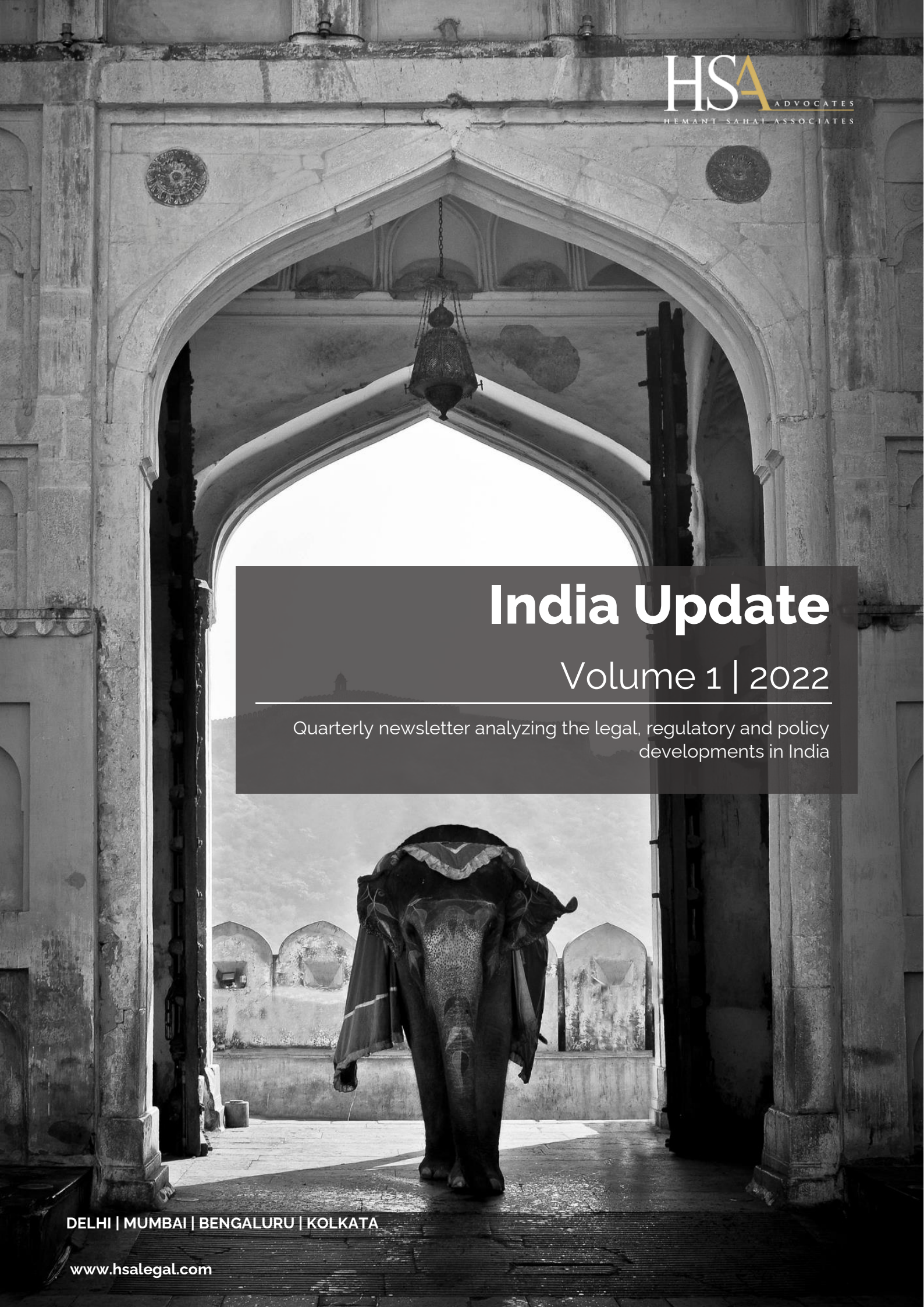

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India Update

Volume 1 | 2022

Quarterly newsletter analyzing the legal, regulatory and policy developments in India

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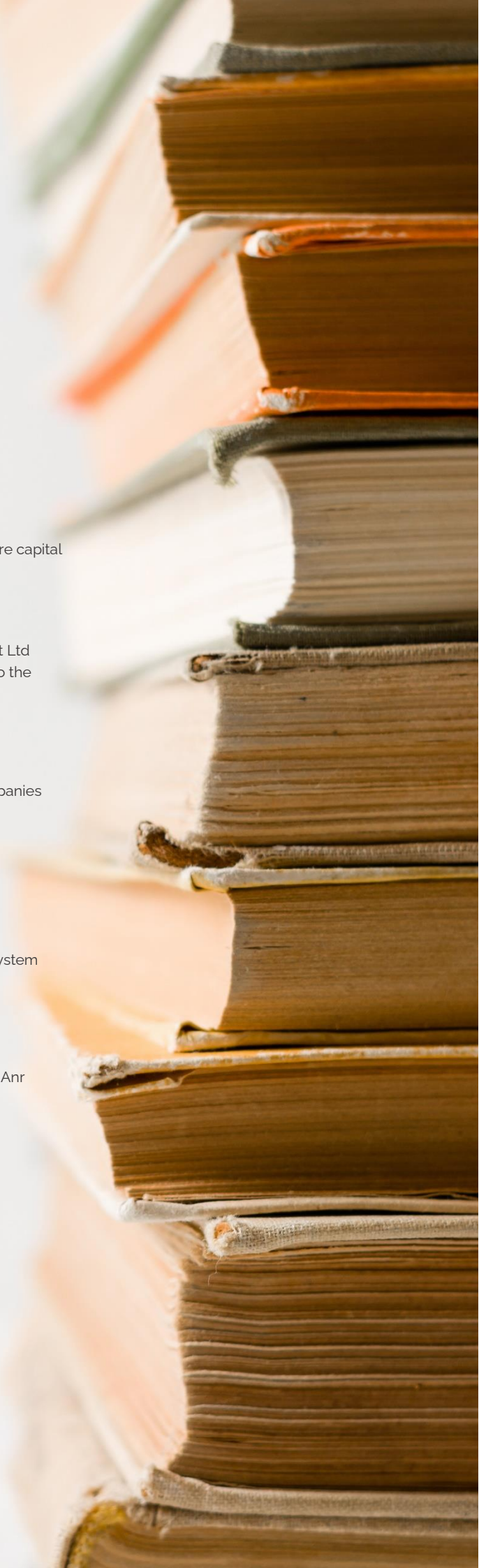


ECONOMIC AND DEAL ACTIVITY ANALYSIS

ECONOMIC ACTIVITY | Jan-Mar 2022

USD **3.12** Trillion

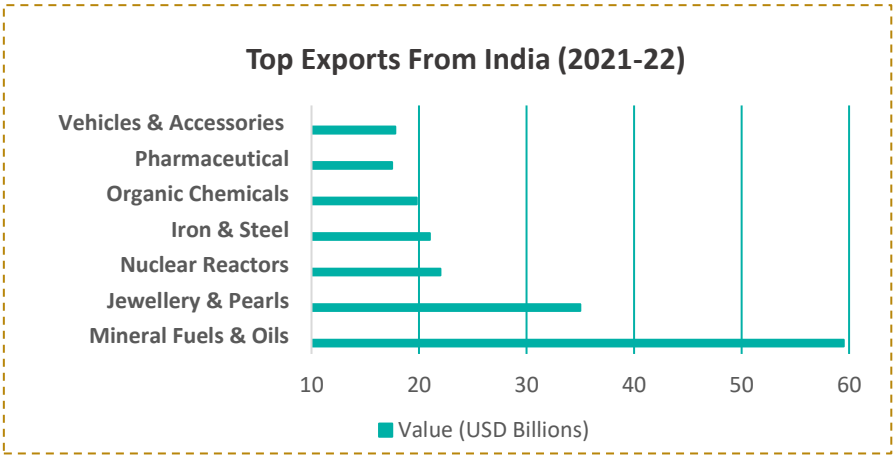
India's GDP
8.9% growth rate for FY 2021-22

USD **37** Billion

February
Highest commodity exports in Q4 FY2021-22

USD **607** Billion

Foreign Exchange Reserves
March 2022



Source: Ministry of Commerce and Industry

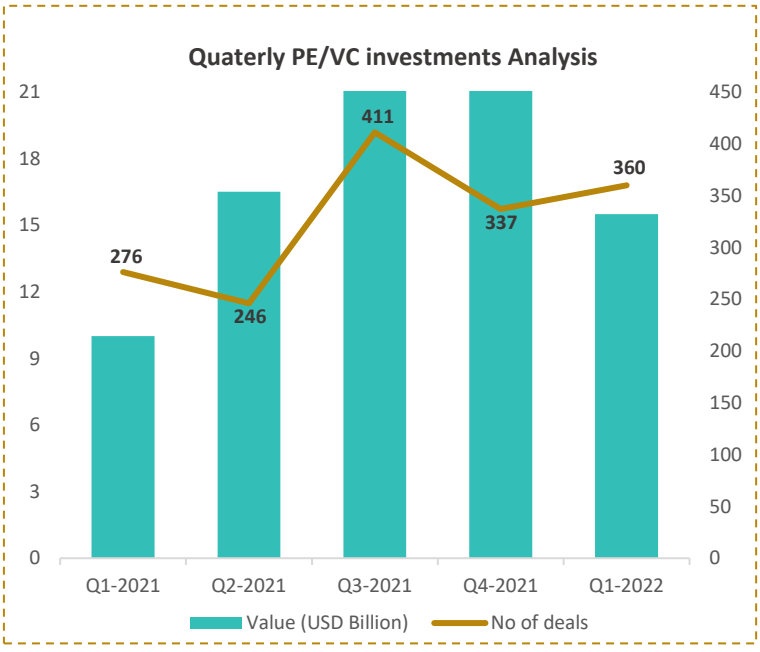
DEAL ACTIVITY | Jan-Mar 2022

USD **15.5** Billion — **360** Deals Jan–Mar 2022

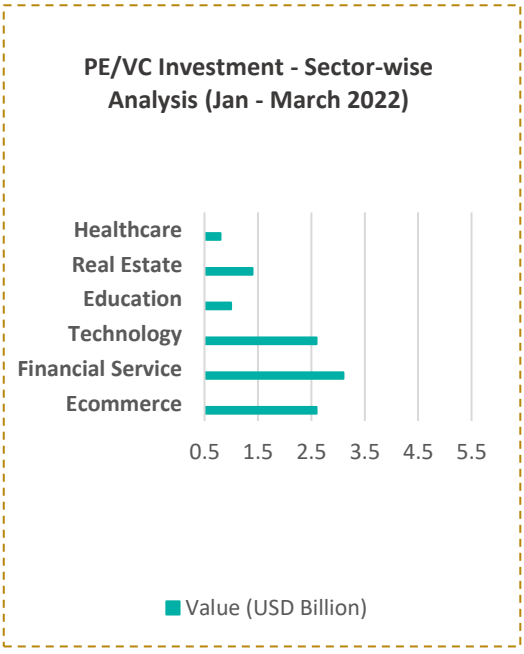
USD **0.9** Billion — **January** Highest FPI Inflow of Jan – March 2022

45 — **Megadeals** (USD 100 million +)

FEB 2022 — **Standout Month** USD 5.8 Billion



Source: EY Quarterly trend analysis: 1Q2022



Source: EY Quarterly trend analysis: 1Q2022

EXISTS | Jan-Mar 2022

USD **1.9** Billion — **Open Market Sale** 11 Deals

USD **2** Billion — **Secondary Sale** 9 Deals

USD **1.5** Billion — **Sectoral Exit** Finance Service Sector

CORPORATE & COMMERCIAL

- CSR disclosure requirements for companies
- Consolidated guidelines & standards for EV charging infrastructure
- Limited Liability (Amendment) Rules, 2022 – Key takeaways

CSR disclosure requirements for companies

On February 11, 2022, MCA amended the Companies (Accounts) Amendment Rules, 2022 (**Amendment**), effective immediately. As per the Amendment, every company covered under Section 135 of the Companies Act, 2013 shall furnish a report on Corporate Social Responsibility (**CSR**) with MCA in Form CSR-2 to the Registrar for the preceding financial year (2020-2021) and onwards.

The newly introduced Form CSR-2 is required to be filed by the following companies falling under the purview of Section 135, Companies Act, 2013:

- Companies having net worth of INR 500 crore
- Companies with turnover of INR 1000 crore or more
- Companies with net profit of INR 5 crore or more in the immediately preceding financial year
- Companies that have constituted a CSR Committee as per the provisions of the section

Under the new 11-page form, as part of the Amendment, companies will have to provide the following information:

- Details of the CSR amount spent in three preceding financial years and details of all ongoing projects
- Details of CSR Committee
- Details of CSR disclosed on the website of the company in pursuance of Rule 9 of Companies (CSR Policy) Rules, 2014
- Net profit and other details of the company for the preceding financial years
- If any capital assets have been created or acquired through CSR spending, companies will have to provide relevant details, including the address, location, pin code of the property, along with amount spent and its registered owner
- As per the Amendment, Form CSR-2 for the preceding financial year shall be filed by March 31, 2022 and thereafter after filing the Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (**Ind AS**) (collectively **Addendums**), as the case may be. Prior to release of this Amendment, there was no prescribed form to furnish a report on CSR. The only mandate was to annex details of CSR in the board Report and disclose on the company's website as per Companies Act, 2013 and Companies (Corporate Social Responsibility Policy) Rules, 2014.

While both the changes were expected – bringing the units by pooled investment vehicles within the ambit of stamp duty regime, as well as clear recognition of debt fund raising by vehicles (including INVITs and REITs) – clarity on the potential inconsistencies shall, of course, be welcome.

Consolidated guidelines & standards for EV charging infrastructure

Ministry of Power (**MOP**) on January 14, 2022 issued the revised and consolidated 'Charging Infrastructure for Electric Vehicles - Guidelines & Standards (**Guidelines**)' with the aim to enable faster adoption of Electric Vehicles (**EV**s) in India and accelerate the e-mobility transition of the country.

The Guidelines were first released in 2018, revised in 2019 and subsequently amended in 2020. The Guidelines emphasize on provisions for Public Charging Stations (**PCS**) and individual owners.

Key highlights

- **Definitions:** Key definitions such as a Public Charging Station, Captive Charging Station, Battery Charging Station, Battery Swapping Station have been provided.
- **Use of existing electricity connections:** Owners are allowed to charge their EVs at their residence/offices using their existing electricity connections.
- **Who can set-up a PCS?** As per the Guidelines, any individual/entity is free to setup a PCS subject to meeting technical and safety requirements as laid down by the MOP, Bureau of Energy Efficiency (**BEE**) and Central Electricity Authority.
- **Alternate mode of obtaining electricity:** any PCS or chain of Charging Stations may obtain electricity from any generation company through open access. Such Open Access shall be provided within 15 days of receipt of application and shall be subject to payment of applicable surcharge, as per Tariff Policy Guidelines.
- **Setup requirements:** The Guidelines have provided a set of certain requirements to be fulfilled for setting up the public charging infrastructure, such as appropriate exclusive transformer, civil works, fire protection equipment, tie up Network Service Providers (**NSP**s) to provide real time status of charging stations, compliance to all relevant Acts and Rules by Authority, etc.
- **Online information to EV owners:** A tie-up with an NSP will be required while setting up the public charging infrastructure, to enable advance remote/online booking of charging slots by EV owners, which shall also include information of location, types and no. of chargers installed/available, service charges, etc.
- **Public charging infrastructure for long range/heavy duty EVs:** Enable setup of Fast Charging Stations (**FCS**) for long range/heavy duty EVs such as trucks, buses, etc.
- **Easy accessibility of charging stations:** It will be enabled that at least one charging station will be available in every 3 km, and one charging station to be setup at every 25 km on both sides of highways/roads. For long range/heavy duty EVs, to ensure setup of FCS at every 100 km, on both sides of highways/roads.
- **Database of PCS:** the BEE shall create and maintain a national online database of all PCS in consultation with the State Nodal Agencies (**SNA**s), where the BEE shall create a Web Portal/Software/Mobile Application for such database throughout the country.
- **Tariff and service charge:** The tariff for supply to PCS shall be a single part tariff and shall not exceed the 'average cost of supply' till March 31, 2025. Additionally, State Government shall fix the ceiling of the service charges to be charged by such PCS/FCS.
- **Provision of land at promotional rates:** As per the Guidelines, the land available with the Government/Public Entities can be provided for setting up PCS to a Government/Public entity on a revenue sharing basis for installation of PCS at a fixed rate of INR 1/kWh to be paid to the Land-Owning Agency from such PCS business payable on quarterly basis. Whereas the land by Land-Owning Agency is provided to a private entity for installation of PCS on bidding basis with floor price of INR 1/kWh
- **Rollout mechanism:** Phases divided in sets of 1-3 years and 3-5 years post consultations with State Governments and different agencies/departments of Central Government. BEE has been appointed as the Central Nodal Agency for the development of PCS Infrastructure. Every State Government will nominate a State Nodal Agency. An Implementation Agency may also be selected by the respective SNA for installation, operation, maintenance of PCS/FCS for designated period as per the policies in place and as entrusted by the SNA.

Limited Liability (Amendment) Rules, 2022 – Key takeaways

On February 11, 2022, the Ministry of Corporate Affairs (**MCA**) released the Limited Liability Partnership (Amendment) Rules, 2022 (Amendment) to amend the Limited Liability Partnership Rules, 2009 (**2009 Rules**), which were published in consonance with the Limited Liability Partnership Act, 2008 (**Act**). The Amendment will come into effect from April 01, 2022.

Key takeaways from the First Amendment

- **New proviso added to Rule 19(1) of the 2009 Rules:** Going forward, an application made under Rule 19(1) of the 2009 Rules, which states that a Limited Liability Partnership (**LLP**) or a company or a proprietor of a registered trademark under the Trade Marks Act, 1999 (47 of 1999) which already has a name or trademark which is similar to or which too nearly resembles the name or new name of an LLP incorporated subsequently, may apply to the Regional Director (**RD**) in Form 23 to give a direction to that LLP incorporated subsequently to change its name or new name, as

the case may be, shall be maintainable within a period of 3 years from the date of incorporation or registration or change of name of LLP under the Act.

- **Compliance in case of default under Section 17 of the Act:** In case an LLP fails to change its name in accordance with the directive of the Central Government in accordance with Section 17(1) of the Act within the prescribed period of 3 months from the date of such a directive, the new name of the LLP will be changed to the word 'ORDNC', which is an abbreviation of 'Order of Regional Director Not Compiled', along with the year of the passing of such direction, the serial number and the existing LLPIN of the LLP. The Registrar of Companies (**ROC**) shall make the necessary entries and issue a fresh certificate of incorporation in FORM 16A. The LLP whose name has been changed by the ROC shall mention the statement 'Order of Regional Director Not Compiled' below its name on all its invoices, official correspondence, and publications.
- **Establishment of an adjudicating authority:** The 2009 Rules did not provide any provision for any adjudicating authority and its functioning for efficient application and disposal of penalties. To address this, Rules 37A, 37B, 37C and 37D of the Amendment were incorporated. As stated in the Amendment, every notice issued by the adjudicating officer under Rule 37A shall indicate the nature of non-compliance or default and reply to such notice shall be filed in electronic mode only within the prescribed period, the adjudicating officer can impose a penalty on any LLP after sending a notice, the LLP shall pay the penalty on MCA portal only.
- **Appeal against the order of adjudicating officer:** Under Rule 37B of the Amendment, an appeal against the order of adjudicating officer can be filed with the RD having jurisdiction over the matter within the prescribed period of 30 days and fees in Form No 33- LLP ADJ. Furthermore, any appeal under this rule shall not seek relief against more than one order unless the reliefs prayed for are consequential. Further, under Rule 37C of the Amendment, it is prescribed that on receipt of such appeal, the RD shall endorse the date on such appeal and shall sign such endorsement and if the appeal appears to be in order, the RD shall register the same and assign a serial number or the RD may allow for more time to the appellant if the said appeal is found to be defective.
- **Admission of an appeal:** Under Rule 37D on the admission of an appeal, the RD shall serve one copy of the appeal on the concerned adjudicating officer on whose order such appeal is sought, and such officer shall file his reply within 21 days. The RD can pass an order after hearing both the parties and recording the reasons for such decision in writing and copies of such order shall be communicated to the appellant and such officer.

The Amendment is a vital addition to the 2009 Rules as it provides for an elaborate adjudication process with certain added provisions for added scrutiny. It further gives more clarity on the redressal mechanism available in case of grievances arising from the orders of the adjudicating officer. The Amendment will put more accountability on the LLPs, as there will be a platform to impose penalties in case of any default. The Amendment is also set to streamline the process of allotment of names of existing LLP and to provide for compliances in case of any default or failure to follow direction as per the provisions of the Act or orders of the ROC, which did not exist earlier.

MCA notified the Limited Liability Partnership (Second Amendment) Rules, 2022 (**Amendment**) vide its Notification dated March 04, 2022.

Key takeaways from the Second Amendment

- **Increase in allotment of number of DPINs at the time of incorporation:** The Amendment has been made w.r.t allotment of Designated Partner Identification Number (**DPIN**) at the time of incorporation. Now, 5 DPINs can be applied at the time of incorporation against the previous framework wherein application for a maximum of two DPINs was allowed at the time of incorporation of a Limited Liability Partnership (**LLP**).
- **Web-based process for LLP incorporation:** Just like the SPICe Plus Forms are required for the formation of a company under The Companies Act, 2013, all the forms required for incorporation of LLPs have now become web-based, vide the Amendment. Another important change made in the process of LLP formation through this Amendment is that now every LLP shall have to mandatorily mention the 'Latitude and Longitude' in the address block and the details of the Directors can be fetched from the Digi Locker Database.
- **Allotment of PAN & TAN along with Certificate of Incorporation:** The Amendment requires that the PAN and TAN would be allotted to LLPs along with the 'Certification of Incorporation' itself. The Amendment has been made to align the incorporation process of LLPs with that of the companies which are incorporated in accordance with The Companies Act, 2013. Previously, there was no implied provision for the automatic allotment of the PAN and TAN for LLPs at the time of incorporation itself and they were required to apply for PAN and TAN separately.
- **Relaxation in the requirement of mentioning the name of authority under which the application for changing the name is filed:** Previously, whenever an application for changing the name of an LLP is to be made Rule 19(4) of the LLP Rules, 2009 required the person making the application to attach the authority under which he is making such an application and a copy of the incorporation certificate of the limited liability partnership or the company or the registration certificate of the entity, as the case may be. Through this Amendment, the requirement of attaching the authority

under which such person is making an application under Rule 19 of the LLP Rules, 2009 is done away with and is beneficial as it reduces the compliance burden of the LLPs.

- **Signing of Statement of Account & Solvency of LLPs:** The Amendment prescribes that the 'Statement of Account and Solvency' may be signed on behalf of the LLP by an Interim Resolution Professional or Resolution Professional, or Liquidator or LLP Administrator in the case where the Corporate Insolvency Resolution Process has been initiated against the LLP under the Insolvency & Bankruptcy Code, 2016 or the LLP Act, 2008. Prior to the Amendment, Rule 24(6) of the LLP Rules, 2009 prescribed that the 'Statement of Account and Solvency' of the LLP be signed by its designated partners. There were no provisions with regard to the signing of the Statement of Account and Solvency of the LLPs under insolvency.

The Amendment focuses on the real-time capturing of the information and promotes ease of doing business and primarily deals with solvency statements and certificates of truthfulness, which are part of the annual returns of LLPs. It further gives more clarity on the redressal mechanism available in case of grievances arising from the orders of the adjudicating officer. Thus, the Amendment is a welcome and significant move by the MCA as these changes will help the businesses registering as LLPs to ease the process of incorporation of an LLP.

BANKING & FINANCE

- NBFCs to implement CFSS by Sept 30
- New category for bank investments
- Changes due to LIBOR transition in ECB and Trade Credits Policy
- Raising promoter's Interest to 26 % of the paid-up voting equity share capital
- Master circular: Bank Finance to NBFC's stakes in banks

NBFCs to implement CFSS by Sept 30

RBI directed certain class of Non-Banking Financial Companies (**NBFC**s) to mandatorily implement Core Financial Services Solution (**CFSS**) by September 30, 2025.

Implementation timeline

NBFC Level	Definition	Deadline
Upper Layer	This layer comprises those NBFCs which are specifically identified by RBI as warranting enhanced regulatory requirement based on a set of parameters and scoring methodology	CFSS to be implemented at least in 70% of 'fixed point service delivery units' on or before September 30, 2024
Middle Layer	This consists of the following: ▪ Deposit taking NBFCs (**NBFC-Ds**), irrespective of asset size ▪ Non-deposit taking NBFCs with asset size of INR 1,000 crore and above ▪ Standalone primary dealers ▪ Infrastructure debt fund ▪ NBFCs core investment companies ▪ Housing finance companies ▪ Infrastructure finance companies	CFSS to be implemented at least in 10% or more 'fixed point service delivery units' as on October 1, 2022, on or before September 30, 2024
Base Layer	Comprises of non-deposit taking NBFCs below the asset size of INR 1000 crore	Implementation of CFSS is not mandatory

Further, a quarterly progress report on implementation of CFSS, along with various milestones, shall be furnished by the NBFCs starting from the quarter ending March 31, 2023.

New category for bank investments

Reserve Bank of India (**RBI**) proposed new norms for their classification and valuation to align the investment portfolio of banks with the global prudential framework and accounting standards.

According to a discussion paper by the central bank, 'Review of Prudential Norms for Classification, Valuation and Operations of Investment Portfolio of Commercial Banks', the new bank portfolio classification norms will come into effect from April 01, 2023. It has invited comments on the paper from stakeholders by February 15, 2022.

As per the proposed norms, the investment portfolio of banks will be divided into three categories:

- Held-to-maturity (**HTM**)
- Available for sale (**AFS**)
- Fair value through profit and loss account (**FVTPL**)

Within FVTPL, Held-For-Trading (**HFT**) shall be a sub-category aligned with the specifications of 'Trading Book' as per the Basel-III framework.

The new norms propose to bridge the gap between the existing guidelines and global standards and practices with regards to classification, valuation, and operations of the investment portfolio of commercial banks. The extant instructions pertaining to the prudential norms on the classification and valuation of the investment portfolio are largely based on the Report of Informal Group on Valuation of Banks' Investment Portfolio, which was submitted in 1999.The recommendations of this informal group culminated in the issue of prudential guidelines on the investment portfolio in October 2002, which forms the basis of the current norms.

While the RBI has been tweaking the guidelines in response to situations as they emerge, a comprehensive review has not been undertaken so far, resulting in a wide gap between the country's norms and the global standards and practices. It is against this backdrop that a discussion paper reviews the rationale and the evolution of the current framework, the corresponding global standards, and developments in the financial markets before framing its proposals.

Changes due to LIBOR transition in ECB and Trade Credits Policy

In order to ensure that the transition from LIBOR remains easy and smooth, the RBI has allowed widely accepted Interbank Rate or Alternative Reference Rate (**ARR**) for External Commercial Borrowings (**ECB**) and Trade Credits (**TC**). The RBI has proposed the following changes keeping in mind the imminent discontinuance of LIBOR as a benchmark rate, and in consultation with stakeholders, to all-in cost benchmark and ceiling for Foreign Currency (**FCY**) ECBs/TCs[1]:

- **Redefining benchmark rate for FCY ECBs and FTCs:** RBI redefined the benchmark rate as any widely accepted interbank rate or alternative reference rate of a 6 months tenor, applicable to the currency of borrowing in case of FCY ECBs/TCs.
- **Change in all-in-cost ceiling for new ECBs/TCs:** In order to manage differences with respect to term premia and credit risk between LIBOR and the new ARRs, the all in-cost ceiling for new FCY ECBs and TCs has been increased by 50 bps to 500 bps and 300 bps, respectively, over the benchmark rates.
- **One-time adjustment in all-in-cost ceiling for existing ECBs/TCs:** To enable smooth transition of currently LIBOR linked ECB/TC the all-in cost ceiling for such ECBs/TCs has been revised upwards by 100 bps points to 550 bps and 350 bps, respectively.

However, RBI clarified that there is no change in the all-in-cost benchmark and ceiling for Indian Rupee dominated ECBs/TCs.

Raising promoter's Interest to 26 % of the paid-up voting equity share capital

In 2020 RBI had constituted the Internal Working Group (**IWG**) to review the guidelines on ownership and corporate structure of Indian private sector banks. The IWG submitted their report in November 2020 and this report was uploaded on the RBI website, inviting comments of stakeholders and the general public. RBI has accepted most of the IWG recommendations.[2]

RBI accepted following recommendations of IWG:

- During the lock-in period, promoter shareholding may continue as a minimum of 40% of the paid-up voting equity share capital of the bank for the first 5 years.
- Cap on promoters' stake is increased in the long run of 15 years from the current levels of 15% to 26% of the paid-up voting equity share capital of the bank. This stipulation should be uniform for all types of promoters and would not mean that promoters who have already diluted their holdings below 26% will not be permitted to raise it to 26% of the paid-up voting equity share capital of the bank.
- Shareholding of non-promoters will be capped at 10% of the paid-up equity capital in the case of natural persons and non-financial institutions or entities.
- A higher ceiling of 15% will be allowed for all categories of financial institutions/entities, supranational institutions, public sector undertaking or Government.
- When a pledge is invoked for over 5% of the paid-up capital, the RBI will restrict the voting rights of the pledgee until the pledgee applies for the regularization of the share acquisition.
- Minimum requirement of experience of promoting entity, including for a converting Non-Banking Financial Company (**NBFC**), may continue at 10 years for Universal Banks and 5 years for small finance banks (**SFB**).

[1] https://www.rbi.org.in/scripts/FS_Notification.aspx?Id=12204&fn=5&Mode=0
[2] https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=52618

- The initial paid-up voting equity share capital/net worth required to set up a new universal bank is increased to INR 1,000 crore from the current INR 500 crores and in the case of SFB, it is increased to INR 300 crores from INR 200 crore.
- Non-operative financial holding companies (**NOFHC**) should continue to be the preferred structure for all new licenses to be issued for Universal Banks. NOFHC may be mandatory only in cases where the individual promoters/promoting entities/converting entities have other group entities.
- Whenever a new licensing guideline is issued, the benefit of any relaxation in the rules would be extended to existing banks immediately. If the new rules are tougher, the legacy banks will have to comply, but a transition path will be finalized with the banks to ensure regulatory compliance is achieved in a non-disruptive manner.

Master circular: Bank Finance to NBFC's stakes in banks

To make a regulatory policy regarding the financing of NBFCs by banks, RBI issued this master circular[3] on January 5, 2022.

- **Bank finance to NBFCs:** Banks can finance RBI registered NBFCs and unregistered NBFCs.
  - **NBFCs registered with RBI:** The ceiling on bank credit linked to Net Owned Fund (**NOF**) of NBFCs has been removed and Banks may formulate suitable loan policy with the approval of their Boards of Directors within the prudential guidelines and exposure norms.
  - **NBFCs not Registered with RBI:** In terms of 'Master Direction - Exemptions from the provisions of RBI Act, 1934' dated August 25, 2016, few categories of NBFCs are exempted from the need for registration with the RBI. Banks may take their credit decisions on the basis of usual factors like the purpose of credit, nature and quality of underlying assets, repayment capacity of borrowers as also risk perception, etc.
- **Bank finance to factoring company:** The banks can finance the factoring companies which:
  - Derive at least 50 % of their income from factoring activity
  - The receivables purchased / financed, form at least 50 % of the assets of the Factoring Company
- **Prudential norms for banks:** The definition and method of computation of exposure would be as prescribed in the circular on Large Exposures Framework dated June 03, 2019:
  - Banks' exposures to a single NBFC (excluding gold loan companies) will be restricted to 20% of their Tier I capital. Banks' exposures to a group of connected NBFCs or group of connected counterparties having NBFCs in the group will be restricted to 25% of their Tier I Capital.
  - The exposure of a bank to a single NBFC which is predominantly engaged in lending against collateral of gold jewellery shall be in accordance with circular on Bank Finance to NBFCs Predominantly Engaged in lending against Gold dated May 18, 2012.
  - Banks shall adhere to the intra-group limits in accordance with Guidelines on Management of Intra-Group Transactions and Exposures dated February 11, 2014.
  - Banks may also consider fixing internal limits for their aggregate exposure to all NBFCs put together.
- **Restrictions on financing:** There are some restrictions placed on the bank for NBFC financing:
  - Banks should not grant bridge loans of any nature, or interim finance against capital/debenture issues and/or in the form of loans of a bridging nature pending raising of long-term funds from the market by way of capital, deposits, etc. to all categories of Non-Banking Financial Companies.
  - Shares and debentures cannot be accepted as collateral securities for secured loans granted to NBFCs.
  - Banks should not execute guarantees covering inter-company deposits/loans thereby guaranteeing refund of deposits/loans accepted by NBFCs/firms from other NBFCs/firms.
  - Banks should not invest in Zero Coupon Bonds (**ZCBs**) issued by NBFCs unless the issuer NBFC builds up sinking funds for all accrued interest and keeps it invested in liquid investments/securities (**Government bonds**).
- **Activities not permitted for bank to finance:** There are activities like:
  - Bills Discounted or Rediscounted by NBFCs
  - Investments of NBFCs both of current and long-term nature, in any company/entity by way of shares, debentures
  - NBFCs lending to individuals for subscribing to Initial Public Offerings (**IPO**s) and for purchase of shares from secondary market
  - Unsecured loans/inter-corporate deposits by NBFCs to/in any company
  - All types of loans and advances by NBFCs to their subsidiaries, group companies/entities are not allowed by banks to finance for the NBFCs

[3] https://rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=12218

RESTRUCTURING & INSOLVENCY

- M/S Construction Consortium Ltd v. M/s Hitro Energy Solutions Pvt Ltd
- SBI (SAM Branch) v. Mahendra Kumar Jajodia (Personal Guarantor to the Corporate Debtor)

M/s Consolidated Construction Consortium Ltd v. M/s Hitro Energy Solutions Pvt Ltd

Civil Appeal No. 1647 of 2021 (Arising out of SLP (C) No.3936 of 2021)

Interpreting 'operational debt' in widest possible manner, the Supreme Court has included claims from persons who receive goods or services from the Corporate Debtor within the ambit of operational debt. Classification of creditors who have advanced monies to Corporate Debtors for goods and services has been a vexed question under India's IBC framework. While this case remained pending before the SC, various NCLTs and the NCLAT had taken different views at different points in time with respect to this issue.

Background facts

- M/s Consolidated Construction Consortium Ltd (**Appellant**) entered into a contract with Chennai Metro Rail Ltd (**CMRL**) for supply of light fittings, pursuant to which the Appellant placed purchase orders with M/s Hitro Energy Solutions (Proprietary Concern) for the supply of light fittings.
- Upon request of the Appellant, CMRL issued a cheque amounting to INR 50,00,000 to the Proprietary Concern on behalf of the Appellant as an advance for its order; however, it subsequently cancelled its contract with the Appellant since the project that CMRL was working on was terminated. Thereafter, the contract with CMRL was cancelled, and the Appellant repaid the sum of INR 50,00,000 to CMRL. However, the Appellant was not able to recover the said amount from the Proprietary Concern as the Proprietary Concern had encashed the cheque for INR 50,00,000. In the interregnum, Hitro Energy Solutions Pvt Ltd (**Respondent**) was incorporated basis a Memorandum of Association (**MOA**), wherein one of the main objects was that the Respondent would take over the Proprietary Concern.
- Thereafter, the Appellant addressed a Demand Notice under Section 8 of IBC to the Respondent, to which the Respondent denied that any debt was owed by them to the Appellant. Accordingly, the Appellant filed an Application under Section 9 of IBC against the Respondent on the ground that the Proprietary Concern had defaulted in repaying the sum of INR 50,00,000 and as per the MOA, the Respondent was to take over the Proprietary Concern. NCLT opined that the Respondent owed the Appellant an outstanding operational debt to the tune of INR 50,00,000, and therefore vide Order dated December 06, 2018, admitted the Application and declared a moratorium..
- Aggrieved by the same, the Respondent preferred an Appeal before the NCLAT. Vide its Order dated December 12, 2019 (**Impugned Order**), the NCLAT set aside the decision of the NCLT. NCLAT dismissed the Appellant's application under Section 9 of IBC and released the Respondent from the rigors of insolvency on the ground that the Appellant was a 'purchaser', and thus, did not come under the definition of 'operational creditor' since it did not supply any goods or services to the Respondent.
- Aggrieved by the Impugned Order of NCLAT, the Appellants filed the present Appeal before the Supreme Court of India (**SC**).

Issues at hand?

- Whether the Appellant is an operational creditor within the meaning of IBC, even though it was a purchaser?
- Whether the Application filed by the Appellant under Section 9 of IBC is barred by limitation?

Decision of the Court

- The SC held that although the Appellant did not provide any goods or services to the Respondent, but only availed of goods or services from the Proprietary Concern, the Appellant is an operational creditor in term of Section 5(20) of IBC. In reaching its findings, SC, inter alia, examined the provisions contained in Sections 5(20) and 5(21) of IBC and noted that Section 5(21) of IBC defines the term 'operational debt' as a claim in respect of provision of goods and services. Thus, the operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Thereafter, SC noted that a reading of Section 8(1) of IBC read with Rule 5(1) and Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 suggests that a notice for an operational debt can be issued either through a demand notice or an invoice and it is not mandatory that an invoice for supply of goods or services to the Corporate Debtor is required to prove the existence of operational debt. In view of the same, the SC concluded that since a demand notice is permissible to be issued even without invoices, a purchaser (who has not issued invoices) must also be considered an operational creditor.
- SC perused Regulation 7(2)(b)(i) and (ii) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and noted that an operational creditor, seeking to claim an operational debt in a CIRP, has an option between relying on a contract for the supply of goods and services with the Corporate Debtor or an invoice demanding payment for the goods and services supplied to the Corporate Debtor. Thus, the contract for supply of goods and services would also include arrangements in which the operational creditor was the receiver of goods or services from the Corporate Debtor rather than the supplier. SC further placed reliance on the decision in the case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*[4], wherein SC while differentiating between operational creditors and allottees in real estate projects, had discussed advance payments in relation to good and services being considered as an operational debt.
- SC relied on its earlier decision in *B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates*[5] wherein it was held that limitation does not commence when the debt becomes due but only when a default occurs. Thereafter, SC noted that CMRL had issued the cheque for INR 50,00,000 to the Proprietary Concern on November 07, 2013. Subsequently, there had been negotiations between the Appellant and the Proprietary Concern regarding the repayment of the sum advanced, and on March 02, 2017, the Proprietary Concern had sent a letter refusing to pay back the amount. Therefore, it was only on March 02, 2017 that the default occurred whereas the debt became due on November 07, 2013 and since the Application under Section 9 of IBC was filed on November 01, 2017, SC held that the Application was filed within the prescribed time-period of three years, and therefore within limitation.
- In view of the above, SC allowed the Appeal and set aside the Impugned Judgment of NCLAT.

SBI (SAM Branch) v. Mahendra Kumar Jajodia (Personal Guarantor to the Corporate Debtor)

NCLAT | Judgment dated January 27, 2022, Company Appeal (AT)(INS) NO.60 OF 2022

A creditor can now de facto exercise its rights as a creditor against a Personal Guarantor. Up until now, the law was not clear on whether an application for initiation of insolvency can be filed against a Personal Guarantor even if no insolvency proceedings have been initiated the Principal Borrower/Corporate Debtor. This judgment is also an extension to the principal of 'joint' and 'several' liability of a Personal Guarantor, as provided under the provisions of the Contract Act, 1872, the NCLAT has taken a liberal approach in the application of the Section 60 of the IBC.

Background facts

- State Bank of India (**Appellant**) filed an Application under Section 95(1) of the IBC for initiation of insolvency proceedings against Mr. Mahendra Kumar Jajodia, the Personal Guarantor to the Corporate Debtor. Vide order dated October 05, 2021 (**Impugned Order**), the NCLT rejected the said application on the ground that no CIRP or Liquidation Process was pending against the Corporate Debtor.

[4] (2019) 8 SCC 416
[5] (2019) 11 SCC 633.

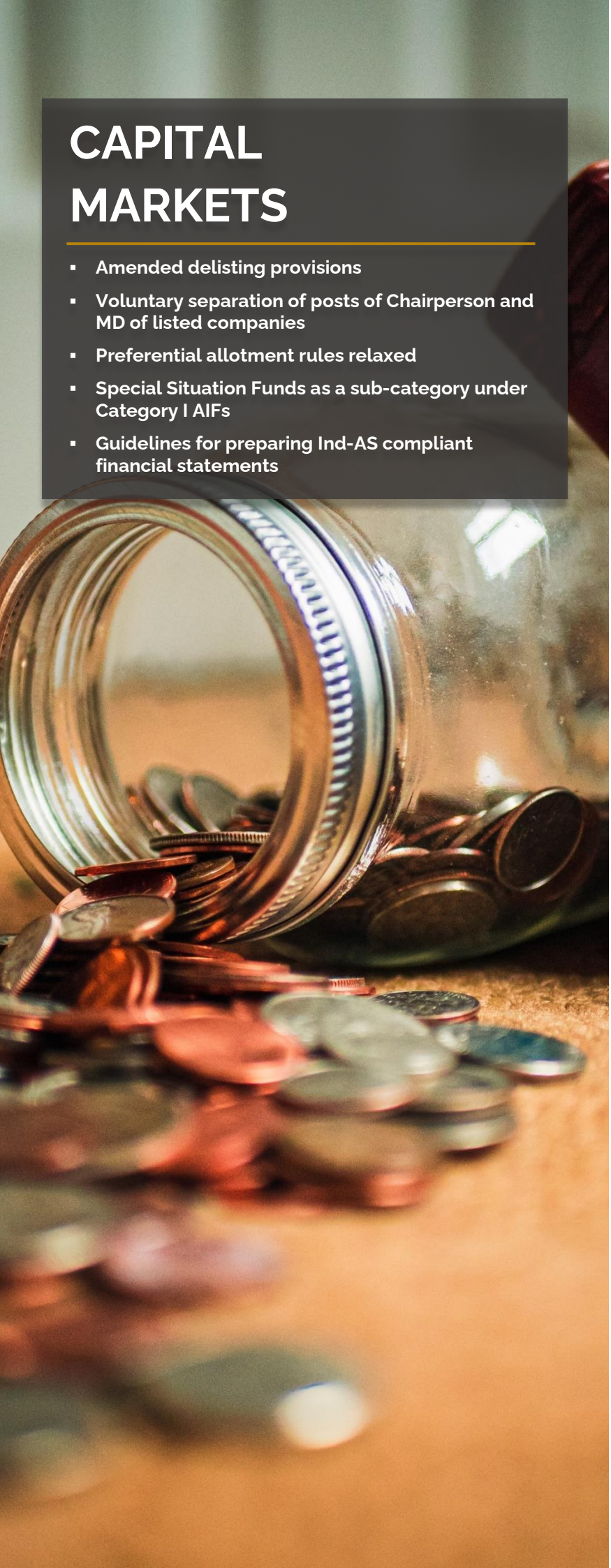
- The NCLT had held that no insolvency was pending as on date because a Resolution Plan had already been approved (therefore bringing the insolvency proceedings to an end). Further, Section 60(2) of the IBC requires that for an Insolvency Resolution Process to be initiated against the guarantor, there must be an ongoing CIRP or Liquidation Process against the principal borrower/Corporate Debtor. Therefore, the Application by the Appellant was rejected by the NCLT.
- Aggrieved by the Impugned Order of the NCLT, the Appellant approached the NCLAT on the ground that the NCLT has wrongly interpreted Section 60(2) of the IBC.

Issue at hand?

- Can insolvency proceedings be initiated against a Personal Guarantor even if the CIRP process for the Corporate Debtor stands concluded?

Decision of the Tribunal

- The Hon'ble NCLAT allowed the present appeal and dismissed the Impugned Order by the NCLT. While arriving at the said decision, the NCLAT dissected Section 60(2) of the IBC and stated that sub-Section 2 of Section 60 requires that where a CIRP or Liquidation Process of the Corporate Debtor is pending before 'a' National Company Law Tribunal, the application relating to CIRP of the Corporate Guarantor or Personal Guarantor, as the case may be, of such Corporate Debtor shall be filed before 'such' National Company Law Tribunal.
- The reasoning behind the aforementioned application of Section 60(2) was that both proceedings be entertained by one and the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor.
- The NCLAT went a step ahead and clarified that sub-Section 2 of Section 60 does not in any way prohibit filing of proceedings under Section 95 of the Code even if no proceeding against the Borrower is pending before NCLT. In addition to this, the Hon'ble NCLAT opined that Section 60(2) begins with expression 'Without prejudice to sub-Section (1)', therefore meaning that the provisions of Section 60(2) are without prejudice to provisions of Section 60(1) and are supplemental to sub-Section (1) of Section 60. Therefore, when a particular case is not covered under Section 60(2), the Application as referred to in sub-Section (1) of Section 60 can very well be filed in the NCLT having territorial jurisdiction over the place where the Registered Office of corporate person is located.
- Lastly, the NCLAT concluded that the Application having been filed under Section 95(1) and the Adjudicating Authority for application under Section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor is pending before the NCLT.
- Therefore, Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending; when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor, there is no applicability of Section 60(2).



CAPITAL MARKETS

- Amended delisting provisions
- Voluntary separation of posts of Chairperson and MD of listed companies
- Preferential allotment rules relaxed
- Special Situation Funds as a sub-category under Category I AIFs
- Guidelines for preparing Ind-AS compliant financial statements

Amended delisting provisions

SEBI released a notification on December 06, 2021 for amending the Shares and Takeover Regulations and released the SEBI (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2021 (**Amendment**). The Amendment primarily pertains to the delisting rules for shares of a company and eases the process of mergers and acquisitions.

Key aspects

- The Amendment has inserted a definition of 'delisting regulation' as per the meaning ascribed under the SEBI (Delisting of Equity Shares) Regulations, 2021.
- An acquirer may seek the delisting of a target company by making an offer at the time of issuing the public announcement of an open offer and the comprehensive public statement, provided that such intention to delist needs to be declared. Previously, only the comprehensive public statement for intention to delist was required to be declared.
- The acquirer needs to complete the delisting offer responsibilities by issuing a public announcement, a comprehensive public statement, and a letter of offer that includes the open offer price calculated in compliance with the Regulation 8 and the indicative price for delisting. Further, the acquirer shall notify both the open offer price and the indicative price at the time of issuing the comprehensive public statement.
- Where a delisting offer fails for one of the following reasons – failure to receive prior shareholder approval in accordance with Regulation 11 of the Delisting Regulations; failure to receive prior in-principal approval of the relevant stock exchange in accordance with Regulation 12 of the Delisting Regulations; or failure to meet the threshold of 90% set out in Regulation 21 of the Delisting Regulations – the acquirer shall make an announcement in all newspapers where the comprehensive public statement was published, within 2 working days of the failure, and adhere to all relevant provisions of these regulations relating to the completion of the open offer.
- When a competitive offer is made as per Regulation 20, the acquirer is not allowed to delist the target company and is also not responsible to pay interest to the shareholders because of the competing offer's delay. The acquirer must adhere to all relevant rules of these regulations and publish an announcement in all newspapers where the comprehensive public statement was published within 2 working days from the date of the public announcement.
- Within 5 working days following the date of the announcement, shareholders who have tendered shares in acceptance of the offer shall be able to withdraw their tendered shares.
- If the target company is unable to be delisted following the delisting offer but the acquirer's shareholding exceeds the maximum permissible non-public shareholding threshold of 75%, the acquirer could aim to delist the target company again within 12 months of the open offer's completion, provided that the acquirer's non-public shareholding in the target company remains above the maximum permissible non-public shareholding threshold.

- The following conditions must be followed for another delisting attempt to be successful:
  - The delisting threshold set forth in Regulation 21 of the delisting regulations is met
  - 50% of the remaining public shareholding is purchased
- If a delisting attempt fails, the acquirer shall comply with the target company's minimum public shareholding criteria under the Securities Contract (Regulation) Rules, 1957 within 12 months.
- Further, the floor price for a subsequent delisting attempt shall be higher than the indicative price proposed on the initial attempt at delisting and the company's book value shall be computed as per the Amendment

Voluntary separation of posts of Chairperson and MD of listed companies

SEBI had earlier amended its listing agreement on April 06, 2021 to specify that from April 01, 2022, the posts of Chairman and Managing Director of listed companies should be separated, and the Chairman should only hold a non-executive post. On February 15, 2022, SEBI revised this requirement and made the requirement for separation of the two posts voluntary, based on multiple representations received from industry bodies and constraints posed by the prevailing pandemic situation.

It is also noteworthy that a review of the compliance status showed that the compliance level stood at 50.4% amongst the top 500 listed companies as of September 2019, which progressed to only 54% as on December 31, 2021. Thus, there has been barely a 4% incremental improvement in compliance by the top 500 listed companies over the last two years. SEBI seems to have concluded that expecting the remaining about 46% of the top 500 listed companies to comply with these norms by the target date would be a tall order.

Preferential allotment rules relaxed

SEBI recently relaxed pricing norms and lock-in requirements to make it easier for companies to raise funds through preferential allotment of shares. The regulator also allowed pledging of shares allotted to promoter or promoter group under preferential issue during the lock in period:

Key takeaways

- The lock-in requirement for allotment up to 20% of the post-issue paid-up capital has been reduced to 18 months from the existing 3 years.
- The lock-in requirement for allotment exceeding 20% of the post-issue paid-up capital has been cut to 6 months from the existing time period of 1 year.
- Any preferential issue resulting in a change in control or allotment of more than a 5% stake will require a valuation report from a registered valuer.
- Any preferential issue allotment resulting in a change in control will be required to provide a reasoned recommendation from a committee of independent directors along with their comments on all aspects of preferential issuance, including pricing.
- Voting pattern of the committee needs to be disclosed to shareholders.
- To determine the floor price for frequently traded security, the floor price for the preferential issue should be higher of 90/10 trading days' Volume-weighted Average Price (**VWAP**) of the scrip preceding the relevant date.
- For infrequently traded security, a valuation report by a registered independent valuer will be required.

Special Situation Funds as a sub-category under Category I AIFs

On January 24, 2022, SEBI amended SEBI (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations**) to introduce Special Situation Funds (**SSF**) as a sub-category under Category I Alternative Investment Funds (**AIF**), with the main purpose to invest in 'Special Situation Assets'.

Requirements for SSFs:

- Minimum corpus requirements
- Minimum investment value to be accepted from investors
- Eligibility requirements to participate as a resolution applicant under Insolvency and Bankruptcy Code, 2016 (**IBC**)
- Comprehensive framework for SSF acquiring a stressed debt in accordance with Clause 58 of the Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021 (**Master Direction**)

Definition

SSFs will become a sub-category under Category I AIF and therefore will invest only in 'stressed assets'. Infrastructure funds, venture capital funds, angel funds, and social and SME funds were all encompassed by SEBI's Category I AIF until now. When compared to other AIF categories, such as Category III, which is primarily related to public market investments, this category enjoys additional tax benefits. Distressed loans available for acquisition under the Master Direction or as part of a resolution plan approved under the IBC will be regarded as stressed assets.

Key aspects

- Each scheme of SSF shall have a minimum corpus requirement i.e., INR 100 crore.
- SSF shall accept an investment of value not less than INR 10 crore from an investor and in the case of an accredited investor, the SSF scheme shall accept an investment of value not less than INR 5 crore. In furtherance to this, the SSF scheme investment limit has been lowered further to INR 25 lakh if in case the investment is from investors who are employees or directors of the SSF or employees or directors of the manager of the SSF.
- If SSF is intending to act as a resolution applicant under the Insolvency and Bankruptcy Code, 2016, SSF shall ensure to comply with the eligibility requirements.
- Furthermore, if the SSF is acquiring a stressed loan pertaining to terms of Clause 58 of the Master Direction, the following amendments have been notified by the SEBI:
  - SSF is allowed to acquire a stressed loan with respect to Clause 58 of Master Direction with and on the inclusion of SSF in the respective annexure.
  - The stressed loan SSF has acquired as per Clause 58 of Master Direction shall also have a lock-in period of six months and this mandatory lock-in period shall not be applicable to the SSF if there is a recovery of stressed loan from the borrower.
  - The initial continuous due diligence requirements shall be fulfilled by the SSF for its investors, if the acquisition of stressed loan is as per the Master Direction, as those mandated by the RBI for investors in Asset Reconstruction Companies (**ARC**s). These funds will also be invested in security receipts issued by ARCs, securities of companies in distress and any other asset/security as may be prescribed by the board from time to time.

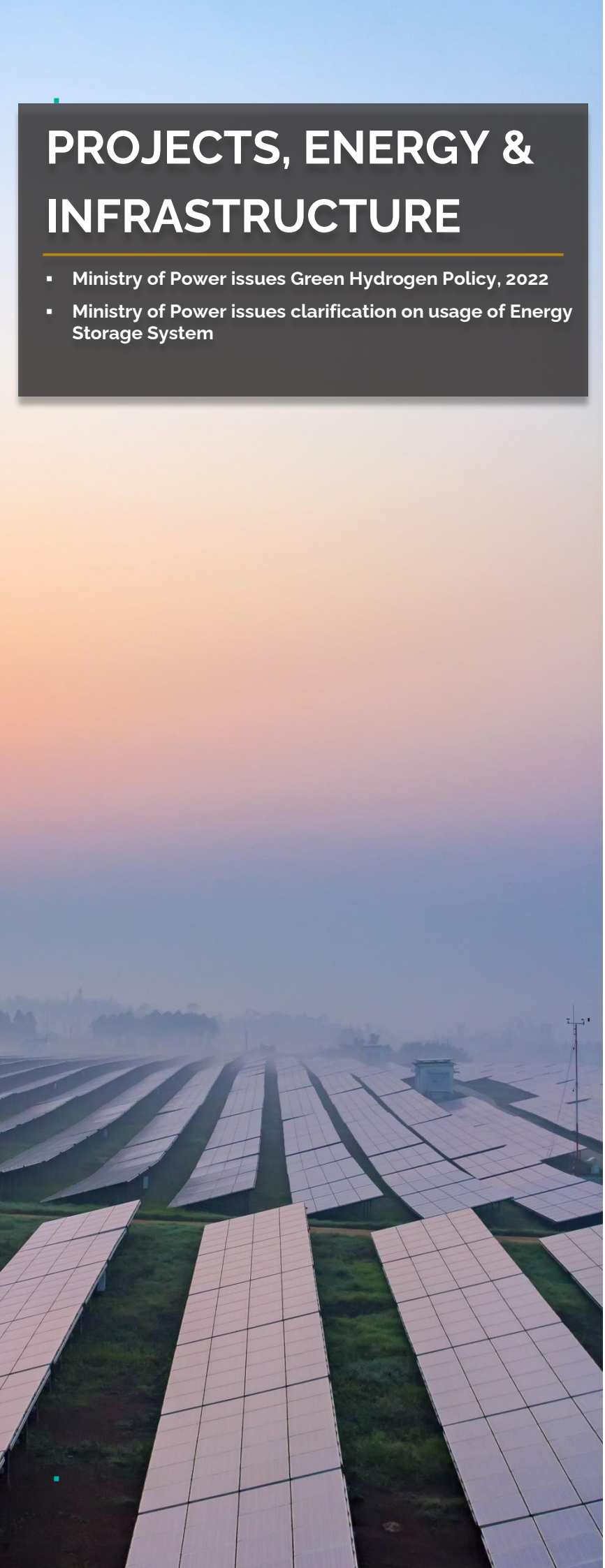
SEBI also ruled last month that SSFs will be exempted from the investment concentration norm in a single investee firm and will have no restrictions on investing their investible funds in the investee company's unlisted or listed shares.

Guidelines for preparing Ind-AS compliant financial statements

Through a notification dated January 25, 2022, SEBI had mandated all Asset Management Companies (**AMC**s) to prepare their financial statements and accounts of the Mutual Fund Schemes in accordance with Indian Accounting Standards (**Ind-AS**), with effect from April 01, 2023. On February 04, 2022, SEBI issued a circular containing certain guidelines to clarify several points.

Key features of the guidelines

- Mutual Fund Schemes shall be required to prepare the opening balance sheet as on date of transition and the comparatives as per the requirements of Ind-AS.
- Perspective historical per unit statistics (**Statistics**) mentioned in Clause 6, Eleventh Schedule of the SEBI (Mutual Funds) Regulations 1996 requires disclosure of scheme wise Statistics for the past 3 years. In this regard, it has been clarified in the Guidelines that the mutual fund schemes may not mandatorily be required to restate the previous years' published Statistics as per requirement of Ind-AS for the first 2 year since the first-time adoption of Ind-AS. However, mutual fund schemes are required to mandatorily furnish following additional information in Statistics:
- Label the previous Generally Accepted Accounting Principles (**GAAP**) information prominently as not being prepared in accordance with Ind-AS
- Disclose the nature of the adjustments that would be required in compliance with Ind-AS, where Mutual Fund Schemes need not quantify such adjustments
- Brokerage and transaction cost incurred for execution shall be charged to the schemes, as provided under Regulation 52(6A)(a), up to 12 bps and 5 bps for cash market transactions and derivatives transactions respectively.
- Any payment towards brokerage and transaction costs, over and above 12 bps and 5bps for cash market transactions and derivatives transactions respectively, may be charged to the scheme within the maximum limit of total expense ratio as prescribed under Regulation 52 of the SEBI (Mutual Funds) Regulations, 1996.



PROJECTS, ENERGY & INFRASTRUCTURE

- Ministry of Power issues Green Hydrogen Policy, 2022
- Ministry of Power issues clarification on usage of Energy Storage System

Ministry of Power issues Green Hydrogen Policy, 2022

The Ministry of Power, Government of India has notified the Green Hydrogen and Green Ammonia Policy through Notification No. 23/02/2022-R&R dated February 17, 2022 (**Policy**). The Policy aims at boosting the domestic production of green hydrogen to 5 million tons by the year 2030, reducing dependence on fossil fuels and import of crude oil, and making India an export hub for the clean fuels such as green hydrogen (**H2**) and green ammonia (**NH3**).

The incentives provided under the Policy are as follows:

- Green H2/NH3 manufacturers may purchase renewable power from the power exchange or set up renewable energy capacity themselves or through any other developer.
- Open access for sourcing renewable energy will be granted within 15 days of receipt of application.
- The green H2/NH3 manufacturer can bank his unconsumed renewable power for up to 30 days with distribution company and take it back when required.
- Distribution Licensees can also procure and supply renewable energy to the manufacturers of green H2/NH3 in their states at concessional prices, which will only include the cost of procurement, wheeling charges and a small margin as determined by the State Commission.
- Waiver of inter-state transmission charges for a period of 25 years will be allowed to the manufacturers of green H2/NH3 for the projects commissioned before June 30, 2025.
- The manufacturers of green H2/NH3 and renewable energy plant shall be given connectivity to the grid on priority basis to avoid any procedural delays.
- The benefit of Renewable Purchase Obligation (RPO) will be granted as an incentive to the H2/NH3 manufacturer and the Distribution Licensee for consumption of renewable power.
- Connectivity, at the generation end and the green H2/NH3 manufacturing end, to the ISTS for renewable energy capacity set up for the purpose of manufacturing green H2/NH3 will be granted on priority.
- Manufacturers of green H2/NH3 will be allowed to set up bunkers near ports for storage of green NH3 for export/use by shipping. The land for the storage for this purpose shall be provided by the respective Port Authorities at applicable charges.
- Further, in order to ensure ease of doing business, a single portal will be set up by the Ministry of New and Renewable Energy for all statutory clearances and permissions required for setting up of green H2/NH3 production in a time bound manner, preferably within 30 days from the date of application.

Ministry of Power issues clarification on usage of Energy Storage System

On January 29, 2022, Ministry of Power (**MOP**), Government of India issued a clarification on usage of Energy Storage System

(ESS) in order to achieve the target of installation of 500 GW of capacity from non-fossil sources by 2030.

- To fulfil the said target, MOP has stated that it is essential to have a mechanism for optimum utilization of resources and selection of right resource mix to meet the projected energy demand of the country.
- ESS is essential to integrate large volumes of renewable energy. ESS system can be Battery Energy Storage System (**BESS**) or Pumped Hydro Energy Storage System or Phase Change Energy System, including energy storage in the form of green ammonia or green hydrogen.
- ESS is an important aspect for grid balancing in view of large-scale penetration of renewable energy in the power system, and can provide fast response/ramping up or down/peaking support, thereby enabling flexibility in the system operation, firming up of renewable energy sources, energy shifting enabling optimum/higher utilization of transmission network, enabling transmission and distribution capex deferral arbitrage, peak shifting, etc.

Status of ESS

- The ESS is a part of the power system defined under Section 2(50) of the Electricity Act, 2003.
- ESS can be utilized either on standalone basis or complimentary with generation, distribution, and transmission. ESS is accorded status on the basis of its application area i.e., generation, transmission, and distribution.
- The ESS can be utilized as generator, grid element or network asset. These assets can be developed, owned, leased, and operated by a generating company or a transmission licensee or a distribution licensee or a system operator or a standalone energy storage provider. When an ESS is owned and operated by and co-located with a distribution licensee or a generating station or a transmission licensee, in that case the ESS have the same legal status as that of the generating station or distribution licensee or transmission licensee.
- If such ESS is not co-located but owned and operated by the generating station or distribution licensee, then the legal status shall be that of the generating station or distribution licensee; however, for the purpose of scheduling and dispatch and other matters, it will be treated at par with a standalone ESS.
- The developer/owner of the ESS may rent out/sell/lease the storage space in whole or in part to any utility engaged in distribution or generation or transmission, or to a Load Dispatch Centre. The owner of the ESS may use part/whole of the storage space in order to buy and store electricity and sell the stored electricity at a later time/date.
- The standalone ESS shall be a delicensed activity at par with a generating company. If the owner/developer seeks to operate the ESS on a standalone basis, the owner/developer has to be registered with the Central Electricity Authority (**CEA**) after providing the details of the capacity and the location. Further, the said owner/developer also needs to comply with rules regarding safety, etc., as laid down by the CEA. The capacity of the ESS shall also be verified by the CEA.
- The connectivity to a standalone ESS shall be granted under the Electricity (Transmission System Planning, Development and Recovery of Inter-State Transmission Charges) Rules, 2021.

DISPUTE RESOLUTION & ARBITRATION

- Indian Oil Corporation Ltd v. M/s Shree Ganesh Petroleum
- UHL Power Company Ltd v. State of Himachal Pradesh
- Deepak Kumar Radheshyam Khurana & Ors v. Mumbai Port Trust & Anr

Indian Oil Corporation Ltd v. M/s Shree Ganesh Petroleum

Civil Appeal Nos. 837-838 of 2022 [Arising out of Special Leave Petition (Civil) Nos.35970-71 of 2016]

If the Arbitral Tribunal fails to act within the terms of the contract or rewrites the terms of the agreement under which it is constituted, then that Award is patently illegal. In terms thereof, the Supreme Court has also cautioned the Arbitrators to pragmatically exercise their jurisdiction in terms of the contract. The Court has also sharpened the distinction between the narrow window of judicial intervention while reviewing the Arbitral Award and the judicial duty to ascertain that the principles of justice are not violated by the Arbitrator by forcing unilateral addition/alteration of a contract upon an unwilling party.

Background facts

- In the present case, M/s Shree Ganesh Petroleum (**Respondent**) desired to start a petrol pump and had approached Indian Oil Corporation Ltd (Appellant) for a dealership. The Appellant agreed to offer the dealership, subject to the condition that the plot of land owned by the Respondent will be leased to it. Subsequently, two agreements were executed between the parties – a Deed of Lease dated September 20, 2005 (**Lease Agreement**) for a period of 29 years and a Dealership Agreement dated November 15, 2006, for a period of 15 years.
- Both the agreements were independent of each other with distinct arbitration clauses. The Lease Agreement provided for reference of disputes to the Managing Director of the Appellant in case of arbitration, and if the Managing Director was unable or unwilling to act as a Sole Arbitrator, then resolution of dispute will be under the sole arbitration of any other person designated or nominated by the Managing Director. On the other hand, the Dealership Agreement provided for reference of disputes to the sole arbitration of the Director (Marketing) of the Corporation who might either himself act as the Arbitrator or nominate some other officer of the Corporation to act as the Arbitrator.
- After a period of time, on inspection of the petrol pump, the Appellant noticed certain irregularities on part of the Respondent, which amounted to violation of the Marketing Discipline Guidelines (**MDG**), 2005. Consequently, on admission of such irregularities by the Respondent, the Appellant terminated the Dealership Agreement.
- After multiple attempts of Appeal before the Appellate Authority of the Appellant proved to be fruitless, the Respondent invoked the arbitration clause under the Dealership Agreement. Accordingly, as stipulated in the Dealership Agreement, the Director (Marketing) of the Appellant was appointed as the Sole Arbitrator. The Respondent requested for an amendment of the Lease Agreement to reduce the lease period and increase the monthly rent as an alternate to set aside the termination of the Dealership Agreement.
- With reference to the termination of dealership by the Appellant, the Sole Arbitrator held that it was legal and valid but as regard the Lease Agreement, he partly allowed the claim of the Respondent by reducing the lease period and by increasing the lease rent.

- As a result, both the Respondent and Appellant filed Arbitration Appeals before the Bombay High Court (**High Court)** under Section 37 of the Act, to challenge the Order of the District Court.
- Accordingly, by way of an Order dated September 11, 2015, the High Court partly allowed the Appeal filed by the Respondent and dismissed the Appeal filed by the Appellant, on the ground that there was no scope for the District Court to interfere with the Impugned Award.
- Discontented with this, the Appellant filed an Appeal in the Supreme Court of India (**SC**) challenging the Order passed by the High Court.

Issues at hand?

- Whether the Arbitral Award and the Order of the District Court are liable to be set aside in so far as the same deal with the disputes pertaining to the Lease Agreement?
- Whether the Order of the High Court is liable to be set aside?

Decision of the Court

- At the outset, SC juxtaposed the Lease and the Dealership Agreements and observed that there is significant difference between the terms of both. Additionally, the SC noted that the disputes arising out of the Lease Agreement could only be referred to the Managing Director of the Appellant for arbitration or his nominee, whereas the disputes arising out of the Dealership Agreement were to be referred to the Marketing Director of the Appellant for arbitration. SC also noted that under the Lease Agreement, if the disputes could not be referred to the Managing Director for any reason, the matter could not go to arbitration at all.
- In view of the foregoing, SC expressed that an Arbitral Tribunal has its origin in a contract and, therefore, it is strictly required to act in terms of the contract under which it is established. Furthermore, when an Arbitral Tribunal defaults to act in terms of the contract or disregards the specific terms of the contract, it is beyond a shadow of doubt that the Award granted by it is illegal. Thereafter, the SC demarcated between the failure to act in terms of a contract and inaccurate interpretation of the terms of the contract by the Arbitral Tribunal and clarified that the latter is valid because the Arbitral Tribunal is empowered to interpret the terms and conditions of a contract while adjudicating a dispute.
- Subsequently, SC referred to its judgement in *Associate Builders v. Delhi Development Authority*[6] to highlight that when an Arbitral Tribunal overlooks the terms of a contract, the Award would be far from public interest. On the strength of this judgement, SC advanced that in the present case, while granting the Award in respect of lease term and lease rent, the Arbitrator completely brushed aside the terms and conditions of the Lease Agreement and, therefore, the Award is evidently against the public policy. In view of the above, the SC arrived at the conclusion that the Impugned Award is clearly beyond the scope of the competence of the Arbitrator appointed under the Dealership Agreement.
- Additionally, the SC recapitulated the principles laid down by it in *SsangYong Engineering and Construction Company Ltd v. National Highways Authority of India (NHAI)*[7] and *PSA SICAL Terminals Pvt Ltd v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors*[8] wherein it was held that an Arbitrator derives its power from the contract and if, in the guise of doing justice, the Arbitrator goes beyond the contract, he would be acting without jurisdiction.
- Lastly, the Court referred to its judgement in *Satyanarayana Construction Company v. Union of India and Ors*[9] to delineate that once a rate had been finalized in a contract, it was not within the scope of the Arbitrator to revise the terms of the contract and award a higher rate.
- In light of the peculiarity of the facts and circumstances of this case, the SC set aside the Award to the extent that the Arbitrator had increased the lease rent and reduced the lease term.
- Further, the SC set aside the Impugned Judgement passed by the District Court as the same pertained to lease rent and lease period. The SC also set aside the Impugned Judgement of the High Court and, thus, answered the issues in affirmative.

UHL Power Company Ltd v. State of Himachal Pradesh

Civil Appeal Nos. 10341 and 10342 of 2011.

This judgment makes it clear that the Arbitrator has the power to award interest on interest. The Supreme Court has shed light on the judicial review of arbitral awards by holding that the jurisdiction conferred on Courts under Section 34 of the Act is fairly narrow. Similarly, when it comes to the scope of an Appeal under Section 37 of the Act, the jurisdiction of an Appellate Court is more circumscribed and when there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found if the Arbitrator proceeds to accept one interpretation as against the other.

[6] (2015) 3 SCC 49
[7] (2019) 15 SCC 131
[8] (2021) SCC Online SC 508
[9] (2011) 15 SCC 101

Background facts

- A Memorandum of Understanding (**MoU**) dated February 10, 1992 and an Implementation Agreement dated August 22, 1997 was executed between UHL Power Company Ltd (**UHL**) and the State of Himachal Pradesh (**State**) for developing a hydro-electric power generation project. However, disputes arose between the parties when the Implementation Agreement was terminated by the State for failure to obtain certain clearances within the contractually stipulated period.
- Accordingly, arbitration proceedings were initiated between the parties and by way of an Award dated June 05, 2005, the learned Sole Arbitrator awarded a sum of INR 26,08,89,107.35 in favor of UHL towards expenses claimed, along with pre-claim interest capitalized annually on the expenses so incurred. In addition, the Arbitrator also awarded compound interest in favor of UHL at the rate of 9% p.a. till the date of claim and in case the awarded amount is not realized within a period of 6 months from the date of making the Award, future interest at the rate of 18% p.a. was also awarded on the principal claim with interest (**Award**).
- Aggrieved by the Award, the State challenged it under Section 34 of the Arbitration and Conciliation Act, 1996 (**Act**) before the High Court of Himachal Pradesh (**HC**). Vide Order dated December 16, 2008, the single judge of the HC disallowed the Award and UHL's entire claim.
- The aforesaid HC Order was challenged by UHL under Section 37 of the Act before the Division Bench of the HC. Vide Order dated May 24, 2011, the Division Bench allowed UHL's Appeal and restored the Award to the extent of INR 9,10,26,558.74 as principal along with simple interest at the rate of 6% p.a. from the date of filing of the claim, till the date of realization of the awarded amount.
- The Court relied on the judgement of *State of Haryana v. S.L. Arora and Co*[10], wherein it was held that compound interest can be awarded only if there is a specific contract or authority under a Statute for compounding of interest. Since there was no general discretion vested in Courts or Tribunals to award compound interest, the HC denied the award of compound interest and stated that in the absence of any provision for interest upon interest in the contract, an Arbitrator does not have the power to award compound interest, either for the pre-award period or for the post-award period (**Impugned Judgement**).
- Aggrieved by the Impugned Judgement, both UHL and the State preferred separate appeals before the Supreme Court (**SC**) on differing grounds, which were clubbed by the SC.

Issue at hand?

- Whether an Arbitrator has the power to grant post-award interest on the interest amount awarded under the Act?

Decision of the Court

- At the outset, SC observed that the position of law regarding an Arbitral Tribunal awarding compound interest was no longer res integra, in view of the judgement in *Hyder Consulting (UK) Ltd v. Governor, State of Orissa Through Chief Engineer*[11], which over-ruled the verdict in *S. L. Arora case*[12] by three-Judge Bench of SC where the majority view was that post-award interest can be granted by an Arbitrator on the interest amount awarded. In Hyder Consulting case, SC clarified that the question on there being interest on interest did not arise since interest under Section 31(7)(b) of the Act was granted on the 'sum' directed to be paid by an Arbitral Award wherein the 'sum' was nothing more than what was arrived under Section 31(7)(a) of the Act.
- Accordingly, SC reversed the findings in the Impugned Judgment regarding the Arbitral Tribunal not being empowered to grant interest on interest or compound interest and re-instated the Award to that effect.
- Thereafter, while analyzing the facts of the case, SC agreed with the HC's view and held that the Single Judge erred in reappreciating the findings of the Arbitral Tribunal and took an entirely different view in interpretating the relevant clauses of the Implementation Agreement governing the parties. It was not open to the Court to do so in proceedings under Section 34 of the Act by virtually acting as a Court of Appeal.
- SC while placing reliance on *Dyna Technologies (P) Ltd v. Crompton Greaves Ltd*[13] observed that the interpretation of the relevant clauses of the Implementation Agreement, as done by the Sole Arbitrator, are both possible and plausible. Merely because another view could have been taken cannot be the ground for the Single Judge to have interfered with the Arbitral Award.
- In view of the above, the SC held that the Order passed by the Single Judge of the HC had exceeded its jurisdiction by questioning the interpretation given to the Implementation

[10] (2010) 3 SCC 690
[11] (2015) 2 SCC 189
[12] Civil Appeal No.1094 of 2010
[13] (2019) 20 SCC 1

Agreement under the Award, since such interpretation was backed by logic. Thus, the restoration of the Award by the Impugned Judgment was held to be proper by the SC.

- In view of the above, SC partly allowed the appeal by UHL by stating that the Arbitrator has the power to grant post-award interest and rejected the Appeal of the State in toto.

Deepak Kumar Radheshyam Khurana & Ors v. Mumbai Port Trust & Anr

Writ Petition (L) No. 17132 of 2021

Mumbai Port Trust was represented by HSA team comprising of Rahul Jain, Associate Counsel and Aasiya Khan, Associate from the Firm's Mumbai office.

The Bombay High Court's decision - that the mandate by MPT to produce periodic RT-PCR reports by the employees who refused to get vaccinated was reasonable - serves as a guiding precedent for Courts while deciding whether any restrictions on the basis of vaccination status/furnishing of periodic negative Covid-19 test results, falls within the umbrella of reasonable restriction on the fundamental rights or not. While studying various decisions of the other High Courts, which took action on the basis that even vaccinated persons could be infected with Covid-19 and could transmit the disease to others, the High Court has looked beyond the obvious, by pointing that the risk of such infections occurring was greatly reduced in vaccinated persons and was significantly higher in unvaccinated persons. The decision is indeed laudable in trying to balance the individual's personal choice in getting the Covid vaccination against the health/safety concerns of the larger workforce.

Background facts

- In the instant case, Mr. Deepak Kumar Radheshyam Khurana & Others (**Petitioners**) are the employees of the Mumbai Port Trust (**MPT**) (**Respondent No.1**), which is an autonomous corporation of Union of India (**Respondent No.2)**.
- Vide an office circular dated June 15, 2021, the Respondent No. 1 inter alia stipulated that its employees who were not vaccinated must produce RT-PCR test certificates to attend office, every ten days. Furthermore, the Respondent No.1 also specified in the circular that it will not bear the treatment costs of the employees who refused to vaccinate themselves as they were effectively insisting on placing themselves at a much higher risk of contracting Covid-19.
- In view of this, the Petitioners filed a Writ Petition before the Hon'ble Bombay High Court, on the following grounds:
  - Vaccination is a voluntary act, and the Respondents cannot compel the Petitioners to get vaccinated.
  - Unvaccinated employees were on par with the vaccinated employees as far as the transmission of the disease was concerned, and therefore, the periodic RT-PCR tests must be performed free of cost in Respondent No.1's hospital.

Issue at hand?

- Whether the requirement of mandatorily producing RT-PCR reports of the Petitioners of the Respondents, every ten days, was reasonable or not?

Decision of the Court

- The Hon'ble High Court remarked that the contention of the Petitioners of being compelled to get vaccinated, does not hold water as the Respondents have evidently provided an alternative of producing periodical RT-PCR reports. Therefore, the High Court stated that the only issue which is to be riddled out is the mandatory production of the RT-PCR report.
- Subsequently, the High Court analyzed the Order of the Gauhati High Court in *Re Dintar Incident vs. State of Mizoram & Ors*[14], the Interim Order of the Gauhati High Court in *Madan Mili vs. Union of India & Ors*[15], Order of the Meghalaya High Court in *Registrar General, High Court of Meghalaya vs. State of Meghalaya*[16] , the Interim Order of the Manipur High Court in *Osbert Khaling vs State of Manipur & Ors*[17] and the Interim Order of the Gauhati High Court in the case of *Dr. Aniruddha Babar vs State of Nagaland & Anr*[18], which were heavily relied on by the Petitioners.
- After juxtaposing and scrutinizing all the aforesaid decisions and Interim Orders of various High Courts, the Bombay High Court advanced a noteworthy observation that, in the present case, Respondent No.1 has not imposed any forceful restrictions which would effectively forbid the unvaccinated employees from working. In this backdrop, the High Court also expressed that the aforementioned decisions and Interim Orders do little to no help to the Petitioners' case.

[14] Order dated 2nd July 2021 in WP(C) No.37 of 2020
[15] Order dated 19th July 2021 in PIL No.13 of 2021
[16] Order dated 23rd June 2021 in PIL No.6 of 2021
[17] Order dated 13th July 2021 in PIL No.34 of 2021
[18] Order dated 28th July 2021 in PIL No.6 of 2021

- Furthermore, the High Court perused the medical material published by the World Health Organization (**WHO**) and the Technical Paper of the Department of Health & Family Welfare, Government of Kerala to arrive at the conclusion that international and state agencies and Governments across the world consider Covid-19 vaccination not only an immense protection against contracting the disease and but effectively reduces the risk of its transmission. Continuing in this vein, the High Court expounded the following, '*Given that unvaccinated persons pose a greater risk of transmission of Covid-19 than vaccinated persons, it is reasonable for a large organization such as the MPT to require a higher degree of checking and monitoring of the Covid-19 status of unvaccinated persons*.'. Therefore, the High Court deduced that the argument of the Petitioners' pitched upon the ground that vaccinated and unvaccinated employees stand on the same footing as far as the transmission of the disease was concerned, was ill-conceived and untenable.
- Lastly, the High Court highlighted that the Petitioners' choice to not take the vaccination was well respected; however, that did not signify that they were ipso facto entitled to an equal treatment as that given to vaccinated persons by Respondent No.1.
- In light of the above, the High Court answered the issue in the affirmative and dismissed the Petition.

SUPERSTRUCTURE MORTGAGES – A BIT WOBBLY?

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The concept of mortgage, as set out in the Transfer of Property Act, 1882 (**TPA**), and related laws, involves the mortgagor fettering its interest in immovable property in favor of the mortgagee or the lender, to secure the mortgagor's or a third party's financial obligations. With mortgages being an integral part of lending and borrowing transactions, there are nuances in the separation of the rights between the superstructures built over the land and the land underneath.

While the law allows for the separate ownership of land and the buildings above, the general presumption is that the rights of ownership of a superstructure or building are merged with the ownership of land unless there is a contrary intent, in which case ownership of the superstructure vests in an entity other than the one which owns the land underneath. In such cases, it is advisable to consolidate the understanding in an agreement so as to avoid conflicts and legal issues.

Judicial precedents have recognized dual ownership even prior to its codification in the TPA and the principles of dual ownership have gotten distilled in various judgements such as the case of *Thakoor Chander v Ramdhone Buttacharjee*[19](**Paramanick**'s case) where it was held that buildings and other improvements do not, by the mere fact of their attachment to the soil, become the property of the owner of the soil. Other judicial pronouncements in *Dr KA Dhairyawan and Ors v JR Thakur and Ors* [20], *Dattaram Waman Kambli & Ors v Shantaram Bapu Kambli & Ors*[21] and *Narayandas Khettry v Jitendra Nath Roy Chowdhury & Ors*[22] have confirmed that there can be ownership of the underlying land separate from that of the building or structure standing on it. However, while it is legally permissible to create a mortgage on the superstructures erected or constructed, but not on the land underneath, practical challenges arise.

One such challenge emanates from the mortgage of distinctively and separately owned superstructure in a lease hold scenario. If a mortgage is created on superstructures built on leasehold land, it will exist only for the period of the lease. The rights of the lender in relation to such superstructures will be at an end once the lease period expires. In commercial terms, the lender should limit its exposure so that, at any time the outstanding amounts do not exceed the valuation of the unexpired period of the lease.

Furthermore, the law has a grey area on what constitute title documents of immovable property attached to the land and superstructures constructed over it. The creation of an equitable mortgage by deposit of title deeds can be difficult as the borrower may not have the title documents of a superstructure. It may be challenging to establish documentary evidence of ownership of a superstructure excluding the land. While this evidence may take the form of documents relating to leasehold improvement expenses or other records, they may require further corroboration and may not be sufficient to satisfy the documentary requirements to create an equitable mortgage.

Lenders may also face difficulties creating registered mortgages over immovable properties as the sub-registrar may not recognize a mortgage over the superstructures without the underlying land. This problem is dependent on the interpretation of registration regulations by the sub-registrars. The requirement to create a mortgage by a registered instrument, except for mortgages by deposit of title deeds, flows from section 59 of the TPA, read with section 17 of the Registration Act, 1908. The Supreme Court has interpreted these provisions in the cases of *State of Haryana & Ors v Narvir Singh & Anr*[23] and *Suraj Lamp & Industries Private Limited v State of Haryana & Anr*[24]. Sub-registrars may create obstructions to the creation of mortgages over superstructures without the underlying land, making the process onerous.

Where a mortgage is created over the superstructure without concomitant security over the underlying land, foreclosure of the mortgage may not raise enough to cover the borrower's debt. Without security over the concerned land, mortgages on superstructures alone may not be foolproof to allow the lender to recover the borrower's debts.

On a reading of the relevant legislation and judicial pronouncements, although it is legally permissible to create a mortgage on the superstructures constructed without creating a mortgage on the land underneath, the practical difficulties caused by the lender having no rights over the land may limit the benefits of such mortgages. It is therefore prudent for lenders to tread cautiously when deciding whether to secure their interests by accepting a mortgage created by the borrower solely on superstructures without a charge over the underlying land.

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[19] 6 Suth WR 228 (B)
[20] 1958 AIR 789, 1959 SCR 799
[21] Second Appeal
[22] AIR (1927) Privy Council 135
[23] Civil Appeal no.9049 of 2013 (Special Leave Petition (Civil) no. 924 of 2009)
[24] Special Leave Petition (c) no.13917 of 2009

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