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Right to Royalty for Underlying Works: Conundrum in Law and Underlying Issues

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INTRODUCTION

Section 18 of the Copyright Act, 1957 ("**Copyright Act**") deals with the assignment of copyright. Such assignment can either be by an owner of an existing work or the prospective owner of the future work to any person, either in whole or in part. By way of the Copyright (Amendment) Act, 2012 ("**Amendment Act**") two provisos were inserted by the legislature to Section 18 of the Copyright Act.

The provisos^[1] essentially prohibit an author of literary or musical work forming part of either a cinematographic film or a sound recording from waiving his/her right to receive royalties (and any such waiver if done will be void) for utilization of the underlying work. The royalties so received is to be shared equally with an assignee of the copyright (if any and as applicable). This rule prohibiting waiver and entitling authors to at least 50% royalty does not apply to assignments made to: (a) communicate the underlying work as part of a cinematograph film in a cinema hall; (b) the legal heirs of

such authors; or (c) a copyright society for collection and distribution.

This piece delves into the principle issue arising out of the provisos, whether the utilizer or the assignee (i.e. a producer) is liable to pay the royalties to the authors. This issue (and the underlying liability) continues to haunt the media and entertainment industry. A deeper look into this issue gives rise to several sub-issues, for instance: (a) whether the royalty paid under a contract by a utilizer of the principal work (i.e. sound recording or a cinematographic film) to an assignee by itself includes the royalty entitlement of the author; and (b) whether the author (who is a non-signatory to a contract between an assignee / producer and the utilizer / broadcaster) can claim benefits arising from such contract.

In addition, this piece also discusses a conundrum created by the rulings of the Hon'ble High Court of Delhi ("**DHC**") (single judge) in the case of *The Indian*

ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies.

We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

Performing Right Society Ltd. vs. Entertainment Network (India) Ltd. (“**Entertainment Network Case**”) and *Phonographic Performance Ltd & Anr vs. CRI Events Private Limited & Ors.*[2] (“**PPL Case**”) (decided together).

HISTORIC EXPLOITATION OF AUTHORS

Prior to the Amendment Act, the Copyright Act (by way of Section 17(i)(b)) provided that the artistic works belongs to the owner, subject to the contract to the contrary. This led to the prevalent practice in the industry, wherein the assignee / producer used to get the rights of the artists unconditionally assigned in its name, making the producer sole author of the copyright instead of the artist. Even all the profits accrued from the utilization of the artistic work were reaped by the producer, depriving the author of the artistic work of any share in the profits.

The aforesaid issue was also addressed in the debate in Lok Sabha[3] (lower house of the Parliament of India) wherein Mr. Kapil Sibal (then Minister of Human Resource Development), described the above as -

“But, unfortunately, there was a provision in Section 17 (i) (b) of the Act under which it was said that the artistic work belongs to the owner, subject to a contract to the contrary. So, what used to happen is that if in a film, a song was to be

sung, the producer of the film would go to the artist and say that you have assigned your rights to me unconditionally and you have assigned them forever. The result was that under the Copyright Act, instead of the artist, the producer became the sole author of the copyright. The result of that was, he produced the film, the artist got the benefit of whatever he could get in the film but he sold those rights of which the producer became the owner through other medium. He sold it to music companies; he sold it to telecom companies; and he made all the profits. The result was that the poor author and the poor creator of the copyright did not get any share of the profit. According to me, this is a historic injustice to the creators.”

The Amendment Act therefore, sought to curb the above stated injustice of not receiving any benefit / royalty by the authors of the underlying works. However, it did not change the manner in which the flow of royalty should happen i.e. from the utilizer / broadcaster to the assignee / producer to the authors of the underlying works.

SCOPE OF THE PROVISOS

It is undisputed that the provisos set out an un-waivable right of an author to claim at least 50% royalties for the utilization of the underlying musical and literary work. The same has also been upheld by the Intellectual Property Appellate Board, New Delhi

(“**IPAB**”) in the case of *Music Broadcast Ltd. vs. Tips Industries Ltd. and Ors.*[4] (“**Tips Case**”). In this case IPAB adjudicated on several applications filed by the Music Broadcast Ltd. under Section 31(D) of the Copyright Act seeking statutory license for broadcasting of literary, musical works and sound recording and to fix the royalties to be paid to assignees of the copyright for radio broadcast of sound recordings to the public. The Indian Performing Rights Society (“**IPRS**”) vide an intervention application raised the issue that the royalty in the underlying works i.e. lyrics and musical composition of sound recording with respect to the radio broadcast should also be fixed independently at the time of fixing the royalties of the sound recording.

IPAB in the Tips Case while considering the arguments and suggestions of IPRS, vide its judgment dated 31 December 2020 observed that royalty payments to an author for the underlying musical or literary work (forming part of sound recording or a cinematographic film) is a mandatory obligation levied by the provisos 3 and 4 of Section 18 (*Assignment of copyright*) and sub-Sections 9 and 10 of Section 19 (*Mode of assignment*) of the Copyright Act.

However, contrary to the ruling in Tips Case, the DHC (single judge) in both Entertainment Network Case and the PPL Case while

adjudicating a similar question reached at a conflicting position.

The Entertainment Network Case was filed by IPRS against a radio broadcaster for violating the terms of license. The broadcaster was permitted to broadcast in seven cities, however the sound recording was broadcasted in three new cities without obtaining any permission. IPRS claimed that there was exploitation of the sound recording as well as the underlying work and demanded the royalty for both these works separately. On the other hand, in the PPL Case, Phonographic Performance Ltd. had filed a suit for exploitation of the sound recordings by a banquet hall without obtaining the requisite licenses / permission. It was also claimed that the alleged exploitation also extends to the underlying work and thus a separate license fee must be paid. The DHC (single judge) vide a common judgment dated 4 January 2021 distinguished the sound recording from the underlying music and literary work and held that the authors of the underlying work shall have no claim or right in the exploitation sound recording.

The Entertainment Network Case / PPL Case thus created a conundrum with regards to the un-waivable right of the authors

of the underlying work to claim royalties. The ruling is contrary to the intent of the legislature. The judgment delivered by the DHC (single judge) along with the IPAB judgment in Tips Case has been challenged before the Division Bench in the case titled, *The Indian Performing Right Society Ltd. and Ors. vs. Entertainment Network (India) Ltd. and Ors.*, and is pending adjudication.

ROYALTY & AUTHORS: AN UNREALISED ENTITLEMENT

Royalty: who owes and who pays?

The standard industry practice in the licensing of copyright include only two parties to the Contract, i.e. assignee / producers and the utilizers / broadcasters. Usually, the utilizers / broadcasters and assignee / producers don't include the authors of the underlying works or copyright societies (on their behalf) in the contract for obtaining a license. A direct license is given by the producer for utilization of sound recording without accommodating entitlement of the authors under the provisos. Copyright societies like IPRS become relevant for the authors of the underlying works who struggle to claim royalty from producers who carry dominance and disproportionate bargaining power in the industry. The authors are unable to claim royalty entitlement from utilizers / broadcasters due to ambiguity in the language of the provisos.

Sound v. Literary and musical work recording

In order to understand the above issue, it is pivotal to first understand whether 'sound recording' is considered a distinct and separate work. The same was partly discussed in Entertainment Network / PPL Case and the DHC (single judge) observed that the sound recordings are not just a sum total of lyrics and musical work only, it is something besides the literary and musical works therein. It is a distinct work (from literary or musical works) produced by the producer who makes the amalgamation of the lyrical work, musical work and sound recording commercially viable and communicable to public. Therefore, law recognizes an independent right on sound recordings.

Licensing of a sound recording to a utilizer does not mandate separate licensing or assignment of the copyright in the underlying works

Division Bench of the DHC in the case of *IPRS vs. Aditya Pandey*[5] which was later affirmed by the Supreme Court of India in the case of *ICSAC vs. Aditya Pandey*[6] held that the law does not mandate separate licensing of the copyright of the underlying work and the licensing of the copyright in the sound recording should suffice. There exists no requirement for the payment of the separate licensing fee for the

underlying works by a utilizer if a licensing fee / royalty has been paid on the assignment of the copyright in the sound recording.

The IPAB, in the Tips Case similarly observed that the payment by the utilizer / broadcaster shall be termed as royalty for the utilization of the sound recording as well as for the underlying work therein within the meaning of the provisos 3 and 4 to Section 18. The IPAB in the Tips Case referred to the Lok Sabha debates and the report of the Standing Committee of the Parliament[7] to ascertain the legislative intent. The IPAB found that the amendments were brought in to recognize the independent right of the authors of the underlying works to receive royalties for the exploitation of the works without affecting the rights of the assignee / producer in the principal work. However, nowhere in the Amendment Act, interpretation of the amendments by the courts and tribunals, and legislative debates and reports, it appears that a separate licensing or assignment of the copyright in the underlying works is required.

Therefore, it can be interpreted that the license fee payable for the principal work (sound recording or a cinematographic film) by the utilizer covers the license fee for the licensing of the underlying work.

Understanding 'equal basis' in the provisos

A plain reading of the provisos 3 and 4 of Section 18 will clarify that the royalties received in respect to utilization of a sound recording or a cinematographic film (except when displayed in a cinema hall) has to be shared at least on an 'equal basis' between an assignee and the author. The provisos do not use the term 'pay' on an equal basis but uses 'share' which undisputedly should mean that obligation is on the party which in the first place has received the royalty to share it equally as against the utilizer / broadcaster of the royalty who pays the royalty. Consequently, any royalty paid by a utilizer to an assignee under the contract executed between these two parties should by itself include the royalty entitlement of the author as well and there should be no obligation on a utilizer to pay royalty separately to the author who is alien to the aforementioned contract.

The above discussions avails support from the legislative intent behind introducing provisos 3 and 4 vide the Amendment Act. Mr. Kapil Sibal while introducing the Copyright (Amendment) Bill, 2012 in the Lok Sabha stated that the government intends to:

"ensure that the authors are the owners of the copyright and whereas the copyright can be

assigned, the right to royalty cannot be assigned" and "the producer and the authors must share that royalty in equal measure".

Additionally, Mr. Shashi Tharoor, member of the Parliament also opined that:

"There are essentially two rights at stake here. There is the sound recording and there is the underlying work, the composition, the tune. When a song is played anywhere, on radio, on your computer, on your ringtone of your cellphone, really two sets of royalties have to be generated; two sets of people have to be rewarded. One is those who have done the recording, that is the producer, perhaps the company, and the other is those who have done the performance, the lyricist and the composer."

Therefore, from the above it is apparent that the royalty paid by a utilizer of the principal work (i.e. sound recording or a cinematographic film) to an assignee covers the royalty of an underlying author. Accordingly, it is the liability of the assignee to share (not pay) the royalty received from the utilizer on equal basis with the underlying authors. No claim for royalties should lie from an author against the utilizer / broadcaster of the principal work.

Assignment in cases of copyright societies

From the above discussions and the bare perusal of the provisos, it can be said that the obligation to pay or share the royalties with the authors of the underlying work is on the assignee / producer and not on the utilizer / broadcaster. However, in cases where the copyright societies are engaged by the authors of the underlying work, the manner of distribution should not be any different. The flow of the royalty would remain the same. The utilizer / broadcaster will pay the copyright society (which is typically not the case since broadcasters as a standard practice obtain the necessary license from the producers) which will in turn be distributing the due share of royalty amongst the beneficiaries.

During the Lok Sabha debates, Mr. Kapil Sibal discussed this issue while answering the question raised by Mr. Tathagata Satpathy with regard to the division of the royalty amount, "how will it be divided?" In response to this question Mr. Kapil Sibal responded:

"With regard to the question how these royalties are to be distributed, these are to be distributed by the Copyright Society. For example, fifty per cent of royalties will be collected

by authors and composers but they will share these 25 percentage. So, that is also provided by the Copyright Society itself."

Rights of non-signatory author to a contract between the assignee / producer and the utilizer / broadcaster

It is undisputed that the sound recording is a distinct work which in itself is an amalgamation of literary and musical works. The assignment of the sound recording requires no separate assignment of the underlying works therein. This has led to a prevalent practice in the industry wherein the contracts entered into by the assignee / producer with the utilizer / broadcaster for the licensing of the sound recording or cinematographic film do not recognize or acknowledge the rights of the authors.

As a general rule it is not open to a non-signatory to a contract to claim any right or reap benefits out of it, unless the contract specifically sets out a non-signatory as a beneficiary in the contract itself. However, it can be argued that since the right of the underlying author to claim royalties emanates from a statute (proviso 3 and 4 of Section 18), it will have an overriding effect to the contractual rights of signatory of the contract. Reliance in this regard is placed upon the case of

Universal Petrochemicals Ltd. vs. Rajasthan State Electricity Board [8], wherein the High Court of Calcutta held that, "We make it clear that the statutory provision will obviously override any agreement between the parties and a private contract cannot override a statute" and on *Kajal Aggarwal vs. The Managing Director, M/s V.V.D. & Sons P. Ltd.*[9] by the High Court of Madras wherein it was observed that "when there is a conflict between the contractual provisions and statutory provisions, it is only the statutory provision that would prevail and not the contractual provisions agreed to between the parties".

Nonetheless, the authors of the underlying work can claim share in royalties in the utilization of their work from the contract between the assignee / producer and utilizer / broadcaster. Since the right to receive royalty to be shared on equal basis is a statutory right between the author of the underlying work and the assignee / producer as opposed to the 'right to claim royalty from the broadcaster / utilizer' or 'liability on the broadcaster / utilizer to pay', the obligation to share the royalty with the authors of the underlying works is placed upon the assignee / producer and not upon the

utilizer / broadcaster. This can also be inferred from the Tips Case wherein it was held that the payment by the utilizer / broadcaster shall be termed as royalty for the utilization of the sound recording and the underlying works therein within the meaning of the provisos. Contrariwise, the right to receive royalty shall be shared by the assignee and the authors of the underlying works.

A prudent and the logical reading of the provisos would mean that the extent of the claim of royalty by the authors of the underlying works lies till the assignee / producer. The underlying authors need not be a party to the contract between the assignee / producer and the broadcaster / utilizer and certainly need not to raise a claim to royalty as a third party to the contract.

CONCLUSION

The provisos though appears to be a prescient approach taken by the legislature (almost a decade back) to safeguard the rights of authors of underlying work in a principal work, however the fruits of the said amendment seem to be motionless. This is especially due to absence of critical jurisprudence addressing the complex issues (both legal and practical) revolving around the amendment or on which the amendment lacks clarity.

In the backdrop of above discussion, it is clear that certain critical gaps and unresolved issues emanating from the Amendment Act continues to haunt the effective implementation of the beneficial legislative intent behind it. Nonetheless, the absurdity follows from the interpretation of the amendment by the DHC (only to the extent), wherein the DHC held that the authors of the underlying work shall have no claim or right in the exploitation of the principal work. The proviso 3 and 4 of the Section 18 appears to be quite clear with regards to the 'un-waivable right' of an author of the underlying work in the share of royalty arising from the utilization of work.

While it may be difficult to predict what the Division Bench of DHC may rule, a holistic reading of the subject would recognize the rights of the authors of underlying works in accordance with the amendments brought in by the legislature in 2012 and align the position of law as intended by and captured in the Lok Sabha debates and the Standing Committee Report.

Be it as it may, the other issues are of far more practical relevance. The authors' right to receive royalties are to be shared by the assignee / producer. The share in the royalty has to be

claimed by authors of the underlying work from the assignee / producer itself and the liability to pay royalties directly to the said authors is not levied on the utilizer / broadcaster.

Any royalty released by the utilizer / broadcaster with regard to the utilization of the principal work is inclusive of the share of the author of the underlying works. In this regard, there exist no legal requirement on the utilizer / broadcaster to seek separate license or assignment of the copyright in the underlying works during the licensing or assignment of the principal work. However, it is important for the effective implementation of the Amendment Act that the legislature or the Court to establish the proper chain of flow of royalty. The obligation to pay royalty lies on the utilizer / broadcaster to pay the assignee / producer which will in turn be sharing it with the authors of the underlying works.

REFERENCES

[1] **Proviso 3:** *Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilisation of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void.*

Proviso 4: *Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilisation of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.*

[2] MANU/DE/0002/2021.

[3] Lok Sabha Debates, Fifteenth Series, Vol. XXVI, Tenth Session, 2012, No. 34, (May 22, 2012).

[4] MANU/IC/0068/2020.

[5] 2012 SCC OnLine Del 2645.

[6] (2017) 11 SCC 437.

[7] Department - Related Parliamentary Standing Committee on Human Resource Development 227th Report on The Copyright (Amendment) Bill, 2010 (November 23, 2010).

[8] 2001 SCC Online Cal 179.

[9] 2017 SCC OnLine Mad 3128.

NEWS AND UPDATES

JANUARY 2022

ARBITRATION

ARBITRATOR CAN GRANT POST-AWARD INTEREST ON AWARDED INTEREST

The Supreme Court of India ("**Supreme Court**") in the case of *UHL Power Company Ltd. vs. State of Himachal Pradesh*, held that the Arbitral Tribunal has the authority to grant compound interest or interest upon interest. The Supreme Court while setting aside the impugned judgment reiterated the position laid down in *Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa*, wherein the three judge bench of the Supreme Court allowing post award interest.

COURTS CAN ONLY TAKE PRIMA FACIE VIEW ON THE EXISTENCE OF THE ARBITRATION AGREEMENT UNDER SECTION 11(6) OF THE ARBITRATION AND CONCILIATION ACT, 1996 ("A&C ACT")

The Supreme Court in the case of *Intercontinental Hotels Group (India) Pvt. Ltd. vs. Waterline Hotels Pvt. Ltd.* reiterated the principle laid in *Vidya Drolia vs. Durga Trading Corporation*, that issues of arbitrability / validity

are matters to be adjudicated upon by arbitrators. The Courts are only empowered to take the prima facie view on the existence of the arbitration agreement under Section 11(6) of the A&C Act, the only narrow exception carved out was that Courts could adjudicate to 'cut the deadwood'.

ARBITRAL AWARD CANNOT BE CHALLENGED MERELY ON THE GROUND THAT THE ARBITRATOR HAS FAILED TO APPRECIATE FACTS

The Supreme Court in the case of *Atlanta Ltd vs. Union of India* held that the Appellate Court exercising power under Section 30 and 33 of the A&C Act ought not to re-assess or re-appreciate evidence or examine the sufficiency of the evidence. It is beyond the jurisdiction of the Appellate Court to assign to itself, the task of construing the terms and conditions of the contract and its provisions and take a view on certain amounts awarded in favour of a party. The Apex Court also held that the arbitral

RECENT UPDATE

Our Managing Partner, Mr. Sonal Kumar Singh along with Mr. Anshuman Gupta (Principal Associate) and Ms. Sukanya Lal (Senior Associate) have published an article on Mondaq titled as "*Can Additional Grounds Of Appeal Be Raised In An Appeal Filed Under Section 37 Of The Arbitration And Conciliation Act, 1996?*". Please [click here](#) to read.

award ought not to be challenged on the ground that the arbitrator had drawn his own conclusion or had failed to appreciate facts.

HIGH COURT CANNOT ENTER INTO THE MERITS IN AN APPEAL UNDER SECTION 37 OF THE A&C ACT

The Supreme Court in the case of *Haryana Tourism Ltd. vs. M/s Kandhari Beverages Ltd.* held that that a High Court cannot enter into the merits of the claim in an appeal under Section 37 of the A&C Act. The Court reiterated the settled position of law that an Award can only be set aside under Section 34 or 37 of the A&C Act, if it falls under the exceptions of being contrary to public policy, interest of India, justice or morality, or if it is patently illegal.

ARBITRAL TRIBUNAL CONSTITUTED BEFORE 2015 AMENDMENT CANNOT OPERATE IF IT VIOLATES NEUTRALITY MANDATE UNDER SECTION 12(5) OF THE A&C ACT

The Supreme Court in the case of *Ellora paper Mills Ltd vs. The State of Madhya Pradesh* held that an arbitral tribunal constituted as per the arbitration clause entered into force before the 2015 amendment to the A&C Act will lose its mandate if it violates the neutrality clause under

Section 12(5) read with the Seventh Schedule, which were incorporated through the 2015 amendment.

IN THE ABSENCE OF DUE SERVICE OF A NOTICE, A PARTY IS FREE TO APPOINT THE ARBITRATOR EVEN AFTER AN ARBITRATION PETITION UNDER SECTION 11(6) OF THE A&C ACT HAS BEEN FILED BY THE OTHER PARTY

The Supreme Court in the case of *M/s Durga Welding Works vs. Chief Engineer, Railway Electrification, Allahabad and Anr.* has held that a party to the arbitration agreement can appoint an arbitrator even after an Arbitration Petition under Section 11(6) of the A&C Act has been filed by the other party before the High Court for appointment of an arbitrator if the party has not been given due notice of the same.

COURTS NOT OBLIGATED TO REMIT MATTER TO ARBITRATION TRIBUNAL MERELY BECAUSE APPLICATION IS FILED UNDER SECTION 34 A&C ACT

The Supreme Court vide judgment dated 3.01.2022 in the case of *I-Pay Clearing Services Private Limited vs. ICICI Bank Limited*, held that merely because an application is filed under Section 34(4) of the

A&C Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The court said that the discretionary power conferred under Section 34(4) of the A&C Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded.

CORPORATE**SEBI ISSUES CIRCULAR REGARDING NORMS TO BE FOLLOWED BY SPECIAL SITUATION FUNDS INTRODUCED AS A SUB-CATEGORY UNDER CATEGORY-I AIFS**

The SEBI vide circular dated 27.01.2022 has specified certain norms with respect to the Special Situation Funds ("SSF") introduced vide notification dated 24.01.2022. As per the circular it is specified that SSF shall have a corpus of at least one hundred crore rupees and shall accept investments of not less than ten crore rupees. The circular further lays down the requirements to be met by a SSF while acquiring stressed loans. The circular comes into force with immediate effect.

RULES TO FURTHER AMEND THE COMPANIES (REGISTRATION OFFICES AND FEES) RULES, 2014 ("RULES")

Ministry of Corporate Affairs ("MCA") vide notification dated 11.01.2022, issued a notification in exercise by the powers conferred by sections 396, 398, 399, 403 and 404 read with sub-section (1) and (2) of Section 469 of the Companies Act, 2013, to further amend the Companies (Registration Offices and Fees) Rules, 2014, under which additional fee and higher

additional fee (in certain cases) shall be applicable for delay in filing forms other than for increase in Nominal Share Capital forms under Section 92/137 of the Act or forms for filing charges. The Rules shall come into force from 01.07.2022.

SEBI PASSED A CIRCULAR FOR ISSUANCE OF SECURITIES IN DEMATERIALIZED FORM IN CASE OF INVESTOR SERVICE REQUESTS

SEBI vide circular dated 25.01.2022, communicated the decision that listed companies shall issue the securities in dematerialized form only while processing service requests enumerated in the circular. The procedure with regard to the processing of such service requests is also laid down in the circular. The securities holder/claimant shall also be required to file Form ISR-4 which will be provided on the website of the issuer companies and the RTAs. The circular came into force with immediate effect.

SEBI MAKES REGULATIONS TO AMEND THE SECURITIES AND EXCHANGE BOARD OF INDIA (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS)**REGULATIONS, 2015**

In exercise of the powers conferred by section 11, sub-section (2) of section 11 A and section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) read with section 31 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Board made a few regulations to further amend the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

SEBI NOTIFIED SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995

Securities and exchange board of India ("SEBI") vide notification dated 20.01.2022, while exercising the powers conferred by section 2 clause (da) and clause (f) of sub-section (2) of section 29 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), made the rules for holding inquiries for the purpose of imposing penalty under Chapter VI-A of the Act. The rules shall come into force from the date of the publication in the Official Gazette.

SEBI NOTIFIES SEBI (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) (AMENDMENT) REGULATIONS, 2022

The SEBI vide notification dated 14.01.2022 notified the amendments to Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018. Regulation 2(1)(III) is amended to include "fraudulent borrowers" along with wilful defaulters. Further the amendment inter alia inserts regulation 8A which provides additional conditions for an offer for sale of issues under regulation 6(2). The amendments will come into effect from the date of publication i.e. 14.01.2022. Amendment to sub-regulation (3A) of regulation 32, regulation 49, regulation 129, regulation 145, clause (10) and clause (15) of Part A of Schedule XIII and Schedule XIV shall come into force from 01.04.2022, for issues opening on or after 01.04.2022.

SEBI NOTIFIES SEBI (FOREIGN PORTFOLIO INVESTORS) (AMENDMENT) REGULATIONS, 2022

The SEBI vide notification dated 14.01.2022 notified the amendments to the Securities

and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019. The amendment inter alia inserts Regulation 43B which grants the SEBI the power to grant exemption from strict enforcement of the regulations in the interest of investors and securities market if it is satisfied that: (i) the non-compliance is caused due to factors beyond the control of the entity; or (ii) the requirement is procedural or technical in nature. The amendments will come into effect from the date of publication i.e. 14.01.2022.

SEBI NOTIFIES SEBI (SETTLEMENT PROCEEDINGS) (AMENDMENT) REGULATIONS, 2022

The SEBI vide notification dated 14.01.2022 notified the amendments to the Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018. The amendment inter alia provides for revised proceeding conversion factor and base amount for alleged defaults relation to disclosure under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997/2001. The amendments will come into effect from the date of publication i.e. 14.01.2022.

SEBI ISSUES CIRCULAR REGARDING DISCLOSURE OBLIGATIONS OF HIGH VALUE DEBT LISTED ENTITIES IN RELATION TO RELATED PARTY TRANSACTIONS (RPTS)

The SEBI vide circular dated 07.01.2022 extended its circular dated 22.11.2021, (which was applicable to high value debt listed companies) i.e. to high value debt listed entities. The circular dated 22.11.2021 lays down disclosures obligations with respect to (i) information to be reviewed by the Audit Committee for approval of RPTs; (ii) information to be provided to shareholders for consideration of RPTs and; and (iii) format for reporting of RPTs to the Stock Exchange. The circular dated 07.01.2022 will come into force with immediate effect.

SEBI ISSUES CIRCULAR EMPOWERING THE STOCK EXCHANGES TO LEVY FINE IN CASES OF NON-COMPLIANCE WITH CONTINUOUS DISCLOSURE REQUIREMENTS

Pursuant to the recent amendments to SEBI LODR Regulations, SEBI has issued a circular dated 29.12.2021 in suppression of the circular dated 13.11.2020. As per the circular, the Stock Exchanges shall levy fine and take actions in cases of

non-compliances with continuous disclosure requirements by the issuers of listed Non-Convertible Securities and / or Commercial Paper. Stock Exchanges may deviate from the above, if necessary and by recording reasons in writing. In case a non-compliant entity is listed on more than one recognized Stock Exchange, the concerned Stock Exchanges shall take uniform actions in consultation with each other. Circular shall come into force for the due dates of compliances falling on or after 01.02.2022

THE MINISTRY OF CONSUMER AFFAIRS, FOOD & PUBLIC DISTRIBUTION NOTIFIED THE CONSUMER PROTECTION (DIRECT SELLING) RULES, 2021 ("RULES")

The Ministry vide notification dated 28.12.2021 notified the Rules to safeguard the interests of consumers. The said Rules lay down the duties and obligations for both the direct selling entities and direct sellers, prohibit them from promoting Pyramid Schemes or money circulation scheme and, make them liable for the grievances arising out of the sale of goods or services. The said Rules also requires the State Government to set up a mechanism to monitor or supervise the activities of direct sellers and direct selling entities. The Rules require the existing direct selling entities, including the direct sellers using e-commerce

e-commerce platforms, to comply with the Rules within 90 days from the publication of the Rules in the official Gazette.

OTHER UPDATES

SECTION 5 OF THE LIMITATION ACT, 1963 IS NOT APPLICABLE TO THE INSTITUTION OF CIVIL SUITS

The Supreme Court in the case of *Sunil Kumar Maity vs. State Bank of India*, held that Section 5 of the Limitation Act does not apply to the institution of civil suit in the Civil Court. Section 5 of the Limitation Act, 1963 provides that an appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Accordingly, the Supreme Court set aside the judgment passed by the National Consumer Disputes Redressal Commission in which it observed that the complainant would be at liberty to seek remedy in the competent Civil Court.

THE RIGHT TO APPLY FOR WINDING UP OF A COMPANY BECOMES RECURRING IF CONDUCT OF THE AFFAIRS OF THE COMPANY IN A FRAUDULENT MANNER IS A CONTINUING PROCESS

The Supreme Court vide judgment dated 17.01.2022 in the case of *Devas Multimedia Private Ltd. vs. Antrix Corporation Ltd. & Anr.*, dismissed the appeal by Devas Multimedia against the orders passed by National Company Law Tribunal ("NCLT") and National Company Law Appellate Tribunal ("NCLAT") and observed that the main departure of the Companies Act, 2013 from the statutory regime of the 1956 Act, is the specific inclusion of fraud directly as one of the circumstances in which a company could be wound up. Section 271 of the 2013 Act lists out the circumstances in which a company may be wound up.

DISQUALIFICATION UNDER SECTION 29A(H) INSOLVENCY AND BANKRUPTCY CODE, 2016 ("CODE") WILL STAND ATTRACTED ON MERE INVOCATION OF PERSONAL GUARANTEE BY A CREDITOR

The Supreme Court in the case of *Bank of Baroda & Anr vs. MBL Infrastructures Ltd. & Ors.*, observed that the words "such creditor" in Section 29A(h) of Code has to be interpreted to mean similarly placed creditors after the insolvency application is admitted by the adjudicating authority. The disqualification under Section 29A(h) of Code will stand attracted on mere invocation of personal guarantee by a creditor, notwithstanding the fact that the insolvency process was initiated by another creditor.

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WRIT PETITION IS NOT MAINTAINABLE AGAINST A PRIVATE FINANCIAL INSTITUTION FOR PROCEEDINGS UNDER SARFAESI ACT

In the case of *Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir*, the Supreme Court held that the writ petition filed against the private financial institution under Article 226 of the Constitution of India to take actions against financial institution under Section 13(4) of the SARFAESI Act cannot be maintained. The Court further observed that the private financial institution cannot be said to perform public functions which are normally assigned to State authorities, hence, the writ jurisdiction of the Court is not invocable.

NCLT MUST MAKE A REASONABLE ASSESSMENT OF THE FEES AND EXPENSES PAYABLE TO THE INTERIM RESOLUTION PROFESSION

The Supreme Court vide judgment dated 05.01.2022 in the case of *Devarajan Raman vs. Bank of India Ltd.* while considering a dispute relating to the payment of costs and expense incurred by a Resolution Professional, set aside the NCLT & NCLAT's order that

awarded an ad-hoc amount to the Interim Resolution Professional without any consideration of the actual amount due as per technical and financial bid. The Court held that an order assigning reasons must be passed in respect of fees of resolution professional; otherwise, it will amount to abdication.

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JANUARY 2022

AWARDS & RECOGNITIONS



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