SAGUS SPEAKS

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This Newsletter covers key Regulatory & Policy Updates, Government Notifications and Judicial Pronouncements.

REGULATORY & POLICY UPDATES

SEBI simplifies norms for accreditation of Investors.[1]

SEBI issued a circular dated 18.12.2023 simplifying the modalities involved in the grant of accreditation to the investors. The key changes introduced are:

i. Accreditation Agencies ("AAs"), also functioning as KYC Registration Agencies ("KRAs"), shall have the authority to retrieve KYC documents available with them in their capacity as KRAs. AAs are also permitted to access such information from the databases of other KRAs, for the purpose of accreditation.

ii. AAs shall grant accreditation solely based on KYC and financial information of applicants. The criteria relating to the applicant's 'fit and proper' status, and other factors like absence of convictions, restraint orders, and non-willful defaulter status, are no longer applicable.

iii. The validity period of the accreditation certificate has been revised as follows:
   - If the applicant meets eligibility criteria for the preceding financial year, the accreditation certificate shall now be valid for 2 years instead of 1 year as previously applicable;
   - If the applicant fulfills eligibility criteria in each of the preceding 2 financial years, the accreditation certificate shall be valid for 3 years instead of 2 years as previously applicable; and

[1] SEBI | Simplification of requirements for the grant of accreditation to investors

- For newly incorporated entities without financial information for the preceding financial year but which meet the applicable net-worth criteria on application date, the accreditation certificate shall be valid for 2 years from the date of issuance.

SEBI amended the master circular on the online resolution of disputes in the Indian securities market.[2]

SEBI issued a circular dated 20.12.2023 amending its prior circular dated 31.07.2023 establishing a common Online Dispute Resolution Portal ("ODR Portal") to harness online conciliation and online arbitration for resolution of disputes arising in the Indian securities market ("Original Circular"), as amended by circular dated 04.08.2023 and consolidated into a Master Circular dated 11.08.2023.

The key amendments to the Original Circular (as amended by the circular dated 04.08.2023) are as follows:

i. It has been clarified that the term 'Investors/ Clients' as referred to under the Original Circular encompasses both institutional and corporate clients.
ii. Clause 3(b) of the Original Circular has been amended to allow investors/ clients to use any independent institutional meditation, independent institutional conciliation, or independent arbitration institution in India for resolving their disputes. Further, it is now specified that the seat and venue of such proceedings shall be in India. The revised clause also specifies that the fees, charges, and costs for mediators, arbitrators, or conciliators shall be mutually agreed upon by the parties involved or prescribed by relevant institutions.
iii. The scope of Clause 3 of the Original Circular has also been expanded to include claims, complaints, or disputes arising from activities or roles performed, or to be performed, by specified intermediaries or regulated entities related to the Indian securities market.
iv. All entities registered with SEBI as intermediaries or issuers, seeking to list securities, are now required to enroll on the ODR Portal immediately upon receiving registration or listing.
v. Claims and disputes against the Government of India/ President of India or State Government/ Governor of State shall not be initiated using the ODR Portal.
vi. In the context of conciliation under the Original Circular, the following has been prescribed:
    - With respect to the determination of admissible claim value of complaints/disputes, it is now specified that the value determined by the conciliator shall only be used for the computation of fees for online arbitration and will not, otherwise, be binding on the parties to the dispute and the arbitrator.
    - Where an online arbitration that is initiated by an investor/client against a Market Participant after the conclusion/ failure of the conciliation process, the Market Participant must participate in such proceedings and within 10 days of initiation of arbitration deposit 100% of the admissible claim value with the relevant Market Infrastructure Institutions ("MIIs"). Failure to comply with such a requirement may lead to action by MIIs and/or SEBI against such Market Participant.
    - If a Market Participant intends to pursue online arbitration after conclusion of the conciliation process, it must notify the ODR institution within 10 days and within 5 days thereafter deposit 100% of the admissible claim value with the relevant MII along with the fees for the online arbitration.
vii. For claims of INR 1 Crore and more, the arbitrator's fee shall be determined at an ad valorem rate of 1% of the claim value or INR 1,20,000, whichever is higher. Additionally, an amount of INR 35,000 will be paid towards the ODR Institution Fee, along with applicable GST, Stamp Duty, etc.
viii. Schedule A which lists the 'Specified Intermediaries and Regulated Entities' against whom investors may invoke the ODR process has been revised to add: (a) Banker to an Issue and Self-certified Syndicate Banks, (b) Merchant Bankers, and (c) Online Bond Platforms and Online Bond Platform Providers.

RBI tightens the norms for investing in Alternate Investment Funds to address concerns relating to evergreening of loans.[3]

RBI through its notification dated 19.12.2023 has introduced new norms with respect to investment by entities regulated by the RBI ("Regulated Entities") in Alternate Investment Funds ("AIFs") to address concerns relating to evergreening of loans ("AIF Circular"). This circular has come into effect from 19.12.2023 ("Effective Date").

In this respect, RBI has advised all the Regulated Entities ("REs") investing in AIFs that:

i. REs shall not make investments in any scheme of AIFs which has downstream investments either directly or indirectly in a 'debtor company' of the RE (*i.e.*, a company to which the RE currently has or previously had a loan or investment exposure anytime during the preceding 12 months).
ii. If an AIF scheme in which RE is already an investor makes a downstream investment in any such 'debtor company', then the RE shall liquidate its investment in the scheme within 30 days from the date of such downstream investment by the AIF.

[2] SEBI | Amended the master circular on the online resolution of disputes in the Indian securities market.

[3] RBI Circular dated 19.12.2023

iii. For existing investments in a 'debtor company', RE shall liquidate its investments within 30 days from the Effective Date. In the event an RE is not able to liquidate its investment within the prescribed time period, it shall make 100% provision on such investments.
iv. All investments by REs in the subordinated units of any AIF scheme with a 'priority distribution model' shall be subject to full deduction from RE's capital funds.

RBI amended the Master Direction on the Transfer of Loan Exposures) Directions, 2021[4]

RBI by a notification dated 28.12.2023 has amended the Master Direction – Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021 ("Directions").

Pursuant to the notification, the requirement of a minimum holding period shall not be applicable to the transfer of receivables, acquired as part of a 'factoring business' as defined under the Factoring Regulation Act, 2011, subject to fulfilment of the following conditions:

i. the residual maturity of such receivables, at the time of transfer, is not more than 90 days, and
ii. the transferee conducts proper credit appraisal of the drawee of the bill, before acquiring such receivables, in accordance with clauses 10 and 35 of the Directions.

RBI amended the Master Direction on lending to MSMEs[5]

RBI issued a notification dated 28.12.2023 amending the Master Direction - Lending to Micro, Small & Medium Enterprises (MSMEs) Sector to provide that for the purposes of priority sector lending, banks and other regulated entities shall follow the classification recorded in the Udyam Registration Certificate (URC) issued to the MSME.

RBI extended the timeline for the implementation of instructions for Fair Lending Practice[6]

RBI had issued a notification dated 18.08.2023 stipulating certain guidelines for levy of penal charges on loan accounts, which was to come into force from 01.01.2024 ("Original Notification").

However, RBI issued a notification on 29.12.2023 extending the timeline for implementation of the said instructions under the Original Notification. Accordingly, all REs are now required to ensure the implementation of these instructions for all fresh loans availed from 01.04.2024 onwards. For all existing loans, the transition to the new regime is mandated should take place on the next review/renewal date which falls on or after 01.04.2024, but no later than 30.06.2024.

GOVERNMENT NOTIFICATIONS

Enactment of the Telecommunications Act, 2023[7]

The Telecommunications Bill, 2023 was passed by the Lok Sabha on 20.12.2023 and Rajya Sabha on 21.12.2023 and further received assent from the President on 24.12.2023.

The Telecommunications Act, 2023 ("Telecom Act") seeks to reform the country's archaic telecom laws which were primarily based upon the Indian Telegraph Act, 1885, Indian Wireless Telegraphy Act, 1993, and the Telegraph Wires (Unlawful Possession) Act, 1950. The aforementioned laws stand repealed under the Telecom Act, and the Repealing and Amending Act, 2023 (in respect of the Telegraph Wires (Unlawful Possession) Act, 1950). The Telecom Act will come into force on such date as the Central Government may appoint, and different dates may be appointed for different provisions of the law.

The preamble to the Telecom Act stipulates that this law aims to amend and consolidate laws pertaining to the development, operation, and expansion of telecommunication services and networks and provide for the assignment of spectrum. Some of the key highlights of the Telecom Act are:

i. The terms 'telecommunications,' 'telecommunication network' and 'telecommunication service' are defined broadly in the Telecom Act. While the broadcasting services, internet-based communication services, OTT have not been expressly included (unlike the Telecommunications Bill, 2022), the aforementioned terms have definitions that are wide enough to include such services as well.
ii. The Telecom Act mandates obtaining prior authorisation from the Central Government for (a) providing telecommunication services, (b) establishing, operating, maintaining, or expanding telecommunications networks, and (c) possessing radio equipment. The existing licenses shall be valid until the period as specified in such license, and where no such period is specified, for a period of 5 years from the appointed day (*i.e.*, the date on which the specified sections of the Telecom Act come into force).
iii. All spectrum for telecommunications shall be assigned by the Central Government through auction, except in specific cases where it shall be administratively assigned. Such cases include national security and defence, law enforcement, public broadcasting, disaster management, weather forecasting, scientific research, satellite communication, transportation safety, services by BSNL and MTNL and community radio stations.
iv. Under the Telecom Act, the Central Government and State Governments have wide powers to intercept and

[4] RBI Amended Master Direction dated December 28, 2023
[5] RBI Notification dated 28.12.2023
[6] RBI Notification dated 29.12.2023
[7] The Telecommunications Act, 2023

seek disclosure of any messages to or from any person, to or from any telecommunication equipment, and direct the suspension of any telecommunication service to or from any person, to or from any telecommunication equipment, or relating to any particular subject, transmitted or received by any telecommunication service or network, in the event of any public emergency or in the interest of public safety. These actions will be subject to such procedures and safeguards as may be prescribed.

v. Under the Telecom Act, the Central Government may, in the interest of national security, friendly relations with foreign States, or in the event of war, take over control and management or suspend the operations of any telecommunication service or network.

vi. The Central Government may provide for measures to protect users which include: (a) prior consent to receive specified messages such as advertising messages, (b) creation of Do Not Disturb registers, and (c) a mechanism to allow users to report malware or specified messages.

vii. The Central Government may establish or approve one or more online dispute resolution mechanisms for the resolution of disputes between users and authorised entities providing telecommunication services. Every authorised entity providing telecommunication services shall participate in such dispute resolution mechanism.

viii. The Telecom Act has extra-territorial applicability in respect of any offence committed or contravention made outside India by any person which involves a telecommunication service provided in India, or telecommunication equipment or telecommunication network located in India.

Parliament passes new laws to repeal IPC, CrPC, and Evidence Act

On December 25, 2023, three legislations, *namely* the Bharatiya Nyaya Sanhita, 2023 ("BNS"), the Bharatiya Nagarik Suraksha Sanhita, 2023 ("BNSS") and the Bharatiya Sakshya Adhiniyam, 2023 ("BSA") were, after having been passed by both of Houses of the Parliament and received President's assent, have been published in the Official Gazette. However, these laws will come into force on such date as the Central Government may appoint, and different dates may be appointed for different laws.

Some of the key changes introduced under these new laws are listed below:

The Bharatiya Nyaya Sanhita, 2023 (has replaced the Indian Penal Code, 1860 (IPC))

BNS has largely retained the provisions of IPC while adding some new offences and removing certain offences.

The new offences *inter alia* include organized crime (such as contract killing, land grabbing, financial scams, etc.), terrorism (act that intends to threaten the unity, integrity, and security of the country, intimidate the general public, or disturb public order), mob lynching (murder or grievous hurt by a group on grounds of race, caste, sex, language or personal belief), and sexual intercourse with a woman by deceitful means or making false promises, etc.

Certain offences which were punishable under IPC have been removed under the BNS such as an attempt to commit suicide, unnatural offences (which were punishable under Section 377 of the IPC), sedition, etc.

Pertinently, instead of sedition, the act of exciting or attempting to excite secession, armed rebellion, or subversive activities, encouraging feelings of separatist activities, or endangering the sovereignty or unity and integrity of India will be penalised under BNS.

A new punishment by way of mandatory community service has also been introduced as punishment for theft of good having a value less than INR 5,000.

The Bharatiya Sakshya Adhiniyam, 2023 (has replaced the Indian Evidence Act, 1872 (IEA))

BSA has retained most of the provisions of IEA, while consolidating a number of provisions of IEA.

One of the key highlights of the BSA is the recognition of electronic records (including information stored in semiconductor memory or any communication devices such as smartphones, laptops, etc.) as primary documentary evidence. BSA also sets out the conditions with respect to custody, storage, transmission, and broadcast of electronic/ digital records, for such documents to be admissible as primary evidence.

Further, under BSA, the scope of secondary evidence has been expanded, and now oral and written admissions and evidence of a skilled person to examine documents are also considered secondary evidence. BSA also allows oral evidence to be given electronically which would imply that a witness, accused, complainant, or victim can testify through electronic means.

The Bharatiya Nagarik Suraksha Sanhita, 2023 (has replaced the Criminal Procedure Code, 1973 (CrPC))

The key changes introduced by BNSS are:

i. mandatory forensic investigation for offences punishable with 7 years or more of imprisonment;

ii. codification of rules relating to Zero FIR, mandating all police stations to register an FIR upon receipt of information regarding the commission of a cognizable offence, irrespective of whether it has jurisdiction or not;

iii. registration of an FIR even where information of commission of a cognizable offence is received through electronic mode;
iv. police are now required to conduct a preliminary enquiry in a time-bound manner i.e., within 14 days from receipt of information of the commission of a cognizable offence punishable with imprisonment of 3 to 7 years;
v. magistrate is empowered to attach a property identified as 'proceeds of crime';
vi. police are empowered to seek custody of an accused for 15 days (which may be extended to 60 or 90 days, as the case be) either all at once or in a staggered manner;
vii. all trials, inquiries, and proceedings may also be held in electronic mode;
viii. requirement to record search and seizure through audio-video electronic means; and
ix. specification of timelines for different stages of trial, inquiries and proceedings.

JUDICIAL PRONOUNCEMENTS

Supreme Court held that an arbitration clause in an agreement that is unstamped or insufficiently stamped is enforceable in law, however such agreement would be inadmissible as evidence.

The Supreme Court through its judgment dated 13.12.2023 in the matter of ***Re: Interplay between Arbitration Agreements under the Arbitration And Conciliation Act 1996 and the Indian Stamp Act 1899***[8] dated 13.12.2023 held that an arbitration clause in an unstamped agreement is enforceable in law, however, the such agreement would not be admissible in evidence, overruling the judgment rendered in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*[9] *("NN Global-2")* and *SMS Tea Estates (P) Ltd. v Co. (P) Ltd.*[10] *("SMS Tea")*, and parts of the judgement in *Garware Wall Ropes Ltd. v Coastal Marine Constructions & Engg.*[11] *("Garware Wall")*.

In *N.N. Global Mercantile (P) Ltd. v Indo Unique Flame Ltd.*[12] *("NN Global-1")*, a three-judge bench of the Supreme Court had held that as the arbitration clause was separate and distinct from the underlying agreement, the arbitration clause would not be rendered invalid if the underlying agreement is not stamped. However, in *Vidya Drolia v Durga Trading Corporation*[13] which affirmed the judgment in Garware Wall, it was held that an arbitration agreement does not exist if it does not satisfy the mandatory legal requirements. Thus, the issue of whether non-payment of stamp duty on a contract would invalidate the arbitration clause contained therein was referred to a larger bench. Thereafter, the Supreme Court in NN Global-2 by majority of 3:2 overruled the NN Global-1 and held that an arbitration clause in an agreement is void and unenforceable in law if the underlying agreement is not stamped or insufficiently stamped. However, the minority judgment was of a different view. By way of a curative petition, this issue was referred to a seven-judge bench of the Supreme Court.

The highlights of the ruling from the seven-judge bench are:

i. The agreements that are unstamped or inadequately stamped are not rendered void or *void ab initio* or unenforceable in law. However, such agreements would be inadmissible in evidence in accordance with Section 35 of the Indian Stamp Act, 1899.
ii. Drawing a distinction between an instrument being inadmissible and an instrument being unenforceable in law, it held that when an agreement is void, it cannot be enforceable in a court of law. However, when it is inadmissible, the issue is only whether the court may consider or rely upon it while adjudicating the case.
iii. As regards whether an objection with respect to the underlying agreement being unstamped or insufficiently stamped falls for determination under Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 ("A&C Act"), it was held that the concerned court has to first examine whether the arbitration agreement *prima facie* exists. Under Section 11(6A) of the A&C Act, a court's competence is limited to examining the existence of an arbitration agreement. Further, the separability presumption contained in Section 16 of the A&C Act is applicable not only for the purpose of determining the jurisdiction of the arbitral tribunal. It also captures the general rule on the substantive independence of an arbitration agreement.
iv. An arbitration clause is independent of the underlying agreement and involves separate consent of parties to resolve disputes through arbitration.
v. The Supreme Court emphasized the rule of *Kompetenz-Kompetenz* noting that an arbitral tribunal is empowered and competent to determine its own jurisdiction including the validity of an arbitration agreement.

NCLAT held that the National Financial Reporting Authority has superior and overriding powers over the Institute of Chartered Accountants of India while adjudicating matters pertaining to professional misconduct.

National Company Law Appellate Tribunal ("NCLAT") through its judgement dated 01.12.2023 in the matter of ***Mr. Harish Kumar T.K v. National Financial Reporting***

[8] Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020.
[9] (2023) 7 SCC 1
[10] (2011) 14 SCC 66
[11] (2019) 9 SCC 209
[12] (2021) 4 SCC 379
[13] (2021) 2 SCC 1

Authority[14] held that National Financial Reporting Authority ("NFRA") has superior and overriding powers over the Institute of Charted Accountants of India ("ICAI") while adjudicating matters pertaining to professional misconduct by chartered accountants ("CAs").

In the present matter, four CAs were assigned the role of Engagement Partners ("EP") by K. Varghese & Co. ("KVC") for carrying out the branch audit of Dewan Housing Finance Limited ("DHFL"), when KVC was appointed as a branch auditor for a period of 5 years (from 2014 to 2019). NFRA on account of suspicion of fraud by the directors of DHFL issued show cause notices to the CAs, alleging that the appointment of the branch auditors was not in consonance with the provisions of the Companies Act, 2013 ("Companies Act") and that various Standards of Auditing ("SAs") were violated by the said CAs. Subsequently, in April 2023, NFRA issued an order on the subject matter imposing a penalty of INR 1,00,000/- on each and debarred the CAs for one year from being appointed as auditor in any company.

An appeal was filed challenging the said order of the NFRA, wherein NCLAT *inter alia* held:

i. Both the accounting standards and the SAs have been defined under the Companies Act and are to be mandatorily followed by all stakeholders including the companies and CAs, and all SAs are not merely advisory but mandatory in nature.
ii. While the disciplinary jurisdiction over CAs remains with both ICAI and NFRA on a concurrent basis, upon a closer reading of Section 132 of the Companies Act, it is to be noted that NFRA has superior powers in relation to professional misconduct which gives overriding powers to NFRA. Additionally, in such circumstances, no other proceedings by any other body/ institute are to continue once the proceedings before NFRA are initiated.
iii. NFRA can initiate an investigation even for misconduct committed prior to coming into force of Section 132(4) of the Companies Act. In this regard, NCLAT noted that SAs are part of the law of the land and are required to be mandatorily complied with from the date of their respective applicability while conducting statutory audits. These standards were to be mandatorily followed even prior to constitution of NFRA. Section 132(4) merely designates NFRA as the forum for determination of professional misconduct.

APTEL held that GSC can be levied on a co-generation plant, operating parallel to the grid, only when it is a CPP and consuming more than 51% of the energy produced by such plant.

The Appellate Tribunal for Electricity ("APTEL") in its judgment dated 14.12.2023 in the matter of ***Rain CII Carbon (Vizag) Ltd.* v. *Andhra Pradesh Electricity Regulatory Commission & Ors.*** [15] has set aside the order dated 30.03.2022 passed by the Andhra Pradesh Electricity Regulatory Commission in O.P. No. 122 of 2021 and O.P. No. 123 of 2021. APTEL held that the levy of Grid Support Charges ("GSC") on non-Captive Power Plant ("CPP") of Rain CII Carbon (Vizag) Ltd. (Rain CII) has to be limited to the power consumed by the co-located load.

Further, APTEL held that the pre-condition of co-location of the plant cannot substitute the condition for the Rain CII to be a CPP in order to be liable to pay GSC. APTEL noted the differences between a CPP and an Independent Power Producer ("IPP") and observed that an IPP can be categorized as a CPP only if the generating station is self-consuming more than 51% of its generation. In case the IPP is consuming less than 51% of energy, it cannot be termed as a CPP and thus, will not be liable to pay GSC.

APTEL observed that 'co-generation' is a process and any plant which operates with such process i.e., produces two or more forms of useful energy simultaneously is a Co-generation Plant, therefore, can be categorized as a CPP if it qualifies the conditions as stipulated under Rule 3(1)(a)(ii) of the Electricity Rules, 2005, failing which it remains as an IPP. Thus, GSC can be levied on a Co-generation Plant operating parallel to the grid only when it is a CPP and consumes more than 51% of the energy produced by such plant.

Accordingly, APTEL held that since the power plants of Rain CII are co-generation based plants, utilising waste heat for the generation of electricity, and did not qualify as CPPs, the imposition of GSC on these non-captive co-generation plants was arbitrary and unreasonable.

NCLT held that a 'servicer' of the lessor who is neither a party to the agreements with the corporate debtor nor the issuer of invoices to the corporate debtor has no *locus standi* to initiate insolvency proceedings as an operational creditor.

National Company Law Tribunal ("NCLT"), New Delhi, in the matter of ***Willis Lease Finance Corporation* v. *SpiceJet Ltd.***[16] through order dated 04.12.2023 held that in the absence of privity of contract between the corporate debtor and the applicant, a servicer/ administrative agent of the lessor, who is neither a party to the Aircraft Lease Agreements nor the issuer of invoices is not entitled to initiate corporate insolvency resolution process ("CIRP") as an operational creditor.

[14] Company Appeal (AT) No. 68 of 2023 & I.A. No. 2007-2009 of 2023

[15] Appeal Nos. 228/ 2022 & 391/2023.

[16] IB NO. 249/(ND)/2023.

In the instant case, Willis Lease (Ireland) Limited, WEST III Engines (Ireland) Limited, West IV Engines (Ireland) Limited and West V Engines (Ireland) Limited (collectively, the "Lessors") leased aircrafts to SpiceJet Limited ("SpiceJet") under certain lease agreements executed by them. Willis Lease Finance Corporation ("WLFC") acted as a 'Servicer' for the Lessors, who was authorised by the Lessors through Servicing Agreements to (a) raise invoices on SpiceJet, (b) direct SpiceJet to make payments to designated accounts, and (c) enforce the rights of the Lessors under the said lease agreements in event of a non-payment by the due date.

Upon a payment default with respect to invoices of the Lessors, WLFC filed an application to initiate CIRP against SpiceJet. The question before NCLT was whether WLFC was entitled to initiate CIRP against SpiceJet in the capacity of an operational creditor.

In this regard, NCLT observed that neither any of the Lease Agreements were executed by the WLFC nor the invoices to SpiceJet were issued by it. Further, the payment details mentioned in the invoices depicted that the payment was owed to the Lessors who had issued the invoices.

Further, considering the definition of 'operational creditor' and 'operational debt,' NCLT noted that the operational debt was neither owed nor legally assigned or transferred to the WLFC by the Lessors. In the present factual circumstances, neither the goods nor services are furnished by the WLFC to SpiceJet. Further, it is WLFC's own admission that it is only a Servicer and an Administrative Agent of the respective Lessors and has inter-se arrangements with Lessors in the form of Servicing Agreements, where SpiceJet is not a party. Consequently, NCLT held that WLFC does not qualify as an 'Operational Creditor' in terms of Section 5(20) of IBC, and had no locus to initiate CIRP against SpiceJet.

CERC held that statutory levy of interest cannot be termed as 'penalty' and such interest amount is liable to be reimbursed.

Central Electricity Regulatory Commission ("CERC") through its order dated 14.12.2023 in the matter of ***NHDC Limited* v. *Madhya Pradesh Power Management Company Limited and Ors***[17] held that since the imposition of 'interest' on statutory taxes in the normal accretion to capital is statutory in nature, it cannot be considered as a 'penalty' and is therefore, reimbursable.

Government of Madhya Pradesh ("GoMP") demanded Electricity Duty under Madhya Pradesh Electricity Duty Act, 1949 along with Energy Development Cess ("EDC") under Madhya Pradesh Upkar Adhiniyam, 1981 from NHDC Limited ("NHDC") for the electricity generated from its hydroelectric projects.

CERC held that NHDC must be reimbursed by Madhya Pradesh Power Management Company Limited with respect to the interest amount that was levied by the GoMP. CERC observed that the delay was caused on the part of the GoMP in raising the demands for Electricity Duty and EDC. Relying upon the judgments of the Supreme Court in *A.S. Pandey* v. *Union of India*[18] and *Central bank of India* v. *Ravindra*[19], CERC ordered that NHDC is entitled to reimbursement of the interest amount.

CERC passed suo moto order addressing concerns related to CERC (Indian Electricity Grid Code) Regulations, 2023.

CERC through its *suo moto* order dated 18.12.2023[20] addressed concerns related to CERC (Indian Electricity Grid Code) Regulations, 2023 ("CERC Grid Code Regulations") and issued clarifications and practice directions with respect to the said regulations. The order was passed in response to issues raised by stakeholders in the power sector, including power stations and organizations, regarding the operational challenges being faced by them.

CERC dealt with the issue of minimum turndown schedule, wherein CERC directed that the minimum turndown levels must be respected to prevent unsafe operating conditions and potential unit shutdowns. CERC has also provided clarifications and practice directions to ensure that scheduling does not result in units operating below safe levels.

Secondly, the issue of revision of declared capacity for partial loading was discussed where CERC held that the Energy Storage Systems mentioned under Regulation 49(7) of the CERC Grid Code Regulations shall be allowed to make two revisions of Declared Capacity ("DC") and schedule in a day for reasons such as partial outages in resource supply. CERC further held that the generating stations should keep a digital record of the reasons for the revision of DC, which can be verified by the Regional Load Dispatch Centre ("RLDC") or Regional Power Committee.

Thirdly, CERC dealt with the issue of scheduling under Tertiary Reserve Ancillary Service and Security Constrained Economic Dispatch on units under shutdown, which was raised by National Thermal Power Corporation. CERC held that if a unit is under shutdown, RLDC should have the status of such units which are under Unit Shut Down so that it has a realistic picture of reserves available on the bar.

Lastly, CERC dealt with the issue of scheduling free power share in Central Generating Stations. The Government of Himachal Pradesh ("GoHP") submitted that it has an entitled

[17] Petition No. 93/MP/2022
[18] (2007) 3 SCC 545
[19] (2002) 1 SCC 367
[20] Petition No. 18/SM/2023

share of free power in various Central Generating Stations ("CGS") situated in Himachal Pradesh. The GoHP requested to be allowed to sell its share of free power directly from the generator periphery/ex-bus of the CGS plants. Here CERC held that GoHP is a hydro-rich state, and it may sell its entitled share of free power directly from the bus bar of the generating stations.

Supreme Court upheld the abrogation of Article 370 granting special status to the State of J&K

A five-judge Constitution Bench in its judgement dated 11.12.2023 upheld its earlier judgment of 05.08.2019 on the abrogation of Article 370 of the Constitution. The Court did not adjudicate upon the validity of the reorganization of the state of Jammu & Kashmir ("State of J&K") into a union territory; however, the Court upheld the carving out of Ladakh as a union territory. The apex court also directed the Election Commission to take steps to hold elections for the J&K assembly by September 30, 2024.

The key conclusions of the Constitution Bench are:

i. The State of J&K did not retain any element of sovereignty after the execution of the Instrument of Accession and the issuance of the Proclamation dated 25 November 1949 by which the Constitution of India was adopted. The State of J&K has no 'internal sovereignty' which is distinguishable from the powers and privileges enjoyed by other States in the country. Article 370 was a feature of asymmetric federalism and not sovereignty.

ii. The exercise of power by the President after the Proclamation under Article 356 is issued, is subject to judicial review. The exercise of power by the President must have a reasonable nexus with the object of the Proclamation. The person challenging the exercise of power must prima facie establish that it is a *mala fide* or extraneous exercise of power. Once a *prima facie* case is made, the onus shifts to the Union to justify the exercise of such power.

iii. The power of Parliament under Article 356(1)(b) to exercise the powers of the Legislature of the State cannot be restricted to law-making power thereby excluding non-law-making powers of the Legislature of the State. Such an interpretation would amount to reading in a limitation into the provision contrary to the text of the Article.

iv. It can be garnered from the historical context for the inclusion of Article 370 and the placement of Article 370 in Part XXI of the Constitution that it is a temporary provision.

v. The power under Article 370(3) did not cease to exist upon the dissolution of the Constituent Assembly of Jammu and Kashmir. When the Constituent Assembly was dissolved, only the transitional power recognized in the proviso to Article 370(3) which empowered the Constituent Assembly to make its recommendations ceased to exist. It did not affect the power held by the President under Article 370(3).

vi. Article 370 could not be amended by exercise of power under Article 370(1)(d). Recourse must have been taken to the procedure contemplated by Article 370(3), if Article 370 is to cease to operate or is to be amended or modified in its application to the State of J&K. Paragraph 2 of CO 272[21] by which Article 370 was amended through Article 367 is ultra vires Article 370(1)(d) because it modifies Article 370, in effect, without following the procedure prescribed to modify Article 370. An interpretation clause cannot be used to bypass the procedure laid down for amendment.

vii. The exercise of power by the President under Article 370(1)(d) to issue CO 272 is not mala fide. The President in exercise of power under Article 370(3) can unilaterally issue a notification that Article 370 ceases to exist. The President did not have to secure the concurrence of the Government of the State or Union Government acting on behalf of the State Government under the second proviso to Article 370(1)(d) while applying all the provisions of the Constitution to Jammu and Kashmir because such an exercise of power has the same effect as exercise of power under Article 370(3) for which the concurrence or collaboration with the State Government was not required.

viii. The President had the power to issue a notification declaring that Article 370(3) ceases to operate without recommendation of Constituent Assembly. The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing. The declaration issued by the President under Article 370(3) is a culmination of the process of integration and as such is a valid exercise of power. Thus, CO 273[22] is valid.

[21] Issued on 05.08.2019 by which Article 367 (an interpretation clause) was amended, *interalia* replacing the words "Constituent Assembly" in the proviso to Article 370(3) with "Legislative Assembly."

[22] Issued on 06.08.209 which states that the President, on the recommendations of the Parliament, had declared that all the clauses of Article 370 have ceased to be operative, except a clause that effectively applies the Constitution of India mutatis mutandis to the State of Jammu and Kashmir.

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