

# CORPORATE LAWS

## Case Law Update



CS Makarand Joshi

### Companies Act – Case 1

#### Adjudication order dated 1st October 2023 in the matter of N.S.J.L. NIDHI LIMITED, ROC Pune

##### Facts of the case

- N.S.J.L. NIDHI LIMITED (hereinafter called as the company) has its registered office under the jurisdiction of ROC Pune.
- The ROC conducted inspection of the records of the company under Section 206 of the Companies Act, 2013 (the Act) and noticed that the company has filed PAS-3 forms wherein the list of allottees attached to the e-form was not signed by the signatory to the form PAS-3.
- Considering this as a violation of section 39(4) read with rule 12 of Companies (Prospectus and Allotment of Securities) Rules 2014, ROC sent the show cause notice to the company.

##### Company's contentions

- the Form PAS-3 was already digitally signed by the signatory Mr' Rohit Hhainburdekar, where the said declaration from the signatory that, the list is complete' correct and legible as per the records of the company', was already mentioned.

- Therefore, before filing the form PAS-3 director has verified and signed digitally by giving consent for all the contents attachments of the said form.
- Further, after reading of instructions kit provided with the said form, the mandatory requirement of certification of attachment is not mentioned, however, attachment in the prescribed format mandatorily is mentioned.
- The company has diligently observed the applicable provisions of the Companies Act, 2013 and rules thereto with respect to further allotment of equity shares made by the company; The minutes of each meeting were duly circulated and were signed.
- While filing the return of allotment in E-form PAS-3, we had no other option but to attach PDF copy of the list of allottees converted from software-generated excel file to, ensure the legibility and comprehensibility of the list of allottees.
- we had made multiple attempts to submit a signed copy with each PAS-3. However, the legibility of the list was compromised due to compression and due to size constraints, we were compelled to attach PDF copy of the

list of allottees converted from software-generated excel file.

- We wish to state with utmost sincerity that there was no mala-fide intention on the part of the management for the aforementioned arrangement;
- In light of the above, it is prudent to note that the certified list of allottees could not be attached to the corresponding E-forms PAS-3 due to size and legibility issues, although the list of allottees were complete and correct as per the records of the company.

### ROC's contentions

- the company has filed the PAS-3 forms wherein the list of allottees is not certified by the signatory of the PAS-3 Forms. This is a violation of section 39(4) read with rule 12 of Companies (prospectus and allotment of securities) rules, 2014.
- The provisions of Section 39(4) r/w. Rule 12 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 as

amended clearly state that there shall be attached to the form PAS-3, a list of allottees stating their names, address, occupation and number of securities allotted to each of the allottees and the list shall be certified by the signatory of the Form PAS-3 as being complete and correct as per the records of the company.

- The Company is relying on the certification of the form whereas the requirement is to certify the list attached in the form too.

### Penalty

- In exercise of the powers conferred on the undersigned *vide* Notification dated 24th March, 2015 and having considered the facts and circumstances of the case mentioned herein above, I do hereby impose the penalty on the company and its officers in default as per the table below for violation of section 39(4) of the Act for each default as referred.

Penalty imposed on Company/directors	Maximum Penalty as per Act [Section 39(5)]	Total Instances of default	Total Penalty imposed
N.S.J.L. Nidhi Limited	₹ 1,00,000/-	16 times	₹ 16,00,000/-
Director 1	₹ 1,00,000/-	16 times	₹ 16,00,000/-
Director 2	₹ 1,00,000/-	16 times	₹ 16,00,000/-
Director 3	₹ 1,00,000/-	16 times	₹ 16,00,000/-

### SEBI – Case 1

**Securities and Exchange Board of India's Adjudication Order in the Matter of Piramal Pharma Ltd**

### Facts of The Case

1. Securities Exchange Board of India ('SEBI') had conducted an examination with respect to the non-disclosure of certain material information by Piramal

- Enterprises Limited ('PEL'). SEBI was informed that there was one unit of PEL in Digwal, Telangana which had faced closure and penalty by the Telangana State Pollution Control Board ('TSPCB') vide order dtd. November 29, 2018. NGT had sustained a penalty of ₹ 8.32 crores on the PEL vide its Order dated November 13, 2019. Later, the said unit was granted permission to restart production.
2. PEL further submitted that pursuant to a scheme or arrangement in 2022 demerger of the pharma business was undertaken by PEL. As per clause four of the scheme of arrangement of 2022 all the liabilities relating to the pharma business viz. the demerged undertaking, as on the Appointed Date i.e., April 01, 2022, shall become the liabilities of the Resulting Company i.e., Piramal Pharma Ltd ['PPL/Noticee']. This means that Noticee was a resultant company pursuant to the scheme of demerger of Piramal Enterprises Ltd. (PEL).
  3. PPL was incorporated on March 4, 2020, and was a material subsidiary of PEL for the financial year 2020-2021 and 2021-2022. Further, PEL submitted that the digwal plant was transferred to the books of the Noticee as part of the sale and transfer of the pharmaceutical business of the PEL by way of restructuring of the pharmaceutical business and Digwal continued to be part of Noticee.
  4. SEBI alleged that PPL did not disclose information related to the imposition of a penalty of ₹ 8.32 Crores by the NGT vide order dated November 13, 2019, on account of environmental pollution to the stock exchange.
  5. Further SEBI alleged that Noticee did not disclose the material event of the shutting down of a plant situated at Digwal, Telangana in 2019 on account of environmental pollution vide an order of Telangana State Pollution Control Board dated November 29, 2018.
  6. SEBI also alleged that Noticee had made incorrect Business Responsibility Reports (BRR) regarding the imposition of penalties and shutting down of plant in Annual Reports for FY 2018-19 and FY 2019-20.
  7. In view of the same SEBI alleged Noticee to be in violation of the provision of SEBI (LODR) Regulations, 2015 ('LODR Regulations') and SEBI circulars issued in this regard.

#### Charges Levied

1. Noticee was alleged to have violated the provisions of:
  - a. Regulation 4(1)(d), 30(3) and 30(4) read with Clause 8 of Para B of Part A of Schedule III of LODR Regulations in respect of non-disclosure of the material event of imposition of penalty by NGT.
  - b. Regulation 4(1)(d), 30(3) and 30(4) read with Clauses 2 and 8 of Para B of Part A of Schedule III of LODR Regulations in respect of non-disclosure of material event of shutting down of plant situated at Digwal, Telangana.
  - c. Regulation 34(2)(f) read with Regulation 4(1)(c) of LODR Regulations and SEBI Circular CIR/CFD/CMD/10/2015 dated November 04, 2015, in respect of incorrect disclosures in the Annual report for FY 2018-2019 and 2019-2020.

## Contentions by The Noticees

### 1. Noticee's Non-disclosure about NCT penalty and closure of Digwal unit by TSPCB

- Noticee contended that PPL could not have made the disclosure as it did not exist at the relevant time. Further, the TSPCB and NGT Orders (dated November 29, 2018, and November 13, 2019, respectively) were issued prior to the incorporation of PPL. Further, it was highlighted to SEBI that PPL got listed on October 19, 2022. Hence, the allegation of non-disclosure cannot be legally sustained and cannot be considered as misrepresentation.
- Noticee further stated that misrepresentation requires an active misstatement or partial and fragmentary statements of facts, where the withholding of a relevant fact renders the stated fact false. However, this is not the case here, as the TSPCB and NGT Orders were not issued against the PPL and did not affect it.
- Furthermore, Noticee contended that the digwal plant was operational before the PPL's incorporation, and any penalty owed to TSPCB had already been paid substantively by PEL and the remainder by PPL prior to it becoming a 'listed entity'. Therefore, since the information was already disclosed in the publicly available Information Memorandum (IM), there was no obligation for PPL to disclose the temporary closure and reopening of the digwal Plant or the imposed penalty at the time of its public listing. These events occurred before the Plant was transferred to PPL's books and before PPL even existed.

- Noticee contended that the only relevant disclosure, if at all, during PPL's public listing was the pending payment of the penalty to TSPCB and by disclosing the pending dispute with TSPCB and the penalty imposed by the NGT Order in the publically available IM, PPL complied with the LODR Regulations.
  - Thus, there was no liability of disclosure arising due to TSPCB and NGT Orders as on the Appointed Date and which could be said to have been transferred to PPL by virtue of the Composite scheme of arrangement.
- ### 2. Noticee's Failure to file correct Annual Report or BRR
- Noticee contended that Regulation 4 of LODR Regulations speaks of 'Principles governing disclosures and obligations. As per these principles, PPL had a duty to disclose facts correctly and not suppress material facts.
  - In this regard, PPL had not issued disclosures in relation to the TSPCB and NGT Orders because it was not and could not have been a material fact for the PPL. Further, it cannot be expected from the PPL to make disclosures of events, which transpired in 2019, in the Business Responsibility Report of 2023. Therefore, 'Principles governing disclosures and obligations' have not been violated. Furthermore, Noticee contended that PPL has disclosed the same in the recent Business Responsibility Report dated July 06, 2023, without prejudice basis as an abundant caution.
  - Also, as per regulation 34(2) of the LODR Regulations, the obligation to disclose a Business Responsibility

Report applies only to the top one thousand listed entities.

- Since the PPL was incorporated on March 04, 2020, and listed on October 19, 2022 (in the Financial Year 2022-2023), it cannot be alleged that the PPL failed to file the correct Annual Reports or a Business Responsibility Report.

### Submissions by The Adjudicating Officer

#### 1. Noticee's Non-disclosure about NCT penalty and closure of Digwal unit by TSPCB

- SEBI noted that events of shutting down of digwal plant by TSPCB and the imposition of a penalty of ₹ 8.32 Crore by the NCT took place on November 29, 2018, and November 13, 2019, respectively. Further SEBI AO noted that the said orders were passed against the company, PEL and nowhere mentioned the name of the Noticee. SEBI also noted that Digwal plant was operational before the incorporation of the Noticee, and the penalty owed to TSPCB had already been paid substantively by PEL and the remainder was paid by the Noticee before it became the 'listed entity'. SEBI AO also considered the submission that Noticee was not incorporated at the time of aforesaid material events.
- Further AO noted that any compliance required to be made under LODR Regulations, must be made by the "listed entity". The Noticee not being a listed company at the time of event could not have made the disclosures under LODR Regulations.
- Since at the relevant time, the pharmaceutical business vested with PEL, SEBI AO believed the

responsibility to make disclosure with respect to the previously mentioned events was with PEL.

- With respect to the clause of the Scheme of Arrangement that the transferee company inherits the assets and liabilities of the transferor company, SEBI AO stated that it must be seen whether the Noticee could perform its duty of disclosures at the relevant time. The liability is passed on to the PPL pursuant to the scheme of arrangement, however, as regards the liability for making the disclosure under the provision of the LODR is concerned, SEBI AO noted that the Noticee was not a listed company at the relevant time. Noticee was only listed on Oct.19, 2022. Hence Noticee cannot be held liable for events which took place before its incorporation and being listed.

#### 2. Noticee's Failure to file the correct Annual Report or BRR

- SEBI AO noted that Noticee was incorporated on March 04, 2020, as a subsidiary of PEL to conduct the pharmaceutical business of the Piramal Group. However, by virtue of the Scheme of Arrangement of 2022, the pharmaceutical business was completely demerged from the company i.e., Piramal Enterprises Ltd. The Noticee was subsequently listed on the stock exchange on October 19, 2022. SEBI AO noted that BRR applies only to top one thousand listed entities and in present matter the Noticee was incorporated on March 04, 2020 and listed on October 19, 2022 hence cannot be said that LODR regulations were violated as the Noticee not being a listed company at the time of event could not have made the disclosures under LODR Regulations.

**Penalty**

1. No liability/ monetary penalty was fastened on Noticee in this matter.

**IBC – Case 1**

**In the matter of *Tapadia Polyesters Private Limited (Appellant) vs. Sales Tax Officer Professional Tax Officer & Anr. (Respondent)* at National Company Law Appellate Tribunal (NCLAT) dated 22 August 2023.**

**Facts of the case**

- To recover the dues of the Sales Tax Department (Respondent) of the State of Maharashtra, an attachment order was already passed on 28 May 2015 wherein the assets of the Linkson International Limited (Corporate Debtor/ CD) were attached. As on the date of the said attachment order, there was no restriction on attachment.
- The attachment order continued; however, the asset could not be sold by the Respondent.
- A petition was filed by Punjab National Bank (Financial Creditor) u/ s 7 of Insolvency and Bankruptcy Code, 2016 (IBC) against the CD. The said petition was admitted on 6 October 2017 by the National Company Law Tribunal (NCLT) and the Corporate Insolvency Resolution Process (CIRP) was initiated against the CD.
- The time gap between the attachment order and the initiation of CIRP was of two years. Hence, the order of attachment had attained finality as the same was not challenged by CD or by the Interim Resolution Professional at the relevant time.
- Thereafter, vide order dated 20 July 2018 in terms of provisions of section 33 of IBC liquidation was initiated.
- An I.A was filed before NCLT by the Mr. Manish Kumar Baldeva – liquidator of the CD (Liquidator) seeking for release of attached properties so as to enable the liquidator to continue the auction/private sale of the assets in terms of provisions of IBC.
- Post commencement of liquidation on 20 July 2018, the Sales Tax Officer filed a claim to the extent of ₹ 101.87 Crore which was admitted by the Liquidator.
- In the liquidation proceeding, the liquidator proceeded to issue auction notice on 1 August 2021 and Tapadia Polyesters Private Limited was declared the Successful Bidder on 25 September 2021.
- Properties of the CD were attached by the respondent vide its attachment orders. As on the date of the said attachment order there was no restriction on attachment. CIRP was initiated against the CD on 6 October 2017, the time gap between the attachment order and initiation of CIRP is two years. Hence, the Order of attachment had attained finality as the same was not challenged by CD or by the IRP at the relevant time.
- NCLT hence concluded that the assets shall not form part of the Liquidation estate and the treatment accorded to the respondent would be that of secured creditor under Section 53(1)(e)(ii) of IBC and in the above backdrop rejected the I.A. vide order dated 10 February, 2023.

- Two appeals were filed at National Company Law Appellate Tribunal (NCLAT) one by the Liquidator challenging the Order dated 10 February, 2023 and another one by Successful Bidder/the appellant.
- It was submitted that even if it was assumed that the respondent was a secured creditor, they have not exercised their right u/s 52 of the IBC to proceed with the assets. The assets become part of Liquidation Assets. Further, referred to Regulation 21A of Liquidation Process Regulations, 2016 it was submitted that assets being part of the liquidation assets, Liquidator has rightly declared the appellant as Successful Bidder.

### Arguments of the Appellant

- It was contended that the respondent cannot be held to be a Secured Creditor and the properties attached by the department is part of the liquidation asset hence the NCLT ought to have lifted the attachment to proceed further with the liquidation process. The liquidator also relied on the judgment of the tribunal in the department of State Tax, through the ***Dy. Commissioner of State Tax vs. Zicom Saas Private Limited & Anr.***
- That attachment which was made of the properties u/s 35 of Maharashtra Value Added Tax Act was never challenged by the appellant and although the right of appeal was given u/s 35(6) but they have never exercised the right, the said order of attachment became final.
- NCLT had rightly relied on Judgment of the Hon'ble Supreme Court in ***M/s Embassy Property Development Private Limited. vs. State of Karnataka & Ors.*** holding that the issue of attachment having become final cannot be brought before the NCLT u/s 60(5) of the IBC.
- It was further contended that the properties were mortgaged to the Punjab National Bank (PNB) and the charge of the PNB was registered with the Ministry of Corporate Affairs and at best the Sales Tax Officer will have a Second Charge.

### Arguments of the Respondent

- The assets of the CD were attached on 28 May 2015 and at that point of time there was no pendency of any proceedings and further the same was not challenged either by CD and or by the Liquidator.
- The attachment notices and the attachment itself were done much prior to the initiation of the present liquidation proceedings approximately 2 years ago. The attachment notice dated 28 May 2015 was issued by the respondent State Department under the Maharashtra Land Revenue Code.
- The CD committed fraud upon the respondent department and the outstanding dues are to the tune of ₹ 91,40,00,000/- at the time of issuance of the first notice of the demand under the Maharashtra Land Revenue Code 1966 dated 6 May 2015.
- It was claimed that they had followed the due procedure of law and procedures before attaching the properties of the CD and the same had not been challenged.
- They had also submitted and filed the claim on time.

- The Liquidator had no power and or any authority to file the present application so as to decide the outstanding dues of the CD payable to the respondent to the tune the claim submitted by them.
- IBC does not specifically prohibit the statutory authority to recover its due from the CD from the property already attached by such authority the power and duty of the liquidator u/s 35 of the IBC does not anywhere give any power to extinguish the dues of their statutory department i.e. STD/respondent.
- That it was pertinent to note that none of the assessment notice, demand notice and attachment had been challenged by the CD and or Liquidator. The respondent stated that the IBC cannot be used as a tool to evade taxes.

#### Held

- Hon'ble Supreme Court in *M/s Embassy Property Developments Pvt. Ltd. vs. State of Karnataka* held that there cannot be any dispute to the proposition that orders passed by the Statutory Authorities which have become final against the Corporate Debtor cannot be questioned and the said order can be questioned under the relevant statute only. Present was not a case where the Liquidator has questioned the attachment order. The attachment Order has become final and the attachment continued till date. The question is of the consequence of the attachment on the assets of the property. The judgment in *M/s Embassy Property Developments (supra)* has no application in the facts of the present case
- Reliance was placed on section 52 of the IBC and Regulation 21A of Liquidation Process Regulations by the successful bidder and the argument that even if it is assumed that the respondent was a secured creditor, it has not exercised its right u/s 52 of IBC, the assets will be part of the Liquidation Estate as per the statutory provisions has substance.
- Further, the charge was registered of the PNB as the first charge holder. The judgment of this Tribunal in *Department of State Tax vs. Zicom Saas Pvt. Ltd. & Anr* as has been relied on by the Liquidator, the provisions of Section 37 of Maharashtra Value Added Tax Act, 2002 which was the provision applicable in the present case have been considered and the Judgment of the Hon'ble Supreme Court in *State Tax Officer vs. Rainbow Papers Ltd* was also taken note and relied on. The above supports the submission of the liquidator that the Respondent Department cannot be treated as a secured creditor of the Corporate Debtor.
- Even when there is the attachment of the assets, the respondent cannot be the owner of the assets and the assets continue to be owned by the Corporate Debtor and will be part of the Liquidation Estate.
- The NCLT committed an error in rejecting the I.A. filed by the Liquidator relying on the Judgment of the Hon'ble Supreme Court in "M/s. Embassy Property Development Pvt. Ltd." which judgment had no application in the facts of the present case. Thus, the Order of the NCLT in the appeal cannot be sustained. Order dated 10 April, 2023 was set aside so as to take further steps in the liquidation. The appeal was allowed accordingly.

