# Between the lines...

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## Key Highlights



### I. Supreme Court: Constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 upheld

The Supreme Court of India (**"SC"**), on November 15, 2019 upheld the order approving the resolution plan submitted by ArcelorMittal India Private Limited (**"ArcelorMittal"**) for Essar Steel India Limited (**"Essar"**) and upheld the constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

**Facts**

On August 02, 2017, the National Company Law Tribunal, Ahmedabad (**"NCLT"**) admitted Company Petition filed by Standard Chartered Bank together with a petition filed by the State Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**). Satish Kumar Gupta was appointed as the interim resolution professional, who was later confirmed as Resolution Professional (**"RP"**).

Pursuant to the above, resolution plans were filed by ArcelorMittal and Numetal Limited (**"Numetal"**). Both the resolution plans were found to be ineligible under Section 29A of the IBC. On March 02, 2018, resolution plans were then submitted by ArcelorMittal, Numetal and Vedanta Limited. The resolution plan of ArcelorMittal specifically provided for an upfront payment of INR 35,000 crores in order to resolve debts amounting to INR 49,213 crores. It was stated that unsecured financial creditors shall be paid an aggregate amount of 5% of their admitted claims. Apart from the above, INR 8,000 crores of fresh capital infusion by way of capex and working capital was also to be infused. INR 3,339 crores - being the aggregate admitted claims of operational creditors, other than workmen and employees, were to be paid to the extent of INR 196 crores, but only to trade creditors and government creditors. Small trade creditors, defined as "having claims of less than one crore" were

to be honoured in full, as was the claim of workmen and employees of the corporate debtor, amounting to INR 18 crores. Importantly, ArcelorMittal empowered the Committee of Creditors (**"COC"**) to decide the manner in which the financial package being offered would be distributed among the secured financial creditors, vide a 'core committee'. Standard Chartered Bank, which was stated to be an unsecured creditor, was to be paid an aggregate amount of 5% of its admitted claims. On April 19, 2018, the Adjudicating Authority directed the COC of the corporate debtor, to consider the eligibility of the aforesaid resolution applicants.

Since both ArcelorMittal and Numetal were ineligible by virtue of their resolution plans being hit by Section 29-A of the IBC, an order was passed by the SC under Article 142 of the Constitution, stating that one more opportunity be granted to both ArcelorMittal and Numetal to pay off the non-performing assets of their related corporate debtors within two weeks, failing which the corporate debtor would go into liquidation. On October 18, 2018, ArcelorMittal informed the RP and the COC that it had made payments as per the Supreme Court's judgment. However, Numetal did not make any such payment. As a result, on October 19, 2019, ArcelorMittal resubmitted its resolution plan, which was then evaluated by the COC, which resulted in ArcelorMittal being declared as the highest evaluated resolution applicant. On October 25, 2019, the final negotiated resolution plan of ArcelorMittal was approved by the COC by a 92.24% majority, after which it was approved by the NCLT.

This approval was appealed to the National Company Appellate Law Tribunal (**"NCLAT"**), which held in an order dated March 20, 2019 that the funds from the winning bid must be distributed equally between operational and financial creditors, as the NCLAT opined that there can be no difference between a financial creditor and an operational creditor in the matter of payment of dues. Pursuant to the passage of this order, the government passed the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (**"Amendment Act"**) which, *inter alia,* clarified the fundamental principle that a secured creditor has priority over unsecured creditors.

Pursuant to this, on March 27, 2019 the COC decided to appeal against the NCLAT's order, and, by a majority, making an ex gratia payment of INR 1,000 crores to operational creditors above INR 1 crore. Appeals filed against the interlocutory orders of the NCLAT were then heard by the SC, which by its order dated April 12, 2019, *inter alia,* directed non-implementation of the judgment dated March 8, 2019 of the NCLT and expeditious disposal of the appeal before the NCLAT.

**Issue**

If the NCLAT was correct in disallowing the resolution plan and stating that the resolution amount is to be distributed equally between the financial creditors and the operational creditors and if Sections 4 and 6 of the Amendment Act are constitutionally valid.

**Arguments**

The counsel for Essar submitted that the IBC provides for a broad classification of creditors as financial creditors and operational creditors on the basis of the nature of the transaction between creditors and a corporate debtor, but does not mandate identical treatment of differently situated inter se creditors either within financial creditors, who

may be secured or unsecured, and/or financial creditors vis-a-vis operational creditors and that financial creditors as a class have a superior status as against operational creditors, same as with secured creditors vis-a-vis unsecured creditors. It was further argued that if secured financial creditors are to be treated at par with unsecured creditors, such secured creditors would rather vote for liquidation rather than corporate resolution, contrary to the main objective sought to be achieved by the IBC.

It was also argued that since a resolution plan is a consent-based plan proposed by the resolution applicant for a corporate debtor, any modification, as has been done by the NCLAT, of such plan is illegal. It was further argued that the NCLAT judgment deserves to be set aside because it has curtailed the authority of the COC; expanded the jurisdiction of the Adjudicating Authority as well as the NCLAT beyond the bounds contained in the IBC; and has transgressed the most basic tenet of the COC's commercial wisdom being reflected by an over 66% majority vote, which has been nullified by the NCLAT by completely modifying and substituting the resolution plan approved by the COC.

Further, the counsel for the State Bank of India argued that the NCLAT had upped the figure to approximately INR 2160 crores completely beyond its limited jurisdiction under the IBC. Further, Standard Chartered Bank is precluded from raising any challenge to the constitution of a sub-committee as it had participated in several meetings in which it raised no objection to the sub-committee, and had in fact requested to be a part of the sub-committee.

The counsel for Standard Chartered Bank, who was opposing the appeal, argued that the very formation of a core committee/sub-committee, was against the provisions of the IBC, and was manifestly illegal. Further, the role of the COC is limited to considering the feasibility and viability of the resolution plan, which does not include the manner of distribution of the amount payable by the resolution applicant to the erstwhile creditors of the corporate debtor. It was also argued that the Parliament has consciously chosen not to create different classes of financial or operational creditors when it comes to the process of resolution of debts. Section 53 of the IBC would apply only during liquidation and not at the stage of resolving insolvency as is clear from the fact that "secured creditor" as defined by Section 3(30) of the IBC is used only in Section 53 (*distribution of assets*) of the IBC which is contained in Chapter III, titled 'Liquidation Process' and not at all in Chapter II of the IBC which is titled 'Corporate Insolvency Resolution Process'. Further, it was argued that neither the COC, nor any sub-committee could possibly decide the manner of distribution as it would give rise to a serious conflict of interest, as the majority may get together to ride roughshod over the minority.

Further, arguments were made by Ideal Movers Limited, which was an operational creditor of the Corporate Debtor to oppose the appeal. It stated that from a reading of the preamble of the IBC and some of its provisions that a key objective of the IBC is to ensure that the corporate debtor goes on doing its business as a going concern during the Corporate Insolvency Resolution Process (**"CIRP"**) as a result of which a large number of operational creditors have to be paid their dues – such as workmen, electricity dues, etc. It was further contended that the process of revival and the process of liquidation are distinct and separate and have been so treated by the IBC. It was argued that, priorities of payment which apply in liquidation cannot apply when the corporate debtor is being run as a going

concern as otherwise secured creditors alone will be paid and not operational creditors who are necessary for the running of the business.

With regards to the constitutional validity of Sections 4 and 6 of the Amendment Act, Ms. Madhvi Diwan, the Additional Solicitor General of India stated that the amendments further the objects sought to be achieved by the IBC, which is maximization of value of the assets of the corporate debtor in a time bound manner, and this loophole that was sought to be plugged in accordance with the original conception for the framework of the IBC. With respect to Section 6 of the Amendment Act, it was argued that there is a symbiotic relationship between a resolution applicant and the COC, who alone are to take a commercial decision by the requisite majority whether or not to put the corporate debtor back on its feet. Mr. Tushar Mehta, Solicitor General of India further added that it is well settled that the legislature can always take away the basis of a judicial decision without directly interfering with the judgment of a court.

**Observations of the Supreme Court**

The SC confirmed that the role of the RP under the IBC and the regulations thereunder, is not adjudicatory but administrative, and that the COC decides the "feasibility and viability" of a resolution plan, after taking into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. It was clarified that it was open to the COC to suggest a modification to the prospective resolution applicant's plan, affecting the payment of priority of dues. Thus, the SC essentially upheld the sanctity of the commercial wisdom of the COC to determine as to how, and in what manner, the CIRP is to take place.

The SC further clarified that protecting creditors in general is an important objective, and what is meant by protecting creditors from each other is only that a bankruptcy code should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law. An "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process, if adopted, secured financial creditors will, in many cases, be incentivized to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the IBC which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

It is the COC, under Section 30(4) of the IBC read with Regulation 39(3) of the CIRP Regulations that is vested with the power to approve resolution plans and make modifications therein as the COC deems fit. It is this vital difference between the jurisdiction of the High Court under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the IBC that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the IBC. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of.

The SC observed that Section 53 of the IBC would be applicable only during liquidation and not at the stage of resolving insolvency. Section 30(2)(b) of the IBC refers to Section 53 not in the context of priority of payment of

creditors, but only to provide for a minimum payment to operational creditors. However, SC held that this does not in any manner limit the COC from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion have been given to the COC to classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realize outside the process of IBC, thereby stymying the corporate resolution process itself. SC further went on to hold that the NCLAT judgment which substitutes its wisdom for the commercial wisdom of the COC, and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must be set aside.

The SC analyzed the Amendment Act and observed that it consists of several sections which have been enacted/amended as difficulties have arisen in the working of the IBC. Further, it observed that though the law laid down by the NCLAT in this case formed the basis for some of the amendments, it could not be said that the legislature has directly set aside the judgment of the NCLAT. Since an appeal against the judgment of the NCLAT lies to the SC, the legislature is well within its bounds to lay down laws of general application to all persons affected, bearing in mind what it considers to be curing of a defective reading of the law by NCLAT. For all these reasons, therefore, the SC observed that it was difficult to hold Sections 4 and 6 of the Amendment Act as constitutionally invalid. In Section 4 of the Amendment Act the SC struck down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution of India. The effect of this is that in exceptional cases, the time can be extended beyond 330 days for completion of the CIRP, however the general rule of 330 days as the outer limit has been retained by the SC.

**Decision of the SC**

The SC held that the CIRP will take place in accordance with the resolution plan of ArcelorMittal, as amended and accepted by the COC. It also upheld the constitutional validity of Sections 4 *(regarding the time limit for the resolution process)* and 6 *(regarding the inter se treatment amongst creditors)* of the Amendment Act.

**VA View**

While the bench has made several noteworthy observations regarding the IBC and the role and responsibilities of each stakeholder in it, the key takeaway from this decision is the importance of the COC's commercial wisdom, as the intention of the legislature was made clear pursuant to the Amendment Act.

This decision clears all hurdles to the takeover of Essar Steel by ArcelorMittal. Another knock down effect should be the clarification that operational and financial creditors cannot be given the same treatment and that the IBC mandates that they receive equitable, and not equal treatment, a move that has been welcomed by the banking industry as a flexible approach rather than one-size-fits-all approach. Further, this should significantly reduce the scope for long winding litigation under the IBC.

## II. Supreme Court: No automatic stay on challenges to arbitral awards

The Supreme Court of India (**"SC"**) in the case of ***Hindustan Construction Company Limited and Another v. Union of India and Others*** (*decided on November 27, 2019*) struck down the insertion of Section 87 to the Arbitration and Conciliation Act, 1996 (**"1996 Act"**), calling it "manifestly arbitrary" and in violation of Article 14 of the Constitution of India. The newly inserted Section 87 of the 1996 Act contemplated that there would be an automatic stay on arbitral awards the moment they are challenged under Section 34 of the 1996 Act, if they pertained to arbitral proceedings commenced before October 23, 2015, that is, the date of enactment of the Arbitration and Conciliation (Amendment) Act, 2015 (**"2015 Amendment Act"**). This was irrespective of the fact that the said court proceedings under Section 34 *(application for setting aside arbitral award)* of the 1996 Act has commenced prior to or after October 23, 2015, Section 34 application only had to relate to an arbitral proceeding commenced prior to October 23, 2015.

The catena of issues in this case derive their genesis from an amendment to Section 36 (*enforcement of arbitral awards)* of the 1996 Act by Section 19 of the 2015 Amendment Act, which removed the automatic stay on operation of arbitral awards merely upon being challenged.

The SC also struck down the repeal of Section 26 *(Act not to apply to pending arbitral proceedings)* of the 2015 Amendment Act by the Arbitration and Conciliation (Amendment) Act, 2019 **("2019 Amendment Act")**. In ***BCCI v. Kochi Cricket Private Limited [(2018) 6 SCC 287],*** the SC had deliberated upon the scope of Section 26, holding that automatic stay would not apply to Section 34 applications filed on or after October 23, 2015, even if the arbitral proceedings had commenced prior to the said date.

The SC held that insertion of Section 87 to the 1996 Act removed the premise of its judgement in ***BCCI v. Kochi Cricket Private Limited [(2018) 6 SCC 287],*** by imposing an automatic stay on arbitral awards if they pertained to arbitral proceedings before October 23, 2015.

**Facts**

A set of writ petitions had been filed before the SC challenging the constitutionality of inserting Section 87 to the 1996 Act and repealing Section 26 of the 2015 Amendment Act. The petitioner in one of the writ petitions, Hindustan Construction Company Limited (**"HCC/ Petitioner"**) had submitted that as a contractor, it had undertaken projects for several government companies such as NTPC Limited, IRCON International Limited, NHPC Limited, in addition to National Highways Authority of India (**"NHAI"**) (collectively **"Respondents"**). All of the aforesaid parties were made respondents to the writ petition. In respect of these projects, cost overrun was always a matter of dispute between HCC and the Respondents. The only way for HCC to receive its dues was by instituting either a civil proceeding or an arbitration proceeding. Even in the scenario that an arbitral award was passed in the favour of HCC, it was invariably challenged by the Respondents by filing an application under Section 34 of the 1996 Act. A Section 34 application resulted in imposition of an automatic stay on the operation of arbitral awards. Consequently, on one hand, HCC's pending dues would be stuck until the application could be adjudicated upon and

on the other hand, HCC's pending dues would become 'disputed debt' as per the provisions of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**). Therefore, any proceeding that could have been initiated by HCC under the IBC against the respondent government companies, would come to be dismissed. In any case, HCC could not initiate any proceeding against a statutory body like NHAI under the IBC.

It was also pertinent that HCC already owed large sums of money to its own operational creditors. In fact, demand notices had already been issued to HCC by these operational creditors for sums amounting to over a hundred crores. Therefore, even if HCC was financially sound, it would be unable to repay its operational creditors because of money being stuck under the automatic stay rule.

**Issues**

I. Whether Section 87 introduced to the 1996 Act by the 2019 Amendment Act was constitutionally valid.

II. Whether Section 26 of the 2015 Amendment Act should have been repealed with effect from October 23, 2015 by the 2019 Amendment Act.

III. Whether Sections 3(7) and 3(23) of the IBC are arbitrary and discriminatory to the Petitioners.

**Arguments**

Arguments raised by the Petitioner:

The Petitioner argued that from the plain language of Section 36 of the 1996 Act, automatic stay did not follow, and therefore, judgments of the SC which had held so, would require re-visitation.

Further, the Petitioner also brought to the SC's notice that in its judgement in *BCCI*, it had considered the report chaired by Retired Justice B. N. Srikrishna (**"Srikrishna Committee Report"**), wherein, it was proposed that Section 87 should be introduced to the 1996 Act. The Petitioner contended that in *BCCI*, the SC had discouraged the introduction of Section 87 to the 1996 Act as it would have defeated the very object of introducing the automatic stay rule. Even though the judgement in *BCCI* was sent to Ministry of Law and Justice and to the Attorney General of India, Section 87 was finally inserted in the 1996 Act by the 2019 Amendment Act, without even a mere reference to the SC's judgement in *BCCI*. Therefore, the 2019 Amendment Act sought to overturn the judgement in *BCCI* without disturbing its basis .The Petitioner, *inter alia,* raised the following contentions:

(i) It was contended that while in a full-blooded appeal, there was no automatic stay, in a summary proceeding as under Section 34 of the 1996 Act, there was an automatic stay merely upon filing of an application.

(ii) It was also contended that payment of a money decree under an arbitral award, even when under challenge, should be the rule whereas the stay should be the exception.

(iii) Further, it was contended that though introduction of Section 87 to the 1996 Act was a direct attack on the judgement in *BCCI*, the said section did not remove the basis of the said judgement. The said section had also arbitrarily imposed a 'cut-off date' qua the application of amended Section 36 of the 1996 Act.

(iv) With reference to NHAI, a statutory body constituted by the NHAI Act, 1988, the Petitioner contended that within Section 3(7) (*corporate person*)of the IBC, the words 'limited liability' should be deleted. Alternatively, Section 3(23) (g) (*any other entity established under a statute*) of the IBC should be read into Section 3(7) of the IBC. It was strongly contended that there was no level playing field under the IBC as far as HCC was concerned. This was because a statutory authority like NHAI could initiate resolution process against HCC but that could not happen vice-versa, which made the provisions of IBC discriminatory as IBC only provides for reorganization and insolvency resolution of corporate persons, etc. thereby excluding statutory bodies from its ambit.

(v) It was submitted that there was no bar to applying an Order VIII-A of the Civil Procedure Code, 1908 (**"CPC"**) type procedure to proceedings under the IBC. Such a manner of application would have manifested a situation wherein, if the Petitioner's sub-contractor triggered the IBC, the Petitioner would be able to make its principal employer a party to such proceedings. Resultantly, the sub-contractor would be able to recover pending amounts directly from the principal employer.

Arguments raised by the Respondents:

(i) It was contended that interpretation of Section 26 of the 2015 Amendment Act was only 'declaratory' in nature. Moreover, it was open to the Parliament to clarify its original intent by an amendment, if it found that a view expressed by the SC did not reflect its original intent. Such clarification was manifested by deleting Section 26 of the 2015 Amendment Act and introducing Section 87 to the 1996 Act.

(ii) Section 87 of the 1996 Act had also retrospectively removed the basis of the judgment of the SC in *BCCI*.

(iii) It was also submitted that in a plethora of cases the SC had held that fixing of a 'cut-off date' was within the exclusive domain of the Parliament.

(iv) The writ petition filed under Article 32 of the Constitution of India could not be converted into a recovery proceeding by the Petitioners.

(v) The definitions under Sections 3(7) and 3(23) of the IBC were separate and independent of each other. Therefore, nothing from Section 3(23) of the IBC which defined a 'person' could be imported into the definition of 'corporate person' under Section 3(7) of the IBC.

(vi) NHAI was a statutory body of the Central Government that carried out sovereign functions. Inevitably, the IBC could not be applied against a statutory body, because no resolution professional or private individual could take over the management of a body that performed sovereign functions.

**Observations of the Supreme Court**

A. Interpretation of Section 36 of the 1996 Act:

It was incorrect to read Section 36 of the 1996 Act as inferring something negative, that where the time period of ninety days for making an application under Section 34 of the 1996 Act had not expired and when such an application was made within the time frame, an automatic stay automatically ensued.

The SC, pointed out that automatic stay of an arbitral award as provided in its previous judgments which are, ***National Aluminum Company Limited(NALCO) v. Pressteel and Fabrications Private Limited and Another [(2004) 1 SCC 540], National Buildings Construction Corporation Limited v. Lloyds Insulation India Limited [(2005) 2 SCC 367], Fiza Developers and Inter-State Private Limited v. AMCI (India) Private Limited and Another [(2009) 17 SCC 796]*** were incorrect. The amended Section 36 of the 1996 Act only restated the position that provisions did not stand in the way of law towards granting a stay of a money decree under the provisions of CPC.

B. Removal of the basis of the *BCCI* judgement by the 2019 Amendment Act:

The retrospective omission of Section 26 of the 2015 Amendment Act by the 2019 Amendment Act had indeed resulted in removal of the basis of the judgement in *BCCI.* The SC observed that at the time of passing of the judgment in *BCCI,* it was well aware of the recommendation of the Srikrishna Committee Report towards introducing Section 87 to the 1996 Act. It had noted that an immediate effect of enactment of Section 87 in the 1996 Act would put all important amendments on a back-burner.

Further, it was noted that such enactment would become contrary to the statement of objects and reasons of the 2015 Amendment Act. The statement of objects and reasons of the 2015 Amendment Act had made it very clear that the law prior to the 2015 Amendment Act had resulted in delay of arbitral proceedings and increased interference by courts in arbitration matters.

C. Constitutional challenge to the 2019 Amendment Act:

The SC agreed with the contentions of the Petitioner that mischief of the old Section 36 of the 1996 Act as regards automatic stay had been remedied after a period of more than 19 years by way of the 2015 Amendment Act, and now enactment of Section 87 to the 1996 Act would mean working in a reverse direction. Moreover, payments already made under the amended Section 36 of the 1996 Act to award-holders in a situation of 'no stay' or 'conditional stay' would be sought to be refunded. It was observed that the Srikrishna Committee Report did not refer to the provisions of the IBC. As a result of an automatic stay, the award holder may become insolvent by defaulting on payments to its creditors, when such payments would have been ordinarily forthcoming from the arbitral awards. Therefore, deletion of Section 26 of the 2015 Amendment Act and insertion of Section 87 to the 1996 Act were struck down as being manifestly arbitrary under Article 14 of the Constitution of India.

As far as the fixing of 'cut-off date' was concerned, it was the non-bifurcation of court proceedings and arbitration proceedings with reference to October 23, 2015 that was found to be manifestly arbitrary. The challenge was not in respect of fixing of a cut-off date. The SC also held that the *ratio decidendi* in *BCCI* would have continued application, so as to enable application of salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after October 23, 2015.

D. Constitutional challenge to the IBC:

The SC held that as far as the statutory body, that is, NHAI was concerned, the Petitioner's argument as to deletion of words in Section 3(7) of the IBC or addition of words from Section 3(23) (g) of the IBC into Section 3(7) of the IBC was not acceptable. NHAI was a statutory body that functioned as an extended limb of the Central Government, and these governmental functions could not be taken over by a resolution professional under the IBC, or any other corporate body. It was also impossible that such a statutory body could be ultimately wound-up under the provisions of IBC. Relying upon its judgment in ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others [(2019) 8 SCC 416],*** the SC held that the IBC is not meant to be a recovery mechanism, what it did in fact intend, was the resolution of stressed assets.

Further, the argument that an Order VIII-A type mechanism as under the CPC was not barred under IBC, was totally rejected by the SC. It was observed that a dispute must be between the parties as provided under the IBC. The IBC was not a debt recovery legislation, wherein by some theory of indemnity or contribution debt owed to the Petitioners could be fastened on to public sector units.

**VA View**

The myriad of legal conflicts started right from the enactment of 2015 Amendment Act. A body of conflicting decisions across High Courts as to the applicability of the automatic stay rule, had resulted in constant uncertainty until the SC finally rendered its judgement in *BCCI*. The primary principle of this judgement is to prevent an automatic stay on an arbitral award when challenged, merely because it pertained to an arbitral proceeding commenced before October 23, 2015, that is, the date of enactment of the 2015 Amendment Act. The SC, in a welcome decision, clearly has recognized the need for India to become an arbitration friendly destination, which had been suddenly nullified by introduction of Section 87 to the 1996 Act. Excessive interference of courts and undue delay would have been the ultimate result of the retrospective resurrection of the automatic stay rule.

More particularly, an award holder would have been rendered insolvent because of obstruction of dues pending under an arbitral award on the one hand, and the escalating debt, now being owed to the award holder's creditors on the other hand. The perpetuation of this vicious cycle would have taken a toll on the financial health of the award holder, and simply defeat the purpose and object of deleting the automatic stay rule. The judgement has done well in green signaling India as a business and arbitration friendly regime.

## III. Supreme Court: Court can permit the filing of a counter claim even after the written statement has been filed but not after the issues have been framed unless there are exceptional circumstances

The Supreme Court (**"SC"**) in the matter of ***Ashok Kumar Kalra v. Wing Commander Surendra Agnihotri and Others*** (*decided on November 19, 2019*) held that a counter claim against the original claim may at the court's discretion be filed after the written statement has been filed but not after the issues have been framed. However, exceptional circumstances exception has been carved out to permit the filing of the counter claim after the issues have been framed in order to prevent the multiplicity of proceedings and avoid the situation of an effective retrial but any counter claim filed after the recording of evidence has begun would be improper.

**Facts**

Dispute arose between Ashok Kumar Kalra (**"Petitioner"**) (Original Defendant No. 2) and Wing Commander Surendra Agnihotri (**"Respondent No. 1"**) (Original Plaintiff) concerning a contract for sale pursuant to which Respondent No. 1 filed a suit on May 02, 2008 seeking the relief of specific performance.

Thereafter, the Petitioner in this case filed his written statement on December 02, 2008 and subsequently a counter-claim in the same suit on March 15, 2009. This was objected to by the Respondent No. 1 and the trial court rejected objections against the filing of the counter-claim after filing of the written statement and framing of issues. This order was quashed by the High Court. Hence, reference was made to the SC on this question of law.

**Issues**

i) Whether Order VIII Rule 6A of the Civil Procedure Code (**"Rule 6A"**) mandates an embargo on filing the counterclaim after filing the written statement.

ii) If not, then what are the restrictions on filing the counterclaim after filing of the written statement?

**Arguments**

The Petitioner argued that the intent behind Rule 6A is to provide an enabling provision for the filing of counterclaim so as to avoid multiplicity of proceedings, thereby, saving the time of the courts and avoiding inconvenience to the parties. Therefore, no specific statutory bar or embargo has been imposed upon the court's jurisdiction to entertain a counterclaim except the limitation under the said provision which provides that the cause of action in the counterclaim must arise either before or after the filing of the suit but before the defendant has delivered his defense. Additionally, the Petitioner submitted that the rules of procedure should not be interpreted in a manner that ultimately results in failure of justice.

Respondent No. 1 argued that the language of the statute, and the scheme of the order, indicates that the counterclaim has to be a part of the written statement also relying on the statutory requirement that the cause of action relating to a counterclaim must arise before the filing of the written statement, and submitted that the

counterclaim must therefore form a part of the written statement. Reliance was also placed on the placement of the provision relating to counter claim in Rule 6A.

**Observations of the Supreme Court**

The SC began emphasizing on the importance of both procedural and substantive justice, and the need to recognize and harmoniously stitch the two types of justice together to have an effective, accurate and participatory judicial system. It then considered the provisions of Order VIII, Civil Procedure Code, 1908, especially the claim of set-off in a money suit and right to claim under Rule 6A in addition to a set off (which is to have the effect of a cross suit) in respect of a cause of action accruing to the defendant before the delivery of his defense. It then went on to add that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. The whole scheme of Order VIII in the opinion of the SC unequivocally points out the legislative intent to advance the cause of justice by placing an embargo on the belated filing of written statement, set-off and counter-claim.

The SC then pointed out the fact that Rule 6A was inserted vide an amendment (Act No. 104 of 1976) to avoid multiplicity of proceedings and that following ***Salem Advocate Bar Association Tamil Nadu v. Union Of India, [(2005) 6 SCC 344],*** procedural law should not be construed in a way to leave the court helpless, giving in fact a wide discretion to the civil court regarding procedural elements of a suit. Then following the ***Mahendra Kumar and Another v. State of Madhya Pradesh and Others, [(1987) 3 SCC 265]*** case, the SC, while considering the scope of Rule 6A(1) held that it does not bar the filing of a counter-claim by the defendant after he has filed the written statement as the cause of action for the counter-claim has arisen before the filing of the written statement.

The SC briefly discussed cases pertaining to the limitation applicable to filing such counter-claims and other judgments dealing with Rule 6A before concluding that a time limitation is not explicitly provided by the legislature, rather only limitation as to the accrual of the cause of action is provided. However, this does not mean that the counter-claim can be filed at any time after filing of the written statement as it is to be treated as a plaint which needs to be compliant with limitation provided under the Limitation Act, 1963. Time-barred suits cannot be entertained under the guise of counter-claim just because the cause of action arose as per the parameters of Rule 6A. The SC preferred a discretionary approach as opposed to the rigid technical view where the courts taking into the consideration, the reasons stated in support of the counter-claim, adopt a balanced approach keeping in mind the object behind the amendment and to sub-serve the ends of justice while deciding whether the counter-claim can be filed.

Hence, the SC stated that Rule 6A does not put an embargo on filing counter-claim after filing written statement but the restriction is only with respect to accrual of the cause of action. This does not give the right to file the counter-claim after substantial delay even if the limitation period has not passed and pegged the outer time limit till the framing of issues. The factors to be taken into consideration while permitting the filing are, *inter alia,* period and reason of delay, prescribed limitation period of cause of action, similarity in cause of action between main suit and counter-claim, injustice and abuse of process, and other facts and circumstances.

The dicta of Justice Shantanagoudar further added that in exceptional circumstances, the subsequent filing of the counter-claim may be permitted after the framing of issues until the stage of recording of evidence as there is no significant development in the proceedings during the intervening period of framing of issues and recording of evidence. A new issue can be framed by the court after the counter-claim if needed, without prejudicing the rights of either party. He however, went on to add that the filing of counter-claims after the commencement of recording of evidence is not illegal per se, rather improper and that the discretion has to be exercised wisely and pragmatically.

**VA View**

One of the foremost activities of the third pillar is to ensure balance is maintained. This task of striking a balance is often a mammoth one, as one wrong precedent may lead to a floodgate of proceedings in the lower judiciary all over the country. The SC in the present judgment has attempted this balance, while trying to carve out principles of allowing a counter-claim to be filed after the written statement, in consonance with Rule 6A of the Civil Procedure Code, 1908. While doing so, the court has enshrined the foundational principle of *"procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice".*

The SC has gone on to expound that although a rigid formula cannot be laid down, a counterclaim can be filed after filing of written statement in certain exceptional cases. The SC has delegated the balancing act to the civil judge to decide upon whether or not to allow such belated filing, while at the same time capping the upper limit at the stage of framing of issues. This delegation comes with a checklist of parameters to allow such filings that may successfully limit the number of counter claims filed at a later stage.

The only concern that may arise from this ruling is that such a belated filing may become a matter of routine and customary procedure. In a number of civil courts, the upper limit for filing a written statement has been increased to ninety days as a matter of practice, even though the statutory time limit is thirty days, and the extended time of up to ninety days is to be allowed only in exceptional cases. This ruling if not applied correctly, may lead to delayed counterclaims becoming a matter of practice, and the SC's upper limit till the stage of framing of issues may only be able to do so much to prevent this practice.

## IV. National Company Law Tribunal, Ahmedabad: Registrar of Companies cannot strike off the name of a company when there is litigation or insolvency proceedings pending by or against it

The National Company Law Tribunal, Ahmedabad (**"NCLT Ahmedabad"**) has by an order dated November 6, 2019 (**"NCLT Order"**), held that the Registrar of Companies cannot, during the pendency of Corporate Insolvency Resolution Process (**"CIRP"**), strike off the name of a company involved in pending litigation.

**Facts**

M/s. J. R. Diamonds Private Limited (**"Company"**) was incorporated in 1977 as a private limited company under the Companies Act, 1956. An Insolvency and Bankruptcy Petition filed under Section 9 of the Insolvency and

Bankruptcy Code, 2016 (**"IBC"**) was admitted against the Company by the NCLT pursuant to an order dated February 13, 2018, under which one Mr. Vinod Tarachand Agrawal (**"Appellant"**) was appointed as the resolution professional. The Appellant was subsequently appointed as the liquidator of the Company by NCLT Ahmedabad by its order dated October 1, 2018. Following this, by a letter dated December 20, 2018, the Appellant informed the Registrar of Companies, Gujarat (**"Respondent"**) of the order passed by the NCLT Ahmedabad for liquidation of the Company, to which no response was received from the Respondent. While the status of the Company at the time of initiation of CIRP was shown as being 'Active', the Appellant subsequently discovered from the web portal of the Ministry of Corporate Affairs that the name of the Company had been struck off from the register of companies maintained by the Respondent during the pendency of the liquidation process pursuant to an order dated August 6, 2018 passed by the Respondent. The present appeal was filed by the Appellant towards seeking restoration of the name of the Company in the register of companies maintained by the Respondent.

**Arguments**

The Appellant, *inter alia,* contended that at the time of Company's name being struck off by the Respondent, the Company had assets valuing INR 81,26,35,384, which included an investment of INR 4,50,00,000 in the preference shares of M/s. Peacock Jewellery Limited (**"PJL"**). The Appellant further contended that the said preference shares had matured and the payment recovery was due from PJL, for which the Appellant, being the liquidator, had filed a petition with the National Company Law Tribunal, Bengaluru. The Appellant informed NCLT Ahmedabad that the said petition was pending as on the date of filing of the present appeal and hence the name of the Company ought to have not been struck off. The Appellant also contended that the Respondent had struck off the name of the Company from the register maintained by the Respondent primarily because the Company had failed to file its financial statements and statutory annual returns from the financial year 2013-14 onwards. It was further contended by the Appellant that the Respondent had not followed the correct procedure under Section 248(1) of the Companies Act, 2013 as it had proceeded to publish the notification for striking off the name of the Company in the official gazette without sending a notice to the Appellant seeking his representation in relation to the proposed strike-off, as is statutorily required.

The Respondent, on the other hand, argued that the present appeal was not maintainable because the Company had failed to file its statutory returns for a continuous period of more than two years which mandated the Respondent to strike-off the name of the Company from the register of companies maintained by it as prescribed under Section 248(1) of the Companies Act, 2013. Notwithstanding the above, the Respondent submitted that NCLT Ahmedabad may pass appropriate orders for restoration of the name of the Company subject to fulfilment of the following conditions: (i) the Company filing all its financial statements and annual returns for the years on which the same were not filed, as well as all other event based filings, as prescribed under the Companies Act, 2013, (ii) publication of notices in two leading newspapers circulating in the district and the official gazette of the Government of India with regard to restoration of the name of the Company, at the cost of the Appellant, (iii) assurance that the Appellant will ensure that the Company will not make any default in filing statutory returns in

the future, and (iv) payment of such costs by the Appellant as may be deemed fit by the Respondent for restoring the name of the Company in the register of companies maintained by it.

**Observations of NCLT Ahmedabad**

NCLT Ahmedabad noted that the Appellant, being the liquidator of the deregistered Company, is competent to file the present appeal to seek restoration of the Company's name in the register of companies maintained by the Respondent. NCLT Ahmedabad also observed that when the name of the Company was struck off by the impugned order dated August 6, 2018, the Insolvency and Bankruptcy Petition had already been admitted and the CIRP had commenced with effect from February 13, 2018. Further, moratorium was declared in relation to the Company under Section 14 of the IBC, and accordingly no proceeding against it could have been legally initiated nor the provisions of Section 248 of the Companies Act, 2013 could have been invoked during such moratorium period.

NCLT Ahmedabad also took cognisance of Circular No. 16 dated December 26, 2016, issued by the Ministry of Corporate Affairs, that sets out that the provisions of Section 248 of the Companies Act, 2013 would not be applicable in respect of companies against which any prosecution for any offence, an application for compounding of offence, or any litigation is pending, pursuant to the order of a competent court.

In arriving at its decision, NCLT Ahmedabad relied on the decision of the ***Delhi High Court in M.A. Panjwani v. Registrar of Companies and Another [(2015) 192 Comp. Case 380 Dec.],*** where it was held that when there is litigation pending by or against a company before any competent court of law, striking off the name of such company by the Registrar of Companies was not justified.

NCLT Ahmedabad also relied on the decision of the Honourable High Court of Andhra Pradesh and Telangana (**"AP HC"**) in ***Velamati Chandrasekhara Janardan Rao v. M/s. Sree Raja Rajeswari Paper Mills Limited and Another [(2016) 198 Comp. Case 335 (AP)]***, where it was held that under Section 560(6) of the Companies Act 1956, the company court has the power to order restoration of a company's name to the register of companies either on an application made by such company or its members or creditors or when it appears to the company court that it is 'otherwise just' that the name of such company be restored in the register. In this matter, the AP HC observed that the company court has the discretion to order restoration, even if the company was not carrying on any business or was not in operation at the time of striking off, if it appears to the court to be 'otherwise just'. In arriving at its decision, the AP HC had relied on the judgement of the Madhya Pradesh High Court in ***Bhogilal Chimanlal v. Registrar of Joint Stock Companies [(1954) 24 Comp. Case 279 (MB)],*** where it held that the effect of the order of the Registrar of Companies striking off the name of a company from the register of companies would be that the company will be deemed to be dissolved and it may be difficult for the petitioner to obtain any relief in a suit pending before the trial court.

In addition to the above, NCLT Ahmedabad noted that the impugned action by the Respondent was inoperative and void in law due of the provisions of Section 238 of IBC, which has an overriding effect over other legislations.

**Decision of the NCLT Ahmedabad**

Considering the above, NCLT Ahmedabad conditionally allowed the present appeal and directed the Respondent to restore the name of the Company in the register of companies maintained by it, subject to compliance of the following conditions by the Appellant on behalf of the Company: (a) the Appellant would file all overdue statutory returns on behalf of the Company with fees and imposed penalties, if any, within ninety days from the receipt of the NCLT Order, (ii) the Appellant would publish a notice in leading newspapers circulating in the district as well as in the official gazette of the Government of India with regard to the restoration of the name of the Company in the register of companies, and (iii) before compliance of the statutory requirements of the Respondent, the Appellant would verify and settle the statutory requirements of the IBC.

**VA View:**

The *ratio decidendi* adopted by NCLT Ahmedabad in this case, that courts can order restoration of the name of a deregistered company that appears to be 'otherwise just' gives definitive discretionary powers to courts/tribunals to settle such matters. In effect, the decision passed by NCLT Ahmedabad invalidates any action not in conformity with the provisions of the IBC during the pendency of CIRP, and reaffirms the overriding effect of the IBC.

This is in consonance with the intent of the said legislation requiring that the moratorium period provided thereunder should act as a bar against any additional statutory process being undertaken against a company, which would otherwise frustrate the very purpose of the CIRP.

## Contributors:

Drushan Engineer, Ishita Mishra, Mahim Sharma, Netra Nair and Sonali Shendge.



Contact Details :

**www.vaishlaw.com**

**NEW DELHI**
1st, 9th & 11th Floor
Mohan Dev Bldg. 13 Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-23320484
delhi@vaishlaw.com

**MUMBAI**
106, Peninsula Centre
Dr. S. S. Rao Road, Parel
Mumbai - 400012, India
Phone: +91-22-4213 4101
Fax: +91-22-4213 4102
mumbai@vaishlaw.com

**BENGALURU**
105-106, Raheja Chambers,
#12, Museum Road,
Bengaluru 560001, India
Phone: +91-80-40903588 /89
Fax: +91-80-40903584
bangalore@vaishlaw.com