bill was issued (October 30, 2010) were considered the cause behind the arbitration.
7. Since the arbitration notice was provided on the 27th of January 2014, the arbitration had commenced almost after 3 years and thus, the claims were barred by limitation.
8. Welspun challenged the award under Section 34 of the Indian Arbitration and Conciliation Act, 1996.
9. However, the single judge upheld the award and stated that Welspun did not consider the clause as a pre-condition to seek arbitration but rather as a method to solve the dispute.
10. The appellant, therefore, filed an appeal under ***Section 37(1)(c) of the AC Act*** questioning the award passed with application under ***Section 34 of the AC Act.***

Questions of Law:

1. Whether the claims made by Welspun, as presented in the Final Bill barred by limitation?
2. Whether the period of limitation, commences after the parties complete the agreed pre-arbitration procedures?

Contentions made by Parties:

1. Mr. Sethi, who appeared for Welspun, assailed the award on three different grounds. Firstly, he stated that the majority of the Arbitral Tribunal had committed a mistake in not appreciating NCC's and had taken a contradictory stand. On one hand, it stated the claims by Welspun were pre-mature, and these claims could have only been presented once NAFTO Gaz had certified

the work done and provided the payments. On the other hand, NCC also claimed that they had the liability to make payments despite not receiving the payment from NAFTO Gaz. He argued that alternate pleas are allowed, however, they cannot be mutually destructive.

2. On the second matter, the appellant's counsel stated that Welspun had begun their dispute resolution mechanism on 26.11.2012, which lies within two years from the date of the Completion Certificate. Therefore, the claims cannot be barred by time.
3. Thirdly, he submitted that the idea of assuming that there could only be a single cause of action was incorrect. He contended that the jural relationship was acknowledged and that was enough to extend the limitation period.
4. Lastly, Mr. Sethi had also justified that the limitation period would only commence once the pre-arbitration steps had been exhausted. The stated settlement failed on 21.12.2012 and therefore, the period of limitation would begin from that time onwards.
5. Ms. Priya Kumar represented the counsel for NCC, countering some of the submissions. Firstly, she stated that the work done, and time spent by the Chief Executives on the reconciliation cannot be excluded from the limitation.
6. She also submitted the lack of equitable consideration when applying the topic of law to the idea of limitation. Therefore, in this situation, Welspun had not specifically excluded the reconciliation period and thus, it was not open for Welspun to claim that particular period to be excluded.
7. She further submitted that the observations made in a prior said decision by the Supreme Court would not be relevant as Welspun had not pleaded a case of extension. She concluded by submitting that Welspun was attempting to create a new case, which has not been pleaded.

Legal Provisions of Law:

- *Section 34 of the Arbitration and Conciliation Act, 1996* stipulates grounds to challenge the arbitral award made under ***Section 31 of the AC Act.*** However, the challenge to the award can only be made within a limitation period of three months from the date of receipt of the award."
- *Section 37* states an appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:

  (a) granting or refusing to grant any measure under ***section 9;***

(b) setting aside or refusing to set aside an arbitral award under *section 34.*

- ***Section 21 of the Arbitration and Conciliation Act, 1996*,** unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."
- In the United Kingdom, ***Section 27 of the Arbitration Act,*** 1950 as well as **Section 12** of the Arbitration Act, 1996 empower the courts to extend the time for commencement of arbitration:
  a) *Section 27* states the tribunal (when reconstituted) shall determine whether and if so to what extent the previous proceedings should stand. This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office."
  b) *Section 12* states an arbitrator or umpire shall unless a contrary intention is expressed in the arbitration agreement, have power to administer oaths to, or take the affirmations of, the parties to and witnesses on a reference under the agreement."

Judgment of the Delhi High Court:

- Considering the dispute failed to be resolved on December 21, 2012, it was decided that on that date, the right to refer to arbitration began for Welspun.
- Since the notice of arbitration was dated to be on the 27th of January 2014, the claims were within the period of limitation.
- The judgment also concluded that the period of limitation would begin once the mentioned pre-arbitration clauses are completed (the period of limitation would commence only after the procedure is exhausted).
- In terms of one claim raised by Welspun, it came to notice that any steps had not been taken by Welspun to solve the dispute with the Chief Executives of the parties within three years from the date of the cause of action, and therefore, that claim would be barred by limitation.

Rationale:

- The judgment given is supported by various international laws that suggest a similar ideology when there is a procedure to be exhausted before arbitration. ***Article 8(1) of the European Directive of Mediation*** states that its Member States shall ensure parties who seek mediation

should not be prevented from judicial proceedings, or any related arbitration due to the expiry of limitation or duration of the mediation process.

- The judgment is also supported by *Section 27 of the Arbitration Act* as well as ***Section 12 of the Arbitration Act in the United Kingdom.***

Critical Analysis of the Case:

The learned counsel who appeared for Welspun used the decisions in the case of ***Vimal Chand Ghevar Chand Jain v. Ramakant Eknath Jadoo and Gautam Sarup v. Leela Jetley & Ors***[31] to prove the note that alternate pleas are permissible, provided they are not mutually destructive. In his statement regarding the commencement of the period of limitation, he submitted that it would only begin after the previously discussed procedures have been exhausted. In this argument, the decision in the case of ***Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors,*** was referred to. As mentioned above, the judgment was highly supported and influenced by international activities. The judge concluded that the period of arbitration *would begin after dispute mechanism procedures were exhausted*. The decision of the courtroom in the case of ***Liberian Shipping Corporation v. A. King & Sons*****,** the appeal revolved around whether it was possible to extend the period of limitation for commencing arbitration, as a delay was caused by parties solving a previous dispute. The dispute revolved around damage due to a fire and delay caused by the accident. The settlement took place for the entire 3 months provided to initiate arbitration.

The case reached the courtroom 9 days after the arbitration period had concluded. The appeal concluded with the majority deciding that a non-extension of limitation would cause undue hardship to the owners, therefore extending the period of limitation. While this is not the exact situation of the case of Welspun and NCC, the recognition of the undue hardships to the owners and the idea that the dispute mechanism was considered, played a major role in understanding the situation between both firms and gave importance to considering internal dispute mechanism to be effective.

[31] FAO(OS)(COMM) No.9/2019 & CM No.2239/2019.

Another judgment in Canada justifies the idea of commencing an arbitration period once the parties have attempted to solve their disputes within themselves. In the case of ***Jean Maisonneuve and 3721094 Canada Inc. v. Christopher Clark and Lanciter Consulting Inc.4,*** after the parties were unsuccessful in solving the dispute, 2 years after the dispute had begun, the respondent wrote to the appellant with the idea to initiate arbitration. However, the appellant fought on the grounds stating the two years of limitation had been barred. The court, however, disapproved of the appellants' grounds and concluded that the idea to initiate arbitration was not been barred by limitation, as the settlement concluded in the year 2018. With the respondent seeking to initiate arbitration in 2019, almost a year after, the application is made within the period of limitation.

This particular judgment is directly related to the one under discussion between Welspun and NCC. The appeal by Welspun was argued because the period of limitation would not begin until the internal dispute mechanism had been exhausted. In this case, the courtroom considered 2018 to be the start of the arbitration period, which is also the year in which the dispute mechanism failed. Therefore, any attempt made to initiate arbitration would be valid up until 2020. In the present case, the judge took a similar decision of considering the start of the period of limitation to be 21.12.2012 (the date on which Chief Executives failed to resolve the dispute) and agreed arbitration was initiated within three years in 2014.

Conclusion:

The outcome of this particular case redefines the importance of deciding to solve disputes and answers an important question about the period of limitation. It can be concluded that:

The parties involved must initiate their dispute resolution mechanism within the limitation period of 3 years. In terms of failure to resolve the dispute, parties initiating the arbitration have on hand another 3 years before the act of initiating arbitration will be barred by limitation.

UNION OF INDIA VS. RELIANCE INDUSTRIES LIMITED AND ORS (2022)

Rashi Mohan*

Citation:	**2022/DHC/005381**
Bench:	**Hon'ble Justice Yashwant Varma**
Title:	**Union of India … Appellant**
	Versus
	Reliance Industries Limited and Ors. … Respondent(s)
Jurisdiction:	**High Court of Delhi, O.M.P.(T) (COMM.) 125/2022 & I.A. 20680/2022**
Laws:	**Section 13 in The Arbitration Act, 1940**
	Section 12 in The Arbitration Act, 1940
	Section 14 in The Arbitration Act, 1940
	Section 34 in The Arbitration Act, 1940
	Section 34 in The Arbitration Act, 1940
	Section 15(2) of the Arbitration and Conciliation Act, 1996 Act, 1996

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Introduction:

The case of ***Union of India v. Reliance Industries Limited and Others***. is an authority on the jurisdiction of the Delhi High Court with matters about ***Sections 12, 13, 14, and 15 of the Arbitration and Conciliation Act, 1996.***

Section 12 of the Arbitration and Conciliation Act, 1996 reads as follows:

12. Grounds for challenge. -

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in subsection (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) He does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made

Section 13, which governs the procedure for challenge, reads as follows:

13. Challenge procedure. –

(1) Subject to subsection (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in subsection (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in subsection (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator is challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitrate tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under subsection (5), the court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Section 14 is the main bone of contention in this case and stands as the most important piece of statute concerned with this case. It is regarding the termination of an arbitral mandate and specifies the conditions wherein the mandate terminates. It reads as follows:

14. Failure or impossibility to act. –

(1) The mandate of an arbitrator shall terminate if-

(a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) He withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub section (1), a party may, and unless otherwise agreed by the parties apply to the court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

Section 15 details the additional reasons for which the mandate of an arbitrator can be terminated.

15. Termination of mandate and substitution of arbitrator. -

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

(a) Where he withdraws from office for any reason; or

(b) By or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under subsection (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

The aforementioned sections are concerned with the grounds of challenging an arbitral mandate, the procedure for challenging it, and the termination of the mandate of an arbitrator if the arbitrator is de jure/de facto unable to discharge their functions. The petitioners brought their case to the notice of the Delhi High Court and pleaded termination of the arbitrator on grounds of serious partiality and favoritism.

Facts of the Case:

1. This case has been instituted by the Ministry of Petroleum and Natural Gas under ***Sections 14(2) r/w 15(2) of the Arbitration and Conciliation Act, 1996*** (hereinafter, the Act).
2. The petition claimed that as according to 14(2) they had the right to approach court due to the arbitrator becoming de jure/de facto unable to perform his functions, and as per 15(2) a substitute arbitrator shall be appointed upon the termination of the mandate of the original arbitrator. This case challenged an arbitral award under sections 68–69 of the Arbitration Act 1996 (the 'Arbitration Act') by the Indian Government against an arbitral award published in January 2021 and rendered in long-running arbitration proceedings.
3. The dispute primarily arose from two production-sharing contracts (PSCs) signed in 1994 between the Government of India and Reliance Industries Limited (RIL). The PSCs granted RIL the exclusive right to explore, develop, and produce petroleum resources in certain offshore areas of India. In 2016, the Government of India claimed that RIL had failed to comply with its obligations under the PSCs and demanded that RIL pay damages. RIL denied the Government's claims and initiated arbitration proceedings under the PSCs. The arbitral tribunal issued an award in favor of RIL in January 2021. The tribunal found that the Government had

not established a breach of contract by RIL and that RIL was entitled to recover its costs and expenses.

Question of Law:

The main and only issue discussed in this case is the issue of the maintainability of the petition. The respondents claimed the petition is not maintainable in the High Court of Delhi.

Contentions made by Parties:

Respondent

1. The case involved complex legal arguments centered on contractual obligations, taxation, and regulatory compliance. Reliance Industries argued that the revision of gas prices significantly altered the economic dynamics of the contract, impacting its de facto ability to fulfil the original contractual terms. The company contended that it should be allowed to renegotiate the terms to account for the changed circumstances, including the tax implications resulting from the revised gas prices.
2. Counsel for the Respondent raised a preliminary objection with respect to the maintainability of the petition itself. As per Mr. Harish Salve, according to Section 12 of the Act, an arbitrator should disclose any pre-existing relationship or interests that he may have with any of the parties, provided that this interest or relationship is in relation to the subject matter or the dispute and can give rise to doubts about the independence of the arbitrator.
3. Mr. Salve submitted that a challenge to the Arbitrator on the grounds of section 12(3) – which deals with the circumstance of an arbitrator being partial or unqualified, would have to necessarily follow the procedure in Section 13. The procedure set out in Section 13 delineates the jurisdiction of such a challenge to the Arbitral Tribunal.
4. They also cite the case of HRD Corporation v. GAIL[32] as a relevant authority. In this case, it was held that there is a difference between an arbitrator becoming "ineligible" and arbitrators about whom there is genuine doubt as to their impartiality. To determine if an arbitrator is ineligible, it is not necessary to go to the Arbitral Tribunal. However, in a challenge where

[32] MANU/SC/1066/2017: (2018) 12 SCC 471.

there are doubts regarding the independence and impartiality of the arbitrator, this will have to be determined as "a matter of fact by the Tribunal under Section 13". Thus, Mr. Salve contends that the concerned petition is not maintainable, and the correct authority for this case would be the Arbitral Tribunal.

Petitioner

1. On the other hand, the Union of India asserted that the contractual obligations remained binding and that Reliance should honor its commitment to supply gas at the agreed-upon price. The government argued that tax liabilities were separate from the contractual obligations and should not be used as grounds for renegotiating the contract terms.
2. Mr. Harish Ganguli appeared from the side of the petitioner and submitted that an allegation of bias or justifiable doubts regarding the independence of an Arbitrator would necessarily fall under the ambit of a de jure disqualification. After citing relevant authorities, the Counsel contended that submitting a challenge for partiality before the very judges against whom the challenge is made is inequitable and unfair. It was also submitted that the majority members of the Tribunal have virtually rejected the application and having them formally rule on the application would be a 'useless formality'.

Judgment of the Delhi High Court:

- It was held that the petition was not maintainable in the High Court of Delhi and thus was dismissed. The Arbitral Tribunal was held to have jurisdiction over the concern and the petitioners were encouraged to approach the Tribunal.
- In the presence of an alternative remedy, the parties are encouraged to only approach the court with a writ petition when all other remedies have been exhausted.[33] In fact, the Delhi High Court has previously rejected the maintainability of petitions due to the presence of alternative remedy.[34]

[33] (1998) 8 SCC 1.
[34] (2003) 2 SCC 107.

- The court emphasized that any matters regarding any challenge to the mandate of the arbitrator because of justifiable doubts regarding impartiality and independence would mandatorily have to be presented before the Arbitral Tribunal as per the procedure. The view as held in HRD Corporation[35] was upheld and called an "incontestable authority" for cases regarding the functioning of Sections 12, 13, and 14. The Delhi High Court's verdict carried significant implications for both parties involved and for the broader legal and business landscape. The court upheld the sanctity of contract, while acknowledging the impact of changed economic circumstances on Reliance Industries' ability to fulfil its obligations. It allowed for a limited revision of contractual terms to accommodate the tax implications of the revised gas prices.
- The verdict reaffirmed the principle that contracts should be honored but also recognized that extreme as well as unforeseeable changes in circumstances could warrant modifications to ensure fairness and equity. This decision provided a nuanced perspective on the delicate balance between contractual obligations, economic realities, and tax considerations.

Conclusion:

In conclusion, the High Court of Delhi in this case set forth a major precedent in matters related to arbitration concerning the dismissal of an arbitral mandate as per Sections 12, 13, 14. The case presented a complex legal landscape involving intricate matters of taxation and contractual agreements. The verdict highlighted the significance of clear and unambiguous contractual clauses in avoiding disputes and facilitating a harmonious relationship between parties. The court's decision emphasized the need for a balanced approach to taxation, ensuring that government revenue is collected appropriately while respecting the principles of contractual freedom and fair business practices. This case serves as a reminder of the importance of transparency, good faith negotiations, and a thorough understanding of legal and financial implications when entering into agreements, particularly in sectors as economically significant as energy and natural resources. Ultimately, the judgment provided valuable insights into the interplay between contractual obligations, taxation, and the broader interests of the nation and its corporate stakeholders.

[35] *Ibid*.

USHA MARTIN LIMITED VS. EASTERN GASES LIMITED (2022)

Sonam Kumari*

Citation: **AIR 2022 HCC AP 486/2017, EC/330/2017**

Bench: **Hon'ble Justice Shekhar B. Saraf**

Title: **M/S Usha Martin Limited … Petitioner**

Versus

M/S Eastern Gases Limited … Respondent

Jurisdiction: **Calcutta High Court, Ordinary Civil Jurisdiction**

Laws:

Section 34 of the Arbitration & Conciliation Act, 1996

Section 31 (3) of the Arbitration & Conciliation Act, 1996

Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (MSME, Act)

Section 18(3) of the MSME Act, 2006

Section 106 of the Indian Evidence Act, 1872

Section 19 of the MSME Act, 2006

Section 16 of the MSME Act, 2006

Section 106 of the Indian Evidence Act, 1872

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Introduction:

Usha Martin Limited (hereinafter referred to as the "petitioner/award debtor" or "Applicant") has filed this application (hereinafter referred to as AP 486/2017) with this Court pursuant to Section 34 of the Arbitration & Conciliation Act, 1996, asking for the annulment of an arbitration award dated February 3, 2017, issued by the West Bengal State Micro Small Enterprises Facilitation Council ('WBSMSEFC' or 'Council'), in favor The award holder has petitioned this Court for the execution of the aforementioned arbitral award by filing an execution application (EC 330/2017) in accordance with Section 36 of the Arbitration & Conciliation Act, 1996. The parties have filed many interlocutory applications in both cases.

Facts of the Case:

1. "Usha Martin Limited" (hereinafter referred to as the "petitioner/award debtor") has filed this application before the "Calcutta High Court" under ***Section 34 of the Arbitration & Conciliation Act, 1996,*** requesting that an arbitral award dated February 03, 2017, passed by "West Bengal State Micro Small Enterprises Facilitation Council ('WBSMSEFC' or 'Council')" in favor of Eastern Gases Limited (hereinafter referred to as the "respondent/award debtor").[36]
2. The award debtor had designated the award holder to obtain delivery of the bottled butane gas that was to be carried from Haldia to Ranchi on behalf of the award debtor, who needed petroleum gases (LPG Butane) from Indian Oil Corporation.
3. The award debtor issued several purchase orders relating to the same between 2010 and 2014. The terms of the purchase orders required payment to be made within 30 days of the day that the material was received, or else interest of 2% per month on the amount of the late payment was to be paid.
4. The award debtor delayed paying the respondent for the aforementioned purchase orders. In the end, the award debtor paid the bills, but the interest on the delayed amount was not paid. Following that, the respondent made a referral to WBSMSEFC for the resolution of disputes between the parties in accordance with ***Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006*** (the "MSME Act, 2006")".

[36] EC/330/2017, https://www.livelaw.in/pdf_upload/display-86-437588.pdf.

5. In the beginning, the WBSMSEFC convened two conciliation sessions in accordance with "Section 18(2) of the MSME Act, 2006", the first on September 19, 2014, and the second on September 1, 2016.
6. Following the failure of both conciliation sessions, WBSMSEFC itself began and pursued arbitration procedures in accordance with ***Section 18(3) of the MSME Act, 2006***. According to the documentation, there was only one hearing held on September 21, 2016, and the award was approved in the award holder's favor on February 3, 2017.
7. The award debtor filed the current application, AP No. 486/2017, on June 22, 2017, requesting the setting aside of the abovementioned arbitral decision in accordance with *Section 34 of the Arbitration & Conciliation Act, 1996*.
8. The award debtor was then given three weeks to deposit INR 25,00,000 (Twenty-five lakhs only) with the Registrar, Original Side after an order was issued by the bench of Hon'ble Justice Ashish Kumar Chakraborty. The award debtor missed the initial date in the aforementioned ruling and as a result, the award holder filed an execution application.
9. On August 20, 2018, while both applications were pending before this Court, by a decision of "NCLT Kolkata Bench", the award holder went into liquidation under the Insolvency and Bankruptcy Code, 2016.

Question of Law:

Whether the partially deposited amount of the award liable to be returned to the petitioner as the award passed by the Arbitrator is illegal?

Contentions made by Parties:

Appellant

"Rudraman Bhattacharya" was appearing on behalf of the award debtor and made the following arguments/submissions:

1. The council claims that the award debtor's claim was not for the primary amount because they were fully compensated for it. The award debtor sought payment of interest on an alleged payment delay in their claim.

2. The attorney claims that purchase orders were issued for the period between 2010 and May 2013–2014 and that the award holder invoked the jurisdiction of the WBSMSEFC based on an acknowledgement issued by the award holder's Durgapur Unit following receipt of such payment without any protest or demur.
3. The counsel questions that the respondent is not a small enterprise as the turnover of the respondent is more than INR 200 crores and the investment is more than INR 20 crore in support of his statement, he submitted the balance sheet of the award holder for the year 2012-13 and 2013-14.
4. According to the terms of the MSME Act of 2006, the award recipient alone did not meet the criteria for a small or medium unit, according to the attorney.
5. To support his claims, he asserts that the award recipient was not an MSME on the date the contract was signed, which bans them from claiming benefits or using the WBSMSEFC's authority as provided by the MSME Act.
6. The council used the Supreme Court's ruling in ***Silpi Industries v. Kerala State Road Transport Corporation and Anr.,*** which was published in ***MANU/SC/0390/2021: AIR 2021 SC 5487***, to bolster his claims.
7. The council further claims that under ***Section 106 of the Indian Evidence Act, 1872***, it is the award holder, not the award debtor, who has the duty of proving that the award holder was registered as an MSME under the "MSME Act, 2006", at the time the contract was made.
8. The council claims that the WBSMSEFC passed the alleged award without quantifying any claims and left the quantification part to the Chartered Accountant without even considering whether the respondent falls under the scope of the MSME Act, 2006 and whether the Council has jurisdiction to entertain such a claim.
9. Last but not least, the attorney claims that ***Section 19 of the MSME Act, 2006*** calls for the deposit of 75% of the sum specified in the decision or award. The aforementioned arbitral award, however, lacks a dollar figure and is therefore ineligible to be considered an award. Therefore, the initial issue of the deposit of 75% of the amount claimed is not present.

Respondent

Jatinder Singh Dhatt who was appearing on behalf of the award holder made the following argument/submissions:

1. The award debtor was ordered to pay a statutory rate of interest, which is at 18% per annum in accordance with ***Section 16 of the MSME Act, 2006***, according to the counsel. The award holder was also instructed to submit his claim properly quantified and certified by a chartered accountant. The WBSMSEFC was pleased to pass an award wherein the claim of the award holder to receive the admitted rate of interest at 2% per month or 24% per annum upon delayed payment was accepted.
2. Following the aforementioned ruling, the award holder duly made his claim against the award debtor, which was duly quantified and confirmed by the chartered accountants' company. The attorney claims that the claim was for INR 1,07,13,081/- (Rupees one crore seven lakhs thirteen thousand eighty-one rupees only) at the time the execution application was filed in 2017.
3. This amount includes interest for the delay in payment at the rate of 3 times the bank rate compounded monthly. According to the attorney, the total amount of the award that is currently owed, including interest, is almost Rs. 2 crores 42 lakhs.
4. The award debtor allegedly filed AP No. 486 of 2017 in June 2017, about nine months after the award was made, in accordance with *Section 34 of the 1996 Arbitration and Conciliation Act.*
5. The council claims that the award debtor successfully obtained an almost ex-prate conditional order of stay upon deposit of 25% of the award amount rather than the mandatory 75% of the award amount as has been enshrined under the provisions of *Section 19 of the MSME Act* and upheld by numerous decisions of the Supreme Court and the High Courts. The award debtor even allegedly refused to deposit the said amount or to comply with the said order.
6. The final argument made by the attorney is that even though the MSME Act of 2006 calls for a decision to be made before the Council within 90 days, the award debtor was able to push back the proceedings from 2014 to 2017 by arguing that the award holder's financial returns indicate that it should not be considered a small enterprise.

Legal Provisions of Law:

Main topics like *section 34 of the Arbitration and Conciliation Act 1996*, *section 106 of the Indian Evidence Act, and MSMEs* are involved which we will discuss here.

- *"**Section 34 of Arbitration and Conciliation Act 1996(**[37]**)**-Application for setting aside an arbitral award. —*

  (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and sub-sections (3).

  (2) An arbitral award may be set aside by the Court only if—

  (a) the party making the application furnishes proof that—

  (i) a party was under some incapacity, or

  (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

  (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

  (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

  Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

  (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

  (b) the Court finds that—

[37] India code, https://www.indiacode.nic.in/handle/123456789/1978?sam_handle=123456789/1362 (last visited 15th June 2023).

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India."

- **Definition of MSMEs-** [38]

  "The definition of Micro manufacturing and services units was increased to Rs. 1 Crore of investment and Rs. 5 Crore of turnover. The limit of small unit was increased to Rs. 10 Crore of investment and Rs 50 Crore of turnover. Similarly, the limit of medium units was increased to Rs. 50 Crore of investment and Rs. 250 Crore of turnover."

- ***Section 106 of Indian Evidence Act*** [39]- Section 106 of The Indian Evidence Act, 1872 (herein referred to as Evidence Act) deals with shifting the onus of proving a particular fact on the accused or when that particular fact is especially within his knowledge. This section is only applicable once the prosecution has proved the prima facie case against the accused. Hence it is clear that the section is an exception to Section 101 of The Evidence Act and its applicability does not extend to taking off the legal burden from the shoulder of the prosecution. Hence the burden that is being talked about in this section is the evidential burden the onus of proving which can be shifted to the accused. Thus, herein these various issues will be taken into consideration and the sub-consequential issues that may arise. The sections are elaborately stated as follows-

  Section 106 of The Indian Evidence Act states that if the burden of proving a fact is especially within the knowledge of any person, the burden of proving that fact will henceforth lie on him. When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."

[38] Msme.gov.in, https://msme.gov.in/faqs/q1-what-definition-msme (last visited 16th June 2023).

[39] India code, https://www.indiacode.nic.in/handle/123456789/2188?locale=en (last visited 16th June 2023).

Judgment of Calcutta High Court:

- It was stated that to a reasonable mind, it is unclear why WBSMSEFC, acting as an arbitrator, passed an arbitral judgment without attempting to quantify the interest claimed or even the period from which that interest will apply. As a result, the decision will be considered unreasonable. Additionally, the delegation carried out by the Council is flagrantly against recognized legal norms, making it unlawful and detrimental to the law. As a result, the contested award is revoked.
- Interlocutory applications submitted by parties are addressed in accordance with the allowance of AP 486/2017. Since the Court approved the *Section 34 a*pplication submitted by the award debtor; the award holder's EC 330/2017 filing has become infructuous.
- As a result, the aforementioned EC 330/2017 is dismissed, and the parties' interlocutory applications are resolved. This Court orders the Registrar, Original Side to give the award debtor the INR 25, 00,000 that they deposited, along with any accumulated interest, within six weeks of the date of the order.
- **Referred Judgements**
  - ***a) Gurucharan Singh Sahney and others V. Harpreet Singh Chhabra and others***
  - ***b) Dyna Technologies (P) LTD. V. Crompton Greaves Ltd.***
  - ***c) Juggobundhu Saha V. Chand Mohan Saha***
  - ***d) Bhuwalka bros. ltd. V. Fatehchand Murlidhar***
  - ***e) Sheo Karan and Ors. V. Kanhaiya and Ors.***
  - ***f) Tirupati Steels V. Shubh Industrial component***
  - ***g) M/S Silpi Industries Etc. and others V. Kerala State Road Transport Corporation***

Conclusion:

In conclusion, the case at hand underscores the need for a thorough examination of the jurisdictional boundaries, adherence to due process, and the importance of reasoned judgments in arbitration proceedings, highlighting the significance of ensuring fairness and transparency in the resolution of disputes within the framework of the applicable legal provisions.

By recognizing the significance of jurisdictional limitations, the legal system can provide clearer guidelines on the scope and applicability of arbitration agreements. This would prevent potential conflicts and ensure that parties are aware of the jurisdictional boundaries before entering into agreements, thereby enhancing the overall efficiency and effectiveness of the arbitration process. Furthermore, upholding the principles of due process is paramount to safeguarding the rights and interests of all parties involved. By guaranteeing procedural fairness, such as the right to be heard, impartiality of the arbitral tribunal, and access to relevant information, the legitimacy and integrity of the arbitration proceedings can be upheld. Strengthening the safeguards in place will not only bolster the party's confidence in the process but also contribute to the overall legitimacy and acceptance of the judgment.

Transparency throughout the arbitration process is crucial to instill trust and confidence in the outcomes. Implementing measures that promote openness, such as public access to relevant documents and reasoned judgments, enables the parties and the wider public to understand the rationale behind the decision-making process. This fosters accountability, discourages arbitrary judgments, and enhances the perceived fairness and integrity of the arbitration system. By addressing these key areas of improvement, the legal community can move closer to achieving a more robust and equitable system of arbitration. The implications of these changes extend beyond the confines of this specific case, setting a precedent for future disputes and reinforcing the values of fairness, transparency, and due process in the resolution of commercial disputes.