DEVELOPMENTS IN CORPORATE LAW AND LABOUR LAW

IN FEBRUARY 2019

ACUITY LAW

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers led by Souvik Ganguly and Gautam Narayan, who have deep and diverse experiences in their chosen areas of practice. We have advised Indian and multinational companies, funds, banks and financial institutions, founders of companies, management teams, international law firms, domestic and international investment banks, financial advisors and government agencies in various transactions in and outside India.

Acuity Law takes pride in rendering incisive legal advice taking into consideration commercial realities. Our areas of practice are divided not two departments.

The Corporate practice is led by Souvik Ganguly and the Disputes practice is led by Gautam Narayan.

As part of the Corporate practice, Acuity Law advises on:

- Mergers and acquisitions;
- Distressed mergers and acquisitions;
- Insolvency Law;
- Private Equity and Venture Funding;
- Employment and labour laws
- Commercial and trading arrangements; and
- Corporate Advisory

As part of the Disputes practice, Acuity Law under the leadership of Gautam Narayan advises and represents clients on domestic and cross - border:

- Civil disputes;
- Criminal law matters; and
- Arbitration matters

Acuity Law actively follows legislative and policy developments in its chosen areas of practice and shares such developments with clients and friends on a regular basis.

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INTRODUCTION

This newsletter covers developments with respect to corporate and labour laws during the month of February 2019.

In relation to corporate laws, we have covered case laws with respect to whether a sale deed is valid if it is signed by someone who is not authorized by a board resolution; whether mortgage of a company's assets without the consent of investors nominee director amounts to oppression and mismanagement; whether rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 is constitutionally valid and whether signing the audit report without examining the books of account contravenes the duties of a statutory auditor.

In relation to labour law, we have covered a High Court judgement with respect to whether an employee may be entitled to gratuity beyond the ceiling limit specified under section 4(3) of the Payment of Gratuity Act, 1972.

Please see below summaries of the relevant developments.

1. A COMPANY CAN ONLY ACT THROUGH THE AUTHORIZATION RECEIVED FROM THE BOARD OF DIRECTORS WHILE EFFECTING SALE OF AN IMMOVABLE PROPERTY

CORPORATE LAW

Matter: Pankaj Paliwal Vs. Vian Infrastructure Limited and Ors.,

Order Date: 14th November 2018

Summary:
Shashi Kumar ("**Petitioner**") filed an application to the Hon'ble High Court of Delhi ("**High Court**"), under rule 9 of the Company Court Rules, 1959 and under section 446 of the Companies Act, 1956 ("**the Act**") read with section 151 of the Code of Civil Procedure, 1908, seeking that the Official Liquidator for the liquidation proceedings of Vian Infrastructure Ltd. ("**Company**") be directed not to auction / sell plot No. D1-67, Sector-2, Sheelki Dungri Tehsil Chaksu, District Jaipur, Rajasthan.

The Petitioner submitted that the property in question was purchased by a registered sale deed. However, later, he learned about the pendency of the present case and regarding auction proceedings. The Petitioner further submitted that by virtue of the sale deed, he was the owner of some part of the property, and his land could not be auctioned along with the land of the Company. On the other hand, the Official Liquidator contended that the sale deed on which the Petitioner was relying, was a fraudulent document, and the person who sold the property to the Petitioner was not authorized by the Company. The High Court noted that an investigation was undertaken by the Economic Offences Wing against the Company and its directors, who were accused of cheating the investors who had invested their money in various projects in the Company including the project located at the disputed property. In this investigation, it had come to light that the Company had purchased the said land, a part of which was claimed to be owned by the Petitioner.

The High Court observed the following:

- The person who had signed the sale deed was not authorized by the Company through a board resolution to sell the land in question.
- There was no proof that the Petitioner had paid the sale consideration nor was there proof that the Company had received any consideration for the said transaction.

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The High Court held that the sale transaction relied upon by the petitioner cannot be relied upon and is a fraudulent document created in an attempt the grab the assets of the Company undergoing liquidation and accordingly dismissed the application.

2. ENCUMBRANCE ON ASSETS WITHOUT THE CONSENT OF THE NOMINEE DIRECTOR IS ILLEGAL WHEN SUCH CONSENT IS REQUIRED UNDER ARTICLES OF ASSOCIATION

Matter: Metmin Investments Holdings Limited v. Rinac India Limited and Ors.

Order Date: 23rd January 2019

Summary:
Metmin Investments Holdings Limited ("**Appellant**") invested a sum of INR 190,000,140 in Rinac India Limited ("**Respondent Company**") by way of subscription to, as well as, purchase of shares. The Appellant was entitled to receive 45% internal rate of return on the amounts invested by them. Pursuant to an order by the National Company Law Tribunal, Bangalore ("**NCLT**"), the directors of the Respondent Company mortgaged the assets of the Respondent Company without the consent of the nominee director of the Appellant. The Appellant thus filed an appeal before the National Company Law Appellate Tribunal ("**NCLAT**") against the order of the NCLT. The Appellant submitted that mortgaging the assets of the Respondent Company without the consent of the nominee director of the Appellant was violative of the Respondent Company's Articles of Association ("**AoA**") and amounted to oppression and mismanagement of the affairs of the Respondent Company

The NCLAT held the following:

- The NCLAT took note of the Appellant's averment that it was entitled to have a nominee director on the board of the Respondent Company, since the AoA mandated explicit consent of the nominee director for creating encumbrances on the Respondent Company's assets. The NCLAT upheld the Appellants claim that they are entitled to appoint a nominee director on the board of the Respondent Company. The NCLAT appointed Mr. Singhi as the Appellants nominee director on the board of the Respondent Company.
- The NCLAT declared all the transactions done by the directors of the Respondent Company on behalf of the Respondent Company without the express consent of the Appellant and in the absence of the nominee director of the Appellant, as illegal and ordered restoration.
- Further, interim reliefs were granted by appointing an independent observer on the board of the Respondent Company in order to ensure that the rights of the Appellant are not trampled upon and to ensure that the affairs of the Respondent Company are not mismanaged.
- Restrain was put upon the directors of the Respondent Company from creating any encumbrance on the assets of the Company and from undertaking any restructuring of the business in any manner whatsoever.
- Accordingly, the appeal was allowed before the NCLAT against the impugned order dated 06 September 2018, passed by the NCLT, which allowed the application of Respondent Company to create a charge / encumbrance over the assets of the Respondent Company to enable the Company to raise loans / avail financial facilities from the banks / financial institutions.

3. RULE 3(2) OF THE COMPANIES (REGISTERED VALUERS AND VALUATION) RULES, 2017 IS CONSTITUTIONALLY VALID

Matter: Cushman and Wakefield India Pvt. Ltd. and Anrs. Vs. Union of India and Anr.

Order Date: 31st January 2019

Summary:
The Hon'ble High Court of Delhi ("**High Court**") passed a judgment stating that a separate class has been carved out based on classification which is found on intelligible differentia and therefore rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 ("Rules") is constitutionally valid.

In the present matter, four petitions were decided by this common order since they involved a common issue with common facts.

Cushman and Wakefield India Pvt. Ltd., Knight Frank (India) Private Limited ("**Petitioner No. 1**"), CBRE South Asia Private Limited and Jones Lang Lasalle Property Consultants (India) Private Limited filed a petition before the High Court praying that an appropriate writ, order or direction be issued, declaring rule 3(2) of the Rules as unconstitutional and violating Articles 14, 19(1)(g) and 301 of the Constitution of India. Petitioner No. 1 is a subsidiary of a body corporate and is engaged in the business of real estate consultancy services including provision of real estate valuation services.

The Union of India ("**Respondent**") submitted that there's a rational nexus to the object of disqualifying all entities with the interest in other professions / business / enterprises so that the integrity of the profession is maintained and there is no conflict of interest, and hence the rule 3(2) of the Rules does not suffer from the vires of excessive delegation.

The question before the High Court was "whether exclusion of a subsidiary company, joint venture or associate of other company, for purpose of eligibility for registration as valuer is reasonable?".

The HC answered the question in the affirmative and held that:

- The objective and intention behind laying down the impugned rule is to introduce higher standards of professionalism in valuation industry.

- The impugned rule obviates the possibility of conflict of interest on account of diverging interests of constituent / associate entities which resultantly shall undermine the very process of valuation, being one of the most essential elements of the proceedings before National Company Law Tribunal.

- A separate class has been carved out based on classification which is founded on intelligible differentia and as such the rule cannot be faulted.

Accordingly, all the four petitions were dismissed.

4. SIGNING THE AUDIT REPORT WITHOUT EXAMINING THE BOOKS OF ACCOUNT IS CONTRAVENTION OF THE DUTIES OF A STATUTORY AUDITOR

Matter: Union of India Vs. Mr. Mukesh Choksi and Zen Shaving Ltd.

Order Dated: 6th February 2019

Summary:
Mr. Mukesh Choksi ("**Respondent No. 1**") was a statutory auditor of Zen Shaving Limited ("**Respondent Company**") during the financial years 2014-15 and 2015-16. Respondent No. 1 never filed the requisite forms required with the Registrar of Companies. The Respondent Company stated that Respondent No. 1 submitted the audit reports for the company for the financial years 2014-15 and 2015-16. Based on multiple complaints relating to alleging siphoning of investor's money, the Ministry of Corporate Affairs ordered the inspection of Respondent Company under section 206(5) of the Companies Act, 2013 ("**the Act**").

The main issue arising was whether Respondent No. 1 who was appointed as a statutory auditor of Zen Shaving Limited for the purpose of examining the books of account being a related person to the Respondent Company and having signed the statutory audit report without examining the books of account of the Respondent Company are violative of the provisions given under the Act, relating to the duties of the statutory auditor.

As per the powers granted under section 207 of the Act, the Inspecting Officer submitted an inspection report which pointed out the following: the failure on part of the Respondent Company to reply to the notices addressed to it; The failure on part of the Respondent Company to produce the books of accounts for the inspection; during the inspection Respondent No. 1 made the statement on oath that he has signed the auditor's report without examining the books of accounts of the Respondent Company; and violation of section 141(3)(d) which provides that a chartered accountant cannot be eligible to be the auditor for the company, whose family members / relatives are holding any security or interest in the same company. The Respondent No. 1 had issued an audit certificate of the company without examining the books of accounts of the Respondent Company. The Respondent No. 1 stated that the act was done under a good faith.

The NCLT, Mumbai Bench in the interim order held that:

- Respondent No. 1 shall cease to be the auditor of the Respondent Company.
- Permit the Petitioner to appoint an independent auditor for the Respondent Company.

After giving an opportunity to Respondent No. 1, the court further stated that Respondent No.1 has not given any plausible explanations to the fraudulent and irresponsible activities committed by him and further held that:

- Respondent No. 1 shall not be eligible to be appointed as the statutory auditor of any company for a period of 5 years from the date of the order as per section 140(5) of the Act. The auditor was also held liable under section 447 of the Act for engaging in fraudulent activities.
- Respondent No. 1 was also directed to return the remuneration received by him from the Respondent Company, during the period he acted as a statutory auditor, under section 147(3)(i) of the Act.

1. AN EMPLOYEE MAY BE ENTITLED TO GRATUITY BEYOND THE CEILING LIMIT SPECIFIED UNDER SECTION 4(3) OF THE PAYMENT OF GRATUITY ACT, 1972

LABOUR LAW

Matter: BCH Electric Limited Vs. Pradeep Mehra and Ors.

Order Date: 6th February 2019

Summary:

The Hon'ble High Court of Delhi ("**High Court**") decided four identical petitions having common issues and similar prayers arising out of the non-payment of gratuity under the Payment of Gratuity Act, 1972, ("**the Act**") by a common judgement upholding the claim of the Respondents / Employees to receive gratuity beyond the ceiling limit prescribed under section 4(3) of the Act.

Facts:

The Respondent was the CEO of BCH Electric Ltd. ("**Petitioner**" / "**Corporation**") admittedly rendering his service for 12 years. The Petitioner sent a letter, after retirement, enclosing a cheque towards the Respondent's gratuity amount being INR 1,019,452, out of which INR 1,000,000 was the amount payable according to the Act at that time and the remaining was the interest calculated thereon. The Respondent claimed that he was entitled to a sum of INR 18,375,000 as gratuity for the entire period of his services rendered. The emoluments of the Respondent were decided by the Chairman & Managing Director ("**CMD**") by issuing Executive Emolument Sheets ("**EES**") that indicated the Respondent's emoluments for the current year as also the enhancements therein for the next few years. These EES always contained an entry towards gratuity, which amount was computed at the rate of 4.81% of the Respondent's annual basic salary and were issued under the signature of the CMD before being handed over to the Respondent in original, thereby becoming a part of the contract between the Petitioner / Corporation and the Respondent / Employee.

The Respondent filed a claim application before the Controlling Authority ("**CA**") under the Act against the Petitioner under section 7 of the Act, praying the Petitioner to pay him a further sum of INR 17,375,000 towards the balance amount payable to him as gratuity. The CA passed the impugned order allowing the Respondent's claim for gratuity and directed the Petitioner to pay him INR 17,375,000 over and above the gratuity amount already paid to him, along with simple interest at the rate of 10% per annum for delayed payment.

The Petitioner filed an appeal against the order of the CA before the Appellate Authority on 23 March 2018 which was dismissed. It is under these circumstances the Petitioner filed a writ petition before the High Court against the impugned orders passed against him. This appeal was filed under Articles 226 and 227 of the Constitution of India, against the impugned order dated 31 July 2017 passed by the CA under the Act. The Petitioner also challenged the order dated 23 March 2018 passed by the Appellate Authority, confirming the aforesaid order of the CA. Further, the jurisdiction of the CA was challenged by the Petitioner in the High Court.

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The High Court held the following:

- Section 4(5) of the Act begins with a non-obstante clause that gives the said provision an overriding effect over the remaining provisions of section 4. Consequently, while Section 4(3) generally prescribes a limit on the maximum amount of gratuity that can be claimed by an employee under the Act. Section 4(5) carves out an exception for those employees who have better terms of gratuity under an award, or an agreement or contract with their employer.

- The very fact that under the above provision better terms of gratuity could be obtained by an employee by an agreement or contract with the employer notwithstanding the scheme of gratuity obtaining under the Act clearly suggests that no standardization of the gratuity scheme contemplated by the Act was intended by the Legislature.

- There can be no doubt that nothing in section 4(3) affects the right of the respondent to claim gratuity in excess of ceiling limit prescribed thereunder.

- When the Act itself protects the right of an employee to get higher gratuity than the prescribed ceiling limit and does not curb the maximum amount of gratuity payable to an employee. The Respondent being entitled to better terms of gratuity in terms of Section 4(5), the CA as also the Appellate Authority rightfully upheld his claim for gratuity in excess of the ceiling limit prescribed under Section 4(3).

- The Act is a complete code in itself with respect to matters relating to the payment of gratuity and the CA appointed under section 3 is statutorily enjoined under section 7(4)(b) to adjudicate any dispute qua the amount of gratuity payable or as to the admissibility of any claim to gratuity.

Accordingly, the writ petition was dismissed with no order as to costs.