

## **Corporate –Commercial Law bulletin**

### **NCLAT JUDGEMENTS**

#### **Editor's Note**

Dear Readers,

Our efforts have always been directed towards making people aware of the new developments in the field of law and its sister disciplines. With this goal in mind, we are extremely pleased to announce the release of our new edition/1st edition of our corporate newsletter - TRIBUNAL, that covers all the major jugements from commercial courts/tribunals of India. Spanning from the ongoing dispute between Amazon and Future Retail Group in the National Company Law Appellate Tribunal (NCLAT) to the power struggle between the Securities and Exchange Board of India (SEBI) and Securities Appellate Tribunal (SAT) to discussing the recently released PM Gati Shakti policy and a plethora of other important judgements, we have attempted to go over the recent updates in the domain of Corporate Law and decisions from various tribunals like National Company Law Tribunal (NCLT), Debt Recovery Tribunal (DRT), Income Tax Appellate Tribunal (ITAT), across the nation.

We hope that you find the following read insightful in enhancing your knowledge of the corporate law domain and in doing so, it benefits the graph of your life. Happy and meaningful reading!

#### **1. Amazon has suffered a setback! The NCLAT affirmed the CCI's high penalty of Rs 200 crore levied on Amazon.**

#### **Abstract**

While hearing an appeal in *Amazon.com NV Investment Holdings LLC v Competition Commission of India & Ors.*<sup>1</sup>, the National Company Law Appellate Tribunal ("NCLAT"), New Delhi Bench, comprised of Justice M. Venugopal (Judicial Member) and Shri Ashok Kumar Mishra (Technical Member), upheld the Competition Commission of India's ("CCI") order dated 17.12.2021 in which Amazon was ordered to pay Rs. 200 crores penalty under Section 43A of Competition Act, 2002. The NCLAT has ordered Amazon to deposit the penalty and comply with the CCI judgement within 45 days. The Order was signed on June 13, 2022.<sup>2</sup>

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<sup>1</sup>2022 SCC OnLine NCLAT 238

<sup>2</sup> [https://www.livelaw.in/pdf\\_upload/1655101602-421763.pdf](https://www.livelaw.in/pdf_upload/1655101602-421763.pdf).

The National Company Law Appellate Tribunal (NCLAT) on June 13 dismissed Amazon's appeal against an antitrust suspension of its investment transaction with Future Group, citing the retailer's failure to make full disclosures at the time of obtaining approval.

NCLAT also upheld a ₹200-crore penalty imposed on Amazon by the Competition Commission of India (CCI) and asked the e-commerce giant to deposit the same in 45 days<sup>3</sup>.

It supported the CCI findings that Amazon didn't make full disclosures regarding the deal with Future Retail subsidiary — Future Coupons Pvt. Ltd. (FCPL).

However, NCLAT slightly modified the orders of CCI and said the penalty of Rs one crore each imposed was “on the higher side” and reduced it to Rs 50 lakh each.

“This appellate tribunal based on the relevant facts and circumstances of the case, mainly the availability of the competitions in the market and financial health of the industry... imposes a penalty of Rs 50 lakh each as per sections 44 and 45 of the Competition Act 2002,” said NCLAT directing Amazon to pay Rs one crore within 45 days calculated from the date of passing of judgement.

The Tribunal ruled that Amazon had not provided full, complete, fair, forthright, and frank disclosure of relevant materials, and had only provided limited details / disclosures, pertaining to its ‘acquiring strategic rights and interests’ over ‘FRL’, and executing ‘Commercial Contracts’ between itself and ‘FRL’ concerning the scope and purpose of ‘Combination,’ and that the penalty imposed was justified.

In December 2021, the Competition Commission of India (CCI) suspended the approval given by it in 2019, for Amazon's deal to acquire a 49 per cent stake in Future Coupons Pvt Ltd (FCPL).

## **2. Summary: The NCLT has the power to recall an order in which the right to respond has been waived: NCLAT.**

In the case of *Printland Digital (India) Pvt. Ltd. vs. Nirmal Trading Company*<sup>4</sup>, the National Company Law Appellate Tribunal (NCLAT) bench comprising Justice Rakesh Kumar Jain (Judicial Member) and Dr. Alok Srivastava (Technical Member) has ruled that the NCLT does not have jurisdiction to review a judgement after it has decided a significant issue, but it does have authority to recall an order in which the opportunity to respond has been forfeited.

### **Case Timeline**

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<sup>3</sup><https://www.barandbench.com/news/litigation/breaking-nclat-upholds-200-crore-penalty-imposed-by-cci-on-amazon-for-discrepancies-in-future-deal>

<sup>4</sup> Company Appeal (AT) (Insolvency) No. 504 of 2022; Judgement dated: 30.05.2022.

The Corporate Debtor's right to file a reply was revoked by NCLT New Delhi in a judgement dated July 22, 2021. The appellant filed an application to set aside the ruling dated July 22, 2021, which terminated the Corporate Debtor's right to file a reply.

The application was dismissed by the NCLT in a decision dated 10.03.2022 on the grounds that the tribunal lacked the authority to recall or review its own order, and that the Appellant had already been given ample opportunities to make a reply.

### **Issue Raised**

The underlying legal issue in the appeal was thus whether the Adjudicating Authority had the competence to overturn its ruling closing the opportunity to file a Reply.

### **Appellant's Arguments**

On behalf of the Appellant, it was argued that the tribunal had jurisdiction to recall its order under Rule 11 of the NCLT Rules, 2016, and that because the panel had not reached a decision on the merits, it had the authority to do so.

### **Respondent's Arguments**

The Respondent argued that the Appellant's actions and conduct are such that no redress is warranted because the Appellant was given many opportunities to file a reply, which he did not take advantage of.

### **Judgment**

After hearing both sides, the Court concluded that there is a distinction between recalling an order and reviewing the merits of a matter decided by the Adjudicating Authority.

*"No doubt that the Adjudicating Authority has no jurisdiction to review its order after deciding a substantial issue but it has the jurisdiction to recall the order of the kind in dispute i.e. where the right to Reply was closed by an order on the ground that the opportunities granted were not availed."*

The Tribunal cited the decision of *Grand Arch Resident Welfare Association Vs. Ireo Pvt. Ltd*<sup>5</sup>, in which it was held that if the Adjudicating Authority has adjudicated on the merits of the issues, it does not have the jurisdiction to review its order, but in the case of a dispute over the right to file a reply that has been resolved by an order, it does have the jurisdiction to recall it under Rule 11 of the NCLT Rules, 2016.

### **Analysis**

The right to recall the order of closing the right to reply has been a bone of contention, sometimes affirmed by Courts and otherwise negated, e.g like in the recent case of *Agarwal Coal Corporation (P.) Ltd. v. Sun*

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<sup>5</sup> Comp. App. (AT) (Ins) No. 271 of 2022

Available at :

[https://efiling.nclat.gov.in/nclat/order\\_view.php?path=L05DTEFUX0RvY3VtZW50cy9DSVNfRG9jdW1lbnRzL2Nhc2Vkb2MvY3JkZXJzL0RFTEhJLzlwMjltMDMtMTYvY291cnRzLzEvZGFpbHkvMTY0NzQyMzAzNTMzNDc2NTA1ODYyMzFhZTNI NjRkOGMucGRm](https://efiling.nclat.gov.in/nclat/order_view.php?path=L05DTEFUX0RvY3VtZW50cy9DSVNfRG9jdW1lbnRzL2Nhc2Vkb2MvY3JkZXJzL0RFTEhJLzlwMjltMDMtMTYvY291cnRzLzEvZGFpbHkvMTY0NzQyMzAzNTMzNDc2NTA1ODYyMzFhZTNI NjRkOGMucGRm)

*Paper Mill Ltd*<sup>6</sup>. This judgement seeks to clarify that the power to roll back such an order is indeed in the hands of the Adjudicating Authority.

### **NCLT Judgements**

#### **1. CoC's commercial wisdom cannot be disregarded arbitrarily by NCLT or its court of appeal in deciding the claim for scrapping of CIRP.**

#### **Introduction**

In the landmark case of *Vallal RCK Vs. M/s Siva Industries and Holdings Limited and Ors.*<sup>7</sup>, the Apex Court established that the Committee of Creditors' (CoC) wisdom, with respect to deciding to withdraw CIRP proceedings, cannot be questioned by the NCLT or its appellate court.<sup>8</sup> This decision gives due weightage to the decisions of the stakeholders.<sup>9</sup>

#### **Facts**

- An application under Section 7 of the IBC was filed by IDBI Bank Limited to commence the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD) , M/s Siva Industries and Holdings Limited.<sup>10</sup>
- The Resolution Professional (RP) presented a resolution plan before the CoC which failed to cross the threshold of 66% votes. The RP then submitted the application for initiating liquidation.
- Suggesting a one-time settlement scheme, Mr. Vallal Rck, the Promotor of the CD brought forth a settlement application under Section 60(5) of IBC.<sup>11</sup>
- The final proposal was presented and deliberated upon by the CoC which consequently gave their 'go-ahead' on 01.04.2021.
- An application for the withdrawal of CIRP was registered. NCLT rejected the application on grounds that Settlement Plans were only Business Restructuring Plans and initiated the liquidation process.

#### **What was the issue?**

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<sup>6</sup> Co. Appeal (AT) (Insolvency) No. 412/2019, Available at <https://ibbi.gov.in/uploads/order/9cc52bc5cc0cef2ad56df1693375b84b.pdf>

<sup>7</sup> Vallal RCK Vs. M/s Siva Industries and Holdings Limited and Ors. [Civil Appeal Nos. 1811-1812 of 2022]

<sup>8</sup> Ibid, 8

<sup>9</sup> <https://www.verdictum.in/court-updates/supreme-court/supreme-court-nclt-or-nclat-cannot-sit-in-an-appeal-over-commercial-wisdom-of-coc-1373373>

<sup>10</sup> [https://ibclaw.in/section-7-initiation-of-corporate-insolvency-resolution-process-by-financial-creditor-chapter-ii-corporate-insolvency-resolution-process-cirp-part-ii-insolvency-resolution-and-liquidation-for-corpor/#:~:text=\(1\)%20A%20financial%20creditor%20either,corporate%20debtor%20before%20the%20Adjudicating](https://ibclaw.in/section-7-initiation-of-corporate-insolvency-resolution-process-by-financial-creditor-chapter-ii-corporate-insolvency-resolution-process-cirp-part-ii-insolvency-resolution-and-liquidation-for-corpor/#:~:text=(1)%20A%20financial%20creditor%20either,corporate%20debtor%20before%20the%20Adjudicating)

<sup>11</sup> <https://ibclaw.in/section-60-adjudicating-authority-for-corporate-persons/>

Can an adjudicating authority or an appellate authority disregard the commercial wisdom of creditors in withdrawing CIRP proceedings? This question was raised in the Supreme Court after the appeal against the NCLT order was dismissed by NCLAT.

### **Contentions of the appellant**

Senior Advocate Abhishek Manu Singhvi contended that neither NCLT nor its appellate tribunal have the power to sit in an appeal over the commercial wisdom of CoC; Creditors had accepted the Settlement Plan by 94.32% voting share. He asserted that goal of the IBC is allowing the CD to “continue as an on-going concern and at the same time, paying the dues of the creditors to the maximum”.<sup>12</sup>

### **Judgement**

Section 12A of IBC, dealing with the withdrawal of applications based itself on the Insolvency Law Committee’s recommendations, considering an exit valid if CoC approves it by 90% voting share. The validity of this provision was upheld in the case of *Swiss Ribbons Private Limited And Anr. v. Union of India And Ors.*<sup>13</sup> where the Supreme Court laid down the requirement being that if more than 90% of the creditors, after due deliberations, permit the settlement plan, then the withdrawal of CIRP could not be questioned. Interference could only be based on the decision of CoC being capricious, arbitrary, irrational and that which dehors the provisions of law.

The bench of Justice B.R. Gavai and Justice Hima Kohli in the judgement dating 3rd June 2022 iterated “the need for minimal judicial interference by the National Company Law Appellate Tribunal (NCLAT) and National Company Law Tribunal (NCLT)”.

### **Analysis**

The Courts seek for at least 90% of the creditors to be in agreement to withdraw CIRP and not a simple majority which shows that it aims to ensure that most, if not all creditors together decide on this course of action so that no one’s interest is left unattended.

### **Conclusion**

The SC, allowing the appeals, iterated that neither NCLT nor NCLAT were justified in not giving adequate weightage to the commercial wisdom of CoC and quashed the impugned judgment of NCLT.

## **2. NCLT, Kolkata Bench reiterates appellate court’s order - Adjudicating Authority not vested with the ‘authority’ to hear cases under PMLA.**

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<sup>12</sup><https://www.verdictum.in/court-updates/supreme-court/supreme-court-nclt-or-nclat-cannot-sit-in-an-appeal-over-commercial-wisdom-of-coc-1373373>

<sup>13</sup> *Swiss Ribbons Private Limited and Anr. v. Union of India and Ors* [(2019) 4 SCC 17]

## Introduction

In the case of *Rahul Carbon Commercials Private Limited v. Kohinoor Steel Pvt. Ltd.*<sup>14</sup>, the Kolkata Bench of NCLT re-established that the adjudicating authority was not vested with the power to hear money-laundering cases, reinforcing the appellate authority's order.

## Facts

- Corporate Insolvency Resolution Process (CIRP) were initiated against the Corporate Debtor on 20.11.2019. However, in another twist of events, the Respondents issued a letter to the Applicant informing them that an investigation under the Prevention of Money Laundering Act 2002 (PMLA) was being conducted against the Corporate Debtor and its directors.
- The Applicant replied stating that the respondents did not have the authority to initiate proceedings under PMLA till the conclusion of CIRP. Disregarding this, the Respondents issued a Provisional Attachment Order (PAO/Attachment Order), and attached properties worth Rs. 96.69 Crores, belonging to the Corporate Debtor.

## The matter in question

Can NCLT hear money-laundering cases under the Prevention of Money Laundering Act (PMLA), 2002, questioning a previous judgement of the NCLAT that decided negatively in this matter. And can proceedings under PMLA be initiated simultaneously when CIRP has already been initiated?

## Judgement

In the case of *Directorate of Enforcement vs. Manoj Kumar Agarwal*<sup>15</sup>, it was established there could not be any attachment of Corporate Debtor's assets under PMLA during the continuation of CIRP.

In PMLA, the procedure is for attachment of "proceeds of crime" and eventually for the sale of the confiscated properties. No special remedy is considered even under PMLA to compensate any individual who could have possibly been victimised by an act of money laundering. The confiscated assets are sold to other parties, so no recovery of any kind is in store for the victims to be compensated. In CIRP however, direct benefits are conferred on the creditors of the Corporate Debtor.<sup>16</sup>

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<sup>14</sup> *Rahul Carbon Commercials Private Limited v. Kohinoor Steel Pvt. Ltd.* [C.P. (IB)/82(KB)2019]

<sup>15</sup> (Company Appeal (AT) Insolvency No. 575/2019)

Available at: <https://nclat.nic.in/Useradmin/upload/192006064860708c7a0445d.pdf>

<sup>16</sup> [https://images.assettype.com/barandbench/2022-03/ea7d22a1-a7ac-4802-8390-f550f79e94d9/Rahul\\_Carbon\\_Commercials\\_Pvt\\_Ltd\\_vs\\_Kohinoor\\_Steel\\_Pvt\\_Ltd.pdf](https://images.assettype.com/barandbench/2022-03/ea7d22a1-a7ac-4802-8390-f550f79e94d9/Rahul_Carbon_Commercials_Pvt_Ltd_vs_Kohinoor_Steel_Pvt_Ltd.pdf)

The main aim of CIRP is not to provide any advantage to the ex- promoters of the Corporate Debtor but “to resolve the insolvency on a ‘clean slate theory’ with the control of the Corporate Debtor being vested with a fresh Resolution Applicant.”<sup>17</sup>

The NCLT declared, “We are of the opinion that this Adjudicating Authority... is bound by the judgment dated January 3, 2022, passed by a three-member Bench of the NCLAT which held that NCLT is not entitled to deal with matters arising under the PMLA.”

### **Analysis**

This judgement clarifies that NCLT cannot hear money-laundering cases. The best explanation for this is that the CIRP proceedings and action under PMLA may stretch and the compensation to the victim/sufferer will not be adequately and swiftly provided, which defeats the aim of the law.

### **Conclusion**

The case was dismissed by Judicial Member Rohit Kapoor and Technical Member Harish Chander Suri from the Kolkata Bench of the National Company Law Tribunal.

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<sup>17</sup>[https://images.assettype.com/barandbench/2022-03/ea7d22a1-a7ac-4802-8390-f550f79e94d9/Rahul\\_Carbon\\_Commercials\\_Pvt\\_Ltd\\_vs\\_Kohinoor\\_Steel\\_Pvt\\_Ltyourd.pdf](https://images.assettype.com/barandbench/2022-03/ea7d22a1-a7ac-4802-8390-f550f79e94d9/Rahul_Carbon_Commercials_Pvt_Ltd_vs_Kohinoor_Steel_Pvt_Ltyourd.pdf)

## **Debt Recovery Tribunal (DRT)**

### **1. Supreme Court stays e-auction as DRT is not functioning in Bihar**

**Summary** - The division bench of the Supreme Court in the case *Chandan Kumar v. State of Bihar and Ors*<sup>18</sup> suspended an e-auction in Bihar after discerning that the Debt Recovery Tribunal in Bihar is not operational.

#### **Introduction**

In this case, the Supreme Court Division Bench of Justices D Y Chandrachud and Justice Suryakant halted an e-auction in Bihar after observing that the Debt Recovery Tribunal is not functional in the state of Bihar.

#### **Facts**

The relief was granted by a bench of Justices DY Chandrachud and Surya Kant while reviewing a special leave petition challenging a Patna High Court judgement dated November 30, 2021.

While providing the petitioner time to settle the account with State Bank of India, the High Court disposed of the plea by granting him the liberty to approach DRT, Bihar if the settlement did not fructify.

#### **Issues mentioned**

A Special Leave Petition challenging the order of Patna High Court.

#### **Petitioner's contentions**

Advocate Shivam Singh, counsel for the petitioner, contended that in the impugned decision, the High Court gave time to settle the account with the respondent – the bank. He further claimed that, although giving time, the High Court proceeded to dismiss the case with the stipulation that if the settlement did not materialise, the petitioner would be free to pursue the remedy before the Debt Recovery Tribunal.

#### **Reasoning and decision of the Court**

The Court considered the facts of the case and ordered the Respondent to stay the auction process until the next date of hearing, and directed the petitioner to deposit one crore with the SBI Stressed Assets Management Branch (respondent) before February 14, 2022, and another 75 lakh on or before March 14, 2022.

The Court emphasised that the Debt Recovery Tribunal is not operational in the state of Bihar, hence the Court granted the petitioner conditional relief by directing the Respondent to suspend the e-auction until the next day of listing.

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<sup>18</sup> Special Leave to Appeal (C) No.1730/2022. Also available at : [https://www.livelaw.in/pdf\\_upload/chandan-kumar-v-state-of-bihar-409733.pdf](https://www.livelaw.in/pdf_upload/chandan-kumar-v-state-of-bihar-409733.pdf)  
<https://www.livelaw.in/top-stories/bihar-drt-not-functional-supreme-court-stays-e-auction-of-a-property-191881>



The Supreme Court has taken note of the concerning scenario in which numerous DRTs and DRATS remain inoperable around the country, owing to unfilled vacancies. In light of this, the Apex Court issued an order in December 2021 asking High Courts to hear debt collection and SARFAESI cases under Article 226 if DRTs/DRATs are not operational in the concerned jurisdiction.

### **Analysis**

The inoperable state of DRTs made the Supreme Court of India to plunge into the sorry state of affairs with regards to the tribunal and also established a rule of thumb for courts to follow for debt collection cases.

## **2. Nagpur Bench of the Bombay High court ruled that the DRT cannot ban a person from traveling overseas.**

### **Introduction**

The Nagpur bench of the Bombay High Court ruled in the case of *Anurag s/o. Padmesh Gupta v. Bank of India*<sup>19</sup> decided that the Debt Recovery Tribunal (DRT) cannot prevent a citizen from travelling abroad because the Recovery of Debts Due To Banks and Financial Institutions Act 1993 lacks any express or implied provision that authorises it to do so.

### **Facts**

- Anurag Gupta, a businessman, petitioned before the Bombay High Court under Articles 226 and 227 of the constitution, challenging DRT's decision to deny his request to travel.
- Mr. Gupta is Gupta Energy Pvt. Ltd.'s personal guarantor.
- The company faced proceedings before the NCLT under the Insolvency and Bankruptcy Code, 2016, followed by a liquidation order in 2018. The consortium filed an application with the Nagpur DRT in 2016 seeking recovery of Rs 110.15 crore as well as a ban on Gupta traveling overseas.

### **What were the issues?**

Mr. Gupta's application to the DRT to allow him to travel abroad was dismissed following which he approached the High Court to decide as to whether the DRT has the authority to restrain a citizen from travelling abroad?

### **Reasoning and decision of the Court**

The petitioner argued that the freedom to travel abroad has been recognised by the Supreme Court and thus could not be restricted, especially since the Act did not provide the Tribunal with such authority. The bank, claimed that the DRT had broad authority to achieve natural justice's goals.

The bench of Justices AS Chandurkar and Amit Borkar stated that a citizen's freedom to travel abroad falls under Article 21 of the Constitution's definition of "personal liberty." As a result, such a provision in the

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<sup>19</sup> Anurag s/o. Padmesh Gupta v. Bank of India [2022 LiveLaw (Bom) 204]

Act was required to prevent a person from travelling overseas. As a result, the bench reversed the DRT's decision and permitted the petitioner to travel to Turkey for a family wedding.

With regard to section 22 of CPC, the Court further stated that the DRT could not go beyond the powers granted by the CPC to ensure natural justice. The court decided that a person cannot be prevented from travelling overseas under subsections sub sections 12, 13(A), 17, and 18 of Section 19, which authorises the tribunal to adopt orders necessary to give effect to its orders, prevent abuse of its process, or ensure the objects of its justice.

### **Analysis**

This decision has emphasised that the right to travel abroad is a fundamental right under the ambit of Article 21 of the Indian Constitution and the absence of a provision in law preventing foreign travel does not allow the tribunal to bar the international travel of a citizen through means of interpretation.

## **SAT Judgements and SEBI Regulations**

- 1. Supreme Court of India asserts that the presumption of insider trading on the grounds of the closeness of the parties is not adequate.**

### **Introduction**

The Apex Court, in the case of *Balram Garg v. Securities and Exchange Board of India*<sup>20</sup> adjudicated that the presumption of insider training could not be simply based on the proximity of the parties. Concrete evidence like letters or emails denoting frequent/continuous communication, etc are essential in such cases.<sup>21</sup>

### **Facts**

The Securities and Exchange Board of India (SEBI) issued an impounding order and show cause notice alleging insider trading in 2019, 2020 against 3 people in connection to P. C Jeweller Ltd. Sachin Gupta, Shivani Gupta and Amit Garg were alleged to have used Unpublished Price Sensitive Information (USPI) to trade.

SEBI claimed that the alleged individuals had access to the USPI based on their close proximity to the promoters of the company. Following this, the Whole Time Member of SEBI (WTM) imposed a penalty

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<sup>20</sup> Balram Garg v. Securities and Exchange Board of India - [2022] 137 taxmann.com 305 (SC)

<sup>21</sup> <https://www.livelaw.in/top-stories/insider-trading-cant-be-presumed-due-to-proximity-between-parties-onus-to-prove-is-on-sebi-supreme-court-197218>

of Rs.20 lakhs and barred them from the securities market. The appeal filed before the appellate tribunal - Securities Appellate Tribunal (SAT) was dismissed as well.

### **The contentions**

The court deliberated upon mainly two contentions -

- a) Were the WTM and SAT right in discarding the claim of estrangement as asserted by the appellants?
- b) Was there any connection between the buying of shares and sharing of USPI between the parties?<sup>22</sup>

### **Arguments by the appellants**

Senior Advocate, Mr. Dhruv Mehta, counsel for Balram Garg asserted that the WTM had held that three alleged individuals to not be 'connected persons' or 'immediate relatives' of his client. Senior Advocate, Mr. V. Giri, representative for the other appellants, stated that the case was solely based on evidence of circumstantial nature and proximity of the parties in question. Proof of estrangement between the parties, along with material evidence had already been presented from the side of his client.

### **The Court's understanding**

The Hon'ble Supreme Court of India outlined the two above-mentioned issues. The claim of estrangement was accepted by the Apex Court as satisfactory evidence was presented by the appellants showing that there was no personal or professional connect left between the parties and the company. SEBI fell short in proving that these individuals were connected to Balram Garg, who allegedly communicated and gave them access to the USPI.

The claim of it being SEBI's duty to successfully establish if communication of the USPI took place, was sustained by the Court, which upheld the claim that SEBI did not prove the existence of communication adequately. Communication links like emails, letters, call records, etc were not presented to sufficiently prove that such an exchange of sensitive, unpublished data took place, and therefore the claim that trading took place on the basis of such intel, also collapsed.

### **Analysis**

The Court arrived at the decision with a two-fold approach of looking at things - whether the alleged sensitive information was actually communicated and concrete evidence (not present) and if there was estrangement between the parties and proof of that (present). This decision shows that an authority cannot arbitrarily allege and 'punish' someone and get away with it without having strong evidence (not circumstantial).

### **Conclusion**

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<sup>22</sup> <https://indiacorplaw.in/2022/04/supreme-court-clarifies-evidentiary-burden-in-insider-trading-cases.html>

The SC decided against the judgement and final orders of WTM and SAT and adjudicated that deposits on behalf of the appellants will be refunded back to the parties. It iterated that mere proximity could not be conclusive evidence of insider training.<sup>23</sup>

## **2. SAT lifts curbs imposed by SEBI on Infosys officials for alleged insider trading**

Mumbai's Securities Appellate Tribunal (SAT) in the case of *Mr. Pranshu Bhutra v. SEBI*<sup>24</sup> while lifting the ban on employees of Infosys from buying or selling securities imposed by SEBI for allegedly violating insider trading regulations, the Coram of Justice Tarun Agarwala (Presiding Officer) and Justice M.T. Joshi (Judicial Member) reaffirmed the established law that the burden of proof is always on the prosecution, SEBI, to prove that he had access to UPSI.

### **Issue**

SEBI examined trading activities of two partnership firms namely, M/s Capital One Partners and M/s Tesora Capital in relation to Infosys Ltd. Audited financial results were released by Infosys on 15th July, 2020.

The said information was Unpublished Price Sensitive Information (UPSI). The appellant was reasonably presumed to have access to the UPSI on probability basis and was considered as an insider under Regulation 2(1)(g) of the PIT Regulations.

### **Employees at Infosys were not allowed to acquire or sell the company's stock: SEBI**

Venkata Subramaniam is the senior principal of Infosys' corporate accounting group, and Bhutra is the senior corporate counsel. They were barred from buying or selling Infosys stock until further instructions were issued by SEBI. On the 15th of September last year, the SEBI issued an order barring Infosys workers from trading due to charges of insider trading breaches.

### **Judgement**

"We are of the opinion that debarring a person from accessing the securities market at this point is not justifiable given the facts of the case," a Bench led by Justice Tarun Agarwala said while quashing SEBI's confirmation order.

### **There is no evidence, either direct or indirect.**

The tribunal stated that, in the absence of any direct or indirect evidence coming forward at this stage, and because the investigation is still ongoing, the continuation of the interim order against the appellant is unjustified, especially since the appellant has not traded in the scrip (It is a form of legal money that permits

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<sup>23</sup> <https://www.taxmann.com/post/blog/sc-sets-aside-insider-trading-orders-against-p-chand-jeweller/>

<sup>24</sup> Appeal No.689 of 2021: Available at : [https://www.livelaw.in/pdf\\_upload/e2022jo202168982-416610.pdf](https://www.livelaw.in/pdf_upload/e2022jo202168982-416610.pdf)

the bearer to receive something in exchange for it) and there is no finding that he is a party to unlawful gain.

### **3. SAT vs SEBI - The Power Struggle<sup>25</sup>**

#### **Summary**

Recently, SEBI has claimed in front of the Supreme Court that SAT lacks jurisdiction and authority to impose costs on SEBI.

#### **Introduction**

Whenever the Securities Appellate Tribunal (SAT) criticises and contradicts the market regulator, SEBI appeals to the Supreme Court (SC) of India, where it is represented by dignitaries like the Attorney General of India, the Solicitor General of India, and more.

High profile cases like Palco Metals Limited, Sawaca Business Machines Limited, Goldman Sachs, etc were appealed in the SC against imposition of costs on itself, but the costs were either set aside as unwarranted, or the Respondents (private parties) agreed not to recover the costs from SEBI. The same pattern can be seen in the present case - *SEBI vs Vital Communications Ltd & Ors*.<sup>26</sup>

There has always been a desire for a cost-benefit analysis before SEBI is allowed to file an appeal with public funds before the Supreme Court of India. SAT has imposed costs on a multitude of authorities like SEBI, National Stock Exchange and the Bombay Stock Exchange. In none of these judgments, the Apex Court has addressed the legal matter of SAT's ability to impose costs on SEBI and its limitations, if any.

But SAT has underlined that cogent data has to be put out in order for SAT to assess the expenses. The level of costs requested by the private party from SEBI in *MLB Financial Services Limited* was rejected because there was inadequate evidence to establish the actual amount of cost spent by them. As a result, SAT assessed and levied an anticipated fee of INR 50,000 on SEBI.<sup>27</sup>

#### **A step forward - A needed judgement?**

In this context, it is worth noting that a recent order, in the issue of *Vital Communications Limited vs SEBI* ('*The Vital Communications Case*'), has once again imposed costs on SEBI, who immediately went to the Supreme Court and secured a stay. Despite the several lawsuits filed since the first SCN was issued in 2005, it is still under appeal in the Supreme Court with respect to SEBI's appeal on costs imposed and is scheduled for ultimate disposition on July 27, 2022. If the Supreme Court decides to look into the legal issues, this might be a watershed decision, outlining the limits of the SAT's civil authority over SEBI.

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<sup>25</sup> <https://www.mondaq.com/india/antitrust-eu-competition-/1192468/imposition-of-costs-on-sebi-a-tussle-between-sat-and-sebi>

<sup>26</sup> *SEBI vs Vital Communications Ltd & Ors* [CA 1649/2022]

<sup>27</sup> <https://www.livelaw.in/top-stories/sebi-v-sat-supreme-court-stays-order-of-securities-appellate-tribunal-imposing-rs-8-lakhs-cost-on-sebi-194354>

### **Conclusion<sup>28</sup>**

Statistically, SAT upholds the majority of SEBI orders, with just a small minority in favour of private parties. According to SEBI's annual report for the fiscal year 2020-21, its orders were clearly sustained in almost 60% of the appeals. Almost 82% of the appeals decided were in favour of SEBI in some form.

SEBI orders the parties to pay legal fees when it resolves administrative and civil procedures. Indeed, the SEBI (Settlement Proceedings) Regulations, 2018, allow SEBI to not credit these charges with the CFI and such sums remain with SEBI. This begs the question of whether SEBI may grant itself such power through its regulatory-making power while opposing SAT's power on the basis of non-explicit laws. If SEBI is granted such authority, its appellate body, SAT, is also granted such authority. Depriving SAT of its ability to impose charges on SEBI would undermine the balance of SEBI's broad powers under the statutory structure.

### **Analysis**

The power tussle between SEBI and SAT has been ongoing for a long time, with SEBI imposing costs on defaulters, who approach SAT which overrides SEBI's decisions and imposes costs on the regulator which ultimately catapults the dispute to the Supreme Court of India. The result of this case hopefully settles the matter about the limits of interference among these authorities and eliminates redundant litigation.

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<sup>28</sup> <https://www.mondaq.com/india/antitrust-eu-competition-/1192468/imposition-of-costs-on-sebi-a-tussle-between-sat-and-sebi>

## **Circulars**

### **1. DLT Circular by SEBI**

#### **Introduction**

The Securities and Exchange Board of India (SEBI) released a circular on 29th March 2022, titled as “Operational guidelines for ‘Security and Covenant Monitoring’ using Distributed Ledger Technology (DLT)”. This was in furtherance of a previous circular, released on 13th August 2021 - “Security and Covenant Monitoring using Distributed Ledger Technology”.<sup>29</sup>

The market regulator elaborated on the manner of recording of charges by Issuers and the manner of monitoring by Debenture Trustees (DTs), Credit Rating Agencies, and others along with detailing the responsibilities that were going to be on these institutions.<sup>30</sup>

#### **What is DLT**

“Distributed Ledger Technology (DLT) is a protocol that enables the secure functioning of a decentralized digital database.”<sup>31</sup>

The DLT system works on the following principle - an issuer will input information into the database. The provided intel needs to be verified, and through ‘smart contracts’, every time an issuer feeds in new information, the relevant intermediary is notified. Once the verification is complete, only then the provided data will be stored/recorded on the blockchain.<sup>32</sup>

#### **DLT’s Operation - Explained**

At the foundation level, this technology involves the uniqueness of assets recorded in the DLT system and a system-generated unique identifier (Asset ID) that shall be allotted for each asset offered by Issuer as security for the non-convertible securities. For data exchange and verification across depositories, and the format for unique Asset ID shall be a 12-digit alphanumeric string.<sup>33</sup>

SEBI has been able to take ‘a step in the right direction’ by incorporating evolving technology to achieve the best results in carrying out due diligence, consistency, transparency, and safeguarding the rights of the

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<sup>29</sup>[https://www.sebi.gov.in/legal/circulars/aug-2021/-security-and-covenant-monitoring-using-distributed-ledger-technology\\_51855.html](https://www.sebi.gov.in/legal/circulars/aug-2021/-security-and-covenant-monitoring-using-distributed-ledger-technology_51855.html)

<sup>30</sup><https://taxguru.in/sebi/sebi-issues-operational-guidelines-security-covenant-monitoring.html>

<sup>31</sup><https://www.investopedia.com/terms/d/distributed-ledger-technology-dlt.asp>

<sup>32</sup>Supra note 30

<sup>33</sup><https://www.sebi.gov.in/legal/circulars/mar-2022/operational-guidelines-for-security-and-covenant-monitoring-using-distributed-ledger-technology-dlt-57331.html>

investors in relation to the assets of Issuers.<sup>34</sup> Removal of redundant/duplicate data and manipulations has been hailed as another aspect of the positives of this move. A series of relaxations have been offered but with corresponding directions on how to avail them and the limits. Eg. Strict deadline for examining existing issuances of non-convertible securities by November 30, 2022.

## Conclusion

With the correct investments, smart planning and a vision, we can level-up our market management and this is what SEBI aims to do with this platform.

## 2. Compliance relaxations for listed companies under certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

The Securities and Exchange Board of India (SEBI), on 13th March 2022 released a circular that was directed to all listed entities and all stock exchanges, informing the concerned institutions regarding certain relaxations in some areas of compliance related procedure.<sup>35</sup> The aim was to reduce the complexities in the functioning of the listed players and make it easy for them.

RELEVANT LODR REGULATION	COMPLIANCE RELAXATION GRANTED
Regulation 36 (Documents and Information to shareholders)	<p>Listed entities are mandated to provide a hard copy of the annual report containing principal attributes of all the documents prescribed under Section 136 of the Companies Act 2013 to the shareholders who have not registered their email addresses, with 21 days before the AGM.</p> <p>Relaxation has been provided to the enlisted individuals/organisations from the above mandate, up to December 31, 2022.</p> <p>Clarification: It is mandatory to provide a hard copy of the full annual report if any shareholder requests the same.</p>

<sup>34</sup>[https://corporate.cyrilamarchandblogs.com/2022/04/a-technology-driven-approach-to-achieving-compliance-sebis-operational-guidelines-for-monitoring-of-security-and-covenants/#\\_ftnref1](https://corporate.cyrilamarchandblogs.com/2022/04/a-technology-driven-approach-to-achieving-compliance-sebis-operational-guidelines-for-monitoring-of-security-and-covenants/#_ftnref1)

<sup>35</sup>[https://www.sebi.gov.in/legal/circulars/may-2022/relaxation-from-compliance-with-certain-provisions-of-the-sebi-listing-obligations-and-disclosure-requirements-regulations-2015\\_58920.html](https://www.sebi.gov.in/legal/circulars/may-2022/relaxation-from-compliance-with-certain-provisions-of-the-sebi-listing-obligations-and-disclosure-requirements-regulations-2015_58920.html)



Regulation 44 (4) (Meetings of shareholders and voting)	If general meetings are to be held in an online format, then the mandate of sending proxy forms to holders of securities in all cases detailing that a holder may cast their vote either for or against a concerned resolution, has been dispensed with, up to December 31, 2022.
Regulation 47 (Advertisement in Newspapers)	In the notice of AGM, published by advertisement under Regulation 47, the addition of a link attached leading to the annual report should be ensured, so as to facilitate access to the full reports for the shareholders' perusal.

### **Income Tax Appellate Tribunal (ITAT)**

- The Vishakhapatnam Bench of ITAT concluded that the promotion plan's export entitlements and duty drawback are income assessable.<sup>36</sup>**

#### **Introduction**

The Income Tax Appellate Tribunal (ITAT) Visakhapatnam Bench, in the case of *Nekkanti Sea Foods Ltd. v. Principal Commissioner of Income Tax*<sup>37</sup> ruled that the promotion plan's export entitlements and duty drawback constitute income assessable under the head "earnings or gains from business or profession" under section 28 clauses (iiib) and (iiid) of the Income Tax Act, 1961.

#### **Background of the case**

- The assessee's company exported frozen shrimp and other sea items. The assessee filed its income tax return for the fiscal year 2017-18.
- After completing the income return under section 143(1), the case was selected for full Computer Aided Scrutiny Selection (CASS) inspection.
- Statutory notices requesting information were sent to the assessee in electronic format and after reviewing the information received from the assessee's representative, the Assessing Officer (AO) issued a disallowance under section 14A read with Rule 8D.
- Invoking the authority given by Section 263 of the Act, the PCIT stated that the assessment order was erroneous and detrimental to the revenue's interests.
- The assessee was served a show-cause notice to which they responded. Taking into account the assessee's representations, the PCIT directed the AO to deny the sum arising from the receipt of duty drawback and the sum arising from the sale of licences.

<sup>36</sup> <https://www.livelaw.in/news-updates/itac-income-tax-act-foreign-trade-development-and-regulation-act-201068#:~:text=The%20Visakhapatnam%20Bench%20of%20the,the%20Income%20Tax%20Act%2C%201961>

<sup>37</sup> Nekkanti Sea Foods Ltd. v. Principal Commissioner of Income Tax i.i.a. no. 156/viz/2021

- The PCIT ruled that it was not derived from the industrial business and so did not entitle the assessee to a deduction under section 80IB (11A) of the Income Tax Act.

### **Contentions of the Assessee**

The assessee contended that the PCIT's order is prima facie erroneous because the AO examined the assessee's books of accounts placed before him. The PCIT's mere change of view was not in conformity with the law. The assessee has received incentives under the Foreign Trade Policy as a result of the assessee's exports.

According to section 28(iiib) of the Income Tax Act of 1961, cash assistance received or receivable by any person against exports under any Government of India plan should be treated as part of business profits.

### **Contentions of the department**

The department maintained that PCIT correctly found that duty drawbacks, licence sales, and so on constitute an independent source of income and do not constitute an eligible activity for the purposes of Section 80IB of the Income Tax Act.

### **Judgement**

The ITAT relied on the Supreme Court's ruling in the matter of *CIT vs. Meghalaya Steels Ltd.*<sup>38</sup>, wherein it was held that monetary aid received or receivable in connection with export schemes is classified as income under the heading “profits and earnings of business or profession.” Subsidies used to compensate expenditures incurred in the manufacturing of items by a specific enterprise would also have to be included under the heading “earnings and gains of business or profession,” rather than “revenue from other sources.”

The two-member bench of Duvvuru RI Reddy (Judicial Member) and S. Balakrishnan (Accountant Member) concluded that the authorities misunderstood the legislative intent underlying the retroactive addition of a clause-(iiid) to Section 28 of the Income Tax Act.

### **Analysis**

The case covers the aspect of export entitlements and duty drawbacks falling under the head of profits earned in the course of the profession and not a separate source of capital earning. This clears the contention that such gains would be eligible for deduction under 80IB of the Income Tax Act.

- 2. The Vishakhapatnam Bench of the ITAT ruled that a loss sustained as a result of the sale of government securities qualified as a trading loss.**

### **Introduction**

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<sup>38</sup>CIT Vs M/s Meghalaya Steels Ltd [(2016) 383 ITR 217 (SC)]

The Income Tax Appellate Tribunal (ITAT) Visakhapatnam Bench, in the case of *Asst. Commissioner of Income Tax v. The Eluru Cooperative Urban Bank Ltd.*<sup>39</sup> opined that a loss incurred as a consequence of the sale of government securities qualified as a trading loss.

### **Facts**

- The assessee, a co-operative urban bank limited filed an income tax return for the fiscal year 2010-11, claiming Rs. 8,72,100/- in total revenue. Consequently, the case was investigated. The assessee's representative submitted the relevant data sought after in the statutory notices.
- After studying the books and the information given by the assessor's representative, the Assessing Officer (AO) conducted the evaluation.
- The assessee, dissatisfied with the AO's decision, filed an appeal with the CIT (A). The CIT (A) granted the claim for provisions for bad and doubtful debts under the first proviso to sub-clause (a) of section 36(1)(viiia) of the Income Tax Act.
- The CIT (A) also permitted a loss on the sale of government securities in conformity with the RBI's standards. The Revenue has filed an appeal with the Tribunal after being dissatisfied with the ruling of the CIT (A).

### **Contentions made by Assessee**

The assessee contended that the government securities were held in the category of “Available For Sale,” and so the loss after adjusting prior year reserves is being charged to the current year’s P & L Account.

### **Contentions made by the department**

The department asserted that the amount claimed by the assessee exceeds 7.5 per cent of the income claimed and declared under section 36(1)(viiia)(a) of the Income Tax Act. As a result, the claimed excess deduction should be denied. The Assessing Officer was not asked about the application of the first proviso to sub-clause (a) of section 36(1)(viiia). Because the assessee failed to report the sale and purchase of government securities in the Profit and Loss Account, the loss sustained as a consequence of the sale of government securities held as investments should be considered as a capital loss rather than a business loss.

### **Judgement**

The ITAT concluded that owing to the nature of their business, banks may be needed to park excess trading money in securities, which, while intended to be trading assets, may be required to be held for longer periods if funds are not required. Securities in the AFS categories must be handled differently than securities in the HTM categories, which are bought and held only for investment reasons.<sup>40</sup>

The two-member bench of Duvvuru RI Reddy (Judicial Member) and S. Balakrishnan (Accountant Member) observed that the treatment of securities in the AFS (available for sale) categories must be viewed in contrast to securities in the HTM (held to maturity) categories, which are purchased and held solely for investment purposes.

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<sup>39</sup> *Asst. Commissioner of Income Tax v. The Eluru Cooperative Urban Bank Ltd.* I.I.A. No.384/Viz/2018

<sup>40</sup> *Supra* 37

## **Analysis**

The judges focused on the different purposes of the securities (HTM and AFS) and how they should accordingly be treated differently and which one of them would classify as a ‘trading loss.’

## **MINISTRY OF CORPORATE AFFAIRS (MCA)**

### **Relaxations and Amendments Approved By Ministry Of Corporate Affairs In May 2022**

#### **1. Subscribers and first directors to provide declaration of government approval under NDI Rules at the time of incorporation of a company**

Section 7(1)(c) of the Companies Act, 2013 (CA 2013) read with Rule 15 of the Companies (Incorporation) Rules, 2014 requires subscribers to the memorandum of association and each of the first directors named in the articles of association of the company to submit Form INC-9. Recently, the Ministry of Corporate Affairs substituted the existing Form INC-9, with a new declaration form of compliance under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules). The subscriber/ first director must declare whether government approval needs to be obtained under the NDI Rules prior to subscription of shares by them.

Part B of Form INC-32 (SPICe+) has a new declaration - application for incorporation of a company whereby it states that if any of the proposed directors seeking appointment are nationals of a country which shares a land border with India, necessary security clearance from MHA, Government of India shall be attached with the consent.

The above amendments were introduced vide the Companies (Incorporation) (Second Amendment) Rules, 2022 dated May 20, 2022<sup>41</sup> and shall come into effect from June 1, 2022.

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<sup>41</sup> <https://egazette.nic.in/WriteReadData/2022/235912.pdf>

## **2. Declaration of prior approval under NDI Rules while effecting corporate reorganizations/restructuring<sup>42</sup>**

MCA has notified the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 (Amendment Rules), to amend the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (CAA Rules) whereby companies submitting applications under Section 230 of CA2013 (Power to compromise or make arrangements with creditors and members) will be mandated to furnish a declaration of prior approval under the NDI Rules.<sup>43</sup>

Rule 25A of the CAA Rules, provides for merger or amalgamation of a foreign company with an Indian company and vice-versa. Sub-rule (4) vide the Amendment Rules deals with cases of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate that is based in a country which shares land border with India.

A declaration (in Form No. CAA-16) shall be required during tendering of application under Section 230 of the CA 2013. New Form No. CAA.16 includes declaration for - **When Government approval under NDI Rules is NOT required OR When Government approval under NDI Rules IS required, and if the same is procured and enclosed prior to the transfer.**

The aforesaid amendment has been introduced vide the Amendment Rules dated May 30, 2022.<sup>44</sup>

## **CORPORATE POLICY**

### **PM GATI SHAKTI PLAN**

PM Modi introduced PM Gati Shakti, a National Master Plan for multi-modal connectivity, on October 13, 2021, with the goal of integrating road, railway, airport, and multi-modal connectivity projects across the country. It encompasses 7 engines for economic transformation, seamless multimodal connectivity and logistics efficiency. They are:

#### **A. Road Transport**

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<sup>42</sup> <https://egazette.nic.in/WriteReadData/2022/236112.pdf>

<sup>43</sup> <https://www.scconline.com/blog/post/2022/05/31/new-form-caa-16-introduced-vide-companies-compromises-arrangements-and-amalgamations-amendment-rules-2022/>

<sup>44</sup> <http://cacult.com/new-form-caa-16-has-been-inserted-under-the-companies-act/>

A master plan for Expressways would be formulated in 2022-23 to ensure a speedier flow of people and goods.

**B. Seamless Multimodal Movement of Goods and People**

Data of all mode operators will be shared utilising the Unified Logistics Interface Platform (ULIP), developed for Application Programming Interface (API), allowing effective transportation of goods, lower logistical costs and eliminating time-consuming paperwork.

**C. Multimodal Logistic Parks**

Contracts for implementation of these parks at four locations through PPP mode will be awarded in 2022-23.

**D. Railways**

Railways will develop products and services for SMEs. In 2022-23, 2000 km of the network will be brought under Kavach with the production of 400 new-generation Vande Bharat Trains.

**E. Mass Urban Transportation**

Novel finance methods and rapid implementation for the construction of large-scale metro networks along with new metro designs suiting New India will be prioritised.

**F. Parvatmala**

The National Ropeways Development Program will be pursued on a PPP model to enhance tourism sustainably.

**G. Capacity Building for Infrastructure Projects**

The Capacity Building Commission will provide technical assistance to federal ministries, state governments, and infrastructure agencies which will improve capacities in all initiatives. Rs. 1 lakh crore will be given to assist states in catalysing total economic investment.

This allocation would be used for state productive capital investment connected to PM GatiShakti. Additional funding for important components of the PM Gram Sadak Yojana, including support for the states' share, would be added. Economic digitization - digital payments and completion of the OFC network, as well as building ordinances, town planning schemes, transit-oriented development, and transferable development rights reforms.

The main aim is economic growth and sustainable development by connecting infrastructure and logistics, enabling greater mobility of people and objects, and improving production while reducing costs and time.