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PERPLEXITY OF TREATMENT TOWARDS ASSETS OF SUBSIDIARY COMPANIES IN THE INSOLVENCY PROCEEDINGS OF THE HOLDING COMPANY

**VARSHA BANERJEE &
MAHIMA AHUJA**

The nuanced issue of “Whether assets of a subsidiary company can be dealt with or treated under the insolvency proceedings of the holding company” has been gaining significance in the ever-evolving insolvency proceedings? Clarifying this issue is essential today, as a concrete segregation of assets is necessary when inter-connected corporate entities are involved in the absence of a legal regime of group insolvency, particularly in cases where subsidiary is having valuable assets with itself.

LEGAL FRAMEWORK: UNDER COMPANIES ACT, 2013

Prior to addressing the core issue, it is prudent to look into the definition of a holding and subsidiary company as defined under Section 2 (46)¹ and (87)² of

the Companies Act. A holding company is defined as an entity that holds more than 50% of the voting power in another entity, known as a subsidiary. Conversely, a subsidiary is an entity in which the holding company possesses more than 50% of the voting power.

Despite the interplay between these entities due to overlapping shareholding, it is eminent to emphasize that they are independent legal entities. The point of distinction of both companies being separate legal entities is that the holding companies owns shares of the subsidiary company thereby, retaining control over the management of the subsidiary company. This in no way makes the holding company the owner of the subsidiary's assets.

This principle was affirmed by the Hon'ble Supreme Court of India in its landmark judgment of Vodafone International Holdings BV³. The Court clarified that, in the event of a subsidiary's winding up, its assets do not belong to the holding company; instead, they are handed over to the liquidator.

LEGAL FRAMEWORK: INSOLVENCY AND BANKRUPTCY CODE, 2016

Since 2016, the insolvency regime in India has been governed by the Insolvency and Bankruptcy Code, 2016 (IBC), which functions as a comprehensive legal framework.

- Section 7 allows financial creditors to initiate insolvency proceedings against an entity in case of a debt default.
- Section 14 imposes a moratorium to maintain the status quo regarding the assets and liabilities of the entity undergoing insolvency proceedings.
- The explanation to Section 18(1) explicitly states that an Interim Resolution Professional shall not include the assets of a subsidiary company in the list of assets compiled during the insolvency proceedings of a holding company.
- Section 30 outlines the process for the approval of a resolution plan.
- Section 32A provides the new management which acquires the Company under IBC is given protection in terms of clean slate principle.
- Section 36 explicitly states that the assets of a subsidiary company shall not be included in the liquidation estate of the holding company.

The mandate of the IBC clearly indicates that no assets of a subsidiary company can be subjected to the insolvency proceedings of a holding company. The doctrine of separate legal personality ensures that the insolvency proceedings of the holding company do not impact the assets of the subsidiary.

JUDICIAL TREND

Interestingly the present issue has come up for consideration before the Hon'ble Supreme Court of India in judicial

pronouncements titled as “Jaypee Kensington Boulevard Apartments v. NBCC (India) Limited & Ors”⁴ and BRS Ventures Investments Ltd. V. SREI Infrastructure Finance Ltd. & Anr⁵.

In Jaypee Kensington, the Supreme Court ruled that the resolution plan of the holding company pertains to its shares in the subsidiary as an asset, meaning it does not encompass the subsidiary's assets, which remain separate and distinct. It must be pointed out that keeping in mind the factual matrix in Jaypee Kensington (Supra), where the parties involved, were left on their own accord to arrive at an amicable resolution left a small resolve of rigidity which could be mis-utilised by multiple stakeholders to reinterpret the law in their own manner.

Subsequently in BRS Ventures Investments Ltd. (Supra), the Hon'ble Supreme Court thoroughly examined the complex question of law and reaffirmed that the assets of a subsidiary company cannot be considered part of the holding company's assets. The Court upheld the National Company Law Appellate Tribunal's finding that the resolution plan of the holding company deals with its investments in the subsidiary, not its assets.

ANALYSIS

The Supreme Court's judgment in BRS Ventures Investments Ltd. effectively addressed the treatment of the assets and liabilities of a holding company undergoing insolvency. This decision protects the rights of various stakeholders involved by excluding subsidiary assets from the holding company's proceedings.

By establishing that the assets of a subsidiary company are distinct, the ruling provides clarity for acquirers and financial creditors, reinforcing the idea that all

companies operate as separate legal entities. Any attempt to take over the assets of a subsidiary by way of a resolution plan of the holding company cannot be entertained thereafter.

This clarity is crucial, particularly in sectors like real estate, infrastructure, investment companies etc where financial arrangements are often intertwined with the assets and liabilities of the subsidiary.

The decision brings certainty as regards the treatment of assets of subsidiaries particularly for complex insolvency proceedings such as real estate companies and infrastructure companies where the assets are involved in inter-company financial arrangements, which can impede stakeholders from exercising their rights. If the assets of subsidiary companies were made part of the holding company's assets, it could result large-scale deterioration of value for certain "Lenders and Stakeholders" exclusively having exposure in the underlying subsidiary, given that an approved resolution plan allows for a clean slate for the new management, free from past liabilities. The clean slate theory provides all acquirers a fair chance to revive the corporate entity while providing immunity from all past acts and debts.

Such clarity is not merely academic; but also serves practical purposes by protecting the rights of various stakeholders, including creditors, employees, and investors while demarcating the individual corporate entities so as to maintain its integrity.

The judgments promote a healthier business environment by preventing potential misuse of insolvency proceedings and fostering accountability. As corporate structures continue to evolve, the need for clear boundaries in insolvency law remains paramount, ensuring that inter-company relationships do not undermine financial

stability or fairness in the marketplace.

Allowing a holding company to incorporate a subsidiary's assets into its resolution plan could lead to significant financial inequities, undermining the rights of the creditors of the subsidiary company and creating an environment ripe for exploitation. The Supreme Court's decisions reinforces the necessity of maintaining strict boundaries in these scenarios, thereby promoting fairness and stability within the corporate sector.

Ultimately, the analysis underscores the need for continued vigilance in preserving the autonomy of subsidiary companies, especially as corporate interconnectivity grows. A robust understanding of these legal delineations is essential for stakeholders to navigate the complexities of insolvency while safeguarding their interests, ensuring that the financial system remains resilient and equitable.

FOOTNOTES

1. (46) "holding company", in relation to one or more other companies, means a company of which such companies are subsidiary companies; [Explanation. -- For the purposes of this clause, the expression "company" includes any body corporate;]

2. (87) "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company--

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the 23[total voting power] either at its own or together with one or more of its subsidiary companies Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed

Explanation.--For the purposes of this clause,--

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression company includes any body corporate;

(d) "layer" in relation to a holding company means its subsidiary or subsidiaries;

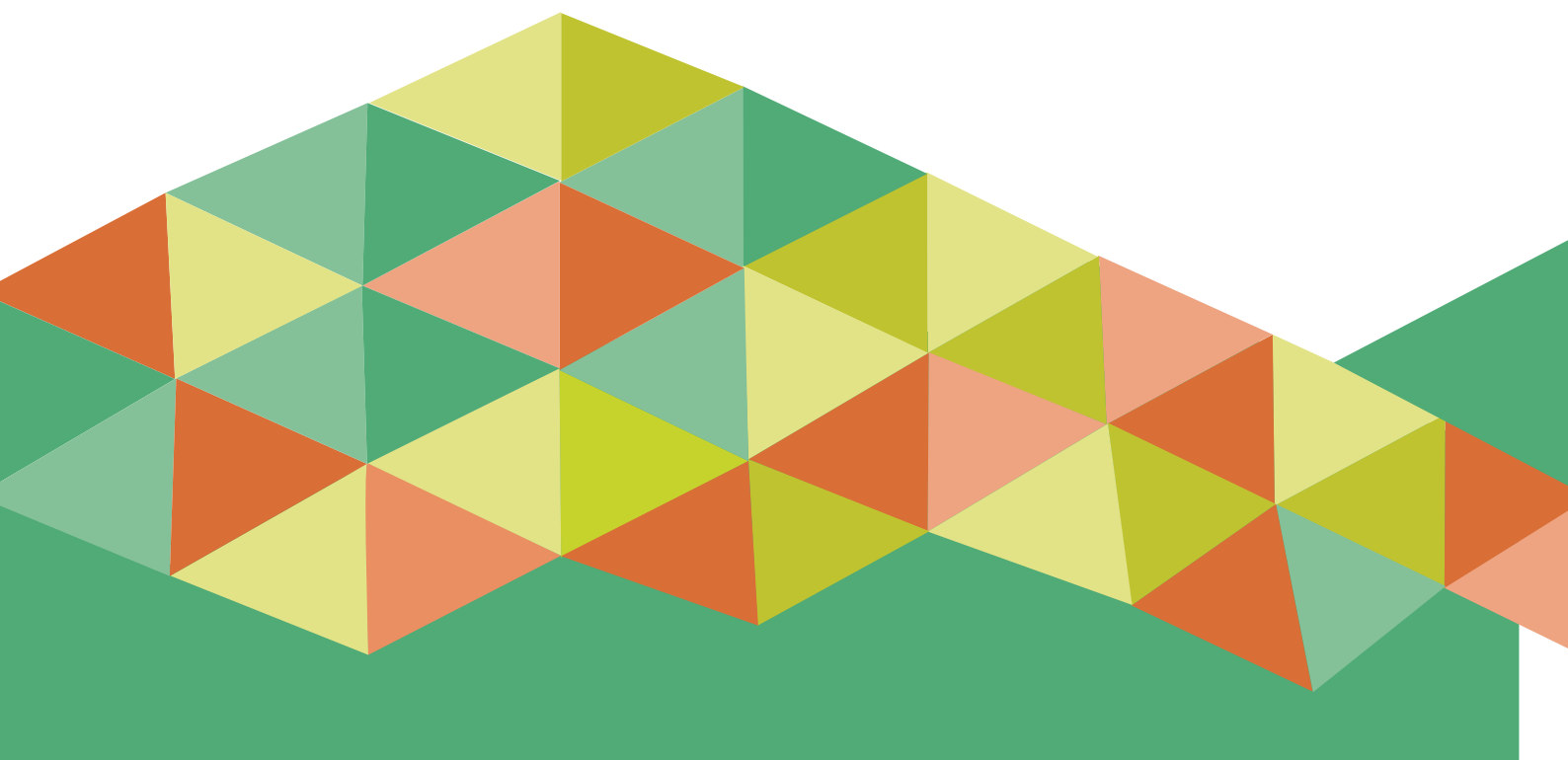
3. Civil Appeal No. 733 of 2012.

4. (2022) 1 SCC 401

5. Civil Appeal No. 4565 of 2021

The article was originally published on Mondaq. Access via

<https://www.mondaq.com/india/insolvencybankruptcy/1527010/perplexity-of-treatment-towards-assets-of-subsiary-companies-in-the-insolvency-proceedings-of-the-holding-company>



NOTABLE DEALS



DEALS & MORE

The Firm advised Jaypee Infratech Limited and Lakshadweep Group as its legal counsel in connection with strategic collaboration and acquisition of a 64% stake in its wholly-owned subsidiary. Jaypee Healthcare Limited (which was undergoing insolvency proceedings under IBC) now stands out of the purview of IBC in terms of the order of NCLAT dated 17.10.2024 upon the successful resolution of its financial debts and acquisition of Jaypee Healthcare Limited by M/s Max Healthcare Institute Limited for the revival of Jaypee Healthcare Limited in the interest of all stakeholders including the holding company, lenders and public at large.

ADVISED BY



Alok Dhir
Founder & Managing
Partner



Sachin Gupta
Senior Partner



Varsha Banerjee
Partner



Udit Singh
Senior Associate



DEALS & MORE

The Firm conducted a rigorous review and comprehensive examination of the internal policies of Nonghyup Bank (India), one of the overseas branches of NongHyup Bank, South Korea, to ensure that the bank's policies are aligned with regulatory requirements, industry best practices, and the highest standards of governance and compliance.

ADVISED BY



Guranpreet Singh Sama
Partner



Shikha Singh
Associate Partner



Arpana Singh
Senior Associate



Akanksha Goyal
Associate



DEALS & MORE

Advised Power Finance Corporation Limited as its legal counsel in connection of financial assistance aggregating to INR 310.74 Crore made available to Acme Pokhran Private Limited for setting up of 49.50 MW wind power project in the state of Gujarat, inter alia, safeguarding the interest of the lender vis-à-vis the transaction from the impact of borrower having its subsidiary.

ADVISED BY



Guranpreet Singh Sama
Partner



Shikha Singh
Associate Partner



Avlokita Kanwar
Principal Associate



Kriti Jain
Associate



DEALS & MORE

Advised Piramal Enterprises Limited for financial assistance of INR 115.00 Crore granted to Pan Ban Associates Private Limited, for the purposes of refinance and acquisition of inventory plots in the project developed in the state of Punjab.

ADVISED BY



Guranpreet Singh Sama
Partner



Arpana Singh
Senior Associate



Akanksha Goyal
Associate



DEALS & MORE

Advised India Infradebt Limited as its legal counsel in connection with a refinancing and top-up facility aggregating INR 1,876.5 million made available to 4 SPVs of Amptin Energy Transition group with a co-obligor/cross guarantee structure for their power projects of approximately 50 MW in the state of Maharashtra.

ADVISED BY



Guranpreet Singh Sama
Partner



Shikha Singh
Associate Partner



Kriti Jain
Associate

THE PODIUM



Sonal Verma, Partner (ESG) spoke at the Annual Legal Summit of CK Birla Group on various aspects related to ESG.



Sonal Verma, Partner (ESG) spoke at The 9th Annual Media, Advertising & Entertainment Legal Summit 2024, Mumbai on “Navigating Complexities in OTT & Broadcasting”



Sonal Verma, Partner (ESG) participated as a Panellist in the **10th Annual Pharma Legal and Compliance Summit 2024** in Mumbai.



Naveli Reshamwalla, Associate Partner, had the privilege of presenting insights on **“The Evolving Regulatory Landscape: Is There a Prescription for Perfection?”**

AWARDS & ACCOLADES

Thought Leadership Awards AUTUMN 2024



Thought Leadership Awards AUTUMN 2024

Environmental Law

**Towards Gender Neutrality:
The Need To Reform The POSH
Act To Ensure Workplace Safety
for All**

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Sonal Verma
Partner & Global Leader
(Markets & Strategy)



Deonn Nash Lobo
Associate



Thought Leadership Awards AUTUMN 2024

Antitrust/Competition Law

**Decoding India's Digital
Competition Bill 2024: Navigating
Market Regulation In Comparison
To The EU's Digital Markets Act**

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Sonal Verma
Partner & Global Leader
(Markets & Strategy)



Sonjuhi Kaul
Associate

RANKINGS



ALOK DHIR
Founder & Managing Partner



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ALOK DHIR
Dhir & Dhir Associates



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MANEESHA DHIR
Dhir & Dhir Associates



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Dispute Resolution,
Arbitration & Litigation



VARSHA BANERJEE
Dhir & Dhir Associates

SACHIN GUPTA
Dhir & Dhir Associates



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**GURANPREET
SINGH SARNA**
Partner



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Founder & Managing Partner

Restructuring and Insolvency
Elite Practitioner





MANEESHA DHIR
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Dispute Resolution
Distinguished Practitioner





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Notable Practitioner



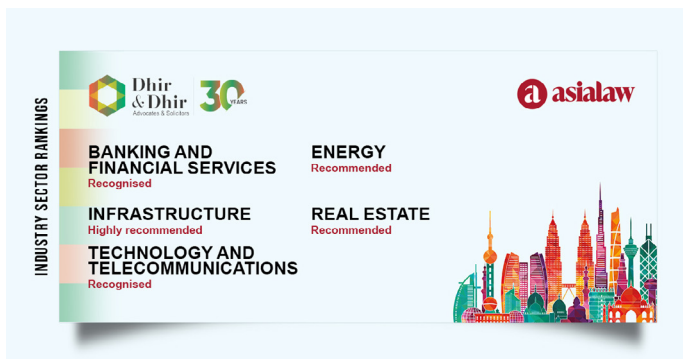


VARSHA BANERJEE
Partner

Restructuring and Insolvency
Notable Practitioner




RANKINGS



FIRM IN THE NEWS




Raveendran loses immediate control of Byju's as NCLT admits BCCI insolvency plea over ₹158 crore in dues


[Read more on MINT](#) 

The resolution professional's main responsibility is to collate information on the entire dues that Byju's owes to all its stakeholders, and create a committee of creditors, said Alok Dhir, founder and managing partner at law firm Dhir & Dhir Associates. "In theory, the management is then passed on to the hands of the creditors."

NCLT admits insolvency plea against Byju's. Here's what it means for the edtech platform


[Read more on MINT](#) 

Budget 2024 Govt announces measures to speed up insolvency resolution

[Read more on MINT](#) 

Setback for Byju's as Supreme Court restores insolvency case, raps NCLAT for overreach.

"The judgment, in effect, instils confidence of the creditors having superior and/or prior charge over assets of a company including funds available with the company. It protects any creditors having subservient rights from stealing a march over other creditors with assistance of a court/tribunal," Alok Dhir, founder and managing partner of Dhir & Dhir Associates.

[Read more on MINT](#) 



FIRM IN THE NEWS



Dhir & Dhir Associates Advises Jaypee Infratech Limited and Lakshdeep Group on Acquisition of Jaypee Healthcare Limited by Max Healthcare Institute Limited.”

“We are proud to have represented Jaypee Infratech and Lakshdeep Group in this crucial transaction that not only resolves the insolvency of Jaypee Healthcare Limited but also brings a major industry player, Max Healthcare, on board. This transaction ensures that the interests of all stakeholders are fulfilled and paves the way for growth and recovery for Jaypee Healthcare.” Alok Dhir, founder and managing partner of Dhir & Dhir Associates.

[Read more on Republic world](#)



Dhir & Dhir Associates advised and represented Jaypee Infratech and Lakshdeep Group in the entire legal proceedings including proceedings before the NCLT/ NCLAT, ensuring compliance with regulatory requirements and protecting the interests of all stakeholders involved.

[Read more on Bar & Bench](#)

[Read more on Outlook India](#)



PODCASTS ESG DECIBELS



**ESG Decibels
Season 3 Ep 5**

ESG Visionary: Dr. Somnath Singh on Transforming Corporate Landscapes

We are delighted to welcome Dr. Somnath Singh, Deputy Director at UN Global Network India, as a distinguished speaker in our ESG Decibel Podcast Series. Dr. Singh brings invaluable insights to the table with a wealth of experience and expertise in various domains, including ESG & sustainability, Business Integrity, Corporate Governance, and Health Initiatives. His leadership in heading four major verticals of UN GCNI, encompassing Resource Mobilization, Project Execution and Management, Strategic Engagement, and Communication and Branding, underscores his multifaceted contributions towards achieving organisational objectives. Dr. Singh's commitment to driving positive change and ensuring organisational sustainability through financial growth and enhanced visibility among diverse stakeholders nationally and globally exemplifies his profound dedication to the field. We look forward to his enlightening perspectives and enriching discussions that will undoubtedly inspire and empower our audience in sustainability and corporate responsibility.



DR. SOMNATH SINGH
Deputy Director
UN Global Network India



SONAL VERMA
Partner
ESG Advisory



**ESG Decibels
Season 3 Ep 4**

Rights in Focus: Exploring Humanitarian Horizons

For the latest episode of the 3rd Season of ESG Decibel Podcast Series, we have the esteemed Prof. Conor Gearty, a luminary in human rights law. As a founding member of Matrix Chambers and now a prominent figure at Matrix International, Gearty brings extensive experience to the table. With appearances in various courts specializing in human rights and public law, he advised both corporations and governments on human rights and corporate social responsibility. Gearty's academic credentials include a Professorship of Human Rights Law at the London School of Economics (LSE), and his scholarly contributions range from books to articles, notably his latest acclaimed work, "On Fantasy Island: Britain, Strasbourg, and Human Rights" (2016). In this episode, Gearty shares profound insights, enriching listeners with his deep understanding of the complex interplay between law, ethics, and societal impact.



PROF. CONOR GEARTY
Founding Member, Matrix Chambers
Professor of Human Rights Law
LSE Law School



SONAL VERMA
Partner
ESG Advisory





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Dhir & Dhir Associates is a leading full-service law firm in India serving as a single-window legal and regulatory advisor globally. It has offices in New Delhi, Mumbai, Hyderabad and a representative office in Japan. The firm's areas of practice include Restructuring and Insolvency, Corporate/Commercial Advisory and M&A, Real Estate, Banking and Finance, Dispute Resolution, Capital Markets, Infrastructure & Energy, Environmental, Social & Governance, IPR, Technology, Media & Telecommunications, Employment Law and Consumer Law.

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