Between the lines...

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Key Highlights

I. NCLAT approves the resolution plan submitted by ArcelorMittal in the resolution proceedings in respect of Essar Steel India Limited while modifying the distribution of money to the financial and the operational creditors

National Company Law Appellate Tribunal (**"NCLAT"**) in case of ***Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Limited and Others*** (*decided on July 4, 2019*), approved the resolution plan submitted by ArcelorMittal India Pvt. Ltd. (**"ArcelorMittal"**) in the resolution proceedings in respect of Essar Steel India Limited (**"Corporate Debtor"**) while modifying the distribution of money to the financial and the operational creditors.

Facts

In the corporate insolvency resolution process (**"CIRP"**) initiated against the Corporate Debtor, the committee of creditors (**"COC"**) approved the resolution plan submitted by ArcelorMittal. Thereafter, the National Company Law Tribunal, Ahmedabad (**"NCLT"**) approved the said resolution plan with certain modifications by its order dated March 8, 2019. A number of applications were preferred by the operational creditors and the financial creditors against the said order in relation to distribution of assets to different financial creditors and the operational creditors on the ground of discrimination or the modification of resolution plan as suggested by the NCLT. Mr. Prashant Ruia,

promoter of the Corporate Debtor (**"Promoter"**) also challenged the order of the NCLT on the ground that the Resolution Applicant is ineligible in terms of Section 29A of the Insolvency and Bankruptcy Code, 2016 (**"Code"**). NCLAT clubbed the said applications/ appeals and the following issues came up for determination:

Issues

1. Whether ArcelorMittal is eligible to file the resolution plan under Section 29A of the Code?
2. Whether the Promoter has right of subrogation under Section 140 and right to be indemnified under Section 145 of the Contract Act, 1872 (**"Contract Act"**)?
3. Whether COC can delegate its power to a sub-committee or core-committee for negotiation with the resolution applicant for revision of plan and distribution of the amount amongst the financial and the operational creditors?
4. Whether the power of distribution of amount to the lenders, that is, financial creditors, operational creditors and other stakeholders is with the resolution applicant or with the committee of creditors?
5. Whether distribution of amount amongst the financial creditors, operational creditors and other stakeholders as shown in the NCLT order dated March 8, 2019 was discriminatory?
6. Whether the financial creditors can be classified on the ground of a 'Secured Financial Creditor' having charge on project assets of the Corporate Debtor and 'Secured Financial Creditor' having no charge on the project assets of the Corporate Debtor or on the ground that the financial creditor is an 'Unsecured Financial Creditor'?
7. Whether the resolution plan can provide for priority of payment of dues to one class of creditors over others?
8. Whether the operational creditors can be validly classified on the ground of (a) employees of the Corporate Debtor; (b) those who have 'supplied goods' and 'rendered services' to the Corporate Debtor; and (c) the debt payable under the existing law (statutory dues) to the Central Government or the State Government or the local authorities?

Findings of the NCLAT

Issue 1:

Promoter argued that ArcelorMittal was ineligible in terms of Section 29A(c) read with Section 29A(j) of the Code. It submitted that Mr. L.N. Mittal held 10 shares in 'Navoday Consultants Ltd.' and as per the statutory filings, Mr. L.N. Mittal was classified as a person holding shares as a promoter and as part of the promoter group. Further, 'Navoday Consultants Limited' was a promoter of 'GPI Textiles Limited' (**"GPI Textiles"**) and 'Gontermann Piepers India Limited' (**"GPIL"**). Hence, Mr. L.N. Mittal can be called as a member of the promoter group of GPI Textiles and GPIL and therefore, ArcelorMittal was ineligible to file the resolution plan under Section 29A of the Code.

The NCLAT observed that the Supreme Court in its judgment in case of ***Arcelormittal India Private Limited v. Satish Kumar Gupta and Others [(2018) SCC OnLine SC 1733],*** already rejected the objections with respect to non-performing assets (NPAs) of GPIL and GPI Textiles. Any attempt to reopen those issues would effectively amount to review or reconsideration of the order of the Hon'ble Supreme Court. An issue which has been settled by the Supreme Court cannot be re-agitated again and again. Any such attempt is clearly barred by the principles of *res judicata.* Further, the NCLAT observed that such appeal was also barred by delay and laches, as the facts stated above were within the knowledge of Promoter and the shareholders of the Corporate Debtor.

Issue 2:

Promoter argued that its right of subrogation under Section 140 of the Contract Act and right to be indemnified under Section 145 of the Contract Act are statutory rights, which have been extinguished by ArcelorMittal in the resolution plan in violation of Section 30(2)(e) of the Code.

The NCLAT observed that the Promoter had executed a 'Deed of Guarantee' between the lenders and the Corporate Debtor. Such guarantee was with regard to clearance of debt. Once the debt payable by the Corporate Debtor stands cleared in view of the approval of the plan by making payment in favour of the lenders, the effect of 'Deed of Guarantee' comes to an end as the debt stands paid. The guarantee having become ineffective in view of payment of debt by way of resolution to the original lenders, the question of right of subrogation of the Promoter's right under Section 140 of the Contract Act and the right to be indemnified under Section 145 of the Contract Act does not arise.

Issue 3:

In the instant case, the NCLAT observed that the COC instead of going through the resolution plan for approval by vote, delegated the power to a sub-committee/ core committee. The NCLAT held that a sub-committee or core-committee is unknown and against the provisions of the Code. There is no provision under the Code, which permits constitution of a core-committee or sub-committee nor the Code or the regulations made thereunder empowers the committee of creditors to delegate their duties to such core-committee/ sub-committee. The NCLAT held that the committee of creditors do not enjoy any authority to delegate to itself the role of the resolution applicant including the manner of distribution of amount amongst the stakeholders, which is exclusively within the domain of the resolution applicant and thereafter before the adjudicating authority, if found discriminatory. Such being the position, the COC cannot delegate its power to a sub-committee or core-committee for negotiating with the resolution applicant(s).

Issue 4:

The NCLAT examined the issue by considering various provisions of the Code and regulations made thereunder. The NCLAT observed that under Section 30(2)(b) of the Code, it is clear that the resolution professional is required to notice whether the resolution plan provides for the payment of the debts of the operational creditors in such manner as may be specified by the Insolvency and Bankruptcy Board of India (**"IBBI"**). The said provision makes it

clear that the resolution applicant in its resolution plan must provide the amount it proposes to pay to one or other creditors, including the operational creditors and the financial creditors. The NCLAT also examined Section 30(3) of the Code, which suggests that the resolution professional is required to present before the committee of creditors, the resolution plan which confirms the conditions referred to in Section 30(2) of the Code. It means that if the resolution plan does not show the distribution amongst the financial creditors and the operational creditors, it cannot be placed before the committee of creditors. The NCLAT also examined Section 30(4)of the Code, which provides that the resolution plan is required to be approved by a vote of not less than 66% of voting share of the financial creditors, "after considering its feasibility and viability and such other requirements as may be specified by the Board". Thereby, all members of the committee of creditors, who are present, are required to go through the resolution plan to find out whether it is in accordance with Section 30(2) of the Code; and whether it is feasible and viable and meets all the requirements as specified by IBBI. With regard to Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**"Regulations"**), the NCLAT observed that the resolution plan must include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and the operational creditors, of the corporate debtor. Therefore, the distribution of amount to the operational creditors, financial creditors and other stakeholders are to be made by the resolution applicant and required to be reflected in the resolution plan.

The financial creditors being the claimants at par with other claimants like other financial creditors and the operational creditors, having conflict of interest, cannot distribute the amount amongst themselves. The members of the committee of creditors being interested party are also not supposed to decide the manner in which the distribution is to take place. Thus, it is clear that the committee of creditors have not been empowered to decide the manner in which the distribution is to be made between one or other creditors.

Issue 5:

The NCLAT observed that the suggestion of ArcelorMittal to distribute the financial package offered by it, only to the secured financial creditors, denying the right of operational creditors and other stakeholders, was against the provisions of Section 30(2) of the Code and Regulation 38(1A) of the CIRP Regulations, which thereby cannot be upheld.

The NCLAT relied on the Supreme Court judgment in case of ***Swiss Ribbons Pvt. Ltd. & Another v. Union of India & Others [2019 SCC OnLine SC 73],*** and observed that Regulation 38 of CIRP Regulations strengthens the rights of the operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors rights, together with priority in payment over financial creditors. The Supreme Court in the said judgment noticed that the NCLAT, while looking into viability and feasibility of the resolution plan that are approved by the committee of creditors, had always gone into whether operational creditors are given roughly the same treatment as financial creditors. If it is not the case then such plans are either rejected or modified so that the operational creditors rights are safeguarded.

In the instant case, the NCLAT noticed that a huge discrimination was made by the COC in distribution of proposed amount to the operational creditors qua financial creditors. Majority of the financial creditors were allowed over 90% of their claim amount, whereas 'NIL' that is 0% was allowed in favour of the operational creditors. The NCLAT observed that such distribution was not only discriminatory but also arbitrary. Further, the financial creditors have discriminated amongst themselves on the grounds of having charge or no charge on the project assets of the corporate debtor. Even though it is accepted that the 'Standard Chartered Bank' is also a secured financial creditor, however, it has been discriminated by the COC on the ground of it having no charge on project assets of the corporate debtor.

Issue 6:

The NCLAT on a conjoint reading of the definitions of financial creditor and financial debt under Sections 5(7) and 5(8) of the Code, respectively, found that it is evident that there was no distinction made between one or other financial creditors. All persons to whom a financial debt is owed by the corporate debtor constitute one class, that is, financial creditor, irrespective of whether they fall within the purview of different clauses of Section 5(8) of the Code. They cannot be sub-classified as secured or unsecured financial creditor for the purpose of preparation of the resolution plan by the resolution applicant.

Issue 7:

With regard to priority of payment of dues of a financial creditor, it was noted that a resolution plan provides for upfront payment in favour of the creditors including the financial creditors, operational creditors and the other creditors. It is not a distribution of assets from the proceeds of sale of liquidation of the corporate debtor and, therefore, the resolution applicant cannot take advantage of Section 53 of the Code for the purpose of determination of the manner in which distribution of the proposed upfront amount is to be made in favour of one or other stakeholders namely, the financial creditor, operational creditor and other creditors. Hence, the NCLAT held that Section 53 cannot be made applicable for distribution of amount amongst the stakeholders, as proposed by the resolution applicant in its resolution plan.

The NCLAT referred to its earlier decision in case of ***Binani Industries Limited v. Bank of Baroda and Another*** (*decided on November 14, 2018*), where it observed that *"Any 'Resolution Plan' if shown to be discriminatory against one or other 'Financial Creditor' or the 'Operational Creditor', such plan can be held to be against the provisions of the I&B Code".*

The NCLAT observed that Section 30(2)(b) of the Code mandates that the resolution plan must provide for the payment of the debts of operational creditors in such manner as may be prescribed by the IBBI which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53 of the Code. That means, the operational creditors should not be paid less than the amount they could have received in the event of a liquidation out of the asset of the corporate debtor. It does not mean that they should not be provided the amount more than the amount they could have received in the event of liquidation; which otherwise amount to discrimination.

Issue 8:

The NCLAT examined the definition of 'Operational Debt', and concluded that the following classification has been made by the Parliament: (i) those who have 'supplied goods' and 'rendered services' and thereby entitled for payment; (ii) the employees who have 'rendered services' for which they are entitled for payment; and (iii) the Central Government, the State Government or the local authority who has not rendered any services but derive the advantage of operation of the 'Corporate Debtor' pursuant to existing law (statutory dues). The NCLAT observed that from the aforesaid definition, the 'Operational Creditors' can be classified in three different classes for determining the manner in which the amount is to be distributed to them. However, they are to be given the same treatment, if similarly situated.

For the aforesaid reasons, the NCLAT held that if the employees or those who have 'supplied goods' and 'rendered services' having claim less than INR 1 Crore are given 100% of their dues, the other 'Operational Creditors' whose claim are more than INR 1 Crore or the 'Central or State Government' or the 'Local Authority', who raise their claim on the basis of the statutory dues, cannot ask for same treatment as allowed in favour of the aforesaid class of 'Operational Creditors'. For the said reasons, the NCLAT held that 100% payment as suggested in the resolution plan in favour of the workmen and employees, unsecured financial creditors whose claim was less than INR 1 Crore and the operational creditors whose admitted claim was less than INR 1 Crore was not discriminatory and the other operational creditors or financial creditors cannot ask for 100% of their claim on the ground that they should also be provided with same treatment.

Decision of the NCLAT

In view of the aforesaid observations, the NCLAT decided not to reject the resolution plan submitted by ArcelorMittal, and modified the plan as approved by the NCLT by its judgement dated March 8, 2019 to safeguard the rights of the operational creditors and other financial creditors. However, the other conditions laid down by the NCLT and as mentioned in the resolution plan were not interfered with.

With respect to the amount to be paid to the financial creditors and operational creditors whose claim was more than INR 1 Crore, the NCLAT calculated the percentage of amount to be paid to the relevant stakeholders against their original admitted claim by dividing the amount available for distribution (as offered by ArcelorMittal in its resolution plan) by the total debt amount payable to the stakeholders. After calculation, the NCLAT held that financial creditors with claim of more than INR 1 Crore will be eligible for 60.7% of the amount of debt claimed. The NCLAT also calculated the revised percentage for amount to be paid to operational creditors with claim of more than INR 1 Crore, and held that 59.614% shall be payable to such operational creditors. The aggregate amount allocated to all the operational creditors and the financial creditors was 60.7% of their respective admitted claims. The operational as well as the financial creditors with claim of less than INR 1 Crore were allowed 100% of their respective admitted claims.

The NCLAT also made a direction to the effect that after the distribution of the amount of INR 42,000 Crores, if any amount would be found to have been generated as profit during the CIRP after due verification by the auditors, it cannot be given to the successful resolution applicant as the successful resolution applicant has not invested any money during the CIRP. If one or other financial creditors would have invested money during the CIRP to keep the corporate debtor as a going concern, it can claim that it should get the interest out of the profit amount. In the present case, since the financial creditors had not invested money during the CIRP, the NCLAT held that it should be distributed amongst all the financial creditors and the operational creditors on pro-rata basis of their claims subject to the fact that it should not exceed the admitted claim.

With regard to disputed claims and remedies available in respect thereof, the NCLAT referred to its earlier judgements and held that the cases where the adjudicating authority or the appellate authority could not decide the claims on merits, the applicants can raise the issue before the appropriate forum in terms of Section 60(6) of the Code. However, the creditors, whose claims have already been decided, cannot avail any remedy under Section 60(6) of the Code. Further, the financial creditors in whose favour guarantee were executed, can also not reagitate such claim from the principal borrower as their total claim stands satisfied pursuant to the resolution plan.

VA View

This judgement will have a significant impact on the status of operational creditors as it places the operational creditors at the same pedestal as financial creditors who form part of the committee of creditors. For the first time, the NCLAT also dealt with profit generated during the CIRP and held that the same should be distributed amongst all the creditors on pro-rata basis of their claims subject to the fact that it should not exceed the admitted claim.

The NCLAT in this judgment criticized the committee of creditors for deciding the distribution of money to the creditors and reiterated that this is the duty and responsibility which vests with the resolution applicant. The NCLAT further stated that the formation of sub-committee/ core committee to renegotiate the terms of the plan are against the provisions of law and any delegation of power to such committees shall be invalid.

It will be interesting to note the fate of this judgment in the pending appeals filed before the Supreme Court. Further in light of this judgement, the Government has acted swiftly and moved an amendment to the Code in respect of the primacy of secured creditors over unsecured creditors in recovery of their dues and setting strict timelines for the resolution and litigation process. Moreover, the amendment proposes to vest the power with committee of creditors in respect of commercial decisions on distribution of funds to various classes of creditors as against the aforesaid judgement of NCLAT, where the NCLAT has given such power to the resolution applicant. The proposed amendments will help in cutting legal delays and help banks to recover more dues and boost India's credit market for future growth.

II. NCLT: Foreign courts cannot intervene in insolvency proceedings

The National Company Law Tribunal, Mumbai Bench (**"NCLT"**), in the case of ***State Bank of India v. Jet Airways (India) Limited*** (*decided on June 20, 2019*) held that foreign courts cannot intervene or create parallel proceedings for the insolvency proceedings of an Indian company.

Facts

The State Bank of India filed an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (**"Code"**) for initiation of corporate insolvency resolution process (**"CIRP"**) against Jet Airways (India) Limited (**"Jet Airways"**), which was clubbed with the applications made by operational creditors under Section 9 of the Code. While it was under consideration, the NCLT was apprised of insolvency proceedings against Jet Airways which had already been initiated by a Dutch Court (the Noord Holland District Court). In the judgement of the Noord Holland District Court dated May 21, 2019, Mr R. Mulder (**"Intervener"**) was appointed as the "administrator in bankruptcy" of Jet Airways.

Issue

Whether the initiation of CIRP against Jet Airways is maintainable before the NCLT, considering ongoing parallel proceedings in the Noord Holland District Court in the Netherlands?

Arguments

The Intervener stated that insolvency proceedings against Jet Airways in the Netherlands had commenced and if the NCLT passes an order of commencement of CIRP in India, a peculiar situation would emerge where the same company has two parallel insolvency proceedings in different jurisdictions, which could lead to complications and delays. This will further create uncertainty and impair the chances of attracting potential resolution applicants for Jet Airways. It was also contended by the Intervener that even though Sections 234 and 235 of the Code, which deal with agreements with foreign countries and letters of request to other countries in certain cases, have not been notified by the Central Government, there is no bar or prohibition under the Code forbidding the NCLT to recognise insolvency proceedings in a foreign jurisdiction. It was also contended that the judgement of the Noord Holland District Court dated May 21, 2019 is final and binding on Jet Airways and its lenders and neither Jet Airways nor any operational/financial creditors of Jet Airways have appealed against the judgement.

Observations of the NCLT

The NCLT analysed the contentions put forth by the Intervener. The NCLT stated that though Sections 234 and 235 of the Code deal with the matters regarding agreements with foreign countries and a letter of request to a country outside India in the insolvency resolution process where the assets of the corporate debtor exist outside India, these sections have not yet been notified and hence are not enforceable. Further, since the registered office of Jet Airways is in India, the jurisdiction lies with the NCLT. Section 234 of the Code states as follows:

"234. Agreements with foreign countries.–

(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified."

The NCLT observed that since the Government of India and the Government of the Netherlands have no such agreement, no other court has the power to pass on order under the Code. Further, the NCLT observed that the contention of Mr. Mulder that the two parallel proceedings will lead to complications, is not sustainable, as the order of the foreign court is a nullity in the eye of law and such order cannot be given effect.

Decision of the NCLT

Considering the above, the NCLT held that the order passed by Noord Holland District Court, Netherlands which resulted in bankruptcy proceedings commencing against Jet Airways under Dutch law is *nullity ab-initio*. It further stressed that since Jet Airways has over 20,000 employees, its debt resolution is of 'national importance'. The NCLT further analysed the report of the Bankruptcy Law Reforms Committee of November 2015, which stated that speed is of the essence. Keeping the above points in mind, the NCLT stated that any further delay in the CIRP proceedings against Jet Airways would be against the provisions of the Code and since both the debt and default in repaying the debt are proved, the petition seeking invocation of the CIRP was admitted and moratorium under Section 14 of the Code was imposed. Since Jet Airways' debt resolution was of 'national importance', the resolution professional was directed to attempt to complete the CIRP process within the statutory period of 180/270 days.

VA View

The NCLT has, in this case, correctly stated that parallel insolvency proceedings should be avoided and that since Jet Airways is an Indian company, Indian law should be applicable to it. By stating that Sections 234 and 235 of the Code are not notified and the Government of India has not entered into an agreement with the Government of the Netherlands and since the registered office of Jet Airways is situated in India, the NCLT has correctly held that any insolvency proceedings for such companies outside India shall be null and void and Indian courts should have a primary and exclusive jurisdiction.

In October 2018, Insolvency Law Committee constituted by the Ministry of Corporate Affairs to recommend amendments to the Code, submitted a report to the government on Cross Border Insolvency, where it suggested that the government shall adopt the 'UNCITRAL Model Law on Cross-Border Insolvency, 1997'. This has been accepted by approximately 44 nations already, and deals with major principles of cross-border insolvency such as coordination between two or more concurrent insolvency proceedings in different countries, which was the bone of contention in the instant matter. Therefore, adoption of such a framework seems to be in the best interests of all the stakeholders concerned and can result in effective maximisation of value of assets in similar cases and in prevention of parallel proceedings.

III. Supreme Court: Non-signatory to an arbitration agreement cannot be impleaded in arbitration unless a clear intention can be gathered from the correspondences, even if the non-signatory falls under 'group of companies' doctrine

The Supreme Court in the case of ***Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited and Another*** (*decided on July 01, 2019*), refused to apply 'group of companies' doctrine to implead a non-signatory party in arbitration on the ground that a clear intention to such effect was not manifest from the correspondences between the parties.

Facts

Reynders Label Printing India Private Limited (**"Respondent"**) approached Reckitt Benckiser (India) Private Limited (**"Petitioner"**) with an offer to print labels for its products. Pursuant to the offer, exhaustive negotiations were held leading to various correspondences. Post negotiation, an agreement was executed which inter-alia included an arbitration clause. The Respondent and Reynders Ttiketten NV (**"Foreign Affiliate"**) are group companies of "Reynders Label Printing Group". Under indemnity clause of the agreement, the supplier group (which includes the Foreign Affiliate) had assumed the liability to indemnify the Petitioner in case of any loss, damage, etc., caused to it on account of acts and omissions of the Respondent. Disputes arose between the parties and a petition was filed under Section 11 of the Arbitration and Conciliation Act, 1996 before the Supreme Court for the appointment of sole arbitrator. The Petitioner also made the Foreign Affiliate a party to the petition. The Foreign Affiliate objected to be made a party as it was not a signatory to the agreement.

Issue

Whether the Foreign Affiliate could be impleaded as a party to the arbitration proceedings despite being non-signatory to the arbitration agreement merely because it is a part of the same 'group of companies' as Respondents?

Arguments

Firstly, the Petitioner argued that the Foreign Affiliate has been impleaded because it was the holding company of the Respondents. Secondly, it mentioned that the Foreign Affiliate had assumed the liability by the indemnity clause of the agreement. It made the Foreign Affiliate an integral party to the agreement. Lastly, it argued that on multiple occasions during the course of negotiations, the Respondent had replied through Mr. Frederik Reynders, who is a promoter of the Foreign Affiliate. In one of the e-mails, he had made a counter proposal concerning the indemnity clause. According to the Petitioner, it meant that the Foreign Affiliate had knowledge of the extension of the indemnity and it was the disclosed principal on whose behalf the Respondent had executed the agreement. It was also argued that the Foreign Affiliate had participated in the escalation meeting after the dispute arose which further goes to prove that the Foreign Affiliate despite being a non-signatory had assented to the arbitration agreement. Therefore, the Foreign Affiliate should be impleaded in the arbitration proceedings.

The Respondent refuted the arguments of the Petitioner by stating that the Foreign Affiliate was not the holding company at all. The Respondent and the Foreign Affiliate in fact form a part of the same group and there was no holding-subsidiary relationship. There was no privity of contract between the Petitioner and the Foreign Affiliate. The Respondent also stated that Mr. Frederik Reynders was not the promoter of the Foreign Affiliate, but was merely an employee of the Respondent.

Observations of the Supreme Court

The Supreme Court basis its earlier decision in ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Others [(2013) 1 SCC 641],*** observed that the arbitration agreement can bind even non-signatory parties, if they are a part of same 'group of companies', provided the circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. The Supreme Court examined the correspondences exchanged between the Petitioner, Respondent and Mr. Frederik Reynders. It read these correspondences in light of the arguments advanced by the parties and observed that the basis of Petitioner's claim was the assent of the Foreign Affiliate to the arbitration agreement attributed by the communications made by Mr. Frederik Reynders. Hence, once it became clear that Mr. Frederik Reynders was merely an employee of the Respondent and not related to the Foreign Affiliate in any manner; the argument of Petitioner became irrelevant. The Supreme Court observed that neither the Foreign Affiliate was a party to the arbitration agreement nor did it have any causal connection with the process of negotiations preceding the arbitration agreement or its execution. The fact that the Respondent and the Foreign Affiliate are a part of the same group, holds no consequence in this instance. Further, the Supreme Court held that the reliance of the Petitioner on the post contractual correspondences (relating to the escalation meeting after the dispute arose) would also not be useful in this instance, by relying on its earlier decision in case of ***Godhra Electricity Company Limited and another v. State of Gujarat [(1975) 1 SCC 199],*** where it was held that post-negotiations in law would not bind the foreign affiliate qua the arbitration agreement limited between the petitioner and the respondent.

Decision of the Supreme Court

The Supreme Court held that burden of establishing a clear intention of the Foreign Affiliate to assent and be a party to the arbitration agreement was not discharged by the Petitioner. Therefore, the Foreign Affiliate cannot be impleaded to the arbitration proceedings. The Supreme Court held that the Petitioner can pursue remedy against the Respondent for appointment of sole arbitrator to conduct the arbitration proceedings as 'domestic commercial arbitration'. However, in this particular case, upon request of both the parties, Supreme Court appointed former chief justice of Jammu and Kashmir High Court as the sole arbitrator.

VA View

In ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Others (supra)*** and ***Cheran Properties Limited v. Kasturi and Sons Limited and Others (2018) 16 SCC 413,*** the Supreme Court allowed non-signatories of arbitration agreements to be made parties to arbitration proceedings. The legal basis to connect an arbitration agreement entered by a company within a group of companies with its non-signatory affiliates would be mutual intention, that is, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. This meant that the parties which were holding the strings of the transaction behind the curtains would be brought to the forefront to face the music and simply by refusing to be a signatory to an arbitration agreement, they could not take the benefit of exclusion from arbitration proceedings.

However, in order to apply the 'group company doctrine' to implead non-signatories, the court ought to be satisfied that the non-signatory was actually involved and played a significant role in the transaction at hand. The burden of proof would lie on the party who would want the non-signatory to be impleaded. Circumstances and correspondences before signing the arbitration agreement can be the primary tools to satisfy this burden. In this case, in light of the pre-contractual facts and correspondences, as this burden was not adequately satisfied, the Supreme Court refused to unnecessarily involve the non-signatory Foreign Affiliate at the initial stage of the arbitration proceedings.

IV. Madras High Court: Contractual relations between private institutions performing public functions and individuals can be enforced under Article 226 of the Constitution of India

The Madras High Court in case of ***Jasmine Ebenezer Arthur v. HDFC ERGO General Insurance Company Limited and Others*** (*decided on June 6, 2019*) held that a writ petition is maintainable against a private body, if it has a public duty imposed on it. Consequently, an insurance company is amenable to the writ jurisdiction of a court, as it performs public functions and have a public duty imposed on it.

Facts

Jasmine Ebenezer Arthur (**"Petitioner"**) and her husband had availed a home loan from HDFC Bank Ltd. (**"HDFC"**) for a property located in Chennai, for an amount of INR 35,00,000, to be repaid in 120 equal monthly installments. A home loan agreement was also executed between the parties. The Petitioner's husband also availed an insurance coverage along with the home loan, via a policy called Home Suraksha Plus (**"Policy"**) by paying a premium of INR 1,45,812, which covered 'Critical Illness Diagnosis'. Section 3(c) of the Policy specifically provided coverage for "Myocardial Infarction". The Petitioner's husband suffered massive cardiac arrest while driving to his office in Abu Dhabi, and was admitted to a hospital where it was diagnosed that he suffered from cardiac arrest and ventricular fibrillation. He died in Abu Dhabi, and no post mortem could be conducted. The Petitioner filed the

claim with the HDFC ERGO General Insurance Company Limited (**"Insurance Company"**), but no action was taken to process the claim. Due to this inaction, the Petitioner was constrained to lodge a complaint with the grievance cell. Upon request of the Insurance Company, the required document with respect to the "cause of Ventricular Fibrillation and Cardiac Arrest" from the treating doctor was submitted by the Petitioner. As per the report, the cause of the death of her husband was "acute coronary artery syndrome". The claim of the Petitioner was repudiated on the ground that the cause of her husband's death was not covered under "Major Medical Illness". The aggrieved Petitioner filed a complaint with the grievance cell which did not yield any positive response. Thereafter, the Petitioner filed a complaint with the Insurance Ombudsman, Chennai and the same was dismissed. Aggrieved by the order of the Insurance Ombudsman, the Petitioner instituted a writ petition under Article 226 of the Constitution of India (**"Constitution"**) before the Madras High Court, praying for a writ of mandamus directing the Insurance Company to honor the claim made by the Petitioner in respect of insurance policy availed by Petitioner's husband without insisting for any further documentations or particulars.

Issues

1. Whether the petition to enforce a contractual relationship is maintainable under Article 226 of the Constitution before the Madras High Court?
2. Whether the private bodies performing public duties can be brought within the purview of judicial review?

Arguments

The Insurance Company questioned the appropriateness of the forum approached, as there exists only a contractual relationship between the Insurance Company and the Petitioner. The Insurance Company also contends that the cardiac arrest suffered by the Petitioner's husband is not "Myocardial Infarction" and thus, not covered under the Policy. HDFC filed a counter affidavit for dismissal of the writ petition on same grounds, and contended that they being the secured creditor, must be entitled to take recourse to legal remedies for recovery of dues with respect to the home loan. In light of the second issue raised, the Insurance Company argued that they are not performing any statutory function or obligations. The Insurance Company argued that it is not "State" under Article 12 of the Constitution, and hence the petition is not maintainable.

The Petitioner contended that the Insurance Company is a registered insurance entity with Insurance Regulatory and Development Authority of India (which is a regulatory authority) and hence, the writ petition is maintainable in law. The Petitioner cited the judgment of the Hon'ble Supreme Court in case of ***Life Insurance Corporation of India and Others v. Asha Goel and Another [(2001) 2 SCC 160],*** to support its argument that a writ petition to enforce a contractual right is maintainable.

Observations of the Madras High Court

Issue 1:

The basic object of the Insurance Act, 1938 is to prevent the abuse of power concentrated in the hands of insurance companies. The Madras High Court observed that since certain public functions such as insurance are allowed to be performed by private bodies, it has to extend its powers under the writ jurisdiction, to keep in check the public functions performed by such private bodies. The Madras High Court further perused Article 226 of the Constitution and held that a writ can be directed towards any person, not only for infringement of fundamental rights, but also for any other purpose.

Issue 2:

The Madras High Court observed that when the public monopoly power is replaced by private monopoly power, it becomes imperative that the private bodies should be made accountable to the judiciary within its scope of judicial review. If any private body has a public duty imposed on it, the court has jurisdiction to entertain the writ petition. Madras High Court also referred to the case of ***LIC v. Escorts Ltd. [AIR 1986 SC 1370],*** where it was held that the court will examine actions of the State, if they pertain to the public law domain, and refrain from examining them, if they pertain to the private law field.

It was also observed by the Madras High Court that there is no equality between the parties in an insurance agreement, as the insurer is a rich corporation and the insured is usually an ordinary individual. In most of the cases, the individual has no legal knowledge about the ambiguous language used in the insurer's policy. The need to have more transparent, accurate and unambiguous facts and provisions in an insurance policy was noted.

With reference to the merits of the case, the Madras High Court observed that from the reports of the expert cardiologist, it was further observed that as per Section 3 of the Policy, the medical event of "Myocardial Infarction" was covered under the Policy, which was denied by the Respondents. It was established that the cause of death of the insured was well within the defined medical events prescribed in the Policy.

Decision of the Madras High Court

The Madras High Court held that the petition is maintainable against the Insurance Company, and the Insurance Company was directed to honor the claim made by the Petitioner, without seeking any further documents or particulars, within a period of 8 weeks from the receipt of the order.

VA View

The evolving jurisprudence of a company, corporation, trust or society being amenable to the writ jurisdiction comes from a catena of judgments over the years. The Supreme Court and various High Courts normally evaluate the extent of the public function being performed by the company, and balance it against the possible harm that can be caused if the writ jurisdiction is not exercised. Initially, the factors for testing the applicability of the writ

jurisdiction rested on a few key factors such as incorporation via a statute, financial assistance, controlling authorities, composition of the board and shareholding, deep and pervasive control of the State, and functions holding importance for the public. Essentially, the test involved financial, administrative and functional control over the company.

Over a period of time, the courts have increased the ambit of applicability of writ jurisdictions from educational institutions, government corporations, airport authorities, to private entities like the Board of Control for Cricket in India. The fulcrum of the court's rationale for extending this jurisdiction hinges mostly upon the nature of the function performed by the entity, and whether the function spills into the public function sphere, affecting masses at large, in a domain where arbitrariness would create an absolutely unfair result. Courts have often curbed misuse of power by intelligent interpretation, of not including the entity under "State" under Article 12 of the Constitution, but nonetheless holding them amenable to the writ jurisdiction only by virtue of the nature of powers it exercises. This liberal approach in extending the writ jurisdiction and binding private entities to constitutional standards has mostly had a positive impact, until the judgment in question.

In the present judgment, the Madras High Court has tried to do the morally correct thing, but has overstepped in its interpretation of public functions/duties, which may lead to the opening of floodgates, and burdening the court with vexatious writ petitions. The Madras High Court's justification for extending the writ jurisdiction to private companies is threefold: first, writ jurisdiction can be extended to persons for "any other purpose"; second, insurance companies have a public duty imposed on it; and third, it is a rampant practice nowadays that insurance companies enter into agreements with laymen who are incapable of understanding the nitty-gritties of the agreement, and often end up being cheated.

In response to the first justification, the Madras High Court has erred in considering the Hon'ble Supreme Court's judgment in ***G. Bassi Reddy v. International Crops Research Institute and Another [(2003) 4 SCC 225],*** wherein the Supreme Court while considering the ambit of the writ jurisdiction and its extension to "a person" and for "any other purpose" has circumscribed the powers and held that *"It is true that a writ under Article 226 also lies against a "person" for "any other purpose". The power of the High Court to issue such a writ to "any person" can only mean the power to issue such a writ to any person to whom, according to the well-established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words "and for any other purpose" must mean "for any other purpose for which any of the writs mentioned would, according to well-established principles issue".*

Therefore, the Madras High Court failed to consider the well settled principles of functional, administrative and financial control enunciated in a number of landmark judgments, and has relied solely on the letter of the law to extend its writ jurisdiction.

With respect to the second justification, the background and history of insurance as a concept and its advent in India makes it abundantly clear that it is a purely commercial transaction, with no public duty imposed on the

same, and the only form of regulation that can be put in place is legislative in nature. This legislative control is already in place by virtue of the Insurance Act, 1938 and Insurance Regulatory and Development Authority, with the Insurance Ombudsman available as a forum for resolving disputes. It is true that over a period of time insurance has become an essential part of a person's life, and a majority of citizens purchase insurance in some form or the other, but this is only a commercial product gaining significant momentum and market cap, and does not tantamount to any form of public duty being imposed on the insurance companies.

With respect to the third justification, the incapacity of the Insurance Ombudsman, along with the fact that insurance contracts are worded in such a manner as to confuse the layman, are policy and enforcement issues which cannot be overcome by extending jurisdictions way beyond the prescribed domain.

In conclusion, although the Madras High Court had a bonafide intention of helping a litigant who was facing immense trouble due to the arbitrariness of the insurance company, the means of achieving the remedy comes at a much higher cost of altering well settled principles of law, and tweaking the jurisprudence of writs and State under the Constitution.

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