Vol. 11 | November 2022

Official Newsletter

Clasis Law

Table of Content

GUEST ARTICLE

New ESG Reporting and Disclosure Requirements - Changing Landscape in India

Author
Divya Kumat
Executive Vice President, Chief Legal Officer & Company Secretary
Datamatics Global Services Limited

"We are in the beginning of a massive transition towards a sustainable economy and society. You can either be hit by the wave, ride the wave, or make the wave." Dr. Jason Jay

Environmental, social and governance (ESG) is about pursuing ethical and responsible business practices with focus on social and environmental equity along with economic development. In India, when we talk about sustainability, there have been two watershed moments—Corporate Social Responsibility (CSR) mandatory reporting and spending and penalties were subsequently introduced in the year 2021, followed by mandatory reporting and disclosures under the Business Responsibility and Sustainability Report (BRSR).

Sustainability of the businesses amidst and post COVID-19 pandemic has drawn the attention of many stakeholders. COVID-19 proved to be a wake-up call for the decision makers, as statistically more than 10,000 companies in India shut down their operations in the middle of this pandemic. Prior to this pandemic, the importance of sustainable development and significance of non-financial factors have always been secondary to the primary motive of earning profits for many organizations. However, a substantial shift in the business goals is expected post this pandemic, making sustainable development a priority along with other financial objectives.

Emerging Trends in ESG in India and other countries are now more focused towards creation of measurable and meaningful change for people, customers, communities and the World. Corporates are realizing that ESG is more than a good intent or ticking boxes in compliance checklist. It is about smarter and righteous way of doing business for a stronger world. It's time to step forward.

The ethos of responsible business is based on the principle of business being accountable to all its stakeholders. In India, ESG was first embedded in the form of voluntary guidelines in the year 2011 and later incorporated in the Companies Act, 2013, which envisages wider responsibilities for a Company and its Directors to its stakeholders - employees, community, and environment. In keeping with global developments, these voluntary guidelines were upgraded and updated further in the year 2019. Initially, the market regulator in India i.e. Securities and Exchange Board of India [SEBI] has mandated top 500 listed companies by market capitalisation to make disclosures on business responsibility and sustainability indicators contained in the Government's voluntary guidelines since 2012 through Business Responsibility Reporting (BRRs). However, on May 10, 2021, SEBI introduced Business Responsibility and Sustainability Report [BRSR] and mandated that the top 1000 listed entities to report their sustainability performance in order to maintain transparency with stakeholders as a part of their annual reports and also the report goes to the stock exchange (s) where the company's securities are listed. BRSR is a departure from the BRR format and as compared to BRR, BRSR is more comprehensive, and an effective communication tool for disclosing an organization's non-financial performance. BRSR reporting and disclosure framework as per the new format has been made voluntary for FY 2021-22 and mandatory from FY 2022-23 in a more structured manner as can be seen from below:

Reporting and Disclosure Framework under BRSR:

I. Section A: General Disclosures - Details of the listed entity; Products/services; Operations; Employees; Holding, Subsidiary and Associate Companies (including joint ventures); CSR Details; Transparency and Disclosures Compliances.

II. Section B: Management and Process Disclosures - This section is aimed at helping businesses demonstrate the structures, policies, and processes put in place towards adopting the (National Guidelines on Responsible Business Conduct) NGRBC Principles and Core Elements.

III. Section C: Principle Wise Performance Disclosures - This section is aimed at helping entities demonstrate their performance in integrating the Principles and Core Elements with key processes and decisions. The information sought is categorized as "Essential" and "Leadership". While the essential indicators are expected to be disclosed by every entity that is mandated to file this report, the leadership indicators may be voluntarily disclosed by entities which aspire to progress to a higher level in their quest to be socially, environmentally and ethically responsible.

- *Principle 1*: Businesses should conduct and govern themselves with integrity and in a manner that is ethical, transparent and accountable.
- *Principle 2*: Businesses should provide goods and service in a manner that is sustainable and safe. This principle encourages businesses to understand every material sustainability issue across their product life cycle and value chain.
- *Principle 3*: Businesses should respect and promote the well-being of all employees, including those in their value chains. This principle identifies the well-being of an employee and the welfare of his/ her family.
- *Principle 4*: Businesses should respect the interests of and be responsive to all its stakeholders. This principle brings into light that businesses have a responsibility to maximize the positive effects and minimize and mitigate the negative impacts of the products, operations and practices on their stakeholders.
- *Principle 5*: Businesses should respect and promote human rights. This principle is inspired, informed and guided by the Constitution of India and the International Bill of Rights and recognizes the primacy of the State's duty to protect and fulfil human rights.
- *Principle 6*: Businesses should respect and make efforts to protect and restore the environment. This principle gives preference to environmental issues that are interconnected at the local, regional and global levels of doing businesses to address the problems like pollution, biodiversity conservation, sustainable use of natural resources and climate change in a comprehensive and systematic manner.

- *Principle 7:* Businesses, when engaging in influencing public and regulatory policy, should do so in a manner that is responsible and transparent. This principle recognizes the legitimacy of businesses to engage with governments for redressal of a grievance or for influencing public policy.
- *Principle 8*: Businesses should promote inclusive growth and equitable development. This principle mentions the need for collaboration amongst businesses, Government agencies and civil society in this development agenda.
- *Principle 9:* Businesses should engage with and provide value to their consumers in a responsible manner. It recognizes consumers having freedom of choice for the usage of goods and services and the enterprises strive to provide the products that are safe, competitively priced, easy to use and safe to dispose of, for the benefit of their consumers.

While, there is no exhaustive list of parameters and standards of disclosing the ESG criteria, there are certain common factors which are universally applied while determining the ESG metrics adopted by the organization:

Environmental: The BRSR has placed significant thrust on environmental compliances by mandating many quantitative and qualitative disclosures with respect to energy consumption, water withdrawal, air emissions (including for greenhouse gas emissions), waste management, sustainable sourcing thereby adhering to Principles 2 and 6 laid down by the NGRBC as detailed above. The company may have the following environmental factors as part of ESG:

- Using the energy more efficiently;
- Using the renewable energies which emit less greenhouse gas instead of traditional modes of generating energy Proper waste management;
- Proper water management;
- Steps taken to reduce the air and water pollution;
- Sustainable use of environmental resources;
- Implementation of environmentally friendly policies such as no deforestation or animal welfare;
- True and complete disclosure about the environmental policies.

Social: BRSR lays down comprehensive reporting requirements regarding measures undertaken for the wellbeing of employees, quantifying gender and social diversity indicators, performance and career development policies, health and safety management, accessibility of work places, equal opportunity, turnover rates and welfare benefits. Additionally, businesses are also required to make disclosures on social impact assessments of projects, restrictive trade practices etc. These disclosures are intended to persuade compliance with Principles 3, 4, 5, 8 and 9 of the NGRBC. The following factors are the social indicators which helps in determining the company's role in the development of society.

- Implementation of gender neutral and no discrimination policies;
- Providing safe and hygienic working conditions for employees;
- Formulating labor standards to ensure fair wages and protection of human rights;
- Development of good relationship with the local communities;
- Providing customer satisfaction;
- Protection of data and respecting the privacy of the personnel;
- Resolution of conflict between the organization and personnel harmoniously;

- Prioritizing the health and safety of employees.

Governance: This criterion focuses upon the corporate policies and standards for governing and running of organizations. Such corporate policies and standards define the roles, responsibility and action of each stakeholder of the organization. By defining the roles and responsibilities, it is easier to meet the interest and develop consensus among stakeholders for the smooth running of organization. Corporate governance is a long-term strategy, and it may include the following indicators which will be in accordance with Principles 1 and 7 laid down by the NGRBC: -

- Tax saving strategy;
- Board composition and independence;
- Committee structure;
- Anti-Corruption and Anti Bribery policies;
- Protecting the interests of shareholders;
- Policies on donations and political contribution;
- Lobbying;
- Risk Management;
- Compensation to executives;
- Whistleblower scheme;
- True and fair disclosure of abovementioned indicators

ESG Regulatory Landscape Across the World

Apart from India, various jurisdictions have also introduced and recognized the importance of ESG disclosures in their investment sector.

(a) Europe is one of the global leaders in developing the regulatory environment of ESG. The European Union Taxonomy Regulation ("Taxonomy Regulation") is a EU wide regulation that is expected to come into effect from 2022. Further, the EU has released the Sustainable Finance Disclosure Regulation ("SFDR"). The SFDR came into effect from March 2021 and they mandate asset managers to disclose and classify their products and sustainability measures on the basis of ESG norms, under one of three categories: dark green (highly sustainable), light green (sustainable) and unsustainable. The Non-Financial Reporting Directive ("NFRD") is another part of the disclosure regime in the EU. The NFRD has already been closely implemented in Germany.

(b) In 2015, when the Modern Slavery Act came into effect in the United Kingdom, companies were forced to make disclosures about social concerns such as slavery and trafficking. The Government is now working towards increasing transparency in supply chains which means more mandatory disclosure regulations are anticipated. After the Brexit, the UK opted to not abide by the EU disclosure norms. It has plans of releasing its own framework.

(c) In 2019, France's Financial Markets Authority established the Climate and Sustainable Finance Commission. The main role of this body is to regulate and supervise matters related to sustainable investments and finance in the country.

(d) The United Arab Emirates, another one of the healthiest regulatory environments for investment, also continues to take strides in the direction of ESG. The UAE Securities & Commodities Authority ("SCA") has issued a Master Plan for Sustainable Capital Markets to support and drive progress on the achievement of the UAE's sustainability agenda.

(e) The Dubai Financial Services Authority ("DFSA") has made significant changes and amendments from time to time to make the Dubai International Finance Centre ("DIFC") a more sustainable platform for investors. Most recently, in the Net Zero 2050 Initiative and the National Climate Change Plan 2017-50, the UAE has demonstrated its sustainability roadmap to the rest of the world.

(f) Recently, Turkey too has taken its first steps in incorporating ESG into its financial sector by joining hands with the United Nations Development Program to draft two reports that reflected the present scenario of sustainable investing.

(g) The regulatory regime in Hong Kong is set up and controlled by the Securities and Futures Commission ("SFC") and the Hong Kong Monetary Authority ("HKMA"). The SFC considers governance, risk management, investment management and disclosure as the most vital elements of the greenwashing prevention process. The disclosure requirements have two sides: they reveal how the climate affects the fund, and also how the fund shall affect the climate.

(h) Singapore has always been a key promoter of sustainability at a global level. It has a Green Finance Industry ("GFIT"), which is a regulatory body that has been established and developed to improve disclosures and promote green solutions to the finance sector.

(i) In India, ESG mandates are an emerging trend. Corporate giants like Wipro, Infosys and Tech Mahindra are listed on the Dow Jones Sustainability Index and the returns garnered by them are proof that companies that follow ESG norms are bound to do financially well. All of these disclosures align with the ESG model proposed by global reporting frameworks such as the Global Reporting Initiative (GRI) and The Sustainability Accounting Standards Board (SASB). GRI is a not-for-profit organization that works for a sustainable global economy. According to the latest statistics, organizations and companies in over 90 countries use the GRI Guidelines. SASB is a US-based unique accounting standard that identifies sustainability issues that are likely to affect the financial condition or operating performance of companies within an industry.

Board's Role on ESG concerns

It is essential for the Board of Directors to involve themselves actively in the planning around ESG norms, in order to ensure that the good governance lays the foundation for ESG implementation as long term strategy for the company. The ESG metrics will always differ from company-to-company and is dependent on the ESG reporting frameworks that offer a level of consistency and financial materiality and measurable disclosures among companies within a given industry. It is pertinent to note that in India currently, there is no law which directly deals with the liability of the Board of Directors on climate change per se, but at the same time, there are several broad provisions pertaining to environmental responsibility of directors in various environmental laws and corporate laws as well. In context of corporate laws, there are two broad duties of directors. First is statutory duty i.e. duty case by law, for eg. Duty to deal rightfully with the assets of the company or duty to provide disclosures. The second is fiduciary duty i.e. duty to act in best interest of the company eg. 'trust like' duties. Section 166 of the Companies Act provides for the overarching duties of a director. Sub-section (2) says, "...director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment." Further, sub-section (3) says, "... director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment." Under section 166 of the Companies Act, 2013, courts have recognized duties of directors as "trust-like" duties wherein directors are seen as fiduciaries, and as such, failure to observe such duty may amount to breach of trust under the trust law as well as Companies Act.

The Supreme Court of India, in the matter of National Textile Workers' Union & Others v. P.R. Ramakrishnan & Another, 1983 SCR (3) 12, observed that, "The duties of good faith which are imposed by this fiduciary relationship are virtually identical with those imposed on trustees, wherein the violation of fiduciary duty of the director has been taken to include violation u/s 166 of the Companies Act, 2013 as well as Section 88 of the Indian Trust Act. However, Directors cannot be held vicariously liable nor can they be held responsible under criminal liability, unless director's consent or connivance that the offence was committed and that the director did not exercise due diligence having knowledge of the offence to prevent the commission of the offence. Besides, there are various environmental laws in India, such as, Environment Protection Act, 1986; the Air (Prevention and Control of Pollution) Act,1981; the Water (Prevention and Control of Pollution) Act, 1974; etc, which specify liability on directors and/or other principal officers in case of non-compliance with provisions of these laws. While these enacted laws may not expressly deal with 'climate change', however, given that climate change itself is a product of multiple environmental issues, the laws are quite relevant in the context. Further, section 134 of the Companies Act requires the board of directors to specify in their board report details of the conservation of energy, technology absorption, including the steps taken or impact of conservation of energy, the steps taken by the company for utilizing alternate sources of energy, and the capital investment in energy conservation equipment. Besides, the board's report should also include a statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the board may threaten the existence of the company. Contravention of section 134 attracts a penalty on both the company and on the directors.

Regarding Directors' duties in relation to climate change, it is highly recommended that directors ensure compliances of various ESG related regulatory and legal disclosure requirements; They should assess the financial impacts of legislative measures like imposition of fines for polluting activities or tax incentives for low carbon activity on the company; and they should consider climate change effects as a factor in their decision-making pursuant to the general fiduciary obligations of directors owed to their companies. These aspects shall adequately protect the directors' liability for climate change.

Challenges being faced by corporates in India

The corporates in India, who are dealing with perceptions of stakeholders on the ESG compliant company and the herculean reporting and disclosure requirements in terms of collection of data which is measurable are finding it an uphill task. To add to their worries is the pressure on margins and the substantial advisory and implementation cost of ESG. Some of the common challenges are: (i) challenges relating to the transition process; (ii) newer companies have less experience in managing and reporting on business sustainability; (iii) the format for BRSR is restrictive in nature as it does not seek sector-specific information in its reporting; (iv) several companies are choosing to differentiate between voluntary disclosures and mandatory disclosures and prefer disclosures that are called for mandatorily; (v) reporting requirements are very comprehensive and time consuming. (vi) key officers are debating whether to focus on business growth and margins or to spend significant time on ESG committee meetings, collating the reporting and disclosure requirements etc. (vii) advisory on ESG is expensive for mid-level companies.

Conclusion

Change is the only constant in life. While, initially the pain of transitioning to mandatory ESG compliances will be sticky, early adoption of ESG “Regulatory Wise” practices will be critical for businesses. Firms will be required to comply with many changing ESG rules, which span everything from governance to disclosure obligations. Businesses that understand the need to adjust to changing socio-economic and environmental conditions are better positioned to spot growth advantages and handle competitive forces. The cost of climate inaction is way higher than the actions required to mitigate the risks. In parallel, ESG communication is assuming great significance, as it enhances stakeholder relationships and public perception. In India, many companies that are not required to follow the ESG criteria set by the regulators are voluntarily and pro-actively making compliances and using such communication to talk about their future business strategy.
The current world that has experienced the pandemic scenario with COVID-19 virus, has observed that those organizations which have had strong foundation with ESG strategy were resilient and agile to adapt to the risks and protect the interest of all concerned stakeholders. ESG ratings creates right awareness and perceptions about the governance and conduct of the companies and impact the profitability.

Disclaimer - *This article was first published in IICJ - a Cambridge, UK publication. The views expressed here are of the author alone and do not represent the views of any organization and readers should not act based on this information without seeking professional legal advice.*

References

1. *SEBI Circular No.: SEBI/HO/CFD/CMD-2/P/CIR/2021/ 562 on “Business Responsibility and Sustainability Reporting by listed entities” dated May 10, 2021.*
2. *National Guidelines on Responsible Business Conduct issued by the Ministry of Corporate Affairs.*
3. *PwC Report on ESG Reporting.*
4. *Newspapers – News articles on ESG Governance.*
5. *ESG Reporting Guide – Nasdaq.*
6. *EY – ESG Reporting Evolution article.*
7. *ESG Article on Mondaq platform.*
8. *Fiona Reynolds, COVID-19 accelerates ESG trends.*
9. *Harvard Law School Forum on Corporate Governance (Nov 05, 2021).*
10. *Matthew Bell, Why ESG performance is growing in importance for investors.*

Whether an offence under Section 138 of the Negotiable Act, 1881 would be attracted if the cheque does not represent legally enforceable debt at the time of encashment?

Introduction

In a recent judgement, the division bench of the Supreme Court of India **("SC")** in the case of *Dashrathbhai Trikambhai Patel Vs Hitesh Mahendrabhai Patel*(1)., has held that for the commission of an offence under Section 138 of the Negotiable Instrument Act,1881 **("Act")** the cheque that is dishonoured must represent a "legally enforceable debt" on the date of maturity or presentation.

Facts

On 2nd April, 2014, the Appellant deposited a cheque dated 17th March, 2014 that was dishonoured due to insufficient funds. Thereafter, the Appellant issued the statutory notice dated 10th April, 2014 calling upon the Respondent to pay a debt of Rs. 20,00,000. The said statutory notice was replied by the Respondent vide reply dated 25th April, 2014 denying allegations stating the said cheque was given by way of security.

The Appellant filed a criminal complaint against the Respondent for the offence under Section 138 of the Act. The trial court acquitted the Respondent on the ground that a sum of Rs. 04,09,315 was paid as part payment. It was also categorically recorded by the Courts below that a sum of Rs. 04,09,315 that was paid by the first respondent was paid to partly fulfil the debt of Rs. 20,00,000.

The Appellant thereafter filed an appeal in the High Court of Gujarat and the same was dismissed affirming the trial court's finding that the cheque was presented without recognising that the part payment was made. The Appellant thereafter preferred present appeal before the SC.

Submissions by the Parties

The Appellant submitted that there is nothing on record to show that the payment of Rs. 04,09,315 was made towards the discharge of debt of Rs. 20,00,000. The said part payment was made before the issuance of cheque. Further, the Respondent did not make the payment of the sum that was due since the statutory notice was served upon the Respondent on 15th April 2014.

The Respondent submitted that the term debt or other liability used in Section 138 of the Act has been defined in the explanation clause to mean "legally enforceable debt or other liability". The demand made in statutory notice must be for a sum that is legally enforceable. If the Respondent has paid the part of the debt, then the statutory notice seeking the payment of entire amount without endorsement under section 56 of the Act would not be sustainable. The Appellant cannot initiate the action if the cheque is represented and dishonoured without deducting or endorsing the part payment.

Analysis by the Court and Conclusion

The Court observed that as the part payment made is made after the issuance of post-dated cheque, the legally enforceable debt at the time of encashment is less than the sum represented in cheque. Further, the court referred to the judgment of Sampelly *Satyanarayan Rao V/s. Indian Renewable Energy Development Agency Limited(2)* wherein it was held that the test for application of the Section 138 is whether there was a legally enforceable debt mentioned in cheque and that if the answer is affirmative then the provision of 138 will be attracted. The court referred to *Sripati Singh Vs State of Jarkhand(3)* wherein this court observed that if a cheque is issued as security and if the debt is not repaid in any other form before the due date or if there is no understanding or agreement between the parties to defer the repayment, the cheque would mature for repayment. The court referring to *Sunil Todi Vs State of Gujarat(4)* wherein the division bench expounded the meaning of the phrase "debt or other liability and the court observed that post dated cheque issued after the debt was incurred would be covered within the meaning of debt. Lastly the Hon'ble court referred to *Shree Corporation Vs Anilbhai Puranbhai Bansal(5)* wherein the court has held that when part payment is made after the cheque is drawn, the payee has the option to either take new cheque for the reduced amount or by making an endorsement on the cheque acknowledging that the part payment was made as per provisions of section 56 of the Act. Thus, when an endorsement is made the instrument can still be used to negotiate the balance amount. If the endorsed cheque presented for the balance amount is dishonoured then the drawee can take recourse to the provisions of the Section 138 of the Act. If the unendorsed cheque is dishonoured on presentation, then the offence under 138 of the Act will not be attracted since the cheque does not represent legally enforceable debt at the time of encashment.

After the detailed contemplation, the court held that for commission of an offence under the Section 138 of the Act the cheque dishonoured must represent legally enforceable debt on date of presentation. If the part debt or whole sum is paid between the period when cheque is drawn and when it's encashed upon maturity, then the enforceable debt on the maturity will not be the sum represented on cheque. Part debt must be endorsed as prescribed under the provisions of the Section 56 of the Act. The Respondent in the present case has made part payment after the debt was incurred and before the cheque was encashed on maturity. The sum of Rs. 20,00,000 represented on cheque was not the legally enforceable debt on the maturity. Thus, the offence under section 138 cannot be deemed to be committed. Further, the court held that since the Respondent has not committed an offence under section 138, the validity of the form of notice need not be decided. Thus, the appeal against order of the High Court of Gujarat was dismissed.

(1) *Criminal Appeal No. 1497 of 2022*
(2) *(2016) 10 SCC 458*
(3) *2021 SCC OnLine SC 1002*
(4) *Criminal Appeal No. 1446 of 2021*
(5) *2018 (2) GLH 105*

Courts cannot question on the validity of registration of trademark when no objection has been raised by defendant

The Delhi High Court in its recent Judgment(1) in *Peps Industries Private Limited vs Kurlon Limited(2)* has clarified, inter- alia, the following:

(i) It would not be apposite for the Court to examine the validity of the trademark registration if such an objection has not been raised by the Defendant; and
(ii) The law recognizes that even a descriptive mark can be registered and exclusivity can be claimed if, before the date of registration, it has acquired a distinctive character as a result of its use made or is a well-known trademark.

Brief Facts

Peps Industries Private Limited **("Peps/Plaintiff")** claimed to be using the mark "NO TURN" in respect of mattresses, wall beds etc. since January 15, 2008. Additionally, the mark "NO TURN" is registered in favour of Peps vide registration dated February 4, 2011 under Class 20 in respect of goods such as mattresses, wall beds, adjustable beds, coir mats, spring mattresses, sofas, pillows, cushions, seats and other related products. Similarly, Kurlon Limited**("Kurlon/Defendant")** also claimed to be using the same mark "NO TURN" for mattresses since 2007.

Upon becoming aware about the use of the mark "NO TURN" by Kurlon, Peps filed a suit for permanent injunction against Kurlon. Along with the plaint, Peps also filed an application for ad *interim* injunction. By its order dated March 6, 2020 **("impugned judgment")**, the Ld. Single Judge dismissed Pep's application for *ad interim* injunction on the ground that the mark "NO TURN" is a descriptive mark in relation to its use on mattresses. The impugned judgment was challenged by Peps before the Division Bench of the Delhi High Court.

Arguments raised by Both Parties

Peps contended that the impugned judgment is erroneous, as despite accepting that Peps is the registered owner of the trademark "NO TURN" and has been continuously using it since January 15, 2008, the Court declined to restrain Kurlon who was been admittedly using the same mark in respect of the products in question and had also not been able to prove prior usage.

It was also, *inter-alia*, argued by Peps that Kurlon had not taken any defence or raised any issue that the mark "NO TURN" was a descriptive mark for which no registration could have been granted in favour of Peps. Thus, in the absence of any challenge to the validity of the registration of the mark in favour of Peps on the ground of being descriptive, the Ld. Single Judge could not have denied an interim injunction on the basis of the mark being descriptive in nature. On the other hand, Kurlon defended the impugned judgment by arguing that even if it had not taken objection to the impugned mark being generic and descriptive, the Court could still examine the issue of whether the Plaintiff's mark is descriptive or not.

Observations by Division Bench

After hearing the arguments by both parties, the Division Bench formulated the following three questions for its consideration:
1. Whether Kurlon, who had applied for registration of the mark "NO TURN" claiming it to be a distinctive mark is estopped from raising the issue of validity of the same mark on the ground of it being descriptive;
2. Whether the learned single judge was correct in adjudicating an issue which was not raised by the parties;
3. Whether a descriptive mark is also be entitled for protection and whether the mark "NO TURN" is descriptive in nature.

Question No. 1: -

In relation to the first question, the Division Bench noted that it is a settled principle of law that a party cannot approbate and reprobate at the same time. The Division Bench in this regard, relied upon the judgments *Kiran Devi vs Bihar State Sunni Wakf Board & Ors.***(3)**, *Suzuki Parasrampuria Suitings (P) Ltd. vs Official Liquidator***(4)**, *Telefonaktiebolaget LM Ericsson vs Intex Technologies (India) Limited***(5)** etc.

The Court also took note of the judgments in *Mind Gym Ltd. Bs Mindgym Kids Library Pvt. Ltd.***(6)** and *Automatic Electric Ltd. vs R.K. Dhawan & Anr.***(7)** and observed that Courts have consistently held that when a party itself is seeking the registration of a mark, it cannot question the mark as being descriptive and incapable of registration. Therefore, the Division Bench held that Kurlon, who had not asserted the mark "NO TURN" to be a descriptive mark, was now estopped from raising such a plea in order to oppose the injunction sought by Peps.

Question No. 2: -

The Division Bench noted that when no ground is taken by a defendant for the purpose of denial of relief in favour of the Plaintiff, it is not apposite for the Court to travel beyond the scope of the pleadings and give any findings. The Court also relied on *Bachhaj Nahar vs Nilima Mandal and Another***(8)**, *Communication Components Antenna Inc. vs Mobi Antenna Technologies (Shenzhen) Co. Ltd. and Others***(9)** etc.

The Division Bench opined that if the validity of the registration of a trademark is not brought in issue, the statutory assumption is that the mark is valid must be accepted. It is not open for a court to *suo moto* question the validity of the registration of the trademark if the same is not disputed by the defendant. Applying the said principle to the facts of the facts of the present case, the Division Bench noted that as it is apparent from the various documents on record that the consistent stand of Kurlon has been that the mark "NO TURN" is a coined term, is distinctive and inherently unique, therefore, the Ld. Single Judge has erred in holding that the mark "NO TURN" is descriptive and Kurlon is not liable to be restrained from using the mark irrespective of the fact that it had never raised an objection as to the validity of the said mark on the ground of it being descriptive.

Question No. 3: -

Taking note of Section 9 of the Trade Marks Act, 1999, the Division Bench observed that the law recognizes that even a descriptive mark can be registered and exclusivity can be claimed if before the date of application for registration it has acquired a distinctive character as a result of its use made or is a well-known trademark. Thus, even a mark which is descriptive in nature can acquire distinctiveness by virtue of being in use for a long period of time. In this regard, the Division Bench relied upon the decision of *Godfrey Philips India Ltd. vs Girnar Food & amp.; Beverages (P) Ltd.* **(10)**

Conclusion

In light of the aforementioned observations, the Division Bench concluded that Peps was entitled to ad interim injunction restraining the Defendant from using the trademark "NO TURN". The Appeal was accordingly allowed and Kurlon was restrained from using the mark "NO TURN" or any other trademark deceptively similar thereto, till the disposal of the suit.

1. *October 9, 2022*
2. *FAO (OS) (COMM) 94 of 2022 & CM No. 18937 of 2020*
3. *2021 SCC Online SC 280*
4. *(2018) 10 SCC 707*
5. *2015 SCC Online Del 8229*
6. *2014 SCC Online Del 1240*
7. *1999 SCC Online Del 27*
8. *(2008) 17 SCC 491*
9. *2021 SCC Online Del 5471*
10. *(2004) 5 SCC Online 257*

JUDGEMENTS

In the matter of M/s Gozing Technology Private Limited for the violation of Section 42 of the Companies Act, 2013 ("Act")

The Company suo-moto filed an application with the Registrar of Companies, NCT of Delhi & Haryana **("ROC")** admitting the non-compliance of section 42 of the Act read with rules made thereunder. As per the facts stated in the application, the Company had passed special resolutions on six instances during the year 2021, for the issuance of preference shares on a private placement basis. However, the private placement offer letter were issued to the identified persons prior to submission of the special resolutions with the ROC. As per the provisions of section 42 read with the rules made thereunder, a company can issue a private placement offer letter to the identified persons only once the relevant special resolution is filed with the concerned registrar. In this regard, ROC conducted a hearing and a Practising Company Secretary attended the hearing on behalf of the Company and its directors and stated that the default is only of the circulation of the offer letter before filing the special resolution and it is a one-time default.

ROC concluded this matter by imposing a penalty of INR 60,000/- each on the Company and its directors under section 450 of the Act for the violation of section 42 of the Act.

Read More

In the matter of M/s Reliance Broadcast Network Limited ("Company") for violation of Section 149 of the Companies Act, 2013 ("Act")

The Company suo-moto filed an application for adjudication of penalties for an offence for the violation of section 149 of the Act. According to the facts stated in the application, the Company being a public company was required to have a minimum of three (3) directors and the number of directors was below the minimum requirement between October 19, 2018, to December 14, 2018. Therefore, the Company was not in compliance with the requirement of the provisions of section 149 of the Act which prescribes the statutory limit of the number of directors to be maintained to the various types of companies. In this regard, the Registrar of Companies, Mumbai ("ROC") issued a notice of hearing to the Company and its officers in default and a Practising Company Secretary attended a hearing on behalf of the Company and its directors where he admitted the fact that the Company has made the default of 56 days by not maintaining the statutory limit of the Directors.

After hearing the facts, ROC imposed a penalty of INR 78,000/- on the Company and its directors under section 172 of the Act as no specific penalty is provided under section 149 of the Act.

Read More

JUDGEMENTS

In the matter of M/s Dedicated Freight Corridor Corporation of India Limited ("Company") for violation of Section 149 of the Companies Act, 2013 ("Act")

In terms of the provisions of section 149(1) of the Act, the paid-up share capital of the Company as per the financial statement exceeded the threshold limit. Therefore, it was required to appoint a women director on the Board. In this regard, a show cause notice was issued by the Registrar of Companies, NCT of Delhi & Haryana ("ROC"). The Company Secretary of the Company and its authorized representative presented at the hearing and stated that the Company is a government company and 100% shareholding is in the name of the President of India through the Ministry of Railways. As per the Articles of Association of the Company, all the Directors are to be appointed by the President of India. In this regard, at least 14 copies of the letter were issued to the Ministry of Railways for the appointment of a women director, and despite the issuance of so many letters, a women director was not appointed for the Company. As the Company is a government company, therefore, the officers are not in a position to rectify the default.

Since the officer of the Company was not in default, ROC concluded this matter by imposing a penalty of INR 2,31,500/- on the Company for the violation of section 149 of the Act.

Read More

In the matter of M/s Rudraksh Synthetic Private Limited ("Company") for the violation of Section 137 of the Companies Act, 2013 ("Act")

The During the procedural scrutiny of statutory financial statements, it was observed by the Registrar of Companies, Ahmedabad ("ROC") that the Company had failed to attach the cash flow statement with form AOC-4 submitted with the ROC for the financial year 2018-19.

As per the provisions of section 137 of the Act, every company has to file a copy of the financial statements including consolidated financial statement, if any with the concerned registrar within 30 days from the date of its Annual General Meeting. As per the definition mentioned under the Act, the financial statement includes cash flow statement, and therefore the violation of section 137 has been conducted by the Company by not attaching the cash flow statement with the financial statement.

In this regard, ROC issued an adjudication notice to the Company and its authorised representative. However, none of the representatives of the Company or directors either furnished their reply or appeared on the date so fixed. However, at the next hearing, a Practising Company Secretary appeared and admitted that the violation is made due to oversight and this is a one-time default.

ROC concluded this matter by imposing a penalty of INR 5,000/- on the Company and all the directors for the violation of section 137 of the Act.

Read More

In the matter of M/s Elanco India Private Limited ("Company") for violation of Section 203 of the Companies Act, 2013 ("Act")

The Company suo-moto filed an adjudication application for violation of the provisions of section 203 of the Act. As per the stated facts in the application and the records available with the Registrar of Companies, Maharashtra **("ROC")**, the Whole time Company Secretary of the Company had resigned from the Company w.e.f. March 20, 2021 whereas the new Company secretary was appointed by the Company with the delay of 122 days. The Company submitted the reason for the delay in appointment due to the non-finding of a suitable candidate. On the hearing date, the Practising Company Secretary attended the hearing and submitted that the Company is in compliance with section 203 of the Act in the present scenario and she further submitted that the Managing Director should be considered as Officer in default and lesser penalty should be imposed on the other two directors being whole-time directors.

After considering all the facts, ROC imposed a penalty of INR 6,22,000/- on the Company and INR 1,72,000/- on the Managing Director and Whole-time directors of the Company.

Read More

In the matter of M/s Kris Packaging Systems Private Limited ("Company") for violation of Section 173 of the Companies Act, 2013 ("Act")

In the present case, the Company suo-moto filed an adjudication application with the Registrar of Companies, Mumbai ("ROC") for adjudication of penalties for an offence of non-convening of four (4) meetings of its Board for the financial year 2019-20 in such a manner that not more than 120 days intervene between two consecutive meetings of the Board. In two instances, the Company conducted the board meeting with a delay of 19 days and 52 days.

In terms of section 173 of the Act, every company is required to hold a minimum number of four board meetings every year in such a manner that not more than 120 days shall intervene between two consecutive meetings of the Board.

In this regard, a notice was issued to the Company by the ROC and the Company replied to that adjudication notice stating that the officer of the Company who must give the notice under this section who failed to do so should be held liable. He also submitted the certified true copy of the resolution passed by the Board authorizing a director to send the notices under section 173 of the Act.

After considering all the facts and submissions, ROC concluded the matter by imposing a penalty of INR 25,000/- on each director.

Read More

JUDGEMENTS

In the matter of M/s Haridra Laxmi Property Managements Private Limited ("Company") for violation of Section 10A of the Companies Act, 2013 ("Act")

In the present case, the Company suo-moto filed an application for adjudication of the violation conducted under section 10A of the Act, i.e. delay in filing of the declaration of commencement of business. As per the facts stated in the application, the Company has taken a loan of INR 10 Crores from Godavari Urban Multistate Credit Co-operative Society Limited on January 17, 2022. But the declaration was filed by the Directors in form INC-20A with a delay of February 14, 2022, i.e. after 28 days from the loan taken by the Company.

As per the provisions of section 10A of the Act, a newly incorporated company shall not commence any business or exercise any borrowing power unless a declaration is filed by a director in Form INC 20A within a period of 120 days from the date of incorporation. Since the Company has taken the loan, i.e. exercised its borrowing power without filing declaration of commencement of business, resulted in the violation of section 10A of the Act. The Company submitted that the default was caused inadvertently and unintentionally due to a lack of knowledge and penalty may be imposed upon the Company and its directors as per the Act. ROC concluded the matter by imposing the penalty of INR 50,000/- on the Company and INR 28000/- each on its directors for the violation of the section.

Read More

Appointment of Internal Ombudsman by the Credit Information Companies (CICs)

On 6 October 2022, the Reserve Bank of India ("RBI") issued a Notification on "Appointment of Internal Ombudsman by the Credit Information Companies". RBI, being satisfied that it is in public interest to do so, directs all Credit Information Companies holding a Certificate of Registration under sub-section (2) of Section 5 of the Credit Information Companies (Regulation) Act, 2005, to comply with the Reserve Bank of India (Credit Information Companies- Internal Ombudsman) Directions, 2022 annexed within the Notification, by 1 April 2023.

These Directions are introduced with a view to strengthen the internal grievance redress mechanism within the Credit Information Company (CIC) by enabling a review of customer complaints before their rejection, by an independent apex level authority within the CIC.

These Directions shall apply to all Credit Information Companies (CICs) as defined under sub-section (e) of section 2 of the Credit Information Companies (Regulation) Act, 2005 as amended from time to time.

Request for Quote (RFQ) platform for trade execution and settlement of trades in listed Non-convertible Securities, Securitised Debt Instruments, Municipal Debt Securities and Commercial Paper

On 19 October 2022, the Securities and Exchange Board of India ("SEBI") issued a Circular on "Request for Quote (RFQ) platform for trade execution and settlement of trades in listed Non-convertible Securities, Securitised Debt Instruments, Municipal Debt Securities and Commercial Paper". The framework for a dedicated debt segment was introduced by SEBI in January 2013, permitting the stock exchanges to offer electronic, screen based trading providing for order matching, request for quote, negotiated trades, etc. In February 2020, pursuant to approvals from SEBI, both National Stock Exchange of India Limited and BSE Limited launched RFQ platforms, as an extension of their existing trade execution and settlement platforms, to bring in transparency in "Over the Counter" deals which were negotiated bilaterally. RFQ is an electronic platform to enable sophisticated, multi-lateral negotiations to take place on a centralized online trading platform with straight-through-processing of clearing and settlement to complete a trade.

Basic Features of the RFQ platform are as follows:

- The RFQ platform is a system or interface for inviting and/ or giving quotes on an electronic platform.
- A participant who seeks quote(s)is termed as an Initiator and a participant who acts/ responds to the quote requests of the Initiator is termed as a Responder.
- A participant may request other participants for a quote for eligible securities.
- The Initiator has the option to place quote(s) by disclosing its name or anonymously.
- The quote can be placed to an identified counterparty (i.e. 'One to One'(OTO) mode) or to all the participants (i.e. 'One to Many'(OTM) mode).
- The platform provides the participants a range of options to seek a quote and to respond to a quote, while keeping an audit trail of all interactions i.e. quoted yield, mutually agreed price, deal terms etc.
- The quotes will be bilaterally negotiated between the counterparties, based on specified parameters. The acceptance of a quote by a participant will be considered as mutual agreement between the parties for the given deal.

The following securities are eligible for being traded on the RFQ platform:

- Non-convertible securities;
- Securitised Debt Instruments;
- Municipal Debt Securities;
- Commercial Paper;
- Certificate of Deposit;
- Government Securities;
- State development Loans;
- Treasury Bills; and
- Any other instrument, as may be specified by Stock Exchanges in consultation with SEBI.

In February 2020, the RFQ platform was introduced as a 'participant-based' model wherein all regulated entities, listed bodies corporate, institutional investors and all India financial institutions were eligible to register, access and transact. To enhance liquidity on the RFQ platforms of the stock exchanges, SEBI has, inter alia, mandatedıregistered Mutual Funds and Portfolio Management Services, to undertake a specified percentage of their total secondary market trades in Corporate Bonds through RFQ platform of stock exchanges. IRDAI has also prescribed similar stipulations for Insurers.

SEBI has been receiving representations from market participants to permit stock brokers to place bids on behalf of their clients to facilitate wider market participation in the corporate bond market. After consideration and deliberations, it has been decided to allow stock brokers registered under the debt segment of the Stock Exchange(s) to place/ seek bids on the RFQ platform on behalf of client(s), in addition to the existing option of placing bids in a proprietary capacity.This circular shall come into force with effect from 1 January 2023.

Addendum to SEBI Circular on Development of Passive Funds

On 28 October 2022, SEBI issued a Circular on "Addendum to SEBI Circular on Development of Passive Funds". This has reference to SEBI Circular dated 23 May 2022 (hereafter referred as "Circular") and subsequent addendum Circular dated 28 July 2022 on "development of passive funds".In this context, based on further feedback received from stakeholders, it has been decided that the clause 2(IV)(A) of the Circular shall be applicable with effect from 1 May 2023.

Reduction in denomination for debt securities and non-convertible redeemable preference shares

On 28 October 2022, SEBI issued a Circular on "Reduction in denomination for debt securities and non-convertible redeemable preference shares".

Chapter V of the Circular dated 10 August 2021, issued by SEBI, prescribes provisions pertaining to denomination of issuance and trading of Non-convertible Securities. The Circular mandates that the face value of each debt security or non-convertible redeemable preference share issued on private placement basis shall be INR 1,000,000 and the trading lot shall be equal to the face value.

SEBI has received various representations from various market participants, including issuers, requesting for review of the said denominations. Thus, the following amendments have been made in Chapter V (Denomination of issuance and trading of Non-convertible Securities) of the Circular:

(a) Paragraph 1.1 shall be substituted with the following:

" 1.1. The face value of each debt security or non-convertible redeemable preference share issued on private placement basis shall be INR 100,000."

(b) Paragraph 2.1 shall be substituted with the following:

" 2.1. The face value of the listed debt security and non-convertible redeemable preference share issued on private placement basis traded on a stock exchange or OTC basis shall be INR 100,000."

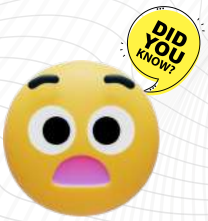
The provisions of this circular shall be applicable to all issues of debt securities and non-convertible redeemable preference shares, on private placement basis, through new International Securities Identification Numbers (ISINs), on or after 1 January 2023.

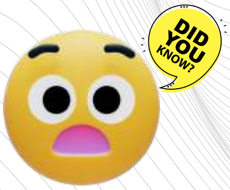
Provided that with respect to a shelf placement memorandum which is valid as on 1 January 2023, the issuer thereof shall have the option while raising funds through tranche placement memorandum, to keep the face value at INR 1,000,000 or INR 100,000. Necessary addendum shall be issued by such issuer to the shelf placement memorandum.

Constitution Day of India

Constitution Day was formerly known as "**National Law Day**". It is also known as *"Samvidhan Divas"*. This day is celebrated on *26th November* every year which symbolizes the historical moment of adoption of the Indian Constitution. On *26th November 1949*, the Constituent Assembly of India adopted the Constitution however, it came into effect on *26th January, 1950*. Lets read about some interesting facts of the Constitution of India.

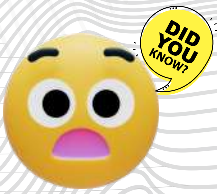
The Constituent Assembly convened for the first time on December 9, 1946. On 6 November, 1949 our Constitution became legally binding and in 1930, the date of January 26 was chosen to announce *"Purna Swaraj"*, or complete freedom.





The final text of the Indian Constitution took two years, eleven months, and eighteen days to complete. It's the world's longest Constitution.

At the Central Library of the Parliament, three exclusive copies of the Indian Constitution are kept in special helium-filled cases that are **22 inches** long and **16 inches** broad.



Source - https://currentaffairs.adda247.com/constitution-of-india-preamble/

CLASIS LAW

Notable Recognitions & Accolades

LEXOLOGY
Legal Influencer Q2 | 2022

Forbes India Present
LEGAL POWERLIST 2020
in association with legitquest
ENLISTED AS THE TOP LAW FIRM (ABOVE 10 YEARS EXP.)


Forbes India Presents
LEGAL POWERLIST 2021
in association with legitquest
Powerlist 2021

CERTIFICATE

This is to certify that

Clasis Law

Corporate & Commercial | Joint Venture, M&A, PE & VC | Labor & Employment | Restructuring, Insolvency & Bankruptcy | Litigation

has been enlisted in the Legal Powerlist 2021 as one of the

TOP LAW FIRM
ABOVE 10 YEARS EXPERIENCE

by an Esteemed Jury Panel comprising:

Justice A K Sikri, Former Judge, SC of India, International Judge of Singapore International Commercial Court (SICC) | Justice M B Lokur, Former Judge, SC of India, International Judge of Fiji SC | Mr. R Venkataramani, Senior Advocate, Former Member – Law Commission of India | Dr. Menaka Guruswamy, Senior Advocate | Mr. Rajshekhar Rao, Senior Advocate | Dr. Amar Kumar Pandey, (IPS) DGP & DG Fire and Emergency Services, Ph.D in Law NLSIU, Bangalore

Brian Carvalho
Editor – Forbes India

March 30, 2022

NOTABLE FIRM
BENCHMARK LITIGATION
ASIA-PACIFIC 2021

ASIAN LEGAL BUSINESS
FAST 30
ASIA'S FASTEST GROWING FIRMS 2021

INDIA BUSINESS LAW JOURNAL
AWARD WINNING LAW FIRM
2021
LAW ASIA

Vol. 11 | November 2022

CLASIS LAW

1
Tolstoy House,
4th Floor, Tolstoy Marg,
New Delhi – 110 001, India
Tel : +91 11 4213 0000
Fax : +91 11 4213 0099

2
Bajaj Bhawan,
1st Floor, 226, Nariman Point,
Mumbai – 400 021, India
Tel : +91 22 4910 0000
Fax : +91 22 4910 0099

Connect with Us