BRIEF CASE ● M J ANTONY

A weekly selection of key court orders

Special laws override Arbitration Act

The Supreme Court has ruled that in the case of National Highways Authority of India (NHAI), the central government has the exclusive right to appoint the arbitrator if a dispute arises, and not one according to the Arbitration and Conciliation Act 1996. This exceptional case arises because of Section 3G(5) of the National Highways Act 1956. The question arose when NHAI acquired the land belonging to Sayedabad Tea Company in Darjeeling. According to the special law favouring NHAI, if there is a dispute over compensation, the arbitrator appointed by the central government will decide the issue. In this case, the tea company disputed the amount and asked the government to appoint an arbitrator. But the government did not respond. Therefore, the company moved an application before the Calcutta High Court invoking the provisions of the Arbitration Act to appoint an arbitrator. Then the government rushed to appoint an arbitrator. The high court ruled that since the Arbitration Act has already been invoked, the government cannot appoint an arbitrator. This was followed by the recusal of the arbitrator and legal imbroglio lasting 12 years over which law would apply. The Supreme Court has ended the controversy stating that a special law like the National Highways Act will override a general law like the Arbitration Act. This principle was applied earlier in the case of the Electricity Act when a similar question arose over arbitrator.

Director can nominate arbitrator

The Delhi High Court has stated that though courts have appointed independent arbitrators when there is a conflict of interest, the Arbitration Act has not done away with the "unilateral right" of a party to appoint an arbitrator. The law only prohibits an ineligible person to act as arbitrator. The court was dealing with the case, Kadimi International vs Emaar MGF Land Ltd in which an arbitration clause became the centre of the dispute. It said a sole arbitrator shall be nominated by anyone of the directors of the company. When an arbitrator was chosen by a director of one of the parties, the rival opposed it as he would not be impartial. It was argued that after an amendment to the Act in 2015, certain persons connected with the disputing parties have been made ineligible. It further contended that since the director of a company cannot himself act as an arbitrator, any appointment made by him would also be void. But the high court asserted that Parliament has not taken away a contracting party's right to make an appointment altogether. It only barred an ineligible person to be an arbitrator.

Stay orders freeze land acquisition

When a court orders a stay in a land acquisition case, the acquisition of all pockets of land should be suspended. Even if one landowner gets a stay order for his/her pocket of land, the acquisition in that whole area cannot proceed further. The authorities have to hold back proceedings. Stating so, the Supreme Court last week set aside the judgment of the Bombay High Court which had quashed the land acquisition in Aurangabad area. The landowners in this appeal, State of Maharashtra vs Moti Ratan Estate, had argued that the acquisition had lapsed as the award was not published within two years as stipulated in the old Land Acquisition Act. The high court agreed with them. However, on appeal by the state, the Supreme Court stated that the period of stay should be excluded from the two-year period and then the award was within time.

Wrong way to calculate compensation

Calculation of compensation for road deaths should be based on the age of the victim, and not on the age of the dependants. There may be many dependants of the deceased, whose ages would vary. Therefore, the age of the dependents would have no relevance, the Supreme Court explained in its judgment, Sunita Tokas vs New India Assurance. In this case, a 21-year-old youth died in an accident while riding pillion. The Delhi High Court awarded ₹9 lakh based on the age of the victim's mother. She appealed to the Supreme Court. It enhanced the award to ₹11.39 lakh based on the age of the son. He was a trained swimmer who had won several state-level competitions. Therefore, he had great potential for the future, which the tribunal and the high court overlooked. The Supreme Court recalculated the compensation considering all aspects of the case and asked the insurer to pay the amount with 7 per cent interest.

Alternative remedies for defaulter

The question whether a defaulting company can move a high court straightaway without approaching the debt recovery tribunal (DRT) has again cropped in the Gujarat High Court in the case, G A Industries vs Bank of Baroda. The MSME had taken a loan from the bank, which it could not return because of the demonetisation and the implementation of GST. The bank declared the account as non-performing and tried to take possession of the assets of the company under the Securitisation (Sarfaesi) Act. The DRT rejected the opposition of the firm. It approached the high court and argued that the action of the bank was in violation of the RBI guidelines on the revival of MSMEs and therefore, there was no need to approach the DRT. The bank cited Supreme Court judgments which criticised high courts for hearing writ petitions in debt matters. The high court, after analysing the facts of the case, allowed the writ petition observing that a "justice-oriented approach ought to have been adopted by the tribunal and even assuming for the sake of argument the firm has an alternative remedy, in my discretion of exercise of jurisdiction, I deem it fit to set aside the order of the tribunal". The case was remanded to the DRT.

Prosecution of directors quashed

The Calcutta High Court last week quashed the prosecution of directors of a company for not depositing the contribution of employees' provident fund. In this case, Malhati Tea & Industries Ltd vs State Of West Bengal, criminal action under the Indian Penal Code was taken against a number of directors of the tea company. Quashing the prosecution ordered by the district judge of Jaipalguri, the high court stated that the term 'employer' in the code did not include the director of a company. It is the company which is the employer, and not its directors either singly or collectively. "Continuance of criminal proceedings against the directors would be an abuse of the process of the court," the court said.

MERGER OF PUBLIC SECTOR BANKS

Has governance been given short shrift?

The govt's silence on the road map to change the governance structure of state-run banks make experts wary of the road ahead

SUDIPTO DEY

The word "merger" was used only once in the recommendations by the committee headed by P J Nayak that reviewed the governance of boards of banks in 2014.

Even former RBI Governor Y V Reddy has been categorical in his assessment on the impact of the move to merge 10 public sector banks (PSBs) into four, when he recently told a television channel: "Merger won't solve governance issues."

The government while announcing the latest merger plans for PSBs did say the boards of banks shall get more freedom in the selection of independent directors and in deciding the role of board members. Among the measures were allowing banks to appoint chief risk officers at market-linked remuneration. But, the government's silence on the road map to change the governance structure of PSBs make experts wary of the road ahead.

Experts point out that there has been no fundamental change in the governance structure of the merged banks. After the current round of mergers, there will be 12 large PSBs. "If anything, the risks have only increased as now they are concentrated with less number of individuals having greater powers, without any accountability," says Shriram Subramanian, founder and MD, InGovern Research Services, a proxy advisory firm.

Many experts feel for governance and accountability to improve, the nomination and remuneration committee of the board has to play a key role in the appointment of directors, rather than the government or the Reserve Bank of India. This has to be linked to the reduction of the government's stake in banks, they suggest.

The setting up of the Bank Board Bureau (BBB) — on the recommendation of the Nayak committee — was a step in that direction. However, experts are divided over the impact that the BBB has had on governance structures in banks. "The BBB is only a recommendatory organisation, and doesn't have any real powers to bring about effective change in the governance structure," says Subramanian.

However, Cyril Shroff, managing partner of law firm Cyril Amarchand Mangaldas, says the BBB has helped insulate the appointment of top management in PSBs. "This has helped improve the governanxce structure. However, additional reforms on this front are important," he adds.

> **"Efficiency in governance, and not the governance structure, is the issue. Efficiency should improve once we reduce the number of individual banks to have a seamless structure"**
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> SANDEEP PAREKH
> Founding partner, Finsec Law Advisors

According to Hetal Dalal, COO, Institutional Investors Advisory Services, a proxy research firm, the mergers may bring a marginal change (in governance structure) in terms of how the performance of senior leadership is measured. "Given the ecosystem of PSBs, the change is unlikely to be perceptible from the investor's point of view," she adds.

However, some experts feel having bigger banks are a step towards better governance structure. "I believe efficiency in governance, and not the governance structure, is the issue. Efficiency should improve once we reduce the number of individual banks to have a seamless structure," says Sandeep Parekh, founding partner, Finsec Law Advisors. Parekh feels the merger has to be the first step in a multi-step reform process.

The overhaul of the governance structure of these banks cannot be implemented in a few months and the legacy issues would continue to linger for a few years, he adds. The Nayak committee had recommended a three-phase overhaul of the governance structure over two to three years.

But, Shroff strikes an optimistic note. "The government has demonstrated a political will by undertaking governance reforms," he says. Steps like giving non-official directors a role analogous to independent directors will enhance governance standards in banks, he adds.

Experts feel the elongation of the tenure of directors and key managerial personnel will help engender better accountability and performance. "The ability to recruit a chief risk officer at market-linked incentives will also be critical in inculcating better credit underwriting standards and sustainable business practices,"says Shroff.

Experts stress the need for more specialists and strategists in PSBs. With the recent lateral recruitment of specialists into bureaucracy, it's a matter of time before the same is done for PSBs, feels Jayesh H, co-founder, Juris Corp. The way forward is to build in accountability and demolish the culture of inaction, he adds.

Experts emphasise the need for continuity in approach given the sensitivity of the banking sector. "One does hope that the current approach is something not just being driven by the ministry of finance, and rather by the PMO itself," says Jayesh.

As to whether the key recommendations of the Nayak committee will see the light of the day, experts remain divided over the issue. While some feel they are too drastic and may face practical implementation challenges, there are those like Shroff who are still optimistic. "The chief economic advisor was also a member of the Nayak committee and we may well see more of the recommendations being implemented," he says.

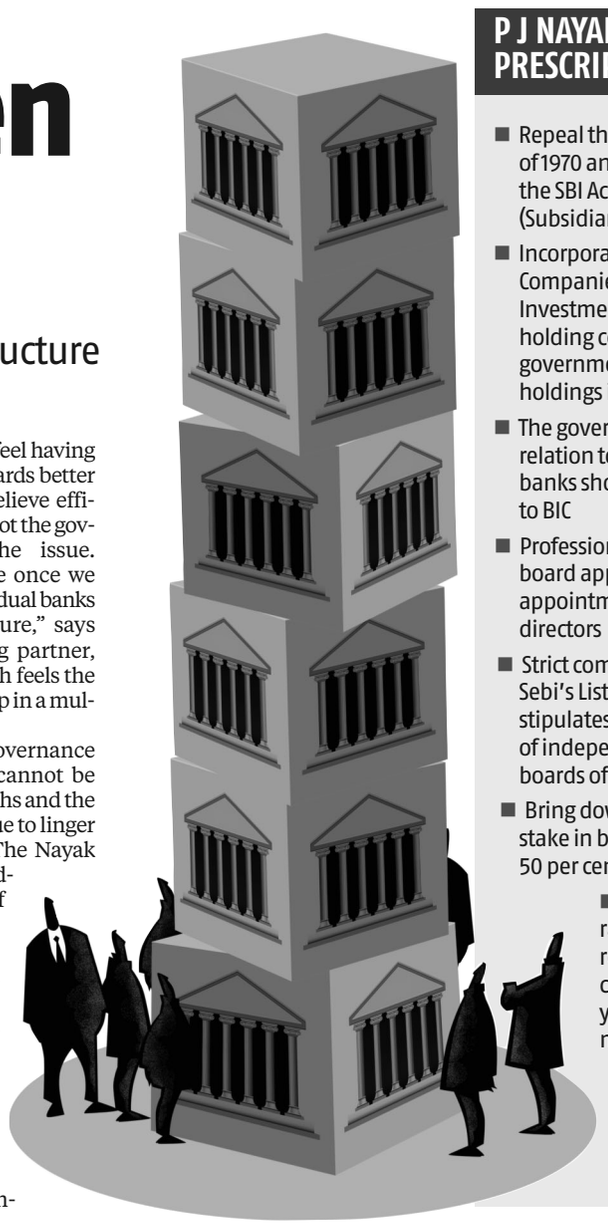

ILLUSTRATION: BINAY SINHA

P J NAYAK COMMITTEE'S PRESCRIPTION

- Repeal the Nationalisation Acts of 1970 and 1980, together with the SBI Act and the SBI (Subsidiary Banks) Act
- Incorporate all banks under the Companies Act, and a Bank Investment Company (BIC), a holding company to which the government transfers its holdings in banks
- The government's powers in relation to the governance of banks should be transferred to BIC
- Professionalise the process of board appointments, including appointments of whole-time directors
- Strict compliance of Clause 49 of Sebi's Listing Guidelines that stipulates a minimum number of independent directors in boards of each bank
- Bring down the government's stake in banks to below 50 per cent
- Need for wide-ranging human resource policy changes to bring younger people in top management
- Redesign the existing process of vigilance enforcement

MONITORING LOWER COURTS

Gujarat High Court's 'war room' shows the way

VINAY UMARJI

There is an array of large LCD monitors mounted side-by-side on a wall with some running statistical figures, while the others displaying CCTV footage. This remote monitoring centre is a "war room" recently set up on the premises of the Gujarat High Court in Ahmedabad.

Set up under the aegis of the State Court Management Systems (SCMS), the data warehousing and mining centre will help the high court monitor and improve judicial proceedings across lower courts in the state. Justice Anant S Dave, the Acting Chief Justice who is also the chairman of the SCMS Committee, had envisioned this project.

Of the six screens in the war room, one for accessing CCTV footage from all the courtrooms across the state. Apart from monitors, the room is equipped with an LED projector, as well as video conferencing set-up with access to live-streaming of the footage of the CCTV network installed in lower courts.

According to H D Suthar, registrar general of the high court, the CCTV footage for any courtroom within the state can be accessed immediately and it will allow the high court to "keep an eye" on judicial officers across courtrooms, apart from monitoring the presence of advocates and police personnel during hearings.

The data warehousing and mining centre will help the Gujarat High Court improve judicial proceedings across lower courts in the state

"Earlier, there was no way to monitor or assess the functioning of lower courts. Data sourcing was cumbersome and took time. As a result, cases of high pendency or lower disposal rates and errors could not be flagged immediately," said Suther. Officials said the centre will now help the high court compile and analyse statistical data, which can help improve the judicial and administrative system in lower courts. These will include statistical data related to city-specific civil cases, the number of judges available or absent, pendency, the disposal rate, types of cases and the functioning of special courts.

Data from the taluka level to the high court level will now be easily accessible for analysis. "Litigants will benefit in the long run," said Suthar.

Manned by three persons, three of the six screens in the war room monitor statistics with respect to subordinate courts' judicial pendency, while one screen looks at the high court's pendency and disposal status — case-type wise and Bench-wise.

Officials said the war room will act as the centre for all compiled statistics on the administration of justice — namely, judicial, administrative, financial, physical infrastructure, and human resources across the judicial set-up of the state. The war room will also be the nodal point for dissemination of all state-related statistics to the Supreme Court, as well as various other organs of the government.

Experts, too, have lauded the Gujarat High Court's initiative, especially when only a few high courts have been able to improve their administrative infrastructure.

"Very few high courts have annual reports like Gujarat does. Now, even the war room is a somewhat unique initiative. This is a model worth emulating. Other high courts should learn from Gujarat to prioritise data collection, gathering, and quality," said Surya Prakash B S, programme director, Daksh, a civil society organisation that undertakes research and activities to promote accountability and better governance.

However, experts highlight the need for robust data analysis. "While there is a lot of data to be gathered, data analysis is not happening as expected," noted one of the former registrars for information and technology at the Karnataka High Court.

Some experts believe high courts can do well by roping in third-party players to analyse the data. While courts could have inhibitions on whether or not to expose themselves to private sector players, to begin with, top institutes like IITs and IIMs could be roped in for such data analysis, experts said.

However, the government will need to formulate some guidelines for such interactions between courts and third-party players, noted the earlier quoted Karnataka high court's former IT registrar.

Question mark over independence of IndiGo chairman

ACCOUNTANCY

ASISH K BHATTACHARYYA

Inter Globe Aviation (IGA), which runs IndiGo Airlines, is co-promoted by Rahul Bhatia and Rakesh Gangwal. The Bhatias have a 38.26 per cent stake and the Gangwal family has a 36.68 per cent stake in the airlines. Institutional shareholders hold 20.12 per cent shares and non-institutional shareholders hold 4.95 per cent shares. IGA got listed in 2015. According to the shareholder agreement, Interglobe Enterprise Group (IEG), which is controlled by the Bhatias, has the right to nominate three non-independent directors and the RG Group, which is led by Gangwal, can appoint one non-independent director. IEG has the right to appoint the chairman of the board, the CEO, the MD, and the president of the company. The shareholder agreement, which will expire in October 2019, gives overarching control to Bhatia. IndiGo is operating efficiently and growing fast because it has benefitted from the friendship between Bhatia and Gangwal, and their complementary capabilities.

Of late, a rift between them has surfaced. The IGA board has six members — three non-executive promoter directors (Rahul Bhatia, Rohini Bhatia and Rakesh Gangwal), one nominee of the promoter director, and two independent directors. Both the independent directors (M Damodaran and Anupam Khanna) have excellent credentials. Damodaran is the chairman of the board. Gangwal is seeking regulatory intervention on past related-party transactions (RPT) and non-independence of the current chairman. The conflict in IndiGo provides a context to look at an important corporate governance issue — independence of independent directors.

The composition of the IGA board meets the regulatory requirements, except that there is no woman director. The regulation requires that if the chairperson is a non-executive chairperson, one-third of the directors should be independent directors, and if the chairperson is an executive chairperson, half the directors should be independent directors. The board is not ideal, because it lacks diversity and the so-called independent directors are not perceived to be independent.

According to the regulation, a nominee director is not an independent director, because he/she represents a particular interest group. Damodaran and Khanna are not classified as nominee directors. They are classified as independent directors. It might be correct legally, but classifying them as such does not meet the highest standard of corporate governance, because Damodaran is nominated by the Bhatias and Khanna is nominated by Gangwal. Positions taken by Damodaran on various issues suggest that he is supporting the views of Bhatia. Similarly, the positions taken by Khanna suggest that he is supporting the views of Gangwal. It is quite possible that by application of mind independently, without any bias, Damodaran is finding the proposals of Bhatia more acceptable in the interest of the company, and Khanna is finding the proposals of Gangwal relatively acceptable. But, as they are nominated by Bhatia and Gangwal, respectively, it creates a suspicion that they may not be able to apply independent mind to the issues arising from the conflict between the two co-promoters. As it is said, perception is more important than reality. It will be interesting the see how the Securities and Exchange Board of India (Sebi) intervenes and what view it takes on the independence of the current chairman.

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Under the law, the chairperson of the board does not enjoy any special power, unless the Articles of Association confers casting vote. He/she is responsible for conducting meetings effectively. Even in the absence of special power, the chairperson can influence board decisions in favour of the controlling group by creating a board culture, which stifles open discussion, and by setting the agenda in consultation with the CEO and prioritising agenda items according to the preference of the controlling shareholder. Therefore, to balance the power between the CEO and the board, the chairman should be a non-executive chairman, who is independent in its true sense, and independent directors are truly independent. In the absence of an independent nomination and remuneration committee, the dominant shareholder tacitly influences the board to nominate its candidates for the position of independent director. In most promoter-driven companies, independent directors are appointed with the blessings of the promoter. Therefore, in a way, they are the nominees of the controlling shareholder, although they fulfil the criteria of independent director specified in the Companies Act 2013. In the case of IGA, it is obvious that the independent directors, including the current chairman, are nominee directors.

Institutional shareholders and other minority shareholders may not be much concerned about the corporate governance issues raised by Gangwal. Good corporate governance does not necessarily create value. But the relationship of trust between the two co-promoters is essential for protecting and creating value.

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