Between the lines...

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Key Highlights

I. Courts can imply a term in a contract only if literal interpretation fails to give the result intended by both the parties

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I. Courts can imply a term in a contract only if literal interpretation fails to give the result intended by both the parties

The Supreme Court of India in the case of ***Adani Power (Mundra) Limited v. Gujarat Electricity Regulatory Commission*** *(decided on July 2, 2019)* held that courts can imply terms in a contract only when literal interpretation fails, and has enunciated the scenarios in which such implication is allowed.

Facts

Gujarat Urja Vikas Nigam Limited (**"GUVNL"**), a holding company engaged in the business of bulk purchases from the power generators and supply to the distribution companies in the State of Gujarat entered into a Power Purchase Agreement (**"PPA"**) with M/s. Adani Power Ltd. (**"Appellant"**). The Appellant herein contended that the bid submitted by it on the basis of which the PPA was entered was solely on the assurance given by Gujarat Mineral Development Corporation (**"GMDC"**) to supply four million tonnes of coal. Since GMDC was not abiding by the assurance given, the Appellant sent various notices to the Government of Gujarat to find a solution. Due to the non-compliance of the Fuel Supply Agreement (**"FSA"**) between the Appellant and GMDC, the Appellant informed GUVNL that the FSA had not been finalized yet. In June 2008, GUVNL asked the Appellant to furnish an additional performance bank guarantee since it had not complied with the conditions of the PPA. The Appellant stated non-execution of the FSA as the reason for not supplying power, in their reply to GUVNL, and that the Appellant had no other option but to terminate the PPA unless the coal supply comes from the GMDC.

Thereafter, there was an attempt to amicably settle the matter amongst the Appellant, GUVNL, GMDC and the Government of Gujarat which was unsuccessful. Finally, the Appellant by a communication dated December 28, 2009, issued a notice to GUVNL, terminating the PPA with effect from January 04, 2010. GUVNL addressed a communication to the Government of Gujarat on December 30, 2009, requesting the Government to impress upon the Appellant to withdraw its termination notice dated December 28, 2009 and also impress upon the GMDC for resolution of FSA with the Appellant. GUVNL also addressed a communication to the Appellant on January 05, 2010, requesting it to keep the notice of termination in abeyance. On January 06, 2010, the Appellant addressed another communication to GUVNL, informing it that since the period of termination has already expired, the PPA stands terminated with effect from January 04, 2010.

The Appellant also deposited an amount of INR 25 crores with GUVNL towards liquidated damages in addition to the performance bank guarantee of INR 75 crores. GUVNL returned INR 25 crores and asked the Appellant to withdraw the termination notice but the same was not accepted. GUVNL filed a petition under the Electricity Act, 2003, for adjudication of the dispute. The Gujarat Electricity Regulatory Commission (**"Commission"**) held that the termination of the PPA was illegal, and directed the Appellant to supply the power to the procurer at the rate determined in the PPA. The Appellant approached the Appellate Tribunal for Electricity (**"Appellate Tribunal"**) against the order of the Commission which was dismissed and the present appeal was filed before the Supreme Court.

Issues

- Whether courts have the right to interpret the contract liberally if literal interpretation fails?
- Whether specific performance can be directed when the contract provided for liquidated damages?

Arguments

The Appellant argued that the bid which was initially submitted by the Appellant in furtherance of which the PPA was created, was only submitted on the basis of the commitment by the GMDC that it will supply the coal required for generation of power. This information was communicated by the Appellant to GUVNL. Thus, when GMDC failed to execute the FSA, non-compliance of Article 3.1.2 of the PPA was observed which entitled the Appellant to terminate the Agreement by giving seven days' notice in accordance with Article 3.4.2 of the PPA. The Appellant also argued that the Commission and the Appellate Tribunal have grossly erred in their judgment, wherein they stated that an express agreement between GUVNL and the Appellant stating the non-compliance under Article 3.1.2 would be the only way to invoke Article 3.4.2 of the PPA. The Appellant further argued that since the PPA provided for liquidated damages, the Commission and the Appellate Tribunal ought not to have given an order for specific performance. The Appellant further alleged that the Commission and the Appellate Tribunal have varied the terms of the contract executed between the parties which is not permissible in law.

GUVNL submitted that the PPA which was entered was not on the basis of the commitment by GMDC. It further argued that the source of coal is immaterial to GUVNL, and the PPA is only for the supply of power between the Appellant and GUVNL. The Respondent further argued that on the failure of GMDC to supply indigenous coal, the Appellant should have made an alternative arrangement and fulfilled their obligations under the PPA. Therefore, by not doing so, it was the Appellant who was committing the default and hence, a party in default cannot be permitted to terminate the PPA. They have also contended that despite having a provision for liquidated damages in the PPA, the courts are not powerless to direct specific performance of the contract. GUVNL finally submitted that the contract is supposed to be read as a whole and the provisions of the contract cannot be read in isolation.

Observations of the Supreme Court

The Supreme Court in the instant case referred to a number of precedents to determine the issue of the interpretation of clauses in the contract between the said parties. In the case of ***Satya Jain v. Anis Ahmad Rushdie*** *[(2013) 8 SCC 131],* the Supreme Court had emphasized on the principle of business efficacy. It was held that the principle of business efficacy is normally invoked to read a term in a contract to achieve the result or the consequence intended by the parties, acting as prudent businessmen. Thus, the test of business efficacy requires a term to be implied only if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties would not have reasonably foreseen. The Supreme Court also observed the "Five Condition Test" which has been set out in the case of ***B.P Refinery (Westernport) Proprietary Limited v. Shire of Hastings*** *[1977 UKPC 13]* wherein the conditions to be fulfilled for an implied condition to be read into the contract are: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. Relying on the above judgments and a long line of precedents following the business efficacy test, the Supreme Court observed that the clauses in any agreement ought to be given their plain, literal and grammatical meaning, and terms may be implied in a contract only if they find that the literal interpretation fails to portray the intention of the parties.

The Supreme Court also observed that the Appellate Tribunal's interpretation wherein they held that there is no need for an express agreement between the parties to be able to invoke the provisions of termination, would amount to inserting a whole new condition and re-writing of the contract, and is therefore not equitable.

Decision of the Supreme Court

The appeal of the Appellant was allowed, and the notice of termination and the consequent termination was held valid and legal. The Appellant was directed to approach the Central Electricity Regulatory Commission for determination of the compensatory tariff, including various other aspects payable to it from the date of supply of electricity.

VA View

This decision of the Supreme Court is in line with a catena of precedents on interpretation of contracts pertaining to situations wherein contractual provisions can be implied. However, this judgment creates an exception by including a third party within the ambit of the contract. The Supreme Court has given the concept of business efficacy and the Five Condition Test a very wide ambit by including a third party with no privity of contract into the application of the contract. The Supreme Court has taken a liberal approach by looking at the conduct of the parties and the communications exchanged inter-se, to establish that the third party was a major factor to the successful execution of the contract, and both the parties were aware of the same.

Therefore, the Supreme Court has made a positive move in the fora of contract law by widening the horizon for implication in contracts. This precedent marks a new era of reading between the lines and extracting the intention of the parties, who may otherwise choose to hide behind literal interpretations, while being fully aware of extraneous circumstances as in the instant case. Further, this judgment is pertinent in situations wherein the government or the public sector undertakings are parties and try to hide behind the veil of ignorance of what prevails in other departments, even though they are closely associated.

II. The fee structure contractually determined for the arbitral tribunal prevails over the fee structure provided under the Arbitration Act

The Supreme Court in the case of ***National Highways Authority of India v. Gayatri Jhansi Roadways Limited with Gammon Engineers and Contractors Private Limited v. National Highways Authority of India*** *(decided on July 10, 2019)* held that the fee structure for the arbitral tribunal previously agreed between the parties under the arbitration agreement, in case of a domestic arbitration, would prevail over the fee structure provided under the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**).

Facts

National Highways Authority of India (**"Respondent"**) and Gammon Engineers and Contractors Private Limited (**"Appellant"**) entered into a contract dated February 07, 2006. The arbitration clause of the contract fixed the fees for the arbitral tribunal as per a policy decision of the Respondent dated May 31, 2004. Disputes arose between the parties on May 23, 2017 and the arbitration clause was invoked by the Appellant. Once the arbitral tribunal was constituted and the matter with respect to the fees of the arbitrators came up before the arbitral tribunal, it was decided that the fees would be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 (**"Arbitration Amendment Act"**). The Respondent, against this order, moved an application dated October 13, 2017 before the arbitral tribunal in which it sought to remind that the fees for the arbitrators had been fixed by the agreement and that, therefore, should be fixed in terms of the circular dated July 01, 2017 of the Respondent and not as per the Fourth Schedule of the Arbitration Act. The arbitral tribunal deliberated on the matter and decided that in view of the latest provisions of the Arbitration Amendment Act, the arbitral tribunal was competent to fix the fees regardless of the agreement between the parties. This was as per the judgment dated September 11, 2017 of the Delhi High Court in the matter of ***National Highways Authority of India v. Gayatri Jhansi Roadways*** ("**NHAI Judgment**").

Respondent thereafter made an application to the Delhi High Court under Section 14 of the Arbitration Act, to terminate the mandate of the arbitrators. According to the Respondent, the arbitrators had wilfully disregarded the agreement between the parties and were, therefore, unable to act any further in the proceedings. Meanwhile, the arbitral tribunal passed another order in which it stated that it had no objection to payment of any fees as would be decided in the pending proceedings by the Delhi High Court. The Delhi High Court stated that the Fourth Schedule of the Arbitration Act not being mandatory, whatever terms were laid down as to arbitrator's fees in the agreement, must be followed. In so doing, it disagreed with the NHAI judgment, wherein, it was held that Section 31(8) (Costs of an arbitration to be fixed by the arbitral tribunal) and Section 31A (Regime for costs) of the Arbitration Act would govern the aforesaid matters. Further, since the expression 'unless otherwise agreed by the parties' had been omitted from Section 31A by the Arbitration Amendment Act, arbitrator's fees would have to be fixed in accordance with the Fourth Schedule of the Arbitration Act instead of the agreement between the parties. The Delhi High Court vehemently disagreed with this view holding the said judgment per incuriam stating that the deletion of words *"unless otherwise agreed by the parties"* in Section 31A only signifies that the parties, by an agreement, cannot contract out of payment of 'costs' and deprive the arbitral tribunal a right to award 'costs' of arbitration in favour of the successful party. The decision of the Delhi High Court in NHAI judgment was challenged before the Supreme Court and a special leave petition was filed. The present matter as well as the special leave petition were clubbed and heard together by the Supreme Court.

Issues

Whether the fees to be paid to the arbitral tribunal should be as per the contract entered into between the parties or as per the Fourth Schedule of the Arbitration Act?

Findings of the Supreme Court

The Supreme Court took note of the fact that a fee schedule for the arbitral tribunal was, in fact, fixed by the agreement between the parties. This fee schedule, based on an earlier circular of 2004 of the Respondent, was now liable to be amended from time to time in view of the long passage of time that has ensued between the date of the agreement and the date of the disputes that arose under the agreement. The Supreme Court accordingly held that the fee schedule that was contained in the circular dated July 01, 2017, substituting the earlier fee schedule, would now operate and the arbitrators should be entitled to charge their fees in accordance with this schedule and not in accordance with the Fourth Schedule to the Arbitration Act.

The Supreme Court further stated that the application that was filed before the Delhi High Court to remove the arbitrators stating that their mandate must terminate, was wholly disingenuous and would not lie. The reason is that an arbitrator does not become unable to perform his functions if by an order passed by such arbitrator(s), all that they have done is state that the agreement does govern the arbitral fees to be charged. The arbitrator(s) were bound to follow the NHAI judgment which clearly mandated that the Fourth Schedule and not the agreement would govern the arbitral fees. The arbitrators merely followed the law laid down in NHAI judgment and cannot be said to have done anything wrong so that their mandate may be terminated as if they have now become de jure unable to perform their functions. The Supreme Court agreed with the conclusion of the Delhi High Court that the change in language of Section 31(8) read with Section 31A of the Arbitration Act which deals only with the costs generally and not with arbitrator's fees is correct in law. The arbitrator's fees may be a component of costs to be paid but it is a far cry to state that Section 31(8) and 31A of the Arbitration Act would directly govern contracts in which a fee structure has already been laid down.

Decision of the Supreme Court

The Supreme Court held that the fee schedule agreed as per the arbitration agreement would prevail over the schedule provided under the Arbitration Act. The Supreme Court also held that the mandate of the arbitral tribunal would not be terminated merely because it passed an order following a previous judicial precedent which was not been held to be per incuriam on the date when such an order was passed.

VA View

Party autonomy has been the bedrock of the Arbitration Amendment Act which has been upheld in several judicial decisions since then. Section 11(14) of the Arbitration Act provides that *"For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule. Explanation- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution."* This provision was inserted in the Arbitration Act on the recommendation of the Law Commission of India Report No. 246 (**"Law Commission Report"**) for the purpose of addressing the issue of high costs associated with ad hoc arbitrations including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. It does not in any way put a restriction on the right of the parties to agree to a fee structure contractually in advance. Further, the Law Commission Report acknowledges that international commercial arbitrations, which involve foreign parties, may have different values and standards for fees for arbitrators; similarly, institutional rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. It would be an absurd reading of the provision if in international commercial arbitrations parties would be free to choose the fees to be paid to the arbitral tribunal in advance but not in case of domestic arbitrations. This judgement rightly upholds the intent of the legislature while giving the parties the elbow room to determine the fees of the arbitral tribunal in accordance with their financial capacity.

III. NCLT Cuttack: Failure to implement the resolution plan cannot reset the clock back to day one to restart the insolvency process

The National Company Law Tribunal (**"NCLT"**), Cuttack in the case of ***State Bank of India v. Adhunik Metaliks Limited and Others*** *(decided on July 8, 2019)* rejected the resolution plan submitted by the resolution applicant on the ground of delay and ordered for liquidation of the corporate debtor.

Facts

State Bank of India (**"State Bank"**) filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**"Code"**) for initiation of the corporate insolvency resolution process (**"CIRP"**) against Adhunik Metaliks Limited and its subsidiary M/s. Zion Steel Limited (**"Corporate Debtor"**) before the NCLT, Kolkata. In pursuance thereto, Liberty House Group (**"Liberty House"**) submitted a resolution plan, which was accepted by the committee of creditors (**"CoC"**) and then was approved by the NCLT, Kolkata.

Liberty House did not take steps to implement the resolution plan. Hence, the CoC filed an application in the NCLT, Kolkata asking for directions to Liberty House for implementation of the resolution plan by making upfront payment or else to pass an order for liquidation of the Corporate Debtor. The NCLT, Kolkata issued notice to Liberty House asking them as to why order of liquidation should not be passed. On an appeal, the National Company Law Appellate Tribunal (**"NCLAT"**) directed Liberty House to make upfront payment within 30 days. Meanwhile, the NCLT Cuttack was functional and upon failure of Liberty House in making payment, the CoC approached the NCLT, Cuttack for cancellation of the resolution plan and requested to allow them to forfeit the money deposited by Liberty House as part of upfront payment claiming it to be performance security for implementation of the resolution plan.

Issue

Whether the resolution plan approved by the NCLT, Kolkata can be rejected for its non-implementation? If so, whether the resolution plan submitted by any other resolution applicant can be considered? If not, whether liquidation can be initiated against the Corporate Debtor?

Arguments

State Bank and the CoC contended that, since Liberty House failed to make the upfront cash payment of INR 410 crores for more than a year,t here is breach of terms of the resolution plan under Section 74(3) *(Punishment for contravention of moratorium or the resolution plan)* of the Code, and therefore, the said resolution plan should be rejected. The CoC also requested to forfeit INR 50 Crores deposited by Liberty House as performance security under Regulation 36B(4A) *(forfeiture of performance security upon failure in implementation of the resolution* *plan)* of the Insolvency and Bankruptcy Board of India *(Insolvency Resolution Process for Corporate Person)* Regulation, 2016 (**"Regulations"**). The CoC argued that an order of liquidation can be passed under Section 33(1) *(Initiation of liquidation)* of the Code, only if: (i) contingencies are that the adjudicating authority does not receive any resolution plan during 180 or 270 days; or (ii) the adjudicating authority rejects the resolution plan under Section 31 of the Code. Since this case did not fall under any of the aforesaid contingencies, an order of liquidation cannot be passed. Hence, it requested the NCLT, Cuttack to revive the CIRP and allow consideration of the resolution plan submitted by the second highest bidder by excluding the days vested by Liberty House in non-implementation of their plan from the CIRP period.

Liberty House contended that the CoC did not co-operate with them in implementation of the resolution plan as they failed to issue offer letter of equity shares of the Corporate Debtor and thus it was difficult for them to invest funds as per the resolution plan. Liberty House argued that INR 50 crores were deposited as a part of upfront cash payment to show its readiness and willingness in implementation of the resolution plan and thus cannot be forfeited by treating it as performance security.

Observations of the NCLT, Cuttack

The NCLT, Cuttack observed that non-compliance with the order of the NCLAT to make the upfront payment within 30 days amounts to breach of the terms of the resolution plan. Further, the NCLT, Cuttack rejected the arguments of Liberty House by stating that the word "upfront payment" used in the resolution plan cannot be qualified by any condition as sought to be attached subsequently by them.

The NCLT, Cuttack further observed that while approving the resolution plan, the CoC did not ask Liberty House for any performance security for successful implementation of the resolution plan. It also observed that Regulation 36B(4A) of the Regulations was added by an amendment dated April 24, 2019 and thus cannot be applied retrospectively. Hence, the upfront payment of INR 50 crores cannot be forfeited by the CoC.

With regard to reviving the CIRP and considering the resolution plan of the second highest bidder, the NCLT refused to accept the contentions of the CoC. It observed that the resolution plan submitted by second highest bidder was considered earlier and rejected because their investment in the Corporate Debtor was below its liquidation value. The NCLT, Cuttack held that it cannot re-set the clock back to day one. Further, if the second highest bidder was really interested in the affairs of the Corporate Debtor, they still have an opportunity to do so by filing an application under Section 230-232 of the Companies Act, 2013 for merger and amalgamation during liquidation.

Decision of the NCLT, Cuttack

The NCLT, Cuttack rejected the resolution plan submitted by Liberty House on account of its failure to implement the same and ordered for liquidation of the Corporate Debtor as a going concern under Section 33 of the Code. The NCLT, Cuttack held that the money deposited by Liberty House cannot be said to be performance security and hence, cannot be forfeited by the CoC. However, since Liberty House did not demand the same, the NCLT, Cuttack did not pass any order thereto at this stage.

VA View

The NCLT, Cuttack draws a line between the underlined objective of the Code, that is, to ensure more resolutions than liquidations and basic tenets of the Code wherein a resolution plan once rejected cannot be later considered. An opportunity was given to the CoC to consider all bids received and it had at that point rejected the same by approving the resolution plan submitted by Liberty House. Thus, in such a scenario, re-setting the clock would go against the spirit of the Code. The NCLT should adopt a stringent approach towards successful bidders who back track on their commitment to implement the plan, and thereby, frustrating the object of the Code to ensure resolution of the corporate debtor within the statutory time limit.

IV. NCLAT: The Insolvency and Bankruptcy Code, 2016 is not applicable to NBFCs

The National Company Appellate Law Tribunal (**"NCLAT"**) has, in the case of ***Housing Development and Finance Corporation Limited v. RHC Holding Private Limited*** *(decided on July 10, 2019)* held that the provisions of the Insolvency and Bankruptcy Code, 2016 (**"Code"**) are not applicable to 'non- banking financial institutions' (**"NBFCs"**).

Facts

Housing Development and Finance Corporation Limited (**"Appellant"**) challenged the December 6, 2018 order of the Principal Bench of National Company Law Tribunal (**"NCLT"**), which had dismissed its insolvency plea against RHC Holding Private Limited (**"Respondent"**), observing that it was an NBFC and hence, does not come under the purview of the Code. The Appellant had moved the NCLT to recover an amount of INR 41 crores due from the Respondent.

Issue

The central issue of this case was whether the Respondent being an NBFC is out of the purview of the Code?

Arguments

The Respondent argued that the NCLT had rightly rejected the application of the Appellant since the Respondent is a 'financial service provider' and is excluded from the definition of Corporate Person as per Section 3(7) of the Code. The Respondent also relied on the NCLAT's decision in the case of ***Randhiraj Thakur v. M/s Jindal Saxena Financial Services*** *(decided on September 18, 2018)* wherein it was held that an insolvency petition filed against an NBFC is not maintainable.

Section 3(7) of the Code is reproduced below:

> *"'corporate person' means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;" (emphasis supplied)*

The term 'financial service provider' has been defined in Section 3(17) of the Code as:

> *"'financial service provider' means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;"(emphasis supplied)*

The term 'financial service' has been defined in Section 3(16) of the Code as:

> *"'Financial service' includes any of the following services, namely-*
>
> *(a) Accepting of deposits;*
>
> *(b) Safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;*
>
> *(c) Effecting contracts of insurance;*
>
> *(d) Offering, managing or agreeing to manage assets consisting of financial products belonging to another person;*
>
> *(e) Rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of-*
>
> > *(i) Buying, selling or subscribing to, a financial product;*
> >
> > *(ii) Availing a financial service; or*
> >
> > *(iii) Exercising any right associated with a financial product or financial service;*
>
> *(f) Establishing or operating an investment scheme;*

(g) *Maintaining or transferring records of ownership of a financial product;*

(h) *Underwriting the issuance or subscription of a financial product; or*

(i) *Selling, providing, or issuing stored value or payment instruments or providing payment services;"*

The Appellant argued that the Respondent is not a 'financial service provider'. According to the Appellant the intent and the purpose of the legislature is to specifically carve out a set of institutions that provide set of identified financial services. The exclusion cannot be beyond what has been contemplated by the Code. The Code is applicable to all entities other than those which are specifically engaged in business of providing 'financial services' under the Code.

It was further argued by the Appellant that the Respondent is a holding company, which invests in shares, bonds, debentures, debts or loans in group companies and gives guarantees on behalf of group companies. Being a holding company, the Respondent is a separate entity altogether. Thus, the services being provided by the Respondent constitute offering and managing assets consisting of financial products belonging to another person, which cannot be equated to financial services as defined above.

Observations of the NCLAT

The NCLAT observed that the definition of 'financial service' if read with definition of 'financial service provider', clarifies that it is not necessary that the 'financial service providers' must accept deposits. It was further held that the definition of 'financial services' as defined in Section 3(16) of the Code is not limited to the nine activities as shown in sub-clause (a) to (i) of Section 3(16) of the Code. The sub-clauses are inclusive which mean that there can be other services which come within the meaning of 'financial services'. Further, reliance was placed on the registration certificate issued by the Reserve Bank of India (**"RBI"**) to commence business of 'non-banking financial services', except the acceptance of public deposits. The NCLAT additionally relied on Section 45-I of the Reserve Bank of India Act, 1934 which defines the meaning of an NBFC.

Decision of the NCLAT

The two-member bench headed by Chairman Justice S J Mukhopadhaya upheld the order of the NCLT which had rejected the Appellant's plea. The NCLAT held that it found no merits in the Appellant's petition and further stated that the Respondent comes under the purview of the RBI and remedies should be sought from the RBI and not the bankruptcy court.

VA View

The NCLAT in this case laid down the cardinal principle that NBFCs, irrespective of their functions, shall not come under the purview of the Code. It has liberally interpreted the definition of 'financial services' provided in the Code and has stated that even if an entity that does not undertake the activities enumerated in Section 3(16) of the Code, it can be considered a financial service provider, as the definition provided is not exhaustive in nature.

In this context, it is pertinent to take note of Section 227 (Power of Central Government to notify financial sector providers, etc.) of the Code, which states that the Central Government has the power to notify certain categories of the financial service providers who may be subject to the provisions of the Code. Till date, no such notification has been issued by the Central Government. However, this can be used as a tool to bring such companies into the ambit of the Code as and when the Central Government deems fit.

It is also imperative to note that financial service providers constitute a significant segment of our economy, wherein public funds are involved. In an event where insolvency proceedings are initiated against these entities, this may result in a cascading effect on the economy, hence these entities have been excluded from the ambit of the Code.

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