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THE NEWSLETTER

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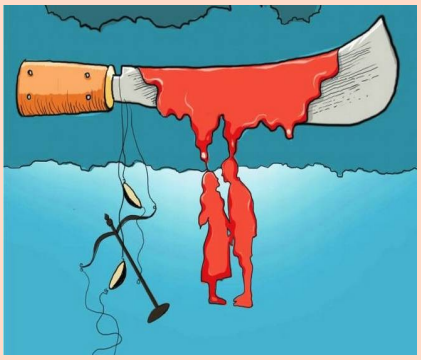
UPDATE YOURSELF

Fundamental Right to Choose a Life Partner

In the case of ***Shakti Vahini vs. Union of India &Ors.[Writ Petition (Civil) No. 231 of 2010 decided on 27.03.2018]***, the Hon'ble Supreme Court of India ("**Court**") has upheld the choice of consenting adults to love and marry as a part of their fundamental rights. The instant petition was preferred under Article 32 of the Constitution of India seeking directions: (i) to the State and Central Government to take preventive steps to combat honour crimes; (ii) to submit a National and State Plans of Action to curb honour killing; and (iii) further, to direct the State Governments to constitute special cells in each district which can be approached by the couples for their safety and well-being. The background of the petition was the sudden increase in the trend of such honour killings in Haryana, Punjab and Uttar Pradesh which has sent a chilling sense of fear amongst young people who intend to get married but do not enter into wedlock out of fear. The violation of human rights and destruction of fundamental rights taking place in the name of class honour or group right or perverse individual perception of honour was duly noted. Moreover, it was observed that the term "Honour Killing" is neither separately defined, nor separately classified as an offence under the prevailing laws in India. It is treated as a murder as defined under Section 300 of the Indian Penal Code, 1860 ("**IPC**") punishable under Section 302 of the IPC. On this sensitive issue, the Court observed that murder in day light and brutal treatment in full public gaze of the members of the society reflect that the victims are treated as inanimate objects totally oblivious of the law of the land and absolutely unconcerned with victim's feelings. During the hearing, instances pertaining to beating of people, shaving of heads and sometimes putting the victims on fire were discussed. The decisions made by *Khap Panchayats* prescribing honour killing and taking the law in their own hands was severely criticized and detested against. Further, various Indian states had put forward their action plans on honour killings while the remaining states were directed to do the same. The Legislature was directed to bring a law appositely covering the field of honour killings. To meet the challenges of the agonising effect of honour crime, preventive, remedial and punitive measures in the nature of guidelines were listed by the Court.



Applicability of RERA on Lease Transactions

The Hon'ble Maharashtra Real Estate Appellate Tribunal ("**Tribunal**") in the case of ***Jitendra Jagdish Tulsiani vs. Lavasa Corporation Ltd & Anr and Real Estate Regulatory Authority [(Complaint No. AT005000000000008), decided on 16.03.2018]*** has given its verdict in an attempt to clear the confusion on the applicability of the Real Estate (Regulation and Development) Act, 2016 ("**RERA**") on the transaction of lease. In the instant case, the appellant had initially filed a complaint with the Maharashtra Real Estate Regulatory Authority

("**MahaRERA Authority**") for claiming compensation under the provisions of Section 18 of RERA against the Lavasa Corporation for unduly extending the date of possession to 31.12.2020 while registering the project with the MahaRERA Authority. The MahaRERA Authority *vide* order dated 15.01.2018 dismissed the complaint for want of jurisdiction because the agreement entered into between the appellant and Lavasa Corporation was in the nature of lease transaction ("**Lease Agreement**"). Aggrieved by the order of the MahaRERA Authority, the appellant approached the Tribunal. The Tribunal while observing the facts in the instant case stated that: (i) the Lavasa Corporation by registering its project with the MahaRERA Authority, had submitted itself to the jurisdiction of the said Authority; (ii) the terms of the Lease Agreement do not restrict or hinder any right of the appellant as a buyer; and (iii) the payment of premium in accordance with the terms of the Lease Agreement was naturally to provide freehold rights to the Appellant for a period of 999 years and as per FAQ No. 6 of the MahaRERA FAQ's, it has been clarified that RERA applies to long term lease. Therefore, taking into consideration the aforementioned observations, the Tribunal set aside the order of the MahaRERA Authority and held that the provisions of RERA will apply to the lease transactions. The Tribunal in its concluding remarks further stated that even if Lavasa Corporation is a township involving various types of transactions including sale etc., the same primarily does not preclude the applicability of RERA on the transaction entered into by the Lavasa Corporation with the appellant under the Lease Agreement. Thus, accordingly, the matter was remanded to the MahaRERA Authority as it had sufficient jurisdiction to entertain the complaint of the appellant on merits.

Doctrine of Mutuality and Tax Implication

The Hon'ble Supreme Court of India ("**Court**") in the case of **Income Tax Officer, Mumbai *vs.* Venkatesh Premises Co-operative Society Ltd. [[2018] 91 taxmann.com 137 (SC), decided on 12.03.2018]** examined the issue as to whether receipts received by co-operative society from its members like non-occupancy charges, transfer charges, common amenity fund charges etc. are exempt from tax under the provisions of the Income Tax Act, 1961 ("**Act**") based on the doctrine of mutuality, even when such receipts were in the nature of business income, generating profits and surplus and had an element of commerciality attached to it. In the instant case, the Court observed that that the receipt of transfer fee before induction to membership in a co-operative society under some of the bye-laws of a co-operative society shall not be taxable if such transfer fee is refunded in the event the person was not admitted to membership. The appropriation of transfer fee by the co-operative society takes place only after admission of a person to membership and then only the principle of mutuality get attracted automatically. Further, the Court also observed that non-occupancy charges were levied in the present case for the purpose of general maintenance of the premises of the co-operative society and for provision of other facilities to its members, therefore, the fact that the members who were not in self-occupation were liable to pay non-occupancy charges at a higher rate is irrelevant so long as such receipts were getting utilised for the benefit of the members of the said society. The Court also observed that even if any amount was left as a surplus at the end of the financial year after meeting maintenance and other common charges of a co-operative society and such surplus fund of the society is getting used: (i) for the common benefit of members of the said society; and (ii) to meet heavy repairs and other contingencies with respect to the said society, then such surplus will not partake the character of profit or commerciality. Thus, in light of the said observations, the Court held that non-occupancy charges received by a co-operative society (the assessee) from its members which were used for mutual benefits towards

maintenance of premises of the said society, repairs, infrastructure and provision of common amenities, would be governed by doctrine of mutuality and therefore, the same shall not be taxable under the provisions of the Act.

SEBI on Corporate Governance

The Securities and Exchange Board of India ("**SEBI**") in its meeting held on 28.03.2018 took various decisions based on the recommendations of the Kotak Committee ("**Committee**") which are in the best interest of the stakeholders. The Committee was constituted by SEBI in June, 2017, headed by banker Shri Uday Kotak, in order to improve the standards of corporate governance of listed entities in India. The Committee was represented by various stakeholders like Government, industry, stock exchanges, academicians, proxy advisors, professional bodies, lawyers, etc. The Committee submitted its report detailing several recommendations on 05.10.2017. SEBI, after considering the recommendations of the Committee as well as the public comments taken in respect of the recommendations, has accepted 40 out of 80 recommendations of the Committee pertaining to a host of issues, including but not limited to ways to strengthen trading, amendments to rules regarding angel funds, mutual funds, buy-backs and takeovers, without any modifications. The some major recommendations are as follows:

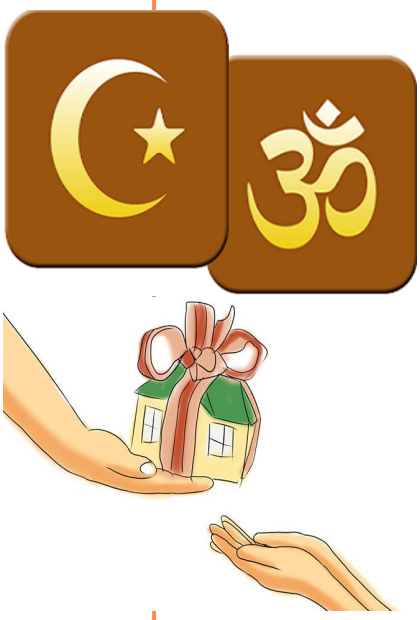
1. Maximum number of directorships of listed entities to be reduced from 10 to 8 by 01.04.2019 and further to 7 by 01.04.2020.
2. Enhancing the eligibility criteria for independent directors.
3. Enhancement in the role of Audit Committee, Nomination and Remuneration Committee and Risk Management Committee.
4. Disclosure with respect to the utilization of funds from Qualified Institutional Placements/Preferential issue.
5. Disclosures regarding auditor credentials, audit fee, resignation of auditors, etc.
6. Disclosure regarding the expertise/ skills of directors.
7. Enhanced disclosure of Related Party Transactions ("**RPTs**") and related parties to be permitted to vote against the RPTs.
8. Compulsory disclosure of consolidated quarterly results with effect from FY 2019-20.
9. Enhanced obligations on the listed entities with respect to subsidiaries.
10. Secretarial Audit to be compulsory for listed entities and their material unlisted subsidiaries under SEBI LODR Regulations.

There are several other recommendations of the Committee which SEBI has decided to accept with modifications such as: (i) there must be at least one women independent director to be appointed in top 500 listed entities by 01.04.2019 and in the top 1000 listed entities by 01.04.2020; (ii) Separation of role of MDs and chairman in top 500 listed entities by market capitalization w.e.f. 01.04.2020; (iii) Quorum for board meetings to be 1/3rd of the size of board or 3 whichever is higher; (iv) Shareholders' approval for royalty/brand payments to related party exceeding 2% of consolidated turnover, etc. Further, SEBI has conferred more powers on stock exchanges to track down listed entities such as the stock exchanges can freeze shareholdings of promoters for non-compliance of the SEBI regulations.

Hindu Convert is Entitled to Inherit Father's Property

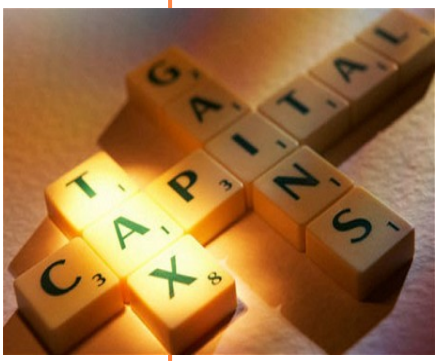
In the case of ***Balchand Jairamdas Lalwant vs. Nazneen Khalid Qureshi [Appeal from Order No. 1175 of 2014, decided on 06.03.2018]***, the main question of consideration before the Hon'ble High Court of Bombay ("**HC**") was whether a Hindu converted into Islam is disqualified from receiving property of the father, who died intestate. In the instant case, the respondent was

sister of the appellant and had converted into Islam. After her father's death, she claimed the suit property as her father's self acquired property. HC while discussing Section 26 of the Hindu Succession Act, 1956 ("**Act**") observed that the said section deals with disqualification of children born to the converts and their descendants but does not capture the converts under the ambit of disqualification. Therefore, from the bare perusal of Section 26 of the Act, it can be inferred that the intention of the Legislature was not to include the convert under the caption of disqualification. Further, HC observed that Section 26 of the Act is a specific section on the point of disqualification due to conversion, wherein the legislature could have mentioned the "convert" along with the "convert descendants". Since, the convert himself is not included under the ambit of Section 26 of the Act, consequently, converts are not disqualified from inheriting the property of any of their Hindu relatives. HC in the present case, while dealing with the aspect of conversion, also dealt with the facet that the religion is a way of life which regulates a particular lifestyles, beliefs and culture and thereby, the Constitution of India has guaranteed right to religion as a fundamental right. Hence, Hindu converted into other religion is not disqualified to claim the property under Section 26 of the Act because while deciding the inheritance, the fact of the religion of the person at the time of birth has to be taken into account to eliminate legal anomaly. Thus, HC, after analyzing the present case in the light of the above observation, ruled that renouncing a particular religion and to get converted to another religion is a matter of choice and cannot cease relationship which are established and exist by birth. Thus, Hindu convert is entitled to his father's property where father dies intestate.



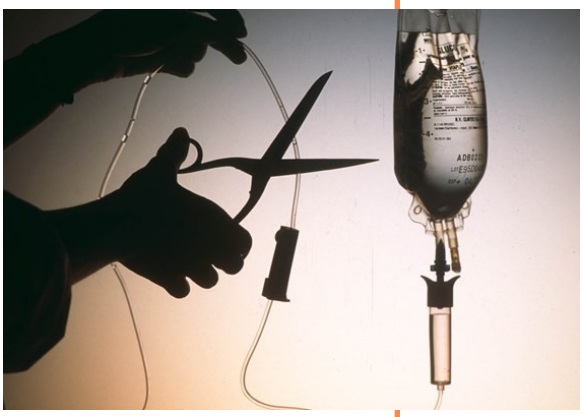
Profit earned by Housewife from Share Transaction is a Business Income and Not Capital Gain

In the case of **Smt. Prem Jain vs. ITO, Ward-29(1), New Delhi [ITA No.2572/Del/2016,** decided on 22.03.2018], the Hon'ble ITAT, Delhi Bench has held that profit earned by a housewife by purchase and sale of shares will amount to business income and not short-term capital gain (**"STCG"**) under the provisions of the Income Tax Act, 1961 (**"IT Act"**). As per the facts of the case, Assessee while filing of ITR for the AY 11-12, disclosed the net profit from shares as income by claiming the deduction of cost of shares and a donation made towards scientific research. After the investigation, the assessing officer (**"AO"**) treated the above income as STCG and disallowed the deduction of donation paid to trust. On appeal to the Ld. CIT(A), the Ld. CIT(A) upheld the findings of the AO in absence of any evidence showing business activity. Thereafter, matter travelled to the Hon'ble ITAT and it was contended by the Assessee that business also includes adventure activity and it is not necessary to constitute trade which shall include a series of transactions, both of purchase and sale. While contending, the Assessee relied upon the decision of Hon'ble Supreme Court of India in the case of ***CIT vs. Sutlej Cotton Mills Supply Agency Ltd. reported in 100 ITR 706***, wherein it was held that *a single transaction of purchase and sale outside the assessee's line of business may constitute an 'adventure the nature of trade'*. Hon'ble ITAT, relied upon the judgment passed by Hon'ble High Court of Delhi in the case of ***CIT vs. D & M Components Ltd. reported in 364 ITR 179*** and held that where there was short duration of holding of shares and lack of clarity in account books, sale and purchase of shares would lead to business income and not short term capital gains. Hence, in light of the same, the Hon'ble ITAT directed the AO to allow the claim of business income on account of profit on the sale of such shares.



Right to Die: Now guaranteed by the Constitution of India

The constitutional bench of the Hon'ble Supreme Court of India ("**Court**") while adjudication upon the issue of whether right to die with dignity is a fundamental right in a petition filed by a society in the matter of ***Common Cause (A registered society) vs. Union of India and Anr. [Writ Petition (Civil) No. 215 of 2005 decided on 09.03.2018]***, upheld the legal validity of passive euthanasia and held that the individual right to die with dignity is a fundamental right enshrined under the Constitution of India ("**Constitution**") and the state is obligated to make sure that the same is protected. The writ petition in the instant case was preferred under Article 32 of the Constitution by the petitioner seeking: (i) the declaration that the right to die with dignity is a fundamental right within the fold of right to live with dignity guaranteed under Article 21 of the Constitution; (ii) that necessary directions to the respondents shall be issued to adopt suitable procedure in consultation with the State Governments, where ever necessary to ensure that persons of deteriorated health or terminally ill patients should be able to execute a document titled —"My Living Will" and Attorney Authorization which can be presented to the hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of the life of the executant; and (iii) lastly to appoint a committee of experts including doctors, social scientists and lawyers to study into the aspect of issuing guidelines as to the "living wills". After hearing the said writ petition, the Court was of the opinion that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in persistent vegetative state with no hope of recovery and in such circumstances the best interest of the patient shall override the State interest. Along with the above observation, the Court laid down the following procedure which needs to be followed by the Indian courts while deciding the issue related to termination of life of a person:



1. Power to determine the termination of life of person rests with the High Court;
2. Bench of at least two Judges has to be formed to decide whether to approval for termination of life should be granted or not;
3. The approval can only be granted after consulting such medical authorities/medical practitioners as the concerned court may deem fit;
4. The High Court Bench shall also issue notice to the State and close relatives of the patient, and in their absence to his/her next friend;
5. A copy of doctor's committee report is to be submitted before the concerned High Court as soon as it is available;
6. Only upon taking the aforesaid into consideration, the concerned High Court should give its verdict.

It is worthwhile to note that the aforesaid procedure is uniform throughout India until Parliament makes legislation on the above mentioned subject.

QUICK TAKEAWAYS

- The Central Government has notified National Financial Reporting Authority (NFRA) with effect from 21.03.2018 to provide for matters relating to accounting and auditing standards under the Companies Act, 2013.
- The Hon'ble Supreme Court of India in ***P Sreekumar vs. State of Kerala [Cr. Appeal No. 408 of 2018, decided on 19.03.2018]*** has held that there is no prohibition in law to file a second FIR in relation to the same incident, if such second FIR was not filed by the person who had filed the first FIR, as a counter-complaint, based on the allegations different from the allegations made in the first FIR.
- In the case of ***Mukesh Kumar Umar vs. State of MP [Writ Petition No. 2377 / 2018, decided on 07.03.2018]*** the Hon'ble High Court of Madhya Pradesh, has held that different age criteria for the candidates from outside the state and the candidates who are domicile of state of Madhya Pradesh in relation to employment under the state government is discriminatory and unconstitutional.
- The Department of Revenue *vide* **Circular No. 35/9/2018-GST dated 05.03.2018** has clarified that the law with regard to levy of GST on service supplied by member of an unincorporated joint venture ("**JV**") to the JV or to other members of the JV, or by JV to the members, essentially remains the same as it was under service tax law.
- The Union Cabinet has given its approval for entering into an agreement between India and Iran for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income.
- Rajasthan High Court in case of ***Commissioner of Income Tax-Exemption, Jaipur vs. Vyapar Sangh [D.B. Income Tax Appeal No. 46 / 2017 decided on 21.03.2018]*** ruled that registration under Section 12AA of the Income Tax Act 1961 cannot be denied merely because of few objects of the society are meant for the benefit of its members.
- In the case of ***M vs. A [CM(M) 140/2017 decided on 23.03.2018]***, the Hon'ble High Court of Delhi held that Family Court can entertain and try a petition for dissolution of marriage under the Special Marriage Act, 1954 where the parties married under the said Act but subsequently performed Nikah ceremony.
- The Hon'ble Supreme Court of India in the case of ***Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd. and Etc [Civil Appeal No. 2881 of 2018 to Civil Appeal No. 2892 Of 2018, decided on 15.03.2018]***, held that the substitution made to Section 36 of the Arbitration and Conciliation Act, 1996 by the Arbitration and Conciliation (Amendment) Act, 2015 would apply even to appeals under Section 34 of the Act filed before the date of amendment i.e. 23.10.2015.
- The Hon'ble Supreme Court of India in the case of ***Dr. Subhash Kasinath Mahajan vs. The State of Maharastra and Anr. [Criminal Appeal No. 416 of 2018, decided on 20.03.2018]*** held that there is no absolute bar against grant of anticipatory bail in cases under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, if no prima facie case is made out or where on judicial scrutiny the complaint is found to be *prima facie* mala fide.
- In the case of ***Suneela Soni vs. Deputy Commissioner of Income Tax [ITA No. 5259/DEL/2017, decided on 16.03.2018],*** the Division Bench of the ITAT Delhi, observed that streedhan in form of jewellery valued to Rs.10,65,312/- received during the span of 25 years of married life cannot be said to be unexplained investment under Section 69A of the Income Tax Act 1961.

KNOWLEDGE CENTRE

FAQs on Real Estate (Regulation and Development) Act, 2016 ("RERA")

Q. 1. What is the purpose behind introduction of RERA?
Ans. RERA has been introduced to address the grievances of buyers by transparency and accountability in the construction and execution of real estate projects.

Q. 2. What are the categories of projects to be governed under RERA?
Ans. RERA applies to all residential and commercial projects, including shops, offices and buildings, but not to rental arrangements. However, the real estate projects where the where area of land does not exceed 500 square meters or where the number of apartments are up to eight, does not require registration in RERA.

Q. 3. Which is the governing body to regulate the matters related to RERA?
Ans. Under RERA, Real Estate Regulatory Authority is responsible to look out the matters related to RERA. Moreover, as per RERA, every State in India shall have to constitute and have Real Estate Regulatory Authority.

Q. 4. Is it required to have compulsory registration of real estate projects in RERA?
Ans. Pursuant to Section 3(1) of RERA, no promoter of the real estate project can advertise, market, book, sell, offer for sale and invite persons to purchase any plot/apartment/building in any real estate project, without having registering prior registration of the real estate project with the Real Estate Regulatory Authority.

Q. 5. Before registration of real estate projects, can promoters put information about an upcoming project with detailed/ limited proposals on their website under 'Coming Soon' category?
Ans. Without having prior registration under RERA, no information can be put up about an upcoming project (with detailed/ limited proposals) on the website, not even under the category of 'Coming Soon', as this would amount to violation of Section 3(1) of the Act.

Q. 6. Is it required to have registration by real estate agent under RERA?
Ans. As per Section 9(1) of RERA, real estate agent shall also require registration to sale or purchase of any plot/apartment/building in a real estate project. Moreover, the web-portals engaged in selling plots or apartments will also be covered under RERA as real estate agent, hence, such entity operating web portal would also require registration under RERA.

Q. 7. How much advance amount can be taken by promoters from allottees?
Ans. The promoters shall not be entitled to take more than 10% of amount of consideration as an advance payment from allotees, without entering into agreement for sale and register the same.

Q. 8. Is there any separate account to be maintained by the developer under RERA?
Ans. A separate account is to be formed and maintained by developer to place 70% of amounts realised from the real estate project from the allottees in a scheduled bank.

Q. 9. What are the kinds of protections given to allottees under RERA?
Ans. The allottees have following two protections against the developer: (a) developer can't make any changes to the construction plan without the written consent of the allottees; and (b) on delay on completion of the real estate projects the developer has to pay interest as per respective State rules.

Q. 10. Can registration of a project be revoked under RERA?
Ans. As per Section 7 of RERA, the Real Estate Regulatory Authority has the powers to revoke registration of a project, for violations specified under Section 7 of RERA. However, revocation of registration of a project is envisaged as a last resort and can only be done after providing a reasonable opportunity of being heard.

EDITORIAL

Board Meeting Through Video Conferencing: A Right To Directors

-By *Aditi Singh, Advocate*

The Companies Act, 2013 ("**Act**") has introduced a provision through Section 173 which allows directors of a company to participate in the board meeting through video conferencing or audio visual means. In addition, the Companies (Meetings of Board and its Powers) Rules, 2014 ("**Rules**") stipulates the procedure to be followed when board meeting is to be conducted through video conferencing or audio visual means. Although the Act provides for such mandatory provision to the directors for conducting the board meeting through video conferencing or audio visual means, however, there have been instances where directors are denied of such facilities by the company. In order to resolve the conflict between the company and directors for such right, this issue was raised before the Hon'ble National Company Law Appellate Tribunal ("**Tribunal**") in the case of ***Achintya Kumar Barua & ors.* v. *Ranjit Barthkur & ors.* [Company Appeal (AT) No. 17 of 2018 decided on 08.02.2018]**, wherein the Tribunal has to determine as to whether provisions of Section 173(2) of the Act which states that the participation of directors in a board meeting '**may**' be either in person or through video conferencing or audio visual means, are mandatory in nature. The relevant extracts of Section 173(2) of the Act are herein reproduced below:

> *"**173. Meetings of Board***
> *(1)…*
> *(2) The participation of directors in a meeting of the Board **may** be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognizing the participation of the directors and of recording and storing the proceedings of such meetings along with date and time:*
> *…"*

In the aforesaid case, the Hon'ble National Company Law Tribunal, Guwahati Bench, Guwahati ("**NCLT**") has allowed the application filed by the respondent directing that the facility of video conferencing under Section 173(2) of the Act should be available. Aggrieved by the decision of NCLT, the appellants challenged the decision of NCLT before the Tribunal.

In the appeal before the Tribunal the appellants claimed that the provisions of Section 173(2) of the Act are not mandatory in nature and therefore, it is not compulsory for the company to provide facility of video conferencing or audio visual means. Further, the appellants also argued that if the respondent participates in the meeting through video conferencing, it will not be possible to ensure that nobody else is present from where the respondent will be participating. Additionally, the appellants claimed that the Secretarial Standards on Meetings of the Board of Directors ("**Secretarial Standards**") have prescribed that such option under the provisions of the Act and Rule 3 of the Rules should be resorted to only when the facilities are provided by the company to its directors.

In order to determine the aforesaid issue the Tribunal referred to Section 173(2) of the Act and the Rule 3 of the Rules. The Tribunal observed that the use of the word 'may' in Section 173(2) of the Act only gives an option to the director to choose between whether he would be participating in person or the other option which he can choose is participation through video-conferencing or other audio-visual means. This word 'may' does not confer a right to the company to deny this right given to the directors

for participation through video-conferencing or other audio-visual means, if they so desire.
In furtherance to above, on perusal of Rule 3 of the Rules which deals with the meetings of board of directors through video conferencing or other audio visual means, the Tribunal observed that the Rules require that the company shall comply with the procedure prescribed for convening and conducting the Board meetings through video-conferencing or other audio-visual means. Moreover, Rule 3(2) of the Rules creates a responsibility on the chairperson and Company Secretary, if any, to take due and reasonable care and the guidelines given under Secretarial Standards cannot override the provisions under the Rules and the Act.

The Tribunal concluded that the Section 173(2) of the Act read with Rules is a progressive step. Section 173(2) of the Act gives right to a director to participate in the meeting through video-conferencing or other audio-visual means and for the same the Central Government has notified Rules to enforce this right and it would be in the interest of the companies to comply with the provisions in public interest. Therefore, the mandate of Section 173(2) read with Rules mentioned above cannot be avoided by the companies.

Thus, going by the aforesaid judgment, it can be fairly construed that the directors of a company have a right to participate in the meeting through video-conferencing or other audio-visual means under Section 173(2) of the Act read with Rule 3 of the Rules and the company in no manner can deny such right to its directors.

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