SINGH & ASSOCIATES
FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS

DECEMBER 2018. Vol. XI, Issue XII

INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

We are pleased to present December 2018 edition of our monthly newsletter "Indian Legal Impetus".In this edition we have covered recent developments, case laws and issues relating to various discipline of laws in India.

The first article provides case analysis of Bank of India vs. Deputy Director, ED, Mumbai in which the Appellate Tribunal for Prevention of Money Laundering examined the issue regarding attachment of properties under the Prevention of Money Laundering Act, 2002 which were already secured by the banks under the SARFAESI Act, 2002. The Tribunal while observing that certain amendments to the SARFAESI Act and RDB Act were carried out to facilitate the rights of secured creditors, held that the provisions of the SARFAESI Act, the RDB Act and also the IBC will have overriding effect over the PMLA.

The next article provides a brief overview of the regulatory framework related to Crowdfunding by analyzing the proposals put forth by SEBI. The next article provides case analysis of The State of Bihar and Ors. Vs. Bihar Rajya Bhumi Vikas Bank Samiti in which the Supreme Court concluded after examining the object of the Arbitration and Conciliation (Amendment) Act, 2015 that the nature of the S.34(5) of the Arbitration Act is directory and not mandatory.

The next article provided case analysis of Caravel Shipping Services Pvt. Ltd. V. Premier Sea Foods Exim Pvt. Ltd. wherein the Supreme Court adjudicated the dispute regarding applicability of the arbitration clause contained in a Bill of Lading upon the parties to a dispute arising out of the same.

The next article provides an update in the recent schemes, guidelines and ordinance issued by the concerned Government in respect of various labour laws related to women. The highlights of the Maternity Leave Incentive Scheme, 2018, Guidelines for Setting up of Crèche Facilities and the Kerala Shops And Establishment Ordinance, 2018 are discussed.

The next article provides an introduction to the Fugitive Economic Offenders Act, 2018 which was a need of the hour especially in light of the scams and economic offences after which the accused/ offenders would flee the nation in order to evade the legal consequences of the offences by them.

Lastly, an article providing an insight in the ordinance amending the Companies Act, namely, Companies (Amendment) Ordinance, 2018. The said article takes the reader through the amendments brought about by the said ordinance while concluding with the impact the said amendment was expected to have.

I hope that our esteemed readers find this information useful and it also enables them to understand and interpret the recent legal developments. I welcome all kinds of suggestions, opinion, queries or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@singhassociates.in

Thank you.

All ©Copyrights owned by Singh & Associates

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means without the prior permission in writing of Singh & Associates or as expressely permitted by law. Enquiries concerning the reproduction outside the scope of the above should be sent to the relevant department of Singh & Associates, at the address mentioned herein above.

The readers are advised not to circulate this Newsletter in any other binding or cover and must impose this same condition on any acquirer.

For internal circulation, information purpose only, and for our Clients, Associates and other Law Firms.

Readers shall not act on the basis of the information provided in the Newsletter without seeking legal advice.

2018 © Singh & Associates

INDIAN LEGAL IMPETUS®
Volume XI, Issue XII

SINGH & ASSOCIATES
ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi - 110065 INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana -122001 INDIA

MUMBAI
Unit No. 48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai - 400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre,
47, Dickenson Road
Bengaluru - 560042, INDIA

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

Email: india@singhassociates.in
Website: www.singhassociates.in

www.singhassociates.in

SINGH & ASSOCIATES
FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS

Managing Editor
Manoj K. Singh

Editor
Manish Gopal Singh Lakhawat

Published by
Singh & Associates Advocates and Solicitors

Contents

SARFAESI ACT & DRB ACT PREVAIL OVER PMLA

Vijay K Singh

Recently the Delhi Appellate Tribunal for Prevention of Money Laundering Act, New Delhi in the case titled *Bank of India vs. Deputy Director, ED*, Mumbai (FPA-PMLA-2173/MUM/2018), examined the issue pertaining to attachment of properties, by the Directorate of Enforcement (ED) under Prevention of Money Laundering Act (PMLA) , which were already secured by the Bank under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 **(SARFAESI Act).**. The appeal was filed by the Bank (Financial Creditor) against the Order passed by the Adjudicating Authority under the Prevention of Money Laundering Act, New Delhi, whereby the Adjudicating Authority confirmed the attachment of the property which was already secured by the Bank at the time of availing credit facilities/loan.

The Adjudicating Authority, without considering the security interest created in respect of the same property, confirmed the attachment under PMLA on the reason that the property was purchased/acquired by 'proceeds of crime'. The Appellate Tribunal, PMLA, considered section 71 of the PMLA which states that the provisions of PMLA shall have overriding effect, notwithstanding anything inconsistent therewith, contained in any other law for the time being in force.

The Appellate Tribunal also noted that amendments were carried out in the SARFAESI Act, 2002 with effect from September 01, 2016, whereas the PMLA had been enacted prior in time. The Appellate Tribunal relied on its earlier decision rendered in the case titled '*Standard Chartered Bank vs. Dy. Director, Directorate of Enforcement, Mumbai*', wherein the Appellate Tribunal had categorically held that the provisions of SARFAESI Act, 2002 and RDB Act, 1993 will prevail over the PMLA, 2002. The Appellate Tribunal examined Section 26E of SARFAESI Act, 2002 and Section 31B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 **("RDB Act")**, which provide that after registration of security interest, the debts due to any secured creditors shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Relying on the provisions of Section 26E of SARFAESI Act, 2002 and Section 31B of RDB Act, 1993, the Appellate Tribunal held that the secured creditor gets a priority over the rates of Central or State Government or any other local authority. The Appellate Tribunal held that the amendment has been carried out in the provisions of SARFAESI Act, and RDB Act to facilitate the rights of secured creditors/Bank which were being hampered by attachment of properties belonging to the secured creditors. The mortgaged properties are security to the loans, and, therefore, cannot be the subject matter of attachment in cases where such properties were purchased and mortgaged prior to events of funds diversion and frauds committed by such borrowers. The Appellate Tribunal held that once the properties are in possession of the secured creditor/ Bank under SARFAESI Act, it cannot be said that the same is purchased from the 'proceeds of crime'.

The proceedings under PMLA before the Adjudicating Authority, PMLA are civil in nature and not criminal. The Appellate Tribunal also reiterated that the provisions of Insolvency & Bankruptcy Code ("IBC") will have overriding effect over the PMLA. After passing aforesaid judgment, it has become evident that if there is no nexus between the alleged offence and the bank who is mortgagee of the properties, and the properties were purchased prior to sanctioning of the loan, no case of money laundering can be made out against the bank who has sanctioned untainted money in favour of the borrowers.

After the passing of this judgment, the Bank/the secured creditors will definitely invoke the provisions of SARFAESI Act and RDB Act for realizing their dues as proceedings under SARFAESI Act and IBC get stalled owing to the attachment orders passed under PMLA.

***

CROWDFUNDING - A BRIEF OVERVIEW OF THE REGULATORY FRAMEWORK

Palash Taing

Keshav (Law Intern)

Crowdfunding is solicitation of small amounts funds from multiple investors through a web-based platform or social networking site for a specific project, business venture or social cause.[1] This process is being practiced all over the world as an alternative to traditional funds raising. It is an alternate source of finance which facilitates interaction of entrepreneurs and prospective investors on an online platform where the former 'pitch' their business ideas and plans with an objective of attracting investments from the latter. Crowdfunding is beneficial as it widens the reach of entrepreneurs beyond the conventional circle of friends, relatives and venture capitalists.

It can be broadly divided into four categories: donation crowdfunding, reward crowdfunding, peer-to-peer lending and equity crowdfunding.

1. Donation Crowdfunding: It involves raising funds for social, artistic, philanthropic or other purposes. This model can be used for raising funds for causes ranging from disaster relief to education sponsorships, charity causes, and payment of medical bills. There are no financial incentives for donors. Donations are made purely as an act of philanthropy.

2. Reward Crowdfunding: This method is modification of the Donation model. Donors are given an incentive of some existing or future tangible reward for making contributions. Reward may be in the form of a product or a service, *for example*, pre-launch edition of a newly developed video game or complimentary meal coupons. Reward Crowdfunding is appropriate for businesses where a creative idea or innovation is involved.

3. Peer-to-Peer Lending or Debt Crowdfunding: Peer-to-Peer Lending (P2P lending) is a form of crowd-funding used to raise loans which are re-paid along with interest. It can be defined as the use of an online platform that matches lenders with borrowers in order to provide unsecured loans. The borrower can either be an individual or a legal person requiring a loan. The interest rate may be set by the platform or by mutual agreement between the borrower and the lender. Fees are paid to the platform by both the lender as well as the borrower.[2]

4. Equity Crowdfunding: It refers to fund raising by a business, particularly early-stage funding, through offering equity interests in the business to investors online. Businesses seeking to raise capital through this mode typically advertise online through a crowdfunding platform website, which serves as an intermediary between investors and the start-up companies.

A distinct form of Security based Crowdfunding has been devised by the Securities and Exchange Board of India (SEBI) in the Consultation Paper on Crowdfunding in India (SEBI Consultation Paper), viz. Fund based Crowdfunding (FbC). It has been proposed that under the FbC model, the funds of the accredited investors [Qualified Institutional Buyers (QIBs), Companies, High Net worth Individuals (HNIs), Eligible Retail Investors (ERIs) which fulfil the prescribed qualifications] registered with a recognized platform will be collected online through the platform and pooled under the Alternative Investment Fund ("AIF") to invest in shares or debt securities in crowdfunded ventures which are displayed on a recognized crowdfunding platform.

The SEBI Consultation Paper furnishes proposals for a regulatory framework governing procedure of Security based Crowdfunding methods for Start-ups and Small and Medium Enterprises (SMEs).

It provides that only an 'Accredited Investor' can invest money in a crowdfunding project, where qualifications of an 'Accredited Investor' have been prescribed thereof as under:

1 *Consultation Paper on Crowdfunding in India, Securities and Exchange Board of India (dated June 2014) available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1403005615257.pdf.*

2 *Consultation Paper on Peer to Peer Lending in India, Reserve Bank of India (dated April 2016), available at https://rbidocs.rbi.org.in/rdocs/content/pdfs/cperr280416.pdf.*

I. Companies incorporated under the Companies Act, with a minimum net worth of Rs.20 crore.

II. HNIs with a minimum net worth of Rs.2 crore.

III. ERIs who fulfil the prescribed criteria.

The SEBI Consultation Paper proposes to place restrictions on the kind of companies that can raise funds through Security based crowdfunding, some of which are as follows:

IV. The company intending to raise capital NOT exceeding Rs. 10 Crore in a period of 12 months.

V. A company which is not promoted, sponsored or related to an industrial group which has a turnover in excess of Rs. 25 Crores.

VI. A company which is not listed on any exchange.

VII. A company which is not more than 4 years old.

VIII. A company which is not engaged in real estate and activities which are not permitted under industrial policy of Government of India.

Also, it is proposed that a crowdfunding platform has to be necessarily recognized by the SEBI, and that it should fulfil the given integrity, experience and solvency requirements.[3] Peer-to-Peer Lending is regulated by the Non-Banking Financial Company–Peer-to-Peer Lending Platform (Reserve Bank) Directions, 2017 (The Directions).

The Directions define a "Non-banking financial company - Peer to Peer Lending Platform"[4] (NBFC-P2P) as a non-banking institution which carries on the business of a Peer-to-Peer Lending Platform. Peer-to-Peer Lending Platform[5] has been defined as an intermediary providing the services of loan facilitation via online medium or otherwise, to the participants[6] (a person who has entered into an arrangement with an NBFC-P2P to lend on it or to avail of loan facilitation services provided by it). Non-banking institutions other than companies have been prohibited from undertaking the business of Peer-to-Peer Lending platform.[7] The Directions provide the scope of activities, prudential norms (the aggregate loans taken by a borrower at any point of time, across all P2Ps, is subject to a cap of Rs.10,00,000/-), operational guidelines, *inter alia* other regulations.

CROWDFUNDING - TREATMENT IN FOREIGN JURISDICTIONS

USA

In USA, Jumpstart Our Business Start-ups Act (JOBS) Act, 2012, is the regulatory law on Crowdfunding. Title II of the JOBS Act regulates equity offers made to accredited investors. Title III deals with equity offers to general public or CSEF (Crowd Sourced Equity Funding). These provisions allow start-ups and other small investors to raise modest amounts of capital through an online platform. This Act provides thresholds for a transaction to qualify as a crowdfunding transaction, and puts limits on the amounts that can be raised and investments made through the online platform.

UK

Financial Conduct Authority (FCA) is the regulatory authority that governs crowdfunding in Britain. Crowdfunding is regulated by broadly dividing it into four types: Investment based, Loan based, Donation based and Pre-payment/Reward based. Investment based and Loan based Crowdfunding are regulated activities under the Financial Services and Markets Act, 2000. Donation based and Pre-payment/reward based crowdfunding activities are regulated under The Payment Services Regulations, 2017.[8]

ITALY

One of the first nations to enact a law on Equity Crowdfunding was Italy. Regulation on "the collection of risk capital via on-line portals"[9] (adopted by CONSOB[10] with Resolution no. 18592 of 26 June 2013, last amended by Resolution no. 20264 of 17 January 2018) is the relevant law governing Crowdfunding. The thrust of the law is to regulate the process of inflow of capital to "innovative start-ups" and "innovative SMEs".

3 *The SEBI Consultation Paper, supra.*

4 *Non-Banking Financial Company – Peer to Peer Lending Platform (Reserve Bank) Directions, 2017, ¶ 4(1)(v).*

5 The Directions, *supra* at ¶ 4(1)(vi).

6 *The Directions, supra at ¶ 4(1)(iv).*

7 *The Directions, supra at ¶ 5(1)(i).*

8 *Crowdfunding and Authorisation, FINANCIAL CONDUCT AUTHORITY, available at https://www.fca.org.uk/firms/authorisation/when-required/crowdfunding.*

9 *Regulation on "the collection of risk capital via on-line portals", CONSOB, available at http://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/reg18592e_2018.htm?hkeywords=&docid=14&page=0&hits=24&nav=false.*

10 *Commissione Nazionale per le Società e la Borsa, also referred to as the Italian Securities and Exchange Commission, is the Securities market regulator.*

Portals are required to be registered with CONSOB[11] and they are entrusted with the duty of shareholder protection.

AUSTRALIA

In Australia, The Corporations Amendment (Crowd-sourced Funding) Act, 2017, amends the Corporations Act 2001 (Corporations Act), and makes minor amendments to the Australian Securities and Investments Commission Act 2001 to govern provisions relating to crowdfunding in Australia. The Crowd-sourced Funding (CSF) Regime seeks to reduce the regulatory requirements for public fundraising while maintaining appropriate investor protection measures. It has been made obligatory for a CSF service provider to hold an Australian Financial Services (AFS) licence.[12]

NEW ZEALAND

Crowdfunding is a type of financial market service covered by the Financial Markets Conduct Act, 2013 (FMC Act).[13] The FMC Act regulates equity based crowdfunding. Companies are allowed under the FMC Act to raise up to $2 million in any 12-month period, without having to issue an investment statement or prospectus (or a product disclosure statement from 1 December 2014). The prevalent Crowdfunding rules have made it easier and quicker for small companies to raise money. There are relaxations in filing and other compliances for companies seeking to raise funds through a licensed crowdfunding service provider.[14]

CONCLUSION

SEBI has sought to achieve an "enabling framework" through the proposals suggested in its consultation paper. The cost of raising funds for start-ups and SMEs has been reduced by cutting down the documentation and filing requirements. Thereby the process of crowdfunding is made easier in comparison to the regular equity route. However, the substitution of the existing framework may have the consequence of exposing retail investors to unscrupulous players.

The current status is that online crowdfunding platforms are neither authorized by SEBI nor recognized under any law governing the securities market. All crowdfunding transactions made on electronic platforms are in contravention of securities laws. Hence, the Caution notice[15] puts the crowdfunding regime in a grey area in the Indian regulation framework.

***

11 *Articles 4-7, Regulation on "the collection of risk capital via on-line portals"*

12 *CSF legislation, AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION, available at https://asic.gov.au/regulatory-resources/financial-services/crowd-sourced-funding/#csf-legislation.*

13 *https://fma.govt.nz/compliance/role/crowdfunding-platforms/who-needs-to-comply/*

14 *https://fma.govt.nz/compliance/offer-information/crowdfunding-issuers/*

15 *SEBI Press Release No. PR No.: 137/2016, dated August 30, 2016, available at https://www.sebi.gov.in/media/press-releases/aug-2016/sebi-cautions-investors_33094.html .*

SECTION 34 (5) OF THE ARBITRATION AND CONCILIATION ACT, 1996: WHETHER MANDATORY OR DIRECTORY?

Divya Kashyap

INTRODUCTION

Recently, the Supreme Court in *The State of Bihar and Ors. Vs. Bihar Rajya Bhumi Vikas Bank Samiti*[1], had the opportunity to examine whether Section 34(5) of the Arbitration and Conciliation Act, 1996, ("Act") inserted by Amending Act 3 of 2016 (w.e.f. 23rd October, 2015), is mandatory or directory in nature. The judgment was delivered on July 30, 2018, by a two-judge Bench of Justices Rohintan Fali Nariman and Indu Malhotra, and serves as a precedent for clarifying the nature of the above-mentioned provision. The judgment highlights how the amendment has to be interpreted in the light of convenience and justice, rather than technicalities of law.

FACTS OF THE CASE

The appeal by special leave arose out of an arbitration proceeding which commenced on May 24, 2015. An arbitral award was made on January 06, 2016. A petition based on Section 34 challenging the said award was filed on April 05, 2016 before the Patna High Court, in which notice was issued to the opposite party by the Court on July 18, 2016. Despite the enforcement of Section 34(5), the common ground between the parties is that no prior notice was issued to the other party in terms of the said Section, nor was the application under section 34 accompanied by an affidavit that was required by the said Sub-section.

The learned Single Judge of the Patna High Court, following the judgment of the Supreme Court in *Kailash Vs. Nankhu and Ors.*[2] held that the provision contained in Section 34 (5) was only directory in nature
.
A Letters Patent Appeal was made to the Division Bench, where considering the Law Commission Report which led to the 2015 amendment to the Act, the mandatory language of Section 34 (5) together with its object, it was held that the sub- section was a condition precedent to the filing of a proper application under Section 34. Based on this conclusion and on analogy of a notice issued under Section 80 of the Code of Civil Procedure, 1908, the Division bench held that since this mandatory requirement had not been complied with, the Section 34 application itself would have to be dismissed. Thus, the appeal was allowed vide the impugned order dated October 28, 2016 and the judgment of the learned Single Judge was set aside.

ARGUMENTS OF THE PARTIES

The main argument of the Appellants was that Section 34 (5) and (6) form part of a composite scheme, the object being disposal of application under Section 34 expeditiously within one year. Since no consequence is provided if such application is not disposed of within the said period, the provisions are only directory, despite the mandatory nature of language used therein. Further, it was argued that procedural provisions must not be construed in such a manner that justice itself gets trampled upon.

On the other hand, the counsel for the Respondents argued that Section 34 (5) was a mandatory provision and an application filed under Section 34 without complying with the condition precedent is an application non-est in law. The consequence follows not from sub-section (6) of Section 34 but from sub-section (3) thereof, under which such application cannot be considered if it is beyond the stipulated period/extended period mentioned in Section 34 (3) of the Act.

OBSERVATIONS OF THE SUPREME COURT

The Supreme Court made an in-depth analysis of the aforementioned provisions and examined the various precedents to determine the nature of Section 34 (5) and (6) of the Act. It began by examining the 246th Law Commission Report where it was stated that the addition of these provisions was to expedite the process of challenges to arbitration awards and for ensuring that parties take their remedies seriously and

1 *AIR 2018 SC 3862,*

2 *(2005) 4 SCC 480*

approach a judicial forum expeditiously and not as an afterthought.

To illustrate the legal position, the Supreme Court went on to examine various judgments on similar provisions. In *Topline Shoes Vs. Corporation Bank*[3], the Supreme Court was called upon to decide whether Section 13 (2)(a) of the Consumer Protection Act, 1986, which spoke of a reply being filed by the opposite party "within a period of 30 days or such extended period not exceeding 15 days, as may be granted by the District Forum". Based on The Statement of Objects and Reasons of the Consumer Protection Act, 1986, and keeping in mind the principles of natural justice, it was held that the said provision was directory in nature. The provision was more by way of procedure to achieve the object of speedy disposal of such disputes. No substantive right in favor of the complainant was created by reason of which the Respondent may be barred from placing his version in defence. It was further held that no penal consequences have been provided in case extension of time exceeds 15 days and hence, the reply is not necessarily to be rejected.

Similarly, in *Kailash Vs. Nankhu and Ors. (Supra),* the Court dealt with the amendment of Order VIII Rule 1 of the CPC under the Amendment Act of 2002. Order VIII Rule 1 is circumscribed by the words "shall not be later than ninety days". The Court observed that the provision is procedural in nature and that its object is to curb the mischief of unscrupulous defendants adopting dilatory tactics by delaying the disposal of cases. The language of the proviso to Order VIII Rule 1 is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, was to be held as directory and not mandatory.

In *Salem Advocates Bar Association Vs. Union of India*[4], the Supreme Court at para 20 held that the use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. Having regard to the context in which it is used or having regard to the legislation, the same can be construed as directory. Rules of procedure are the handmaid of justice and not its mistress. Strict interpretation would defeat justice.

The Apex Court in the present case further went on to discuss *New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd.*[5] where a three-judge Bench following the judgment of *J.J. Merchant vs. Shrinath Chaturvedi*[6] struck a discordant note. However, the case of *J.J. Merchant (supra)* was distinguished in *Kailash (supra).* It stated that no focused argument in *J.J. Merchant (supra)* was made on whether the provision of Section 13 (2) (a) of the Consumer Protection Act, 1986 could be held to be directory.

In *State Vs., N.S. Gnaneswaran*[7], the Supreme Court, while dealing with Section 154(2) of the Code of Criminal Procedure, 1973, held that despite the mandatory nature of the language used in the provision, no consequence was provided if the Section was breached. Hence, it was directory in nature.

CONCLUSIONS OF THE COURT

The Court held Section 34 (5) to be procedural in nature, the object behind which is to dispose-off applications expeditiously and not scuttle the same. It further drew contrast between Section 80 of the Code of Civil Procedure, 1908, and Section 34 (5) of the Act by referring to *Bihari Chowdhury and Anr. Vs. State of Bihar and Ors.*[8] where it was held that Section 80, though a procedural provision, has been held to be mandatory as it is conceived in public interest and advancement of justice as it affords the government or public officer an opportunity to scrutinize the claim proposed to be filed against them, thereby avoiding unnecessary litigation and saving public time and money by settling the claim without driving the person who has issued the notice to file a suit.

The Court further negated the contention of the counsel on behalf of the Respondent that Section 34 (5) is a condition precedent by stating that Section 34 (1) does not refer to this sub-section. The only requirement is that an application for setting aside an award be in accordance with Sub-sections (2) and (3). Hence, even legislatively, Section 34 (5) is not a condition precedent to filing an application under Section 34 of the Act.

3 (2002) 6 SCC 33
4 (2005) 6 SCC 344
5 (2015) 16 SCC 20
6 (2002) 6 SCC 635
7 (2013) 3 SCC 594
8 (1984) 2 SCC 627

In contrast with Section 29 A of the Act which provides for termination of mandate of the Arbitrator as consequence of delay, the Court observed that no consequence has been provided in case the period for deciding the application under Section 34 has elapsed.

Further, the Court observed that the express language of Section 34 (6) of the Act mitigates against the submission of the counsel for the Respondents that Section 34 (5) is independent of Section 34 (6) of the Act and is a mandatory requirement of law by itself.

The Apex Court further observed that the judgments of High Courts of Patna[9], Kerala[10], Himachal Pradesh[11], Delhi[12] and Guwahati[13] had all taken the view that Section 34 (5) of the Act is mandatory in nature on the premise of the mandatory nature of the language used therein and the object sought to be achieved by it. However, in *Global Aviation Services Private Limited Vs. Airport Authority of India*[14], the Bombay High Court held that the provision is directory in nature, largely because no consequence has been provided for breach of the time limit specified. The aforesaid judgment has been followed in recent judgments of the High Courts of Bombay[15] and Calcutta.[16]

Finally, at paragraph 27, the Apex Court set aside the judgment of Patna High Court and opined that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of law. However, the endeavor of every court in which a section 34 application has been filed shall be to stick to the time limit prescribed under the Act.

CONCLUSION

The judgment clarifies the law as regards the nature of Section 34 (5) of the Act to be directory. The vested right of a party to challenge an award under Section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of arbitration petition. To construe such a provision as mandatory would defeat the advancement of justice as applications filed without adhering to requirements of Section 34 (5) would scuttle the process of justice by burying the element of fairness.

***

9 *Bihar Rajya Bhumi Vikas Bank Samiti v. State of Bihar and Ors. L.P.A. No. 1841 of 2016 in C.W.J.C. No. 746 of 2016 [decided on 28.10.2016].*

10 *Shamsudeen v. Shreeram Transport Finance Co. Ltd., Arb. A. No. 49 of 2016 [decided on 16.02.2017].*

11 *Madhava Hytech Engineers Pvt. Ltd. v. The Executive Engineers and Ors. O.M.P. (M) No. 48 of 2016 [decided on 24.08.2017].*

12 *Machine Tool (India) Ltd. v. Splendor Buildwell Pvt. Ltd. and Ors. O.M.P. (COMM.) 199-200 of 2018 [decided on 29.05.2018].*

13 *Union of India and Ors. v. Durga Krishna Store Pvt. Ltd., Arb. A. 1 of 2018 [decided on 31.05.2018].*

14 *2018 SCC Online Bom 233*

15 *Maharashtra State Road Development Corporation Ltd. v. Simplex Gayatri Consortium and Ors. Commercial Arbitration Petition No. 453 of 2017 [decided on 19.04.2018].*

16 *Srei Infrastructure Finance Limited v. Candor Gurgaon Two Developers and Projects Pvt. Ltd., A.P. No. 346 of 2018 [decided on 12.07.2018].*

CASE ANALYSIS ON CARAVEL SHIPPING SERVICES PVT. LTD. V. PREMIER SEA FOODS EXIM PVT. LTD. MANU/SC/1252/2018

Shivika Agarwal

BRIEF FACTS

The dispute arose out of a document titled "Multimodal Transport Document/Bill of Lading" (hereinafter referred as "B/L"). The B/L specifies the Appellant to be an agent of M/s Premier Sea Foods Exim Pvt. Ltd. who facilitates transport.

The opening clause of B/L states that "*In accepting this Bill of Lading the Merchant expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the Bill of Lading whether typed, printed or otherwise*". Also, clause 25 of the B/L, which was a printed condition annexed thereto, contained the arbitration clause.

The Respondent had filed a suit in 2009 before the Sub-Judge's Court in Kochi to recover a sum of Rs.26,53,593/- wherein B/L was expressly stated to be a part of cause of action. Immediately after the filing of this suit, the Appellant filed an Interlocutory Application (hereinafter referred as "I.A.") in 2009 under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "the Act"), wherein it was pointed to the Sub-Court, Kochi, that the printed terms annexed to the B/L has an arbitration clause included in it. The I.A. was dismissed by the Sub-Court, Kochi basing its decision on the reasoning that printed conditions annexed to the Bill of Lading is not binding on the parties.

The Appellant then moved to Hon'ble Kerala High Court under Article 227 of the Constitution of India. The Hon'ble High Court dismissed the Petition by referring to the provisions of the Multimodal Transportation of Goods Act, 1993, and that the parties had no intention to arbitrate and there was nothing to show that the Clause (printed in B/L) was brought to the notice of the Respondent. A review petition filed by the Appellant was also dismissed by the High Court.

ARGUMENTS ADVANCED ON BEHALF OF BOTH THE PARTIES

The Appellant stated that both the parties were bound by the express printed conditions referred to in the B/L and that reading Section 7(5) of the Act and *M.R. Engineers and Contractors Private Limited v Som Datt Builders Limited*[1] judgment together, it is clear that there is reference of an arbitration clause in the contract which is in writing hence forming part of the contract.

The Respondent on the other hand stated that section 7(4)(a) of the Act requires the arbitration agreement to be in a document signed by the parties and that since B/L is not signed by Respondent, it was not bound by that Arbitration Clause.

COURT'S FINDING AND JUDGMENT

I. The court stated that B/L in its opening clause specified the term 'Merchant' defined as shipper, consignor or consignee under clause (1) (e) of the Standard Conditions Governing Multimodal Transport Document.

II. That on the perusal of Clause 25 of the B/L, it can be stated that parties have expressly agreed to be bound by the terms despite the Arbitration Clause being in a printed condition, annexed to the B/L.

III. The Respondent cannot blow hot and cold by relying on the B/L (though unsigned) for the purpose of suit filed by them, and for the purpose of Arbitration stating that it should be signed.

IV. That in *Jugal Kishore Rameshwardas v Mrs. Goolbai Hormusji*[2], the court has held that an arbitration agreement needs to be in writing though it need not be signed. Further, adding to this, the Court held that section 7(4) of the Act only adds that an arbitration agreement would be found on the circumstances mentioned in the sub-clauses of section 7(4).

1 *(2009) 7 SCC 696*

2 *A.I.R. 1955 S.C. 812*

Therefore, reading section 7(5) of the Act with *M.R. Engineers* case, it can be held that reference in B/L is such as to make arbitration clause part of the contract and that the arbitration agreement needs to be in writing though it is not signed by the parties. Accordingly, the Supreme Court allowed the appeal and set aside the judgments of the High Court.

***

LABOR LAWS – UPDATES

Harsimran Singh

MATERNITY LEAVE INCENTIVE SCHEME, 2018

On November 16, 2018, the Ministry of Labour and Employment, Government of India ('Ministry') proposed the Maternity Leave Incentive Scheme[1] ('Scheme') whereby seven weeks' wages would be reimbursed to employers who employ women workers with a wage ceiling up to INR 15,000.00 a month (USD 209 approximately) and provide them maternity benefit of 26 weeks paid leave, subject to certain conditions.

In perspective, Maternity Benefit Act, 1961 (Act) was amended in 2017 (2017 Amendment), to enhance/ increase the maternity leave period to 26 weeks from the previous 12, for a woman employee, for the first two children. Since the 2017 Amendment was aimed to ensure the health of women employees pursuant to giving birth, and to ensure safety of the newborn child, it appeared to be a positive development for women employees in the private sector. However, it has been widely reported that there has been a shortfall in the implementation of the 2017 Amendment resulting in the amendments to the Act being inadequate and ineffective.

Sadly, a perception has surfaced whereby employers are not inclined to employ women as they would then be required to sponsor them for a 26-week long paid maternity leave. This point can be corroborated from a report of the World Bank, where it has been statistically provided that female participation in the labour force dropped to 27% in 2017 from 35% in 1990.[2]

Hence, the Scheme could be seen as the missing motivation for the private employers to hire women employees as partial cost being borne by the Government making it less financially challenging for the employers and gradually shedding the above prevalent notion.

Currently, the Scheme is in draft stage and more is yet to be seen. Nevertheless, the Scheme seems to be the apt step in line with prevalent global polices in countries such as Australia & Canada (*benefits of maternity are entirely financed by public funds*), United Kingdom & Singapore (*shared responsibility on the employer and the Government to contribute to the wages disbursed on account of maternity leave*), and South Africa (*responsibility on three stakeholders – i.e. the employer, employee and the Government*).

The proposed Scheme, if approved and implemented, shall ensure the women in this country an equal access to employment and other approved benefits along with adequate safety and secure environment. The work places will be more and more responsive to the family needs of the working women. There are some media reports that this Scheme has been approved/ notified. However, it has been clarified that Ministry is in the process of obtaining necessary budgetary grant and approvals of competent authorities.[3]

GUIDELINES FOR SETTING UP OF CRÈCHE FACILITIES

Vide its office memorandum dated November 2, 2018, the Ministry of Women and Child Development, Government of India issued National Minimum Guidelines[4] for setting up and running Crèches under Maternity Benefit Act, 2017 (Crèche Guidelines). Some of the key highlights of the Crèche Guidelines are as under:

I. There should be one crèche for every 30 (thirty) children which should be extended to children of age group of 6 (six) months to 6 (six) years of all employees including temporary, daily wage, consultant and contractual workers;

II. The location of the crèche facility should be at the workplace or within 500 (five hundred) meters from the premises of the establishment;

1 *http://pib.nic.in/newsite/PrintRelease.aspx?relid=184805*

2 *https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS*

3 *http://pib.nic.in/newsite/PrintRelease.aspx?relid=184805*

4 *http://www.wcd.nic.in/sites/default/files/National%20Minimum%20Guidelines.pdf*

III. Appointment of one crèche personnel along with one helper for every 10 (ten) children in the age group of below 3 (three) years and for every 20 (twenty) children in the age group of 3 (three) to 6 (six) years. It also provides for appointment of a crèche-in charge if the number of children in crèche is more than 5 (five).

(i). Streamlining of the crèche timings, keeping in view the parents' working hours/ timings/ shifts in an establishment (*assuming an 8 (eight) hours shift*);

(ii). Every establishment must adopt a child protection policy. The Crèche Guidelines provide for a model child protection policy that can be adopted by establishments. The objective of this policy is to prevent child abuse in any form at establishment's workplace and within its operating hours. Such policy must provide for a complaints committee constituted by the establishment to receive complaints, conduct formal enquiries and recommend appropriate action for redressal and punishment;

(iii). Norms and Standards for a crèche have been provided which comprise the regulations for crèche environment, crèche equipment/ material, safety/ protection at the crèche, health practices, nutrition practices, hygiene and sanitation practices etc.

a) Crèche equipment/material- the materials to be procured by crèche for its operations which includes certain non-recurring expenses such as furniture, appliances, etc. and certain recurring expenses such as eatables, stationary, etc. The complete descriptive list of materials under recurring and non-recurring expenses are mentioned in annexure to the Crèche Guidelines,

b) Nutrition and health practices - sample immunization schedule, calorie requirement chart for different age group of children and the WHO standard growth-monitoring chart to monitor the growth of the children in the crèche. The sample meal charts for various age groups are also mentioned in annexure to the Crèche Guidelines which could be adopted by the establishments setting up crèche,

c) Crèche transactions- the activities to be organized for holistic development of children and provides for a curriculum depending on the age group of children in crèche. The Crèche Guidelines also outline activities to monitor the development of children in the crèche depending on the age of children;

(iv). The preferred age of crèche staff shall be between 20 to 40 years. Further, the workers are also required to undergo training and their appointments would be made on assessment of their skills, knowledge and attitude. Such training may be provided by different organizations who specialize in providing training of childcare workers. There is no specification on who can impart such training to the establishments;

(v). In order to monitor and supervise the functioning of crèche, a crèche monitoring committee is required to be set up by the establishments. The crèche monitoring committee would constitute 3 to 4 parents, crèche worker, crèche supervisor and human resource/ administrative officer.

It is seen that the Crèche Guidelines are likely to serve as a prototypical recommendations for all the States to appropriately incorporate these in their State specific maternity benefit rules.

1. <u>Kerala Shops And Establishment Ordinance,</u>

2018

The Government of Kerala vide notification dated October 4, 2018, promulgated an ordinance - *Kerala Shops and Establishments (Amendment) Ordinance*[5] (hereinafter referred to as the "Ordinance") with a view to further modify the prevalent Kerala Shops and Establishments Act, 1960 (hereinafter referred to as the "Act"). The Act provides for registration of establishments, duties of employer, payment of wages, hours of work, leaves, holidays, overtime, intervals for rest, prohibited employment as in case of children, cleanliness, ventilation and lighting and penal consequences in the event of failure of compliance.

Below are some of the many amendments to stated sections of the Act, as introduced by the Ordinance:

(i). Section 2(6) - "Employee" means a person wholly or principally employed in, and in connection with, any establishment and includes apprentices or class of persons as may be declared by the Government.

(ii). Section 11 - Substitution of the said provision allows for grant of weekly holidays-

a) Every person employed in a shop or a commercial establishment shall be allowed in each week a holiday of one whole day provided that nothing in this sub-section shall apply to any person whose total period of employment in the week including any days spent on authorized leave, is less than six days.

b) No deduction shall be made from the wages of any employee in an establishment on account of any day on which a holiday has been allowed in accordance with this section and if such person is employed on the basis that he would not ordinarily receive wages for such day, he shall nonetheless be paid for such day the wages he would have drawn had the holiday not been allowed on that day.

(iii). Section 20 - No woman or any person who has not attained the age of seventeen shall be required or allowed to work whether as an employee or otherwise in any establishment before 6 A. M. or after 9 P. M. However, an employer may employ women employees between 9 P.M. and 6 A.M., after obtaining the consent of such women employees ensuring that no female employee is employed between those hours other than in groups consisting of at least five employees having a minimum of two female employees and adequate protection of their dignity, honor and safety, protection from sexual harassment and facility for transportation from the shop or establishment to the doorstep of their residence;

(iv). Section 21B - Newly introduced provision for seating facilities states that in every shop and establishment, suitable arrangements for sitting shall be provided for all workers so as to avoid 'on the toes' situation throughout the duty time, so that they take advantage of any opportunity to sit which may occur in the course of their work;

(v). Section 29 - Modifications have been made to the penal provisions increasing the amount of the prescribed penalties;

(vi). Section 30 - The registers, records and display of notices shall be maintained in electronic as well as physical form.

The Ordinance accords equality of working opportunities to the women in State of Kerala while ensuring their safety and protection. In order to ensure compliance to the provisions of the Act, stricter penalties have been imposed.

***

5 *http://www.lc.kerala.gov.in/images/pdf/gos/Ordinance.pdf*

AN INTRODUCTION TO THE FUGITIVE ECONOMIC OFFENDERS ACT, 2018

Vineet Kumar (Law Intern)

In recent times India has witnessed a number of scams and economic offences which have left an adverse impact on the Indian economy and also the banking industry. Some prominent of these have been the IPL Scam having Lalit Modi (former IPL Commissioner) at the center of it, the Rotomac Scam, but probably the most reported one has been the alleged fraud by owner of the now defunct Kingfisher Airlines Vijay Vittal Mallya, who has been out of India for quite a while now in order to evade trail for criminal offences. In an attempt to bring once prominent liquor baron, who has been earlier declared a "fugitive" by Special PMLA Court in Mumbai, to justice and grab him by the neck, the Indian Parliament recently enacted The Fugitive Economic Offenders Act, 2018 which was assented to by the President on 31st July, 2018 and is deemed to have come into force on 21st April, 2018.[1] The recent turn of events that led to the enactment of the legislation were a part of headlines not only in India but outside India as well. He is currently reported in the United Kingdom, where once 'the king of good times' is battling an extradition proceedings initiated by India to bring back Vijay Mallya to face criminal actions regarding the unpaid loans of about $1.4 billion that he owes to Indian authorities and creditors. Interestingly, he has also offered to repay the dues to all the creditors. In September, 2018 the Indian government had failed to provide any substantial evidence to justify extraditing tycoon Vijay Mallya from Britain to face fraud charges.[2] On December 10, 2018, the proceedings regarding extradition of Vijay Mallya, which had been going on for almost a year, concluded in the favour of India. The United Kingdom's Westminster Magistrates' Court gave a green signal to extradite Mallya to India to face charges of fraud and economic offences for duping a number of banks of almost Rs. 9,000 Cr. The Court observed that there was no substance in the argument placed on behalf of Mallya that the charges and proceedings against him were politically motivated.

Coming to the Act itself, it has a variety of provisions including, but not limited to, declaration of a "fugitive economic offender" in respect of a person, attachment of the property of such person and bar over civil claims. The statute defines 'fugitive economic offender' as any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who (i) has left India so as to avoid criminal prosecution, or (ii) being abroad, refuses to return to India to face criminal prosecution.[3] The Act also defines 'benami property' and assigns it the same meaning as provide under the Prohibition of Benami Property Transactions Act, 1988. This implies that the FEO Act, 2018 applies to any property which is the subject matter of a benami transaction and also includes the proceeds from such property. Further it also covers within its scope the transactions which are in nature of benami transactions under the Prohibition of Benami Transactions Act, 1988.[4]

Further, upon a bare reading, it appears that Section 5 of the FEO Act, 2018 is similar to Section 5 of the Prevention of Money Laundering Act, 2002. It has been drafted on the same lines and both these provisions, though occurring in different statutes, provide for the same thing, i.e. attachment of the property of a person accused of committing the offences prescribed therein by the Director with the permission of the Special Court.[5] This also displays the intention of the legislature towards to consolidate the power and grip of the regulatory and adjudicating authorities over such accused person in order to prevent him from leaving the jurisdiction, or absconding from the legal bounds of the Indian government. Section 2(n) of the legislation provides that a 'Special Court' means a Court of Session designated as a Special Court under Section 43(1) of the Prevention of Money Laundering Act, 2002.

One of the most prominent provision provided under the FEO Act, 2018 is the bar from putting forward or defending any civil claim once an individual has been

1 *Section 1(3), The Fugitive Economic Offenders Act, 2018.*

2 *Michael Holden, Livemint (Sept. 12, 2018). (Available at: https://www.livemint.com/Companies/nLyNim2xqg5lgGLeYkB4PO/Vijay-Mallya-in-UK-court-for-extradition-case-hearing.html?utm_source=scroll&utm_medium=referral&utm_campaign=scroll)*

3 *Section 2(f), The Fugitive Economic Offenders Act, 2018.*

4 *Section 2(9), The Prohibition of Benami Transactions Act, 1988.*

5 *Section 5, The Fugitive Economic Offenders Act, 2018.*

declared a fugitive economic offender by the virtue of Section 12 of the Act by the Special Court. This bar finds application upon any and all civil claims, including civil proceedings which have no nexus with the offences in question including but not limited to divorce proceedings, succession petitions, suits relating to family disputes, consumer complaints etc. The bar so stipulated under the Act is elementally different from an Order of Moratorium under the Insolvency and Bankruptcy Code, 2016 as while the latter stipulates the halt on all relevant proceedings for both litigants, the former has the effect of disabling the FEO from filing or defending any and all civil claims.[6] This provision necessary implies towards ex-parte proceedings against a company or any individual declared to be fugitive economic offender. Such a provision puts the individual, or company in an adverse position as they are barred from defending or maintaining any civil claim which might be completely different from the proceedings initiated under the FEO Act, 2018. For these reasons, Section 14 has been questioned by the critics for taking the powers of the State and authorities at an unnecessary length, leading to denying the fundamental right of access of justice to the accused person, which has been held to be an integral part of the Right to Liberty under Article 21 of the Constitution, which has been affirmed by the Apex Court in a number of significant judgments, most landmark being the *Maneka Gandhi vs. Union of India*[7]. Additionally, the National Commission to Review the Working of Constitution (NCRWC), in its report, suggested incorporation of Article 30A in the Constitution, which was as follows:

"30A: Access to Courts and Tribunals and speedy justice

(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum. (2) The right to access to courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other fora and the State shall take all reasonable steps to achieve the said object."[8]

Vijay Mallya is now all set to be extradited and as per the updates the FBI has also requested the National Investigation Agency in India to join them and complete the formalities. Of course, Vijay Mallya has, as per the law of the UK, 14 days to appeal against the verdict in the higher court.

***

6 *Available at: https://blog.ipleaders.in/fugitive-economic-offender/.*

7 *Maneka Gandhi vs. Union of India, AIR 1978 SC 597.*

8 *National Commission to Review the Working of Constitution Report, 2002 (Vol. 1). (Available at: http://legalaffairs.gov.in/sites/default/files/chapter%203.pdf)*

HIGHLIGHTS OF COMPANIES (AMENDMENT) ORDINANCE, 2018

Anadi Saxena (Law Intern)

INTRODUCTION

The much-awaited amendment to the Companies Act was recently introduced by means of an ordinance. The twin objective of this landmark amendment is promoting ease of doing business and ensuring better corporate compliance. Under this ordinance, 31 amendments are made to the Companies Act. This article will discuss the major changes introduced and expected impacts under this Ordinance. The amendments can be classified into four major heads:

- Re-categorizing of Compoundable Offences
- Ensuring compliances of the defaults and prescribing stiffer penalties in case of repeated defaults
- De-clogging of the NCLT
- Some other provisions related to corporate governance

RE-CATEGORIZING OF COMPOUNDABLE OFFENCES

In the past, many committees from time to time, have suggested creation of a civil liability framework under the Companies Act for offences which are procedural or technical in nature. The committee on Companies Act, 2013, made an effort to analyze the nature of all compoundable defaults under the Companies Act. The Committee, in the process, realized that it is not practically possible to strictly define as to what constitutes a technical or procedural lapse. After a detailed analysis all the compoundable offences were classified into eight categories.[1]

I. Those resulting from non-compliance of the order/ direction of the Central Government/NCLT/ Regional Director (hereinafter referred to as "RD") or Registrar of Companies (hereinafter referred to as "RoC");

II. Those resulting from default in respect of maintenance of certain records in the registered office of the company;

III. Those resulting from defaults on account of non-disclosures of interest of persons to the company, which vitiates the records of the company;

IV. Those resulting from defaults related to certain corporate governance norms;

V. Those resulting from technical defaults relating to intimation of certain information by filing forms with the RoC or in sending of notices to the stakeholders;

VI. Those resulting from defaults involving substantial violation which may affect the going concern nature of the company or are contrary to larger public interest or otherwise involve serious implications in relation to stakeholders;

VII. Those resulting from default related to liquidation proceedings;

VIII. Those resulting from defaults not specifically punishable under any provision, but made punishable through an omnibus clause.

The committee, after due consideration of the offences covered under these categories, concluded that out of the eight categories only the offences covered under category IV and category V were to be recommended for re-categorization. All the other offences were not subjected to amendment as they were serious in nature and if re-categorized (from compoundable to non-compoundable) it may affect the interest of the public/ stake holders at large. Moreover, the committee was of the view that almost all the offences covered under the 4th and the 5th category were merely technical in nature and should to be brought under the regime of in adjudication.[2]

1 *The Report of the Committee to review offences under Companies Act, 2013 http://www.mca.gov.in/Ministry/pdf/ReportCommittee_28082018.pdf*

2 *The Report of the Committee to review offences under Companies Act, 2013 http://www.mca.gov.in/Ministry/pdf/ReportCommittee_28082018.pdf*

Under this amendment 16 offences under these two categories were re-categorized. This was done by replacing the word "fine" or "imprisonment" under these sections with "penalty".

In common parlance the words "fine" and "penalty" are used interchangeably. However, under the Company's Law the word "Fine" is the amount of money that a court can order to pay for an offence after successful prosecution in a matter (the procedure for imposition of fine is covered under section 441 of the Companies Act). Whereas, "Penalties" do not require court proceedings and are imposed on failing to comply with a provision of an Act (the procedure for adjudication of penalty is covered under section 454 of the Companies Act 2013). Therefore, by replacing the word "fine" with the word "penalty" the nature of offence has changed.

ENSURING RECTIFICATION OF THE DEFAULTS AND PRESCRIBING STIFFER PENALTIES IN CASE OF REPEATED DEFAULTS

One of the major objectives of the Companies (Amendment) Ordinance, 2018, is to amend the sections in such a manner that the authorities not only levy penalties for defaults but ensure rectification of the defaults.

Under the latest amendment ordinance, section 454(3) of the act was amended. The amendment gives the adjudicating officer the power to give direction to the defaulter to rectify his default.

Apart from amending certain sections, a new sub section was also added. To curb repeat of the same defaults, a new provision, **Section 454A** has been introduced. Under this section where a penalty for a default has been imposed on a person and the person commits the same default within a period of three years from the date of order imposing such penalty (RD or adjudicating officer), such person will be liable for second and every subsequent defaults for an amount equal to twice the amount provided for such default under relevant provisions of the Companies Act. Now apart from only imposing penalty the adjudicating officer will also direct the defaulter to make good the default. Therefore, now the intention behind the section is not only to levy penalty but also to ensure compliance.

DE-CLOGGING OF THE NCLT

One of the main objectives of the amendment ordinance was to reduce the pressure on special courts and NCLT. Through re-categorizing of compoundable offences, burden on the NCLT has been reduced. Additionally, certain specific provisions have been inserted to further reduce the pressure on NCLT.

- Section 441 dealing with compounding of offences has been amended.
  - Through amendment the pecuniary jurisdiction of the Regional Director has been increased from 5,00000/- to 25,00000/-. Through this amendment more cases will be adjudicated by the regional director instead of the NCLT.
- Giving the power to the Central Government
  - The Central Government was vested with the power to approve the alternation in the financial year of a company under section 2(41) Under this section an Indian Company situated outside India, is allowed to change the financial year as per the approval of the NCLT. Through this ordinance power of the tribunal has been transferred to the Central Government. After the ordinance, financial year can be changed with the approval of the Central Government.
  - The Central Government was vested with the power to approve cases of conversion of public companies into private companies. Under section 14(1) a public company can be converted into private company. Before the amendment the power to amend was vested with the NCLT and now the power has been transferred to the Central Government.

Through this amendment it is expected that the pressure on the NCLT will be reduced by 60%. This step will make speedy redressal possible.

EXPECTED IMPACT OF THE AMENDMENT

- This landmark amendment is expected to reduce the pressure on NCLT, as after this amendment NCLT will not adjudicate in the matters involving offences that have been re-categorized as non-compoundable. The government is expecting that more than 60% cases in different courts will be

dropped as a result of this amendment.

- The Government is expecting that this amendment is going to promote ease of doing business as entrepreneurs will no longer have to approach courts for minor violations under the Companies Act.

- This amendment will make speedy redressal possible under Companies Act.

***

SINGH & ASSOCIATES

FOUNDER MANOJ K SINGH

ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi - 110065, INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana - 122001, INDIA

MUMBAI
Unit No. 48 & 49, 4th Floor
Bajaj Bhavan, Nariman Point
Mumbai - 400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre
47, Dickenson Road
Bengaluru - 560042, INDIA

india@singhassociates.in
www.singhassociates.in