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Articles

Companies (Significant Beneficial Owners) Amendment Rules, 2019: Significant clarity at last

By **Sudish Sharma, Samad Ali and Anantha Desikan S**

Introduction

The Companies (Significant Beneficial Owners) Rules, 2018 ("SBO Rules") was notified on June 14, 2018. The SBO Rules endeavor to identify the natural person who holds beneficial interest in a company, by laying down multi-layered criteria for determining who a significant beneficial owner ("SBO") is in relation to a company. "Beneficial interest" in a share has been described in Section 89(10) of the Companies Act, 2013 ("CA 2013") to *inter-alia* mean the right to exercise any rights attached to such share or to participate in any distribution in respect of such shares. The Ministry of Corporate Affairs, Government of India ("MCA") had on February 8, 2019 notified the Rules to revise the provisions of SBO Rules, namely, Companies (Significant Beneficial Owners) Amendment Rules, 2019 ("Amendment Rules"). The key changes to the SBO Rules *vide* the provisions of the Amendment Rules are discussed further below.

Who is an SBO?

Section 90 of the CA 2013 *inter-alia* stipulates that every individual who holds beneficial interests of not less than 25% in shares of a company exercises control over a company would be classified as an SBO. As per Section 90 of the CA 2013, the Central Government is empowered to prescribe the holding percentage threshold to determine who an SBO is. The Central Government has prescribed new criterion for the determination of SBOs vide the Amendment Rules. Rule 2 of the Amendment Rules *inter-alia* states that an SBO in relation to a company means a person who (acting alone or together or through a trust) possesses one or more of the following rights or entitlements in such company, namely: who holds indirectly or together with any direct holdings not less than 10% of the shares or voting rights, who through indirect holdings or together with any direct holdings has the right to participate in not less than 10% of any distribution in a financial year and who has the right to exercise significant influence or control other than through direct holdings alone. The Central Government has thus elaborated on the provisions of Section 90 of the CA 2013 and has laid down detailed objective criteria regarding the determination of SBOs.

The new perception of SBOs

If the test of control is applied to determine who an SBO is, significant influence and control must be ascertained based on indirect means of exercising such control and not based on direct holdings alone. Further, the thresholds of holding shares and voting rights of a company, as discussed above, only apply to the following two scenarios: where such shares or voting rights are held purely indirectly by an individual or are held in conjunction with any direct holdings. Only direct holding of shares or voting rights have thus been ruled out to positively ascertain who an SBO is. This is a significant development as it clarifies the intent of the SBO Rules, namely, to identify significant beneficial owners whose

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identity has not previously been disclosed to the concerned company.

Key concepts clarified

Rule 2 of the Amendment Rules provides that "significant influence" means the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company but is not control or joint control of those policies. Significant influence under the Amendment Rules would thus imply significant direct or indirect participation by an individual in key decision making of a company while at the same time not having any control over such policies.

Further, Explanation V of the definition of "significant beneficial owner" provided in Rule 2 of the Amendment Rules provides that if any individual or individuals acting through any person or trust, act with a common intent or purpose of exercising any rights or entitlements, or exercising control or significant influence, over a reporting company, pursuant to an agreement or understanding, formal or informal, such individual or individuals, acting through any person or trust shall be deemed to be 'acting together'. Thus, the Amendment Rules have laid down detailed criteria regarding what constitutes 'acting together' for the purposes of the SBO Rules.

The definition of the term 'majority stake' has been inserted vide Rule 2 of the Amendment Rules. 'Majority stake' means holding more than 50% of the equity share capital in the body corporate, or holding more than 50% of the voting rights in a body corporate, or having the right to receive or participate in more than 50% of the distributable dividend or any other distribution by the body corporate.

It is pertinent to note that Rule 2 also provides that instruments in the form of global depository receipts, compulsorily convertible preference shares or compulsorily convertible debentures shall be treated as 'shares', for the purposes of the Amendment Rules. Thus, some of the instruments that have been cast outside of the ambit of 'shares' for the purposes of the Amendment Rules include partially convertible preference shares, partially convertible debentures and non-convertible debentures.

Not mandatory for every company to identify a person as 'significant beneficial owner':

Prior to the notification of the Amendment Rules, the existing SBO Rules provided that in case a company is unable to identify a person as SBO, then the companies were required to identify its senior management officials as the SBO. As a much-needed relief, the Amendment Rules has done away with such requirement.

Conclusion

The Amendment Rules have brought about necessary changes regarding the objective tests that are required to be employed for the identification of SBOs. The insertion of the above-mentioned concepts, namely, 'significant influence', 'acting together', 'majority stake' and 'shares' have shed much needed light on what clearly constitutes the same. The most significant change under the Amendment Rules is the fact that the following forms of direct association with a company: directly holding shares, directly holding voting rights and/or exercising direct control have been ruled out as tests for the identification of SBOs, which is in line with the spirit of the SBO Rules (i.e. the identification of persons exercising indirect influence over companies by virtue of their indirect shareholding, indirect voting rights or indirect control).

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Maximum pensionable salary - SC upholds HC judgment quashing cap thereon

By **Ankit Parhar**

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act") is a social welfare legislation enacted to provide social security to employees in the form of retirement or old age benefits. The EPF Act extends to the whole of India, except the State of Jammu & Kashmir, and applies to every establishment which is a factory engaged in any industry specified in Schedule I to the EPF Act, and in which twenty or more persons are employed. The EPF Act also applies to any other establishment employing twenty or more persons or a class of such establishments as notified by the Central Government from time to time.

In exercise of the powers conferred by the EPF Act, the Central Government has framed the Employees' Provident Fund Scheme, 1952 ("EPF Scheme"). The EPF Act and the EPF Scheme provide for the establishment of funds, membership of the fund, contributions by employers and employees, administration of the fund, payments and withdrawal from the fund etc.

As per the EPF Act read with the EPF Scheme, it is mandatory for employees of a covered establishment drawing basic wages, dearness allowance and retaining allowance of less than Rs. 15,000/- to become members of the fund created under the EPF Scheme. Consequently, it is mandatory for such employees and their employers to make contributions at the rate of 10% / 12% of the basic wages, dearness allowance and retaining allowance as per the EPF Act and EPF Scheme. For employees of a covered establishment drawing basic wages, dearness allowance and retaining allowance of more than Rs. 15,000/- per month it is mandatory to make contributions upto the limit of Rs. 15,000/- and it is voluntary to make contributions beyond the said limit.

It may be noted that, recently, the Supreme Court[1] reiterated the position that 'special allowances' or other allowances that are paid across the board to all employees in a particular category are liable to be construed as part of 'basic wages' unless it is demonstrated that these allowances are variable or linked to some incentive for production.

The EPF Act also provides for the framing of the Employees' Pension Scheme, 1995 ("Pension Scheme") and the establishment of a Pension Fund. The Pension Scheme and Pension Fund have been established for the purpose of providing for superannuation pension, retiring pension or permanent total disablement pension to the employees of covered establishments and widow or widower's pension, children pension or orphan pension payable to the beneficiaries of such employees.

The EPF Act and Pension Scheme do not contemplate any additional contributions by the employer or the employee towards the Pension Fund over and above the contributions to be made in terms of the EPF Scheme. The corpus of the Pension Fund is met from a part of the employers' contributions towards the Provident Fund subject to a cap of 8.33% of the basic wages, dearness allowance and retaining allowance of the employees. The Central Government also contributes at the rate of 1.16% of the pay of the employees.

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[1] *RPFC(II) West Bengal* v. *Vivekananda Vidyamandir and Ors.* [C.A. No. 6221 of 2011 decided on 28.02.2019]

Initially, the maximum pensionable salary on the basis on which pension is calculated, was capped at Rs. 5,000/- and the contributions payable by the employer and the Central Government were capped at this level. The Pension Scheme was amended with effect from 16.03.1996 and a proviso was added to Para. No. 11(3) of the Pension Scheme giving an option to employers and employees to make contributions in respect of pay in excess of Rs. 6,500/-. The cap was subsequently increased to Rs. 6,500/- w.e.f. 01.06.2001.

Several employees who were drawing salaries in excess of the prescribed limit opted to pay contributions on the basis of their actual salaries. However, many of these requests were rejected on the ground that the option was exercised beyond the cut-off date of 01.12.2004. These employees approached the Kerala High Court challenging this rejection. The High Court held that the proviso was retrospective in operation and was applicable from the date of the commencement of the Pension Scheme, therefore, a joint application by the employer and the employee to make contributions in excess of the prescribed limit could be made at any time. This judgment was upheld by a Division Bench of the Kerala High Court as well as the Supreme Court. The Employees Provident Fund Organisation ("EPFO") reluctantly implemented this judgment.

Accordingly, several employees exercised the option granted by the proviso to Para. No. 11(3) of the Pension Scheme. These employees were required to contribute the difference between the actual contributions made in the past and the contributions that would have been payable on the salaries above the prescribed limit. However, these employees were also entitled to arrears of the higher pension from the date of retirement.

Subsequently, the Pension Scheme was further amended with effect from 01.09.2014. As per the amendments, the proviso to Para. No. 11(3) was deleted and the maximum pensionable salary was capped at Rs. 6,500/- upto 01.09.2014 and at Rs. 15,000/- from 01.09.2014 onwards. Effectively, the amendments sought to negate the option of making contributions in excess of the prescribed limit in terms of the proviso to Para. No. 11(3). However, the amendments also provided that employees who have been contributing in respect of salaries above the prescribed limit may, on a fresh option to be exercised jointly by the employer and employee within six months, continue to contribute on salaries above the prescribed limit by making an additional contribution of 1.16% towards the salary exceeding Rs. 15,000/-.

These amendments were challenged before the Kerala High Court[2] on several grounds. It was contended by the Petitioners that the amendments are arbitrary and illegal and that they drastically reduce the pension payable to employees and cause serious prejudice to them. It was also contended that an amount of about Rs. 32,000 Cr. was already lying as unclaimed pension in the fund and there was no justification for reducing the pension payable to the employees. On the other hand, the Central Government defended the amendments stating that no liability to make any contributions over and above the prescribed limit was ever assumed by the Government and if pension is computed on the basis of actual salaries, then employees would be drawing higher pension than the contributions made by the employers and employees which would ultimately deplete the fund.

[2] *P. Sasikumar & Ors.* v. *Union of India & Ors*. [W.P. (C) No. 13120 of 2015 decided on 12.10.2018].

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After considering the submissions of the parties, the High Court was pleased to set aside the amendments. The High Court held that since the EPF Act did not contemplate any additional contributions by the employer or the employee towards the Pension Fund, therefore, neither the contention of depletion of the Pension Fund nor the condition of additional contribution of 1.16% by employees could be sustained. The High Court held that the amendments brought out by the Central Government exceeded the powers granted by the EPF Act. The High Court also held that the amendments create arbitrary classes of pensioners such as those: (i) who exercised the option to make contributions on actual salaries and continued in service beyond 01.09.2014; (ii) who did not exercise the option and continued in service beyond 01.09.2014 (iii) who did not exercise the option and retired prior to 01.09.2014; and (iv) who exercised the option and retired prior to 01.09.2014.

The judgment of the Kerala High Court was challenged by the Central Government before the Supreme Court by way of a Special Leave Petition. However, the Supreme Court dismissed the petition as being without merit.

Now that the judgment of the High Court has attained finality, it is likely that several employees will exercise the option to make contributions towards pay in excess of the prescribed limit and get the benefit of higher pension. However, it remains to be seen as to whether the EPFO will implement the judgment swiftly.

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Notifications and Circulars

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 – Amendments: In terms of extant Regulations, applications received from a non-government organization, non-profit organization, body/agency/department of a foreign Government for opening of a branch office or a liaison office or a project office or any other place of business in India are to be forwarded to the Reserve Bank for prior approval and be considered in consultation with the Government of India. This has since been reviewed and as notified through Notification No. FEMA 22(R)(1), it is advised that if such an entity is engaged, partly or wholly, in any of the activities covered under Foreign Contribution (Regulation) Act, 2010 (FCRA), it shall obtain a certificate of registration under the said Act and shall not seek permission under FEMA 22(R). A.P. (DIR Series) Circular No. 20, dated 27-2-2019 issued for the purpose also states that Form FNC has also been suitably modified.

Companies (Incorporation) Amendment Rules, 2019: The Ministry of Corporate Affairs by way of Amendment in the Companies (Incorporation) Rules, 2014 have introduced Rule 25A pertaining to Active Company Tagging Identity and Verification (ACTIVE). In accordance with this new provision, every company incorporated on or before the 31st December

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2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE (Active Company Tagging Identities and Verification) on or before 25.04.2019. The Proviso to the Section restricts any company which has not filed its due financial statements under Section 137 or due annual returns under Section 92 or both with the Registrar from filing e-Form-ACTIVE, unless such company is under management dispute and the Registrar has recorded the same on the register. It also exempts companies that have been struck off or are under process of striking off or under liquidation or amalgamated or dissolved, as recorded in the register, from filing e-Form ACTIVE. It further provides that if a company does not intimate the said particulars, the Company shall be marked as "ACTIVE-non-compliant" on or after 26th April 2019 and shall be liable for action under sub-section (9) of Section 12 of the Act.

Ratio Decidendi

Claims in quantum merit vis-à-vis damages in breach of contract

Brief facts:

The present appeal arises out of a dispute under the Telecom Regulatory Authority of India Act, 1997. The relief sought through a petition before the Telecom Disputes Settlement and Appellate Tribunal, New Delhi ["TDSAT"] by the respondent, Tata Communication Ltd. against the appellant, Mahanagar Telephone Nigam Ltd., is for a recovery of a sum of INR 1,10,57,268/- plus interest thereon.

Issue raised:

The specific issue was whether a claim in *quantum merit* would be permissible in cases where the parties are governed by a contract under Section 70 of the Indian Contract Act, 1872.

Held:

On Section 70: It was observed that Section 70 falls under the purview of Chapter V of the Contract Act. It provides for a situation where a non-gratuitous act by a person results in forming obligations on another party receiving a benefit out of such act. The principle under Section 70 is considered similar to the doctrine of restitution (*quantum merit*). In the present case, the Supreme Court, while considering import of Section 70 in a contractual claim, referred to the split verdict of *Moselle Solomon v. Martin & Co*. where Williams J. had held that Section 70 is an independent remedy based on a different cause of action and therefore can be deemed to be an additional remedy. Whereas Jack J. held that the provision had no applicability in the case of an express contract. The Supreme Court held that the amount deducted by MTNL was a claim of *quantum merit* which cannot be raised due to the existence of the contract. It was held that MTNL can claim only the sum stipulated in the contract and anything claimed above this sum shall be refunded accordingly.

On Section 74: It was held that, the compensation for breach of a contract was deemed to be governed by Section 74 of the Contract Act, which states that where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated (*Kailash Nath Associates v. DDA*). In the impugned judgement, maximum of 12% can be levied as liquidated damages under

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the contract, which sum would amount to a sum of INR 25 lakh. Since this clause governs the relations between the parties, obviously, a higher figure, contractually speaking, cannot be awarded as liquidated damages, which are to be considered as final and not challengeable by the supplier. This being the case, the appellant can claim only this sum. Anything claimed above this sum would have to be refunded to the respondent.

[*Mahanagar Telephone Nigam Ltd.* v. *Tata Communications Ltd.* - 2019 SCC Online SC 278]

Arbitration – No award of interest when arbitration agreement not provided so

Brief facts:

The appellant herein was awarded the contract under which it was to execute certain works. Agreement in this behalf was signed on 18th December,1998. Some disputes arose between the parties. Since the agreement contained an arbitration clause, two claims raised by the appellant were referred for arbitration. The arbitral tribunal was constituted with three Arbitrators. This arbitration was under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act'). The majority award pronounced on October 10, 2010 allowed the two claims to certain extent. On the said claims awarded, the Arbitrators also granted interest at the rate of 10% per annum from the date when the arbitration was invoked, i.e., October 09, 2007, till 60 days after the award. Future interest at the rate of 18% per annum till the date of payment was also awarded.

Issue raised:

Whether the Arbitrators could award any interest in view of Clauses 50 and 51 of the General Conditions of Contract (GCC) which governed the terms between the parties.

Decision of the High Court:

Single Judge of the High Court of Delhi passed the order dated November 15, 2011 quashing the award limited to the interest that was awarded by the Arbitrators. The appellant preferred intra-court appeal which has been dismissed by the Division Bench of the High Court, thereby upholding the judgment of the Single Judge. The effect is that the High Court has held that no interest is payable as Clauses 50 and 51 of GCC bar the arbitrators from granting interest.

Decision of the Supreme Court:

The Supreme Court analyzed several prior decisions and concluded that (under the 1996 Act), "*in case clauses 50 and 51 of GCC put a bar on the arbitral tribunal to award interest, the arbitral tribunal did not have any jurisdiction to do so.*" Noting that the tribunal was itself of the opinion that clause 51.0 of the GCC barred such payments, the Supreme Court upheld the decision of the Delhi High Court. The Supreme Court, like the Division Bench of the Delhi High Court, also followed its previous ruling in *Tehri Hydro Development Corporation Ltd. & Anr. v. Jai Prakash Associates Ltd.*

[*Jaiprakash Associates Ltd.* v. *Tehri Hydro Development Corporation India Ltd.* - 2019 SCC Online SC 143]

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News Nuggets

Mere plea of coercion without evidence is not enough to appoint arbitrator

Supreme Court has held that even in presence of an arbitration agreement, mere plea of fraud, coercion and undue influence without placing material on record is not enough to exercise power under Section 11(6) of the Arbitration Act. The Apex Court in the case of *United India Insurance v. Antique Art Exports* held that the High Court committed error by appointing arbitrator mechanically without looking into presence of substantial evidence. It ruled that claim was settled leaving no arbitral dispute to be examined. Supreme Court also observed that appointment of arbitrator is not merely an administrative function.

Competition - Failure to pay penalty under Section 43 can attract criminal action

Delhi High Court has held that failure to pay penalty under Section 43 of the Competition Act is included in one of the possible reasons leading to criminal action. Court observed that CCI is a statutory body and criminal action initiated by it is non-violative of Article 20(2) of Constitution of India. The Court in the case of *Rajasthan Cylinders & Containers v. CCI* refused to interfere with summoning order of Chief Metropolitan Magistrate on criminal complaint initiated by the CCI under Section 42(3) over non-deposition of penalty under Section 43. Apex Court judgement in the case of *UOI v. Purushottam* was relied on.

Every order of Arbitral Tribunal terminating proceeding is not an award

Bombay High Court has held that petition under Section 14(2) read with Section 32(2) of the Arbitration Act is maintainable where termination of arbitral tribunal took place not due to passing of final award but because there was only one claimant when proceedings initiated. Court in *Neeta Lalitkumar v. Bakulaben Dharamdas* set aside order of sole arbitrator and directed him to substitute petitioner as the claimants and proceed with the arbitration to pass a final award expeditiously. It observed that there could be several situations where tribunal may terminate proceedings.

NCLAT Rules – Service of notice for hearing mandatory: SC

Supreme Court has set aside the NCLAT order and remanded the case for fresh consideration, holding that service of advanced copy of appeal cannot be treated as service of notice as stipulated under Rule 48 of NCLAT Rules. The Apex Court in the case of *Jai Balaji Indus. v. SBI* held that since no record was found as per Rule 52 in NCLAT office register for payment of process fee for issuance of notice, no notice was served and right of the appellant to be heard, *audi alteram partem,* was violated. Judgement in *Ghaziabad Development Authority v. Machchla Devi* was relied on.

Insufficient stamping of agreement not effects appointment of Arbitrator

Delhi High Court has held that in the presence of a valid arbitration agreement, objection that the agreement is insufficiently stamped cannot stop the appointment of an arbitrator. The Court in the case of *Damont Developers (P) Ltd. v. Brys Hotels (P) Ltd.* observed that court will confine itself only to the issue of

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existence of an arbitration agreement and that objections including insufficient stamping will be dealt by the appointed arbitrator in compliance with Section 12 of the Arbitration Act. Judgement in *Sandeep Soni v. Sanjay Roy* was relied on.

Insolvency – NCLT when not to direct RP to file for liquidation

NCLAT has held that at initial stage of resolution process, no observation be made nor any direction be given to Resolution Professional, by NCLT, on completion of 180 days, to file application under IBC Section 33 for liquidation. It observed that it is open to CoC to ask for more time and if necessary, call for fresh resolution plans, and held that NCLT prejudged the matter relating to liquidation. The Appellate Tribunal in *LIC Housing Finance v. Sripriya Kumar* also held that CoC is clothed with power to give directions to make necessary corrections in expression of interest.

Disqualified directors relieved – Section 164(2) of Companies Act prospective

Ministry of Corporate Affairs had issued notification on 12-09-2017 and published a list of directors associated with struck off companies. The move was towards removal of shell Companies generating black money but the given MCA notification was retrospective. Gujarat High Court has now in the case of *Gaurang Balvantlal Shah v. Union of India,* quashed the MCA Notification and held that Section 164(2) of the Companies Act will have prospective effect and filing of annual returns shall be counted from F.Y. 2014-15. The judgement is a sigh of relief to 3,09,614 directors who earlier stood disqualified.

View of one judge is view of the bench if other judges do not dissent

Supreme Court has rejected the contention that in a 3-judge bench where one judge has expressed his opinion and other two have not, the view of one will not be regarded as view of the Bench by majority. The Apex Court in the case of *Kaikhosrou Kavasji Framji v. UOI* held that if there is no dissent amongst judges, view expressed by one would be view of the Bench and thus the law laid down by the Court under Article 141 of Constitution. Decision of Queen's Bench in *Guardians of Poor of West Derby Union v. Guardians of the Poor of the Atcham Union* (1889) was relied on.

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