Between the lines...

VAISH ASSOCIATES ADVOCATES ESTD. 1971

NEW DELHI | MUMBAI | BENGALURU

February, 2020

Key Highlights

I. Supreme Court: No provision under the IBC requiring the resolution plan to match liquidation value; and an approved resolution plan cannot be withdrawn under Section 12A of the IBC

The Supreme Court (**"SC"**) has by its judgement *(decided on January 22, 2020)* held that there is no provision in the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) that requires a resolution plan to match the liquidation value of the assets of the corporate debtor and that an approved resolution plan cannot be withdrawn by a successful resolution applicant under Section 12A of the IBC.

Facts

M/s. Maharashtra Seamless Limited (**"Appellant"**) was a successful resolution applicant in the corporate insolvency resolution process involving United Seamless Tubulaar Private Limited (**"Corporate Debtor"**) and its creditors. The total debt of the Corporate Debtor was INR 1,897 crores, comprising of term loans aggregating to INR 1,652 crores availed from two entities of Deutsche Bank, and a working capital loan of INR 245 crores taken from an Indian Bank, which was also the initiator of the corporate insolvency resolution process before the National Company Law Tribunal, Hyderabad (**"Adjudicating Authority"**). Under an order dated January 21, 2019, the Adjudicating Authority approved the resolution plan submitted by the Appellant (**"Resolution Plan"**). The Resolution Plan included upfront payment of INR 477 crores by the resolution applicant, that is, to the financial creditors, operational creditors and other creditors of the Corporate Debtor, as per the ratio suggested therein. Ancillary directions were issued by the Adjudicating Authority while giving its approval to the said Resolution Plan and observing that the said plan met all the requirements of Section 30(2) of the IBC. The aforesaid order passed by the Adjudicating Authority was however, taken up in appeal before the National Company Law Appellate Tribunal (**"NCLAT"**) by one of the promoters of the Corporate Debtor, by the name Padmanabhan Venkatesh, and the Indian

Bank (**"Respondents"**). The Appellant herein had also preferred an appeal before the NCLAT challenging the order of the Adjudicating Authority dated February 28, 2019, on the ground that it was not given access to the assets of the Corporate Debtor.

Under a common order dated April 8, 2019, dealing with all the three aforementioned appeals, the NCLAT held that the Appellant should increase the upfront payment from INR 477 crores, as proposed under the Resolution Plan, to INR 597.48 crores, to make it at par with the average liquidation value of INR 597.54 crores and that such increased amount should be paid in the same ratio as suggested in the Resolution Plan. The NCLAT further held that if the Appellant failed to undertake the payment of the additional amount and deposit it in an escrow account within thirty days, the impugned order of approval of the Resolution Plan was to be treated as having been set aside.

The said order of the NCLAT was appealed against by the Appellant in the instant case before the SC on April 23, 2019. Similarly, the financial creditor, DB International (Asia Limited) also filed an appeal against the aforesaid order of the NCLAT on May 1, 2019 before the SC. In addition to the appeal, an Interlocutory Application (**"IA"**) was filed by the Appellant before the SC on August 2, 2019, seeking refund of the sum deposited by it in terms of the Resolution Plan along with interest, and withdrawal of the Resolution Plan. The Appellant's grievance was that in order to take over the Corporate Debtor it had availed of a substantial term loan facility and deposited the sum of INR 477 crores for resolution of the Corporate Debtor in a designated escrow account on February 19, 2019, but due to delay in implementation of the Resolution Plan, it was compelled to bear the interest burden. Also, the export orders it had accepted in anticipation of successful implementation of the Resolution Plan were cancelled, as a result of which the takeover of the Corporate Debtor had become untenable.

Issues

(i) Whether the scheme of the IBC contemplates that the sum forming part of the Resolution Plan should match the liquidation value or not.

(ii) Whether Section 12A of the IBC is the applicable route through which a successful resolution applicant can retreat.

Arguments

Contentions raised by the Appellant:

The Appellant, *inter alia*, contended that the NCLAT had exceeded its jurisdiction in directing matching of the liquidation value in the Resolution Plan. The Appellant further contended that the final decision on the Resolution Plan should be left to the commercial wisdom of the committee of creditors and there is no requirement that the Resolution Plan should match the maximized asset value of the Corporate Debtor. Additionally, the counsel for DB International (Asia Limited), while supporting the main appeal of the Appellant, resisted the plea of the Appellant for withdrawal of the Resolution Plan and refund of the sum already remitted. On the aspect of withdrawal of the Resolution Plan, the counsel for the financial creditors submitted that the only route through which a resolution applicant can travel back after admission of the Resolution Plan was as per Section 12A of the IBC.

Contentions raised by the Respondents:

The Respondents' primary contention was that approval of the Resolution Plan, under which the assets of the Corporate Debtor were valued at INR 477 crores, would ultimately entitle the Appellant to excessive gains as it would get assets valued at INR 597.54 crores at a much lower amount. They emphasized that there could be no reason to release the property valued at INR 597.54 crores to the Appellant at INR 477 crores. One of the Respondents further contended that another resolution applicant, namely, Area Projects Consultants Private Limited, had made a revised offer of INR 490 crores, which was more than the amount offered by the Appellant.

Observations of the Supreme Court

The SC noted that, in the course of appeal before the NCLAT, substantial argument was also advanced over failure on part of the Adjudicating Authority to maintain parity between the financial creditors and the operational creditors on the aspect of clearing dues. Thereafter, the SC referred to Section 30(2)(b) of the IBC which specifies the manner in which a resolution plan shall provide for payment to the operational creditors. The SC also referred to the decision dated November 15, 2019, of a co-ordinate bench of the SC in the case of ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta [Civil Appeal Nos. 8766-8767],*** which dealt with the manner of handling claims of operational creditors in a corporate insolvency resolution process. The co-ordinate bench of the SC had observed that there is no doubt that a key objective of the IBC is to ensure that the corporate debtor keeps operating as a going concern during the insolvency resolution process and must therefore make past and present payments to its operational creditors, without which such operation as a going concern would become impossible. On the point of dealing with claims of the operational creditors, the SC, referring to the aforementioned judgment, held that the UNCITRAL Legislative Guide makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors and that there is a difference in payment of the debts of financial creditors and operational creditors, with operational creditors having to receive a minimum payment, being not less than the liquidation value, which does not apply to financial creditors. However, since none of the operational creditors in the instant case had questioned the legality of the Resolution Plan, the SC observed that the said issue had become academic.

On the question of whether the scheme of the IBC contemplates that the sum forming part of the Resolution Plan should match the liquidation value or not, the SC delved into the text of Section 31 of the IBC which specifies the manner of approval of a resolution plan. The SC then placed reliance on Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**"Regulations"**) which deals with the determination of liquidation value of the assets of the corporate debtor. The SC held that no provision in the IBC or Regulations has been brought to its notice under which the bid of any resolution applicant has to match the liquidation value arrived at in the manner provided in Clause 35 of the Regulations. The SC stated that the object behind prescribing such valuation process is to assist the committee of creditors to take a decision on a resolution plan properly. Once a resolution plan is approved by the committee of creditors, the statutory mandate of the Adjudicating Authority under Section31(1) of the IBC is to ascertain whether the resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 of the IBC.

The SC held that it did not, per se, find any breach of the said provisions in the order of the Adjudicating Authority in approving the Resolution Plan. The SC further held that the NCLAT had proceeded on equitable perception rather than commercial wisdom in holding that the liquidation value was inequitable. The SC categorically stated that the NCLAT ought to cede ground to the commercial wisdom of the creditors rather than assess the Resolution Plan on the basis of quantitative analysis. The scope of interference by the Adjudicating Authority is limited to judicial review only. The SC thus, held that the NCLAT ought not to have interfered with the order of the Adjudicating Authority in directing the resolution applicant to enhance its fund inflow upfront.

With respect to the IA filed by the Appellant seeking refund of the amount remitted, coupled with the plea of withdrawal of the Resolution Plan, the SC held that the exit route prescribed in Section 12A of the IBC is not applicable to a resolution applicant. The procedure envisaged in the said provision applies only to applicants invoking Sections 7, 9 and 10 of the IBC for initiation of corporate insolvency resolution process by the financial creditor, operational creditor and corporate applicant respectively. The SC further held that the Appellant having appealed against the NCLAT order with the object of implementing the Resolution Plan could not be permitted to take a contrary stand in the IA filed in connection with the very same appeal for refund of the amount remitted. The SC further observed that considering the Appellant had raised funds for implementing the Resolution Plan by mortgaging the assets of the Corporate Debtor, it would, in the said circumstance, not engage in the judicial exercise of determining the question as to whether after having been successful in a corporate insolvency resolution process, a resolution applicant altogether forfeits its right to withdraw from such process or not.

Decision of the Supreme Court

In view of the above, the SC allowed the present appeal and set aside the order of the NCLAT dated April 8, 2019. The SC affirmed the order of the Adjudicating Authority passed on January 21, 2019 which approved the Resolution Plan, and directed the Appellant to remit an additional sum to the resolution professional for further remittance to the operational creditors as per their dues. Further, the IA filed by the Appellant seeking refund of the amount remitted, coupled with the plea of withdrawal of the Resolution Plan was dismissed. The SC accordingly directed the resolution professional to take physical possession of the assets of the Corporate Debtor and hand it over to the Appellant within a period of four weeks. The police and administrative authorities were directed to render assistance to the resolution professional to enable him to carry out the directions of the SC. The SC further ordered that all interim orders stand dissolved and connected applications disposed of.

VA View:

The SC has, by this judgment, categorically held that there is no provision under the IBC requiring that the bid of any resolution applicant has to match the liquidation value arrived at. By endorsing the commercial wisdom of the committee of creditors in assessing the resolution scheme for the benefit of all stakeholders, the SC has clearly demarcated the scope and ambit of the adjudicating authority limiting it to only judicial review and barring interference by it in the commercial decision arrived at by the committee of creditors.

This judgment also clears the air on the aspect of withdrawal of the resolution plan upon admission by explicitly elucidating that such an exit option is not available to a resolution applicant. A plethora of judgments of the SC have held that any insolvency resolution process is a case of a mutual contract between the creditors and the debtor. Upon getting the seal of approval of the adjudicating authority the resolution plan becomes a statutory contract. A resolution is, therefore, a consensus in substance. However, withdrawal of an approved resolution plan under the garb of Section 12A would render lock down of economic resources, and unsuccessful/unscrupulous promoters continuing to manage the businesses, which is against the purpose and intent of the IBC.

II NCLAT: No default by real estate developer if possession delayed due to reasons beyond control

An application had been filed by home buyers, Shilpa Jain and Akash Jain (collectively, **"Respondents"**) under Section 7 of the Insolvency and Bankruptcy Code, 2016, to initiate Corporate Insolvency Resolution Process (**"CIRP"**) against Raheja Developers (**"Corporate Debtor"**). The National Company Law Tribunal, Special Bench at New Delhi (**"NCLT"**) by order dated August 20, 2020 (**"Impugned Order"**), initiated CIRP against the Corporate Debtor. The promoter/ shareholder Navin Raheja (**"Appellant"**) thereafter filed an appeal before the National Company Law Appellate Tribunal (**"NCLAT"**) in order to challenge the Impugned Order on two primary grounds: (i) that there was fraudulent and malicious initiation of the CIRP; and (ii) that the application filed by the Respondents was barred by limitation and not maintainable on several other grounds. The NCLAT by its judgement dated January 22, 2020 held that if the delay was not due to the Corporate Debtor, it could not be alleged that the Corporate Debtor had defaulted.

Facts

The Respondents had booked an apartment in the residential project of the Corporate Debtor, in respect of which the Corporate Debtor had: (i) issued a joint allotment letter dated August 3, 2012; and (ii) executed a Flat Buyer's Agreement dated August 3, 2012 (**"Buyer's Agreement"**). In pursuance of the same, the Corporate Debtor received a total amount of INR 86,62,691 from the Respondents. As per Clause 4.2 of the Buyer's Agreement, possession of the apartment was to be provided within thirty-six months, that is, by August 3, 2015. As per the said clause, in the event the construction could not be completed by the Corporate Debtor within the allotted time frame, the Corporate Debtor was under an obligation to pay the Respondents compensation at the rate of INR 7 per square feet of the super area per month for the entire period of the delay commencing from the time the apartment was to be conveyed. Thereafter, the Respondents filed an application under Section 7 of the IBC *(initiation of corporate insolvency resolution process by financial creditor)* before the NCLT. They were seeking a refund of the entire principal amount of INR 86,62,691 along with interest at the rate of 18% per annum.

Issues

(i) Whether the Corporate Debtor had committed a default if the offer of possession had been delayed due to reasons beyond the control of the Corporate Debtor.

(ii) Whether the Respondents had filed the application before the NCLT with a fraudulent and malicious intent for reasons other than for resolution of insolvency or liquidation.

Arguments

Contentions raised by the Appellant:

(I) The Corporate Debtor had taken the plea before the NCLT that it had issued a notice of possession for the apartment on November 15, 2016, and even after repeated requests, the Respondents had refused to take possession of the apartment.

The Corporate Debtor had also informed the NCLT that it had already filed a writ petition before the Supreme Court (**"SC"**) against the application filed by the Respondents. Under the said writ petition, the Corporate Debtor had challenged the constitutional validity of explanation to Sections 5(8)(f), 7, 21(6A)(b) and 25A of the IBC which respectively deal with any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing, initiation of corporate insolvency resolution process by financial creditor, application for appointment of insolvency professional other than interim resolution professional for certain class of creditors and rights and duties of authorized representative of financial creditors. Herein, the SC had also issued a notice staying all proceedings before the NCLT. Despite the same, and not considering the decision of the SC in ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others [2019 SCC Online SC 1005],*** the Impugned Order was passed.

(ii) The Corporate Debtor had also informed the NCLT that as per the Buyer's Agreement, the possession of the apartment was to be handed over to the allottees subject to certain force majeure conditions. In this instance, any delay could be attributed to these force majeure conditions and not to the Corporate Debtor.

The Corporate Debtor had completed the construction in advance and further, an occupation certificate was also applied for by the Corporate Debtor in the year 2013. As such, the Corporate Debtor had complied with all obligations under the Buyer's Agreement. It was also contended that any delay in processing of the application for the occupation certificate could be attributed to the delay of the relevant authority. Therefore, such delay was clearly beyond the control of the Corporate Debtor or the promoter. Despite such delays, the Corporate Debtor had managed to secure the occupation certificate in 2016. In pursuance of the receipt of the said certificate, the possession of the apartment was offered to the Respondents by way of the notice of possession on November 15, 2016. However, the Respondents conveniently chose to file a petition under Section 7 of the IBC after the expiry of a period of two years from the notice of possession. The Respondents had also failed to comply with the various formalities provided for by the Corporate Debtor in the notice of possession. Such conduct of the Respondents only reflects their *mala fide* intention.

(iii) In addition, the Corporate Debtor had also annexed a demand letter seeking payment of an outstanding amount of INR 86,62,851. The Respondents had also defaulted to make the aforesaid payment and had deliberately suppressed such fact. The Respondents were now seeking a refund of the entire amount along with

interest, totaling to INR 87,32,108, which was higher than the principal amount paid by the Respondents. It was notable that the Respondents were also given the discretion to accept the money deposited by them if they did not intend to accept possession.

Observations of the NCLAT

As per Clause 4.4 of the Buyer's Agreement, the construction was subject to force majeure conditions which, *inter alia,* included the condition for delay in grant of completion/ occupation certificate by the Government and/ or any other authority or if non-delivery of possession is beyond the control of the company. In such a case, the Corporate Debtor was entitled to a reasonable extension of time for delivery of the possession depending on the prevailing circumstances.

The Corporate Debtor also reserved the right to alter the terms and conditions of allotment or even suspend the scheme in case the circumstances warrant the same. As per Clause 5.1 of the Buyer's Agreement, the Appellant had a right to cancel the allotment upon refunding payment along with interest at the rate of 5% per annum. In essence, it could not be stated that the Respondents were remedy less. The NCLAT observed that in the case of *Pioneer,* the SC had held that the Real Estate (Regulation and Development) Act, 2016 (**"RERA"**) was in addition to and not in derogation of the provisions of any other law for the time being in force. Therefore, the remedies under RERA were additional and not exclusive to the remedies under IBC. Thus, the provisions of IBC would also apply in addition to RERA.

The SC had also noted in the aforesaid judgement that under Section 19 *(rights and duties of allottees)* of RERA, an allottee was entitled to claim possession of the apartment, plot or building, as the case may be, or refund of amount paid along with interest in accordance with the terms of the agreement for sale. In addition, all allottees were responsible for making necessary payments in instalments within the time specified in the agreement for sale and were also liable to pay interest at such rate as may be prescribed for any delay in such payment. Further, an allottee was duty bound to take physical possession of the apartment, plot or building, as the case maybe, within a period of two months of issuance of the occupancy certificate.

The SC had also taken note of the Andaman and Nicobar Islands Real Estate (Regulation and Development) (General) Rules, 2016, that made provisions for 'interest payable by promoter and allottee' and the 'timelines for refund', wherein it had observed that once a default relating to amounts due and payable to the allottee was made out in an application under Section 7 of the IBC, the burden shifted on the promoter/ real estate developer to point out that allottee himself was a defaulter. Further, it was also important for the promoter/real estate developer to point out under Section 65 of the IBC that CIRP has been invoked fraudulently. This could be done by showing that: (i) the allottee was only a speculative investor and not genuinely interested in purchasing the apartment; and (ii) the allottee did not want to fulfil his obligation to take possession of the apartment under RERA in light of a failing real estate market. The NCLAT noted that as per the judgement of the SC in Pioneer, the Corporate Debtor could now refer to Section 65 of the IBC to show that the proceedings had been invoked fraudulently or maliciously.

The NCLAT observed that in a large number of cases, the allottees happened to be speculative investors. They simply wanted to forsake possession and seek monies already paid. The NCLAT noted that the NCLT had refused to accept the notice of possession, wherein a further period of four months and a further period of three months were sought for handing over possession and registration, respectively.

As such, the NCLAT also noted that the Appellant had taken a stand before the NCLT in respect of non-availability of necessary infrastructure facilities by the government for carrying out developmental activities.

Further, the Appellant had also agreed to pay the amount with interest but the Respondents wanted a higher percentage of money at the rate of 18% per annum.

While the Respondents haven't denied that they were offered possession, the fact remains that after two years, they did not seek possession and only wanted their money back. As per Clause 4.4 of the Buyer's Agreement, the Corporate Debtor could not be made responsible if there was a delay on account of non-availability of necessary infrastructure facilities being provided by the government for carrying out developmental activities. The delay in providing the occupation certificate therefore, fell squarely within the said clause.

Decision of the NCLAT

The NCLAT held that the Respondents had filed the application under Section 7 of the IBC fraudulently with malicious intent, and only wanted to jump ship and retrieve the amount paid by employing coercive measures. Delay in grant of approval by the relevant competent authority could not be taken into consideration in holding that the Corporate Debtor had delayed in delivering possession. Further, the NCLT had also ignored the decision of the SC, which though delivered prior to the admission of the application was binding on all courts.

The NCLAT held that the case fell within the ambit of Section 65 of the IBC. It also imposed penalty on the Respondents in addition to setting aside the Impugned Order and dismissing the application under Section 7 of the IBC. The NCLAT also observed that before admitting any case, it would be desirable for the NCLT to enquire if the intention of the allottees was to seek refund and not the possession of the apartment.

Moreover, if the delay was attributable to force majeure and not to the fault of the Corporate Debtor, it could not be alleged that the Corporate Debtor had defaulted in delivering the possession.

VA View:

This is a welcome move by the NCLAT in reaffirming the judgement of the SC in Pioneer and acknowledging that allottees cannot simply jump ship by attuning their decision to seek possession of the apartment/ refund of amounts paid as per the prevailing real estate market.

The decision imposes a duty upon the NCLT to place an application filed by the allottee under strict scrutiny to determine the true intent of the allottee. As such, once a prima facie case is made out by the applicant, the real estate developer is given an opportunity to prove that the allottee was himself a defaulter and point out, as under Section 65 of the IBC, that the allottee had in fact filed an application only with a fraudulent intent.

Further, the decision also reinforces a protection to the real estate developer if the possession was delayed due to reasons beyond control.

III. Supreme Court: Provident Fund benefits payable to contractual employees from date of filing writ petition and not retrospectively

The Supreme Court of India (**"SC"**) has, in the case of ***Pawan Hans Limited and Others v. Aviation Karmachari Sanghatana and Others*** *(decided on January 17, 2020)*, held that the contractual employees in an establishment *(not hired through a contractor)* are also entitled to provident fund (**"PF"**) benefits.

Facts

Pawan Hans Limited (**"Appellant"**) is a company where Government of India holds 51% stake and the balance 49% is with Oil and Natural Gas Company Limited. The Appellant notified 'Pawan Hans Employees Provident Fund Trust Regulations' (**"Regulations"**) in 1986 and constituted 'Pawan Hans Employees Provident Fund Trust' (**"Trust"**) in 1987 for giving PF benefits to the employees.

Relevant clauses in Regulations are reproduced hereunder:

"1.3 - These Regulations shall apply to all the employees of the Corporation.

...

2.5. –"Employee" means any person who is employed for wages/salary in any kind of work, monthly or otherwise, in or in connection with the work of the Corporation and who gets his wages/salary directly or indirectly from the Corporation, and excludes any person employed by or through a contractor or in connection with the work of the Corporation but does not include any person employed as an apprentice or trainee."

Although the Regulations defined the term 'employee' to include any person employed directly or indirectly, the Appellant provided PF benefits only to its regular employees. Consequently, Aviation Karmachari Sanghatana (**"Respondent"**) made representations to the Appellant to extend the benefit under Regulations even to contractual employees.

However, the Appellant did not give response to the representations. Accordingly, the Respondent approached Honourable Bombay High Court (**"BHC"**) by filing a writ petition. By its order dated September 12, 2018, BHC concluded that the contractual employees are entitled to benefits under Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (**"Act"**) and Employees' Provident Funds Scheme, 1952 (**"Scheme")**. Hence BHC directed the Appellant to enrol contractual employees under the Scheme. Further, it directed the Appellant to deposit PF contribution for the period commencing from the date when such employees became eligible under Scheme till the time they worked for the Appellant. Being aggrieved by the said order, the Appellant preferred an appeal before the SC.

Issues

(i) Whether the Appellant is under a statutory obligation to provide the PF benefit.

(ii) If contractual employees are entitled to PF benefit, whether such benefit is payable under the Regulations or the Act?

(iii) If contractual employees are entitled to PF benefit, from what date the aforesaid benefit be extended to them?

Arguments

The Appellant, *inter alia*, argued that: neither the Act nor notification dated March 22, 2001 *(the said notification made provisions of the Act applicable to certain specified establishments including the airlines industry, other than airlines owned or controlled by the Central or State Government)* thereunder is applicable to it. As under Section 1(b) of the Act, an establishment belonging to or under the control of the Centre and whose employees are entitled to the benefit of contributory PF in accordance with any scheme or rules framed by the Central or State Government in respect of such benefits, is exempted under the Act. The SC in ***Regional Provident Fund Commissioner v. Sanatan Dharam Girls Secondary School [(2007) 1 SCC 268]*** laid down a twin-test for an establishment seeking exemption from the Act, namely, (I) the establishment must be either "belonging to" or "under the control of" the Central or State Government and (ii) employees of such an establishment should be entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or State Government governing such benefits. As far as the question of scheme was concerned, the Company already had its own Regulations in force.

It was also contended that since several contractual employees had superannuated, passed away, resigned or ceased to be in the employment of the Appellant, the BHC had committed an error by applying provisions of the Act retrospectively from the date the contractual employees joined the Appellant. Finally, it was contended that the BHC order had doubled the Appellant's liability as the contractual employees had already been paid their full monthly financial benefits/emoluments.

Respondent No. 3, that is, Regional Provident Fund Commissioner (**"RPFC"**) submitted that Appellant was not covered under the Act and thus BHC's direction to deposit contribution from the date of eligibility of the contractual employees till the date of remittance was not workable and could not be sustained.

The Respondents, *inter alia*, argued that: (i) Regulations defined the term 'employee' to include all employees, including employees engaged on contractual basis, who are in the direct or indirect employment of the Appellant; (ii) the contractual employees were employed directly by the Appellant and not through any contractor; (iii) the Appellant directly remunerated the contractual employees; and (iv) the Appellant is not a government owned/ controlled company since its affairs were managed and controlled by a board of directors.

Observations of the Supreme Court

In order to be exempted from the Act, the Appellant had to meet the 'twin test' to seek exemption under the Act as laid down in ***Regional Provident Fund Commissioner v. Sanatan Dharam Girls Secondary School***

[(2007) 1 SCC 268]- (i) being a government company; and (ii) providing PF benefits to all employees. While the Appellant did in fact have its own scheme in force, it restricted the applicability of such scheme only to the 'regular employees.' Moreover, the Appellant's scheme was not framed by the Central or State government, nor applicable to all of its employees. Therefore, the SC observed that the Appellant did not fulfil the second test and, held that the Appellant was liable to provide PF benefits to contractual employees.

The SC observed that the contractual employees would be entitled to PF benefits either under the Act or Regulations as: (i) they were not engaged through any contractor; (ii) they received wages/salary directly without involvement of any contractor since the date of their engagement; (iii) they have been in continuous employment of the Appellant for long periods of time; and (iv) their work was of perennial and continuous nature owing to which they cannot be termed 'contractual' in nature. However, SC preferred to cover the contractual employees under the Regulations over the Act so as to ensure uniformity in the service conditions of all the employees of the Appellant.

The SC elaborated on the predicament faced by the Appellant in complying with BHC's order by holding that the BHC order would create imbalance if it were to be applied retrospectively. The SC observed as under:

"Provident Fund is normally managed on actuarial basis; the contributions received from employer and the employee are invested and the income by way of interest forms the substantial fund through which any pay-out is made. For all these years the Fund in question was subsisting on contributions made by the other employees and, if at this stage, the benefit in terms of the judgment of the High Court is extended with retrospective effect, it may create imbalance. Those who had never contributed at any stage would now be members of the fund. The fund never had any advantage of their contributions and yet the fund would be required to bear the burden in case any pay-out is to be made. Even if concerned employees are directed to make good contributions with respect to previous years with equivalent matching contribution from the employer, the fund would still be deprived of the interest income for past several years in respect of such contributions." (emphasis supplied).

Decision of the Supreme Court

1. The Appellant to provide PF benefit to the contractual employees from January 2017 when writ petition was filed before the BHC. However, PF benefit would not be extended to contractual employees who have superannuated, expired, resigned or ceased to be in employment of the Appellant on the date of SC judgement;

2. RPFC to compute the PF amount for the period of January 2017 to December 2019 (**"Contribution Period"**) to be deposited in to the Trust by Appellant and the contractual employees;

3. The Appellant was directed to pay simple interest at the rate of 12% per annum for the Contribution Period under Section 7Q *(interest payable by the employer)* of the Act on the amount so computed by RPFC;

4. Contractual employees to deposit matching PF contribution for the Contribution Period along with interest at the rate of 6% per annum; and

5. From January 2020 onwards, the Appellant and the contractual employees to make their respective contributions as per the Regulations.

VA View:

The SC has established a progressive stance by bringing 'contractual employees' on the same footing as that of the regular employees in terms of PF contribution. Further, SC's direction to the employer as well the contractual employees to pay PF contribution from the date of writ petition (January 2017), instead of a retrospective date *(from the date when the contractual employee became eligible)* is carefully thought out. SC has also undertaken a positive approach by directing employees to make the same PF contribution as the employer. As such, the Act or the Scheme nowhere provides that the employee needs to make PF contribution for the past period or that the employee needs to pay interest on such contribution in respect of the said period.

Further, in light of the peculiarity of the facts and circumstances of this case, the SC exercised pragmatism in holding that contractual employees who have superannuated, expired, resigned or ceased to be in employment of the Appellant are ineligible to receive PF benefit.

IV. NCLT: Automatic waiver of legal proceedings is not permitted in a resolution plan

The National Company Law Tribunal, Ahmedabad Bench (**"NCLT"**) in the case of ***Bhavi Shreyansh Shah, Resolution Professional for VS Texmills Private Limited v. Canara Bank and Others*** *(decided on January 01, 2020)* held that as per the provisions of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) automatic waiver of legal proceedings by/ against a corporate debtor is not allowed in a resolution plan.

Facts

An application was filed by Reliance Commercial Finance Limited, which was a financial creditor of V S Texmills Private Limited (**"Corporate Debtor"**) under Section 7 of the IBC seeking initiation of the Corporate Insolvency Resolution Process (**"CIRP"**) against the Corporate Debtor. The application was admitted on January 09, 2019, and Bhavi Shreyansh Shah was appointed as an interim resolution professional, who subsequently became the Resolution Professional (**"RP"**) in the first meeting of the Committee of Creditors (**"CoC"**) on February 06, 2019. In the third meeting of the CoC, which was convened on March 14, 2019, it was agreed to invite Expressions of Interest (**"EoI"**) from potential resolution applicants.

Pursuant to the invitation for EoIs, the RP received two EoIs, one from Chamaria Fashions Private Limited (**"Chamaria"**) and the other from Vikash Enterprises. Thereafter, Vikash Enterprises withdrew from the process, leaving Chamaria as the only interested potential resolution applicant. Revised resolution plan dated June 20, 2019 was discussed by the CoC in its fifth meeting where they sought improvement of the plan and accordingly, Chamaria was given a chance to rectify the resolution plan. It was also resolved by the CoC to extend the CIRP

period and accordingly, an interlocutory application was preferred by the RP, pursuant to which the adjudicating authority by its order dated July 12, 2019 extended the CIRP for another 90 days beyond the initial 180 days.

The CoC approved the Resolution Plan dated June 20, 2019 which was modified by addendums, the last being an addendum dated September 11, 2019 with majority voting share of 92.44% of the CoC in favour of the same.

Issue

The core issue identified while approval of the NCLT of the resolution plan submitted was sought by the RP was whether automatic waiver of legal proceedings against/ by a corporate debtor can be permitted in a resolution plan.

Observations of the NCLT

The NCLT held that to decide the issue it will be pertinent to notice the very object of the IBC, which is resolution. It held that on glancing at the preamble of the IBC it can be ascertained that the IBC aims to promote resolution over liquidation. The purpose of resolution is for maximization of value of assets of the corporate debtor and thereby all creditors. As per the provisions of the IBC, the first objective is resolution. The second objective is maximization of the value of assets of the corporate debtor. The third objective is promoting entrepreneurship, availability of credit and balancing interests. Therefore, these objectives of the IBC are sacrosanct. It was observed that the IBC only allows for liquidation on the failure of the corporate insolvency resolution process and facilitates and encourages resolution. As held by the Supreme Court of India in the case of ***Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Others*** *(decided on October 04, 2018)* if there is a resolution applicant who can continue to run the corporate debtoras a going concern, every effort must be made to ensure that this is made possible.

Subsequently, the NCLT analysed its own powers and functions with regards to a resolution plan and cited the decision of the Supreme Court of India in ***K. Sashidhar v. Indian Overseas Bank and Others*** *(decided on February 05, 2019),* where it was held that the NCLT has no authority to analyse and evaluate the commercial decision of the CoC to enquire into justness of the rejection of the resolution plan by dissenting financial creditors.

Decision of the NCLT

The NCLT held that on perusal of the resolution plan, it was found that the resolution plan met the requirements of Section 31 *(approval of resolution plan)* read with Section 30(2) *(examination of resolution plan by resolution professional)* of the IBC. The application was allowed however, the NCLT held that Clause e of Chapter IV of the resolution plan would not be allowed since it relates to the subject matter of the various competent authorities, each having their own jurisdiction. The clause is reproduced below:

"All business permits required by the Corporate Debtor to conduct its business and which have not been granted, cancelled, terminated, revoked, suspended or not renewed; having been granted or reinstated, as the case may be, at no additional costs to the resolution applicant or Corporate Debtor… "

It was further held that the approval of the resolution plan does not mean automatic waiver or abatement of legal proceedings, if any, which are pending by or against the corporate debtor as those are the subject matter of the

concerned competent authorities having their own jurisdiction to pass any appropriate order as the case may be. The resolution applicant, on approval of the plan may approach those competent authorities for appropriate reliefs sought for in Clause e of Chapter IV of the resolution plan. It was further held that the matters referred to in Clause e of Chapter IV of the resolution plan are the subject matter of the concerned appropriate competent authorities, and that the resolution applicants have the liberty to approach them for any concession, relief or dispensation as the case may be.

VA View

The NCLT, in declining to allow automatic waiver of legal proceedings to be a part of the resolution plan has decided on what was a grey area of the law, specifically on the powers of a resolution plan to decide on points such as business permits or licenses that have been previously cancelled, terminated, revoked or suspended for any reason.

Business permits are a very wide-ranging topic, and for certain permits/ licenses, the company in question may have to demonstrate that they can meet certain benchmarks in order to achieve the same. Therefore, the NCLT has rightly held that such licenses should not be granted as a matter of right just by inclusion into the resolution plan, and that each company should apply for the same independently.

It also held that with respect to waiver of legal proceedings, all pending matters cannot be terminated at the stroke of a pen, and that each competent authority would have the power to pass judgements as it deems fit.

Contributors:

Ajita Patnaik, Drushan Engineer, Ishita Mishra, Itisha Khandelwal and Netra Nair

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