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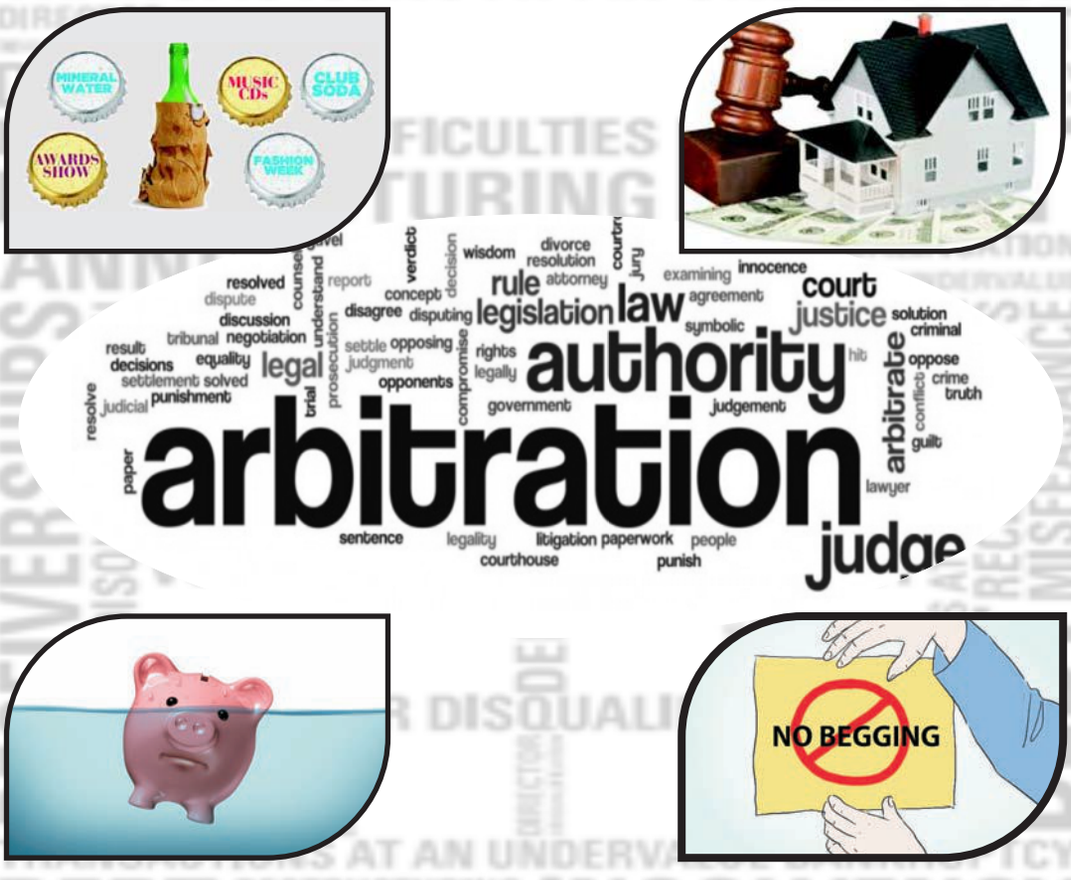

EDITORIAL

Manoj K. Singh
Founding Partner

It is our pleasure to present the **May 2017** edition of our Newsletter '**Indian Legal Impetus**'. We are extremely grateful to our readers who have always bestowed overwhelming support on us, as a result of which we have been successful enough to bring you the latest legal developments in India.

The present edition is multifarious covering latest legal issues floating in the arena along with new enactments and amendments meeting the need of the hour. The cover article of the current edition, ***A Glimpse of some decisions passed under Insolvency & Bankruptcy Code, 2016;*** has put forth latest decisions held by the Hon'ble National Company Law Appellant Tribunal [NCLAT] discussing whether requisites, timelines, documentation as provided under I&B are mandatory to follow or are simply procedural in nature and can be differed. The second article, ***Vacation of Office of Director -An Upshot from Disqualification of Directors U/S 164 (2) Of The Companies Act, 2013,*** elaborates on how there is an ambiguity in understanding prospect of disqualification of the directors as to prospectively or retrospectively. It covers various MCA Guidelines, notification and scenarios affecting the disqualification ground as a point to be kept in mind at the time of re-appointment. The next article, ***Difference in the Concepts of Independence and Impartiality of Arbitrator*** delves into Section 12(5) r/w Schedule Seventh of the amended Act whether the Courts can adjudge the list of arbitrators provided in light of their expertise and to nominate its arbitrator from the entire panel not from the short list restricting the ambit and scope of the entire schedule. It has critically analyzed a very recent judgment on similar lines. Another engaging article is ***The Real Estate (Regulation And Development) Act, 2016 – Key Aspects,*** wherein new law governing Real Estate sale and purchase transaction have been passed enabling a close door monitoring to the business and balancing the interests of consumers and promoters establish symmetry of information, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. In the similar lines of corporate crimes there is an article; ***Comprehensive Analysis of Strike off Under Companies Act 2013*** covers modes of strike off; procedure adopted by Registrar of Companies and by way of filing an application under Section 248(2). Family law aspect being evolving day by day, the author through his article titled as ***Parental Alienation Syndrome,*** has analyzed the aspects, issues and problems evolving in this field. Another article dealing with corporate barriers is ***Cross Border Insolvency: A New Regime*** wherein the author deals with the position of law under the new Insolvency and Bankruptcy Code, 2016 with respect to cross border insolvency wherein it deals with three aspects: *Firstly*, if insolvent company may have several foreign creditors wanting their claim to be protected even if they are not in the country where the insolvency proceedings would take place. *Secondly,* insolvent company may have assets located in another jurisdiction which the creditor may access as part of the insolvency proceedings. *Thirdly,* Insolvency proceedings with respect to the same debtor may be commenced and ongoing in more than one country.

Under the Intellectual Property Rights section, we have a very interesting article on ***Surrogate Advertisements in India,*** with the loose management of ASCAI and other advertising agencies it highlights the instances wherein the Non-advertisement banner is easily surpassed by focusing on the associated commodities but updating the people about the main brands and commodities. The lack of proper legal framework enables the advertisement to pass the umbrella as fast emerging and most unique method of marketing products. The next article; ***Anti-Begging Laws in India - "Idleness is the Key of Beggary"*** the author has made an effort to dig into the laws for tackling organized child begging, for rehabilitation of beggars and the penalties imposed for the same. The last article; ***Relationship between Lex Fori & Lex Arbitri*** elaborates on the relationship between the law of the Court and the law of the place where the arbitration takes place.

Lastly we have brought to you brief salient features of the latest ***Online Maintenance of Registers under Labour Laws 2016*** via our ***Newsbyte*** section which have opened a new way of labour law practices with an aim to be beneficial and fast track.

We hope this issue helps us in further achieving our objective of bringing the laws and recent legal developments in India to your doorstep. We welcome all suggestions and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Inputs" a valuable reference point and possession for all.

You may send your suggestions, opinions, queries or comments to newsletter@singhassociates.in.

Thank you.

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1. Singh & Associates
Advocates & Solicitors

NEW DELHI (HEAD OFFICE)
E-337, East of Kailash, New Delhi - 110065
Email: newdelhi@singhassociates.in

GURUGRAM
Unit no. 701-704, 7th Floor, ABW Tower
IFFCO Chowk, Gurugram,
Haryana-122001

MUMBAI
48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra - 400021, INDIA
Email: mumbai@singhassociates.in

BANGALORE
N-304, North Block, Manipal Centre47,
Dickenson Road, Bangalore - 560042, INDIA
Email: bangalore@singhassociates.in

Ph : +91-11-46667000
Fax : +91-11-46667001

www.singhassociates.in

SINGH & ASSOCIATES
Founder - Manoj K. Singh
ADVOCATES & SOLICITORS

Managing Editor
Manoj K. Singh

Editors
Surbhi Darad
Kunal Kumar

Published by
Singh & Associates
Advocates and Solicitors

Contents

A GLIMPSE OF SOME OF THE DECISIONS PASSED UNDER INSOLVENCY AND BANKRUPTCY CODE 2016

Daizy Chawla

Insolvency and Bankruptcy Code 2016 (I & B Code 2016) was published in the Gazette of India on 28th May 2016. The object and reasons for the enforcement of the said Code the objective of this Code is to preserve by providing linear, time-bound and collective process; improve the time taken to return; failure to provide clear exit option to investor; increase recovery value; bring all insolvency, bankruptcy related cases under one umbrella; and to develop other avenues of financial businesses[1].

The I&B Code 2016 read it with Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as I&B Adjudicating Rules, 2016) provides the manner and procedure to initiate the Corporate Insolvency Resolution Process. Under I & B Code 2016, the IRP proceedings can be initiated by a Financial Creditor or by an Operational Creditor or by the Corporate Debtor itself. Section 7, 9 and 10 of I&B Code 2016 respectively deals with the manner and procedure for initiating the Corporate Insolvency Resolution Process.

I&B Code 2016 are still in the stage of the evolution and the Adjudicating Authorities including Hon'ble National Company Law Appellant Tribunal [NCLAT] are trying to interpret its various provisions. In the present article we will discuss whether requisites, timelines, documentation as provided under I&B are mandatory to follow or are simply procedural in nature and can be differed.

Prior to discussing the judicial precedents as on date it would be important to refer to Section 238 of the I&B Code 2016 which to some extent clarifies the intention of the law making agencies that they since inception wanted to keep I&B Code 2016 separate and have overriding effect over other statutes. In other words, the requisites, timelines, documentation as provided under I&B 2016 are mandatory in nature.

IS IT MANDATORY TO SERVE NOTICE UNDER SECTION 8(1) OF I&B CODE 2016 BEFORE FILING THE APPLICATION UNDER SECTION 9 OF I&B CODE 2016 BY AN OPERATIONAL CREDITOR.

As per Section 9 whenever the Adjudicating Authority receives an application for initiating an Insolvency Resolution Process against a Corporate Debtor, it has to satisfy itself that all the conditions provided under Section 9(3) have been satisfied.

The conditions provided under the said section 9(3) are that the operational creditor shall, along with the application furnish:

a) A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the operational debtor;

b) An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

c) A copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debt and

d) Such other information as may be specified.

In ***Era Infra Engineering Limited V/s Prideco Commercial Services Private Limited***[2], the issue before Hon'ble National Company Law Appellate Tribunal was whether the Corporate Insolvency Process Order passed by Hon'ble Adjudicating Authority and subsequent appointment of Insolvency Resolution Professional and declaration of moratorium period on the basis of an application filed by Operational Creditor under Section 9 of I&B Code 2016 was correct as the Operational Creditor had failed to issue demand notice as required under Section 8 of the I&B Code 2016. The Operational Creditor had in past served demand notice

1 *From the debate of Parliament dated 05.05.2016.*

2 *Company Appeals (AT)(Ins) No. 31 of 2017;*

under Section 271 of Companies Act, 2013 and was relying on the said demand notice.

The Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi), have on receipt of the application under Section 9 of I&B Code 2016, from operational creditor i.e. Prideco Commercial Services Private Limited had triggered the Corporate Insolvency Process against the Corporate Debtor *Era Infra Engineering Limited* and accordingly appointed an Insolvency Resolution Professional and declared the moratorium under Section 14 of I&B Code 2016.

The Hon'ble NCLAT in the appeal set aside the order passed by Hon'ble Adjudicating Authority and quashed all orders, interim arrangement including declaration of moratorium and appointment of Insolvency Resolution Professional. It further held that all actions taken by Interim Resolution Professional after passing of the order as illegal. The Appellant Tribunal observed that serving of notice under Section 271 of Companies Act, 2013 cannot be considered as sufficient notice as required to be served under Section 8(1) of I&B Code 2016 in the prescribed format.

The Hon'ble NCLAT, while deciding observed that "*Admittedly no notice was issued by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under Section 9 of I&B Code 2016*". The Hon'ble NCLAT further held that "*the Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. Though the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld*"

IS IT MANDATORY TO ANNEX THE CERTIFICATE FROM FINANCIAL INSTITUTION ALONG WITH THE APPLICATION FILED BY THE OPERATIONAL CREDITOR UNDER SECTION 9 OF I&B CODE 2016.

In ***Smart Timing Steel Limited V/s National Steel and Agro Industries Limited***[3], the issue before the Hon'ble NCLAT was whether filing of a "copy of certificate from the "financial institution" maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the "Corporate Debtor" as prescribed under clause (c) of sub-section (3) of Section 9 of the I&B Code 2016 is mandatory or directory.

The said Appeal was filed by the Appellant, who was an operational creditor who has filed a petition against the Respondent for initiating the Corporate Insolvency Process which was rejected by the Adjudicating Authority (NCLT), Mumbai, who had held that "*On perusal of Section 9 of Insolvency and Bankruptcy Code, it is evident, that it is mandatory to file copy of Certificate from the Financial Institutions reflecting non-payment of the operational debt impugned, for the operational Creditor has failed to annex copy of the said Certificate as required u/s 9(3) of the Code, this petition is liable to be rejected.*"

The Hon'ble NCLAT, while rejecting the appeal filed by Operational Creditor held that it is clear that the word "shall" used in sub-section (3) of the Section 9 'I&B Code' is mandatory, including clause 3 therein. The Hon'ble Tribunal while deciding observed that one of the cardinal principles of interpretation of statute is that, the words of statute must prima facie be given their ordinary meaning, unless of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When the words of statute are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such a case, effort must be to give a meaning to each and every word used by the legislature and it is not sound principle of construction to brush aside the words in statute as being redundant or surplus, and particularly when such words can have proper application in circumstances conceivable within the contemplation of the statute.

IS THE TIMELINE OF 14 DAYS PROVIDED UNDER I&B CODE TO ADMIT AND INITIATE THE CORPORATE INSOLVENCY PROCESS IS EXTENDABLE.

In ***J K Jute Mills Company Limited V/s Surendra Trading Company***[4], the issue before the Hon'ble NCLAT

3 *Company Appeal (AT) (Insolvency) No. 28 of 2017*

4 *Company Appeal (AT) No. 09 of 2017*

was "*Whether the time limit prescribed in Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as Code 2016) for admitting or rejecting a petition or initiation of insolvency resolution process is mandatory*"

The Hon'ble NCLAT after discussing each of the Section of the I&B Code 2016 wherein the time is prescribed held that "*the object behind the time period prescribed under sub-section (5) of the Section 7, sub-section (5) of Section 9 and sub-section (4) of Section 10, like Order VIII Rule 1 of CPC is to prevent the delay in hearing the disposal of the cases. The Adjudicating Authority cannot ignore the provisions. But in appropriate cases, for the reasons to be recorded in writing, it can admit or reject the petition after the period prescribed under Section 7 or Section 9 or Section 10.*"

The Hon'ble Appellate Tribunal referred to various decisions of Hon'ble Supreme Court wherein the Hon'ble Apex Court has held that the mandatory provisions are to be complied within the time frame prescribed.

The Hon'ble NCLAT while deciding the case held that "*the time is the essence of the code and all the stakeholders, including the Adjudicating Authority are required to perform its job within time prescribed under the Code except in exceptional circumstances if the adjudicating authority for one or other good reason fails to do so. In the case in hand we find that the Adjudicating Authority has unnecessarily adjourned the case from time to time which is against the essence of the code.*"

WHETHER BENEFITS AVAILABLE IN OTHER ENACTMENT IS OF ANY RELIEF IN AVOIDING THE PROVISIONS OF I&B CODE 2016.

In **Innoventive Industries Limited V/s ICICI Bank Limited**[5], the issues before the Hon'ble NCLAT were as follows:

(i) Whether a notice is required to be given to the Corporate Debtor for initiation of Corporate Insolvency Resolution Process under I & B Code, 2016 and if so, at what stage and for what purpose?

(ii) Whether 'Maharashtra Relief Undertaking (Special Provisions) Act (Bombay Act XCVI of 1958)' (hereinafter referred to as MRU Act 1958) shall prevail over I & B Code 2016. In other words, whether a Corporate Debtor who is enjoying the benefit of MRV Act, can be subjected to I & B Code 2016? And

(iii) Whether in a case where Joint Lender Forum (JLF) have reached agreement and granted permission to the Corporate Debtor prior consent of JLF is required by financial creditor before filing of an application under Section 7 of the I & B Code 2016?

The Appellant in the present case has approached Hon'ble NCLAT against the order of Hon'ble Adjudicating Authority who after checking the application filed by the financial Creditor under Section 7 has triggered the Corporate Insolvency Process against the Corporate Debtor after getting itself satisfied that there is a default.

The Hon'ble NCLAT after hearing both the parties have held as in some of the cases initiation of Insolvency Resolution Process may have adverse consequences on the welfare of the Company. Therefore, it will be imperative for the "adjudicating authority" to adopt a cautious approach in admitting Insolvency Application by ensuring adherence to the principle of natural justice. Though in the present case in hand, it was observed by the Hon'ble NCLAT that opportunity was given to the Corporate Debtor to defend himself before admitting the application.

Furthermore, with respect to the protection of any other enactment like in the present case the Appellant were taking the benefit of Maharashtra Relief Undertaking (Special Provisions) Act. The Hon'ble Appellant Authority held that Section 238 of the I & B Code, 2016 is non-obstante clause which overrides the operation of the MRU Act. As per Section 238 of the I & B Code, 2016 the provisions of the Code are to are to be given effect to notwithstanding anything contrary contained any other law or any instrument having effect under such law.

1. SECTION 238 STATES AS FOLLOWS:

"238 - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in anti other law for the time being in force or anti instrument having effect by virtue of any such law."

With respect to the last question, the Hon'ble Appellant Tribunal held that for initiation of corporate resolution process by financial creditor under sub-section (4) of

5 *Company Appeal (AT) (Insolvency) Nos. 1 and 2 of 2017*

Section 7 of the Code, 2016, the 'adjudicating authority' on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under Section 5 of Section 7, the 'adjudicating authority' is required to satisfy-

(a) Whether a default has occurred;

(b) Whether an application is complete; and

(c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.

Once it is satisfied it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected. Beyond the aforesaid practice, the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be rejected.

CONCLUSION:

It is no doubt that I&B Code 2016 can be considered as Draconian Law being strict in nature as the Adjudicating Authority has to decide whether to initiate the Corporate Insolvency Resolution Process within a time span of 14 days. However, at the same time if we step in the shoes of the Creditors (*Operational as well as Financial Creditor)* for them they have got a ray of hope that there outstanding will be repaid soon as other forums like filing of recovery suits, winding up petition as well as filing of application before Debt Recovery Tribunal are lengthy process.

As mentioned in the object and reason of the I&B Code 2016 also, the objective of the Act is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

***

VACATION OF OFFICE OF DIRECTOR -AN UPSHOT FROM DISQUALIFICATION OF DIRECTORS U/S 164 (2) OF THE COMPANIES ACT, 2013

Daizy Chawla, Kumar Deep & Arpita Karmakar

BACKGROUND

Section 164 of the Companies Act, 2013 (herewith referred to as the '**Act**') states various disqualifications for appointment of Director in a company. Further, Section 167 of the Act states the instances for the occurrence of the vacation of the office of director. In the present Article the efforts has been done to make the reader understand the effect of clause (a) of sub-section (2) of Section 164 read with clause (a) of the sub-section (1) of section 167 of the Act to the extent that it is not limited to the provisions of the Section itself i.e. disqualification under Section 164 (2) of the Act does not only makes a director ineligible to be re-appointed as a director of that company or appointment in other companies, but also shall mean to effect the directorship in the existing companies when read with Section 167 (1)(a) of the Act.

Further, in this article it has been emphasized that the intention of the law makers to bring such strict provisions under the Act was to tighten the noose of the defaulters for non-filing of the financial reports annually is an act of keeping the stakeholders in grave obscurity.

The relevant extract of the provision under the aforesaid sections are as follows:

Section 164. *"(2) No person who is or has been a director of a company which—*

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b)…..,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so."

Section 167. *"(1) The office of a director shall become vacant in case--*

(a) he incurs any of the disqualifications specified in section 164;"

RETROSPECTIVE OR PROSPECTIVE EFFECT OF SECTION 164(2) OF THE ACT

Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Procedural law establishes a mechanism ***for determining*** those rights and liabilities and machinery for enforcing them.

On study of various judgments, one could settle that it is a cardinal rule in law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

In this article, we shall elaborately discuss in the following points whether the applicability of Section 164 (2) shall be retrospective or prospective or whether even the question of the same arises keeping in mind the intention of the law.

GENERAL CIRCULAR 41/2014 DATED 15.10.2014.

Before interpreting the provisions of Section 164(2) and its applicability as prospective or retrospective, it would be important to refer to the General Circular 41/2014 dated 15.10.2014 issued by Ministry of Corporate Affairs.

The said circular dated 15.10.2014 was issued by the MCA on the clarification been sought by the Stakeholders that whether the directors of the Companies who have filed their (past) balance sheets or annual returns after 01.04.2014 but before the Company Law Settlement Scheme 2014 (CLSS-2014) [15.08.2014] will get immunity from disqualification under Section 164(2)(a).

As per the said circular, the MCA has clarified that the disqualification will be applicable for the prospective defaults of such companies directors who have filed their Balance Sheets and Annual returns on or after 01.04.2014 but before CLSS-2014 i.e. before 15.08.2014.

In other words, it can be said that the provisions of Section 164 (2) are not prospective in nature that is the three financial years will not be counted from 01.04.2014 (the day the section became effective) but even in case where the balance sheets or annual returns of previous years i.e. prior to 01.04.2014 have not been filed for consecutive period of three years and such default continues after 01.04.2014, the directors of such companies will be considered as disqualified. The prospective effect of disqualification will be applicable on such companies who have prior to 15.08.2014 have complied with filing of its past balance sheets or annual return as the case may be.

SECTION 274(1)(G) OF COMPANIES ACT, 1956.

It is to be noted that Section 164(2) correspond to Section 274(1)(g) of Companies Act, 1956, wherein a person was not capable of being appointed director of a Company if such person is already a director of a public company which has not filed the Annual Accounts or Annual Return for any continuous three financial years commencing on or after the first day of April 1999.

Here, as one can see the difference between Section 164(2) and Section 274(1)(g) is that in case of Section 274(1)(g) the default of non filing is w.r.t public company however in case of Section 164(2) there is no such distinguishment between Private Company or Public Company. Furthermore, under Section 274(1)(g), the applicability of the Section was defined i.e. the three financial years were taken into account from on or after 1st April 1999 however, in the present Section 164(2) there is no such date mentioned. Meaning thereby same is continuous in nature i.e. the defaults prior to introduction of the said Section 164(2) will be considered for the purpose of determining the disqualification.

CIRCULAR DATED 12.08.2014 OF MINISTRY OF CORPORATE AFFAIRS INTRODUCING COMPANY LAW SETTLEMENT SCHEME, 2014 (CLSS).

Furthermore, it would also be important to peruse the circular dated 12.08.2014 relating to CLSS. This circular by MCA provides the intention of introducing the scheme of the *Company Law Settlement Scheme, 2014*. The relevant extracts are as follows:

a. *"1. . . .*

2. The companies Act, 2013 lays down a stricter regime for the defaulting companies with higher additional fees….Additionally, the provisions of section 164(2) of the Act, inter alia, providing for ***disqualification of directors*** *in case a company has not filed financial statements or annual returns for any continuous period of three financial years has been* ***extended to all companies****.*

3. The Ministry has received representations from various stakeholders requesting grant of transitional period/one-time opportunity to enable them to file their pending annual documents to avoid attraction of higher fees/fine and other penal action, ***especially disqualification of their Directors*** *prescribed under the new provisions of the Act.*

6……. (xii):-In case of defaulting companies ***which avail of this scheme*** *and* ***file all belated documents****, the provision of 164 (2)(a) of the Companies Act, 2013 shall apply* ***only for the prospective defaults****, if any, by such companies."*

Further, the defaulting companies were defined under the Scheme as a company which has made a default in filing of annual statutory documents and such defaulting companies were permitted to file belated documents which were due for filing till 30th June, 2014.

Accordingly, on the basis of above the circular also it is clear that the intention of law was to curb the continuing default of the companies for non-filing of their statutory documents by bringing strict provisions under section 164 (2) of the Companies Act, 2013. Had the same not been the intention the purpose of the relief provided under the aforesaid scheme would fail.

VIKRAM AHUJA VS. GREENSTONE INVESTMENTS PVT LIMITED AND ORS., BEFORE NCLT, MUMBAI BENCH, DECIDED ON 22.11.2016:

In the said case law, one of the point for discussion and decision before the Hon'ble bench was "*whether the disqualification set forth in Section 164(2)(a) r/w 167(1)*

(a) of the Act 2013 has retrospective effect or not";

a. The Hon'ble Tribunal, after considering various case laws considered that: "*this provision has to be read as* ***applicable to the situations where non-filing has started, at the most in the past and continuing while this enactment has come to into existence and also to future non-filing***……..."

b. Also, in a decided case law it has been provided that, *the statute providing posterior disqualification on past conduct does not become a retrospective one because a part of a requisition for its action is drawn from a time antecedent to its passing*;

c. Therefore, the provisions of Section 164 (2)(a) shall be applicable where the non-filing has started in the past and continuing while this enactment has come to existence and also to the future non-filing. Mere applicability of such provision on continuous default till date shall not give rise to the question of retrospective or prospective effect.

ACCOMPANIMENT OF SECTION 167(1)(A) AND SECTION 164(2) OF THE ACT

It is to be noted that Section 167(1)(a), mentions that "he incurs any disqualification specified in Section 164". The section collectively talks about the disqualification under Section 164 without further bifurcating as disqualification specified under Section 164(1) or Section 164(2). Had, it been the intention of legislature to refer to only Section 164(1) the same should have been clearly mentioned.

Further, Section 164 provides the type of disqualification due to which a person to be appointed or re-appointed as Director is restrained from being appointed or re-appointed. On the other hand Section 167 provides for the circumstances wherein vacation of the existing director from the board of directors of any Company (without any discrimination as Private or public) will automatically happen. One such circumstance is any of the disqualifications contemplated under Section 164.

REPORT OF THE COMPANIES LAW COMMITTEE

Also, we have brought about the intention of the law makers w.r.t. Section 164 (2) read with Section 167 (1) (a) of the Act. The relevant extracts from the Report of the Companies Law Committee, issued in February 2016 (also available on the website of Ministry of Corporate Affairs), has been discussed below with respect to the stringent provision of disqualification and vacation of Director.

This Committee was formed on 4th June, 2015 by the Ministry of Corporate Affairs, to make recommendations to the Government on issues arising from the implementation of the Companies Act, 2013 as well as on the recommendations received from the Bankruptcy Law Reforms Committee, the High Level Committee on CSR, the Law Commission and other Agencies.

The relevant extract of the same is as follows [Page No. 57 para 11 (Part 1)]:

Disqualifications from appointment as, and vacation of office of director

11.13 Section 167(1)(a) dealing with ***vacation of office by a director triggers an automatic vacation of office of the director if he incurs any of the disqualifications stipulated under Section 164****. Section 164(1) provides for disqualifications which are incurred by a director in his personal capacity such as being an undischarged bankrupt, of unsound mind, convicted of an offence etc., and Section 164(2) lists out disqualifications related to the company such as non-compliance of annual filing requirements, etc.*

The Committee acknowledged that this Section created a paradoxical situation, as the office of all the directors in a Board would become vacant where they are disqualified under Section 164(2), and a new person could not be appointed as a director as they would also attract such a disqualification. ***In this regard, the Committee recommended that the vacancy of an office should be triggered only where a disqualification is incurred in a personal capacity and therefore, the scope of Section 167(1)(a) should be limited to only disqualifications under Section 164(1).***

11.14 ***The Committee also recommended that a disqualification under Section 164(2) be only applicable to a person who was a director at the time of the non-compliance, and in case of a continuing non-compliance, there should be a period of six months' time allowed for a new Director to make the company compliant.***

The Committee above has also referred that in case of disqualification incurred by any Director under Section 164 (2) of the Act will automatically vacate the office of the director under Section 167(1)(a) of the Act in all the companies in which at that point of time such person is a director.

APPLICABILITY OF SECTION 164(2) TO PRIVATE COMPANIES OR PUBLIC COMPANIES

Disqualifications as provided under section 164(2) of the Act are applicable to all companies irrespective of their category and status. The private companies may add such other disqualification in its Articles in addition to the statutory disqualifications provided under the Act. Further, as far as the applicability of Section 164(2) to the private companies are concerned here it would be relevant to refer the circular dated 5th June 2015 wherein the Ministry of Corporate Affairs have clarified the sections which are exempted in case of Private Companies.

CONCLUSION

The above discussions relating to vacation of office of director due to disqualification incurred by a director under section 164(2)(a) of the Act may be concluded with the observation that such disqualification is one of the basis upon which the office of a director shall become vacant in all the companies in which he is holding position of director. However, it is pertinent to note that such vacation of office will be effective instantly when such disqualification has incurred by the director.

Although the said section 164(2) notified w.e.f. 01.04.2014, the disqualification shall be considered if there is default in filing of financial statements and annual return by a company in which a person is holding a position of directorship and thus such person as director shall be disqualified to be appointed as director in any other company and his position shall be vacated in all the companies in which he is a director in terms of Section 167 (1) (a) of the Act. The same may be understood by the following illustration:

Mr. A is a director in the following companies:

i. XYZ Pvt. Ltd., which has last filed its financial statements and annual return up to financial year 2011-12;

ii. PQR Ltd. which has last filed its financial statements and annual return up to financial year 2013-14;

iii. RST Pvt. Ltd. which has last filed its financial statements and annual return up to financial year 2015-16;

The disqualification of Mr. X shall not be considered up to financial year 2014-15. Thereafter he will be disqualified pursuant to Section 164(2)(a) as XYZ Pvt. Ltd. has not filed its financial statements and annual return for the continuous period of three financial years till date. By virtue of this continuous offence, he is liable to vacate his directorship in all other companies viz. PQR Ltd. and RST Pvt. Ltd. in terms of Section 167 (1)(a) of the Act.

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DIFFERENCE IN THE CONCEPTS OF INDEPENDENCE AND IMPARTIALITY OF ARBITRATOR

-Nilava Bandopadhyay & Anandini Sood

Vide the amendment of the Arbitration and Conciliation Act in 2015 following the 246th Law Commission Report, many provisions of the Act were amended suitably to smoothen out the roughed up edges of the 1996 Act. The issue of independence and impartiality of the arbitrator(s) has been discussed in a string of judgments in the pre-amendment era as well.

However, after the 2015 amendment, it was in the case of *Assignia-VIL JV* v. *Rail Vikas Nigam Limited*[1] that Schedule Fifth and Seventh r/w Section 12 of the amended Act was discussed. In that case, the Respondent made a suggestion to appoint its own employee who was either a present employee or retired employee, as the arbitrator. However, it was held by the Hon'ble Delhi High Court that the request could not be accepted as the arbitration had been invoked after the amended Act came into operation and that if the said request was allowed, the very purpose of amending the Act would be defeated. This judgment followed the league of previous case laws such as *ACE Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corporation Ltd.*[2], *Northern Railway Administration, Ministry of Railway* v. *Patel Engineering Co. Ltd.*[3] and *North Eastern Railway* v. *Tripple Engineering Works*[4] wherein the Hon'ble Court held the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in the past. In all the above mentioned judgments, one of the parties to the dispute was a government entity and each time the Court decided that the government entity cannot be allowed to appoint an arbitrator from one of its own employees be it a current employee or retired.

Therefore, after the 2015 amendment, it emerged as a rule of thumb that in cases where there was even the slightest of apprehension of bias on part of the arbitrator on account of Fifth or bar under the Seventh Schedule, the Court will not be wrong in exercising its discretion and appoint the arbitrator(s).

In the recent judgment of *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd.*[5], the Hon'ble Supreme Court while dealing with similar situation has also dealt in detail about the four pillars, which are the basis of the Arbitration Act in India. The Hon'ble Court also observed that *"…Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings."*

The section 12(5) of the Arbitration and Conciliation Act, 1996 starts with a non-obstante clause and provides that despite of any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. The Seventh Schedule in turn provides for various situations under which a person is ineligible to be appointed as an arbitrator.

The Hon'ble Apex Court while deciding the Voestalpine (*supra*) matter, has held that if a person nominated to be the arbitrator is a retired officer of the government or any statutory corporation or a public sector undertaking and has no connection with the party in dispute, the same would not attract the application of Section 12(5) r/w Schedule Seventh of the amended Act. The Hon'ble Court also went ahead and stated that

1 *Assignia-VIL JV v. Rail Vikas Nigam Limited, 230(2016) DLT235*

2 *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd., (2007)5SCC304*

3 *Northern Railway Administration, Ministry of Railway v. Patel Engineering Co. Ltd., (2008)10SCC240*

4 *North Eastern Railway v. Tripple Engineering Work, (2014)9SCC288*

5 *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., AIR2017SC939*

had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. The Hon'ble Apex Court has observed that where the panel of persons nominated to be arbitrator(s) consists of experienced ex-employees who are technically sound as well, bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with the party in dispute. It was also held that the very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilizing their expertise when they act as arbitrators.

In this case, as there was a peculiar situation that the Petitioner was supposed to nominate its Arbitrator only from the list of five arbitrators provided by DMRC, the Hon'ble Court observed that such a situation has to be countenanced and therefore, direct DMRC to broaden its list and also directed the Petitioner to nominate its Arbitrator from the entire panel not from the short listed five arbitrators.

The Hon'ble Court also directed DMRC to include engineers of repute from private sector, as well as retired judges and reputed lawyers in its list to be prepared by DMRC.

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THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 – KEY ASPECTS

Harsimran Singh

Vide recent Notification dated April 19 2017 being S.O. 1216(E) issued by the Ministry of Housing and Urban Poverty Alleviation sections 3 to 19, 40, 59 to 70 and 79 to 80 of the Real Estate (Regulation and Development) Act, 2016 (the "Act' or 'RERA') came into force w.e.f. May 01 2017. Earlier, the Ministry notified effective date for sections 2, 20 to 39, 41 to 58, 71 to 78 and 81 to 92 of the Act as May 01 2016.

THE PREAMBLE OF THE ACT STATES:

> *An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.*

The Act aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.

OBJECTS OF RERA

- ensure accountability towards allottees and protect their interest;
- infuse transparency, ensure fair-play and reduce frauds & delays;
- introduce professionalism and pan India standardization;
- establish symmetry of information between the promoter and allottee;
- imposing certain responsibilities on both promoter and allottees;
- establish regulatory oversight mechanism to enforce contracts;
- establish fast- track dispute resolution mechanism;
- promote good governance in the sector which in turn would create investor confidence

KEY FEATURES OF RERA

- All developers will now have to disclose the original sanctioned plans and changes made in the project at the later stage and duration of the time within which they will complete the project.
- Each state will set up its own regulatory authority that has the responsibility to register and regulate projects under this Act. It will be the responsibility of each state regulator to register real estate projects and real estate agents operating in their state under RERA. The details of all registered projects will be put up on a website for public access. No developer can advertise/market the project, apartment or building without registering the project with the RERA authority.
- After registering with regulatory authority, the builder has to update all the project details online on authority's website and update the same on regular basis in terms of status of the project and other information. This, in turn, will help the buyer to get accurate information about the project and make informed decision while investing in the project. To provide clarity to buyers, developers will have to keep them informed of their other ongoing projects. The promoter is also required to furnish the following additional information and documents at the time of registration of the project with the Regulatory Authority:

- brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;
- a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;
- an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;
- the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;
- the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;
- the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;
- proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;
- the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any;
- the number and areas of garage for sale in the project;
- the names and addresses of his real estate agents, if any, for the proposed project;
- the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;
- a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorized by the promoter, stating:--
    - that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;
    - that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;
    - the time period within which he undertakes to complete the project or phase thereof, as the case may be;
    - that seventy per cent of the amounts realized for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose.

Qua declaration to be submitted by the promoter, as stated above, following further conditions are also to be met, namely:

- the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project,
- that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project,
- that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilized for the project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.
- For new projects, the promoter is required to declare the time period within which he intends to complete the construction of the project, failing which, the registration will lapse. However, for ongoing projects, the promoter is required to mention the extent of (i) the construction work completed as per the last approved sanctioned plan of the project; and (ii) the development of common areas, amenities etc. along with expected period of completion of on-going project, which has to be commensurate with the extent of development already completed.
- Under the Act, the period of registration may be extended by the Regulatory Authority due to specified force majeure events. In certain cases, it may be extended on account of reasonable circumstances but such an extension shall not exceed 1 (one) year in aggregate. In addition to this, the Rules made under RERA provide that the registration period may be extended, where actual work (as per the sanctioned plan) could not be carried by the promoter due to (i) specific orders from any court of law or tribunal, competent authority, statutory authority, relating to the project; or (ii) due to such mitigating circumstances, as may be decided by the Regulatory Authority.
- The developer has to pay penalty in case of delay in giving possession or return the total amount with interest at a defined rate, as mentioned in the agreement of sale, to the homebuyer;
- A developer cannot ask for more than 10 per cent of the booking amount as an advance without making an agreement for sale. Earlier, developers asked for 10 per cent of the total cost of property as the booking amount;
- Promoters must have the consent of two-thirds of the buyers in a project before making any change in the number of units or other structural changes. RERA prescribes penalties, including imprisonment on developers who delay projects or do not deliver on promises. Developers are required to disclose their project details on the real estate regulator's website, and provide updates on construction progress;
- In case of any structural defect or poor quality, it will be the responsibility of the developer to rectify such defects for a period of 5 years. Any structural or workmanship defects brought to the notice of a promoter within a period of five years from the date of handing over possession must be rectified by the promoter. For delayed possession, developers need to pay an interest rate of 2 percentage points above State Bank of India's lending rate;
- Developers/builders are required to submit the original approved plans for their ongoing projects and the alterations that they made later. They also have to furnish details of revenue collected from allottees, how the funds were utilized, timeline for construction, completion, and delivery that will need to be certified by an engineer/architect/practicing chartered accountant;
- Quality of construction in projects has been given significance under RERA based on protest from buyers regarding poor quality of flats over the last few years. The regulator will ensure protection

to buyers in this matter for five years from the date of possession. If any issue is highlighted by buyers in front of the regulator in this period including in quality of construction and the provision of services, the developer will have to rectify the same in a matter of 30 days;

- Developers can't invite, advertise, sell, offer, market or book any plot, apartment, house, building, investment in projects, without first registering it with the regulatory authority. Furthermore, after registration, all the advertisement inviting investment will have to bear the unique RERA registration number. The registration no. will be provided project-wise;

- After registering the project, developers will have to furnish details of their financial statements, legal title deed and supporting documents;

- If the promoter defaults on delivery within the agreed deadline, they will be required to return the entire money invested by the buyers along with the pre agreed interest rate mentioned in the contract based on the model contract given by RERA;

- If the buyer chooses not to take the money back, the builder will have to pay monthly interest on each delay month to the buyer till they get delivery;

- After developers register with the regulator, a page will be created for the builder on the regulatory authority's website. The developer will be given login credentials using which it will upload all the information regarding the registered projects on the regulator's website. The number, type of apartments, plots and projects and their completion status will be updated at a maximum quarterly basis;

- The regulator will have the power to fine and imprison errant builders based on a case by case basis. The imprisonment can go up to a period of three years for a project;

- Imprisonment of up to three years prescribed for errant developers. A developer can sell only on the basis of carpet area which will help home buyers understand what they will be paying for each square foot they will get for use.

and many such other aspects introduced under RERA.

Till now, Andhra Pradesh, Madhya Pradesh, Bihar, Uttar Pradesh, Gujarat, Kerala, Odisha, and union territories of NCT of Delhi, Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu and Lakshadweep have notified rules for implementation of RERA. Bihar and Odisha have notified rules in complete sync with the one notified by the Ministry. While other states like Uttar Pradesh, Haryana and Gujarat have provided certain exemptions to ongoing projects; and states such as Delhi and Maharashtra have given relaxation in terms of disclosures and lock-in period on investments made by developers.

With implementation of RERA, real estate industry is entering a new regime with protection for buyers and stringent laws against promoters / developers for non-compliance. To begin with the agreements signed between land owners, developers, financial institutions and buyers will have to undergo a complete makeover in order to be in accordance with RERA. Rest, time will tell.

*** more details with follow in subsequent issues of India Legal Impetus.*

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COMPREHENSIVE ANALYSIS OF STRIKE OFF UNDER COMPANIES ACT, 2013

Kumar Deep

INTRODUCTION:

The Ministry of Corporate Affairs ("**MCA**") vide Notification[1] dated 26.12.2016 notified Section 248 to 252 of the Companies Act, 2013 ("**Act**") and revised the process of striking off the name of the company from the register of companies maintained by the Registrar of Companies ("**ROC**"). The procedure of strike off the name of company through the Fast Track Exit ("**FTE**") mode under the provisions of section 560 of the Companies Act, 1956 stands revised and accordingly, the "Strike Off" mode was introduced by the MCA vide said notification. The provisions relating to Strike Off provide an opportunity to the defunct companies to get their names struck off from the records of the ROC. In addition to the provisions of the Act relating to Strike Off, MCA has also issued the Companies (Removal of Names of Companies from the Register of Companies) Rules[2], 2016 ("**Rules**") to be effective from the same date i.e. 26.12.2016 in order to provide procedural aspect of Strike Off under the Act.

MODES OF STRIKE OFF:

There are two modes of strike off under the provisions of the Act and Rules made therein as below:

1. By ROC itself under Section 248(1) of the Act; and
2. By way of filing application by the Company under Section 248(2):

1. STRIKE OFF BY ROC SUO MOTO UNDER SECTION 248(1) OF THE ACT:

The various aspects of strike off by the ROC suo-moto may be summarized in the following manner:

1.1 Power of removal of name by ROC

In pursuance of section 248(1) read sub rule (1) of Rule 3 of these rules, the ROC may remove the name of a company from the register of companies in terms of sub-section (1) of section 248 of the Act.

Section 248(1) of the Act provides that, "*where the ROC has reasonable cause to believe that:*

(a) a company has failed to commence its business within one year of its incorporation; [or]

(b) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455,

he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations."

Accordingly, the ROC may initiate the process of Strike Off if the company has failed to commence its business within one year of its incorporation or had not been doing business or operation for last two financial years and has not applied with the ROC for the status of dormant company.

1.2 Companies Excluded from Applicability of the provisions of Strike off:

Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides that the ROC may remove the name of a company from the register of companies in terms of sub-section (1) of section 248 of the Act, *Provided that following categories of companies shall not be removed from the register of companies under this rule and rule 4, namely:-*

(i) *listed companies;*

(ii) *companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;*

(iii) *vanishing companies;*

(iv) *companies where inspection or investigation is ordered and being carried out or ac-*

1 http://www.mca.gov.in/Ministry/pdf/Notificatiion_28122016.pdf
2 http://www.mca.gov.in/Ministry/pdf/Rules_28122016.pdf

tions on such order are yet to be taken up or were completed but prosecutions arising out of such inspection or investigation are pending in the Court;

(v) *companies where notices under section 234 of the Companies Act, 1956 (1 of 1956) or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;*

(vi) *companies against which any prosecution for an offence is pending in any court;*

(vii) *companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;*

(viii) *companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;*

(ix) *companies having charges which are pending for satisfaction; and*

(x) *companies registered under section 25 of the Companies Act, 1956 or section 8 of the Act.*

1.3 Procedure to be followed by ROC for strike off by its own motion

The ROC has to follow the following procedures for strike off by its own motion:

a) Serving of Notice: ROC shall sent a notice in writing in Form STK - 1 to all the directors of the company at the addresses available on record, by registered post with acknowledgement due or by speed post. The notice shall:

- contain the reasons on which the name of the company is to be removed; and
- seek representations, if any, against the proposed action from the company and its Directors along with the copies of relevant documents, if any, within a period of thirty days from the date of the notice.

b) Representation of Company: The ROC shall consider the representation of the Company if it has received the same. If the ROC is not satisfied with the representation made by the company and its directors, it may proceed further for the strike off the name of company.

c) Publication of notice: the notice for removal of name under sub-section (1) of section 248 shall be in Form STK 5 and the same be –

- placed on the official website of the MCA on a separate link established on such website in this regard;
- published in the Official Gazette;
- published in english language in a leading english newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated.

d) Intimation to regulatory authorities: The ROC shall simultaneously intimate the concerned regulatory authorities regulating the company, viz, the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over the company, about the proposed action of removal or striking off the names of such companies and seek objections, if any, to be furnished within 30 days of notice.

e) Strike off the name and publish notice of dissolution of the company: in accordance with sub – section (5) of section 248, the ROC may, at the expiry of the time mentioned in the notice, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and publish notice thereof in the Official Gazette. The company shall stand dissolved on the publication of this notice in the Official Gazette.

f) Sufficient provision has been made for realization of all amounts due: ROC, before striking off, shall satisfy itself that sufficient

provision has been made for realization of all amounts due to the company and for the payment or discharging of its liabilities.

1.4 Effect of company notified as dissolved

As per Section 250 of the Act, if a company stands dissolved under section 248, it shall on and from the date mentioned in the notice of dissolution, cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realizing the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.

1.5 Liabilities of directors, managers, officers and members to be continue:

The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under this section, shall continue and may be enforced as if the company had not been dissolved.

1. <u>Strike off by way of filing application by the Company under Section 248(2):</u>

The various aspects of strike off by the ROC on the application filed by company may be summarized in the following manner:

1.1 Grounds for filing application:

Section 248(2) of the Act provides that, "*without prejudice to the provisions of sub-section (1), a company may, <u>after extinguishing all its liabilities</u>, by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:*

Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application."

Accordingly, a Company can file an application for Striking off its name with the ROC. The application may be filed on all or any of the grounds as mentioned under sub section 1 of section 248 of the Act.

1.2 Restriction on making application:

In additions to the companies which are excluded from applicability of provisions of strike off in accordance with sub – rule (1) of rule 3 of the Rules and listed at point no. 1.2 herein above, a company, in pursuance of provisions of section 249 of the Act, is not eligible to make an application for strike off under section 248(2) of the Act if, at any time in the previous three months-

a) the name of the company changed or registered office has been shifted from one state to another by the company;

b) the company has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal of gain in the normal course of trading or otherwise carrying on of business;

c) the company has engaged in any other activity except the for one which is mandatory or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company or complying with any statutory requirement;

d) an application has been made by the company to the National Company Law Tribunal ("**Tribunal**") for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or

e) the company is being wound up under Chapter XX by the Tribunal.

1.3 Process to followed for strike off on application of the company:

a) Holding a Board Meeting: to hold a Board meeting to pass Board Resolution for strike off the company subject to approval of the shareholders and authorizing the filing of this application with the ROC;

b) Holding a General meeting: to hold a general meeting of members of the company to obtain Shareholder's approval by way of Special Reso-

lution;

c) **Approval of concern authorities**: In the case of a company regulated by any other authority, approval of such authority shall also be required.

d) **Filing of Form STK-2:** Application in Form STK-2 to be filed by the Company along with following documents:

(i) Indemnity Bond duly notarized by every director in Form STK 3;

(ii) An affidavit in Form STK 4 by every director of the company;

(iii) a statement of accounts containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant;

(iv) a copy of the special resolution duly certified by each of the directors of the company or consent of seventy five per cent of the members of the company in terms of paid up share capital as on the date of application;

(v) a statement regarding pending litigations, if any, involving the company.

e) **Public notice by ROC**: after filing application for strike off by the company , the ROC shall publish a public notice in Form STK-6 inviting objections to the proposed Strike off, if any. The objections are to be sent to the respective ROC within thirty days from the date of publication. The notice shall be placed on the website of Ministry of Corporate Affairs, published in the Official Gazette and published in a leading English newspaper and at least in one vernacular newspaper where the registered office of the company is situated.

f) **Intimation to regulatory authorities**: The ROC shall simultaneously intimate the concerned regulatory authorities regulating the company, viz, the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over the company, about the proposed action of removal or striking off the names of such companies and seek objections, if any.

g) **Publication of notice of dissolution**: ROC, after having followed and dealt with the above steps, shall strike off the name and dissolve the Company and a Notice of striking off and its dissolution to be published in the Official Gazette in Form STK 7. On the publication in the Official Gazette of this notice, the company shall stand dissolved with effect from the date mentioned therein. The same shall also be placed on the official website of the MCA.

1.4 Penalties:

a) **In case application is filed in violation of section 248(1):**

In pursuance of Section 249(2) **that if a company files an application in violation of** Section 248(1) **it shall be punishable** with fine which may extend to Rs. 1 lakh.

b) **In case application is filed with the intention to defraud:**

Section 251(1) **provides that where it is found that an application by a company has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company** has been notified as dissolved, be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and be punishable for fraud in the manner as provided in Section 247. Furthermore, ROC may also recommend prosecution of the persons responsible for the filing of an application under Section 248(2).

2. <u>Restoration order</u>:

Section 252 of the Act empowers the Tribunal, to pass an order for the restoration of company which has been struck off by the ROC, in the following manner:

2.1 on appeal filed by any person:

Any person aggrieved by the order of the ROC may file an appeal before the Tribunal within 3 years of the order passed by ROC and if the Tribunal is of the opinion that the removal of name of company is not justified in view of the absence of any of the grounds on which the order was passed by the ROC, it may pass an order for

restoration of the name of the company in the register of companies after giving a reasonable opportunity of making representations and of being heard to the ROC, the company and all the persons concerned.

2.2 On application filed by ROC:

The ROC may, within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company if it is satisfied that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors.

2.3 On application filed by Company or any member or creditor or workmen:

The Tribunal, on an application made by the company, member, creditor or workman before the expiry of 20 years from the publication in the Official Gazette of the notice of dissolution of the company, if satisfied that:

a) the company was, at the time of its name being struck off, carrying on business or in operation; or

b) otherwise it is just that the name of the company be restored to the register of companies,

may order the name of the company to be restored to the register of companies. Further, the Tribunal may also pass an order and give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.

3. Key changes from the earlier FTE:

The difference between FTE under Section 560 of Companies Act, 1956 and under Section 448-252 of Companies Act, 2013 are as below:

Sr. No.	Particulars	under FTE	under the Act
1	Authorization to tile application	**Board Resolution** was required for approval for making application for removal of the name.	**Special Resolution or consent of 75% members** in terms of paid up share capital are mandatorily required for making application for strike off by the company.
2	Number of years	a company which is not carrying any business operations **since last one year** may file application for strike off	a company which is not carrying any business or operation **for a period of two immediately preceding financial years** may make application for strike off under section 248 of the Act.

CONCLUSION:

The section 248 to 252 of the Act corresponding to the earlier provisions under the Companies Act 1956 seems more controlling in terms of authorizations and procedures. It is undoubtedly the most speedy way to shut down a company as compare to other modes of winding up under the Companies Act. Even though the company can easily dissolve through this mode and its name removed from the ROC's registers the liabilities continues on every director, officer and members of the company and may be enforced in the same manner as if the company had not been dissolved. In addition, by providing restoration provisions, the company

which has been struck off may get a chance to restore its name in the register and get active with the permission of Tribunal even within 20 years of being struck off. Since the notification of the strike off provisions under the Act, the ROC became very active in sending notices to the companies which seems eligible for strike off under section 248(1) of the Act and such notices are also being posted at the website of MCA recently. The companies are required to take due care while making reply to such notices to the ROC and it should be kept in mind that strike off does not relieve the directors and members from their liabilities, if any, under the law.

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PARENTAL ALIENATION SYNDROME IN THE LIGHT OF VIVEK SINGH VS. ROMANI SINGH CASE

Rahul Pandey

Aayushmaan Vatsyayana

"Hatred is not an emotion that comes naturally to a child. It has to be taught, a parent who would teach a child to hate the other parent represents a grave and persistent danger to the mental and emotional health of that child."~The Honorable Judge, Gomery of Canada

Parental Alienation Syndrome is the unhealthy coalition between a narcissistic parent and his or her children against the targeted, non-narcissistic, non-abusive parent. In such a scenario, the innocent or targeted parent receives hostility and rejection from his or her children in this system. The psychological health of the children is used as arsenal in the narcissist's twisted world. This syndrome is destroying the child in many manners like the relationship of the children's are getting destroyed with the targeted parents; mentally and physically also the child is getting disturbed.[1]

The term "Parental Alienation Syndrome" (hereinafter referred as PAS) is coined by Richard A. Gardner a very popular American Psychiatrist in 1980's. According to him this is a sort of disorder in which child impedances and insults targeted parent without having any justification.[2]

The Indian Courts are very familiar to such situations and in most of such cases the custody of the minor child normally granted to the mother. In several cases stronger and wilier parent usurps the child's custody in defiance of the court orders. The ones having faith in the justice machinery knock the doors of the Courts without any positive developments foe several years. And when the case reaches the higher courts, the custodial parent is denied the right because the usurper parent by would have had the custody of the child for several years. The law's logic, therefore, is not to disturb the settled, though it being an illegal custody.

Another practice followed in such situations is that after a lengthy legal battle against the usurper parent, the child is finally interviewed by the Court who naturally opts for the usurper parent. That is what psychologists called Parental Alienation Syndrome. It is said that a child's mind is like a colorless bottle hat assumes the color of the liquid which is poured into it. Similarly the parent in custody creates hate and animosity in the child against the non- custodial parent

The judgment of Justice Jasti Chalameshwar and Justice A.K. Sikri has recognized PAS in India. It is the most relevant jurisprudence for improving a remediable psychological condition in children.

In the Case before the abovementioned bench of the Hon'ble Apex Court namely Vivek Singh vs. Romani Singh [(13.02.2017 - SC): (2017) 3 SCC 231] the Appellant Vivek Singh was married to the Respondent Romani Singh. There was fight between the Appellant and the Respondent forcing the Respondent to leave the matrimonial house and unwillingly leave the barely two year child behind as the Appellant did not allow her to do so. The Respondent filed petition Under Section 25 read with Sections 10 and 12 of the Guardians and Wards Act, 1980 (Act) for the custody and appointment of the Guardian of the minor daughter before the Principal Judge of the Family Court. The Principal Judge, Family Court was of the opinion that the Appellant was fit person to retain the custody of the child and, therefore, dismissed the petition filed by the Respondent.

The order of the Family Court was challenged by an appeal in the High Court which found it appropriate to handover the custody of the child to the Respondent mother. In the opinion of the High Court, the Respondent, being mother of a girl child of less than five years' of age at the relevant time, was better suited to take care of the child. And that the visitation rights were granted to the father the Appellant, by the Court.

1 *Children with Attachment Based Narcissistic "Parental Alienation Syndrome" By Sharie Stines, Psy.D*

2 *https://law.ucdavis.edu/faculty/bruch/files/bruch.pdf visited on 18.05.2017 03:52p.m.*

The Father challenged the decision of the High Court in the Apex Court and the Apex Court dealt the following issues while deriving the final standing on the law relation to the PAS.

Firstly, the report of the Principal Counselor stated that the child did not want to change her present environment and that she was more interested in staying with the father. Further, it was also observed in the report that the child was in a very sensitive phase of mental and physical growth.

Secondly, for the best interest of the child though the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children and that the child-centric human rights jurisprudence that has evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation.

Thirdly, the factors in favor of the Father were that child was living with him from tender age of 21 months and that she was happy in his company with the desire was to continue to live with him. However, from the events various factors in favor of Respondent emerged. For first 21 months when the parties were living together, it was the Respondent who had nursed the child. And that the Respondent mother was forcibly deprived by the custody of the child when she was forced to leave the matrimonial house. The Respondent, therefore, could not be blamed at all for the Appellant's custody of the child.

Lastly, the continuous company of the mother with child, for some time, was absolutely essential. It was a fit case where Respondent deserved a chance to have the custody of child for the time being, i.e., at least for one year, and not merely visitation rights.

CONCLUSION

In conclusion, PAS is destructive irrespective of the gender of the alienating parent. Every year, thousands of children and parents are experiencing this phenomenon of PAS and the resulting devastation it causes. The financial and emotional cost of PAS is excessive to the target parent. Government has a crucial role in helping those innocent children who are pitted into custody. They should see the horrifying conditions of family courts as there is a shortage of judges and trained counselors. The sheer volume of cases has overwhelmed the system from the past few years. The governments must understand that equipping the Family Courts is for the benefit of the next generation of Indians who have to be nurtured and eventually grown from their broken marriages.

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CROSS BORDER INSOLVENCY: A NEW REGIME

Bornali Roy

The Indian Insolvency and Bankruptcy Code, 2016 (Code), which came into effect on May 28 2016 provides a consolidated framework for the insolvency of companies, limited and unlimited liability partnerships, and individuals. The Code provides a mechanism for time-bound recovery of dues from insolvent debtors in India and for contributing to the ease of doing business in India. However, the efficiency of the Code relating to cross border insolvency is disputable.

CROSS BORDER INSOLVENCY

Cross border insolvency is not defined in the Code, but in general it may be understood as insolvency of borrowers who have assets or creditors in different jurisdictions, or are subject to insolvency proceedings in multiple jurisdictions. Therefore, cross border insolvency majorly includes three aspects:

- The insolvent company may have several foreign creditors who want their claim to be protected even if they are not in the country where the insolvency proceedings take place;
- An insolvent company may have assets located in another jurisdiction which the creditor may access as part of the insolvency proceedings;
- Insolvency proceedings with respect to the same debtor may be commenced and ongoing in more than one country.

The first scenario is catered by the Insolvency and Bankruptcy Code, 2016 as it does not discriminate between domestic and foreign creditors. By including "persons not resident in India" in the definition of persons under Section 3(23) of the Code and resultantly in the definition of creditors, the new legislation permits foreign creditors to commence and participate in the proceedings under the Code. Foreign creditors have been given the same rights as of the domestic creditors regarding distribution of assets on the liquidation of an insolvent company. However, the second and third aspects mentioned above are not dealt with in the Code as it currently lacks any mechanism for reciprocity, cooperation and coordination between jurisdictions of an Indian court or tribunal to seek the assistance of a foreign courts or insolvency authorities when an insolvency proceeding may have implications across national borders.

Subsequently, to fill up the lacuna, the Joint Parliamentary Committee's Report introduced two new provisions, *namely* Sections 234 and 235 to address these situations. Section 234[1] states that the Central Government may enter into bilateral agreements with other countries for purposes of enforcing the Code. Section 235[2] provides the relevant court or tribunal in India to issue a letter of request to a foreign court or tribunal seeking its assistance in situations where a debtor's assets may be located abroad.

BILATERAL AGREEMENT: WAY FORWARD

Bilateral agreements can and have in the past been used to deal with cross border insolvency concerns. In fact, even before introducing procedural framework in form of treaties, the provisions for bilateral agreements should be embedded in the domestic law of the country. The Code provides for this primal requirement.

DRAWBACKS IN CROSS BORDER INSOLVENCY PROCEDURE

Even if entering into Bilateral Agreement with different countries may be a way for dealing with cross border insolvency provided by the Code, there are various problems to it:

- Materializing a bilateral agreement requires time;
- Insolvency regimes of different countries may vary widely;
- Countries may have different rules regarding assistance and recognition of judgment in different countries.

CONCLUSION

India has become a destination for foreign investors. Hence, it is important to ensure that the rights and interests of foreign investors are secured to collect their dues just like domestic investors. It

1 *"Agreement with foreign countries"*
2 *"Letter of request to a country outside India in certain cases"*

is important that proper insolvency regime is established if India wants to promote foreign direct investment. A cross border insolvency law helps in providing effective mechanisms for dealing with cross border insolvency. It is done by increasing cooperation and reciprocity amongst different courts and competent authorities.

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SURROGATE ADVERTISEMENTS IN INDIA

Sharbani Raut

In the words of advertising tycoon Leo Burnett, "Let's gear our advertising to sell goods but let's recognize also that advertising has a broad social responsibility."

SURROGATE ADVERTISEMENTS: DEFINITION

Merriam Webster defines a Surrogate as a 'substitute'. And surrogate advertisements are just that. A surrogate advertisement can be defined as an advertisement that duplicates the brand image of one product to promote another product of the same brand. The surrogate or substitute could either resemble the original product or could be a different product altogether but it is marketed under the established brand name of the original product. Surrogate advertisements are used to promote and advertise products of brands when the original product cannot be advertised on mass media. Some instances of surrogate advertisements are: Bagpiper Soda, Cassettes and CDs, Royal Challenge Golf Accessories and Mineral Water, Imperial Blue Cassettes and CDs etc.

FUNCTION OF SURROGATE ADVERTISEMENTS.

Ever since advertising of tobacco and liquor products have been banned on Mass Media, these companies have resorted to surrogate advertising tactics to keep their brands alive in the minds of consumers. The most important function of a surrogate advertisement is that of brand-recall. A surrogate advertisement advertises other market commodities without alluding to tobacco or liquor but under the same brand.

Surrogate advertising came into India in the mid-1990s after the Cable Television Networks (Regulation) Act, 1995 read with Cable television Rules, 1994, came into force, which banned direct liquor, tobacco and cigarette advertisements.[1] Before that the Cigarettes (Regulation of Production, Supply and Distribution) Act,1975 made it mandatory to display a statutory health warning on all packages and advertisements. Advertisements have a strong influence in the minds of consumers especially in this era of new age technology. Banning direct advertisements about liquor and tobacco was a step ahead by the Government to curb the influence of such advertisements on the public and effectively diminish the ill effects of these products in general. Therefore Surrogate Advertisements by these liquor and tobacco companies defeat the very purpose of this ban.

Launching new products with a common brand name is known as brand extensions and is not per se illegal or objectionable in nature. The problem arises when a brand extension is carried out in response to a ban on advertisement of one product category.

SURROGATE ADVERTISEMENTS IN INDIA:

In India, Surrogate Advertisements are done mainly in the tobacco and liquor industry. This is a direct consequence of the ban on direct advertisements of tobacco and liquor. Therefore to promote and advertise their products to the masses, Liquor and tobacco found a way around the ban through surrogate ads. The banned product (alcohol or cigarettes) is not projected directly to consumers but rather masked under another product under the same brand name so that whenever there is a mention of that brand, people start associating it with its main product.

Brands like Kingfisher, Wills actually bank upon such ads to draw attention to their other products. For instance, Kingfisher has promoted everything from bottled water, to soda to calendar under the umbrella of the brand name 'Kingfisher'. Former Union Health Minister Mr. Anbumani Ramadoss had challenged the name of the Bangalore Indian Premier League (IPL) cricket team, "Royal Challengers", which was an out and out blatant surrogate advertisement for the liquor brand "Royal Challenge". But the Supreme Court of India has since pointed out that the team was not named 'Royal Challenge', the liquor brand BUT "Royal Challengers". 'Only those who drink can be attracted by these things,' the bench observed in a lighter vein, alluding to the fact that a name would not have any effect on non-drinkers.[2]

1 *Rule 7(2)(viii) of the Cable Television Rules,1994*

2 *https://sports.ndtv.com/cricket/now-ramadoss-challenges-bangalore-ipl-team-over-name-1605911*

NATIONAL AND INTERNATIONAL REGULATIONS

CIGARETTES AND OTHER TOBACCO PRODUCTS(PROHIBITION OF ADVERTISEMENT AND REGULATION OF TRADE AND COMMERCE, PRODUCTION, SUPPLY AND DISTRIBUTION) ACT, 2003 ("COTPA"):

Section 5 of the Act prohibits the advertisement of "Tobacco products" by both direct and indirect means. Sub-clause (i),(iii) and (iv) of Rule 2 of COPTA Rules, clearly sets out that the use of a name or brand of Tobacco products for marketing, promoting or advertising other products would constitute a form of "indirect advertisement". Accordingly, surrogate advertising carried out by tobacco companies would constitute a form of indirect advertisement and would consequently be prohibited under Section 5.

THE CABLE TELEVISION NETWORKS (REGULATION) ACT,1995

Rule 7(2)(viii) of the Cable Television Rules clearly prohibits the direct or indirect promotion and advertisement of "cigarettes, tobacco products ,wine ,alcohol, liquor or other intoxicants";

However the proviso to this rule also runs as:

"Provided that a product that uses a brand name or logo, which is also used for cigarettes, tobacco products, wine, alcohol, liquor, or other intoxicants, may be advertised on cable services subject to the following conditions that-

- the story board or visual of the advertisement must depict only the product being advertised and not the prohibited products in any form or manner;
- the advertisement must not make any direct or indirect reference to prohibited products;
- the advertisement must not contain any nuances or phrases promoting prohibited products;
- the advertisement must not use particular colors and layout or presentations associated with prohibited products;
- the advertisement must not use situations typical for promotion of prohibited products when advertising the other products"

The rules therefore provide a clear leeway for such surrogate advertisements under the cover of brand-extensions

THE ADVERTISING STANDARDS COUNCIL OF INDIA("ASCI")

ASCI is a voluntary self-regulation council, registered as a non-profit company under the Companies Act. It is formed to safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large.

Section 6 of the ASCI code states :

'Advertisements for products whose advertising is prohibited or restricted by law or by this code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is not prohibited or restricted by law or by this code. In judging whether or not any particular advertisement is an indirect advertisement for product whose advertising is restricted or prohibited, due attention shall be given to the following:

- Visual content of the advertisement must depict only the product being advertised and not the prohibited or restricted product in any form or manner.
- The advertisement must not make any direct or indirect reference to the prohibited or restricted products.
- The advertisement must not create any nuances or phrases promoting prohibited products.'

This section specifically prohibits surrogate advertising along with laying down the criteria for deciding whether an advertisement is an indirect advertisement.

FRAMEWORK CONVENTION ON TOBACCO CONTROL(FCTC)

India ratified the convention on 5th February,2004 and the Convention came into force on 27th Feb,2005. The convention seeks to protect present and future generations from devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures.

Article 13 of the Convention is titled as Tobacco advertising, promotion and sponsorship. This article recognizes the fact that a comprehensive ban is necessary and imperative. The framework gives the parties the freedom to introduce a comprehensive legislation banning all tobacco advertising, promotion and sponsorship.

PRESENT SCENARIO

On February 25, 2008 the Government issued a notification banning surrogate advertising of liquor companies in print, electronic and outdoor media.[3] However, subsequently on February 27, 2009, I&B Ministry issued a notification amending the said Rule to allow advertisements of products which shared a brand name or logo with any tobacco or liquor product with several caveats viz: (i) the story board or visual of the advertisement must depict only the product being advertised and not the prohibited products in any form or manner etc.

In 2014, social activist Teena Sharma filed a PIL in the Delhi High Court seeking a ban on surrogate advertisements. She argued that the Cable Television Network rules 1994 must require that all advertisements found to be genuine extensions by the Ministry of Information and Broadcasting must be previewed and certified by the CBFC. For unknown reasons, this PIL was later withdrawn.

It is very clear from the aforementioned existing laws and regulations that any direct or indirect advertising of the prohibited products is not permitted in India.

While the Government notification dated February 27, 2009 allows advertisements of products which shares a brand name or logo with any tobacco or liquor product, it at the same time also states that no reference direct or indirect could be made to the prohibited products in any form. Further, I&B Ministry has also made it very clear vide its Directive dated June 17, 2010 that the Government notification dated February 27, 2009 cannot be cited as an excuse to telecast advertisements of products in violation of Rule 7(2)(viii)(a) of CTNR.[4]

STEPS THAT CAN BE TAKEN TO COMBAT SURROGATE ADVERTISING:

1. Making clear and unambiguous transparent laws banning surrogate advertisements for different products under a single brand name.

2. Conducting consumer awareness programmers to help people understand the negative impact of surrogate advertisements.

3. Providing more power to the Advertising standards Council of India to enable it to take action against false and misleading advertisements and keep a close vigil over clever evasion of the law, instead of just issuing notices.

4. Establishing a mechanism for effective implementation of international and national regulations.

5. Several NGOs such as HRIDAY(Health related information dissemination amongst youth), SHAN (Student Health Action Network) etc led campaigns appealing the Government for a comprehensive ban on tobacco advertising. The role of NGOs in combating the menace of surrogate advertising should be recognized and they should be given more authority to work on such issues.

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3 *http://economictimes.indiatimes.com/industry/services/advertising/govt-issues-notification-banning-surrogate-liquor-ads/articleshow/2878618.cms*

4 *https://naiknaik.com/surrogate-advertising-in-india-permissible-or-not/*

ANTI-BEGGING LAWS IN INDIA - "IDLENESS IS THE KEY OF BEGGARY" - C.H. SPURGEON

Tanuka De & Mehul Singh

To begin with, let us first understand what constitutes the meaning of the word "Begging". The Bombay Prevention of Begging Act of 1959 (hereinafter referred to as "the Act") has defined the term "Begging" in Section 2(i) of the Act as

"(a) Soliciting or receiving alms, in a public place whether or not under any pretence such as singing, dancing, fortune telling, performing or offering any article for sale;

(b) entering on any private premises for the purpose of soliciting or receiving alms;

(c) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound injury, deformity of diseases whether of a human being or animal;

(d) having no visible means of subsistence and wandering, about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exist soliciting or receiving alms;

(e) allowing oneself to be used as an exhibit for the purpose of soliciting or receiving alms;

but does not include soliciting or receiving money or food or given for a purpose authorizes by any law, or authorized in the manner prescribed by [the Deputy Commissioner or such other officer as be specified in this behalf by the Chief Commissioner]"

There are a sum total of 22 states which have adopted the Prevention of Begging Act 1959 as a derivative in absence of any central act for the same cause. All offences under this act are to be tried summarily except those under Section 11 of the act which penalizes the act of employing or causing persons to beg or use them for the purposes of begging. The Act elaborates in the aforesaid section that if any person employs or causes any other person to solicit or receive alms, or whoever having the custody or charge of the child, connives or encourages, their employment or the causing the child to solicit or receive alms or uses another person as an exhibit, shall be punished for imprisonment for a term up to three years but which shall not be less than one year.

Receiving Centers and Certified Institutions are set up by the Chief Commissioner, which may include the provision for the teaching of agricultural, industrial and other pursuits, and for general education and medical care of the inmate. As per the regulation of the Act, an Advisory Committee will be constituted to visit such facilities, tender advice regarding management, collect subscriptions towards expenses and advice the such facilities through the Chief inspector *(for carrying out the purpose of this Act, The Chief Commissioner may appoint a Chief Inspector, Additional Chief Inspector of Certified Institutions, an Inspector and such number of Assistant Inspectors and Probation Officer as he think advisable to assist the Chief Inspector, and every person so appointed to assist the Chief Inspector shall have such of the powers, and perform such of the duties, of the Chief Inspector as the 1[Chief Commissioner] directs but shall act under the direction of the Chief Inspector.)* Every Receiving Centre shall be inspected by Chief Inspector, Inspector, Assistant Inspector or a Probation Officer, every six months. The Government has drafted a bill that seeks to decriminalize beggary and offer a life of dignity to the beggars, homeless and others who live in poverty or abandonment. Begging is currently a crime under the Bombay Prevention of Begging, 1959. Under this Act, a person found begging can be sent to a shelter home or even jail without even a trial. The draft 'The persons in destitution Bill 2015' looks at the issue as a social menace. Destitution refers to a state of poverty arising from economic or social deprivation and 'persons in destitution' include the homeless, beggars, and people with physical and mental disabilities, the old and infirm.

Section 24(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides that whoever employs or uses any juvenile or the child for the purpose of begging or causes any juvenile to beg, can be imprisoned upto three years and shall also be liable

to fine. Those who abet begging are also liable for the same punishment. Section 363A of Indian Penal Code (IPC) provides for punishment for a person who kidnaps or maims a minor for purposes of begging. Unauthorized vending/hawking and begging in trains and Railway premises is an offence under the provisions of Section 144 of the Railways Act, 1989.

Child beggars are treated as children in need of care and protection under the "Integrated Child Protection Scheme (ICPS)" being implemented by the Ministry of Women and Child Development. Further, there are many government schemes for destitute men and women so that they do not take to streets. (For instance, under the Indira Gandhi National Old Age Pension Scheme (IGNOAPS) central assistance is also provided to States for giving pension to persons above 65 years, living below the poverty line, @ Rs. 200/- per month, which is meant to be supplemented by at least an equal contribution by the States.)

TACKLING ORGANIZED CHILD BEGGING

Enforce ban- To control this problem, the Government as well as the Corporation should enforce a ban on begging. Secondly, arrangements should be made to collect the beggars and place them in poor homes set up for them.

Partial ban- A total ban on begging as a first step would not be fruitful and not a clever decision.

Rehabilitate them-The Government should also take more effective measures to crush gangs which thrive on begging in an organized manner. More beggars' homes should be opened where training in various crafts and trade may be provided.

All-round protection-The following methods may be followed to curb child begging. Provide sex education for children in the workplace. Laws must be developed and existing laws relating to children such as drug trafficking laws be scrutinized.

INITIATIVE FOR REHABILITATION OF BEGGARS

PUNE: The union government is mulling over a new centrally-supported initiative for the rehabilitation of beggars as local self government bodies in India have failed to implement schemes for the same.Recently a few municipal corporations in Maharashtra including Pune Corporation had launched 'beggar free city' campaign. However the campaign was abruptly concluded and hardly any beggar was rehabilitated across the state. The Pune Corporation claims that it has rehabilitated 16 of 479 beggars that were identified in the city.

BILL TO MAKE BEGGING LEGAL

Under the draft bill, employing a child for begging and any form of organised or syndicate or forced beggary will be a crime punishable under the Juvenile Justice Act and the Indian Penal Code. Further, the person found begging will be sent to a rehabilitation centre, for which states have been asked to make budgetary allocations, the district welfare officer, department of social welfare or the department handling the issues of destitutes and beggary in states shall be responsible for the supervision, monitoring and coordination of the implementation of this act in the districts. The director of social welfare shall be responsible at the state level. The bill, however, is a model legislation that has to be adopted and notified by states.

The crime of begging is also non-bailable, i.e., the accused has to make an application in court to get out of jail while the inquiry goes on. The level of awareness regarding free legal representation is very low in India and activists have often found the quality of representation to be poor. A person accused of begging would typically have no means to hire legal representation, and would find getting bail very hard.

Though the model bill does not criminalise begging *per se*, it allows for people found begging repeatedly to be detained indefinitely in rehabilitation centres with police assistance, if necessaryFurther, the bill envisages the issuance of identity cards which can potentially be used for surveillance purposes. These provisions could also allow and assist the police to conduct raids and 'clean-up drives', making the situation not very different from now.

WHAT ABOUT CHILDREN?

State laws on begging differ fundamentally in their approach towards the treatment of children found begging. Under the Juvenile Justice (Care and Protection of Children) Act, 2015, children found begging are treated as victims in need of care and protection to be dealt with by child welfare committees

whilst some of the state laws treat them as criminals who can be sent to an institution.

THE SHIFT FROM A PUNITIVE TO REHABILITATIVE APPROACH

By treating beggars simultaneously as criminals and as those in need of help, different State Governments have failed in their duty to reintegrate them into society, with the result that they usually end up begging again. Doing so incriminates them again, and the punishment for repeat offences is higher extending to detention for an indefinite period of time. India's policy-makers must develop a consistent and humane approach towards begging, which focuses not on penalizing but on rehabilitating them. The model bill marks a shift towards a more rehabilitative approach, but continues to perceive ostensible poverty as indicative of begging, and allows indefinite detention and the involvement of police in certain circumstances.

ONCE A PERSON HAS BEEN DETAINED:

1. Court ordering the detention shall forthwith forward him to the nearest Receiving Centre with a copy of the order of detention.

2. Will be handed over into the custody of the Superintendent of the Receiving Centre and shall be detained in the Receiving Centre until he is sent there from to a Certified Institution.

3. When any such person has also been sentenced to imprisonment, the Court passing the sentence of imprisonment shall forthwith forward a warrant to a jail in which he is to be confined and shall forward him to such jail with the warrant together with a copy of the order of detention. After the sentence of imprisonment is fully executed, the officer executing it shall, if detention in a Certified Institution for any period remains to be undergone by such person, forward him forthwith together with the copy of the order of detention to the nearest Receiving Centre, and thereupon the provisions of sub-section (1) shall as far as may be applied.

In case of leprosy patients and lunatics:

1. Where it appears that any beggar detained is of unsound mind or a leper, the beggar might be shifted to a mental hospital or leper asylum or another place of safe custody, to be kept and treated.

2. Where it appears that the beggar has ceased to be of unsound mind, or is cured of leprosy, the Chief Commissioner shall, by an order direct to the person having charge of the beggar if still liable to be kept in custody to send him to the Certified Institution from which he was removed or if the beggar is no longer liable to be kept in custody order him to be discharged.

3. The provisions of section 31 of the Indian Lunacy Act, 1912, (IV of 1912) or (subject to the provisions of sub-section (2) of section 14 of the Lepers Act, 1898 (III of 1898) shall apply to every beggar confined in a mental hospital or leper asylum

Such beggars who have been detained, shall be let go at the end of three months from the commencement of the release on licence of any person under Section 22 of the said Act, if the Chief Inspector is satisfied that there is a probability that such person will abstain from begging, recommend to the Chief Commissioner his unconditional release. The Chief Commissioner may on such recommendation release such person unconditionally.

PENALTY FOR BEGGING

The court shall order the person found to be a beggar under the last preceding sub-section to be detained in a Certified Institution for a period of not less than one year, but not more than three years. Provided that, if the court is satisfied from the circumstances of the case that the person found to be a beggar as aforesaid is not likely to beg again, it may after due admonition release the beggar on a bond for the beggar's abstaining from begging and being of good behavior, being executed with or without sureties as the court may require by the beggar or any other person whom the court considers suitable. The Court shall have regard to the following considerations, that is to say:- (i) the age and character of the beggar, (ii) the circumstances and conditions in which the beggar was living, (iii) reports made by the Probation Officer.

PENALTY AFTER BEING DETAINED FOR BEGGING

The sole purpose of this act and all its derivative acts is to rehabilitate beggars from their current illegal profession so that they be trained and employed in proper legal professions instead of resorting to begging.

While many would suggest that this act is archaic, one cannot negate the fact that Beggary is one of the biggest and most crucial social issues of India. The reasons for beggary range right from Poverty to Infirmity. Many would agree that it is also used as a method to scam good Samaritans by adhering to rules of deception to get easy money.

It is important to know that Begging has grown across the country by many folds, but as a citizen of this society believe that the correct rehabilitation, reformation and restoration of this evil we can overcome this problem of Beggary.

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RELATIONSHIP BETWEEN LEX FORI & LEX ARBITRI

Kunal Kumar & Ruchika Darira

Lex Fori means the law of Court in which the proceeding is brought whilst Lex Arbitri is the law of the place where the arbitration takes place.

The Hon'ble Supreme Court of India in the case of **Imax Corporation vs. E City Entertainment India Private Limited** decided on 10 March 2017 (*Civil Appeal No. 3885 of 2017*) has affirmed the significance between of the relationship between the Lex Forti and Lex Arbitri upholding that the parties intended expressly exclude themselves from Part-I of the Arbitration & Conciliation Act, 1996.

FACTS OF THE CASE:

On 28.09.2000, the Petitioner and the Respondent entered into an agreement for supply of large format projection systems for cinema theatres to be installed all across India.

The agreed arbitration clause constituted in the agreement read as under:

> *"This Agreement shall be governed by and construed according to the laws of Singapore, and the parties attorn to the jurisdiction of the courts of Singapore. Any dispute arising out of this master agreement or concerning the rights, duties or liabilities of E-City or Imax hereunder shall be finally settled by arbitration pursuant to the ICC Rules of Arbitration."*

As it is evident from the above stated arbitration clause, the parties failed to decide on the seat of the arbitration. The Appellant filed a request invoking arbitration with the ICC on 16.06.2004 and claimed for damages. The ICC rendered two partial awards dated 11.02.2006 and 24.08.2007 and the final award was delivered on the 27.03.2008. Since under the arbitration clause, the seat of arbitration was not chosen, the ICC fixed the juridical seat of arbitration as London under the Article 14(1) of the ICC Rules. It was held that:

> *"As well be noticed, no provision was made for a venue for any arbitration contemplated by Clause 14, but subsequently the court of the ICC decided on the 8th of October, 2004 to fix London as the juridical seat of the arbitration in accordance with the powers vested in the court Under Article 14 of the ICC Rules. Accordingly, this is an arbitration to which Part-I of the English Arbitration Act 1996 applies."*

Subsequently, on 11.02.2006 a partial award was passed declaring that the Respondent was in breach of the said agreement and was liable to pay damages to the Appellant. On 05.09.2006, the Respondent objected on the ground that the Appellant did not hold any legal status and the law firm representing the Appellant is not authorized to pursue the arbitration. The reasons for objection were stated as below:

> *"The seat of this arbitration is London. Therefore, English law determines the effect of any want of capacity suffered by "Imax Ltd" under the Canadian law as a result of its amalgamation into Imax Corporation with effect from 1st January, 2001."*

The second partial award was delivered on 24.08.2007, accordingly the tribunal determined the quantum of the of damages payable for an amount $9,406,148.31. The final award was delivered on the 27.03.2008 on the issue of interest and costs. The tribunal awarded a sum of $1,118,558.54 by way of interest and further levied a sum of $ 2,512.60 per day from 01.10.2007 until the payment was made. Additionally, the tribunal also awarded the cost for arbitration as fixed by the ICC and also the costs towards the attorney's fees, expert fees related expenses for $ 400,000 and $ 384,789.21, respectively.

Aggrieved by the award dated 27.03.2008, the Respondent challenged the award under Section 34 before the Hon'ble Bombay High Court. The Hon'ble High Court upheld the maintainability of the petition under Section 34 of the Act.

Subsequently, the Appellant in the present case filed an appeal before the Hon'ble Supreme Court of India challenging the interim order passed by the Bombay High Court. The question before the Hon'ble Supreme

Court of India was whether the award could be challenged before any of the Courts in India or not.

The Supreme Court held that firstly; if the parties had to resort to the court they could only approach the Courts of Singapore as per the clause. Thus any non-arbitrable dispute that may arise from the agreement or any dispute regarding the correctness or validity of the award could only be adjudicated by the Courts of Singapore.

Further, the intention of the parties to exclude Part-I of the Arbitration & Conciliation Act, 1996 was discussed. It was held that the governing law was Singaporean law and the rules as agreed between the parties were ICC Rules. The ICC had chosen the seat of arbitration as London. Importantly, it was held that the parties made an express choice regarding the conduct of arbitration i.e. the ICC Rules. Since the parties had mutually agreed for the ICC, it could be presumed that they were aware of the provision of the Rules that the place of arbitration will be decided in accordance with the ICC Rules. The Court held that the Parties intention to exclude Part-1 of the Arbitration & Conciliation Act, 1996 can be inferred from the agreement wherein they had decided the arbitration rules as ICC Rules and thus a willingness to conduct the arbitration outside India. Additionally the Supreme Court also referred to a case decided by the Supreme Court of Sweden from a passage in Redfern & Hunter:

> *"...no particular provision concerning the applicable law for the arbitration agreement itself was indicated [by the parties]. In such circumstances the issue of the validity of the arbitration Clause should be determined in accordance with the law of the state which the arbitration proceedings have taken place, that is to say, Swedish Law."*

Further, the relation between Lex Arbitri & Lex Fori:

> *"Parties may well choose a particular place of arbitration precisely because its lex arbitri is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration are concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard."*

After concluding, the Hon'ble Supreme Court of India held that that Part – I had no application as the parties chose and agreed the arbitration to be conducted outside India.

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NEWSBYTE

ONLINE MAINTENANCE OF REGISTERS UNDER LABOUR LAWS

As we had communicated earlier[1], the Ministry of Labour and Employment ('Ministry') vide its Notification dated 4th November, 2016 being G.S.R. 1048(E) paved way for ease of record keeping under various labor laws by way of proposing Ease of Compliance to Maintain Registers under various Labour Laws Rules, 2016 (the 'Proposed Rules'). The purpose behind the combined registers is to facilitate ease of compliance, maintenance and inspection, and will also make the information provided thereunder easily accessible to the public through electronic means thereby increasing transparency. The proposed Rules will benefit making references of registers provided under different labor related laws simple, which will serve public purpose in a better way.

Also, the Ministry vide Notification dated February 21, 2017[2] for ease of compliance of Labour Laws reduced the number of Registers to be maintained to 5 in place of 56 Registers which were provided under the stated Central Labour Laws/Rules.

Now, the Ministry vide its Notification No. Z-20024/ 06 /2016-IT dated 30th April 2017[3] has invited suggestions on *Online Maintenance of Registers under 9 Labour Laws (Central Sphere)*. This is a reach-out by the Ministry for developing software for online maintenance of the relevant registers by the Establishments. On as is basis the software is reported to have following facilities:

(i) Sign up and login by establishments;
(ii) Matrix of 9 labor laws along with the name of registers that are required to be maintained under respective labor laws applicable to that establishment;
(iii) Beta version of software in demo mode has been uploaded at http://dotestrun.in
(iv) For login at the above URL user id is *LIN12345678* **and password is** *Password@123*

The Ministry seeks comments of all stakeholders including the establishments for ascertaining:

(a) Ease of the operation of software;
(b) Utility of the software with respect to ease of maintenance of the registers;
(c) Utility of the software with respect to the MIS.

Under April 30 Notification the Ministry has requested stakeholders to login into the software via URL and run it with actual or test data to observe its utility so as to provide comments & suggestions for further improvements/ enhancements/ alteration to make the software more user friendly.

The comments / suggestions should reach the undersigned by 31.05.2017 at mail id itcell-mole@nic.in

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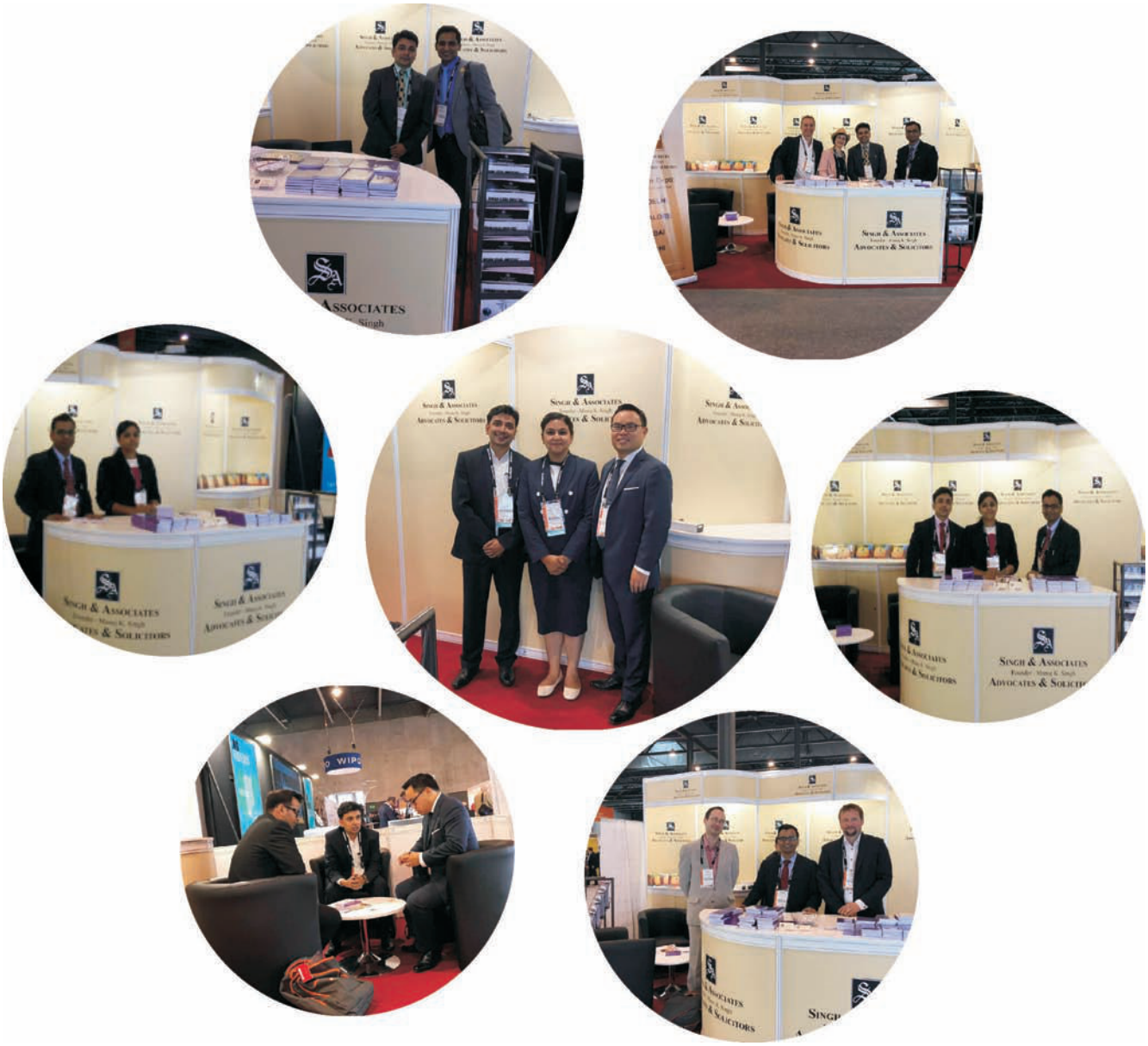
1. *Indian Legal Impetus, Vol. IX Issue XII (Newsbytes) http://singhassociates.in/UploadImg/NewsImages/Vol%20IX%20Issue%20XII.pdf*
2. *http://www.labour.nic.in/sites/default/files/Ease%20of%20Compliance%20Rules.pdf*
3. *http://www.labour.nic.in/sites/default/files/Online_Maintenance_of_Registers_under_9_labour_Laws_0.pdf*

SINGH & ASSOCIATES DELEGATION AT THE 139TH INTA ANNUAL MEETING IN BARCELONA, SPAIN

Singh & Associates, Founder Manoj K. Singh, Advocates & Solicitors attended the 139th INTA Annual Meeting held in Barcelona Spain from 20th May, 2017 – 24th May, 2017. The Annual Meeting was attended by almost 10,000 IP professional across the world. This event is of great importance to the Firm as it gives us a chance to meet our existing clients & acquaintances and at the same time make new ones. The Firm booked itself a booth within the Exhibition Area and was represented by Mr Shirmant Singh, Sr. Principal Associate (Patents), Mr Himanshu Sharma, Sr. Principal Associate (Trademarks) and Ms Vijaya Singh, Principal Associate (Litigation). The Annual Meeting was a success. Few pictures for the events are shared below for our readers.



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SINGH & ASSOCIATES

Founder - Manoj K. Singh

ADVOCATES & SOLICITORS

NEW DELHI [HEAD OFFICE]
E-337, East of Kailash, New Delhi-110065
Phone : +91-11-46667000
Fax : +91-11-46667001
newdelhi@singhassociates.in

MUMBAI
48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra-400021
mumbai@singhassociates.in

BANGALORE
N-304, North Block, Manipal Centre
47, Dickenson Road, Bangalore - 560042
Ph : +91-80-42765000
bangalore@singhassociates.in

GURUGRAM
Unit no. 701-704, 7th Floor, ABW Tower
IFFCO Chowk, Gurugram,
Haryana-122001

www.singhassociates.in