Newsletter

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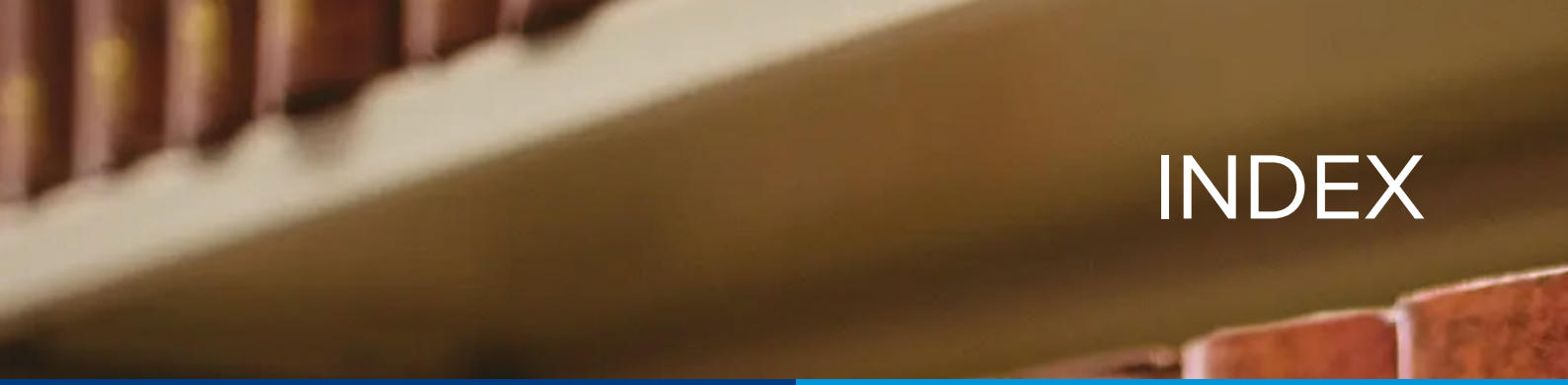

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Editor's note

Dear Readers,

I am pleased to share with you our newsletter for the month of August, 2024, which covers significant legal and regulatory developments.

The recent rulings by the Delhi High Court and the Supreme Court of India provide clarity on aspects of arbitration law in the resolution of commercial disputes.

In a noteworthy judgment, the Hon'ble Delhi High Court expounded on the jurisdictional scope of arbitrators concerning disputes arising from settlement agreements. The Court opined that disputes regarding the existence or validity of a settlement agreement, being inherently factual in nature, should fall under the purview of the arbitrator rather than the court. The Supreme Court of India has provided much-needed clarity on two critical aspects related to the enforcement of arbitral awards.

Legal practitioners and stakeholders in the arbitration landscape must stay informed of these developments to navigate the complexities of arbitral processes effectively.

The recent judicial pronouncements by the Supreme Court of India and the Delhi High Court are noteworthy. The Delhi High Court, in its assessment of cheque dishonour cases involving friendly loans, has provided crucial observations on the presumption under Section 139 of the NI Act. The Court recognized the challenges faced in cases involving friendly loans, which are often informal and lack a documentary trail, typically being in the form of cash transactions.

The recent judicial interpretations and rulings on the Insolvency and Bankruptcy Code, 2016 (IBC) have brought forth crucial clarifications that will significantly impact the resolution processes, creditor rights, and the legal landscape surrounding corporate insolvency.

The Reserve Bank of India (RBI) has recently introduced significant updates to its regulatory framework, focusing on the processing of e-mandates for recurring transactions and a review of the guidelines governing Non-Banking Financial Companies (NBFCs) operating Peer-to-Peer (P2P) lending platforms. These updates are aimed at improving the efficiency of digital payment systems and ensuring the integrity and proper functioning of P2P lending platforms.

The recent updates from the Securities and Exchange Board of India (SEBI) have several implications for Small and Medium Enterprises (SMEs), particularly those involved in capital markets, alternative investments, and regulated financial activities.

The Supreme Court in the case of Prem Prakash vs. Union of India reaffirmed the legal principle that "bail is the rule, and jail is the exception." This case involved the denial of bail under the Prevention of Money Laundering Act (PMLA), where the Court stressed the importance of protecting the fundamental right to liberty under Article 21 of the Constitution. In this issue we have included an article authored by our Partner, Ashish Kumar, highlighting the Supreme Court's efforts to balance the stringent provisions of the Prevention of Money Laundering Act (PMLA) with the protection of constitutional rights, particularly the right to personal liberty under Article 21.

I hope you will find this edition useful.

Best wishes,

Rajesh Narain Gupta

Founder & Chairman,
SNG & Partners

A. ARBITRATION AND CONCILIATION ACT, 1996

1. **Delhi High Court expounds: Dispute regarding settlement agreement settled falls under jurisdictional scope of Arbitrator, not the Court**

The Hon'ble Delhi High Court, reliyng upon the precedent of SBI Insurance Co Ltd v. Krish Spinning [ARB.P. 862/2023 (Delhi High Court)] reiterating the conditions required for the appointment of an arbitrator under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 opined that determining a dispute regarding the existence of a settlement agreement, being a disputed question of fact, falls under the scope of an arbitrator and not the court.

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2. **Supreme Court clarifies on critical aspects regarding the accrual of interest on amounts deposited in court and the appropriate exchange rate for converting foreign currency deposits in the context of enforcing arbitral awards.**

Supreme Court has held that "According to Order 21, Rule 1 CPC, once the judgment-debtor deposits the amount in court or tenders it to the decree-holder, interest on the deposited amount ceases. The reasoning is that the decree-holder, having the opportunity to access and use the deposited funds, should not benefit from further interest accrual.".

Apex Court Bench further stated, "the relevant date for determining the conversion rate of foreign award expressed in foreign currency is the date when the award becomes enforceable".

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B. INSOLVENCY AND BANKRUPTCY CODE, 2016 (IBC)

1. Supreme Court has ruled that assets of the subsidiaries cannot be included in the resolution plan of the holding company

The Hon'ble Supreme Court has expounded that a holding company is not the owner of the assets of its subsidiary. Therefore, the subsidiaries' assets cannot be included in the resolution plan of the holding company. Further, it has held that the financial creditor can always file separate applications under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('IBC') against the corporate debtor and the corporate guarantor. The applications can be filed simultaneously as well.

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2. NCLAT, New Delhi holds that RP cannot be made personally liable for payments made with approval of COC

The NCLAT, Principal Bench New Delhi has opined that when the Resolution Professional make the payments with the approval of the Committee of Creditors, then no personal liability can be fastened on the Resolution Professional.

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3. Delhi High Court expounds that issuance of lookout circular cannot be resorted to in every case of bank loan

It was held that issuance of lookout circular cannot be resorted to in every case of bank loan defaults or credit facilities availed for business and the Fundamental Right of a citizen of the country to travel abroad cannot be curtailed only because of failure to pay a bank loan more so when the person against whom the lookout circular is opened has not been even arrayed as an accused in any offence for misappropriation or siphoning off the loan amounts.

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4. NCLAT, New Delhi dismisses Sec 10 application for CIRP filed by Corporate Debtor himself

The NCLAT, Principal Bench New Delhi held that the protective umbrella over the assets of the Corporate Debtor is not to be misused or abused in a manner so as to become a tool for deriving undue advantage at the cost of insolvency resolution which objective unequivocally resonates in the preambular aspirations of the IBC.

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5. NCLAT, New Delhi clarifies interpretation of Sec 11 IBC

The NCLAT, Principal Bench New Delhi observed that

(a) Section 11A(2) of the IBC says that precedence is to be given to a pending application under Section 54C (which deals with application to initiate pre-packaged insolvency proceedings) if later on an application under Section 7, 9 or 10 is filed.

(b) If the application under Section 7, 9 or 10 is pending and the application under Section 54C is filed within 14 days of the filing of the Section 7, 9 or 10 application then the precedence has to be given to the said application filed u/s 54C.

(c) Section 11A(3) cast an exception as it provides that where an application under Section 54C is filed after fourteen days of the filing of the application under Section 7, 9 or 10 then it has not to be given precedence rather the precedence has to be given to the application filed under Section 7, 9 or 10 of the IBC.

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6. NCLAT, New Delhi: Oppression need not necessarily be for obtaining pecuniary benefit, it may be for obtaining power and control

The NCLAT, Principal Bench, New Delhi expounded that 'Oppression' may take different forms and need not necessarily be for obtaining pecuniary benefit. It may be due to a desire to obtain power and control, or be merely vindictive. In this background, the decision of the Tribunal cannot be faulted with.

Having said that, it was also held that act of "oppression and mismanagement" should be pre-judicial to a member of the company and not against the director of the board. Technically and legally speaking the appointment and removal of directors cannot be treated as act of "oppression and mismanagement".

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7. NCLAT, New Delhi opines that claim is liable to be dismissed if filed after more than 3 years

The NCLAT, Principal Bench, New Delhi in appeal wherein Appellant furnished only one reason that there was delay in filing the claim as they were not aware of the liquidation order; held that NCLT did not commit any error in rejecting the application as the claim was filed after more than three and a half years.

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8. NCLAT, New Delhi opines that extinguishment of criminal liability of Corporate Debtor is important to the new management

The NCLAT, Principal Bench, New Delhi opined that Section 32-A of the Insolvency and Bankruptcy Code, 2016 (IBC) has been engrafted in the legislation, which is a legislative scheme and if legislature thought that immunity be granted to the Corporate Debtor or its property, it hardly furnishes a ground for this Court to interfere. Further, that the extinguishment of the criminal liability of the Corporate Debtor is apparently important to the new management to make a clean break with the past and start on a clean slate.

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9. NCLAT, New Delhi opines that permission to file fresh petition under Sec 9 cannot be claimed as a matter of right

The NCLAT, Principal Bench, New Delhi ruled that IBC proceedings are proceedings, which insist on timeline for completion of the proceedings. Timeline is an important and cardinal principle in IBC process. When an Application under Section 9 proceeded for more than a year and are sought to be witdrawan without there being any valid reason, the Appellant, cannot claim as a matter of right that it ought to have been permitted to file a fresh petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC).

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C. MINISTRY OF CORPORATE AFFAIRS (MCA)

1. Amendment in Companies (Indian Accounting Standards) Rules, 2015

The following key amendments have been notified for the Companies (Indian Accounting Standards) Rules, 2015:

a. Under the heading "B. Indian Accounting Standards (Ind AS)", —

(A) in "Indian Accounting Standard (Ind AS) 101", —

for paragraph 39AE, the following paragraph shall be substituted, namely: —

"39AE Ind AS 117, Insurance Contracts, amended paragraphs B1 and D1, deleted the heading before paragraph D4 and paragraph D4, and after paragraph B12 added a heading and paragraph B13. An entity shall apply those amendments when it applies Ind AS 117."

b. in "Indian Accounting Standard (Ind AS) 103", —

(i) for paragraph 17, the following paragraph shall be substituted, namely: —

"17. This Ind AS provides an exception to the principle in paragraph 15:

(a) classification of a lease contract in which the acquiree is the lessor as either an operating lease or a finance lease in accordance with Ind AS 116, Leases.

(b) [Refer Appendix 1] The acquirer shall classify those contracts on the basis of the contractual terms and other factors at the inception of the contract (or, if the terms of the contract have been modified in a manner that would change its classification, at the date of that modification, which might be the acquisition date)."

The amendment rules include the removal of Ind AS 104, which previously addressed insurance contracts. This change means that the old way of reporting insurance contracts is being replaced by new rules. The update is part of an effort to modernize and align Indian accounting practices with global standards, making financial reports clearer and more accurate. This will help everyone, including investors, better understand how insurance contracts impact a company's finances.

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2. Amendment in Companies (Registration of Foreign Companies) Rules, 2014

Following are the amendments:

a. in rule 3, in sub-rule (3), for the word, " registrar", the words, "Registrar, Central Registration Centre" shall be substituted.

b. (ii) in rule 8, in sub-rule (1), the following proviso shall be inserted, namely:-

"Provided that the documents for registration by a foreign company referred to in sub-rule (3) of rule (3) shall be delivered in Form FC-1 to the Registrar, Central Registration Centre."

Amendment will come into force with effect from 09th day of September, 2024.

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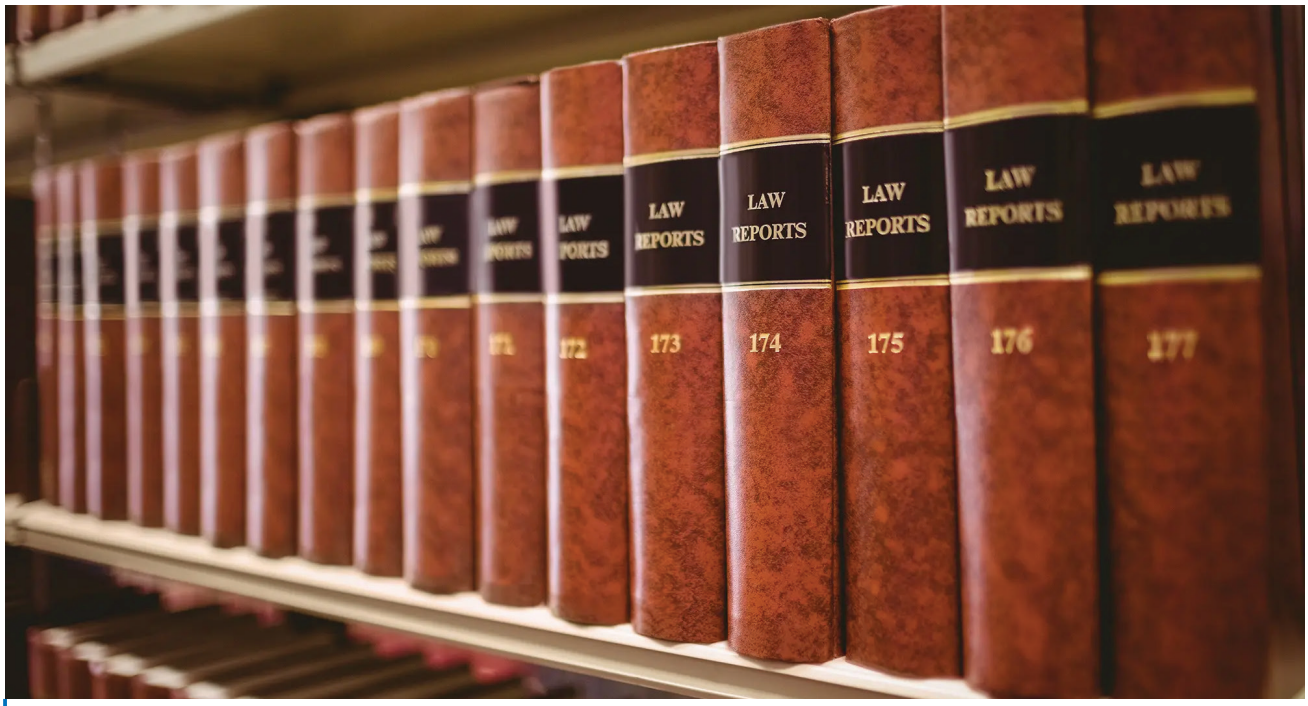

D. NEGOTIABLE INSTRUMENTS ACT, 1881

1. Supreme Court opines that liability under Sec 141 NI Act arises from the conduct or omission of the individual involved, not merely their position within the company

The Hon'ble Supreme Court (while deciding the question Whether the signatory of the cheque, authorized by the "Company", is the "drawer" and whether such signatory could be directed to pay interim compensation in terms of section 143A of the Negotiable Instruments Act, 1881 leaving aside the company?) opined that distinction between legal entities and individuals acting as authorized signatories is crucial. Authorized signatories act on behalf of the company but do not assume the company's legal identity. This principle, fundamental to corporate law, ensures that while authorized signatories can bind the company through their actions, they do not merge their legal status with that of the company and thus directors or other individuals cano tbe held to be personally liable for interim compensation u/s 143A of the NI act.

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2. Delhi High Court while recognizing friendly loans expounds: Presumption under Section 139 of NI Act must be properly assessed

Delhi High Court assessed the difficulty faced in cheque dishonour cases involving friendly loans, observing that they are usually in the form of cash having no document trail, and added that, "It would be unwise for the court to not acknowledge that friendly cash loans".

The Bench further declared that a statement made under section 313, CrPC cannot rebut the presumption raised under Section 139, NI Act.

HC Bench remarked, ".... his statement under Section 313 CrPC cannot be read as evidence for the purpose of rebutting presumption raised under Section 139 NI Act".

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E. RESERVE BANK OF INDIA

1. Processing of e-mandates for recurring transactions

It has been decided to include auto-replenishment of FASTag and NCMC, as and when the balance falls below a threshold set by the customer, under the e-mandate framework. Payments for auto-replenishment, since they are recurring in nature but without any fixed periodicity, will be exempt from the requirement of pre-debit notification.

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2. Review of Master Direction - Non-Banking Financial Company – Peer to Peer Lending Platform (Reserve Bank) Directions, 2017

It has been observed that some of these platforms have adopted certain practices which are violative of the said Directions. Such practices include, among others, violation of the prescribed funds transfer mechanism, promoting peer to peer lending as an investment product with features like tenure linked assured minimum returns, providing liquidity options and at times acting like deposit takers and lenders instead of being a platform. Such violations, when observed, have been dealt with bilaterally by the Reserve Bank of India for remediation.

In view of the above, it has been decided to elaborate and clarify certain provisions with some modifications for proper implementation of the Directions. The amended provisions of the Directions are enclosed in the Annex to this circular.

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F. SECURITIES AND EXCHANGE BOARD OF INDIA

1. Institutional mechanism by Asset Management Companies for identification and deterrence of potential market abuse including front-running and fraudulent transactions in securities

SEBI had proposed putting in place a structured institutional mechanism at the end of AMCs, which can proactively identify and deter instances of market abuse.

Accordingly, the SEBI (Mutual Funds) Regulations, 1996 were amended.

In view of the amendments, AMCs shall put in place an institutional mechanism for identification and deterrence of potential market abuse including front-running and fraudulent transactions in securities. This mechanism shall consist of enhanced surveillance systems, internal control procedures, and escalation processes such that the overall mechanism is able to identify, monitor and address specific types of misconduct, including front running, insider trading, misuse of sensitive information etc.

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2. Amendment to Master Circular for Infrastructure Investment Trusts (InvITs) dated May 15, 2024 - Board nomination rights to unitholders of InvITs

to promote ease of doing business and based on the request of the industry and recommendation of Hybrid Securities Advisory Committee (HySAC), it is proposed to insert the following proviso under paragraph 22.3.1. (b) of Master Circular for Infrastructure Investment Trusts dated May 15, 2024:

"Provided that the above restriction relating to the right to nominate a Unitholder Nominee Director shall not be applicable if the right to appoint a nominee director is available in terms of clause (e) of sub-regulation (1) of regulation 15 of the SEBI (Debenture Trustees) Regulations, 1993."

This circular shall come into force with immediate effect.

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3. Amendment to Master Circular for Real Estate Investment Trusts (REITs) dated May 15, 2024 – Board nomination rights to unitholders of REITs

to promote ease of doing business and based on the request of the industry and recommendation of Hybrid Securities Advisory Committee (HySAC), it is proposed to insert the following proviso under under paragraph 18.2.2. (b) of Master Circular for Real Estate Investment Trusts dated May 15, 2024:

"Provided that the above restriction relating to the right to nominate a Unitholder Nominee Director shall not be applicable if the right to appoint a nominee director is available in terms of clause (e) of sub-regulation (1) of regulation 15 of the SEBI (Debenture Trustees) Regulations, 1993"

This circular shall come into force with immediate effect.

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4. Amendment to Circular for mandating additional disclosures by FPIs that fulfil certain objective criteria

SEBI has decided that University Funds and University related Endowments shall not be required to make the additional disclosures as specified inPara1(xiii) of Part C of the FPI Master Circular, subject to compliance with certain conditions.

The following is inserted in the FPI Master Circular After clause (g) of Para 1(xiv) of Part C:

"(h) University Funds and University related Endowments, registered or eligible to be registered as Category I FPI, subject to them fulfilling the following additional conditions:

i. Indian equity AUM being less than 25% of global AUM
ii. Global AUM being more than INR 10,000 crore equivalent
iii. Appropriate return/filing to the respective tax authorities in their home jurisdiction to evidence the nature of a non-profit organization exempt from tax"

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5. Introduction of Liquidity Window facility for investors in debt securities through Stock Exchange mechanism

SEBI has proposed to introduce a Liquidity Window facility framework by use of put options exercisable on pre-specified dates or intervals, as specified under Regulation 15 of the NCS Regulations ,in the manner outlined in this circular attached as Annexure A.

Following are some of the heads:

a. Choice of the issuer

b. Prospective applicability

c. Authorisation and guardrails

d. Period of operation of liquidity window

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6. Guidelines for borrowing by Category I and Category II AIFs and maximum permissible limit for extension of tenure by LVFs

To facilitate ease of doing business and provide operational flexibility, it has been decided to allow Category I and Category II AIFs to borrow for the purpose of meeting temporary shortfall in amount called from investors for making investments in investee companies ('drawdown amount').

Further, Existing LVF schemes who have not disclosed definite period of extension in their tenure in the PPM or whose period of extension in tenure is beyond the permissible five years, shall align the period of extension in tenure with the requirement as given at para 6 above, within three months from the date of this circular, i.e., on or before November 18, 2024.

This circular shall come into force with immediate effect.

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7. Modalities for migration of Venture Capital Funds registered under erstwhile SEBI (Venture Capital Funds) Regulations, 1996 to SEBI (Alternative Investment Funds) Regulations, 2012

Securities and Exchange Board of India ("SEBI") vide Circular no SEBI/HO/AFD/AFD-POD- 1/P/CIR/2024/111 provided outline for modalities for migration of Venture Capital Funds ("VCFs") registered under SEBI (Venture

Capital Funds) Regulations, 1996 ("VCF Regulations") to SEBI (Alternative Investment Funds) Regulations, 2012 ("AIF Regulations"). This migration process is intended to provide these VCFs facility regarding handling of the unliquidated investments of their schemes upon expiry of tenure.

While opting for migration to AIF Regulations, VCFs having only schemes whose liquidation period (in terms of Regulation 24(2) of VCF Regulations) has not expired, shall be subject to the following conditions :

a. The facility of migration to AIF Regulations shall be available till July 19, 2025.
b. The tenure of scheme(s)of the Migrated VCF, upon migration, shall be determined in the following manner:
    - In case a definite tenure was disclosed in the Private Placement Memorandum (PPM)of the scheme(s)under the VCF Regulations, such scheme(s) shall continue with the same tenure upon migration.
    - In case a definite tenure was not disclosed in the PPM of the scheme(s),the residual tenure of the scheme(s)of the Migrated VCF shall be determined prior to the application for migration, with the approval of 75percentof investors by value of their investment in the scheme(s).

Upon migration to AIF Regulations, the investors on-boarded, investments held and units issued by the VCF or scheme(s)of the VCF registered under VCF Regulations, shall be deemed to be that of the Migrated VCF or its scheme(s), under the AIF Regulations.

This circular shall come to force with immediate effect.

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8. Cybersecurity and Cyber Resilience Framework (CSCRF) for SEBI Regulated Entities (REs)

The CSCRF framework is broadly based on two approaches: cybersecurity and cyber resilience. Cybersecurity approach covers various aspects from governance measures to operational controls and the cyber resilience goals include Anticipate, Withstand, Contain, Recover, and Evolve.

The divided into four parts:

a. Part I: Objectives and Standards: The objectives highlight goals which a security control needs to achieve. The standards represent established principles for compliance with CSCRF.
b. Part II: Guidelines: The guidelines recommend measures for complying with standards mentioned in this document. However, few of the guidelines are mandatory in nature and shall be complied by REs as applicable.
c. Part III: Structured formats for compliance
d. Part IV: Annexures and References

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G. PREVENTION OF MONEY LAUNDERING ACT

Prem Prakash Vs. Union of India through Directorate of Enforcement
2024 SCC OnLine SC 2270 (decided on August 28, 2024)

BAIL NOT JAIL

In a matter which carries great significance and implications both for an accused as well as the enforcement agencies and which can be perceived as a signal by the Apex Court to prevent misuse of law and uphold Constitutional rights; in the recent judgment of *Prem Prakash vs. Union of India through Directorate of Enforcement*, the Apex Court has reiterated and reinforced the very important and well accepted principle of law that 'bail is rule and jail is exception'.

While India fights the plague of corruption and black money through many laws including the Prevention of Money Laundering Act, 2002; Prevention of Corruption Act, Fugitive Economic Offenders Act, 2018, Prohibition of Benami Property Transactions Act, 1988, Black Money (Undisclosed Foreign Income and Assets and Imposition of Tax) Act, 2015 etc., the laws have received mixed reviews from the society. While many call them as the need of the hour, yet others refer to them as draconian. Legal luminaries are themselves divided on the subject.

In the context of the Prevention of Money Laundering Act, 2002, the same being a stringent law, often the trial courts and the High Courts have chosen to err on the side of caution by refusing to grant bail to accused, thereby in many cases leading to infringement of the fundamental right of the accused as enshrined in Article 21 of the Constitution.

The matter of *Prem Prakash (supra)* before the Apex Court saw the challenge to the judgment of the High Court of Jharkhand dismissing a regular bail application in connection of an offence registered under *Section 3 (Offence of money-laundering)* and Section 4 *(Punishment for money-laundering)* of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA' or the 'Act'). For the purposes of this Article, we are confining ourselves only to *Section 45 (Offences to be cognizable and non-bailable)* of the Act and its implications and interpretation by the Apex Court in the above mentioned matter.

Setting aside the judgment of the High Court, the Apex Court inter alia emphasized on the relevance of the twin conditions for bail under section 45(1) of the PMLA. The said section is reproduced as under:

"45. Offences to be cognizable and non-bailable. *(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless-*

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government."

The Apex Court considering the weight of Article 21 of the Constitution *(Protection of life and personal liberty), i.e., "no person shall be deprived of his life or personal liberty except according to the procedure established by law", highlighted that the principle of "bail is the rule and jail is the exception"* is only paraphrasing of Article 21. Liberty of the individual always being the Rule and deprivation being the exception. The Apex Court emphasized that deprivation can only be by the procedure established by law, which procedure has to be valid and reasonable and thus clarified that Section 45 of the PMLA did not re-write this principle to mean that deprivation is the norm and liberty is the exception.

As if cautioning on the trend of the enforcement agencies in detaining the accused for long periods of time on the pretext of completion of trial, the Apex Court referring to the cases of *Manish Sisodia (II) v. Directorate of Enforcement (Criminal Appeal No. 3295 of 2024) and Ramkripal Meena vs. Directorate of Gulam Nabi Shaikh v. State of Maharashtra, 2024 SCC OnLine SC 1693*, observed that where the accused had for a considerable number of months, already been in custody and there being no likelihood of conclusion of trial within a short span, the rigours of Section 45 of PMLA can be suitably relaxed to afford conditional liberty. This is a significant observation from the Supreme Court to ensure that punishment without trial should not become a norm where an accused is imprisoned for prolonged periods before being pronounced guilty.

On the issue of the scope of inquiry under Section 45 *(referring to the case of Vijay Madanlal Choudhary v. Union of India, (2022 SCC OnLine SC 929))*, the Apex Court has emphasized that a Court need not dive deep into the merits of the case while considering the application of grant of bail in PMLA and only a view of the Court based on the available material available on record was required. It observed that the words used in Section 45 are *"reasonable grounds for believing"* which means that the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt.

Conclusion

It thus becomes clear that while the twin conditions as provided under section 45 of the PMLA, though restrict the right of the accused to grant of bail, but it cannot be said that this is absolute, i.e., the said conditions under section 45 cannot impose an absolute restraint on the grant of bail. While the discretion is vested in the court, however, in its judicial exercise of such discretion, the courts must bear in mind, as cautioned by the Supreme Court, that the same is not arbitrary or irrational, is judicial, guided by law and most important of all, takes into consideration Article 21 of the Constitution which enjoys a higher right than any other law, being the constitutional mandate. As such any law including Section 45 of the PMLA should align itself to the protections provided by the Constitution to ensure that laws no matter how stringent are not misused to deprive someone of personal liberty in cases which may otherwise be simple and straightforward.

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