



# DEVELOPMENTS IN CORPORATE LAW AND LABOUR LAW

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IN SEPTEMBER

# 2018

## 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 astute legal advice informed by commercial realities. Our areas of practice are divided into 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](http://www.acuitylaw.co.in) or write to us at [al@acuitylaw.co.in](mailto:al@acuitylaw.co.in).

## INTRODUCTION

This newsletter covers developments with respect to corporate and labour laws during the month of September 2018.

In relation to corporate laws, we have covered case laws with respect to oppression and mismanagement and misappropriation of funds to defraud creditors; the eligibility criteria to constitute a corporate social responsibility committee; the amendments made to the Limited Liability Partnership Rules, 2009; and a circular from the Reserve Bank of India revising external commercial borrowing norms and rupee denominated bonds norms.

In relation to labour laws, we have covered a Supreme Court judgement with respect to payment of back wages to workmen.

Please see below summaries of the relevant developments.

### 1. PRODDATURI MALATHI v. SRP LOGISTICS PRIVATE LIMITED, 24 JULY 2018

#### CORPORATE LAW

Proddaturi Malathi (Appellant) had filed a petition before NCLT Hyderabad Bench, levelling allegations of oppression and mismanagement against Sekhar Pendam (Respondent 2), Salalitha Parsha (Respondent 3) and Mallesham Mekala (Respondent 4) in the affairs of the SRP Logistics Pvt. Ltd. (the Company).

The Appellant, Respondent 2 and Respondent 5 had incorporated the Company. Subsequently, Respondent 3 came to be substituted as the shareholder of the shares held by Respondent 5. The Appellant impugned the induction of Respondent 3 (wife of Respondent 2) as holder of in place of Respondent 5, thereby questioning the issue of such shares. The Appellant contended that because of Respondent 3's induction, the collective shareholding of Respondents 2 and 3 (hereafter collectively referred to as Respondents) crossed 50% of the total share capital of the Company.

Appellant further challenged the share distribution done after the Extra Ordinary General Meeting (**EOGM**) for increasing the authorized capital of the Company through which her shareholding stood reduced, at 28.58%, while the Respondents' shareholding exceeded 70%. The Appellant thus contended that there was no equitable distribution between the shareholders. The Appellant stated that vide another EOGM, the Company's authorized capital was further increased and more shares were allotted to her and the Respondents, reducing her shareholding. This time, some shares had also been allotted to Respondent 4, who was an outsider. The Appellant stated that such allotment, was illegal, and also submitted that the shares were issued to Respondent 2 and 4 on preferential allotment and private placement basis respectively, without following the due procedure laid down in the Companies Act, 2013 (**the Act**). The Appellant also submitted that she had received a notice of Board Meeting wherein one of the agenda items proposed her removal and appointment of Respondent 4 as Director in the Company.

**PRODDATURI MALATHI v.  
SRP LOGISTICS PRIVATE  
LIMITED, 24 JULY 2018  
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NCLAT had the following observations:

- That the meeting held in the year 2005, in which the alleged transfer of shares to Respondent 3 took place, the Appellant was present. NCLAT stated that even after that, until 2017, the Appellant did not question the transfer, and remarked that the grievances raised in this regard are hopelessly delayed and do not merit consideration.
- That the Company's Annual Return filed for the year wherein the Company's authorized capital was increased, reflected the modified shareholding and bore the Appellant's signature, thereby authenticating the entries therein. Further, the increase of authorized capital in the second EOGM and the subsequent allotment were on a different footing. NCLAT perused section 62 of the Act along with rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 and noted that there was no material to substantiate that the valuation of shares was done, or that other provisions envisaged under the Act had been complied with, NCLAT remarked that the Respondent Nos. 2 and 3 simply issued large number of shares to Respondent No. 2 by way of preferential allotment and that too at par value. Therefore, NCLAT held that the Respondents had acted in an oppressive manner with the Appellant.
- NCLAT held that having gained in numbers in such manner Respondents 2 and 3 then proceeded to get rid of directorship of Appellant. NCLAT ruled that thus, the Appellant was oppressed, and in the process, the Company was mismanaged by illegal increase and distribution of share capital.
- Therefore, NCLAT quashed (i) the Board Resolution calling the second EOGM, (ii) increase of share capital and its subsequent allotment; and (iii) steps taken by Respondents to induct Respondent 4 as Director and Resolution for Appellant's removal. In conclusion, NCLAT partly allowed the appeal, directed the Respondents to refrain from indulging in oppressive acts and mismanagement, and to pay INR 1 lakh each to the Appellant, from their own funds.

**2. CENTRAL BANK OF INDIA v.  
SURYA PHARMACEUTICAL  
LIMITED 20 AUGUST 2018**

The Central Bank of India (**Petitioner**) filed a petition under section 237(b) of the Companies Act, 1956 (**the Act**), seeking direction from the Central Government to appoint an inspector to conduct a comprehensive enquiry into the affairs of Surya Pharmaceutical Ltd. (**Company**), in order to protect the interest of its creditors.

The Petitioner granted a term loan of INR 600 million to the Company, and after considering all the debit and credit transactions, the Company was liable to repay over INR 1.29 billion. However, since it failed to repay the dues, the Company's account was classified as a Non-Performing Asset (**NPA**). Further, the Petitioner submitted that certain financial irregularities were going on in the Company, being inter alia funding of long term assets using short term resources; willful diversion of funds; grant of inter corporate loans to its group companies during periods it claimed industrial sickness; and adverse comments made in the audited balance sheets of the Company. Moreover, the Company did not attempt, to preserve any security to repay the dues. The Petitioner thus claimed that the course of conduct of the Company pointed towards evading financial obligations, disregarding contracts and closing commercial operations.

**CENTRAL BANK OF INDIA v.  
SURYA PHARMACEUTICAL  
LIMITED 20 AUGUST 2018  
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The Company refuted the Petitioner's contentions, by submitting that due to various factors the financial health of the Company came under a lot of stress which resulted in defaulting in servicing of its debts. The Company alleged that its lenders refused to sanction further loan and declared the Company's account as an NPA, which compounded its already stressed financial health further. The Company also submitted that the Petitioner had filed applications for recovery of its debt against the Company, before several authorities and such forum shopping amounted to taking coercive action against a sick company, which was prohibited in terms of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The Company pleaded that the petition therefore deserved to be dismissed.

NCLT stated that by virtue of section 237(b) of the Act, with the same subject matter as under section 213(b) of the Companies Act, 2013 (the new Act), it is empowered to investigate into the affairs of the Company. Therefore, it could entertain an application filed by 'any other person' under section 213, and hence, the instant petition was maintainable.

Further, NCLT held the following:

- The Company was liable to pay an outstanding amount of over INR 10 billion to various creditors. In view of such outstanding amount, lenders were open to not give further loan facilities, and accordingly not being sanctioned a further loan cannot be ground for rejecting the petition.
- The accounts of the Company clearly depicted the diversion of funds, including false sale and purchase of goods, and stated that on this count alone, prima facie adverse opinion could be formed that the affairs of the Company were being conducted with a view to defraud the creditors.
- That as described under section 213(b) of the new Act siphoning of funds had caused prejudice to the creditors, and misappropriation / diversion of funds was done with the intent to defraud them.
- NCLT stated that a deeper probe into the affairs of the Company was necessary, and hence allowed the petition, thereby directing the Central Government to take steps to investigate the affairs of the Company.

**3. ELIGIBILITY CRITERIA FOR  
CONSTITUTING A  
CORPORATE SOCIAL  
RESPONSIBILITY  
COMMITTEE**

The Ministry of Corporate Affairs vide notification dated 19 September 2018 has notified section 37 of the Companies Amendment Act, 2017 which in turn amends section 135 of the Companies Act, 2013 (**the Act**).

The said amendment provides that every company having a net worth of INR 5 billion or more, or turnover of INR 10 billion or more, or a net profit of INR 50 million or more during the last preceding financial year is required to constitute a Corporate Social Responsibility (**CSR**) committee comprising of three or more directors, out of which at least one director is required to be an independent director. However, where a company is not required to appoint an independent director under section 149(4) of the Act, it shall have a CSR committee of two or more directors.

**ELIGIBILITY CRITERIA FOR  
CONSTITUTING A  
CORPORATE SOCIAL  
RESPONSIBILITY  
COMMITTEE  
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The amendment clarifies that one of the objectives the CSR committee is to formulate and recommend to the board of directors of the company, a CSR policy which shall indicate the activities undertaken by the company in areas or subject specified in Schedule VII of the Act.

The amendment also clarifies that for the purposes of section 135 of the Act, "net profit", shall be calculated in accordance with the provisions of section 198 of the Act and shall not include:

- sums arising from any profit of any overseas branch or branches of the company whether operated as a separate company or otherwise; and
- any dividend received from other companies in India, which are covered under and complying with section 135 of the Act.

**4. REVISAL OF ECB AND RDB  
NORMS**

The Reserve Bank of India vide circular dated 19 September 2018, has revised the norms with respect to external commercial borrowings, trade credit, borrowing and lending in foreign currency norms.

According to the circular, borrowers of external commercial borrowings who are in the manufacturing sector can now raise up to USD 50 million or its Rupee equivalent with a minimum average maturity period of 1 year. Prior to the circular, eligible borrowers in the manufacturing sector could raise up to USD 50 million with a minimum average maturity period of 3 years.

With respect to rupee denominated bonds, Indian banks are now allowed to participate as arrangers, underwriters, market makers, traders in the overseas issue of rupee denominated bonds subject to applicable prudential norms. Previously, Indian banks, subject to applicable prudential norms could act only as an arranger and an underwriter for the overseas issue of rupee denominated bonds and in case of underwriting, their holding could not exceed more than 5% of the issue size after 6 months of the issue.

**5. RAJASTHAN STATE ROAD  
TRANSPORT CORPORATION  
JAIPUR VS. SHRI PHOOL  
CHAND (DEAD) THROUGH  
L.RS  
&  
THE MANAGEMENT OF  
REGIONAL CHIEF ENGINEER  
P.H.E.D RANCHI VS. THEIR  
WORKMEN REP. BY  
DISTRICT SECRETARY**

**LABOUR LAW**

The question which arose in the Supreme Court with respect to these cases is whether, the High Courts of Rajasthan and Jharkhand as well as the labour courts were justified in awarding full back wages to workmen.

The Supreme Court in both cases held that workmen have no right to claim back wages from their employer as a right merely because the courts had set aside their dismissal order and had directed their reinstatement of service.

The Supreme Court accordingly directed that it is necessary for the workman in such cases to plead and prove with evidence that after their dismissal from service, the workman was not gainfully employed anywhere and had no earning to maintain themselves or their families.

**RAJASTHAN STATE ROAD  
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The Supreme Court also stated that the employer was entitled to prove otherwise against the employee, namely that the employee was gainfully employed during the relevant period and hence not entitled to claim back wages. The Supreme Court further clarified that the initial burden of proof was on the employee.

Therefore, the Supreme Court had found that the High Courts of Rajasthan and Jharkhand as well as the labour courts had erred in applying the law mentioned above to the cases. However, after having regard to all the facts and circumstances of the cases, the Supreme Court, in exercise of its powers granted under article 142 of the Constitution of India, ordered the payment of back wages to the workmen and their legal representatives in the interest of justice.