

## Court Hurdle in Insolvency's Path

Resolution process should get a chance first

The Supreme Court has erred in putting on hold the insolvency proceedings against real estate firm Jaypee Infratech. It shows an ongoing resolution process can be stymied if sufficient number of people raise their voice. The stay does not reflect institutional maturity, nor does it necessarily guarantee relief for homebuyers. The National Company Law Tribunal (NCLT) — the adjudicating authority for companies under the Insolvency and Bankruptcy Code — had already appointed an insolvency professional to work out a resolution plan. But homebuyers moved the Supreme Court alleging that they had not received their flats and the insolvency proceedings initiated against the company will render them without any remedy. It is not the court but the resolution process that can solve the homebuyers' problem.

The NCLT, in the Jaypee Infratech case, had advised homebuyers to file their claim with the insolvency professional. But the need is to make regulation clear on the rights of such unsecured claimants.

The code allows the proceeds from the sale of assets to be distributed to secured lenders or banks, to pay off workmen's dues, to pay wages and dues owed to employees and to clear financial debts owed to unsecured creditors. The Real Estate Regulation and Development Act entitles a buyer to claim compensation from a developer who fails to deliver the unit paid for but does not contemplate insolvency of the promoter. Since homebuyers and their creditors have a legitimate claim, their status among creditors should be clarified, preferably by legislation. Perhaps, a Supreme Court ruling could set a case law on homebuyers' rights. But the court's involvement should have awaited the outcome of the resolution process, not superseded it.

The best remedy in the specific case would be to increase the floor-area ratio for the project and allow a large enough number of extra residential units to be built to pay for the cost of completing the construction of homes that remain to be fully built. The resolution professional should get the opportunity to apply this remedy.

## For Brics Beyond Mere Sweet Nothings

As the biggest beneficiaries of globalisation, the five nations, Brazil, Russia, India, China and South Africa, which constitute Brics have come out strongly in favour of an open and inclusive world economy. They champion inclusive globalisation and a rules-based, transparent and multilateral trading system, even as the US wants bilateral agreements that put America First and Europe focuses on internal turmoil. The group has renewed its call for reforms in the International Monetary Fund, the World Bank and United Nations to reflect changing global realities. The Xiamen declaration of the Brics reiterates the group's commitment to addressing climate change and expanding green finance, and proposes a Brics bond fund in local currency.

This would have been more credible if Brics could come up with something with more teeth on North Korea's nuclear aggression than calling for resolution "through peaceful means and dialogue". China holds the key to reining in North Korea, with coercion or otherwise. Russia's sensibilities find reflection in the approach on Syria and Yemen. Similarly, the declaration does not mention Pakistan and its support for terror networks. However naming of terror groups, Lashkar-e-Taiba, Jaish-e-Mohammed, Tehrik-i-Taliban Pakistan and the Haqqani network, in reference to the security situation and violence in the region, and reiterating the responsibility of states to prevent and counter terrorist activities are a win for India.

Despite this, the Brics has succeeded in presenting a common platform and starting point for action, one that is broadly in keeping with the G20. That is helpful in an era where protectionism and unilateralism are emerging as dominant forces, including among some Brics nations.

Hypocrite he is, but let us welcome Pahlaj Nihalani (back) to the liberal fold

## Isn't It Lovely to Be an Adult, Chief Sanskari?

The proof of the pudding is in the eating. Liberal Indians had earlier half-guffawed, half-shook their heads in anger at sacked Central Board of Film Certification (CBFC) chief Pahlaj Nihalani's 'sanskari' shenanigans. Now, the pudding that liberals must eat to prove their own worth is to not turn into Nihalani's 'sanskari' himself. The man, once dived into Nihalani's role as CBFC chief, has gone back to making what he did best: producing films of relatively high (for Indian standards) erotic 'overground' content. Tomorrow, as the movie's producer, Nihalani will be 'presenting' the 'bold, beautiful and blessed' — the alliteration may be the only good thing he picked up during his stint close to the present alliteration-loving government — July 2, an erotic film starring a lot of skin, primarily belonging to (going by the film's trailer) the lovely Raai Laxmi. We must welcome it.

Yes, so Nihalani's hypocrisy as a man who treated all fellow Indians as seven-year-olds, and who now caters to an audience that knows its 'visual erotic' when it sees one, is indeed staggering. But better he propagate the opposite of what he preached during his time as Chief Sanskari than him making movies according to his own earlier temporary, silly, nanny rules. We wish him all the best as the provider of an adult India's many entertainments.

STATE OF PLAY India's handling of Doklam shows us the way to talk tough issues with China

## Speak Mandarin in 73 Days



Pranab Dhal Samanta

How to deal with China? This is easily the biggest foreign policy question for most governments in today's global power order. And that's precisely why the resolution to the Doklam stand-off will necessitate continuous relooking. Because the outcome in itself is an exception to what was becoming a new normal.

While China's larger interest on the success of the Brics Summit in Xiamen did help expedite an end to the two-month stand-off, the fact that India could manage to successfully stage off a strong and shrill Chinese challenge has reverberated across world capitals.

The understanding was arrived at after some 13 rounds of negotiations done through established diplomatic channels. No backchannel, no false assurances. This is quite an out-of-the-ordinary experience for all countries with a Beijing problem, specifically those that share land and maritime boundaries with China.

Just over the last few weeks alone, New Delhi has established itself quite a reputation, one that seemed to have rubbed off on the Brics Summit itself where India could achieve some desirable outcomes.

So, is there now an India model to emulate while dealing with a confrontational China? While that would receive some detailed attention in the days ahead, what's clear is that there were certain distinctive contours to the Indian approach. And while these worked for India, it's also a fact that they proved effective because of a larger context that continues to weigh heavily on China.

The context is now becoming increasingly embarrassing for China. The North Korean tests, including the missile that was fired over Japanese territory on the day Doklam issue was resolved, underline the weight of that embarrassment.

### Terror Has a Capital

The other country pulling down China in a similar manner is Pakistan, which is under fire for sponsorship of terrorism not just by India alone, but by now a growing spectrum of countries. These start with Afghanistan and go on to include countries in West Asia, Europe, and the US, as exemplified in President Donald Trump's South Asia strategy address.

In short, North Korea and Pakistan are not the best advertisements for a country aspiring global economic leadership. At a time when the US is looking insular as an economic power, China has thrown in its hat to lead the free trade pitch. The Brics, for instance, is a key forum to strengthen this claim. And just then, to have Pyongyang set off a nuclear device doesn't help matters.

This kind of 'Notoriety Club' had a utility for China, but that time may have passed. This is a conclusion only Beijing can make. But it cannot stop



Mr. Modi, please do cross the line and make yourself at home

other countries drawing their own meanings in their national interest.

It's in this context that the shrill rhetoric on Doklam did not help. There were very few takers for China's case, frankly, even before it was articulated. The reason for that being China's lack of credibility in subcontinental matters, given its own long-term strategic commitment with Pakistan. Further, the tone and content of the official attack did not help either, sending signals that made others equally insecure.

In contrast, India had a more nuanced approach, which can now be fleshed out along few parameters. To begin with, there was a conscious, clear decision to halt Chinese construction activity and stand by Bhutan regardless of how the situation evolved. This was a departure from the past practice to avoid direct confrontation. But this time, the overall military assessment was that China had come too close for comfort.

The initial action was done swiftly. Thereafter, India decided to keep quiet, not aggravate matters. So, New Delhi had, early in the day, recognised the principle that there could be no gain made by humiliating China.

New Delhi followed this edict to the point that it did not allow itself to be provoked by any Chinese humiliation.

The next principle at play was that China has much bigger stakes in the international system and the global commons for it to just abandon all of that in favour of military action against a global systems-compliant country and emerging economy like India. That assumption was correct. Which is why China did not cross the Brics deadline.

### Cultivation Season

And, finally, it was assessed that in the bigger picture, Beijing's aspirations require cultivating more positive relations with New Delhi. Which is why the condemnation of Lashkar-e-Taiba and Jaish-e-Mohammed in the Brics statement is better understood as a rethink in China than a victory for India.

The Doklam handling tells us that there's indeed an effective way to talk tough issues with China, and not by giving in or speaking out, but by showing up and conversing relentlessly to find convergences. China, after all, cannot have an ambition at the cost of everyone else.

Post the initial Doklam action, India decided to keep quiet. New Delhi had recognised the principle that there could be no gain made by humiliating Beijing

### GENDER JUSTICE

## Don't Be a Triple Talaq Pony



Rakesh Mohan Chaturvedi

The recent Supreme Court verdict making instant triple talaq illegal is a big step towards ensuring gender justice. But those who claim it will swing Muslim women votes to the BJP may be way off the mark.

The Congress had gone against the Shah Bano verdict to please Muslim clerics and prevent the loss of votes of Muslim men. Despite that, most Muslim women continued to vote for the Congress. They were guided by the opinion of men in their family. In many cases, the diktat of the patriarch on which party the family should vote was impossible to defy.

Three decades have passed since, and Muslim women are freer to make their own decision as to which party they would vote for. But it would be naive to believe that they will vote for the BJP only on the basis that the party backed the cause of banning instant triple talaq.

For starters, the BJP may be seeking more credit than is due for the verdict. Second, it does not have a very impressive record as far as pushing for gender justice goes.

The battle against instant triple talaq was fought mainly by Muslim women who went to court against the practice. The BJP played cheerleader. Later, the party hailed the verdict as one that would ensure gender justice in Muslim families. The BJP saw an opportunity of getting additional (Muslim) votes.

It is not just Muslim men who closely follow the issues the BJP espouses; Muslim women, too, who are impacted closely track the BJP on such matters. When Prime Minister Narendra Modi raised the 'Shamshan vs kabristan' (crematorium vs cemetery) issue at a rally in Fatehpur during the Uttar Pradesh election campaign in February, both Muslim men and women bristled.

Many have cited Modi's raising the issue of instant triple talaq during the same poll campaign having swayed the Muslim women vote in western UP for the BJP. While the party itself has doubts about this claim, the issue did serve to polarise the electorate.

A liberal, educated Muslim woman will be more independent in deciding



Think of the adarsh Bharatiya nari

whom to vote for: The views of male family members may influence them to a lesser degree. This electorate is likely to also think about the BJP's stand on gau raksha (cow protection) lynch mobs and other matters that can affect it before casting its votes.

Instances of instant triple talaq are not high. However, it is not just opposed by Muslim women affected by it but also by liberals, including liberal Muslims. According to rough estimates, only 2-3% Muslim women vote for the BJP. Mostly Shias have been inclined towards the party to some degree. They have never practised instant triple talaq.

All parties, be it the Congress or the BJP, should take up this issue primarily as a fight for gender justice. Although the Congress has supported the Supreme Court verdict in the case, its own attorneys-cum-politicians

fought the court battle against the criminalisation of the instant talaq. This makes its stand nebulous.

Muslim women still do not have equal rights to divorce. A Muslim man can divorce his wife over three months. Khula, the Muslim woman's right to divorce, does not compare with talaq-e-hasan or talaq-e-ahsan, which still gives the man far more powers than to a woman.

The BJP needs to work more to ensure gender justice and equal rights for all women. Sadly, most of the time its leaders are obsessed about the uniform civil code rather than looking at problems that women face per se. If the party is sincere about gender rights, the BJP should also work to ensure these rights are also delivered to non-Muslim women, Hindus included, on matters of education, inheritance, rights over children, and marriage (involving dowry, etc).

The BJP should not commit the mistake that the Congress did of being guided by vote-bank politics while dealing with the rights of Muslim women. It should fight for gender justice for all women, irrespective of their religious persuasion.

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### COMPETITION COMMISSION VS TELECOM REGULATORY AUTHORITY

## Fierce Contest Over Competition



M M Sharma

The ongoing turf war between the Competition Commission of India (CCI) and the Telecom Regulatory Authority of India (Trai), triggered by CCI chairman Devender Sikri writing a letter to Trai chairman R S Sharma on July 21, shows no sign of abating. Trai is now claiming to possess more experience in handling competition issues — e.g., abuse of dominance and predatory pricing — within the telecom sector. The tussle between new entrant Reliance Jio and entrenched players like Bharti Airtel, Vodafone and Idea to grab the maximum share of the huge telecom market is to be seen in the light of this turf war.

Undoubtedly, CCI is the expert body constituted under the Competition Act, 2002, for deciding 'all competition-related' issues. It has a statutory mandate to 'sustain and promote competition in markets' across all sectors. A statutory mechanism already exists for voluntary consultation between CCI and sector regulators such as Trai, the Insurance Regulatory and Development Authority (Irdi), the Petroleum and Natural Gas Regulatory Board (PNGRB), and the Central Electricity Regulatory Council

(CERC). But the opinion of either party is non-binding on the other.

The consensus among competition experts seems to be that the promotion of competition is everyone's duty, but checking anti-competitive practices is the sole duty of CCI. The counter-argument, though, could be that competition regulation being 'ex-post' (after the event) cannot regulate 'ex-ante' (before the event) sectoral issues, such as determination of tariff, which the sector regulator is better equipped to decide.

Moreover, as an ex-post and overarching economic regulator, CCI needs to follow a hands-off approach where the relevant statute also provides for regulation of competition. Rather, it should encourage sector regulators to sustain healthy competition through its policies and regulations.

So, what was wrong if Trai included a chapter on 'anti-competitive behaviour in tariff' in its consultation paper on regulatory principles

of tariff assessment issued in February? The effort of Trai to lay down guidelines for clarity of all stakeholders in the telecom sector ought to be commended, since CCI may not be in a position to do so for each sector.

In 2011, the Delhi High Court stopped an investigation ordered by CCI against a perceived cartel between the three state oil marketing companies — Indian Oil Corporation (IOC), Bharat Petroleum Corporation (BPCL) and Hindustan Petroleum Corporation (HPCL) — on a complaint by Reliance for supply of jet aviation fuel, and referred to PNGRB.

In 2012, the same court left the decision on jurisdictional overlap between CCI and the Copyright Board on the issue of determining abuse of dominance by music company T-Series in the grant of licence to radio company 104 FM on alleged excessive rates to CCI. CCI, accordingly, decided it had jurisdiction to decide whether there has been abuse of dominance by T-Series or not, while leaving the rates to be decided by the Copyright Board.

In 2014, the Delhi High Court stayed an investigation into the affairs of the Institute of Chartered Accountants of India by CCI. The matter is pending. The same year, the court left it to CCI (instead of CERC) to decide whether the Maharashtra State Power Generation Co (Mahagenco) had abused dominance by refusing to provide open access to the other independent power producers. In March, 2016, the Delhi High Court refused to stop a CCI inquiry against

telecom company Ericsson on the ground of pendency of civil suits for patent infringements against Intex and Micromax.

So, there has been a gradual shift in how the judiciary now accepts CCI jurisdiction on competition issues over sector regulators.

In other countries, two main models are followed. One, sector regulators dealing with competition issues within their own sectors; two, concurrent jurisdiction of both with equal powers and mandatory consultative process. The US follows the first model. Sector regulators such as the Department of Transportation are authorised to grant anti-trust immunity. The second model prevails in Britain.

The third model of voluntary, non-binding consultation, as in India, has not worked in countries like Ireland and Spain. A transition from the voluntary consultative process to a mandatory one is now emerging with the concurrent jurisdiction model gaining popularity.

Turf wars like the 'CCI vs Trai' one are a lawyer's delight. Such overlaps can be resolved if Trai deals with ex-ante technical and tariff issues, and leave the determination of pure behavioural issues to CCI, with a mandatory and binding consultative process between the two. The Centre should consider reviving the National Competition Policy that's been gathering dust since 2011.

The writer heads competition law, Vaish Associates, Advocates



the speaking tree

## The Purpose of Education

J KRISHNAMURTI

Why are you being educated? Your parents send you to school. You attend classes, you learn mathematics, you learn geography, history. Why? What is the point of your passing examinations and getting degrees? Is it to get married, get a job and settle down in life as millions of people do? The whole world is questioning the basis of education. We see what education has been used for.

Human beings throughout the world are being educated to conform, to fit into society and into their culture, to fit into the stream of social and economic activity, to be sucked into that vast stream that has been flowing for thousands of years. Is that education, or is education something entirely different?

Can education see to it that the human mind is not drawn into that vast stream and so destroyed; see that the mind is never sucked into that stream; so that, with such a mind, you can be an entirely different human being with a different quality to life? Real education means that a human mind, your mind, not only is capable of being excellent in mathematics, geography and history, but also can never, under any circumstances, be drawn into the stream of society.

Because that stream that we call living, is very corrupt, is immoral, violent, greedy. That stream is our culture. So, the question is how to bring about the right kind of education so that the mind can withstand all temptations, all influences, the bestiality of this civilisation and this culture.

### Chat Room

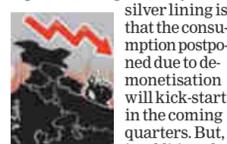
## Cabinet Gets a New Coat

Apart from Prime Minister Narendra Modi, the only other person whose hand is clearly visible in Sunday's Cabinet reshuffle is Amit Shah. The Modi-Shah duo has redefined the National Democratic Alliance (NDA) terms of exchange from the very start. By ignoring the ever-complaining Shiv Sena, Modi has made it clear that he isn't open to political blackmail. But the one who may have felt sidelined could be Bihar chief minister Nitish Kumar, the latest ally of the NDA.

JAKSHOBHYA Mysuru

## Growth Ball in Centre's Court

Apropos 'Knight in Shining Armour' by Mythili Bhushanurmath (Sep 4), we might attribute the first-quarter gloomy GDP growth rate of 5.7% to a demotivation aftershock and the new chip on the block, goods and services tax, but it does signal an ailing economy. The



silver lining is that the consumption postpone due to demotivation will kick-start in the coming quarters. But, in addition, the government must accelerate spending on infrastructure. This, in turn, could help boost private investment in manufacturing, raise the ratio of investment as a proportion of GDP, and boost growth. Agriculture too needs structural reform.

MONIKA ADWANI Indore

## Prove Majority to Avoid Polls

This refers to the Edit, 'End Tamil Nadu's Political Uncertainty' (Sep 4). It is really sad that the party in power is not doing anything worthwhile for the development of the state; it is simply engaged in continuing in power and celebrating centenaries of erstwhile leaders in all districts to increase its popularity at government's expense. They have drifted away from the masses. The governor too is silent on the matter. At least now the chief minister should be asked to prove his majority in the assembly, failing which fresh election should be ordered.

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