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VEDANAM

A monthly newsletter by Mehta & Mehta

EXPERT VIEWS ON SATURDAYS

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SECURITIES EXCHANGE BOARD OF INDIA

SEBI clarifies timing of submission of NOC by Listed Entities from the lending scheduled commercial banks/ financial institutions/ debenture trustee

SEBI vide Circular dated 03rd January 2022 clarified that the NOC shall be submitted before the receipt of the No-objection letter from stock exchange in terms of Regulation 37(1) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Link of Circular:
https://www.sebi.gov.in/legal/circulars/jan-2022/schemes-of-arrangement-by-listed-entities-clarification-w-r-t-timing-of-submission-of-noc-from-the-lending-scheduled-commercial-banks-financial-institutions-debenture-trustee_55166.html

Disclosure obligations of listed entities in relation to Related Party Transactions

SEBI vide its notification dated 07th January 2022, decided to make provisions of the circular dated November 22, 2021 regarding disclosure obligations of listed entities in relation to Related Party Transactions applicable to high value debt listed entities.

Regulations 15 to 27 of Listing Regulations shall be applicable to high value debt listed entities on a 'comply or explain' basis.

https://www.sebi.gov.in/legal/circulars/jan-2022/disclosure-obligations-of-high-value-debt-listed-entities-in-relation-to-related-party-transactions_55225.html

SEBI releases Framework for operationalizing the Gold Exchange in India

SEBI issued circular dated 10 January 2022 for operationalizing the Gold Exchange Scheme in India.

https://www.sebi.gov.in/legal/circulars/jan-2022/framework-for-operationalizing-the-gold-exchange-in-india_55251.html

SEBI issued SECURITIES AND EXCHANGE BOARD OF INDIA (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) (AMENDMENT) REGULATIONS, 2022 vide circular dated 14th January 2022.

Link of the Circular:
https://www.sebi.gov.in/legal/regulations/jan-2022/securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-amendment-regulations-2022_55351.html

Please note SEBI vide Notification dated 24th January 2022 amended the Securities and Exchange Board of India (Listing Obligations And Disclosure

Requirements) (Amendment) Regulations, 2022.

Link of the circular:
https://www.sebi.gov.in/legal/regulations/jan-2022/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-amendment-regulations-2022_55526.html

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AMENDMENTS

RESERVE BANK OF INDIA

RBI issues Framework for Facilitating Small Value Digital Payments in Offline Mode

The framework consists of guidelines for making payments, it sets out the limits for making payments, offline payments shall be guided and monitored by RBI's circular.

https://www.rbi.org.in/Scripts/NotificationUser.aspxId=12215&Mode=0

MCA UPDATE

MCA vide notification dated 11th January 2022 amended the Companies (Registration Offices & Fees) Rules 2014 to Companies (Registration Offices & Fees) Amendment Rules 2022.

They are effective from 1st July, 2022

https://egazette.nic.in/WriteReadData/2022/232589.pdf

RESERVE BANK OF INDIA

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CASE LAWS

INSOLVENCY AND BANKRUPTCY CODE

THE COC APPROVAL IS NOT MANDATORY FOR SEEKING 'EXCLUSION OF TIME' EVEN IF IT IS SOUGHT ON THE GROUNDS OF LOCKDOWN/ TIME LOST DURING THE PERIOD OF ANY 'STAY'/STATUS QUO.

Case Title- Indiabulls Housing Finance Limited v. Sandeep Chandna and Ors.

Date Of Order- 18th Jan 2022

Brief of the case:
The brief point which falls for consideration in this Appeal is whether the approval of the CoC under Section 12(2) of the Code is mandatory for seeking 'exclusion of time" even if it is sought on grounds of lockdown/time lost during the period of any 'Stay'/Status Quo /or for any other reason. It is the case of the Appellant that be it exclusion or extension, Section 12(2) i.e., approval of 66% of Voting Shares of the Members of the CoC is mandatory and that the act of the IRP in going ahead with the filing of the Application before the Adjudicating Authority seeking exclusion of the period of 87 days, even if it is on the ground of lockdown, is against the provisions of the Code.

Decision:
Hon'ble NCLAT dismissed the appeal and held that,
The fact that the Adjudicating Authority had exercised its Discretionary Powers under Rule 11 of the NCLT Rules, 2016, that the period sought for excluding the time period lost is based on the reasons mentioned in the table in para 10; the fact that had this period not been excluded, the Company would have gone into Liquidation, which stage of 'Corporate Death' should be the last resort as envisaged by the Hon'ble Supreme Court in a catena of Judgements; that keeping in view the scope, spirit and objective of the Code and reading Section 12 together with Regulation 40C and also the unforeseen pandemic in mind, the Adjudicating Authority has rightly 'excluded' the period of 87 days from the CIRP period."

CASE LAWS

INSOLVENCY AND BANKRUPTCY CODE

AFTER THE PAYMENT OF EMD THE BIDDER CANNOT WITHDRAW THE BID AND SEEK THE REFUND OF THE AMOUNT PAID ON THE GROUND THAT THE OFFER MADE BY THE BIDDER WAS A 'CONDITIONAL OFFER'.

Case Title- M/s. Visisth Services Ltd. Vs. Mr. S. V. Ramani, Liquidator of United Chloro-Paraffins Pvt. Ltd.

Date Of Order- 11th Jan 2022

Brief of the case:
The Appeal was filed on the ground whether the Successful Bidder, can, upon corresponding with the Liquidator, before the date of e-Auction, state that his Bid is conditional i.e. the liabilities would not be foisted upon the Bidder, and if in case his conditional offer is not accepted, he can withdraw from the Bid and seek for refund of his EMD amounts.

Decision:
Hon'ble NCLAT dismissed the appeal and held that,
"The Bidder-Appellant is bound by the terms and conditions of the Bid document and no communication to the Liquidator stating that it is a conditional offer, is sustainable. If the Appellant had any apprehensions and conditions about the liabilities the Appellant could have exercised their choice of not participating in the Bid. Having participated, the Appellant cannot propose certain conditions after their participation and putting in their Bid.
The Liquidator shall endeavour to sell the Corporate Debtor Company as a 'Going Concern' only in accordance with the law. If the Bidder is allowed to withdraw from the Bid at this stage and seek refund on the ground that their conditional offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the Code.

CASE LAWS

INSOLVENCY AND BANKRUPTCY CODE

THE SATISFACTION OF THE ADJUDICATING AUTHORITY IS NECESSARY TO ESTABLISH THAT THE DEFAULT HAS OCCURRED, AND FINANCIAL DEBT IS DUE AND PAYABLE

Case Title- Mr. Kalpesh Dineshbhai Patel, Director of Kingston Paptech Pvt. Ltd. v/s.Krishna Paper Trading Co. and Anr.

Date Of Order –6th Jan 2022

Brief of the case:
The Appeal was filed on the ground that the alleged amount of loan was wrongly taken. The Adjudicating Authority was unable to ascertain the existence of default from the information submitted in section 7 application, and hence the Adjudicating Authority passed order on 12.2.2020 without even ascertaining whether the said amount was financial debt in default as per the definition of "financial debt" under IBC.

Decision:
Hon'ble NCLAT allowed the appeal and held that,
"the existence of debt has to be clearly stated in section 7 application for which a detailed format is provided in the IBC. The application has to be submitted in the stipulated format and the Financial Creditor has to furnish record of the default with the information utility or such other record or evidence of default as may be specified. Further under section 7 application, the satisfaction of the Adjudicating Authority is necessary to establish that default has occurred and financial debt is due and payable.

Moreover, no evidence by way of any written or oral contract or communication regarding the loan or record of information utility has been produced by Respondent No. 1 in support of his claim of advancing a loan to the Corporate Debtor."

CASE LAWS

INSOLVENCY AND BANKRUPTCY CODE

AD HOC ORDER REGARDING FEES AND EXPENSES PAYABLE TO RESOLUTION PROFESSIONAL MUST NOT BE PASS BY NCLAT AND NCLT

Case Title- Devarajan Raman Versus Bank of India Limited.

Date Of Order –5th Jan 2022

Brief of the case:
Appellant was appointed as Resolution Professional for a Corporate Debtor. The admission order of NCLT for initiation of CIRP proceedings was set aside by the NCLAT at the behest of the directors of the company, the proceedings were remitted back for determining the insolvency resolution costs.

An Appeal was preferred against the impugned order dated 30.07.2020 passed by NCLAT wherein the appellate authority remitted the proceedings to the NCLT to decide upon the fee and costs of the Corporate Insolvency Resolution Process incurred by the appellant which was to be borne by the respondent as a financial creditor.

NCLAT while dismissing the appeal, observed that:

- The appellant had worked for about 3 months as RP
- Fee for the RP for the entire period was not reasonable
- Fixation of fee is not a business decision depending upon the commercial decision of CoC.

The issue in dispute relates to the payments of costs and expenses incurred by the Resolution Professional.

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Decision:
Hon'ble Supreme Court allowed the appeal with following observations:
Both the orders suffer from an abdication in the exercise of jurisdiction. In the absence of any reasons either in the order of the NCLT or the appellate authority, it is impossible for the Court to deduce the basis on which the payment of an amount of Rs 5,00,000 together with expenses has been found to be reasonable. Consequently, an order of remand becomes necessary.

We accordingly allow the appeal and set aside the impugned judgment and order of the NCLAT dated 30 July 2020.

CASE LAWS

COMPANY LAWS

Case: Axis Bank Limited Vs National Stock Exchange of India Ltd

Appellant : Axis Bank

Respondent : National Stock Exchange of India

Facts :
Axis Bank has filed an appeal with the Tribunal, in which it sought to revoke the communication order made by National Stock Exchange. As a result, SEBI has raised the point that according to Section 15L(2), a Bench with two or more Judicial or Technical Members must be established by the Presiding Officer of the Tribunal. There was no Technical Member on the Tribunal's Bench at the time as technical Member resigned on March 31, 2021, henceforth the Bench was not precisely formed in accordance with the rules of the SEBI Act. As a result, the Tribunal was unable to consider appeals until the Central Government nominated a Technical Member.

The argument is that any Bench must have at least one Technical Member, and because the current Bench is made up of Judicial Members, the bench's constitution is flawed, and any orders issued by this Bench would be void.

Provision :
Section 15L(2)(b) of SEBI act states that any Bench must have at least one Technical Member mandatory and for this Securities Appellate Tribunal has to exercise the powers and discharge the duties conferred by the tribunal. Subject to the provisions of this Act, the Securities Appellate Tribunal jurisdiction has to form a Bench with the help of Presiding Officer of the Securities Appellate Tribunal with two or more Judicial or Technical Members as he may deem fit: Provided, however, that each Bench shall include at least one Judicial Member and one Tech Member. As a result, we believe that if a vacancy exists in a Member, if it is a Judicial or Technical Member, even if there is a quorum in spite of the vacancy, the Tribunal will continue to hear the cases.

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Further other relevant provision can be applied in this case:-

Section 15P discusses the filling of vacancies. It also specifies that hearings before the Tribunal can be continued until the vacancy is filled. SEBI claims that when a vacancy arises, the Tribunal becomes non-functional and can only become functional and resume hearings after the vacancy is filled.

Further Section 15-PA states that in the case of a vacancy in the office of the Presiding Officer of the Tribunal, the senior-most Judicial Member may serve as the Presiding Officer before a new Presiding Officer is named, this submission appears to be incorrect.

Section 15R will have the effect of qualifying and treating the word "must" in the proviso to Section 15L to mean "can," i.e., that there shall be at least one Judicial Member and one Technical Member in any Bench, where such members are available; however, where such members are not available, it would not be a mandatory requirement to be met, and by law, the judicial member and technical member would be replaced by the judicial member.

Analysis :
In this case there is the vacancy in the Technical Members formation. The proviso to Section 15L(2)(b) states that any Bench must have at least one Technical Member mandatorily to promote the interests of investors under the SEBI Act, this provision must be construed in harmony with the other provisions of the Act. The legislature never intends Tribunal to stall or become non-functional in the absence of a Technical Member, and therefore a harmonious construction must be provided in this case. As a result, it becomes appropriate to go through other provisions as well of the Act. The Tribunal would not become inoperable or devoid of leadership.

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In this regard, Rule 5 states that in the absence of a Presiding Officer, the Government will nominate one of the members to preside over the Tribunal's sittings, implying that even if a vacancy occurs, the Tribunal may continue to work with the remaining members.

Thus, if the provisions of Section 15L are read in conjunction with Section 15P, Section 15-PA, and Section 15R, it is clear that the Tribunal does not come to a halt whenever a Member is absent or a vacancy occurs. When there is no Technical Member, the Presiding Officer must select a Bench from among the members who have been appointed.

Judgement:
It cannot be argued that if a Technical Member is unavailable, the Bench of two Judicial Members will be unable to operate. The Tribunal's current functioning, which consists of a Presiding Officer and a Judicial Member, is not impaired by the absence of a Technical Member, and the Bench, which consists of the Presiding Officer and Judicial Member, can proceed to hear, and consider the appeals, etc. submitted before the SAT. SEBI's objection has been dismissed.

In addition, the fourth post of Technical Member was created in this case by a notice dated May 16, 2019. Despite the fact that this position has been vacant for two years, the Central Government has taken no action to fill it.

Furthermore, the government was aware that the Technical Member was set to retire on March 31, 2021. No measures have been taken to fill the position as of yet, despite the fact that such steps should have been done at least a few months prior to the Technical Member's retirement. As a result, the Central Government is urged to fill the vacancies as soon as possible.

CASE LAWS

COMPANY LAWS

Case: Niklesh Tirathdas Nihalani Vs Shah Poddar Nihlani Organisers (P.) Ltd.

Facts:
Company was constituted by three families, namely Shah, Nihalani and Poddar, as the name reflects. In case of transfer of shares of the Company, the Articles of Association provided pre-emptive rights to the shareholders. However, the alleged transfer of shares was made to the outsiders, i.e. not to the Company's existing shareholders and without giving them the right under Articles of Association to exercise their pre-emptive right. The Appellant, being aggrieved by the said transfer of shares and getting the knowledge of the transfer, had filed Appeal U/S 59 of the companies act 2013 before the NCLT.

However, during the pendency of the Appeal, the Respondents called EOGM and replaced the entire sets of Articles of Association of the Company and removed the pre-emptive right given to the existing shareholders. Therefore, the transfer of shares to outsiders was not permitted under the Articles of Association of the Company. Therefore, it is evident that the Respondents have transferred shares in complete violation of the Articles of Association of the Company.

Rules :
Appeal before NCLT was filed under section 59 of the Companies Act 2013 which says that If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register is without sufficient cause than the person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed to the Tribunal or to a competent court specified by the Central Government.

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CASE LAWS

COMPANY LAWS

Analysis:
The Appellant came to know from other sources that the Company's land has been transferred to some other persons by transferring the Company's shares and there had been an illegal transfer of 3250 shares with complete disregard of Articles of Association about the transfer of shares, more specifically Articles 13 to 20 of AOA. These provisions were not followed by the management and were done fraudulently. As the Company has no business activities and there were no plans to sell or dispose of assets. The Directors have no other role to play in the Company except to do their fiduciary duties, as stated in Section 166 of the Companies Act, 2013.

The Appellant, being aggrieved by the said transfer of shares and getting the knowledge of the transfer, had filed Appeal U/S 59 of the companies act 2013 before the NCLT. However, during the pendency of the Appeal, the Respondents called EOGM and replaced the entire sets of Articles of Association of the Company and removed the pre-emptive right given to the existing shareholders. Therefore, the transfer of shares to outsiders was not permitted under the Articles of Association of the Company. Therefore, it is evident that the Respondents have transferred shares in complete violation of the Articles of Association of the Company.

The Articles of Association was amended pending the Company Appeal No. 34 of 2017 for rectification of register of members Such an act is nothing but an act of grass oppression and mismanagement on the minority shareholder, especially the Appellant, who has already challenged the illegal and fraudulent share transfer before the NCLT. Hence Appellant was left with no other option but to move before the NCLT with the Company Petition No. 24 of 2018 filed under sections 241 and 242 read with Section 244 of the Companies Act, 2013 against alleged acts of oppression and mismanagement.

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CASE LAWS

COMPANY LAWS

Judgement :

This Appeal emanates from the combined judgment and final Order dated 3rd August 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in Company Appeal No. 34/59/NCLT/2017 in CP No. 24/NCLT/AHM/2018 whereby learned NCLT has rejected Company Appeal No. 34 of 2017 filed under section 59 of the Companies Act, 2013 as barred by limitation, given Section 433 of the Act. By the same common Order, the NCLT has dismissed the Company Petition being CP No. 24 of 2018, filed under sections 241 and 242 of the Companies Act 2013. The Petitioner has failed to prove any ingredient of operation and mismanagement. The Parties are represented by their original status in the Company Petition for the sake of convenience.

"PLACE OF BUSINESS IN ACCORDANCE TO FOREIGN COMPANY"

A place of business means premises where there is a physical or visible indication that the company may be contacted there. The Indian courts emphasized on the requirements of establishing a physical presence in India for a foreign body corporate to be considered as having a place of business in India, and consequently being categorised as a 'foreign company' under the Companies Act, 1956. In the matter of Willis Europe BV v. Willis India Insurance Brokers (P) Ltd.,[2] the High Court of Bombay observed that". Section 591(1) (a) applies not to companies that carry on business in India, but to companies that establish a place of business in India."

In determining whether a foreign company has established a place of business in India under Section 591 of the Companies Act, 1956, the High Court of Delhi in Dabur (Nepal) P. Ltd. v. Woodworth Trade Links P. Ltd.[3] held that "a company would be held to have established a place of business in India if it has a specified or identifiable place at which it carries on business, such as an office, storehouse, godown or other premises, having some concrete connection between the place and its business."

The above text makes it evident that under the 1956 Act, the definition of 'foreign company' was exclusively based on condition of having established 'place of business' in India. The requisite of having a physical place of business restricted a lot of companies operating in India to be termed as foreign companies. Due to technological boom, various companies were operating in the country without having any physical presence, solely coordinating their functions through internet and providing services to Indian citizens.

During the overhaul of the company laws in India during 2013, definition of foreign companies was also expanded to include all kinds of companies operating in India and to regulate their functioning.

Definition of Foreign Company under Companies Act, 2013 and its scope

The term 'foreign company' is clearly laid down under Section 2 sub-section 42 of the Companies Act, 2013 (New Act). A foreign company is any company or body corporate incorporated outside India which,

has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

conducts any business activity in India in any other manner.[4]

In order to be considered a 'foreign company', one has to fulfil both the abovementioned criteria. Hence, this new definition has a wider scope compared to the earlier Act. To fully appreciate the scope of the definition, it is necessary to define the terms 'electronic mode' as well as 'business activity'.

Electronic Mode

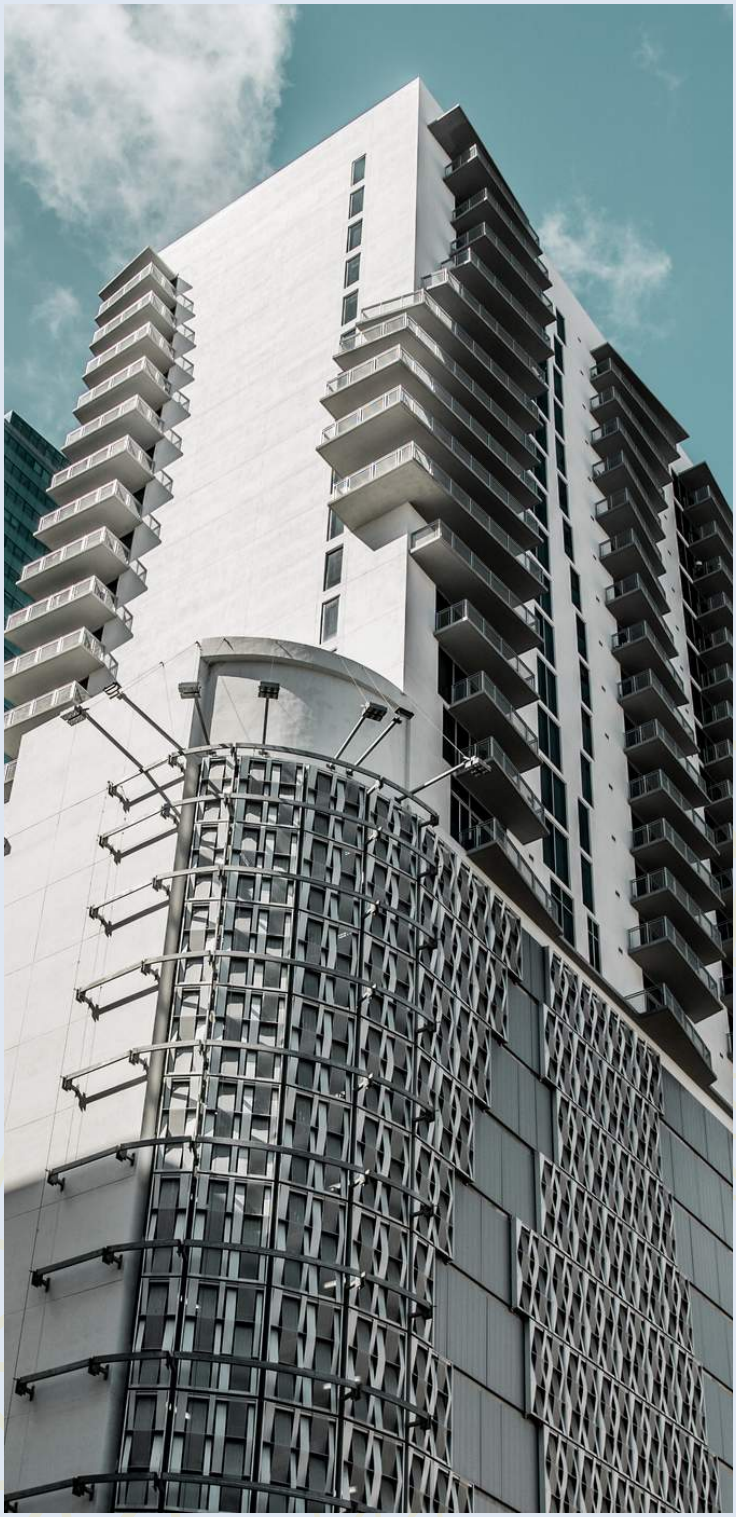
The Companies (Specification of Definitions Details) Rules, 2014 defines the term 'electronic mode' in the context of a foreign company under Rule 2(h). The same is also defined under Rule 2 (1)(c) of Companies (Registration of Foreign Companies) Rules, 2014.

The definition of electronic mode encompasses all electronic based transactions, such as business to business and business to consumer transactions, data exchange and other digital supply transactions. It further includes all online services and all related data communication services whether conducted by e-mail, mobile devices, cloud computing, social media, data transmission or otherwise.

This definition clearly states that even if the location of the main server is outside India, it would still come within the purview of the term 'electronic mode'. Hence, leaving no ambiguity in its interpretation.

Business Activity

The Companies (Registration Offices and Fees) Rules, 2014, defines 'business activity' under Rule 3. The definition of 'business activity' is identical to 'electronic mode'. Rule 3 states that every company including a foreign company that carries out its business through electronic mode, whether its main server is installed in India or outside India, shall be deemed to have carried out business in India.



The sole difference being that definition of 'electronic mode' in Companies (Specification of Definitions Details) Rules, 2014 is applicable to only foreign companies whereas, 'business activity' defined under the Companies (Registration Offices and Fees) Rules, 2014 is applicable to all kinds of companies.

As per the definitions of specified terms, a 'foreign company' under the Companies Act, 2013 would include not just those companies incorporated outside India which subsequently established an office or a branch in the territory of India for carrying on business activity, but would extend to any foreign company which has entered into any kind of transaction with an entity or person located in India through electronic mode. By virtue of this definition of 'foreign company' under the Companies Act, 2013, even a foreign e-commerce website based outside India, not having any office, employees, servers, or any other sort of physical presence in India would attract the provisions of the Companies Act, 2013, if an Indian resident placed an order on such merchant website.

"CREATION OF CHARGE ON OVERSEAS ASSETS IN FAVOR OF DOMESTIC LENDER"

An Indian Party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on the assets of its overseas JV or WOS or SDS in favor of an AD bank in India as security for availing of the fund based and/or non-fund based facility for itself or its JV or WOS or SDS outside India subject to the terms and conditions prescribed under Regulation 18A.

Below are the conditions prescribed under Regulation 18A of the notification:

Creation of charge on the overseas assets of JV / WOS / SDS of an Indian party in favour of a domestic lender to the Indian party or to its group / sister / associate concern or to any of its overseas JV / WOS / SDS requires prior approval of the Reserve Bank.

Amendment to Regulation 18A

The existing Regulation 18A shall be substituted with the following, namely:

"18A Creation of charge on domestic and foreign assets

(1) An Indian party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on the assets of its overseas JV or WOS or SDS in favour of an AD bank in India as security for availing of the fund based and/or non-fund based facility for itself or its JV or WOS or SDS outside India.

Provided that

1. The value of the facility is reckoned as financial commitment for the Indian party and the total financial commitment of the Indian party remains within the limit stipulated by the Reserve Bank from time to time for overseas direct investments in the JV / WOS;
2. The overseas lender is regulated and supervised as a bank as per the law of the host country;
3. A 'No Objection' is obtained from the overseas lender or domestic AD bank in whose favor if charge is already created on the overseas assets;
4. The facility extended by the domestic AD bank to the Indian party / JV / WOS / SDS is governed by the prudential norms and other guidelines issued by the Department of Banking Operations and Development, Reserve Bank; and
5. Subject to the additional terms and conditions prescribed by the Reserve Bank from time to time."

(2) An Indian party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on its assets [including the assets of its group company, sister concern or associate company in India, promoter and / or director] in favor of an overseas lender as security for availing of the fund based and/or non-fund based facility for its Joint Venture (JV) or Wholly Owned Subsidiary (WOS) or Step Down Subsidiary (SDS) outside India.

Provided that

1. The value of the facility is reckoned as financial commitment for the Indian party and the total financial commitment of the Indian party remains within the limit stipulated by the Reserve Bank from time to time for overseas direct investments in the JV / WOS;
2. The overseas lender is regulated and supervised as a bank as per the law of the host country;
3. A 'No Objection' is obtained from the domestic lender in whose favour if charge is already created on the domestic assets; and
4. Subject to the additional terms and conditions prescribed by the Reserve Bank from time to time."

RBI APPROVAL NOT REQUIRED BY NRIS DURING PURCHASE OF PROPERTY RESERVE BANK

Reserve Bank of India on 29thDecember 2021ordered that now non resident Indians and Overseas Citizen of India do not require prior approval for acquisition and transfer of immovablepropertyin India, except cultivationland, farm house and plantation property.Thisclarification comesout in February 2021 after Supreme Court order, "which said,that any sale or gift of property by a foreigner without prior permission from the RBI would be invalid.

Case Reference

Facts

In this case Supreme court quoted Section 31 of the Foreign Exchange Regulation Act, (FERA) 1973. In which court was dealing with a property that was transferred by the widow of a foreigner which was the current owner transferred the property without obtaining prior permission of RBI.

The undisputed facts are that one Mrs. F.L. Raitt, widow of late Mr. Charles Raitt, a foreigner and the owner of the property in question, gifted it to respondent No.1 (Vikram Malhotra) without obtaining previous permission of the Reserve Bank of India under Section 31 of the 1973 Act.

Provision

Section 31 of Foreign ExchangeRegulation Act, (FERA) 1973 states restriction on acquisition, holding, etc of immovable property in India.—

- No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India.Provided that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.
- Any person or company referred to in sub-section (1) and requiring a special permission under that sub-section for acquiring, or holding, or transferring, or disposing of, by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India may make an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.
- On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, either grant or refuse to grant the permission applied for: Provided that no permission shall be refused unless the applicant has been given a reasonable opportunity for making a representation in the matter.

Judgement

Further taking into consideration the judgment ofSupreme Court dated February 26, 2021 which was related to provisions of Section 31 of FERA, 1973 has been repealed under Section 49 of FEMA, 1999," said the RBI in a press release.RBI stated that now NRIsand Overseas Citizen of Indiaare governed by provisions of FEMA 1999 and do not require prior approval of the RBI for acquisition or transferof immovable property in India,other than agricultural, farm house, plantation property.As Section 31 of FERA, 1973 has been repealed under Section 49 of FEMA, 1999

Section 49 of FEMA Act, 1999

Acquisition and Transfer of Immovable Property in India by a person resident outside India who is a citizen of India (NRI), can acquire by way of purchase, any immovable property in India other than agricultural land/plantation property/farm house. He can transfer any immovable property other than agricultural or plantation property or farm house without prior permission of RBI.

Payments provision for such Acquisition and Transfer of Immovable Property in India ;-

Payment for acquisition of property can be made out of Funds received in India through normal banking channels by way of inward remittance from any place of India or Funds held in any non-resident account maintained in accordance with the provisions of the Foreign Exchange Management Act, 1999 and the regulations made by Reserve Bank Of India from time to time.

Such payment can not be made either by traveller's cheque or by foreign currency notes or by other mode than those specially mentioned above. A person resident outside India who is a person of Indian Origin (PIO) can acquire any immovable property in India other than agricultural land, farm house, plantation prop.

How such transaction takes place

Any transaction involving acquisition or transfer of immovable property under these regulations shall be undertaken,through banking channels in India; subject to payment of applicable taxes and other duties in India.

Permitted activities for acquisition of Immovable Property :-

A person resident outside India who has established in India in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016, as amended from time to time, a branch, office or other place of business for carrying on in India any activity, excluding a liaison office, may -

1. acquire any immovable property in India, which is necessary for or incidental to carrying on such activity;
2. transfer by way of mortgage to an authorized dealer as a security for any borrowing, the immovable property acquired in pursuance of clause (a).

Provided no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, other than on lease not exceeding five years, without prior approval of the Reserve Bank.

Acquisition by a Long-Term Visa holder:-

A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment subject to the following conditions:

Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries:-

No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.

Conclusion

It is hereby clarified by Reserve Bank of India, that now non resident Indians and Overseas Citizen of India do not require prior approval for acquisition and transfer of immovablepropertyin India, except cultivationland, farm house and plantation property.