DEVELOPMENTS IN CORPORATE LAW AND LABOUR LAW

IN JANUARY

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.

If you want to know more about Acuity Law, please visit our website www.acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

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

In relation to corporate laws, we have covered case laws with respect to oppression and mismanagement petitions; deactivation of Director Identification Numbers; removal of statutory auditor; directors being held vicariously liable for anti-competitive activities of the company; and contravention of section 3 under the Competition Act, 2002.

In relation to labour law, we have covered a Supreme Court judgement with respect to whether a teacher would be covered under the definition of an 'employee' under the Payment of Gratuity Act, 1972 and entitled to claim gratuity.

Please see below summaries of the relevant developments.

1. P. RAM BHOOPAL AND ORS v. PRAGNYA RIVERBRIDGE DEVELOPERS LTD AND ORS., 16 NOVEMBER 2018

CORPORATE LAW

The National Company Law Appellate Tribunal (**NCLAT**), passed a judgment upholding the ruling of the National Company Law Tribunal, Hyderabad (**NCLT**) that dismissed a petition for oppression and mismanagement filed by the P. Ram Bhoopal (**Petitioner**) against Pragnya Riverbridge Developers Ltd. (**Respondent Company**) and its directors (**Respondent Nos. 2 to 6**).

Facts

A petition for oppression and management was filed against the majority directors of the Respondent Company. The original promoters of the Respondent Company held about 26% shares of the company and had entered into a Shareholders Agreement (**SHA**) with Respondent Nos. 2 to 6, who held the remaining shares, in relation to the duties and powers of the two parties. The Petitioner had subsequently obtained the promoter's shares and became a minority shareholder in the Respondent Company. The Petitioner filed the application on grounds that inter alia, the terms of the SHA were not being upheld by the Respondent Company; that the Petitioner's objections at meetings were not being given due consideration and that the Petitioner was unfairly removed as director of the Respondent Company. The NCLT dismissed the appeal by finding that the allegations of the Petitioner were not meritorious. Subsequently, the present appeal was preferred before the NCLAT.

The NCLAT determined the issues in question and the following observations were made:

- The NCLAT found that the Petitioner was not a party to the original SHA and that by simply purchasing the shares of the promoters, who were parties to the SHA, he could not derive the benefits flowing from the SHA. The non-enforcement of the SHA was found to not be a ground for oppression and mismanagement.

P. RAM BHOOPAL AND ORS v. PRAGNYA RIVERBRIDGE DEVELOPERS LTD AND ORS., 16 NOVEMBER 2018 CONTINUED…

- The NCLAT held that the non-consideration of the objections of the Petitioner at meetings could not be a ground of oppression and mismanagement as they had all been business decisions made as per corporate procedure and in the absence of arbitrariness displayed by the Respondents.

- On the matter of removal as director of the Respondent Company, the NCLAT held that the retirement of the director and re-election or not to re-elect the director is the normal routine in the company matters and on retirement as per the terms of the Companies Act, 2013 or the articles of association of a company. Accordingly, no grievance can be raised by the concerned person.

2. PRAVIN JAIN AND ORS. v. DIASTAR JEWELRY PRIVATE LIMITED AND ORS., 07 DECEMBER 2018

The National Company Law Tribunal (**NCLAT**), passed a judgment setting aside the order of the National Company Law Tribunal (**NCLT**) that dismissed a petition for oppression and mismanagement filed by Mr. Pravin Jain (**Appellant No. 1**) along with his wife and son (**Appellant Nos. 2 and 3**) against Diastar Jewelry Private Limited (**Respondent Company**) and its Managing Director and director (**Respondent Nos. 2 and 3**).

Facts

A petition for oppression and mismanagement was filed against Respondent Nos. 2 and 3. The Appellants cumulatively held 24,02,000 shares in their individual capacity in the Respondent Company whereas Respondent No. 2 held about 19.60% of total shares of the Respondent Company. He continued to remain director of Respondent Company and it is therefore alleged by the Appellants that Respondent Nos. 2 and 3 were systematically excluding the Appellants from the management and affairs of the Respondent Company as no notice of any meetings was served to them and Respondent Nos. 2 & 3 also denied the Appellants from inspecting the statutory records which amounts to depriving the shareholders of their right to information. Further, Appellant No. 1 and Respondent No. 2's father, Late Kishanlal Jain, transferred his 4,77,600 shares in favor of Respondent Nos. 2 and 3 by way of gift deed dated 10 December 2002, but the same was disputed by the Appellants contending that the said deed was void and the transfer was actually done in the favor of Appellant Nos. 2 and 3 by way of a gift deed dated 16 October 2007. NCLT dismissed the company petition and held that the transfer of shares in favor of Respondent Nos. 2 and 3 was valid.

Further, Respondent No. 2, a citizen of U.S.A., had incorporated a company by the name Diastar Inc. in U.S.A. which took a loan from the Respondent Company. Diastar Inc. became bankrupt whereby loans given were written off in the books of Respondent Company. The NCLT dismissed the company petition by finding that there was no mismanagement of the funds of the company or oppression of the Appellants by the Respondent Nos. 2 & 3. Thus, the present appeal was preferred before the NCLAT.

PRAVIN JAIN AND ORS. v. DIASTAR JEWELRY PRIVATE LIMITED AND ORS., 07 DECEMBER 2018 CONTINUED…

The NCLAT determined the issues in question and the following observations were made:

- The NCLAT found that the gift deed dated 10 December 2002, in favor of Respondent Nos. 2 and 3 was conditional and cannot be executed for want of permission from RBI as both are US Citizens and in the absence of said permission, the joint names added of Respondent Nos. 2 and 3 in 2003 could not be legally recognized. It was also held that the gift deed executed in favor of Appellant Nos. 2 and 3 was valid and further directed the Respondent Company to take on record in its registers the names of Appellants Nos. 2 and 3 as joint holders of 40,77,600 equity shares of Late Kishanlal Jain.

- The NCLAT also held that there was oppression and mismanagement on part of the Respondent Nos. 2 and 3 as Respondent No. 2 who is managing the Respondent Company since 2002 which was doing business with Diastar Inc. and he was also managing the company Diastar Inc. He wrote off dues recoverable from Diastar Inc. worth INR 178.7 million because Diastar Inc. invoked bankruptcy proceedings. Moreover, no efforts were made by the Respondent No. 2 to recover the dues from Diastar Inc.

- The NCLAT further held that the non-responsive attitude of the Respondent Nos. 2 and 3 to the Appellants seeking information regarding the affairs of the Respondent Company also amounts to oppression.

- The NCLAT directed investigation into the affairs of the Respondent Company and removed Respondent No. 2 as Managing Director and Respondent No. 3 as director of the Respondent Company.

- The NCLAT further appointed Appellant No. 1 as the director of the Respondent Company and his continuation subsequent to next AGM and requested NCLT, Mumbai to immediately appoint an Independent Director to the Company to regulate the affairs of the Respondent Company in future.

3. GAURANG BALVANTLAL SHAH v. UNION OF INDIA, 18 DECEMBER 2018

The Hon'ble High Court of Gujarat (**High Court**) allowed and clubbed the petitions filed by Gaurang Balvantlal Shah and twenty others (**Petitioners**) and passed a judgment setting aside the notification issued by the Ministry of Corporate Affairs (**Respondent No. 1**) dated 12 September 2018 on their website and order of the Registrar of Companies (**Respondent No. 2**) striking out the name of one of the companies from the registrar of companies. Respondent No. 1 published a list of directors disqualified for being associated with "struck off companies" and further instructed for deactivation of their Director Identification Number (**DIN**).

Facts

Respondent No. 1 issued a notification dated 12 September 2018, on their website publishing the list of directors disqualified for being associated with "struck off companies". Several petitions were filed before the High Court for setting aside the abovementioned notification

GAURANG BALVANTLAL SHAH v. UNION OF INDIA, 18 DECEMBER 2018 CONTINUED…

issued by the Respondent No. 1. The DINs of the Petitioners were also disabled though the Petitioners had not incurred any disqualification. Further, Petitioners were also directors in various other companies and as a result thereof, the Petitioners were unable to utilize their DINs for filing the documents with respect to their position in the non-defaulting companies as well. On the other hand, the Respondents contended that the disqualification of the Petitioners was the consequence of the continuous violation on the part of the company to file their statutory returns. Respondents further said that they introduced a scheme known as "Company Law Settlement Scheme" for giving a one-time opportunity to the defaulting companies in 2014, but the Petitioners did not avail the benefits of the said scheme. On the request of different defaulting companies seeking an opportunity to become compliant and normalize the operations, the Central Government further introduced a scheme known as "Condonation of Delay Scheme 2018", to give a one-time opportunity to such defaulting companies but the Petitioners failed to avail the benefits of the said scheme as well and thus the said notification was issued by the Respondent No.1. Therefore, the present petition is filed before the High Court challenging the said notification.

The High Court allowed the all the petitions and made the following observations:

- The High Court held that section 164(2) of the Companies Act, 2013 (**Act**) which had come into force from 01 January 2014 would have a prospective effect and not a retrospective effect and the defaults contemplated under section 164(2)(a) of the Act with respect to non-filing of financial statements or annual returns for any continuous period of 3 financial years would be the defaults to be counted from the financial year 2014-15 only and not 2013-14.

- The Respondent No. 1 could not have treated the directors as disqualified / ineligible for a period of 5 years from 01 November 2016 to 01 November 2021, while publishing the impugned list under section 248 of the Act.

- Even if Respondent No. 2 removes the name of a company from the register of companies, and even if such company would stand dissolved under section 248 of the Act, the statutory liabilities / obligations of such struck of company and its directors would remain to be discharged, in view of section 250 of the Act.

- The Respondent No. 1 could not have deactivated the DINs allotted to the directors under section 154 of the Act, except under the circumstances mentioned in rule 11 of the Companies (Appointment of Directors) Rules, 2014.

4. UNION OF INDIA v. MUKESH MANEKLAL CHOKSI AND ORS., 03 JANUARY 2018

The National Company Law Tribunal, Mumbai Bench (**NCLT**), in a petition filed under section 140(5) of the Companies Act, 2013 (**Act**) by the Union of India (**Petitioner**) passed an order removing Mr. Mukesh Maneklal Choksi (**Respondent No. 1**) as the statutory auditor of Zen Shaving Limited (**Respondent Company**).

UNION OF INDIA v. MUKESH MANEKLAL CHOKSI AND ORS., 03 JANUARY 2018 CONTINUED…

Facts

Petitioner filed a petition before the NCLT under section 140(5) of the Act to remove Respondent No. 1 as a statutory auditor of the of the Respondent Company. It is alleged by the Petitioner that shares of the Respondent Company are not listed on Pune Stock Exchange despite the assurances given in the prospectus dated 10 October 1996. It is further alleged that the Respondent Company is involved in siphoning of investor's money and has not issued any financial statement after 1995. Further, no response has been received by Registrar of Companies (**ROC**) from any of the representatives of the Respondent Company. Petitioner also alleged that Respondent Company has been changing its registered office frequently. Inspection of all the commonly known attributes of the Respondent Company was conducted by the investigation officer and pursuant to the inspection, an investigation report was submitted.

The NCLT determined the issues in question and the following observations were made:

- NCLT found that Respondent No. 1 has miserably failed to exercise his duty of statutory auditor as he has certified in the statement given to the inspecting officer that he has issued an auditor certificate even without examining any of the records / books of accounts of the Respondent Company.

- NCLT further found that the family members of Respondent No. 1 are shareholders of the Respondent Company which is violative of section 141(3)(d) of the Act which specifically prohibits any individual from becoming statutory auditor whose relative or partner is holding any security or interest in the company.

- Due to the above reasons, NCLT removed Respondent No. 1 as the statutory auditor of the Respondent Company and further allowed the Petitioner to appoint an independent auditor for the Respondent Company as per the first proviso to section 140(5) of the Act read with explanation I thereto.

5. MAHYCO MONSANTO BIOTECH (INDIA) PVT. LTD. AND ANR. v. COMPETITION COMMISSION OF INDIA & ORS., 03 JANUARY 2018

The Hon'ble High Court of Delhi (**High Court**) in the order dated 18 December 2018 dismissed the writ petition challenging the dismissal of the writ petition by a Single judge bench of the same court.

Facts

In the present case, the petitioners contended that no notice can be issued against the directors of a company until the time a finding has been made by the Competition Commission of India (**CCI**) against the company with respect to anti-competitive activities under section 3 (anti-competitive agreements) and section 4 (abuse of dominant position) of the Competition Act, 2002 (**Act**). The Petitioners also contended that vicarious liability under section 48 of the Act can only be made applicable if the contravention is with respect to the orders of CCI or the Director General (**DG**) under sections 42 and 44 of the Act and not for contravention of section 3 and section 4.

MAHYCO MONSANTO BIOTECH (INDIA) PVT. LTD. AND ANR. v. COMPETITION COMMISSION OF INDIA & ORS., 03 JANUARY 2018 CONTINUED…

The High Court held that:

- In a single proceeding against the company, its director or persons-in-charge can also be proceeded against on the principles of vicarious liability and a finding against the directors can be made before the CCI decides on the alleged anti-competitive activity of the company.
- The directors can be held vicariously liable under section 48 only if the CCI comes to the conclusion that the particular directors were in-charge and responsible for the conduct of the company.
- Liability under section 48 is not limited to contravention of orders of the CCI or the DG under sections 42 and 44 and that directors may incur vicarious liability from contravention of sections 3 and 4 too.
- In view of the above, the High Court dismissed the said writ petition.

6. CHIEF MATERIALS MANAGER, EASTERN RAILWAY VS. M/S LAXVEN SYSTEMS & ORS., 02 JANUARY 2019

Facts

The Chief Materials Manager / Sales, Eastern Railway (**Informant**) filed information under section 19(1)(b) of the Competition Act, 2002 (**Act**) against Laxven Systems (**OP-1**) and Medha Servo Drives Private Limited, (**OP-2**) (**collectively – OPs**) alleging contravention of provisions of section 3 of the Act, dealing with anti-competitive agreements.

The Informant floated a tender on 13 July 2017 (**Impugned Tender**) for procurement of Microprocessor Control and Fault Diagnostics System (**System**). The procurement of the System was restricted only to vendors approved by Chittranjan Locomotive Works, which were OP-1 and OP-2.

The Informant alleged OP-1 did not participate in the Impugned Tender which gave monopoly status to OP-2, being the only remaining approved vendor. The Informant further alleged that OP-2 quoted a high rate and even after negotiation of the price under the Impugned Tender, OP-2 did not bring down the rate to an acceptable level, which left the Informant with no option but to accept the high rate quoted by OP-2 in order to avoid shortage of the System.

Further, the Informant alleged that non-participation of OP-1 in the Impugned Tender was due to bid suppression by OP-1 and that there exists a cartel between the OPs in contravention of section 3(3)(d) read with section 3(1) of the Act. Therefore, the Informant has sought relief under section 27 of the Act.

The Competition Commission of India (**CCI**) held the following:

- CCI sought additional documents from Informant to substantiate its allegation of cartelization / bid suppression against OPs, however, the Informant expressed its inability to access the records to substantiate the nexus.

CHIEF MATERIALS MANAGER, EASTERN RAILWAY VS. M/S LAXVEN SYSTEMS & ORS., 02 JANUARY 2019 CONTINUED…

- CCI observed from an examination of the tenders that OP-1 has abstained from quoting in all these tenders. The issue CCI observed now was whether the non-participation of OP-1 was due to the cartelization amongst the OPs or for some other reason. CCI noted that the non-participation of OP-1 in the tendering process was due to its inability to produce the said item, therefore, the allegation of bid suppression by OP-1 in collusion with OP-2 is unsubstantiated.

- CCI examined the technical bid and that the System had additional features of real time remote monitoring, BP and BC pressure measurement, one additional digital input card and output card, bigger size TFT display, energy meter etc. Hence, it was observed that the increased price quoted by OP-2 in the Impugned Tender was reasonable.

- Therefore, with respect to the facts and evidence available on record, it was held that no case of contravention of provisions of section 3 of the Act is made out against the OPs.

1. BIRLA INSTITUTE OF TECHNOLOGY v. STATE OF JHARKHAND, 09 JANUARY 2019

LABOUR LAW

Respondent No.4 joined the Birla Institute of Technology (**Appellant**) as an assistant professor on 16 September 1971 and superannuated on 30 November 2001 after attaining the age of superannuation. Respondent No. 4 made a representation to the Appellant for payment of gratuity under the Payment of Gratuity Act, 1972 (**Act**). However, the same was declined by the Appellant.

Subsequently, Respondent No. 4, filed an application before the controlling authority (**CA**) under the Act against the Appellant and claimed the amount of gratuity. The CA allowed the application filed by Respondent No.4 and directed the Appellant to pay a sum of INR 338,796 along with interest at the rate of 10% p.a. towards the gratuity to Respondent No. 4.

The Appellant being aggrieved with this order, filed an appeal before the appellate authority under the Act but the same was dismissed. The Appellant then moved to the High Court of Jharkhand (**High Court**) by way of a writ petition. The High Court (Single Judge) dismissed the writ petition and upheld the orders of the CA passed under the Act. The Appellant then filed Letters Patent Appeal before the Division Bench against the order passed by the Single Judge but the same was dismissed. The Appellant being aggrieved by the order of the High Court Division Bench appealed to the Supreme Court of India (SC) by way of a special leave petition.

The SC observed that the same issue was dealt in *Ahmadabad Pvt. Primary Teachers Association vs. Administrative Officer and Others*, in favor of the Appellant.

The SC relied on the reasoning given in the above mentioned case wherein it was observed that:

- on plain construction of the words and expression used in the definition under section 2(e) of the Act, "teachers" who are mainly employed for imparting education are not intended to be covered for extending gratuity benefits under the Act.
- if the legislature had intended to cover in the definition of "employee" all kinds of employees, it could have as well used such wide language as is contained in section 2(f) of the Employees' Provident Funds Act, 1952 which defines "employee" to mean "any person who is employed for wages in any kind of work, manual or otherwise in or in connection with the work of an establishment …". Absence of such wide language in the definition of "employee" in section 2(e) of the Act reinforces the conclusion that teachers are clearly not covered in the definition.

Accordingly, the SC vide its order dated 07 January 2019 held that Respondent No. 4 being a teacher was not eligible to claim gratuity amount from the Appellant under the Act. The order of the High court was set aside, and the application made by the Respondent No.4 before the CA against the appellant was dismissed as not maintainable.

Subsequently, the SC passed another order dated 09 January 2019 and held that in the present matter, it failed to take into account the amendment made to section 2(e) of the Act by the Amending Act No. 47 of 2009 with retrospective effect from 03 April 1997.

BIRLA INSTITUTE OF TECHNOLOGY v. STATE OF JHARKHAND, 09 JANUARY 2019 CONTINUED…

Keeping in view the amendment made to section 2(e), which was not brought to the notice of the Bench, this issue was not considered though had relevance for deciding the question involved in the appeal. Accordingly, the SC found error in its judgment dated 07 January 2019 and held that it shall not be given effect to till the matter is reheard finally by the appropriate Bench.